

CHANGES TO THE ENDANGERED SPECIES ACT INCLUDED IN REPRESENTATIVE POMBO'S THREATENED AND ENDANGERED SPECIES RECOVERY ACT AS PASSED BY THE HOUSE OF REPRESENTATIVES

The Threatened and Endangered Species Recovery Act (TESRA) sponsored by Representative Pombo makes a number of sweeping changes to the Endangered Species Act. Conservationists and wildlife scientists agree that if these changes are enacted, it is almost certain that fewer species will recover to optimum or even sustainable populations. The major changes TESRA makes to the ESA can be categorized as follows:

1. *TESRA significantly reduces the protection of habitat necessary for species survival and recovery.* Perhaps TESRA's most controversial and major change to the ESA is that it eliminates critical habitat. TESRA proponents contend that habitat is sufficiently addressed in the bill's new requirements for recovery plans. However, those provisions fall short of concrete protection for habitat. Although TESRA requires that recovery plans identify areas of "special concern," it is uncertain whether areas that are truly needed for species recovery will be identified and those areas will not necessarily be protected. Recovery plans will be prepared, in most instances, by "recovery teams" which will include those with economic or other interests that will be affected by listing and recovery plans. Thus, despite the requirement that plans be based on the "best available scientific data," the fact that those affected by the species protection will be writing recovery plans will undoubtedly have an affect on the extent to which the recovery plans meet the needs of the species. In addition, TESRA clarifies that recovery plans establish no binding requirements. Habitat on federal lands will also receive less protection through the changes made to the ESA's interagency consultation provisions. Those changes include allowing agencies to exempt a number of actions from consultation with the Fish and Wildlife Service (FWS) (to determine whether a proposed action will jeopardize the continued existence of a listed species) and limiting consultation to only the affects of a proposed action that are distinct from a baseline of all prior effects on the species.

2. *TESRA undermines the science.* TESRA changes the Act's scientific standard from "the best available scientific and commercial information" to "the best available scientific data" and gives the Secretary – not scientists – authority to determine what constitutes best science. In addition, TESRA requires that concurrent with listing the Secretary is to prepare an analysis of the economic and other impacts of listing. In the current ESA Congress intended that listing decisions be based solely on scientific considerations. The analysis under TESRA, while not a factor in listing, will be publicly available and will undoubtedly affect listing decisions. TESRA also requires that recovery plans be written, in most instances, by "recovery teams" composed of developers, state or local government officials or others with an economic interest in any decision to protect species or habitat. Thus, recovery plans will be less likely to fully address the measures scientists believe are necessary for species recovery.

3. *TESRA requires payments to landowners who are affected by the ESA, draining recourses that should be used on research and species protection.* TESRA includes two incentive programs within recovery plans, a conservation grant program to pay landowners the fair market value for the loss of a proposed use of land due to the ESA (essentially a payment for perceived “takings), and a program to reimburse livestock owners for the death of any livestock due to reintroduced species. While incentive programs may be useful to encourage habitat protection, the proposed programs along with the grant program need to be improved to avoid abuse. The livestock reimbursement program is currently in place with funds coming from private interests, not the government.

4. *TESRA expands the statutory exemptions to the ESA.* TESRA opens a large exemption by authorizing landowners to seek a determination from the Secretary as to whether a certain activity will result in a prohibited take of a listed species. If the Secretary fails to respond within 180 days, the activity is deemed to not violate the ESA. If the Secretary determines that a take will result, the landowner must be paid through the new conservation grant program for any loss of use of the land. Due to the requirement that the Secretary pay landowners if a take will occur, it is highly likely that the Secretary will not respond in many cases and activities will be deemed to not violate the Act. In addition, TESRA codifies the controversial No Surprises Policy currently established by regulation, allows the President to exempt any activity from the ESA if deemed necessary for national security, and exempts operators of reservoirs or other artificial water delivery facilities from the ESA’s take prohibition even if recreational fishery programs they establish result in predation or competition with listed species.

5. *TESRA includes a legally sanctioned public campaign to discredit the ESA.* Several amendments to the ESA included in TESRA appear designed to focus attention on the costs of species protection with no concomitant focus on the benefits. Specifically, TESRA includes new requirements that concurrent with listing the Secretary prepare an analysis of the economic and other impacts of listing; that recovery plans must include estimates of not only the time and cost required to carry out the measures in the plan, but also direct, indirect and cumulative costs of carrying out the plan along with the estimated cost of acquiring land for habitat protection; and that hydroelectric power providers include in billings each customer’s share of complying with the ESA.

A more detailed analysis of TESRA follows. Citations included below are to TESRA as passed by the House on September 29.

