



Legislative Bulletin.....September 29, 2005

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Summary of the Bills Under Consideration Today:

Total Number of New Government Programs: 0

Total Cost of Discretionary Authorizations: \$2.7 billion over five years for H.R. 3824 and baseline or below for the C.R.

Effect on Revenue: See below

Total Change in Mandatory Spending: See below

Total New State & Local Government Mandates: 0

Total New Private Sector Mandates: 0

Number of Bills Without Committee Reports: 0

Number of Reported Bills that Don't Cite Specific Clauses of Constitutional Authority: 1

**H.J.Res. 68 — Making continuing appropriations for the fiscal year
2006 (Lewis)**

Order of Business: The resolution is scheduled to be considered on Thursday, September 29th, subject to a rule, with one motion to recommit made in order.

Summary: H.J.Res. 68 would authorize continued funding with respect to the nine remaining appropriations bills, through November 18, 2005, at the lower of three levels: current law (FY05), House-passed, or Senate-passed. Defense appropriations is also funded at this rate, but as a result of emergency supplementals provided in FY05, the lower level *is* the House-passed

amount which over the course of a full fiscal year equals a 3.5% increase over last year (although 1% less than the President requested).

In addition, the resolution extends a number of provisions that are set to expire, including the authority for the President to waive the prohibition against providing direct assistance to countries whose elected leaders have been deposed by a coup with respect to Pakistan. Similarly, the resolution extends the Social Security Administration's authority to process outstanding Medicare claims, the availability of administrative start-up funds with regard to Medicare reform under the Medicare Modernization Act (P.L. 108-173), and the authority for the Department of Agriculture to dispense food stamps benefits through 2005. The resolution also extends the authorization for the Interagency Council on Homelessness through November 18th.

Additional Background: Thus far, only two FY05 appropriations bills have been signed into law: Interior and Legislative Branch. Without this continuing resolution, the portions of the federal government that are funded by the other nine appropriations bills could not operate past midnight of September 30th.

Cost to Taxpayers: H.J.Res. 68 would not authorize any new expenditure above the baseline. In fact, since it funds government programs at the lower of current law, House-passed or Senate-passed levels, the resolution would save money over the course of a full year.

Does the Bill Expand the Size and Scope of the Federal Government?: No.

Does the Bill Contain Any New State-Government, Local Government, or Private-Sector Mandates?: No.

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H.R. 3824 — Threatened and Endangered Species Recovery Act of 2005 (Pombo)

Order of Business: The bill is scheduled for consideration on September 29, 2005, subject to a structured rule. Amendments made in order under the rule will be summarized in a separate RSC document.

Summary: H.R. 3824, known as the Threatened and Endangered Species Recovery Act (TESRA), amends the Endangered Species Act of 1973 to amend various provisions relating to the determination of endangered or threatened species, procedures for making those determinations, and the role of states and private property owners in the determination process. The specific provisions of the bill are described below by section:

Sec. 3. Definitions.

- Defines the phrase “best available scientific data” to mean scientific data that is available to the Secretary at the time of a decision or action, regardless of source, that the Secretary determines is the “most accurate, reliable, and relevant for use in the decision or action.”

- Requires the Secretary of the Interior to issue regulations that establish criteria within one year of enactment which must be met to determine which data constitutes the best available scientific data.

Sec. 4. Determinations of Endangered Species and Threatened Species.

- Modifies the criteria used to determine whether any species is an endangered or threatened species by adding clarifying language (underlined below) to the first of the current criterion: “present or threatened destruction, modification, or curtailment of its habitat or range by human activities, competition from other species or other catastrophic natural causes.”
- Strikes existing provisions that bar the Secretary of the Interior (who is responsible for enforcement of the ESA) from changing the status of any species listed without the prior approval by the Secretary of Commerce, in instances where program responsibilities have been vested in the Secretary of Commerce.
- Requires the Secretary to conduct a review every five years of all species included in the list of endangered or threatened species and to move or change the designation of species on the list as necessary.

