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Reauthorization of the Endangered Species Act (ESA): A Comparison of Pending Bills and a Proposed Amendment with Current Law

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Reauthorization of the Endangered Species Act (ESA): A Comparison of Pending Bills and a Proposed Amendment with Current Law

Summary

The Endangered Species Act (ESA) protects species that are determined to be either endangered or threatened according to assessments of their risk of extinction. The ESA has not been reauthorized since September 30, 1992, and efforts to do so have been controversial and complex. Some observers assert that the current ESA is a failure because few species have recovered, and that it unduly and unevenly restricts the use of private lands. Others assert that since the act's passage, few species have become extinct, many have improved, and that restrictions to preserve species do not place a greater burden on landowners than many other federal, state, and local laws.

This report provides a side-by-side analysis of two bills and a proposed amendment that would amend the ESA. This analysis compares H.R. 3824, the Threatened and Endangered Species Recovery Act of 2005, as passed by the House; proposed House Amendment 588 to H.R. 3824 (Miller/Boehlert Amendment); and S. 2110, the Collaboration for the Recovery of Endangered Species Act.

Proponents of each proposal indicate that it is designed to make the ESA more effective by redefining the relationship between private and public property uses and species protection, implementing new incentives for species conservation, and removing what some see as undue land use restrictions. Thus, all three proposals contain provisions meant to encourage greater voluntary conservation of species by states and private landowners, a concept that has been supported by many observers. Further, all three proposals would modify or eliminate certain procedural or other elements of the current ESA that some have viewed as significant protections and prohibitions, including eliminating or changing the role of "critical habitat" (CH) (which would eliminate one aspect of the current consultation process); making the listing of all threatened and endangered species more difficult or less likely; expanding §10 permits allowing incidental take (which could incur a greater need for agency oversight and enforcement); and expanding state rather than federal implementation of ESA programs (which might make oversight more difficult). Proponents of these changes assert that tighter listing standards would enable a better focus on species with the most dire needs, and that other measures would achieve recovery of more species. Critics argue that proposed changes create gaps in the ESA safety net of protections and prohibitions.

It is difficult to assess whether, on balance, the proposals would be likely to achieve greater protection and recovery of species, or to what extent the controversies over land use constraints would diminish. However, replacing some of the protections of the current ESA with new incentives, rather than adding the new incentives to the current protections, arguably makes adequate funding of the new programs more critical to determining the outcome of the ESA.

This report will be updated as events warrant.

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Introduction

The Endangered Species Act (ESA)[1] protects species that are determined to be either endangered or threatened according to assessments of their risk of extinction. The act can be controversial because it can affect the use of both federal and non-federal lands and resources, and because dwindling species can be harbingers of broader ecosystem decline. The ESA has not been reauthorized since September 30, 1992, and efforts to do so have been controversial and complex.

Some observers assert that the current ESA is a failure because few species have recovered, and that it restricts the use of private lands unduly and unevenly. Others assert that since the act's passage few species have become extinct, while many have improved, and that some restrictions are a reasonable burden to preserve species, including some that may directly affect human well-being. The conservation of habitat was seen as crucial when the ESA was enacted in 1973, reduced habitat still is widely recognized by scientists as a major cause of species loss, and habitat preservation is a focus of debate today. Whether to retain the current system of designating habitat critical for the conservation of species, or to eliminate that system in favor of other options has been discussed widely. There appears to be consensus on the desirability of creating incentives for property owners to preserve habitat, but there is disagreement as to whether such incentives should replace enforceable protections or supplement them. Other issues are the role of science in ESA decision-making, reducing conflicts with other activities (such as those of the Department of Defense), and possibly enacting some of the approaches taken in current regulations as provisions of the act.

This report provides a side-by-side analysis of two bills and a proposed amendment that would amend the ESA. This analysis includes H.R. 3824, the Threatened and Endangered Species Recovery Act of 2005, as passed by the House, which would reauthorize and amend the ESA;[2] proposed House Amendment 588 to H.R. 3824 (Miller/Boehlert Amendment), which would also reauthorize and amend

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[1] P.L. 93-205, 87 Stat. 884, 16 U.S.C. §§1531 *et seq.*

[2] Introduced Sept. 19, 2005, by Rep. Richard Pombo and passed the House Sept. 29, 2005. Page numbers in text refer to House-passed version.

the ESA;[3] and S. 2110, the Collaboration for the Recovery of Endangered Species Act, which would amend but not reauthorize the ESA.[4]

Proponents of the individual proposals have indicated they are intended to make ESA more effective by encouraging greater voluntary conservation of species by states and private landowners, modifying or eliminating critical habitat, and expanding state rather than federal implementation of ESA programs, among other things. Of the three proposals, H.R. 3824 proposes the most extensive changes to current law. The Miller/Boehlert Amendment is similar to H.R. 3824 in several respects, but omits some of the provisions of H.R. 3824 and modifies others. S. 2110 would make some significant changes to current law and establish a system of tax incentives and credits for property owners.

This report presents a summary and comparison of current law, the two bills, and the Miller/Boehlert Amendment. It does not attempt to analyze the current law's history and implementation in detail. For a comprehensive discussion of the ESA, its features, and history, see CRS Report RL31654, *The Endangered Species Act: A Primer*, by Pamela Baldwin, Eugene H. Buck, and M. Lynn Corn; and CRS Report RL32992, *The Endangered Species Act and Sound Science*, by Eugene H. Buck, M. Lynne Corn, and Pamela Baldwin. In the attached chart, the three measures are compared with each other and with current law. Current law is the baseline against which the changes of the various proposals can be identified or explained, with emphasis on the extent of changes to current law and the contents of the provisions. The columns present the legislation in the order the bills were introduced. The comparison is based on topics covered in the bill and does not analyze all language. Topics generally follow the section-by-section structure of the ESA. Current law and the provisions from the bills and the Miller/Boehlert Amendment are paraphrased for brevity. In the chart, CRS analyses and comments addressing specific provisions are written in italics below the provision discussed. Page numbers in the chart refer to the PDF version of the bill or the Miller/Boehlert Amendment as formatted by the U.S. Government Printing Office. Because S. 2110 is the only bill that contains extensive provisions on conservation banks and tax incentives for property owners, those provisions are discussed separately in the **Appendix**.[5]

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[3] House Amendment 588 in the nature of a substitute to H.R. 3824, offered on Sept. 29, 2005, by Rep. George Miller; it was rejected (206 yeas to 216 nays).

[4] Introduced Dec. 15, 2005, by Sen. Mike Crapo.

[5] For information on current issues regarding the ESA, and status of legislation, see CRS Issue Brief IB10144, *The Endangered Species Act (ESA) in the 109th Congress: Conflicting Values and Difficult Choices*, by Eugene H. Buck, M. Lynne Corn, Pervaze A. Sheikh, Pamela Baldwin, and Robert Meltz.

Overview of the Bills

H.R. 3824.[6] This bill would include a definition of *best available science* that sets out several limitations and requirements, and applies to listing and species status determinations. Further, H.R. 3824 would require an analysis of the economic, national security, and other relevant impacts of making a listing determination. The ESA-related role of the National Marine Fisheries Service (Secretary of Commerce) would be eliminated and those duties transferred to the Fish and Wildlife Service (FWS). The bill would repeal the designation of critical habitat (CH) and label current areas of CH as *areas of special value* for recovery planning purposes. The elimination of CH would also eliminate one aspect of consultation under §7. The bill would set deadlines for the completion of many recovery plans, and require biological criteria in habitat conservation plans to assist in evaluating results. Further, it would require that recovery plan teams include various constituencies, and that satisfaction of the criteria specified in a recovery plan be considered in decisions to change the status of species.

The bill would expand cooperative agreements with states to include candidate and certain other species that the Secretary and a state agree are at risk, yet are not federally listed as threatened or endangered, and specify conditions for suspending or terminating these agreements. Further, the bill would establish recovery and conservation agreements with private property owners; provide grants to property owners who voluntarily undertake conservation measures; provide for written determinations of whether a proposed private action would violate the ESA; and, when requested, pay aid or compensation to qualifying property owners who forego a proposed use of their property to avoid violating the ESA. Compensation would also be available for livestock losses due to reintroduced species.

The bill would specify additional requirements for §10 permits and codify a *No Surprises* approach similar to that in current regulations to afford greater certainty to landowners. It would clarify exemption authorities in times of emergencies or disasters, or for national security. Further, the bill would allow action-agencies to determine types of actions as well as particular actions that could be granted categorical exclusions from jeopardy determinations or exempted from consultation requirements for a period of time for many actions involving the use of pesticides.

Miller/Boehlert Amendment to H.R. 3824. The Miller/Boehlert Amendment would define *best available science*, emphasize the inclusion of data obtained by scientifically-accepted methods and procedures, and establish a science advisory board to evaluate the use of science in implementing the ESA. Jeopardy would be defined with broader language than found in agency regulations, likely making it easier to find jeopardy than under current law. Conditions applicable to consultation on cooperative agreements and agency actions would be provided.

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[6] See CRS Congressional Distribution Memorandum: *Summary and Analysis of H.R. 3824, the Threatened and Endangered Species Recovery Act of 2005 (TESRA), as passed by the House, Oct. 13, 2005*, by Pamela Baldwin (available from the author).

The definition of CH would be retained and under §3(5)(B), CH apparently could still be designated for listed species without recovery plans. However, the Miller/Boehlert Amendment also states that CH designated *before* enactment would be treated as "areas necessary for recovery" until a new recovery plan or recovery plan revision is completed, and no more CH would be designated. Areas important to species recovery would be designated in recovery plans. The bill would also address the status of each listed species every five years; require notices to states for proposed determinations; and require a Secretarial justification for any prohibitions on threatened species. The Miller/Boehlert Amendment would require recovery plans for listed species; a priority system for developing plans; and recovery teams to develop plans and coordinate with federal agencies. Contents of recovery plans are specified, including the identification of publicly owned lands needed for recovery, or private lands, only if also necessary for recovery. Opportunities for public comment and access to recovery plans would be provided.

The Miller/Boehlert Amendment would expand cooperative agreements with states so that listed and candidate species, as well as species of special concern, could be included. There would be provisions related to monitoring and changing the status of agreements. Exemptions for national security and disasters would be provided. Conditions for obtaining written determinations of the lawfulness under ESA of a proposed action would be specified. A conservation program for landowners to improve habitat and promote conservation on private lands would be established. Agreements between the Secretary and landowners would be authorized, and include management plans and criteria for evaluation. Conservation grants and compensation for livestock loss due to reintroduced species would also be available.

S. 2110. The bill would not change any existing definitions under current law, but would establish a priority system for determining the status and habitat of species. The priority system would consider risk of extinction, likelihood of recovery, and conflicts with human activities, among other things. Critical habitat designation would be retained; however, designation would occur later than under current law. Recovery plans would include input from an executive committee, a recovery coordinator would be required, and a recovery team of experts could be appointed, but would not be required. Additional requirements for recovery plans would be set out.

S. 2110 would provide for cooperative agreements with states on listed and candidate species, and species that are likely to be threatened or endangered. Agreements would be subject to consultation with the Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) when entered into, amended, or renewed, but consultation would not be required for species in an area covered by a cooperative agreement that became listed after an agreement is finalized. Incidental take statements could be issued based on cooperative agreements. S. 2110 would also provide for the monitoring, enrollment, termination, and review of cooperative agreements.

This bill would create a system of conservation banks for improving recovery of listed and candidate species, and species of concern. The bill contains criteria to be included in regulations on managing conservation banks; mechanisms for transferring and pricing credits; and provisions for *out-of-kind mitigation*. A system

of tax credits would be provided for landowners who participate in the recovery of certain species. Landowners could also receive tax credits for conservation and recovery costs. Specifications for entering into an agreement, eligibility requirements for credits, and value of credits under different tax conditions are provided.

S. 2110 would modify requirements for habitat conservation plans (HCP), and a *No Surprises* approach similar to the current administrative regulation would be codified. Provisional permits for incidental take would be available for voluntary implementation of the terms of a proposed HCP. Participants in farm bill conservation programs[7] who conduct site-specific recovery activities with a net benefit for listed or candidate species would receive §10 incidental take permits.

Comparison of H.R. 3824, the Miller/Boehlert Amendment, and S. 2110

This portion of the memorandum compares and discusses briefly some of the principal topics in the legislation in a format that loosely follows the section-by-section structure of the ESA. (Please refer to the chart for more detail.)

Section 3 — Definitions. S. 2110 makes no changes to the definitions under current law. The House bill and Miller/Boehlert Amendment would replace the current phrase *best scientific and commercial data available* with *best available scientific data*. Both would elaborate on what is the best available science. Under H.R. 3824, the Secretary is to develop regulations that ensure compliance with the Data Quality Act, and that data be empirical or found in sources reviewed by qualified individuals recommended by the National Academy of Sciences (NAS). The Miller/Boehlert Amendment would rely less on Secretarial determination of what data can be used in decision-making, and would establish criteria for *scientifically accepted* data, including those data that meet scientific standards and are widely used within the relevant fields of science. Some contend that the specification of empirical data in H.R. 3824 would exclude estimates derived from models and limit the type of data available for use compared to the provisions of the Miller/Boehlert Amendment and current law. However, estimates derived from modeling could be allowed under H.R. 3824, if it meets the NAS peer-review conditions set forth in the bill.

Currently, *Secretary* refers to either the Secretary of the Interior or the Secretary of Commerce, depending on the species involved.[8] H.R. 3824 would eliminate the role of the Secretary of Commerce and transfer those duties to the Secretary of the Interior. The Miller/Boehlert Amendment would retain the definition of *Secretary* as in current law, but would delete several specific references to the Secretary of Commerce, and would not authorize appropriations for the Department of Commerce. Some contend that eliminating the Secretary of Commerce would reduce

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[7] Food and Security Act of 1985 (16 U.S.C. §3831).

[8] The Secretary of Agriculture also has duties with respect to the importation or exportation of terrestrial plants.

duplication of efforts and increase resources for recovery, others contend that the Fish and Wildlife Service might not have the expertise to manage ocean species.

The Miller/Boehlert Amendment would define *jeopardy* to include any action that lessens the likelihood a species will recover. This definition is broader than the way *jeopardy* has been interpreted by the courts to date. It is not clear how this broader definition would affect other sections of the statute, but it could make it easier to find jeopardy during §7 consultations on federal actions or private actions with a federal nexus. Several sections relating to critical habitat would be eliminated, thereby eliminating the other current test for reviewing actions under current §7 processes.

Section 4 — Determinations/Listings. Under current law, there is a duty to list species that either are threatened with extinction or in danger of becoming extinct. The bills and the Miller/Boehlert Amendment contain many provisions relating to determinations of species status. The type of data used to make determinations under H.R. 3824 could be more limited than under current law, due to the definition of best available scientific data (i.e., data must be empirical or found in sources reviewed by NAS). The Miller/Boehlert Amendment does not appear to limit the type of data and analyses used as long as it meets scientifically accepted standards, a condition that appears to embody current legal interpretations. The Miller/Boehlert Amendment would mandate peer review through a Scientific Advisory Board (SAB) composed of appointed nominees recommended by the NAS. The SAB would have a broader mandate than peer review panels proposed in H.R. 3824, because it would evaluate the use of science in implementing the act and develop policies on the use of scientific information. H.R. 3824 and the Miller/Boehlert Amendment would expressly make all information used to make a determination on a species publicly accessible; S. 2110 would make no changes to current law. (However, the Data Quality Act requires that information relied on by agencies be made available.)