SCIENTIFIC STANDARD

The ESA requires that all decisions be based on the “best available scientific and commercial information.” The term is not currently defined in the Act likely because at the time the Act was passed in 1973, the public as well as politicians generally accepted scientific conclusions and trusted scientists to follow scientific methods. In addition, Congress likely understood that science changes over time with advances in technology

and methodologies and scientists must have the flexibility to use the information they deem best at the time.

TESRA, Section 3(a), changes the standard to “best available scientific data” throughout the Act and defines it to mean “scientific data, regardless of source, that are available to the Secretary at the time of a decision or action for which such data are required by this Act and that the Secretary determines are the most accurate, reliable and relevant for use in that decision or action.” Within one year of TESRA’s enactment, the Secretary must issue regulations establishing criteria for determining what constitutes “best available scientific data.” Only data that meets the criteria established by the Secretary, or regulations issued by the Office of Management and Budget under the Data Quality Act, empirical data or from sources that have been peer reviewed by reviewers recommended by the National Academy of Scientists can be used to make decisions under the ESA. Thus, under these criteria, greater weight will be given to empirical data, ignoring the importance and integrity of scientific modeling. These criteria will simply make it more difficult to list species.

TESRA’s changes substantially undermine good science by requiring the a political appointee (the Secretary), not scientists, to determine what constitutes best science. Once criteria are established in regulation, it will be difficult to change them so scientists will no longer have the flexibility to determine what constitutes the best science. Moreover, good science must be outside the hands of politicians, yet this amendment interjects politics into the realm of science. TESRA also gives the Secretary discretion to determine what is “relevant” in making any decision based on scientific information.

LISTING

1. Under the ESA the Secretary considers four factors when determining whether to list a species as endangered or threatened. The first factor is “the present or threatened destruction, modification or curtailment of its current range.” TESRA amends this by adding after “current range”: “by human activities, competition from other species, drought, fire, or other catastrophic natural causes.” This amendment limits species that can be listed to only those whose habitat or range is affected by the listed causes. It is unclear if the intent is to limit species that can be listed or rather to ensure consideration of certain causes. However, good drafting would add “or any other reason” or similar clause to ensure all causes are considered.

2. TESRA adds a section, 4(a)(2) mandating that the Secretary use the authority to list distinct populations “only sparingly.” This codifies current FWS policy for listing distinct population segments which in turn reflects Congressional intent expressed in the 1979 Amendments to the Act. The House Report for TESRA states that this policy is being codified because committee members believe that FWS is listing too many distinct populations and thus is abusing this policy. However, the FWS policy sets clear limits on when distinct populations can be listed and, if many are being listed, perhaps that is a reflection of the decline of species, not abuse by FWS.

3. TESRA adds a section, 4 (d), requiring that concurrent with making a listing determination, the Secretary must prepare an analysis of the economic and national security impacts and benefits of the determination and any other relevant impact and benefit. This analysis interjects factors other than species protection into the listing process. Although the amendment specifically states that this analysis shall not affect the criteria used in making a listing determination, the fact that it will be prepared and will be publicly available will be used by opponents of the ESA to discredit listings and to attempt to sway the public against the ESA.

4. TESRA adds a section, 6(a), requiring that petitions to list a species must include copies of all materials cited in the petition. This amendment is a waste of paper. Petitioners normally include material cited in a petition that was not produced by a federal government agency but assume that the Secretary can obtain government documents from its own or other agencies.

5. Section 6(b)(1)(A)(iv) of TESRA adds a requirement that a complete record of listing determinations or revisions must be available on a publicly accessible website, and section 6(b)(1)(B) lists the information that must be included, but allows the withholding of information that may be withheld under section 552 of the Administrative Procedures Act (Freedom of Information Act). This addition seems reasonable.

EMERGENCY REGULATIONS

The ESA authorizes the Secretary to issue, on an emergency basis, regulations that regarding “any emergency posing a significant risk to the well-being of any species.” Emergency regulations expire after 240 days. TESRA adds a qualifier to this provision in section 6(b)(3), limiting emergency regulations to only listing determinations. This limits the actions the Secretary can take to protect species.

CRITICAL HABITAT

Section 5 of TESRA eliminates critical habitat protections in the Act. Habitat may be protected under TESRA by “recovery plans” (see below) but identifying any particular habitat for protection is not mandatory and, under TESRA, recovery plans are non-regulatory and provide no mandatory protections for habitat. Habitat protection is the critical component for protecting and recovering most species. According to an analysis by Environmental Defense, habitat destruction and degradation is the cause of endangerment for 88% of imperiled species. Thus, with no mandatory statutory requirement to protect habitat, species will inevitably decline.

