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Endangered Species Act Reauthorization: Congress Proposes a Rewrite with Private Landowners in Mind

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ENDANGERED SPECIES ACT REAUTHORIZATION: CONGRESS PROPOSES A REWRITE WITH PRIVATE LANDOWNERS IN MIND

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I. Introduction

During the 104th Congress, the United States House of Representatives has considered several bills designed to substantially amend and reauthorize the Endangered Species Act.[1] Thus far, the most significant effort is House Bill 2275, formally titled, "The Endangered Species Conservation and Management Act of 1995."[2] The bill was introduced on September 7, 1995, by Rep. Don Young (R.-Alaska), Chairman of the House Committee on Resources, along with ninety-four original cosponsors. Prominent among the cosponsors of the bill is Rep. Richard Pombo (R.-Cal.), who, over the past year, headed a task force that conducted hearings in seven U.S. cities on implementation of the Act. Based in part on the testimony offered during the hearings, as well as written comments and letters, the task force drafted House Bill 2275.

The bill touches all parts of the Act, providing much-needed balance, flexibility and accountability to the nation's traditional and frequently criticized approach to conserving endangered and threatened species.[3] The bill strengthens the role of states,[4] provides higher standards for listing decisions,[5] streamlines the consultation process,[6] reforms federal conservation planning,[7] and restores balance to the Act's purposes and policies.[8]

Most important, it provides several measures designed to protect private landowners and to encourage private efforts to conserve species. This paper focuses on these several new measures in the bill which, considered together, offer

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1. 16 U.S.C. §§ 1531-1544 (1991).
2. H.R. 2275, 104th Cong., 1st Sess. (1995).
3. *See, e.g.*, Stuart L. Somach, Essay, *What Outrages Me About the Endangered Species Act*, 24 ENVTL. L. 801 (1994); Ike Sugg, *Caught in the Act: Evaluating the Endangered Species Act, Its Effects on Man and Prospects for Reform*, 24 CUMB. L. REV. 1 (1993-94).
4. H.R. 2275, 104th Cong., 1st Sess. §§ 305, 701 (1995).
5. *Id.* §§ 301-304.
6. *Id.* §§ 401-402.
7. *Id.* §§ 501-504.
8. *Id.* § 3.

a welcome new perspective on the proper role of private landowners in species protection.

II Compensation for Private Property Owners

The bill telegraphs its intentions from the outset, amending the Act's original findings by adding the following new paragraph: "[T]he Nation's economic well-being is essential to the ability to maintain a sustainable resource base, therefore economic impacts and private property owners' rights must be considered while encouraging practices that protect species."[9] This new sentiment is echoed in the bill's statement of purpose, which reads in part, "To provide a feasible and practical means to conserve endangered species and threatened species consistent with protection of the rights of private property owners and ensuring economic stability."[10]

Given this acknowledgment of the importance of balancing species protection with the rights of private landowners, the bill appropriately begins by outlining a process to compensate private property owners for government actions taken under the Act. The bill provides compensation whenever an agency action under the Act results in reduction of the value of any portion of a parcel of privately owned property by twenty percent or more.[11] With the stroke of a pen, Congress has initiated one of the first federal extraconstitutional compensation schemes for landowners burdened by environmental regulation. If enacted, small landowners will no longer be compelled to face the federal government in court when their property values plummet from the listing of a new species or designation of their land as critical habitat for a species. And no longer will challenges to impacts of environmental regulation on private property have to be positioned within the limited (and ordinarily hopeless) confines of Fifth Amendment "takings" decisions.[12]

Both federal agencies and private property owners have separate responsibilities under the bill's provision. An agency must notify affected property owners whenever it takes an action under the Act limiting the use of private property. The agency notice must explain the options for compensation and the procedures for obtaining that compensation.[13] Landowners seeking compensation must submit a written request to the agency implementing the action. At a minimum, the landowners' request must identify the affected property, the nature of the limitation on use, and the amount of compensation claimed.[14] Landowner requests must be

9. *Id.*

10. *Id.*

11. *Id.* § 101.

12. *See* Robert Meltz, *Where the Wild Things Are: The Endangered Species Act and Private Property*, 24 ENVTL. L. 369 (1994) (concluding that despite the negative effect of Endangered Species Act prohibitions on some property owners, constitutional takings challenges will rarely succeed).