The Miller/Boehlert Amendment would address threatened species by requiring the Secretary to publish justification for any prohibitions regarding threatened species, and to restrict the circumstances under which prohibitions may be applied to more than one threatened species. H.R. 3824 would address distinct population segments[9] by directing the Secretary to determine them as endangered or threatened *only sparingly*, language taken from H.Rept. 96-151 (p. 7). H.R. 3824 would require the Secretary to prepare an analysis of the economic, national security, and other impacts and benefits of species status determinations concurrently with making a determination. This analysis however, would not change criteria in making a

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[9] A distinct population segment is a population segment of a vertebrate species that is discrete (e.g., geographically separate) from the remainder of the species, considered significant to the species, and has endangered or threatened status. Invertebrates and plants are not afforded protection at the population level under current law. See U.S. Department of Interior and Commerce, "Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act," *Federal Register*, vol. 61, no. 26 (Feb. 7, 1996), p. 4722.

determination. Similar analyses would be used under S. 2110 to determine a priority system for ranking species for consideration. (See discussion below.)

Current law authorizes the Secretary to establish a ranking system to identify species that should receive priority review, and FWS and NMFS have established such priorities. This current system relates to the commitment of agency personnel and funds, but may be overridden by court orders because the statutory duties of the ESA agencies to list species and CH remain. S. 2110 would elaborate statutorily on how to establish a priority ranking system and a related schedule for agency actions. It appears that courts could only consider whether agency actions are consistent with that schedule and may only order compliance with it. S. 2110 could modify or eliminate the duty to list, depending on how its judicial review provision is interpreted.

Some of the criteria in S. 2110 for ranking species could be seen as contradictory and no guidance is given as to the weight to be given the various factors. For example, is a species with unusually narrow geographic distribution and habitat needs, but with various other subspecies still extant, to be considered a higher or lower priority than a species that is the only living representative of its genus, but is widely distributed? Several of the factors seem aimed at ascertaining which species are in grave difficulty, yet another factor is the likelihood of achieving recovery of the species. How to determine which is more important? The latter criterion might be used to suggest that those species listed at the earliest sign of depletion would be given a higher priority than those species listed after considerable delay, at a time when species numbers point unequivocally to endangerment. For species so depleted that their recovery is in doubt, another remaining question is whether they should be allowed to slide to extinction, or could such species be maintained?

Under H.R. 3824 and the Miller/Boehlert Amendment, the five-year reviews of species status required by current law would be based on biennial reports sent to Congress and *any other information the Secretary considers relevant*. The relationship of this last language to the best available science requirements is not clear.

Section 4 — Designation of Critical Habitat (CH). Current law requires the designation of CH for a species at the time of listing, and makes destruction or adverse modification of CH a trigger for consultation procedures. Critical habitat is currently defined as habitat that is *essential for the conservation of a species*. FWS and others have asserted that the designation of CH provides no additional benefit beyond that which is accomplished through the duty to avoid jeopardizing species. However, several courts have held that this conclusion rests on an erroneous agency regulation, and that based on the definition of *conserve*, CH should include habitat necessary to accomplish recovery, not merely to avoid jeopardy. *Conserve* is defined in the current law as bringing a species to the point where it no longer needs the protections of the act, wording that courts have held includes recovery. See, for example, *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F. 3d 434 (5th Cir. 2001).

H.R. 3824 would eliminate CH altogether, and rely on landowner incentives to secure adequate habitat. The Miller/Boehlert Amendment would retain the current

definition of CH, but would repeal several references to it and also treat current CH as *areas necessary for recovery* until a recovery plan is developed or revised, similar to H.R. 3824. CH under the Miller/Boehlert Amendment apparently would also be eliminated for future designations, although the current definition of CH would allow for some future designations. The bills and Miller/Boehlert Amendment would delay the time at which CH (or its substitute) is designated from listing to a later time. Already designated CH would be treated under H.R. 3824 as *areas of special value*. These areas may or may not be retained when areas of special value are determined in a new or revised recovery plan.

The Miller/Boehlert Amendment would call for identifying publicly owned areas or other areas of land or water necessary to achieve the purposes of a recovery plan, and impacts on these areas that shall be considered when evaluating whether a proposed action might jeopardize a species. This provision requires the location of CH (or equivalent areas) on public lands first, and only if that is insufficient, looking to private lands. The elimination of CH in the House bill and in several instances under the Miller/Boehlert Amendment would reduce the §7 consultation process to only an evaluation of whether a proposed federal action would jeopardize the continued existence of a listed species. Under current law, since CH is defined as that area necessary to *conserve* (i.e., usually interpreted as recovery) a species, the elimination of CH could significantly change the §7 protections. However, the Miller/Boehlert Amendment would define *jeopardy* more broadly than under current interpretations, so the net effect on §7 protections of eliminating several provisions on CH is not clear.

CH would be largely retained under S. 2110 and designated either three years after a recovery plan is commissioned, or in accordance with the priority system, but not later than five years after a species is listed. This may mean that designation must appear on the schedule and hence be part of an enforceable timetable, or possibly that CH would not be enforceable in the case of a low-priority species that is never listed and for which no recovery plan is developed.

Section 4 — Recovery Plans. Under current law, the Secretary must develop recovery plans for all listed species unless the Secretary finds that a plan will not promote the conservation (recovery) of the species. Plans are *to the maximum extent practicable* to give priority to species that are most likely to benefit from them, or which are in conflict with construction or other economic activities. Plans are to include both site-specific actions necessary to achieve the plan's goal and objective, measurable criteria which, when met, would result in species being removed from lists. Plans also are to include estimates of the time and costs required. All the bills elaborate on the development of recovery plans.

H.R. 3824 and the Miller/Boehlert Amendment would impose deadlines for recovery plans. S. 2110 would require the Secretary to publish provisional recovery goals at the time of listing that remain in effect, unless replaced by an approved recovery plan. H.R. 3824 and the Miller/Boehlert Amendment would require the Secretary to promulgate regulations for establishing recovery teams. H.R. 3824 would require stakeholders to be on recovery teams, but would not expressly require that scientists be on teams; this might be offset by a requirement that team members with relevant scientific expertise would establish objective, measurable criteria for

recovery based solely on the best available scientific data. Under all three measures, appointment of a team would not be required, and if one is not appointed, the Secretary could develop the plan. Although a recovery team might not be appointed, under S. 2110 the Secretary would appoint an executive committee comprised of stakeholders, and a recovery coordinator to staff and coordinate implementation of a plan. If a group of stakeholders forms a committee that qualifies as an executive committee, the species in which the group is interested would receive priority for development of a recovery plan. Although there are requirements in S. 2110 for recovery *plans*, there are none for the recovery *programs* created by the Secretary.

Under H.R. 3824, a recovery plan may provide for the interim improvement of the status of a species, rather than its recovery, if there are insufficient *best available scientific data*, as determined by the recovery team (or by the Secretary if no recovery team is appointed). This provision may provide a mechanism for assisting species until sufficient scientific data are available to measure when recovery has been achieved and delisting is appropriate. On the other hand, the fact that the recovery team itself determines the adequacy of best available scientific data, both initially and upon review, may permit the interim plans that are tied to improvement rather than recovery to continue. The recovery team reviews these interim plans at intervals no greater than five years. Under the Miller/Boehlert Amendment, a plan would have to include an estimate of land acquisition costs from willing sellers, and identify publicly owned lands that will assist in recovery and any other necessary additional lands. Under S. 2110, the Secretary would have to acknowledge "appropriate existing conservation programs" and coordinate with all governmental agencies when creating recovery plans. The bills and the Miller/Boehlert Amendment all would include more express requirements on notice and opportunities for public review of recovery plans than in current law, including notice to states and tribes.

Section 6 — Cooperative Agreements with States. Current law authorizes the Secretary to enter into cooperative agreements with any state that has an adequate and active program for the conservation of endangered and threatened species. The relationship of these cooperative agreements to the enforcement of the prohibitions under the ESA is somewhat ambiguous. All three proposals would expand the agreements to cover candidate species or other species that the state and the Secretary agree are likely to be determined to be endangered or threatened. Most agree that authorizing earlier conservation efforts will result in more options and a wider distribution of any burdens of remedial actions.

The bills and the Miller/Boehlert Amendment state that §7 consultation requirements would apply to these agreements — language that appears to direct the Secretary to consult with FWS, as appropriate, regarding the agreements. H.R. 3824 and S. 2110 state that the consultation requirement would apply at the time the agreements are entered into, renewed, or amended; the Miller/Boehlert Amendment simply states that the agreements would be subject to consultation requirements and regulations. Consultation would not be required for species that are listed as threatened or endangered after an agreement is approved, a point that some contend does not provide adequate protection.

H.R. 3824 addresses the relationship of cooperative agreements with *take* prohibitions of the ESA in two ways: 1) by allowing incidental take statements

(allowing take of listed species) to be issued on approved cooperative agreements, and 2) by providing that the relevant state and landowners enrolled in the program would be exempt from ESA liability for authorized take as long as the agreement and the program are adequate for conserving the species. S. 2110 is worded similarly, but appears to apply only to candidate species. S. 2110 requires actions of the Secretary to be reviewed every three years. Current law does not expressly address cancellation of cooperative agreements, although cancellation authority arguably is implied by the fact that the Secretary's annual review of state programs for adequacy. (Adequacy is a necessary condition for entering into a cooperative agreement.) If a review concludes that the program is inadequate, then the program arguably could not be authorized.

All three proposals contain provisions for suspending or terminating agreements after consultation with the Governor of the relevant state. Termination may occur only if continuation of the agreement is likely to jeopardize the continued existence of species — or, for S. 2110, result in destruction or adverse modification of CH. Neither H.R. 3824 nor the Miller/Boehlert Amendment would allow termination of an agreement for destruction or adverse modification of CH, since that concept would be eliminated or changed. Whether termination should be available only if species are likely to be jeopardized by the continuation of the agreement could be a point of controversy — some might urge that termination should be available if a cooperative agreement is not contributing to the conservation/recovery of species subject to the cooperative agreement. The Miller/Boehlert Amendment defines jeopardy as lessening the likelihood of recovery. (See section 3 above.)

Section 7 — Consultation. Current law requires federal agencies to consult with the Secretary (in practice FWS or NMFS) "to insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action')" is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of its CH. The reference to "any action" authorized, funded, or carried out by a federal agency encompasses private actions with a federal nexus, such as actions under a federal permit (e.g., § 404 dredge and fill permits or oil and gas drilling permits), or those receiving federal funding. Page 43 of H.R. 3824 would change the reference from "any action" to "any *agency* action" (emphasis added), a change that arguably eliminates the consultation requirements for private actions with a federal nexus. However, other references to consultations involving permit or license applicants are retained, so the net effect is ambiguous.

In addition, H.R. 3824 would authorize the Secretary to identify certain actions or types of actions that do not jeopardize species through procedures other than the §7 consultation processes. Alternative procedures could replace agency biological assessments, the preparation of biological opinions by FWS or NMFS, and the limitation on agency commitments of resources. However, the authority for issuing an incidental take statement and the provision exempting from the penalties of the act any takes of a species pursuant to an incidental take statement would only apply if the Secretary finds or concurs that the agency action meets the standards of §7(a)(2) — i.e., "will not jeopardize." Further, the Secretary shall suggest, or concur in any suggested, reasonable and prudent alternatives developed for any action determined not to meet the no-jeopardy standard. These changes could be seen as

expediting the consultation process along the lines of current administrative practices, see H.Rept. 109-237, pp. 44-45. On the other hand, allowing the action agencies to make the initial determination as to jeopardy, and reducing the role of the Secretary to one of concurrence, arguably could reduce the independent role of the FWS and NMFS. The extent to which action agency processes replacing biological opinions from FWS or NMFS could be reviewed by the courts is not clear.

Although authority for *counterpart regulations* has existed in regulations for years, it has only recently been used and is being challenged in court. The process is somewhat similar to *categorical exclusions* regarding types of actions for which no environmental analyses under the National Environmental Policy Act (NEPA) need be prepared, but the NEPA exemption applies to an essentially procedural process, and these alternative consultation processes would apply to substantive determinations.

H.R. 3824 would eliminate the Endangered Species Committee (*the God Squad*) that currently can exempt proposed actions from prohibitions of the ESA.

Section 10 — Exemptions from Take Prohibitions and Property Owner Incentives. All of the proposals would increase incentives for landowners to conserve listed species and to conserve or increase habitat. All three would make statutory a *No Surprises* approach similar to the current regulation at 50 C.F.R. §17.22(b). Under the No Surprises concept, agreements can be negotiated that impose limitations on the additional measures that can be required of a landowner in the case of either changed circumstances that are contemplated in the agreement, or circumstances that are not contemplated in the agreement. These agreements are seen by some as providing landowners with greater certainty and stability, thereby facilitating investment and economic development, while aiding the conservation of listed species. None would codify the *Safe Harbor* concept, whereby a landowner can create habitat and later return to the original *baseline* as set out in agreements.

Current regulations specify that an agreement under the No Surprises approach can be revoked for several causes, or if continuation of the activities under the agreement would be inconsistent with the survival and recovery of a species in the wild. All three proposals would change the current regulatory stance regarding revocation of §10 permits. All would allow revocation if a permittee is not in compliance with the permit. H.R. 3824 and the Miller/Boehlert Amendment would allow revocation if there are changed circumstances and continuation would be inconsistent with §10(a)(2)(B)(iv) — that is, if continuation would reduce the likelihood of survival and recovery of the species. S. 2110 is similar, but would amend paragraph (2) so that it is difficult to discern what circumstances would justify revocation. Under the current regulation, revocation related to jeopardy is not limited to changed circumstances, as appears to be true under the bills and the Miller/Boehlert Amendment.

In addition, H.R. 3824 has several varieties of agreements. First, *species conservation contract agreements* would authorize persons to carry out conservation practices for endangered or threatened species, candidate species, or other species subject to comparable designations under state law. These agreements would specify the conservation practices the person would undertake and describe economic

activities that would be compatible with those practices. Landowners would be compensated for their costs in implementing the conservation practices at the rate of 60% for a 10-year agreement, 80% for a 20-year agreement, and 100% for a 30-year agreement. The Secretary would establish priorities for entering these agreements, after considering statutory criteria.

Second, *species recovery agreement*s would cover landowners who would protect and restore habitat for listed species. Priority for these agreements would go to areas identified in recovery plans as areas of special value to the species.

Third, landowners could also request a *written determination* from the Secretary as to whether a proposed action on their lands would violate the ESA. If so, a landowner could request aid/compensation for foregoing the proposed use. The Secretary *shall award* aid if the proposed use meets the qualifying criteria — that the proposed use would be lawful under state and local law and that the property owner has demonstrated the means to undertake the proposed use. The criteria are worded generally, and eligibility for aid would be broader than under current interpretations of the Takings Clause of the 5th Amendment. Aid might be triggered for example, by a curtailment of any proposed use of any part of an owner's land or water. Several aspects of this aid program are unclear, and the cost of compensation is difficult to determine, but could be high. If appropriated funds (whether regular, supplemental, or reprogrammed) appear to be insufficient to satisfy anticipated demands for aid, the Secretary could face a conflict between paying aid which "shall" be provided but for which funds are not sufficient, and permitting actions which might otherwise violate the ESA to go forward. H.R. 3824 does not specify how the conflict is to be resolved. In the face of inadequate funding, the Secretary could be forced to permit landowners to proceed with violative proposed actions. If a written determination has been sought and the action permitted to go forward, any use or action taken by a property owner in reasonable reliance on either a written determination or a default permission to proceed cannot be treated as a violation of the prohibitions of ESA.

Fourth, *conservation grant*s would be available to landowners who voluntarily seek to conserve threatened and endangered species. Grants may not be used to fund several specific activities: litigation, lobbying, the acquisition of leases or easements of more than 50 years, among other things. Priorities are set out for awarding grants, and preference is given to grants that would promote conservation while making economically beneficial use of the property.