RECOVERY PLANS

1. Section 9(a) of TESRA sets a 2-year time limit for the completion of recovery plans for species listed after enactment of TESRA. For species already listed, TESRA requires

the Secretary to establish a priority ranking system for the development of recovery plans for those species and then to establish a tentative schedule for developing or revising the recovery plans. The Secretary has 10 years to complete recovery plans for all species currently listed.

2. Under the ESA recovery plans are to include objective, measurable criteria that when met would result in a species being removed from the listing. TESRA section 9(a) shifts the goal of recovery plans by amending plan contents to require that, in the alternative, recovery plans include criteria that will result in species being reclassified from threatened to endangered. The House Committee Report explains that as soon as a species reaches a certain level it should promptly be downlisted. However, in light of the lesser requirements for threatened species, full recovery may never occur.

3. Under the ESA, recovery plans must include “estimates of the time required and the cost” to carry out measures in the plan. TESRA section 9(a) expands the scope of this cost estimate to include “direct, indirect and cumulative costs” as well as the estimated cost, where practicable, of acquiring land from willing sellers for habitat protection. Estimates of time and cost need not be based on the best available scientific data.

4. TESRA section 9(a) requires that recovery plans identify areas that are “of special value” to the conservation of the species. This is the replacement for critical habitat designation.

5. The ESA gives the Secretary discretion to procure the services of “appropriate public and private agencies and institutions, and other qualified persons” in developing a recovery plan. TESRA section 9(a) eliminates this discretion by mandating that the Secretary promulgate regulations to establish criteria and the process for selecting members of recovery teams to develop recovery plans that ensure that constituencies with a demonstrated direct interest in the species or in the economic and social impacts of its conservation are represented.

These amendments undermine the scientific integrity of recovery teams. In implementing the ESA, the FWS ensures such integrity by distinguishing between Recovery Teams made up of agency, university and independent scientists, and Implementation Teams made up of economic, conservation and other interests. TESRA requires that all federal agencies that put the species at risk and each type of private action that threatens the species be placed on the recovery team, but does not require any federal wildlife scientists on the team. This ensures that those least interested in protecting the species will be partially responsible for developing the plan for its recovery.

6. TESRA section 9(a) requires that any area currently designated as critical habitat shall be treated as an area “of special value” until a recovery plan is developed or an existing plan is revised. Designation of land as an area of “special value” to a species means nothing.

7. TESRA section 9(a) (ESA § 5(i)(2)(B)) mandates that nothing in recovery plans shall be construed to establish regulatory requirements. The only way recovery plans will be binding is if a federal agency enters into an agreement with the FWS specifying the measures it will carry out (ESA § 5(i)(2)(A)(i)) or if a landowner enters into a cooperative agreement with FWS (see below). The House Committee Report states that recovery plans are currently only non-binding guidance.

8. TESRA section 9(b) requires that recovery plans for species that occupy more than one state shall specify actions to be taken by each state to allow each state to determine the status of the species and request that the species be removed from the threatened or endangered list for that state. This institutes state-by-state management without regard to the status of the species as a whole.

INCENTIVES PROGRAM

1. TESRA section 9(c) establishes two incentive programs under recovery plans: species recovery agreements and species conservation contract agreements. Under both programs the Secretary is obligated to make annual payments (subject to appropriation) or other compensation, to landowners for actions taken to protect species. Both programs require that a management plan be included in the agreements.

2. Species recovery agreements are to be for terms of not less than 5 years and require private land owners to protect and restore habitat in order to contribute to the conservation of listed species. Priority will go to lands identified in recovery plans as areas of special value, which are lands that are currently designated as critical habitat.

3. Species conservation contract agreements are for terms of 30, 20 or 10 years with payments of 100, 80 or 60 percent respectively, of the land owner's actual cost to implement conservation practices described in the management plan included in the agreement.

INTERAGENCY CONSULTATION

1. The ESA requires that FWS biologists review projects that other federal agencies (e.g. the U.S. Forest Service, Bureau of Reclamation, Bureau of Land Management, etc.) have determined will likely harm endangered species in order to ensure that the proposed action will not jeopardize the continued existence of the species. Because agencies are themselves proposing, and will benefit from, the harmful action, the FWS biologists perform an essential independent review and also provided necessary wildlife expertise. TESRA section 11 (a) amends the ESA to allow the exemption of individual projects and entire categories of actions from this independent review and instead substitute undefined "alternate procedures" to consultation. This amendment will eliminate independent oversight from a vast array of habitat destruction projects. The House Committee Report contends that this is already occurring by regulation.

2. TESRA section 11 (a) requires that interagency consultation shall consider “only the effects of any agency action that are distinct from a baseline of all effects upon the relevant species or critical habitat” that have occurred prior to the action. This addition effectively changes the jeopardy standard and invites agencies to point to other actions as a reason for any effect on a species and thus claim the proposed action has no additional effect.