13. H.R. 2275, 104th Cong., 1st Sess. § 101 (1995).

14. *Id.*

made within one year after the landowner receives actual notice that the use of his property was limited by an agency action.[15]

The bill provides three procedures for obtaining compensation from the federal government when property is sufficiently devalued by agency actions. First, the agency may negotiate informally with the owner regarding the amount of compensation owed and the terms of any agreement for payment.[16] The agreement between owner and agency may include transfer of ownership to the agency or use of the owner's property for a limited amount of time. If no agreement is reached within 180 days following the property owner's written request, the owner may either elect binding arbitration or seek compensation in a civil action.[17] Arbitration procedures are governed by Title 9 of the United States Code, and an award under arbitration includes attorneys' fees, arbitration costs, and appraisal fees. A landowner who prevails in a civil action against an agency is entitled to attorneys' fees, litigation costs, and appraisal fees.[18]

When the limitation on use of a portion of an owner's property is extraordinary, the property owner has an additional option against the agency. When the diminution in value of a portion of the property is greater than fifty percent, the owner may compel the agency to purchase the portion of the property affected.[19] The agency's purchase price is determined by calculating the property's fair market value prior to the limitation on use imposed by the agency.[20]

Payment of compensation by agencies to affected property owners is subject to the availability of the agency's appropriated funds. The agency head may transfer or reprogram any appropriated funds available to the agency in order to compensate property owners. If appropriated funds are exhausted, the agency head is required to seek sufficient funds to compensate owners during the next fiscal year.[21]

Agency actions that may result in compensable diminishment in value of private property include: (1) designation of private property as critical habitat; (2) denial of a section 10 incidental take permit; (3) restrictions imposed by a biological opinion under section 7; (4) agreements under section 6 which set aside property for habitat under the terms of an easement or other contract; (5) restrictions imposed under a section 5 conservation plan; and (6) any other agency action that restricts a legal right to use property, including the right to alter habitat.[22]

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15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. The bill somewhat clumsily defines "fair market value" to mean "the most probable price at which property would change hands, in a competitive and open market under all conditions requisite to fair sale, between a willing buyer and willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts, prior to occurrence of the agency action." *Id.*
21. *Id.*
22. *Id.*

Although the bill authorizes a fund to cover landowner claims for diminishment in property value, it remains to be seen whether Congress will actually appropriate sufficient funds to effectuate this crucial portion of the bill.[23] Thus, although this new section appears to give private landowners some assurance that the costs of species' protection will not fall disproportionately on a few individuals, the bill does not mandate that payments to private landowners take precedence over other activities of the agency. Essentially, an agency head retains discretion to determine the importance of compensating property owners affected by agency actions. Ultimately, the effectiveness of the compensation scheme depends upon the availability of funds appropriated for that purpose and the willingness of agencies to rank landowner compensation a high priority.

III. Cooperative Management Agreements

The bill provides a number of new measures designed to encourage involvement by private landowners in species protection. Prominent among the measures is a provision for cooperative management agreements between private landowners and the federal government. A cooperative management agreement is initiated voluntarily by a landowner to manage a species or group of species on public or private land, including those species listed, proposed to be listed, or candidates for listing.[24] The management agreement may include the acquisition or designation of land as habitat for such species. The private landowner is responsible for developing and submitting a proposed agreement.[25] Following submission of the proposal, the Secretary has 120 days to decide whether the proposal sufficiently promotes the "conservation of the species."[26] Preparation and approval of an agreement is not subject to completion of an environmental impact statement.

In order to gain approval, a proposed cooperative management agreement must meet a number of requirements. The Secretary is required to approve a proposal if the Secretary finds that: (1) the landowner has sufficient legal authority to carry out the terms of the agreement; (2) the agreement defines an area that serves as habitat for the relevant species or group of species; (3) the agreement adequately provides for management of the area; (4) the agreement promotes the conservation of the species; (5) the agreement is of sufficient duration to accomplish the objectives of the agreement; and (6) the agreement is adequately funded.[27]

Two major advantages accrue to landowners who successfully negotiate a cooperative management agreement with the Secretary. First, the landowner can

23. Section 803 of the bill establishes the Endangered Species and Threatened Species Conservation Trust Fund and provides that amounts in the fund are available to the Department of Interior for the purpose of compensating landowners, as well as for other purposes. *Id.* § 803. However, the bill does not authorize specific appropriations for the fund as it does, for example, to carry out cooperative management agreements. *Id.* § 801.