Under the Miller/Boehlert Amendment, a landowner may request a written determination as to whether a proposed action could violate the prohibitions of the act, and hence whether an incidental take permit may be necessary to proceed. There is no obligation to pay aid or compensation, and there is no presumption of approval if the Secretary does not render a timely decision. The Miller/Boehlert Amendment states that the process does not apply to agency actions that are subject to consultation under §7. The Miller/Boehlert Amendment would authorize agreements with property owners to provide technical assistance and financial assistance up to 70% of the costs of implementation. The Secretary would be required to give priority to agreements that apply to private lands necessary to achieve recovery. These agreements could be seen as serving similar purposes to the species conservation

agreements, recovery agreements, and conservation grants set out separately in H.R. 3824.

Some of the new agreements in the Miller/Boehlert Amendment and H.R. 3824 resemble the *Candidate Conservation Agreements with Assurances* promulgated under 50 C.F.R. § 17.22(d)(1) for species that are candidates for listing, or other unspecified unlisted species. These agreements provide regulatory guarantees to landowners who voluntarily agree to protect habitat for wildlife and plant species before they are listed for protection under the ESA.

S. 2110 authorizes conservation banking agreements that would be somewhat similar to the conservation banking system for protecting wetlands. Conservation banks could be established by private landowners who demonstrate that the affected area would be managed under an enforceable legal instrument and contribute to the conservation of a listed species, a candidate species, or a species of special concern. There is no requirement that the conservation banks be consistent with approved recovery plans. The habitat that is protected would not need to be contiguous, and the agreement is to run in perpetuity or for an *appropriate period*. The Secretary is to promulgate regulations on managing conservation banks, and is to determine the value and credits for each bank. The service area to which the conservation bank credits would apply is to be defined in the conservation agreement, and biological data would determine how many credits a bank can sell. S. 2110 would also establish tax incentives for private conservation efforts. These include tax credits for certain federal or state approved conservation and recovery agreements. The amount of the credit would vary depending on the length of the agreement. Details on qualifying costs and other limitations are provided. S. 2110 would also add broad additional protections for landowners participating in the Healthy Forest Recovery Act program. S. 2110 does not contain provisions on individual conservation agreements and financial aid similar to the two House proposals.

Section 15 — Authorization. Although the authorization for appropriations under the ESA expired in FY1992, activities under the ESA have continued to be funded. H.R. 3824 and the Miller/Boelhert Amendment would reauthorize the ESA from FY2006 to FY2010. Both proposals would authorize "such sums as are necessary" for the Secretary of the Interior to carry out the functions and responsibilities of the DOI; and for the Secretary of Agriculture to carry out functions and responsibilities of the *DOI* (emphasis added) with respect to the enforcement of the act and pertaining to imports of plants under the Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES). The intent of the language authorizing the Secretary of Agriculture to carry out enforcement functions of the DOI is unclear. S. 2110 does not reauthorize appropriations for the ESA.

Costs. The administrative cost of implementing the ESA could be reduced by some provisions of the three ESA proposals and increased by others. Reductions to federal expenditures could result from state administration of ESA programs under cooperative agreements, repeal of CH designations, and possibly fewer listings under a priority schedule. Federal administrative costs could be increased in the short term as a result of new data and information accessibility requirements; increased species recovery agreements; increased monitoring, execution, and oversight of various types of agreements with landowners; management of conservation banks; and processing

of written compliance determinations. In addition to administrative costs, there may be increased costs to the federal government due to aid/compensation resulting from the written determinations process, tax incentives, and tax credits. (See bill comparison table for specific details.)

Two bills would add new provisions on cost analyses: H.R. 3824 and the Miller/Boehlert Amendment would require the Secretary of the Interior to submit an annual report containing reasonably identifiable expenditures made for the conservation of listed species on a species-by-species basis and expenditures not attributable to particular species (e.g., conservation activities on a river that may benefit several species). Expenditures would include federal and state funds, and funds voluntarily reported by local government entities. S. 2110 does not amend the annual cost analysis in current law.

Conclusion

All three proposals contain incentives that proponents indicate would encourage greater voluntary conservation of species by states and private landowners, a concept that is supported by many observers in the past and present. All three proposals would modify or eliminate parts of what some have seen as the current ESA *safety net* of protections and prohibitions, including eliminating or changing the role of critical habitat (which would eliminate one aspect of the current consultation process), making the listing of all threatened and endangered species more difficult or less likely, expanding §10 permits allowing incidental take (which could incur a greater need for agency oversight and enforcement), and expanding state rather than federal implementation of ESA programs (which might make oversight more difficult). Proponents of these changes assert that improved standards would enable a better focus on species with the most dire needs, and that other measures would recover more species. It is difficult to predict whether, on balance, the proposals would be likely to achieve greater protection and recovery of species. However, replacing some of the protections of the current ESA with new incentives, rather than adding the new incentives to the current protections, arguably makes adequate funding of the new programs more critical to determining that outcome.

Table 1. Side-by-Side Comparison of The Endangered Species Act (H.R. 3824), Miller/Boehlert Amendment to H.R. 3824, and S. 2110

Topic and Current Law	H.R. 3824	Miller/Boehlert Amendment to H.R. 3824	S. 2110
Best Available Science Definition.			
Currently there is no definition of **best available scientific and commercial data**. The **best scientific and commercial data available** is to be the sole basis of listing decisions (§4(b)(1)(A)). *Commercial data are considered to be such information as records of tonnage or pelts taken.*	Defines **best available scientific data** 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" (p. 3).	Defines **best available scientific data** as data and analyses, regardless of source, produced by scientifically accepted methods and procedures at the time of a decision or action (p. 2).	No similar provision.
Jeopardy.			
Under current law, *jeopardy* or *jeopardize the continued existence of*, is not defined. In regulations, it has been defined as meaning: "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of *both the survival and recovery* of a	No similar provision.	Defines *jeopardy* in terms of effects on recovery: "to engage in an action that, directly or indirectly, makes it less likely that a threatened species or an endangered species will be brought to the point at which measures provided pursuant to this Act are no longer necessary, is likely to significantly	No similar provision.

Topic and Current Law	H.R. 3824	Miller/Boehlert Amendment to H.R. 3824	S. 2110
listed species in the wild by reducing the reproduction, numbers, or distribution of that species." (50 C.F.R. §402.02. Emphasis added.) *The FWS has interpreted "jeopardize the continued existence of" as actually meaning survival.*		delay doing so, or is likely to significantly increase the cost of doing so." *This definition changes the interpretation of the FWS definition of jeopardy as meaning survival. The effects of the broader interpretation on other parts of the Act are unclear. Arguably for example, more actions could trigger the duty to consult under §7.*	
Role of the Secretary of Commerce.			
The Secretary of the Interior administers the ESA (through the Fish and Wildlife Service [FWS]) for terrestrial species, and the Secretary of Commerce (through the National Marine Fisheries Service [NMFS]) has various duties for marine and anadromous species. The Secretary of Agriculture has enforcement duties with respect to the	The role of the Secretary of Commerce is eliminated (p. 82). The President is directed to transfer to the Secretary of the Interior all duties, resources, and responsibilities of the Secretary of Commerce under the ESA, and the reference in the definition of **Secretary** in current §3 to the responsibilities of the Secretary of Commerce under the provisions of Reorganization Plan Number 4 of 1970	The definition in ESA §3(15) for **Secretary** is not modified to delete reference to the Secretary of Commerce. The new §18 does not authorize appropriations for the Department of Commerce (p. 54-55). In addition, §19(j)(6)((A) deletes several specific references to the Secretary of Commerce (p. 56).	No similar provision.

Topic and Current Law	H.R. 3824	Miller/Boehlert Amendment to H.R. 3824	S. 2110
provisions of the ESA and the Convention (The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) which pertain to the importation or exportation of terrestrial plants.	is stricken. The Secretary of Commerce retains responsibilities under the Marine Mammal Protection Act (pp. 70-71). *According to some, the change reduces duplication and focuses federal resources to the FWS on recovering threatened and endangered fish. However, others have expressed concern about the transfer, noting that management of ocean species would be given to an agency without ocean expertise, and that dividing the management of anadromous fish between NMFS and FWS on the basis of whether a species is protected under the ESA or not would be unworkable and contrary to the recommendations of two recent reports on management of ocean resources.*		

Topic and Current Law	H.R. 3824	Miller/Boehlert Amendment to H.R. 3824	S. 2110
Endangered and Threatened Determinations.			
The Secretary shall determine whether any species is endangered or threatened because of any of several factors (§4(a)(1)).	Adds "including by human activities, competition from other species, drought, fire, or other catastrophic natural causes" to the list of factors under current law (p. 5). The Secretary is directed to use the current authority to list a distinct population segment "only sparingly" (p. 6). *The reference to"only sparingly" was derived from H.Rept. 96-151(p. 7). This approach has been criticized based on concerns it could increase the likelihood that a vertebrate species would be protected only when all populations of the species face potential extinction, and that it could also mean that the United States would rely more on other countries to maintain cross-boundary species if they are dwindling only within our borders.*	Same as H.R. 3824 (p. 4). *As in H.R. 3824, the addition of "competition from other species" may give new emphasis to protection of species imperiled by invasive species.*	No similar provision.

Topic and Current Law	H.R. 3824	Miller/Boehlert Amendment to H.R. 3824	S. 2110
The Secretary may take into account efforts being made by any state or foreign nation to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas (§4(b)(1)(A)).	When considering a status determination, the Secretary could take into account efforts to protect species made by any federal agency in addition to other efforts the Secretary may consider under current law (p. 6).	Similar to H.R. 3824 (p. 5).	No similar provision.
Use of Scientific and Commercial Data.			
Under §4(b), the Secretary must base listing determinations and CH designations solely on the best available scientific and commercial data. No specific definitions of these types of data are given. Under the Data Quality Act, the FWS and NMFS must address the quality of information they use. Both agencies have administrative guidance on this subject that predates the Data Quality Act.	Replaces **best scientific and commercial data available** with **best available scientific data**. The Secretary is to adopt regulations that establish criteria for which data constitute the best available scientific data. The regulations are to assure compliance with guidance issued under the Data Quality Act (44 U.S.C. §3516) by the Director of the Office of Management and Budget and by the Secretary. The regulations are also to assure that data consist of empirical data or are found in sources that have	Replaces **best scientific and commercial data available** with **best available scientific data**. Data must meet scientifically accepted standards of objectivity, accuracy, reliability, and relevance (p. 2). **Scientifically accepted** means those methods, procedures, and standards that are widely used within the relevant fields of science, including wildlife biology and management. No specific reference to Secretarial determination of best available science or to the Data Quality Act. Provides	No similar provision.

Topic and Current Law	H.R. 3824	Miller/Boehlert Amendment to H.R. 3824	S. 2110
	been subject to peer review by qualified individuals recommended by the National Academy of Sciences to serve as independent reviewers (p. 4). *The emphasis on empirical data appears to change the current understanding of best available science, which commonly uses both empirical data and mathematical, physical, and other models to explain natural phenomena. However, the bill does provide for the consideration of data from peer reviewed sources, which may include estimates from modeling.* *The Secretary is to issue regulations that establish criteria that must be met to determine which data constitute the best available scientific data. This could create consistency among the data considered to be the best available scientific data.*	guidelines to federal agencies to include criteria for determining best available scientific data (p. 15). *Like current law, the amendment does not give the Secretary the sole authority to determine what constitutes* ***best available scientific data*** *and therefore continues to allow the courts the opportunity to review whether the science used in a particular instance was actually the best available. Further, the amendment does not restrict or give priority to one scientific method (e.g., empirical data) over others (e.g., population modeling).*	

Topic and Current Law	H.R. 3824	Miller/Boehlert Amendment to H.R. 3824	S. 2110
	It is not clear to what extent defining best available science as that determined to be so by the Secretary may restrict judicial review of whether the science used in a particular instance was in fact the best available. *Information on which decisions would be based is currently subject to the Data Quality Act, under which the agency is required to respond to any corrections proposed by the public.*		
No similar provision.	The Secretary is required to make available, on a publicly accessible website and in a searchable format, all information concerned with determining that species should be listed, or with changing the status of listed species. The Secretary must also post all information submitted to the Secretary by third parties. Similarly, in §14 there is a requirement that the Secretary must also maintain a substantial body of other data, publications, and documents and make	Identical (pp. 50-51). *See comments on H.R. 3824.*	No similar provision.

Topic and Current Law	H.R. 3824	Miller/Boehlert Amendment to H.R. 3824	S. 2110
	them accessible over the internet (pp. 65-66). *Volumes of information about species currently exist on the internet. The requirement for providing data through the internet could be a significant and possibly costly task, particularly if the database is to be maintained and kept current.*		
Science Advisory Board.			
Under current law there is no scientific advisory board; the Secretary receives input through comments submitted during comment periods on proposed rules and other actions as published in the *Federal Register*.	No similar provision.	Secretary would establish a Science Advisory Board (SAB) to evaluate (upon request) the use of science in implementing the act, including development of policies and procedures on use of scientific information (p. 66). *Scientific weight might be limited because the SAB is restricted only to review issues requested by the Secretary.*	No similar provision.

Topic and Current Law	H.R. 3824	Miller/Boehlert Amendment to H.R. 3824	S. 2110
		The SAB would have 9 members, appointed from list of nominees recommended by National Academy of Sciences (NAS). Members would be selected on qualifications in specified sciences; not be federal employees; and would have their names and professional affiliations published in the *Federal Register*. The SAB would elect its chair and the Secretary would make employees available to assist the SAB (pp. 66-67). *Some question whether the SAB could act quickly enough to avoid slowing implementation of ESA decisions.*	
Critical Habitat — General.			
The ESA is designed to protect individual species that are determined to be in danger of extinction or threatened with extinction. Further, the stated purposes of the ESA are "to provide a means whereby the ecosystems upon which endangered	Section 5 of the bill repeals all current requirements related to the designation of CH (pp. 8-10). Areas that are currently designated as CH would be considered **areas of special value** until a recovery plan is developed for that species, and recovery plans would be	The definition for CH is retained as it is stated in current law (§3(5)), yet other references to the designation of CH have been deleted, similar to H.R. 3824 (p. 6-8). *The current definition of CH in*	CH provisions are retained and modified. The Secretary shall designate any habitat of an endangered species or a threatened species that is considered to be CH in accordance with the priority system (p. 9).