Sec. 5. Repeal of Critical Habitat Requirements.

- Eliminates the critical habitat provisions of the Endangered Species Act, which allows the Secretary of Interior (or Secretary of Commerce in some instances) to designate land as “critical habitats” when an endangered or threatened species existed on the land, thus providing federal restrictions on the use and ownership of the land.

Sec. 6. Petitions and Procedures for Determinations and Revisions.

- Prohibits the Secretary from finding that a petition to add a species to the endangered or threatened list may be warranted unless the petitioner provides to the Secretary a copy of all information cited in the petition.
- Requires the Secretary to provide a complete record of all determinations and revisions to the endangered species and threatened species list on a publicly accessible website, to include any status review and related documentation referred to in a review or petition.

Sec. 7. Reviews of Listings and Determinations.

- Sets forth additional provisions that the Secretary must consider when conducting a review of the lists of endangered or threatened species and determining if any species should be added or removed from either list.

Sec. 8. Secretarial Guidelines; State Comments.

- Eliminates the current provisions of the Endangered Species Act regarding recovery plans and monitoring for endangered or threatened species (replacing it with new language in Sec. 9 below).

Sec. 9. Recovery Plans and Land Acquisitions.

- Requires the Secretary to develop and implement recovery plans for endangered or threatened species, unless the Secretary finds that such a plan will not promote the conservation and survival of the species.

- Requires the Secretary to establish recovery teams to assist in the development of such plans, giving priority to species that will most likely benefit from such plans, particularly those species that are “in conflict with construction or other development projects or other forms of economic activity.”
- Requires the Secretary to publish a priority ranking system within one year for preparing or revising recovery plans for those endangered or threatened species listed as of the date of enactment; provides two years for publishing a recovery plan for species added to the list after enactment.
- Requires the Secretary, within 18 months of enactment, to publish a tentative schedule for development of such plans, and requires the Secretary to provide reasons for any deviation from the published priority list and recovery plans. Thus, it sets specific time limits on how long the federal government may delay making decisions on whether and to what extent property owners may use their land.
- Requires that the recovery plans be based on the “best available scientific data” and include, among other things, estimates of the time required and the costs to carry out the measures; also to include cost estimates for any recommendation by the recovery team or Secretary to acquire any land on a willing seller basis.
- Requires the Secretary to report to Congress every two years on the status of all domestic endangered or threatened species and the status of efforts to develop and implement recovery plans.
- Requires the Secretary to consult with any pertinent state, Indian tribe, or regional or local land use agency prior to final approval of a new or revised recovery plan.
- Requires the Secretary to monitor, for at least five years, the status of all species that have recovered to the point at which the Endangered Species Act provisions are no longer necessary and have been removed from the endangered or threatened lists.
- Authorizes the Secretary to: (1) enter into species recovery agreements and species conservation contract agreements with persons, other than federal or state agencies, for conservation activities to protect endangered or threatened species; and (2) make grants to promote the voluntary conservation of endangered and threatened species by private property owners. Stipulates specific goals and priorities that are to be included in any contract agreements with private property owners, along with expectations for both the Secretary and the land owner.

Sec. 10. Cooperation with States and Indian Tribes.

- Authorizes the Secretary to enter into cooperative agreements with states or Indian tribes to develop a program for conservation of a species determined to be at risk of being an endangered or threatened species.
- Provides that any cooperative agreement entered into by the Secretary that would include private lands or water rights would be subject to voluntary enrollment for the owners of such land or water rights.
- Requires the Secretary to report to Congress annually on expenditures made primarily for the conservation of species.

Sec. 11. Interagency Cooperation and Consultation.

- Eliminates the Endangered Species Committee and the process for granting exemptions from endangered or threatened species determinations.

Sec. 12. Exceptions to Prohibitions.