3. TESRA section 11(b) requires that any terms and conditions imposed by the Secretary in an agency incidental take permit must be “roughly proportional in extent to the impact of the incidental taking identified.” The House Committee Report explains that this language is consistent with the language from takings cases. However, it will only invite interagency disagreement and, most likely, less protection because agencies will allege that certain conservation measure are not “roughly proportional” to the impact on a listed species.

4. TESRA section 11(d) eliminates the Endangered Species Committee (also known as the “God Squad”) a cabinet level panel with the authority to approve project which would otherwise be prohibited by the ESA. By its very existence the God Squad has discouraged exemptions and, instead, encouraged negotiations to achieve a compromise solution. While intended to provide a mechanism to overrule species conservation, the God Squad has been a disappointment to development interests because 1) it can only be invoked by a federal agency or state governor, 2) has rarely been invoked and is always very controversial, and 3) the committee has often sided with the species rather than developers.

EXCEPTIONS TO PROHIBITED ACTS

1. TESRA section 12(a) codifies the FWS’s No Surprises Policy under which permittees who have obtained take permits and developed habitat conservation plans are not subject to additional minimization or mitigation measures or during the life of the permit, unless the permittee consents.

2. TESRA section 12(c) defines the term “experimental population” to mean any population authorized by the Secretary for release but only when such population is in the area designated for it and such area must be wholly separate geographically from areas occupied by non-experimental populations. This addition is a response to the litigation following the reintroduction to wolves.

3. TESRA section 12(d) authorizes landowners to seek a determination from the Secretary that a proposed activity will not violate the ESA’s take provision. The Secretary has 180 days to respond. If the Secretary does not respond, the activity is deemed to not be a violation of the Act and is not subject to enforcement. If the Secretary determines that the activity will result in a take, the Secretary will then have to provide payments in the form of grants set forth in the next section.

4. TESRA section 12(e) includes a very broad exception, allowing the President to exempt any activity from the ESA if he determines it is necessary for national security, and section 12 (f) authorizes the President to suspend the ESA in any area for which a major disaster is declared.

5. TESRA section 12(g) exempts operators reservoirs, diversion structures, canals or other artificial water delivery facilities from liability under the ESA's take prohibition for any take of listed aquatic species that occurs as a result of predation, competition or other adverse effects attributable to recreational fishing programs operated by a state agency in a river basin in which the water delivery facility is located.

CONSERVATION GRANTS

Under TESRA section 13 conservation grants shall be given to land owners who have received a written determination that a proposed use of land will violate the ESA's prohibition on takes. Such "aid" shall be in an amount not less than the fair market value of the use that was proposed by the property owner if the owner has foregone the proposed use and the owner requests financial aid within 180 days of the Secretary's written determination.

REIMBURSEMENT FOR DEPREDATION OF LIVESTOCK

TESRA section 16 authorizes the Secretary to reimburse the owner of any livestock for any loss resulting from depredation by any population of species that has been reintroduced. To be eligible for such reimbursement, presentation of the body of the animal is not required. This is a response to the reintroduction of wolves in western states.

HAZARDOUS PESTICIDES

Under TESRA section 20 any state or federal agency or individual who complies with the Federal Insecticide, Fungicide and Rodenticide Act shall be deemed to be in compliance with the ESA for the next 5 year or until regulations are completed.

ELIMINATION OF NOAA FISHERIES AUTHORITY

The ESA assigns endangered terrestrial and freshwater species to the Secretary of Interior who acts through the U.S. Fish and Wildlife Service. Marine species are assigned to the Secretary of Commerce who acts through NOAA Fisheries. TESRA section 21 requires the President to transfer all ESA responsibilities from Commerce to Interior.

PROTECTIVE REGULATIONS FOR THREATENED SPECIES

TESRA section 22 requires the Secretary to review existing regulations relating to protections for threatened species under ESA section 4(d) in order to determine if those regulations should be revised. Those regulations provide the protections afforded to endangered species for threatened species as well. The House Committee Report clearly states an intent that the Secretary to repeal or rewrite the regulation.

COST DISCLOSURE BY POWER PROVIDERS

TESRA section 23 requires that the administrators of Bonneville, Western Area, Southwestern and Southeastern Power Administrations include in monthly customer billings a report of each customer's share of the agency's direct and indirect costs to comply with the ESA.

SURVEY OF BLM AND FOREST SERVICE LANDS

TESRA section 24 requires the Secretary, within 2 years, to survey BLM and Forest Service lands to assess the value of such lands for management for recovery of a listed species and for addition to the National Wildlife Refuge System.