Topic and Current Law	H.R. 3824	Miller/Boehlert Amendment to H.R. 3824	S. 2110
species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions (§2(b)).” The current ESA also provides for the determination of “critical habitat” (CH), which triggers special duties for federal agencies or for private actions with a federal nexus. Federal agencies must consult with FWS or NMFS with respect to agency actions and private actions that are authorized, funded, or carried out by a federal agency to ensure not only that those actions do not jeopardize the continued existence of species, but also that they do not result in the destruction or adverse modification of CH (§3(5) and §4(b)(2)).	required to identify **areas of special value** for the species (p. 22-23). *Under H.R. 3824, recovery plans would not be required to retain CH areas, and there are no requirements as to what areas will qualify as areas of special value. Special value areas will receive consideration in the implementation of certain other provisions (e.g., the priority given to such areas in completing species recovery agreements), and would provide guidance in the development of recovery plans, but the phrase “special value areas” is not defined and there are no binding requirements. There would be no explicit duty for federal agencies or others to consult regarding special value areas and no express duty to avoid destroying or adversely modifying them. There is no requirement in the bill that moneys spent on recovery plans be used to secure the areas of special value as a*	*§3(5)(A)(ii) provides for designation of CH areas essential for the conservation of species. The retention of this language despite the repeal of other CH provisions is ambiguous.* Recovery plans are to identify areas on publicly owned lands or waters or other areas of land or water necessary to achieve the purposes of the recovery plan (p. 21), and currently designated CH is to be treated as such an area (p. 22) until a recovery plan is developed or revised (p. 22).	*See comments on priority systems below.*

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	priority.		
Critical Habitat — Designation.			
A final regulation designating CH of an endangered or threatened species shall be published concurrently with the final regulation implementing the determination that the species is endangered or threatened, unless the Secretary deems that — 1) It is essential for the species that the determination is promptly published; 2) CH cannot be determined or that it is not prudent to establish CH. If CH cannot be determined, the one-year period specified may be extended for an additional year (§4(b)(5)(C)).	CH is eliminated (pp. 8-10). *Repeal of CH eliminates one aspect of the current §7 consultation process. Without CH, §7 consultations are only required when federal actions might jeopardize the continued existence of a species.* (For more explanation see Consultations — Alternative Procedures.) *FWS and NMFS have maintained that CH adds almost no benefit not already encompassed by the no-jeopardy standard. Court cases have held that this agency conclusion rests on an unlawful interpretation and regulation. See Sierra Club v. U.S. FWS, 245 F. 3d 434 (5th Cir. 2001), cited with approval in New Mexico Cattle Growers Ass'n v. USFWS, 248 F. 3d 1277, 1283 (10th Cir. 2001); Gifford*	Current CH designations become areas necessary for recovery until recovery plans are completed or revised. Species listed after enactment would not have CH designated (p. 6-8), as in H.R. 3824. *The designation of areas necessary for recovery is to substitute for CHs. However, compliance with recovery plans is voluntary. The elimination of CH would eliminate one aspect of consultation, but effects on areas identified as part of recovery planning are to be considered in evaluating jeopardy during §7 consultations and a new definition of jeopardy that is broader than the current definition in regulations is added.*	CH would be designated either three years after the date on which a recovery plan is commissioned, or in accordance with the priority system, but not later than five years after a species is listed (p. 14). The Secretary must determine whether a petition to revise CH may be warranted in accordance with the schedule, but not later than one year after receipt of a petition, and the response time for decision on how to proceed with warranted petitions would be in accordance with the schedule or not later than three years from the date of receipt of a petition (pp. 12 and 14). *Under the bill, the time for designating CH would be moved to being later than at listing. CH is not be designated for species that are not listed. While this is also true under*

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	Pinchot Task Force v. USFWS, 378 F. 3d 1059, 1069-1070 (9th Cir. 2004) amended 387 F. 3d 968 (2004).		*current law, the limitation on judicial review (p. 21) could preclude listings that might be ordered by a court under current law.*
Critical Habitat — Location.			
Under §4(c)(1), the Secretary shall publish a list of all threatened and endangered species, including the portion of their ranges where they are endangered or threatened, and specify any CH within their ranges. CH can be in areas occupied by the species, or unoccupied areas if essential for the conservation of the species (§3(5)(A).	CH is eliminated (pp. 8-10).	Similar to H.R. 3824 (pp. 6-8).	With respect to a regulation to designate or revise CH (p.13), maps and coordinates that describe in detail the specific areas and all field survey data upon which the designation is based must be published. The current requirement to designate CH only when prudent is retained in the bill. *There is no indication of how the requirements for publishing the exact location of CH are to relate to the discretion under current §4 (a)(3)(A) of the ESA to refrain from indicating where CH is if doing so would not be prudent. Mapping CH may be difficult and, precision or detail may not be possible for many species, either for lack of knowledge, variability of the*

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			species, or other factors.
Critical Habitat — Economic Impact and Benefit Analyses.			
When designating CH, the Secretary shall take into consideration the economic or any other relevant impacts of specifying an area as CH (§4(b)(2)). See discussion on CH below.	Concurrently with making a listing determination, the Secretary will prepare an analysis of the impacts and benefits of the listing determination, relating to economic, national security, and any other relevant factors (p.7). *(This does not apply to CH since it is eliminated under this bill.)*	No similar provision.	No similar provision. *S. 2110 would allow for the consideration of economic and national security factors when determining the priority for species.*
Review of Listed Species.			
The Secretary shall conduct a review of all listed species every five years and determine whether the status of any species should be changed (i.e., removed, threatened to endangered, or endangered to threatened) (§4(c)(2)).	In changes to §4(c) of the act, the Secretary would base the five-year reviews of species status on biennial reports sent to Congress and would be allowed to consider "any other information the Secretary considers relevant" in determining whether to change the status of a species listed as threatened or endangered (pp. 6-7). *How this phrase would be construed in light of the Secretary's obligation to*	Similar to H.R. 3824 (pp. 5-6). *See comments for H.R. 3824.*	No similar provision.

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	consider the best available scientific data is unclear.		
Notice to States.			
The Secretary shall cooperate with states, including consultation with appropriate state agencies, before acquiring any land or water, or interest therein, for conserving any endangered species or threatened species (§6(a)). Major actions (e.g., listing) are through rule-making with publication in the *Federal Register*. The Secretary must give notice of proposed listing on CH designation or revisions to state agencies in the state where species is thought to exist (§4(b)(5)) and consider their comments; similar for foreign nations.	Section 6(b) would require notice to the governor of a state and state agencies of proposed endangered or threatened determinations (p.11). Section 8 would require that any comments of a governor, state agency or local government on proposed regulations finalizing such determinations be considered (p.16). *Under current law, there are no express requirements for notices or consideration of comments as specified in H.R. 3824, although major actions are done through rulemaking with notice and comment. Local governments are not specifically involved under current law, though they may comment on all proposed actions.*	Would require notice to the governor of a state and state agencies of proposed endangered or threatened determinations (p. 10).	No similar provision.

Topic and Current Law	H.R. 3824	Miller/Boehlert Amendment to H.R. 3824	S. 2110
Special Rules for Threatened Species.			
Whenever any species is listed as threatened, the Secretary shall issue regulations to provide for its conservation. For threatened species, the Secretary may prohibit acts prohibited for endangered species under §9(a)(1) and (2); except for taking resident species of fish or wildlife. *The extent to which §4(d) rules are enforceable in states with cooperative agreements is not clear.* Current law states that §4(d) regulations apply to states with cooperative agreements only to the extent that regulations are also adopted by the state (§4(d)), yet other provisions indicate that the ESA prohibitions do apply (§§6(c)(E)(ii) and (f)). *By regulation, the FWS has afforded*	The Secretary shall review regulations under §4(d) of ESA to determine if their revision would facilitate and improve cooperation with states under §6 of ESA (p. 83). *A review of §4(d) rules for threatened species could result in the removal of federal penalties for threatened species covered by state law and a cooperative agreement.*	Section 8 amends ESA §4(d) to specifically require consultation with states before species are designated as threatened (p. 13). It also requires published Secretarial justification for any prohibitions on threatened species, and restricts conditions under which such prohibitions may be applied to more than one species (pp. 13-14). *This could result in the removal of prohibitions on the take of threatened species in the absence of special rules and remove the current FWS presumption of the full protection of the ESA for such species unless special rules provide other options. While offering potential additional flexibility, this change may be an incentive to list species as endangered rather than threatened.*	No change to this provision of ESA.

Topic and Current Law	H.R. 3824	Miller/Boehlert Amendment to H.R. 3824	S. 2110
most threatened species the same protections as endangered species unless a special rule is adopted for a particular species, while NMFS has generally adopted special rules for all threatened species.			
Recovery Plans — Overview.			
The Secretary shall develop and implement recovery plans for the conservation and survival of threatened and endangered species, unless the Secretary feels that such a plan will not promote the conservation of the species. Priority is given to species most likely to benefit from recovery plans and plans for species with economic conflicts (§4(f)(1)). A recovery plan need not be created for all listed species.	The Secretary shall develop and implement recovery plans for threatened and endangered species, unless the Secretary feels the plan will not promote the conservation and survival of the species (p. 17).	Similar to H.R. 3824 (p. 17), but specifies that recovery plans are "for the conservation" of listed species.	A recovery plan is to be non-binding and advisory (p. 27), as in current law. The recovery plan may be amended by the Secretary or by recommendation of the executive committee and approval by the Secretary (p. 27). *Although the Secretary and an executive committee can initiate revisions of a recovery program, a scientific recovery team can not. It is not clear what roles the public may play in these amendments to recovery plans.*

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Recovery Plans — Development.			
The Secretary shall develop and implement recovery plans for the conservation and survival of threatened and endangered species that would benefit from such a plan. Priority is given to those species most likely to benefit from such plans. Recovery plans might not be prepared for all species. To the maximum extent practicable, recovery plans must incorporate a description of management actions to achieve the plan's goals, objective and measurable criteria for determining the removal of species from ESA lists; and estimates of time required and cost to carry out the recovery plan (§4(f)(1)).	The Secretary will give priority to plans for species that are most likely to benefit, particularly those that are, or may be, in conflict with economic activities. The Secretary will publish a recovery plan within two years for species listed after enactment (pp. 17-18). For species listed at the time of enactment, a priority system will be created, and within 10 years, recovery plans will be completed for species without recovery plans or species whose recovery plans need to be revised (pp. 18-19).	Recovery plan goals must be considered in changing the status of a listed species (p. 13); recovery plan priority continues to go to species most likely to benefit, and most likely to conflict with economic activity (p. 17). Recovery plan deadline for newly listed species is three years (p. 19). For previously listed species without recovery plans, the new deadline is within 10 years (pp. 18-19), and Secretary must publish reasons for deviation from schedule for meeting deadlines (p. 19). A recovery plan must identify publicly owned areas necessary to achieve recovery, and if a species cannot be recovered on those areas, other necessary areas (p. 21). *The use of public lands for achieving the recovery of listed species through*	At the time of listing, the Secretary must publish provisional recovery goals which may include standards for delisting (p. 15). These remain in effect unless replaced by an approved recovery plan. When a species is scheduled for recovery on the priority schedule, or upon petition by a qualifying collaborative group, the Secretary shall establish a recovery program for that species (and others if practicable) by assigning a recovery coordinator and possibly forming a recovery team or executive committee, or both (pp. 21-22). No deadlines are set for recovery plans. *The provisional recovery goals, including standards for delisting, might not be replaced with a recovery plan, but rather be set by the Secretary alone.* *The absence of a deadline for recovery plans in combination with limitation of*

Topic and Current Law	H.R. 3824	Miller/Boehlert Amendment to H.R. 3824	S. 2110
		recovery plans is required before use of private lands. The Secretary may, before plan approval, identify activities or areas where those or other activities may impede conservation (p. 21).	*judicial review could result in recovery plans not being prepared for some species. Under current law, not all species need to have a recovery plan. Under S. 2110 a qualifying collaborative group could force preparation of a plan.*
Recovery Plans — Team.			
In developing and implementing recovery plans, the Secretary may procure the services of appropriate public and private agencies and institutions, and other qualified persons. Recovery teams appointed pursuant to this subsection shall not be subject to FACA (§4(f)(2).	The Secretary shall promulgate regulations for establishing recovery teams (pp. 22-23). Criteria will be established for selecting members of the team to ensure that teams are able to complete the recovery plan and include representation from stakeholders who have interest in the species or in the economic or social impacts of a plan. A recovery team is not required for creating a recovery plan and the Secretary is to provide guidelines specifiying when a team is not necessary (p. 23). If a team is not appointed, the Secretary may prepare a plan. Teams are not subject to FACA.	The Secretary is to issue regulations for recovery teams; teams must ensure that plans are scientifically and economically rigorous (p. 22). Regulations must ensure that team is of a size and composition to enable timely completion, includes expert scientists and those with a demonstrated direct interest in the species' conservation or in economic and social impacts of the plan (pp. 22-23). Teams are exempt from FACA. *These provisions increase the role of economic analysis and consideration, while continuing to give scientific criteria a larger role than economic*	The Secretary may establish a recovery team (pp. 22-23), composed of members with expertise and technical and academic experience relating to the species or ecosystem, who are to act in good faith and not express the views or representations of any organization. The recovery team would propose a recovery plan to the executive committee. For every recovery *program*, the Secretary shall establish an executive committee (pp. 23-25) to reflect a balance of viewpoints and knowledge and, to the maximum extent practicable, be from nearby

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	Although there are references to recovery team members with relevant scientific expertise, there is no express requirement that such members be appointed, or how many there should be. However, the bill does specify that constituencies affected by conservation of a species must be represented (p. 23). This may allow stakeholders with diverse perspectives and experiences to create recovery plans with scientific and socio-economic considerations.	*factors. However, the presence of non-scientists on recovery teams may have an indeterminable effect on the goals of resulting plans.*	communities and have an economic, social, or professional interest in the recovery of the species (pp. 23-24). The recovery team and executive committee are exempt from FACA. A recovery coordinator also is assigned to staff and coordinate implementation of a recovery plan (p. 25). *The recovery team seems to be the more scientific body, but is optional. The executive committee is composed of stakeholders and is mandatory. A recovery team cannot initiate a revision of a recovery plan, but an executive committee may. Although there are requirements for recovery plans, there are no requirements for recovery programs. Thus recovery efforts might not have the benefit of a scientific team to establish the needs of a species.*
Recovery Plans — Coordination with Government Agencies.			
The Secretary may procure the services of appropriate private and	Federal agencies may enter into agreements with the Secretary	Similar to H.R. 3824 (p. 25), except in omitting a provision to clarify that	Would authorize the Secretary to coordinate with all government

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public agencies in developing and implementing a recovery plan (§4(f)(1)(2)). Recovery plans are not mandatory.	specifying the measures the agency will carry out to implement a recovery plan (p. 26). *This language does not impose a duty on federal agencies to take actions to support recovery.* Federal agencies must consider best available scientific data from recovery plans in any NEPA analysis (pp. 25-26).	recovery plans are not mandatory.	agencies to incorporate other conservation programs into the recovery program for listed species (p. 27).
Recovery Plans — Contents.			
To the maximum extent practicable, recovery plans must incorporate a description of management actions to achieve the plan's goals, objective and measurable criteria for determining the removal of species from ESA lists, and estimates of time required and cost to carry out the recovery plan (§4(f)(1)). There is no provision that requires recovery plans to be based on the best available science.	The criteria set out in a recovery plan are among the things that may be considered when deciding whether to delist or downlist a species (p. 14). Recovery plans shall be based on the best available scientific data and include objective, measurable criteria for determining that a species could be delisted or reclassified from an endangered to a threatened species (p. 19). Recovery team members with	Recovery plans shall be based on the best available scientific data and include objective, measurable criteria for determining that a species could be delisted or reclassified from an endangered to a threatened species. Provisions regarding relative costs of alternatives, estimated time and costs required to implement plans, and least costly alternatives are similar to H.R. 3824 (p. 20).	Recovery plans must be approved by the Secretary, and must include a description of site-specific recovery actions including financial assistance and incentive programs for landowners; guidance on how the geographic distribution of site-specific recovery actions can enhance recovery; and objective, measurable criteria that can indicate that the status of a species should be changed, or that the species should be removed from

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	"relevant scientific expertise" will establish objective, measurable criteria based solely on the best available scientific data (pp. 21-22). Site-specific measures would be required that would achieve the criteria of the recovery plan (pp. 19-20). Recovery teams are to consider the relative costs of alternatives that are of comparable expected efficacy (p. 22). Estimates of the time and costs required and the identification of the least costly alternatives expressly would not be required to be based on the best available scientific data (p. 22). A recovery plan may provide for only interim improvement of the status of a species if there are insufficient best available scientific data, as determined by the recovery team, to ascertain the criteria or measures that indicate when a species may be delisted (p. 21). If a recovery plan does not contain specified criteria provided in the bill,	Requires the identification of publicly owned lands needed for recovery, and other lands that may be necessary to achieve recovery (p. 21). The Secretary may issue guidance that identifies particular activities or areas of lands or water that may impede the conservation of species (p. 21).	the list (pp. 26-27). In planning recovery, the Secretary must acknowledge "appropriate existing conservation programs," and coordinate with all governmental agencies (p. 27).