24. H.R. 2275, 104th Cong., 1st Sess. § 102 (1995).

25. *Id.*

26. *Id.*

27. *Id.*

rely on the terms of the agreement to prevent additional restrictions or mandates under the Act.[28] Specifically, the landowner will not be required to make an additional payment for any purpose or accept any additional development restrictions on any parcel of land covered by the agreement. The landowner is also protected from undertaking any other measures to minimize or mitigate impact on any species covered by the agreement.[29] The second advantage is that neither the section 7 consultation process nor the section 9 prohibition on takings apply to landowner activities conducted in accordance with a management agreement.[30]

State and local governments are also entitled to enter cooperative management agreements with the federal government. Although such agreements may cover both private and public land, no restriction on private land is effective without the written consent of the landowner.[31]

The bill authorizes the Secretary to provide habitat conservation grants to landowners in order to offset the costs of carrying out the terms of cooperative management agreements.[32] A habitat conservation grant is transferable to subsequent owners of the property for which the grant is provided.[33] Apart from those landowners entering into cooperative management agreements, the new conservation grants are available generally "for the purpose of conserving, preserving, or improving habitat" for any listed species.[34]

IV. Private Consultation Under Section 10

In another new provision, the bill offers private landowners a consultation procedure similar to the procedure mandated under section 7 for actions authorized, funded, or carried out by a federal agency. Voluntary consultation under section 10 allows a private landowner to initiate a consultation with the Secretary "on any prospective activity of the person."[35] The purpose of a voluntary consultation is twofold: (1) to determine if a proposed activity is consistent or inconsistent with a conservation objective[36] or conservation plan,[37] or (2) to determine whether an

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28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. H.R. 2275, 104th Cong., 1st Sess. § 103 (1995).
34. *Id.* The bill authorizes $20,000,000 per year from 1996-2001 to provide habitat conservation grants. *Id.* § 801.
35. H.R. 2275, 104th Cong., 1st Sess. § 203 (1995).
36. Section 501 requires the Secretary to publish a conservation objective for each listed species. Within 30 days of listing, the Secretary must appoint an "assessment and planning team," consisting of: (1) experts in biology or other pertinent scientific fields, economics, property law and regulation, and other appropriate disciplines from the Department of Interior, other federal agencies, and the private sector; (2) a representative nominated by the Governor of each affected state; (3) representatives nominated by each affected local government; and (4) representatives of individuals who may be directly, economically impacted by the conservation plan. *Id.* § 501. The team is required to make a full assessment of the species' viability, including the biological, economic, and intergovernmental impacts of the listing and any potential conservation measures identified by the team. *Id.* Within 210 days of

inconsistent activity is likely to jeopardize the continued existence of a listed species, or to "destroy or adversely modify the designated critical habitat of the species in a manner that is likely to jeopardize the continued existence of the species."[38]

For the most part, the voluntary consultation process for private landowners is governed by the same procedures and requirements as consultation by federal agencies under section 7. However, the bill has improved upon section 7 in several ways. For example, a private consultation must be completed within 90 days from the date on which the consultation was initiated, unless the landowner and the Secretary agree on a different timetable.[39] Landowners are not required to prepare a biological assessment, and neither the proposed activity nor the consultation process itself require preparation of an environmental impact statement.[40]

A private consultation results in a written opinion only, unless the landowner requests an incidental take permit. If the Secretary's written opinion concludes that the proposed activity is consistent with the relevant conservation objective or conservation plan, the landowner is exempted from the section 9 taking prohibition for that activity.[41]

If the landowner specifically requests it, the Secretary will consider issuance of an incidental take permit at the conclusion of a private consultation.[42] The Secretary is required to issue a permit if the circumstances point to one of three results. A permit must be issued if the Secretary finds that the proposed action is: (1) consistent with the relevant conservation plan or conservation objective; (2) is not likely to jeopardize the continued existence of a listed species; or (3) may jeopardize the species, but the landowner is willing to pursue a reasonable and alternative action offered by the Secretary.[43] An incidental take permit allows a section 9 taking by the landowner if the "taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."[44]