- Prohibits the Secretary from requiring a permit holder (allowing the holder to use lands impacted by the Endangered Species Act) to adopt new ESA measures to meet circumstances that may have changed since the issuance of the permit. The Committee Report refers to this as the “No Surprises” provision, relating to permit revocation regulations. Thus, valid permit holders who are in compliance with the terms of the original permit may not be compelled to adopt or carry out new provisions as circumstances change.
- Regulates the ability of the Secretary to require or implement additional ESA measures on any land or water covered in a permit to address changed circumstances, and specifies that such changes may impose additional restrictions *only if it does not impose* additional restrictions on land, water, or other natural resources otherwise available for development or use.

Sec. 13. Private Property Conservation.

- Allows the Secretary to provide conservations grants to land owners to promote the voluntary conservation of endangered species and threatened species on their property. While the amount of the grants are not specified, they are to be consistent with paying for or compensating property owners for species conservation efforts on the land in question.
- Stipulates what the funds may and may not be used for, including specifically stating that funds: 1) may not be used to fund litigation or lobbying, and 2) may be used to compensate land owners for the foregone use of their land. Also requires that any grant activities carried out on private property are supported by the property owner.
- Allows the Secretary to provide conservation aid (payments) to property owners who have been denied use of their property “as evidenced by a written determination that the owner’s proposed use of the property would violate the ESA prohibitions.
- Establishes that fair market value of the foregone use of private property means what a willing buyer would pay to a willing seller in the open market for the affected property
- Establishes that in determining fair market value, the Secretary and the property owner are to jointly select two licensed independent appraisers. In the case that a resolution cannot be reached within 180 days, a third appraiser would be jointly selected by both parties to determine fair market value within an additional 90 days.

Sec. 14. Public Accessibility.

- Requires the Secretary to make certain information publicly accessible on a website, including but not limited to: 1) lists of endangered and threatened species, 2) all proposed and final regulations, and 3) the results of all 5-year endangered species list reviews.

Sec. 15. Annual Cost Analyses.

- Requires the Secretary to report to Congress annually on expenditures made primarily for the conservation of species.

Sec. 16. Reimbursement for Depredation of Livestock by Reintroduced Species.

- Allows the Secretary to reimburse the owner of livestock for any loss of livestock resulting from depredation by any population of an endangered or threatened species and includes or derives from members of the species that were reintroduced into the wild.

Sec. 17. Authorization of Appropriations.

- Authorizes such sums as may be necessary for FY06-FY10 to the Secretary of the Interior and to the Secretary of Agriculture to carry out the provisions of this Act.

Sec. 18-20. Miscellaneous.

- Makes miscellaneous technical and clerical corrections.

Additional Information: The Endangered Species Act (ESA) was originally enacted in 1973, although less extensive acts were passed in 1966 and 1969. It was amended in 1976, 1977, 1978, 1979, 1980, 1982, and 1988. Authorization for funding under ESA expired on October 1, 1992, although Congress has appropriated funds in each succeeding fiscal year.

The U.S. Fish and Wildlife Service (FWS), under the Department of the Interior, is largely responsible for enforcing the provisions of ESA. According to CRS, an endangered species is defined as “any species which is in danger of extinction throughout all or a significant portion of its range...” A threatened species is defined as “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” The protection of the ESA extends to all species and subspecies of animals, and more limited protection is available for plants species. “As of March 30, 2005, a total of 1,827 species of animals and plants had been listed as either endangered or threatened; 1,264 of these occur in the United States and its territories and the remainder only in other countries. Of the U.S. species, 1,031 were covered by recovery plans.” For more information on the history of the ESA and its current provisions, see CRS document RL31654:

<http://www.congress.gov/erp/rl/pdf/RL31654.pdf>

A stated purpose of the ESA is to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” There are frequently economic interests on both sides of many threatened and endangered species issues, and the extent to which ESA regulations limit or prohibit use and development of public and private property. Many conservative have argued that the ESA in its current form has not been effective. Two frequent and leading criticisms may be 1) the fact that a major goal of the ESA is the recovery of species to the point at which the protection of the ESA is no longer necessary – and only 16 species have been de-listed due to recovery, and 2) the enforcement of ESA provisions have been so broadly interpreted as to negatively impact economic development, commerce, and private property rights with little benefit to the affected species.