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	the recovery team shall review the plan at least every five years and determine if the plan can be revised to adopt the criteria (p. 21). *The interim recovery plan provision may provide a mechanism for assisting species until sufficient scientific data are available to measure when recovery has been achieved and delisting is appropriate. On the other hand, the fact that the recovery team itself determines the adequacy of best available scientific data, both initially and upon review, may permit interim plans aimed at improvement rather than recovery to continue.* *Recovery provisions under a heading relating only to federal agencies state that recovery plans would continue to be non-binding and recommendatory, as in current law. It is not clear whether this provision on plans being non-binding is meant to have general applicability.*		

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Recovery Plans — Consultation and Comment.			
The Secretary shall, prior to final approval of a new or revised recovery plan, provide public notice and an opportunity for public review and comment on such plan (§4(f)(4)). States and other governments may submit comments. FACA does not apply to recovery teams.	Prior to final approval of a recovery plan or revision, the Secretary shall provide for public review and state review of the plan (pp. 24-25). Further, the Governor, or any state agency in any state in which a recovery plan would apply will be provided a draft of the plan to comment on (p. 25). In the final plan the Secretary must respond to the comments of the Governor and the state agency. The Secretary shall also consult with any pertinent state, tribal, or regional land use agency prior to approval of the plan (p. 25). FACA does not apply to recovery teams (p. 24). *See comments from the Amendment.*	Before approving of new or revised plans, the Secretary is to provide for public notice and comment, and consider resulting information before final approval (p.24). Affected Governors, state agencies, and Indian tribes would receive a draft plan and have opportunity to comment; and the Secretary must respond to comments of the Governor, state agencies, or local and regional use agencies (pp. 24-25). All final recovery plans, and draft plans after the enactment date, would be available on the Internet (pp. 50-51). FACA does not apply to recovery teams (p. 23). *The requirement to respond in a recovery plan to any comments from the Governor and state may increase cooperation between the state and federal governments. Public access to*	Proposed recovery plans are reviewed by an executive committee that is to consult with a recovery team (previously established); state, local, and tribal governments, and landowners on opportunities for implementing the plan (p. 24).

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		recovery plan information is increased.	
Recovery Plans — Status.			
The Secretary shall report every two years to the Senate Committee on Environment and Public Works and the House Committee on Resources on the status of efforts to develop and implement recovery plans for all species listed pursuant to this section and on the status of all species for which such plans have been developed (§4(f)(3)).	Every two years the Secretary shall report to the House Resources and Senate Environment and Public Works Committees on the specified criteria concerning the status of threatened and endangered species and efforts to develop recovery plans (pp. 23-24).	No similar provision regarding review at least every five years if a plan does not contain the required criteria. Similar to H.R. 3824.	The Secretary shall periodically review recovery programs; if a recovery program is not making progress towards recovery or "is not acting within the guidance of the recovery plan" (p. 28), the Secretary shall submit to the relevant executive committee a written inquiry for an explanation and specific remedial actions. The executive committee would have 180 days to respond. A process is provided for resolving disputes between an executive committee and the Secretary regarding recovery program progress and whether remedial actions are necessary (pp. 28-29).

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Establishing Priority of Species.			
Under §4(b)(3)(B)(iii), a petitioned action may be precluded by other pending listing proposals. Courts can review assertions by an agency that a listing is "warranted but precluded" to determine if the postponement is legitimate or the agency is delinquent. California Native Plant Society v. Norton, 2005 U.S. Dist. LEXIS 4634 (2005). Under §4(h), the Secretary shall establish agency guidelines to carry out activities such as listings, CH designations, and recovery plans. The guidelines should include (1) procedures for recording the receipt and the disposition of petitions; (2) criteria for making the findings from petitions; (3) a ranking system to assist in the identification of species that should receive priority review under §4(a)(1) of the section; and (4) a	No new priority system for species determinations is proposed. *(But see recovery plans above.)*	Petitioned actions could only be precluded in a fiscal year by proposals involving species at greater risk (pp. 9-10). *This could facilitate consideration of particular petitions of at-risk species.*	The Secretaries of Interior and Commerce would each be required to establish priority systems for making decisions in the "most efficient and effective manner practicable" (p. 16). The priority systems would apply to all decisions which relate to status/listing determinations, designation of CH, and recovery plans. Priorities are to be based on five criteria (pp.16-18). *Courts would lack the power to require the Secretary "to complete an action inconsistent with" the priority schedule.* *Currently, there is a duty to list all species that are threatened or endangered. No species legally may be consigned to extinction. It appears that the new priority system and schedule — combined with the references to: 1) considering whether a species is likely to be able to*

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system for developing and implementing, on a priority basis, recovery plans. Agency guidelines also provide additional details on these priorities. *This system relates to the commitment of agency personnel and funds, but may be overridden by court orders because the statutory duties of the ESA agencies to list species and CH remain.*			*recover; 2) making listing and other decisions in a "practicable" manner; and 3) the possible limitation on judicial review — could result in some species never being afforded enforceable protections under the Act.*
No similar provision.	No similar provision.	No similar provision.	1) The first criterion is the magnitude and immediacy of the risk of extinction (including the factors considered at the time of listing, the species' geographic distribution, its habitat specificity, and its taxonomic distinctiveness) (p. 16).
No similar provision.	No similar provision.	No similar provision.	2) The priority system is to be based on the likelihood of achieving recovery (p. 17).
No similar provision.	No similar provision.	No similar provision.	3) The quality and quantity of available information would be a

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			criterion. Within that, four factors are to be considered. In "increasing order of importance" they are: known distribution; occupied habitat data; rates of reproduction, survival, or population growth; and the habitat types that correlate with these rates. These four factors together represent the basic demographic data which would be used to assess the health of a species (p. 17). *Where the information is available, these factors would undoubtedly be considered by the agencies, whether required in law or not, and may not represent a substantial change from current practice. Such data may not be available for many rare species likely to be listed under ESA, and might be especially difficult to obtain for foreign species.*

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No similar provision.	No similar provision.	No similar provision.	4) The degree to which recovering the species helps to recover other species is to be considered (p. 18). *Explicit inclusion of this criterion may aid FWS and NMFS considerably since many species may be rare in the same diminishing habitat, but a few species may be better understood than others and conservation of the "primary" species would benefit the others as well.*
Under the current §4(f)(1), the Secretary is to give priority to minimizing conflicts with "construction or other development projects or other forms of economic activity."	No similar provision.	No similar provision.	5) Another criterion is the degree to which recovery would minimize conflicts with specified economic activities, military needs, or other undefined human activities (p. 18). *The major change here is the inclusion of military needs and other human activities.*
For recovery plans, the Secretary will give priority to those species that are most likely to benefit, particularly those species that are or may be in	The Secretary shall publish a priority ranking system for preparing or revising recovery plans. Priority will be given to endangered and threatened	Similar to H.R. 3824 (p. 17).	The priority systems would apply to all decisions which relate to status/listing determinations, designation of CH, and recovery plans (p. 16).

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conflict with construction or other development projects or other forms of economic activity (§4(f)(1)(A)).	species that will benefit most from such plans, especially those that may be or are in conflict with forms of economic activity (p.17).		
Establishing Priorities of Species — Schedule.			
The Secretary shall establish agency guidelines to carry out activities in §4. The guidelines should include (1) procedures for recording the receipt and the disposition of petitions; (2) criteria for making findings from petitions; (3) a ranking system to assist in identifying species that should receive priority review under subsection (a)(1); and (4) a system for developing and implementing, on a priority basis, recovery plans (§4(h)).	The Secretary is to implement agency guidelines similar to current law, but with the addition of criteria for determining best available scientific data (p. 15).	Similar to H.R. 3824 (p. 15).	The Secretary is to establish a schedule of actions based on the priority ranking system (pp. 18-22). The Secretary also is to submit to relevant congressional committees, information on listing status petitions in review (based on the priority ranking system), together with information on all findings, decisions, and designations that are pending (pp. 19-20). Determinations remanded to the Secretary by a court before the date of enactment are to be entered on the schedule, and no court is to have the power to require the Secretary to complete action inconsistent with the priority schedule. The Secretary has authority to revise the priority schedule (p. 21). *There are no provisions related to the*

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			establishment of the schedule other than the criteria for priorities discussed above; nor are there provisions relating to public participation in or appeal of priority schedule decisions. It appears that no listings, etc., could be ordered contrary to the priority schedule. If so, this could eliminate the possibility of injunctive court relief to compel the Secretary to complete species status determinations (listings) or to designate CH, and judicial review could be limited only to the question of whether the Secretaries' actions were consistent with the schedule. Various proposals have circulated that include making (or failing to make) CH designations beyond judicial review, but this bill provision could be interpreted as applying to species status/listing determinations as well, such that some species may be allowed to go extinct with no recourse for judicial intervention to give higher priority to a species ahead of other,

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			less urgent actions. On the other hand, requests by qualified collaborative groups are to receive highest priority, which provides a means to get species onto the schedule.
Cooperative Agreements With States.			
The Secretary is authorized to enter into a cooperative agreement with any state which establishes and maintains an adequate and active program for conserving endangered and threatened species (§6(c)(1)). Separate cooperative agreements are authorized for animals and plants (§6(c)(2)).	The Secretary may enter into cooperative agreements with states not only for listed species, but also for candidate species or any other species that the state and the Secretary agree is at risk of being determined to be an endangered or threatened species. A cooperative agreement may be entered between the Secretary and an Indian tribe in substantially the same manner as with a state (pp. 38-43).	Similar to H.R. 3824 (pp. 27-30).	Cooperative agreements would allow cooperative efforts to address candidate species or any other species that the state and the Secretary agree are likely to be determined to be an endangered species or threatened species (p. 3).

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Cooperative Agreements — Consultation.			
No express provisions as to when actions relating to cooperative agreements are subject to consultation.	Agreements would be subject to consultation requirements before they are entered into and upon renewal or amendment (pp. 41-42). However, if a species not listed as threatened or endangered at the time of the agreement is listed later, no new consultation on the agreement would be required (pp. 38-39). *It appears that the Secretary would consult with FWS on agreements, a process somewhat analogous to the intra-service consultations on §10 permits.*	Generally agreements would be subject to consultation requirements and regulations implementing such provisions. Specific times for consultation are not identified (p. 29).	Consultation on a cooperative agreement under §7 of the ESA would only occur at the time the cooperative agreement is entered into or when the Secretary approves a renewal or amendment of the cooperative agreement to accomplish certain stated things. Consultation would not recur in connection with incidental take statements allowing take (pp. 3-4).

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Cooperative Agreements — Incidental take and Consultation .			
The relationship of cooperative agreements with states to the applicability of ESA prohibitions and to incidental take permits is not always clear.	Any incidental take statement issued on the agreement would apply to the state and to any landowners enrolled in any program under the agreement. If the agreement is for candidate species or species of special concern, no further consultation would be needed if those species became endangered or threatened if the current agreement is adequate for conserving those species (pp. 38-39).	No provisions regarding the relationship of agreements to incidental take.	Any incidental take statement issued on a cooperative agreement appears to apply to candidate or species determined likely to be endangered or threatened species addressed in the agreement, and to the state and landowner enrolled in a program under the agreement without further consultation if additional species are subsequently determined to be endangered or threatened. However, the cooperative agreement and its program must be adequate for the conservation of the species (pp. 3-4).
Cooperative Agreements — Monitoring, Voluntary Enrollments, and Review.			
Actions taken by the Secretary under §6 must be reviewed annually (§6(e)).	A cooperative agreement may provide for monitoring or assistance in monitoring the status of candidate species or species that are determined to be recovered and are delisted (p. 39). The Secretary may review cooperative	Similar to H.R. 3824 (pp. 27-29). Similar to H.R. 3824.	A cooperative agreement may provide for monitoring or assistance in monitoring the status of candidate species or species that are determined to be recovered and are delisted. The Secretaries are directed to ensure that any enrollment of land or water rights under an agreement is voluntary (pp.

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	agreements and "seek to make changes the Secretary considers necessary" to conserve species (p. 39). The Secretary is to ensure that the enrollment of private lands or water rights in a program established by an agreement is voluntary (p. 39). The Secretary may suspend a cooperative agreement after consultation with the Governor of the affected state if the Secretary finds during the periodic review that the cooperative agreement no longer constitutes an adequate and active program (p. 42).	 Similar to H.R. 3824. Similar to H.R. 3824.	4-5). Actions taken by the Secretary under §6 would be subject to review by the Secretary at least every three years (p. 5). The Secretary may suspend a cooperative agreement after consultation with the Governor of the affected state if the Secretary finds during the periodic review that the cooperative agreement no longer constitutes an adequate and active program (p. 7).
Cooperative Agreements — Termination.			
There are no specific provisions stating the requirements for terminating a cooperative agreement with a state. However, for the program to be deemed an adequate and active program for the conservation of listed species, the Secretary is required to	The Secretary may terminate a cooperative agreement after consultation with the Governor if the Secretary finds that continued implementation of the cooperative agreement is likely to jeopardize the continued existence of an endangered	Similar to H.R. 3824 (pp. 29-30).	Similar to H.R. 3824, except that destruction or adverse modification of CH may also result in termination (pp. 7-8).

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review a list of conditions under each agreement annually (§6(c)(2)(A)). *If a program is not adequate and active for the conservation of listed species, then it appears the cooperative agreement would not be authorized (§6(c)(1).*	or threatened species. To terminate an agreement, the Secretary must also find that either: (1) the cooperative agreement has not been amended or revised to incorporate a reasonable and prudent alternative offered by the Secretary; or (2) if the Secretary had suspended the agreement, the agreement has not been revised or the problems remedied within 180 days after the date of suspension (pp. 42-43).		
Indian Tribes.			
The Secretary shall, prior to final approval of a new or revised recovery plan, provide public notice and an opportunity for public review and comment (§4(f)(4)). Tribes may participate to the same extent as other entities, but are not expressly mentioned or afforded any special treatment.	"Pertinent" Indian tribes may consult on recovery plans prior to their final approval and or revision (p. 25). Indian tribes may enter into cooperative agreements in a manner similar to states, and may provide assistance to persons entering into management plans (pp. 35-36). *Similar comments as the Amendment.*	The amendment specifies opportunities for recognized Indian tribes to comment on draft recovery plans (pp. 24-25); allows tribes to participate in cooperative agreements in a manner similar to states (p. 28); allows tribes to offer expertise to private property owners engaged in cooperative species management plans (p. 47). (See also Public Input, below.) *Provisions tend to put tribes on a*	Recovery plans are to be reviewed by an executive committee, which has broad guidelines for membership, and therefore could include representatives from Indian tribes (pp. 23-24). The executive committee is to consult with tribal governments on opportunities for implementation of the plan (p. 24).

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		footing similar to states, especially in enhanced opportunities to comment on draft recovery plans.	
Consultations — Alternative Procedures.			
Federal agencies must consult on "any action" that is authorized, funded, or carried out by an agency to insure that the action won't jeopardize the continued existence of an endangered or threatened species or result in the destruction or adverse modification of CH. The reference to "any action" includes non-federal actions with a federal nexus. For federal activities, FWS or NMFS issues biological opinions as to whether a proposed agency action would jeopardize a species or destroy or adversely modify CH, and, if so, suggests reasonable and prudent alternatives to avoid or mitigate the harm (§§7(a) — (c)).	*Critical habitat* is eliminated. *Without CH, §7 consultations are only required when federal actions might jeopardize the continued existence of a species.* Would change "any action" to "any *agency* action." (Emphasis added.) *This change arguably eliminates the consultation requirements for private actions with a federal nexus. However, other references to consultations involving permit or license applicants are retained, so the net effect is ambiguous.* Authorizes the Secretary to identify certain agency actions or types of action through alternative procedures other than the §7 consultation process	Would eliminate references to CH under §7, but would add a definition of *jeopardy* different from what is now used in regulations. "Jeopardize the continued existence" is defined to mean acting so as to make it less likely that, or to delay the time when, a species will no longer need the protections of the act, or to significantly increase the cost of doing so (i.e., be recovered) (p. 3). *Jeopardy is not defined in current law; provision specifies that recovery is the standard by which jeopardy is judged, and adds increased costs as a factor in determining whether an agency is jeopardizing a listed species. The language is broad — in finding jeopardy for any action that makes recovery less likely. The consequences*	No similar provision.