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listing a species and following review of the assessment and planning report, the Secretary must issue a conservation objective. The Secretary has the discretion to issue a conservation objective ranging from full recovery of the listed species to imposition of the section 9 take prohibition only. *Id.*

37. In those instances where the Secretary establishes a conservation objective that provides the lowest level of protection (prohibiting section 9 takes only) for a species, the Secretary is not required to develop a conservation plan. *Id.* § 501. In all other instances, the Secretary must develop and publish a final conservation plan within 18 months of listing the species. *Id.* § 502. Section 502 sets out certain priorities that the Secretary must observe in developing the plan. Notably, the priorities include: (1) the implementation of conservation measures that have the least economic and social costs, and (2) nonregulatory incentive-based conservation measures and commercial activities that provide a net benefit to the conservation of the species. *Id.*

38. H.R. 2275, 104th Cong., 1st Sess. § 203 (1995).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

V. Other Benefits to Private Property Owners

A. Modifying the Definition of "Take"

Other important provisions of the bill are either directed to or are highly favorable to private landowners. The bill modifies the statutory definition of "take" by excluding "harass" from the definition and overriding the controversial Fish and Wildlife Service application of "harm" to modification of habitat.[45] The bill's definition provides that "the term 'harm' means to take a direct action against any member of an endangered species of fish or wildlife that actually injures or kills a member of the species."[46] The new definition is intended to clarify the confusion surrounding the proper interpretation of "harm" by limiting a "take" to "direct action" against a member of an endangered species.[47]

B. Private Property Exemptions

The bill includes two important exemptions for privately owned property. First, the Secretary may not include private property within a critical habitat designation unless the landowner either gives written consent to the designation or is compensated for the diminishment in value of the private property included within the critical habitat designation.[48] Second, section 7 consultation and conferencing is not required for any federal agency action that "permits activities that occur on private land."[49]

C. Protection of State Authority to Allocate Water Rights

In a provision with potentially enormous benefits to farmers and ranchers, the bill addresses and clarifies water rights issues. It explains that the Act may not be construed to supersede or limit a state's right and authority "to allocate or administer quantities of water."[50] It further provides that no federal agency can utilize the Act's authority to impose extra requirements not imposed by a state that would "condition, restrict, or otherwise impair rights to the use of water resources allocated under state law."[51] If interpreted as written, the bill would return responsibility for appropriate uses of water to state lawmakers, rather than federal agencies and federal judges.

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45. By rule, the Fish and Wildlife Service defines "harm" to mean "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3 (1994).

46. H.R. 2275, 104th Cong., 1st Sess. § 202 (1995).

47. *See* Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S. Ct. 2407 (1995). The Supreme Court reversed the District of Columbia Court of Appeals and held that the Fish and Wildlife Service's definition of "harm" was reasonable. *Id.* at 2418. The Supreme Court viewed the legislative history of the Act as establishing Congress' intent that "take" apply broadly "to cover indirect as well as purposeful actions." *Id.* at 2416.

48. H.R. 2275, 104th Cong., 1st Sess. § 504 (1995).

49. *Id.* § 402.

50. *Id.* § 105.

51. *Id.*

D. Technical Assistance Program

The bill requires the Secretary to set up a new technical assistance program. The program is intended to assist landowners by providing information on habitat needs of species, optimum management of species habitat, methods for propagation of species, feeding needs and habits, predator controls, and any other information which a landowner may utilize for the purpose of conserving a species.[52]

E. Federal Cost-Sharing

In addition to providing private landowners with new options to assist them in conserving endangered species, the bill also mandates that the federal government pick up certain costs associated with compliance with the Act's provisions. For example, the Secretary is required to pay fifty percent of a landowner's "direct costs"[53] to prepare an incidental take permit application and to implement the terms and conditions of the permit.[54] The Secretary must also pay half the direct costs of preparing and implementing the terms and conditions of a cooperative management agreement. The same fifty percent federal cost-share applies to requirements imposed on private landowners by the Secretary under a section 7 voluntary consultation.[55]