Rep. Don Young made comments to this affect in the Committee Report, “For too long, the Endangered Species Act has been used not as a tool for protecting the environment but as a roadblock. The original intent of species protection has been lost by those eager to wield the ESA’s power for legal and bureaucratic ensnarement. While the Federal Government has failed to recover endangered species to healthy and sustainable populations, it has unfortunately not failed to cause massive hardship for landowners and communities while pursuing this so far

widely unobtained goal. A better approach is needed--for plants, wildlife, and humans. I applaud Chairman Pombo and his efforts on this urgent matter.”

According to information provided by Chairman Pombo, the FWS, “under both Democrat and Republican Administrations has maintained that the designation of statutory critical habitat under current law actually does more harm than good.” FWS has stated “In 30 years of implementing the ESA, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of conservation resources. The Service's present system for designating critical habitat is driven by litigation rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic costs. The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits and to comply with the growing number of adverse court orders. As a result, the Service's own proposals to undertake conservation actions based on biological priorities are significantly delayed.”

As noted in the bill summary above, TESRA amends the most controversial provisions of ESA, namely those concerning the type of data used in determining and revising the lists of endangered or threatened species, designation of critical habitats, and private property rights.

Administration Policy: At the time of publication, a Statement of Administration Policy was unavailable.

Amendments: Amendments made in order under the rule will be summarized in a separate RSC document. There are only two amendments: the manager s amendment and an amendment in the nature of a substitute.

Committee Action: H.R. 3824 was introduced on September 19, 2005, and referred to the Committee on Resources. The bill was considered and a mark-up session was held on September 22, 2005, and it was reported to the House by a vote of 26-12 (H. Rept. [109-237](#)).

Cost to Taxpayers: CBO estimates that “the U.S. Fish and Wildlife Service (USFWS) and the Animal and Plant Health Inspection Service (APHIS) would spend a total of about \$2.7 billion over the 2006-2010 period to carry out and enforce the ESA as amended by this legislation, assuming appropriation of the necessary amounts. CBO estimates that direct spending “would likely be small over the next five years – probably less than \$10 million.”

CBO further notes that “The cost of providing payment of aid to certain land owners is uncertain and would depend on how the legislation would be interpreted by the Administration, private property owners, and the courts. While CBO cannot predict the impact of the aid requirement on the total costs of carrying out the ESA over time, we estimate that federal payments over the 2006-2010 period would likely total less than \$10 million because of likely delays in resolving conflicting interpretations of the law, implementing the necessary administrative mechanisms, and processing requests. The costs of those payments the program has been fully implemented could be much more significant-despite the likely small size of individual payments--because the volume of requests could be very large at first. After 2010, we expect that such payments would

probably average less than \$20 million a year--though annual amounts would likely vary significantly from year to year.”

Does the Bill Expand the Size and Scope of the Federal Government?: No. As noted above, the bill largely clarifies or limits the federal governments’ power to impose ESA provisions, and provides additional protections to private property owners.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No. Within the committee report, CBO states “some provisions in this bill would give state or local governments a greater role in carrying out the Endangered Species Act. Any costs they might incur in response would be incurred voluntarily.”

Constitutional Authority: The Committee Report, H. Rept. [109-237](#), cites constitutional authority for this legislation in Article 1, Section 8 of the Constitution, but fails to cite a specific Clause.

House Rule XIII, Section 3(d)(1), requires that all committee reports contain “a statement citing the *specific* powers granted to Congress in the Constitution to enact the law proposed by the bill or joint resolution.” *[emphasis added]*

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