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	under current law (p. 44). *Alternative procedures could substitute for agency biological assessments, the preparation of biological opinions by FWS or NMFS, and the limitation on agency commitments of resources. However, the authority for issuing an incidental take statement and the provision that exempts from the penalties of the Act any takes of a species pursuant to an incidental take statement, would only apply if the Secretary finds or concurs that the agency action meets the standards of §7(a)(2) — i.e., will not jeopardize.* The Secretary shall suggest, or concur with, any suggested, reasonable and prudent alternatives developed for any action determined not to meet the no-jeopardy standard (p. 44). *These changes could be seen as expediting the consultation process*	*of the definition for consultation and throughout the ESA are not clear.* In determining whether an agency action is likely to jeopardize the continued existence of a species, the Secretary must consider any special areas identified in recovery plans (p. 22). Cooperative agreements with a state or tribe may be ended if continued implementation of an agreement threatens to jeopardize the continued existence of listed species, and the agreement is not amended to include a reasonable and prudent alternative offered by the Secretary. An agreement may also be terminated if it has been suspended and the Secretary finds it does not constitute an adequate and active program (pp. 29-30).	

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	along the lines of current administrative practices (see H.Rept. 109-237, pp. 44-45). On the other hand, allowing the action agencies to make the initial determinations as to jeopardy, and reducing the role of the Secretary to one of concurrence, arguably could reduce the independent role of the FWS under this bill. The extent to which agency processes replacing biological opinions could be reviewed by the courts is not clear. *Although authority for "counterpart regulations" has existed in regulations for years, it has only recently been used and is being challenged in court. The process is somewhat similar to "categorical exclusions" re types of actions for which no environmental analyses under the National Environmental Policy Act need be prepared, but the NEPA exclusion applies to an essentially procedural process, and these alternative consultation processes would apply to*		

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	substantive determinations.		
No similar provision.	A new §7(a)(5) would direct a federal agency or the Secretary in conducting a jeopardy analysis to "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" (p. 45). *A jeopardy analysis would not look at the proposed action's effect as part of the aggregate of all other impacts on that species; rather the jeopardy analysis would be limited to the most recent action, which considered alone, might not harm a species, but which taken together with other prior actions or conditions might result in jeopardy. Administratively taking the approach of new §7(a)(5) was recently enjoined in National Wildlife Federation v. National Marine Fisheries Service, 2004 U.S. Dist. LEXIS 15239, aff'd 418 F. 3d 871 (9th Cir. 2005) as not*	No similar provision.	No similar provision.

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	providing an adequate analysis of the true impacts of an agency action. *Some contend that a jeopardy analysis should be based on the incremental effects of agency actions and that pre-existing conditions or past activities should not be included.*		
Exemption Changes: Repeal of the Endangered Species Committee; National Security; and Emergencies.			
Subsection §§7(e) — (p) of the ESA requires the Endangered Species Committee (the "God Squad") to grant or deny an exemption for a federal action after completing a little-used and cumbersome process. *Since its creation 33 years ago, the Endangered Species Committee has rendered three decisions (on the Tellico Dam, a water project on the Platte River, and timber sales in Oregon). The committee rejected the dam and approved the water project and some of the Oregon timber sales. (The approved timber sales were later*	Section 11(d) of the bill would repeal the Endangered Species Committee provisions and the current exemption process (pp. 48-49). *Several new exemptions under Presidential authority would be established, but no general system for exemptions would replace the current Endangered Species Committee procedure. This might necessitate special legislation to permit particular projects to go forward despite jeopardy to species.*	No similar provision.	No similar provision.

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withdrawn.) In addition, three exemption applications were begun, but later withdrawn before the committee was convened.			
Under current §7(j), the Endangered Species Committee must grant an exemption if the Secretary of Defense finds the exemption is necessary for national security, and under §7(p), the President may exempt projects to repair or replace public facilities in declared disaster areas, subject to certain conditions.	Section 12(e) would replace §7(j) with new §10(l) giving authority to the President, after consultation with the appropriate federal agency, to exempt any act or omission from the act if necessary for national security (pp. 58-59). The bill would expand the authority for the President to make exemption decisions from any provision in ESA in declared disaster areas (p. 59). The Secretary is to promulgate regulations regarding application of the ESA in the event of an emergency, including circumstances other than a major disaster, involving a threat to human health or safety or property. These regulations may address immediate	President may exempt any act from ESA provisions if necessary for national security (p. 43). Under certain circumstances, President may exempt federal agencies from requirements for consultation, biological opinions, biological assessments, and limitation on committing resources, to repair or replace public facilities in federal disaster areas (p. 35). *Exemption is available not only for federal but also non-federal actions; no need for approval of Endangered*	No similar provision.

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	threats through expedited consideration under or waiver of any provision of the ESA (p. 59). *Some current authority exists in § 7(p) for the President to make exception determinations in disaster areas.*	*Species Committee; no limit on President's authority other than consultation with the appropriate federal agency (undefined); and no public disclosure process specified.*	
Takings — Written Determination.			
The "take" prohibitions of §9 of the current law include actions that directly kill and prohibit "harming" a species, a term defined in regulations as including habitat destruction that actually injures or kills a species by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. (50 C.F.R. § 17.3 (2004)) Private landowners can obtain permission to take species through §7 incidental take statements or §10	Under a new procedure, landowners could request a *written determination* from the Secretary as to whether a proposed action on their private lands would violate the ESA. If so, a landowner could request aid/compensation for foregoing the proposed use. The Secretary "shall award" aid if the proposed use meets the qualifying criteria — that the proposed use would be lawful under state and local law and that the property owner has demonstrated the means to undertake the proposed use	For uses that are lawful under state and local laws, landowner may request written determination from Secretary on whether a proposed use, as described, requires an incidental take permit under §10(a) (p. 41-42). Description is to include specified information; if written determination is denied due to omission of specified information, applicant may resubmit, with new information. Determination is to be made within 180 days of submission, unless requestor agrees to more time; there is no presumption	No similar provision.

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incidental take statements (both processes involve public review). There is no current statutory procedure for obtaining a written determination of compliance with §9 prohibitions.	(pp. 55-56). *Several aspects of this aid are unclear, and the costs of compensation are difficult to determine, but could be high. (See "Property Owner Incentives — Compensation to Landowners" for further explanation.)* The landowner would submit a written description of the proposed action to the Secretary. The Secretary may request additional information which the applicant "may" provide (p. 56). If the Secretary determines, based on the applicant's information, that the proposed use would comply with the take prohibitions of §9(a), the use may proceed (pp. 57-58). If the Secretary determines that the proposed use would not comply with §9(a), then a property owner who requests "aid" for foregoing the use must be paid if qualifying criteria are met (pp. 60-65). *It appears that the Secretary's*	that an action may proceed without a permit if Secretarial response is delayed, nor is aid provided to applicants for a determination that a permit is necessary. Secretary is to report to Congress on determinations that were not timely (pp. 42-43). Provision does not apply to agency actions subject to §7 consultations (p. 43). *The determinations might quickly eliminate concerns of some landowners about whether a §10 permit is necessary, but only if the Secretary responds in a timely way.*	

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	determination is to be made based only on information submitted by the applicant, and that information "is deemed to be sufficient for consideration by the Secretary" if it includes certain elements. *The written determination process appears to provide an alternative to the current requirements of §10 that allow a landowner who submits a habitat conservation plan to obtain an "incidental take permit" allowing excused takes of listed species, and is an alternative process that lacks the public input of the §§7 and 10 processes. In addition, it may allow a landowner who is uncertain that a take will occur at all to obtain a written determination that it will not.*		
No similar provision.	If a written determination is not received within 180 days of application (subject to some possible extensions), uses are deemed acceptable and may proceed free of	No similar provision.	No similar provision.

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	penalties under the act (p. 57). A deemed determination is effective for five years, and a written determination is effective for 10 years (pp. 57-58). The Secretary may withdraw any determination if unforeseen circumstances would preclude conservation measures essential to the survival of a species, but compensation could also be owed if a previous determination of compliance were withdrawn (p. 58). *If the Secretary does not make a decision within the time limit, the proposed action is deemed approved. If appropriated funds (whether regular, supplemental, or reprogrammed) appear to be insufficient to satisfy anticipated demands for aid, the Secretary could face a conflict between paying aid which "shall" be provided but for which funds are not sufficient, and permitting actions which might*	*There is no presumption that an action is approved if Secretarial response is delayed, nor is aid provided to applicants for determinations that a permit is necessary.*	

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	otherwise violate the ESA to go forward. H.R. 3824 does not specify how the conflict is to be resolved.		
Incidental Take — Habitat Conservation Plans (HCPs).			
Under §10(a)(2)(A), an incidental take permit must specify the steps the applicant will take to minimize and mitigate impacts and any other measures the Secretary may require as necessary or appropriate.	Amends §10(a)(2) to require that an applicant's HCP include 1) measurable biological goals and how they will be achieved; 2) how impacts will be monitored; and 3) adaptive management provisions to responds to changes in circumstance. The Secretary is required to evaluate a permit for how reasonable its length might be, the extent to which the plan will enhance conservation of covered species, the scope of the plan's adaptive management, and other factors. The Secretary will impose terms that are roughly proportional to impacts (pp. 50-52). *The addition of measurable biological goals may add certainty to an applicant's own planning, as well as*	Similar to H.R. 3824, except that the terms imposed can be no more than necessary to offset impacts (pp. 35-37). *The amendment lacks provisions on acre-for-acre mitigation, capability of successful implementation and consistency with applicant's objectives.*	Applicants must provide an HCP with measurable biological goals for species, as well as measures to achieve these goals, and a description of how impacts of the HCP will be monitored (pp. 44-45). The current requirement that an HCP include "measures that the Secretary may require as being necessary or appropriate for purposes of the plan" would be repealed, but a similar authority for the Secretary to specify terms and conditions in §10 permits would be retained. *See H.R. 3824 comments on biological goals. The modified requirements for HCP applicants generally add clarity and require additional information as part of HCPs. Although the authority of the Secretary to impose "other measures that the Secretary may*

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	provide clearer markers to indicate whether the plan is succeeding. The Secretary may require greater than acre-for-acre mitigation if necessary. All terms and conditions must be capable of successful implementation and consistent with the objective of the applicant to the greatest extent possible.		*require as being necessary or appropriate" is repealed, the authority in §10(a)(1) to require terms and conditions in §10 permits is retained.*
Incidental Take — Recovery Plan Actions.			
No similar provision.	No similar provision.	No similar provision.	The Secretary is required to specify terms and conditions necessary to offset or reduce impacts of incidental takings if a proposed HCP implements an action from an approved recovery plan (pp. 46-47); such terms and conditions are to be: (1) proportional to the effect of the incidental take; and (2) feasible and consistent with HCP goals (p. 46). If the Secretary also finds that the contribution to recovery is at least proportional to the potential for, and degree of, incidental take,

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			approval of the HCP would constitute compliance with the consultation requirements of §7(a) of ESA and with NEPA (p. 47). *This language appears to balance the rights and responsibilities of both applicant and permitting agency in providing assurances of what may be reasonable. However, the restructuring of §10 may leave the Secretary with basically a yes-or-no role in approving an applicant's HCP in actions implementing recovery plans, because the bill language would eliminate consultation under the ESA and the consideration of alternatives under NEPA for significant HCPs. As a result, the flexibility to consider other alternatives could be curtailed.* *P. 45 refers to reducing the likelihood of "survival and recovery" of any species covered by the plan — language that has been subject to repeated litigation and has been*

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			interpreted by the agencies as meaning only survival rather than recovery.
Incidental Take — No Surprises.			
Section 10 provides that the Secretary may issue permits to allow incidental take of species for otherwise lawful actions. The applicant for an incidental take permit must submit a habitat conservation plan (HCP) that shows: the likely impact of the activities to the species; the steps to minimize and mitigate the impact; the funding for the mitigation; the alternatives that were considered and rejected; and any other measures that the Secretary may require. Through administrative regulations *No surprises* provisions provide landowners greater certainty that changes to the terms of the agreement would be limited (50 C.F.R. §§17.22(b) and 17.32(b)). Streamlined procedures for activities with minimal impacts were also administratively provided. A permit can be revoked for	New language would codify a No Surprises concept similar to that in current regulations. This provides permit holders with more management certainty during the life of a permit, by assuring permittees that no additional requirements will be imposed without the consent of the permittee for changes of circumstance identified in the permit (pp. 52-54). For changes of circumstance not identified in the permit, the additional actions the Secretary may require are limited (p. 52). The Secretary bears the burden of proof for changed circumstances (p. 53). Transition provisions are provided (p. 53). The Secretary may revoke a permit if the permittee is in violation of the permit, or under changed circumstances if continuation would be	Same as H.R. 3824 (pp. 37-40), except that as for revocation, the Secretary is required to fund remedial conservation measures if plan goals are likely to fail (p. 39). Other revocation provisions are the same	Similar to H.R. 3824, except provisions regarding the revocation or termination of permits. A permit shall be terminated if the holder is not in compliance, but new §10(a)(7) limits the circumstances when the Secretary may revoke a permit due to changed circumstances to those in which continuing the activities under the permit would be inconsistent with §10(a)(2) (p. 53). *Because paragraph (2) would be expanded, it is not clear what would justify revocation. Overall, this language may clarify the rights and responsibilities of both parties. However, the word "additional" appears to be missing from p. 50, line 19, which states that a permit holder who is in compliance cannot be*

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several causes or if continuation would decrease the survival and recovery of the species in the wild (50 C.F.R. §17.22(b)(8)).	inconsistent with survival and recovery of the species, and if the Secretary and the permittee cannot remedy the inconsistency (pp. 53-54). *Under current No Surprises regulations, a permit may be revoked if the continuation of its prescribed activities would decrease the survival and recovery of the species in the wild (50 C.F.R. §17.22(b)(8)). The revocation authority in current regulations is not limited to "changed circumstances" as is true in the two bills and the amendment.*		*required to adopt any minimization, mitigation, or other measures; it may have been intended that requirements* in addition *to those set out in the agreement and permit cannot be required.*
Incidental Take — Provisional Permits.			
No similar provision.	No similar provision.	No similar provision.	New §10(a)(3) provides for provisional permits for incidental take if an applicant voluntarily implements the terms of a proposed HCP during review and has completed a survey to determine the area occupied by the species (pp. 47-48). Provisional permits would authorize management activities (other than ground clearing)

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			until a §10 permit is issued (p. 48). Information submitted for a provisional permit cannot be used as evidence for prosecuting prohibited acts. *Provisional permits appear to provide more certainty for applicants while permits are under consideration. The cost of administering a provisional permit program may be a concern. The fact that information submitted for provisional permits is not admissible in prosecutions of offenses might provide an opportunity to circumvent enforcement.*

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Incidental Take — Protection from Liability for Site Specific Plans Under the Healthy Forests Restoration Act of 2003.			
No specific provision in ESA, but another law (Healthy Forests Restoration Act of 2003; HFRA, 16 U.S.C. §6576(a)) allows a forest landowner to enroll private land in a healthy forests reserve program, one requirement of which is that enrollment of the private land will restore, enhance, or otherwise measurably increase the likelihood of recovery of a listed species, with priority given to lands that will provide the greatest conservation benefit to listed species. If a landowner's conservation activities result in a net conservation benefit for listed, candidate, or other species, the Secretary of *Agriculture* must make available safe harbor agreements, or similar agreements, and protection from penalties for incidental take, either under §7(b)(4) of ESA (regarding incidental take statements after consultation with FWS or NMFS)	No similar provision.	No similar provision.	Section 401 adds additional ESA protections for landowners in the healthy forests reserve program (pp. 62-63). If there is an approved recovery plan under ESA, and a landowner agrees to engage in site-specific recovery actions from that plan, then the landowner is not liable under §9 of ESA for incidental take of species covered by the restoration plan. Liability would be waived for the duration of the landowner's agreement (which under HFRA can be 99 years), and the waiver would be for take proportional to the area in which net conservation benefits would accrue. *The exemption for a landowner from §9 take liability could be sweeping. It is not conditioned on the landowner complying with either an incidental take statement or a §10 permit and contains no provision to review the*

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or §10(a)(1) of ESA (regarding incidental take permits obtained by nonfederal parties).			*landowner's actions if obligations are not met, or if recovery plan goals are not being met. In addition, the provision appears to apply to areas not covered by the landowner's agreement under the HFRA, as long as the exempted takes are proportional to the area of net conservation benefits. For forested areas containing wide-ranging species (e.g., Northern spotted owls or Florida panthers), the exemption from the take prohibition in one area might negate the anticipated benefit in another area, possibly too rapidly to be reversed or adapted to, even when or if it were detected.*
Property Owner Incentives — Compensation to Landowners.			
Any compensation to landowners for property takings for ESA-related actions is limited to that required under the Takings Clause of the 5th Amendment of the United States Constitution.	In addition to possibly providing optional conservation grants under new §13 (pp. 60-62), the Secretary *shall* provide financial compensation, "aid," for conservation measures imposed on private property owners by the ESA (pp. 62-65).	No similar provision.	No similar provision.