VI. Background and Future of House Bill 2275

House Bill 2275 is best understood as a compilation and summation of ongoing efforts to change the focus of the Endangered Species Act. For example, the bill borrows several key concepts from an attempt in Congress last session to introduce consideration of economic and private property interests into species planning.[56] It also builds on a reauthorization bill introduced in the Senate this year by Sen. Slade Gorton (R.-Wash.) that includes conservation incentives like cooperative management agreements and habitat conservation grants.[57] The important House Bill 2275 language concerning compensation for private landowners is drawn nearly verbatim from House Bill 925, a property rights measure passed in the House of Representatives in March of this year.[58] Study of earlier approaches by legislators has allowed the sponsors of House Bill 2275 to incorporate the best ideas from a number of sources to chart a powerful direction for the Act's ultimate reauthorization, a direction, however, blocked by serious obstacles.

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52. *Id.* § 104.

53. "Direct costs" include "expenditures on labor, material, facilities, utilities, equipment, supplies and other resources which are necessary to undertake a specific conservation measure." *Id.* § 802.

54. H.R. 2275, 104th Cong., 1st Sess. § 802 (1995).

55. *Id.*

56. H.R. 1490, 103d Cong., 1st Sess. (1993) (introduced by Rep. Billy Tauzin (D.-La.) and Rep. Jack Fields (R.-Tex.)). For a summary of the bill's provisions, see Nancy Kubasek et al., *The Endangered Species Act: Time for a New Approach*, 24 ENVTL. L. 329, 344-49 (1994).

57. S. 768, 104th Cong., 1st Sess. (1995).

58. H.R. 925, 104th Cong., 1st Sess. (1995) (introduced by Rep. Charles Canady (R.-Fla.)).

It is not surprising that attempts to revamp the Act surface in Congress each year. Those harmed by the rigid and absolutist nature of the Act are highly motivated to introduce flexibility, creativity, and consideration of economic impacts into the nation's effort to protect endangered species.[59] Even so, it is unlikely that any progress toward making substantial changes in the Act will go forward in Congress this session.

As much as its critics find the Act wrongheaded, its supporters celebrate the Act's primacy among environmental laws.[60] Evidence of the difficulty facing passage of a comprehensive reworking of the Act is found in the harsh reaction of the Clinton administration to the introduction of House Bill 2275. Interior Secretary Bruce Babbitt warned of dire consequences if the bill were adopted.[61] Equally daunting is the discord among Republican members on the House Resources Committee. Within two weeks of the introduction of House Bill 2275 by Committee Chairman Don Young, two competing bills issued from Republican members of the same committee,[62] and a third Republican committee member announced his intention to offer his own competing bill.[63] All in all, it is likely to be some time before Congress assembles a majority capable of producing a thoughtful, workable rewrite of the Endangered Species Act.

59. The Act's nature was stated by the Supreme Court in the landmark decision, Tennessee Valley Authority v. Hill, 437 U.S. 153, 184 (1978). The Court insisted that the "balance has been struck in favor of affording endangered species the highest of priorities" and that "the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, *whatever the cost*." *Id.* (emphasis added).

60. *See, e.g.*, Elizabeth Foley, *The Tarnishing of an Environmental Jewel: The Endangered Species Act and the Northern Spotted Owl*, 8 J. LAND USE & ENVTL. L. 253 (1992).

61. DAILY REP. FOR EXECUTIVES, Sept. 9, 1995, at A-21. According to Secretary Babbitt, "This bill would effectively repeal the Endangered Species Act." *Id.* at A-22.

62. H.R. 2364, 104th Cong., 1st Sess. (1995) (introduced on Sept. 19, 1995, by Rep. John Shadegg (R.-Ariz.)). Rep. Shadegg's proposal entirely replaces the Act's structured conservation program with a nonregulatory, incentive-based program. *Id. See also* H.R. 2374, 104th Cong., 1st Sess. (1995) (introduced on Sept. 21, 1995, by Rep. Wayne Gilchrest (R.-Md.)).

63. On Sept. 21, 1995, Fisheries, Wildlife and Oceans Subcommittee Chairman Jim Saxton announced that he had "parted ways with leaders of Congress" and would introduce his own "sensible, middle-ground" bill. Cong. Green Sheets Wkly. Bull., Sept. 25, 1995, at B7.