



Endangered Species Act Alert 2005-1

RE: H.R. 3824, “Threatened and Endangered Species Recovery Act of 2005”

DATE: November 7, 2005

In late September the U.S. House of Representatives passed H.R. 3824 (the Threatened and Endangered Species Recovery Act of 2005) which would amend the Endangered Species Act. The amendment has been referred to the Senate Committee on the Environment and Public Works for consideration although no further action has been taken. The Chairman of that committee, Senator Inhofe has applauded the House approved amendment. The subcommittee that would likely author a senate version has convened advisory groups on the issue and it will not act until the advisory group reports in 2006 according to the subcommittee chairman, Senator Chafee. The primary point of debate seems to be the need for, and if desired the level of aid or compensation that is appropriate, for private landowners affected by species listed under the ESA. Other proposed changes have gained wider support such as the elimination of the requirement for designation of critical habitat.

This alert provides a brief summary of the provisions of the amendment that may affect Parametrix projects and clients.

- Section 3(a) of the amendment would add a new definition of “best available scientific data” as “. . . the most accurate, reliable and relevant for use in the subject decision or action” and requires that such information be empirical or peer reviewed. The amendment replaces the existing “best scientific and commercial data” with the new term throughout the ESA. *Other than removal of the “commercial” reference (i.e. fishing catch logs) the new standard may be just an articulation of existing standards. Empirical or peer reviewed requirements could restrict data that can be used in preparation of Biological Assessments, HCPs or other documents.*
- Section 5 of the amendment would delete the requirement for designation and protection of critical habitat from the ESA. *Could have implications for projects in Pacific Northwest where significant amounts of the waterways have recently been designated critical habitat for salmonids and significant amounts of forest are protected for the spotted owl. Practically, it may not matter because affecting any listed species habitat may potentially cause a take under the ESA whether it is designated critical habitat or not. Further, the critical habitat provision would be replaced with the specific areas of special value to conservation provision described in the next bullet in this ESA Alert.*
- Section 8 of the amendment would remove the recovery plan language from Section 4 of the ESA and Section 9 of the amendment adds new recovery plan requirements to Section 5 of the ESA including that:
 - Species “in conflict with construction or other development projects or other forms of economic activity” would be given priority in development of recovery plans. *Adding a priority for types of projects addressing construction, development, and other economic activity may address some project delays, but probably would not have as much effect as it would appear to potentially have because arguably most projects that require ESA compliance are these types of projects.*
 - Newly listed species have a recovery plan developed within 2 years of listing, unless development of the plan would not promote conservation and survival of the species.
 - All recovery plans be completed within 10 years for currently listed species without recovery plans. *New recovery plan standards and timeline would mean significant amounts of work for*

- USFWS (and NMFS if it is not absorbed by USFWS) that could effect the ability of this agency to address all needed work in a timely manner.*
- Adds a provision for designating “specific areas of special value to the conservation of the species” that could be viewed as a replacement for the critical habitat designations. *As noted above, critical habitat designation would be eliminated in the House version of the ESA amendment, but this provision will could address the same habitat areas. Regardless, special value areas in Recovery Plans would not have the regulatory power of designated critical habitat.*
 - Section 9 of the amendment would amend Section 5 of the ESA by adding provisions for “species incentives programs” and “species conservation contract agreements” under which a private landowner can receive compensation for conducting conservation activities in the contract. Such agreements would be considered permits to enhance the propagation or survival of such species under section 10(a) (1) of the act. *These new programs could result in potential project opportunities to assist private landowners. The most likely beneficiary of these programs would be non-profit land trusts that can now get money to do conservation work. This is not an HCP substitute and is intended for property where conservation is the focus.*
 - Section 11 of the amendment would modify Section 7 of the ESA in the following ways:
 - By adding that jeopardy analyses “shall consider only the effects of any agency action that are distinct from a baseline of all effects upon the relevant species that have occurred or are occurring prior to the action.” *This provision could impact some entities, such as ODOT, that have been required to compensate for past runoff impacts.*
 - Adding provision for a draft biological opinion and comment by involved federal agencies and permit applicants. *This adds a comment period for USFWS and NMFS decision that is currently not required.*
 - Eliminates the Endangered Species Committee, commonly known as the God Squad. *The impact of this amendment is not clear. The God Squad has not been used extensively, but it does have the authority to make the ultimate decision to not implement the recovery provisions of the ESA.*
 - Section 12 of the amendment would modify Section 10 of the ESA in the following ways:
 - Adds that habitat conservation plans (HCP) must include: 1) objective measurable biological goals and specific measures to achieve the goals; 2) monitoring measures; and 3) adaptive management provisions. *Currently HCPs are usually required by USFWS and NMFS to include these measures.*
 - Codifies the “no surprises/ assurances policy” for all new HCPs. This limits additional minimization, mitigation or other measures that can be required as long as the property owner is in compliance with the HCP. Also validates existing HCPs with no surprises clauses. The HCP may only be revoked if: 1) it would “appreciably reduce the likelihood of the survival and recovery on the species in the wild,” 2) sixty days notice is given, and 3) adverse conditions can not be remedied. *Codification of this policy could increase use of HCPs by landowners interested in such protections.*
 - Adds a process by which a property owner may request a written determination that a proposed use of property will not violate Section 9(a) of the ESA (take of a listed species). If such determination is not made within 180 days the activity is deemed to comply with Section 9. The proposed use must be shown to be lawful under state and local laws and does not apply to activities that involve a Section 7 consultation. *This could be an important new program for those projects that are unlikely to result in take, but still want some guarantee of protection. May work as an HCP substitute because for those projects in compliance with Section 9 it provides ESA coverage and those projects that would result in take can get compensated for restrictions (see amendment Section 13 below). This could increase the protective role of state and local laws (i.e. Washington Critical Areas Ordinances) since a showing of compliance with state and local laws are a prerequisite.*
 - Section 13 of the amendment would add two new programs to Section 13 of the ESA as follows:

- A grants program to promote conservation of listed species on private property. Grants may be given to property owners to be used for conservation activities and establishes a priority system. *This new program could result in more conservation activities on private lands.*
- A program to compensate property owners. For any private property owner who received a written determination (see above amendment Section 12) that a proposed use of the property would violate Section 9(a) of the ESA, it would require that the property owner be awarded “aid” in the amount of the fair market value of the prohibited use. The “use” would have to be lawful under state and local law and the property owner would need to demonstrate the means to undertake the proposed use. *Could act as an HCP substitute (see amendment section 12 above).*
- Section 20 of the amendment would add a provision that any action done in compliance with the Federal Insecticide, Fungicide, and Rodenticide Act complies with the ESA, although it does not change any restrictions or procedures required by a court before the date the amendment is enacted. *This provision codifies what is currently required by USFWS and NMFS.*
- Section 21 of the amendment would transfer all the ESA responsibilities of the National Marine Fisheries Service over to the U.S. Fish and Wildlife Service. *This provision could provide better consistency and efficiency in implementation of the ESA. The transfer of responsibilities would probably take time and creates potential problems having to do with expertise, mixed authority (if NMFS retains all other authority it currently has), administrative functions, and budgets.*

Additional Resources:

Amendment Text:

http://resourcescommittee.house.gov/issues/more/esa/TESRA/hr3824_housepassed.pdf

Resources Committee section by section summary:

http://resourcescommittee.house.gov/issues/more/esa/TESRA/section_by_section.pdf

Need More Information?

If you have questions or comments about this ESA Alert, please contact Jesse Halsted, ESA Policy Analyst (jhalsted@parametrix.com), or John Marsh (jmarsh@parametrix.com), Director of ESA Program.

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