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	Compensation for property owners under §13 would be broader than the compensation available under the current interpretation of the 5th Amendment of the Constitution, in that less impact to property interests need be shown than under 5th Amendment "regulatory takings" analysis, and the impact to a part of the property rather than to the property as a whole is the measure of compensation under the bill. This fact could be relevant, for example, to assertions that failure to deliver full amounts of Bureau of Reclamation water would be compensable. *The relationship of §13 compensation to 5th Amendment compensation is not totally clear; also not clear is whether §13 compensation would be limited to those obtaining a written determination or might be available more broadly.*		

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No similar provision.	If a written determination is made under new §10(k) that a proposed use of private property would not comply with the take prohibitions of §9(a) of the ESA, or if the Secretary withdraws a determination of compliance, then, upon receiving a request from a property owner, the Secretary **shall** pay the qualifying property owner **aid** to not proceed with the proposed use. The aid to private property owners is to be equal to the fair market value of the foregone use, if the use is lawful under state and local law and the property owner demonstrates the means to undertake the proposed use (pp. 62-63). *It is unclear how compliance with state and local law is to be determined, and the bill does not require the property owner to obtain state permits or take other specific actions to demonstrate that the use is concrete and lawful.* *The availability of compensation may*	No similar provision.	No similar provision

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	affect whether a landowner chooses to seek a written determination or proceed under full §10 processes and go forward with a project. If appropriated funds appear to be insufficient to satisfy anticipated demands for aid, the Secretary could face a conflict between paying aid which "shall" be provided but for which funds are not sufficient, and permitting actions which might otherwise violate the ESA to go forward. (See "Takings — Written Determination" for more information.)		
No similar provision.	The Secretary and the property owner would each conduct an appraisal of the fair market value of the proposed use and if they cannot reach an agreement, a third appraiser is appointed whose determination shall be the final offer by the Secretary (p. 64).	No similar provision.	No similar provision.
No similar provision.	The Secretary must negotiate with the property owner to document the foregone use through various mechanisms "such as contract terms,	No similar provision.	No similar provision.

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	lease terms, deed restrictions, easement terms, or transfer of title" (pp. 63-64). Such documentation is to be negotiated between 30 and 60 days after the request for aid. If agreement is not reached within 60 days, the Secretary determines how the foregone use will be documented. The documentation must have "the least impact on the ownership interests of the property owner necessary to document the foregone use, which shall not include transfer of title." *How this last reference to not transferring title relates to the previous references to easements, deed restrictions, or transfer of title is not clear.* Compensation generally must be paid within 270 days of receipt of a request for payment, unless questions regarding the fair market value need to be resolved (p. 63).		

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No similar provision.	The property owner may not receive "additional aid for the same foregone use of the same property and for the same period of time" (p. 65). *It is not clear whether the owner could receive compensation for various uses involving the same period of time, or how a "period of time" would be calculated for each use. Arguably, payment for one foregone use would not preclude payment for not pursuing others.*	No similar provision.	No similar provision.
No similar provision.	New §10(k)(7) states that the written determination process is only available to those whose actions are not subject to consultation under §7 (p. 57).	No similar provision.	No similar provision.
Property Owner Incentives — Conservation Agreements.			
An incidental take permit may be issued to an applicant who submits a habitat conservation plan (HCP). An HCP may address listed and certain unlisted species, and contain elements specified in §10(a)(2)(A).	Under species conservation contract agreements, running for 10, 20, or 30 years, persons would carry out conservation practices to meet statutory goals for endangered and threatened species, candidate species,	The Secretary is authorized to enter into agreements with property owners to improve habitat and promote conservation for listed and candidate species, with payments to property owners to implement these agreements	No similar provision, but see **Appendix**.

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For an HCP to be approved, the plan must contain the elements under §10(a)(2). With an approved HCP, the Secretary may authorize the take of protected species consistent with the plan. In addition, under regulations at 50 C.F.R. §17.22(d) and 17.32(d), an applicant may seek a "candidate conservation agreement with assurances" covering proposed, candidate, or other species not yet listed.	or species subject to comparable designations under state law (pp. 30-32). *This provision would expand species assistance to a point earlier in time — before a species is on the brink of extinction — which could provide greater flexibility and potentially fewer restrictions.* The agreements specify the conservation practices the person will undertake, and describe other economic activities on the land that would be compatible with the conservation practices (pp. 30-31). The terms of the agreement would specify the acts or omissions that would be considered violations, provide for an opportunity to remedy any violations, and provide for early termination of the agreement if a violation is not remedied (pp. 31-32). *There are no other provisions*	of as much as 70% of costs (pp. 44-50). The agreement will include a management plan for species and habitat, a finding by the Secretary that the land is appropriate for the conservation of the species, a description of activities to be used for conserving the species and restoring habitat, a description of future activities compatible with the agreement, and terms and conditions for modifying or terminating the agreement (pp. 44-45).	

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	regarding termination, and it is not clear whether the Secretary could terminate these agreements if a species later proved to be in jeopardy on the landowner's property or elsewhere.		
Property Owner Incentives — Priorities for the Selection of Agreements.			
There are no statutory priorities for selecting conservation agreements under ESA.	The Secretary would establish priorities for the selection of agreements or groups of agreements that address the potential of land, among other things, to contribute significantly to the conservation or improvement of species (pp. 32-33). Financial compensation would be an amount equal to 100% of the person's actual costs to implement the conservation practices if the agreement is for 30 years; 80% if 20 years; and 60% if a 10-year agreement (p. 34). The agreement would be deemed to be a permit under §10(a)(1) for incidental take of species free of penalties under the act (p. 37).	The Secretary shall give priority to those agreements that apply to areas other than public lands that are necessary for recovery under §5(c)(1)(A)(iv) (p. 21), and areas that would yield the greatest benefit for conservation of the species in relation to the cost of implementation (pp. 46-47). *If the best plan for the species is not the one that has the best benefit-cost ratio, conservation goals may not be achieved.* The Secretary may provide up to 70% of the cost to implement the management plan (p. 46).	No similar provision.

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	Both types of agreements must be with parties other than federal agencies or departments, or state governments. The agreements would obligate the Secretary to provide payments or other compensation for the implementation of the agreements, subject to the availability of funds.		
Property Owner Incentives — Species Recovery Agreements.			
Under current regulations, FWS offers landowners an incentive to assist in the recovery of a protected species by providing regulatory assurances to landowners who agree to improve habitat conditions for species listed under the ESA. These **safe harbor agreements** (50 C.F.R. §§17.22(c) and 17.32(c)) allow a landowner to provide a net conservation benefit that will contribute to recovery of a listed species in exchange for the assurance that a return to the baseline habitat condition at the time of permit inception will not result in liability for unlawful take.	Species recovery agreements are made with landowners who will protect and restore habitat for endangered and threatened species pursuant to a management plan with specified features (pp. 28-30).	See Conservation Program summarized above.	A system of conservation banks of undefined scope would be authorized in a new §4(A) (pp. 30-43). A conservation bank is an area of land, water, or other habitat to be managed in a specified manner and subject to conditions (p. 31).

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No similar provision.	New species recovery agreements (pp. 28-30) are to be for not less than five years and must meet certain criteria, including that the person with whom the agreement is made will protect and restore habitat for endangered or threatened species pursuant to a management plan. Priority in entering into the agreements would go to areas identified in recovery plans as areas of special value to species (p. 30). The agreement also would set out the compensation to be paid to the landowner and the circumstances under which the parties could mutually agree to modification or termination, and the acts that would constitute violations. *There is no explicit language authorizing unilateral modification or termination of an agreement by the Secretary if a species later is in jeopardy of extinction.*	See Private Property Conservation Program summarized above.	See Conservation Banks in **Appendix**.

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Property Owner Incentives — Conservation Grants.			
The Private Stewardship Program provides grants on a competitive basis to individuals and groups engaged in local, private, and voluntary conservation efforts that benefit federally listed, proposed, or candidate species, or other at-risk species. This program is authorized generally by ESA and other wildlife statutes. (See annual FWS Budget Justification.)	The Secretary may provide conservation grants to promote voluntary conservation of species by private property owners (p. 60). Priorities are set out for awarding grants, and giving preference to grants that promote conservation while making economically beneficial use of the property (pp. 61-62).	The Private Property Conservation Program is essentially a grant program for private property owners who enter into a conservation agreement (pp. 44-50). (See above for more explanation.)	No similar provision, but see **Appendix**.
Tax Incentives — Deduction for Cost of Credits Purchased from Conservation Banks.			
Under current law, it appears the IRS treats the costs of credits purchased from conservation banks as capital expenditures (*See* IRS PLR 9612009.) This means that the costs are added to the taxpayer's basis in the credit or the project's property, and the taxpayer may only recover the costs in a future taxable year (i.e., the year of sale) or, if the property is depreciable, over a period of years.	No similar provision.	No similar provision.	Taxpayers may deduct the cost of credits purchased from conservation banks in the taxable year in which the credit is purchased (pp. 55-56). The deduction may be claimed in taxable years ending after the act's enactment.

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Tax Incentives — Credit for Conservation and Recovery Costs; See Appendix .			
Annual Cost Analysis.			
Under current law, the Secretary of the Interior shall submit an annual report to Congress containing an accounting on a species-by-species basis from the preceding fiscal year of: 1) reasonably identifiable federal expenditures made for the conservation of listed species; 2) reasonably identifiable expenditures made for the conservation of listed species by states receiving grants under §6 of ESA (§18).	Requires the Secretary to submit an annual report of all reasonably identifiable expenditures made primarily for conservation of threatened and endangered species covering the preceding fiscal year (p. 66). This report is to contain expenditures from the previous fiscal year of federal and state funds, and funds voluntarily reported by local government entities on a species-by-species basis, and funds not attributable to specific species (p. 67). *This provision will expand reporting requirements of current law to include expenditures made for the conservation of listed species that cannot be attributed to one species. This may include expenditures for refuges or rivers where several listed species may benefit. By providing for local governments to report, this*	Identical to H.R. 3824 (pp. 51-53). *See comments under H.R. 3824.*	No similar provision.

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	provision appears to capture the universe of government spending on listed species. Note that tribal and non-governmental spending are not included in these reports.		
	The Secretary will provide means for local government entities to voluntarily report expenditures electronically and to attest to the accuracy of such data (p. 67). States will not be eligible for financial assistance unless they provide information on expenditures made for the conservation of listed species as described in §16(b)(2) (p. 68).		
Compensation — Livestock.			
No similar provision.	Authorizes compensation to landowners for loss of livestock to reintroduced species (pp. 68-69). Livestock owner is not required to present, and Secretary may not demand, the body of individual livestock as a condition for	Similar to H.R. 3824, except provisions on presentation of animal carcasses not included and the Secretary is authorized to accept donations for compensation.	No similar provision.

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	reimbursement.		
Authorization of Appropriations.			
Under current law, appropriations of definite amounts were authorized from FY1988 to FY1992 for the Department of the Interior to carry out its responsibilities and functions under the act; to the Department of Agriculture to carry out its functions and responsibilities with respect to enforcement of this act and the Convention which pertains to the exports and imports of plants (referring to the Convention on the International Trade in Endangered Species of Wild Fauna and Flora; and to the Department of Commerce to carry out its functions and responsibilities under this act (§15). *ESA functions have been funded from FY1993 to present, even though the underlying authorization lapsed at the end of FY1992.*	Authorizes such sums as may be necessary from FY2006 to FY2010 for the Secretary of the Interior to carry out functions and responsibilities of the Department of the Interior under this act; and for the Secretary of Agriculture to carry out functions and responsibilities of the *Department of the Interior* with respect to the enforcement of this act and the convention which pertains to the importation of plants. These provisions do not apply to activities under §8A(e) (p. 69). *There are no set limits on the authorization of funds to implement this bill. Funding for the Secretary of Commerce is not included, which reflects the elimination of functions and responsibilities of the Secretary of Commerce under this bill.*	Identical to H.R. 3824 (p. 54). *Under the amendment, there are no set limits on the authorization of funds to carry out the provisions under this bill, and funds for the Secretary of Commerce are not provided. The*	No similar provision. *S. 2110 does not reauthorize the ESA.*

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	Reference to the Secretary of Agriculture to receive funds for carrying out the functions of the Department of the Interior is not clear. Also, the provision refers to duties under the Convention with respect to the importation of plants, but omits the current reference to exports of plants.	*definition of the Secretary of Commerce is still retained.* *See comments under H.R. 3824, regarding the authorization of appropriations for the Secretary of Agriculture.*	
Under current law, the Secretary of the Interior is authorized to receive funds not to exceed a certain limit for carrying out §8A(e) for FY1988 to FY1992. §8A(e) authorizes the Secretary of the Interior to implement the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (56 Stat. 1354, T.S. 982)	Authorizes such sums as may be necessary from FY2006 to FY2010 for the Secretary of the Interior to carry out functions of §8A(e) (p. 70).	Identical to H.R. 3824 (p. 55).	No similar provision.
ESA and Farm Conservation Programs.			
No similar provision.	No similar provision.	No similar provision.	Participants in Farm Bill conservation programs that conduct activities resulting in a net conservation benefit for a listed, candidate, or other species

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			may receive a permit for incidental take for the duration of the agreement if it allows take within the area where net conservation benefits will accrue (p. 49). Incidental take will be allowed if the takes occur as a result of implementing a site-specific recovery action of an approved recovery plan and is at least proportional to the contribution to recovery (pp. 49-50). *This change appears to improve coordination of the conservation reserve and ESA programs. Further, this provides certainty for landowners that incidental consequences of certain actions taken to promote species recovery will not be prosecuted.* NEPA analysis is limited for any permit to either the applicant's alternative or a no-action alternative. The Secretary would be required to reimburse an applicant for any reasonable costs in meeting any NEPA documentation or requirements related

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			to an incidental take permit (pp. 53-54). *The possible costs for implementing this reimbursement program are uncertain, but could be substantial. Further, the avoidance of costs might bias against requiring comprehensive NEPA compliance in situations where such compliance might otherwise be applicable.*
No similar provision.	No similar provision.	No similar provision.	ESA §7(a) consultation will not be applicable to species covered by incidental take permits or to agency actions related to HCPs or other agreements under incidental take permits (p. 47). *This language would reduce the burden on landowners by foregoing any potential §7 consultation that might otherwise be required, but presumes that the modified procedures for incidental take permits are sufficiently stringent to provide species*

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			protection. Comments made above also relate to this additional elimination of consideration of alternatives .
No similar provision.	No similar provision.	No similar provision.	Publication of a notice of decision is required 15 days before the effective date of any action to approve, disapprove, or amend an incidental take permit (p. 55). *This language requires notification in the* Federal Register *of actions taken on incidental take permits. It is not clear whether this notice provision is meant to eliminate a public comment period.*
Miscellaneous Provisions — ESA and Pesticides.			
No similar provision.	Section 20 would add a new exemption for using pesticides. Any action taken by a federal agency, state agency, or person that complies with the Federal Insecticide, Fungicide, and	No similar provision.	No similar provision.

Topic and Current Law	H.R. 3824	Miller/Boehlert Amendment to H.R. 3824	S. 2110
	Rodenticide Act (FIFRA) would be deemed to comply with the consultation and take requirements of the ESA for a period that is the earlier of either five years from the date of enactment or the date of completion of any procedure required under 50 C.F.R. Subpart D, Part 402 (on consultation) (pp. 81-82). *This last date may mean the time when the EPA reaches a determination under their "counterpart" regulations regarding the need for consultation on a proposed action. Compliance with FIFRA relates to registration of pesticides and to compliance with requirements as to how, where, and in what amounts pesticides may be used. This waiver is controversial because of litigation over current counterpart pesticide regulations and the effects of pesticides on fish.*		

Topic and Current Law	H.R. 3824	Miller/Boehlert Amendment to H.R. 3824	S. 2110
Miscellaneous Provisions — Compliance Costs of Federal Power Administrations.			
No similar provision.	Several power marketing administrations would be required to show in each customer's monthly bill a report of that customer's share of the direct and indirect generating and marketing costs related to compliance with the ESA (p. 84).	No similar provision.	No similar provision.
Miscellaneous Provisions — Survey of Bureau of Land Management and Forest Service Lands.			
No similar provision.	Not later than two years after enactment, the Secretary of the Interior shall survey all BLM and FS lands to assess their value for management for the recovery of listed species and for addition to the National Wildlife Refuge System and make recommendations to Congress for managing such lands as part of the Refuge System (p. 85). *The Secretary of the Interior is to conduct the survey, even though lands managed by the Forest Service are in the Department of Agriculture. The*	No similar provision.	No similar provision.

Topic and Current Law	H.R. 3824	Miller/Boehlert Amendment to H.R. 3824	S. 2110
	survey provision appears to be based on the premise that all lands that could be of value to recovering listed species might be managed as a part of the National Wildlife Refuge System.		
Miscellaneous Provisions — Consultation and the Marine Mammal Protection Act.			
If ESA consultation involves a listed marine mammal species, taking is authorized pursuant to §101(a)(5) of the Marine Mammal Protection Act of 1972 (MMPA; 16 U.S.C. §§1361, et. seq.).	Section 25 states that an ESA consultation is equivalent to a §101 incidental take authorization under the MMPA for receiving dock building permits (p. 86).	No similar provision.	No similar provision.

Topic and Current Law	H.R. 3824	Miller/Boehlert Amendment to H.R. 3824	S. 2110
Costs of Implementation.			
Section 18 of the ESA requires the FWS to submit to Congress an annual report of a cost analysis of federal and state expenditures for conserving threatened and endangered species. The latest report was available Feb. 9, 2006 at [http://www.fws.gov/endangered/expenditures/reports/FWS%20Endangered%20Species%202004%20Expenditures%20Report.pdf].	*Costs will probably be reduced by the repeal of CH designations and increased state administration of ESA programs under cooperative agreements (pp. 40-43). Short-term cost increases may result from information and data collection and new systems for making data more available, recovery plans, species recovery agreements, species conservation contract agreements and associated financial assistance (p. 34), oversight of expanded cooperative agreements (pp. 40-43), increased incidental take permits, written compliance determinations (pp. 55-57) and payment of "aid" to landowners (p. 62), and any discretionary compensation for livestock lost to reintroduced species.* *Because the "aid" to be paid to property owners can be triggered by limits on any proposed use of even a*	*Costs will likely be reduced by the repeal of CH requirements (p. 6) and increased state administration of ESA programs under cooperative agreements. Increases might be expected from revisions to various regulatory requirements, including listing (p. 3), information and data availability systems (p. 50), recovery plans, monitoring (p. 16), increased incidental take permits, negotiation and administration of agreements under the Private Property Conservation Program, technical assistance (p. 44), cost analysis report (p. 51), the Science Advisory Board (p. 66), and any discretionary compensation for livestock lost to reintroduced species (p. 53).*	*Costs will probably be reduced as a result of state administration of ESA programs under cooperative agreements, and possibly a reduction of federal ESA actions identified on the priorities schedule. Increases might be anticipated from increased oversight activities, tax incentives, and tax credits.*

Topic and Current Law	H.R. 3824	Miller/Boehlert Amendment to H.R. 3824	S. 2110
	part of an owner's land and water, the potential costs of such aid could be high. *See also Congressional Budget Office, Cost Estimate for H.R. 3824, available at [http://www.cbo.gov/showdoc.cfm?index=6663&sequence=0], Feb. 9, 2006.*		

Appendix

Since conservation banks and tax incentives are addressed only in S. 2110, they will be discussed outside the table to conserve space. Provisions related to conservation banks will be paraphrased and CRS comments are in italics. Page numbers refer to the PDF version of S. 2110 as introduced.

Conservation Banks Under S. 2110

Under S. 2110, a conservation bank is defined as an area of land, water, or other habitat (not necessarily contiguous) that is managed in perpetuity or for an "appropriate period" under an enforceable legal instrument and for the purpose of conserving and recovering habitat, or an endangered, threatened, or candidate species, or a species of special concern (p. 31).

The conservation bank definition includes habitat "not necessarily contiguous," which suggests that a bank could consist of segments of habitat rather than a block. Given the importance and benefits of habitat continuity for species survival, some might argue that banks consisting of fragmented portions would have less value than banks with contiguous habitats. This definition also mentions an "appropriate period" as an alternative to in perpetuity when referring to the lifetime of the bank. The bill does not identify who will make the determination of an appropriate period or what criteria will be used.

Credit is defined as the "unit of currency" of a conservation bank generated by preserving or restoring habitat in an agreement, and quantified through the conservation values of a species or habitat. Conservation values are to be determined by the Secretary for each bank and converted into a fixed number of credits (pp. 31-32).

The definition of credit is written in a way that appears to allow alternatives to money that could be exchanged to pay for the values being purchased out of the bank. There is no indication what those alternatives might be. There is little guidance on how the Secretary will determine or measure conservation value, and how much "value" will equal a credit. Due to the changing nature of habitat and the potential for habitat improvement or degradation, conservation values may change within banks. There do not appear to be any provisions that allow the Secretary to reassign values to conservation banks. On the other hand, allowing the Secretary to determine the value and credits for each bank, has the potential to insure that there will be consistency among banks. This may be helpful, since a credit program for species could involve a wide range of habitat values.

A service area is an area identified in a conservation bank agreement. It includes a soil type, watershed, habitat type, political boundary, or an area in a federally recognized conservation plan, among others, in which a credit may be used to offset the effects of a project (p. 32).

The scope of a service area may vary broadly under this definition, which could allow the Secretary to create areas that fit desired biological criteria. Because

person *under the ESA includes federal agencies, and page 32 includes a reference to federally recognized conservation plans, the provisions on conservation banking may apply to federal agencies; it is unclear if this was intended.*

Conservation banks may be established by any private landowner who applies and demonstrates that the affected area is managed under an enforceable legal instrument and contributes to the conservation of a listed species, a candidate species, or a species of special concern (pp. 32-33). Secretary shall approve or disapprove a bank within 180 days after the application is submitted (p. 33). A bank can be managed by a state, a holder of the bank, another party specified in the agreement, or a party that acquires property rights related to the conservation bank (p. 34).

While conservation banks would require an enforceable legal instrument, the bill does not specify any contents for that instrument. There may be certain minimal contents that all such instruments or banking agreements should contain to ensure that protection of species and habitat will be effective and consistent from site to site. The time limit for a decision will allow approved banks to enter into the program and gain credits within six months, which some feel would encourage participation, but it is unclear whether this period will be sufficient for the Secretary to render a decision with adequate justification. Management of the bank is not restricted, which may relieve the burden of management from the landowner and allow other entities (e.g., state agencies or non-governmental organizations) to manage the bank. However, no criteria for holders are stated.

The holder of a conservation bank is required to establish an agreement that describes the proposed management of the bank (p. 34). The agreement is submitted to the Secretary, who shall approve or disapprove it "as soon as practicable" (p. 35). Conditions for amending and nullifying the agreement are given (pp. 35-36). The Secretary shall consider the use of banks for implementing recovery plans and must adopt regulations on managing banks that balance the biological conditions of the target species and habitat with "economic free market principles" to ensure value to landowners through a tradeable credit program (p. 36).

A bank management agreement undergoes a separate approval process from establishing a conservation bank, and the deadline for approving or disapproving bank management agreements is uncertain. No standards for acceptable agreements are provided. An approved agreement does not seem to be required to transfer credits or to maintain a conservation bank. The bill does specify that the bank must contribute to the conservation of qualified species, but there is no requirement that banks be consistent with approved recovery plans, and it is not clear that bank managers must comply with the relevant agreement.

The Secretary is to promulgate regulations on managing conservation banks (p. 37). The regulations are to relate to 11 subjects, including conservation and recovery goals, activities that may be carried out in any conservation bank, measures that ensure the viability of conservation banks, "the demonstration of an adequate legal control of property proposed to be included in the conservation bank" (p. 37), criteria for determining credits and an accounting system for them, and the applicability of and compliance with §7 and §10 of ESA. Monitoring and reporting requirements are also to be addressed in the regulations (pp. 37-38).

The regulations are to include provisions "relating to" how the consultation requirements of §7 of the ESA and the incidental take provisions apply in the context of conservation banks. It is not clear whether the authority given the Secretary to develop these regulations could be broad enough to eliminate consultation, or to authorize the issuance of general incidental take permits for activities in conservation bank areas. The requirement that banks be financially viable (pp. 37-38) appears to refer to both biological and financial viability. As to the latter, some contend that financial viability should be determined by market forces rather than the federal government, which should ensure the biological viability of the species or habitat should a bank fail.

Biological data would determine how many credits a bank can sell (p. 38), and the Secretary is to establish a standard process by which credits could be transferred. Credit transfers can be used to comply with court injunctions, to meet requirements of §§7(a), 7(b) or 10(a)(1) of the ESA, and to provide out-of-kind mitigation (p. 39). "Out-of-kind mitigation" is defined as mitigation involving the same species or habitat, but in a different service area. Additional requirements must be met for approval of out-of-kind mitigation, and the Secretary is to give preference to in-kind mitigation to the maximum extent practicable (pp. 39-40). The Secretary is not to regulate the price of credit transfers or to limit participation by any party in the credit transfer process (p. 40). In some circumstances, credits may be transferred before the Secretary approves a bank (p. 41).

The criteria for transferring credits do not include habitat or species requirements for the area being mitigated by the purchase of credits. Habitat for different species may not be interchangeable; therefore, if the area being mitigated contained habitat for an endangered species of salamander, there are no requirements that credits purchased will be from a conservation bank with similar habitat.

Out-of-kind mitigation is allowed when both ecological desirability and economic practicability can be met. The bill allows transfer of credits before the bank is approved if specified conditions can be met, which would seem to be a risk to the federal interest in species protection should the Secretary ultimately reject the application for establishing the bank. If the Secretary rejects a bank proposal, how would that rejection affect any prior purchase of credits?

Creation of conservation banks can be integrated with conservation plans developed under §10 of the ESA if certain criteria are met (pp. 41-42). Any party to an agreement, including the United States, may sue for breach of the agreement, and sovereign immunity is waived for participating federal, state, tribal, and local governments (pp. 42-43).

Subsection (g) (pp. 41-42) requires, to the maximum extent practicable, *that a bank be integrated with habitat conservation plans developed under §10 of the ESA if the bank meets the ecological criteria of the habitat conservation plan and provides greater economic benefits compared with other forms of mitigation of habitat destruction. Only a party to the agreement (not interested outsiders with standing) may sue for breach of the agreement. How this restriction could affect enforcement actions under §10 is not clear. Since a party violating an agreement is*

not likely to sue to enforce the agreement, this really means that only the Secretary can enforce the agreement. "Equitable relief" is specifically allowed, despite the wording that judicial review is allowed for a breach of an agreement — which usually connotes a suit for damages. It is not clear in what circumstances states, local governments, or tribes would be defendants.

Tax Incentives Under S. 2110

Taxpayers may claim a tax credit based on the taxpayer's qualified conservation and recovery costs for the taxable year (pp. 56-62). Qualified costs are those paid or incurred by the taxpayer in carrying out approved site-specific recovery actions under §4(f) of ESA or other federal- or state-approved conservation and recovery agreements that involve an endangered, threatened, or candidate species (p. 57). The project must be undertaken according to a binding agreement, and the credit is subject to recapture if the agreement is breached or terminated (pp. 57-58 and 61). The amount of tax credit gained depends on the length of the agreement: 1) if it is for at least 99 years, the credit equals the reduction in the land's fair market value due to the recovery action or agreement plus the property owner's actual costs; 2) if it is for at least 30 years but less than 99 years, the credit equals 75% of the above amounts; 3) if it is for at least 10 years but less than 30 years, the credit equals 75% of the actual costs (pp. 57-58).

The qualifications or standards for the binding agreement are unclear. Depending on the specifics of the agreement, the requirements for claiming the tax credit may be more or less stringent than those for tax incentives that currently exist for similar conservation activities (e.g., the charitable deduction for conservation easements under IRC §170).

The taxpayer must submit to the IRS evidence of the binding agreement and a written verification from a biologist that the conservation and recovery practice is described in the agreement and implemented during the taxable year in accordance with the agreement's schedule (pp. 58-59). The credit may not be claimed if the taxpayer received cost-share assistance from the federal or state government under any credit-eligible recovery action or agreement for that year (p. 59). There is an exception for individuals whose adjusted gross income is less than the limitations in IRC §32, the earned income tax credit (p. 59). Also, the taxpayer's qualified costs are reduced by any non-taxable governmental assistance for qualified conservation and recovery costs received in the year the credit was claimed or in any prior year (p. 61).

With respect to the second limitation regarding cost-share assistance, it is unclear as to whether the assistance must have been received for the specific project for which the credit is claimed. There are no requirements regarding the qualifications of the biologist who can verify the agreement.

The basis of the property for which any credit is allowable must be reduced by the amount of the taxpayer's qualified costs, regardless of whether those costs were greater than the amount that the taxpayer's tax liability exceeded the sum of the specified credits (p. 60).

This could be interpreted to require that the taxpayer reduce the basis by the total qualified costs in the first taxable year even if the taxpayer did not claim the full credit in that year. Thus, the taxpayer would experience the negative consequences from reducing the basis to account for the total costs without necessarily receiving the positive benefits from claiming the full credit.

The amount of any deduction or other tax credit must be reduced by the taxpayer's qualified costs, limited to the taxpayer's tax liability (pp. 60-61).

This appears to require that the taxpayer reduce all deductions and other credits by the amount of the credit allowed, regardless of whether they are based on the same expenses used for this credit.

The credit is limited to the taxpayer's tax liability (including alternative minimum tax liability) after applying certain credits (p. 57). Any portion of the credit that cannot be claimed because of this limitation may be carried back for one year and carried forward for 20 years (pp. 59-60). The new credit may be transferred through sale and repurchase agreements (p. 60).

The tax consequences of such sale are unclear. This provision is unusual as no other tax credit is allowed to be sold.