SECTION-BY-SECTION ANALYSIS
H.R. 3824

SECTION 1- Short Title

Establishes H.R. 3824 as the "Threatened and Endangered Species Recovery Act of 2005."

SECTION 2- Amendment References

Technical provision noting that unless otherwise identified, the statute being addressed is the Endangered Species Act (ESA).

SECTION 3- Definitions

Defines "Best Available Scientific Data" as scientific data, regardless of source, available to the Secretary at the time of the decision or required action, which has been determined as the most accurate, reliable and relevant for use in the subject decision or action.

- Within 1 year of enactment, the Secretary must establish by rulemaking criteria for the Secretary's decision as to what constitutes the best available scientific data.

- To the extent that data compiled for a decision or action do not: (1) meet the criteria for the best available scientific data; (2) are not in compliance with OMB Guidance for compliance with Data Quality Act; (3) do not include any empirical data; or (4) are found in sources that have not been subject to peer review in a generally acceptable manner--then the Secretary must undertake measures to ensure compliance with the criteria and/or guidance and may secure empirical data, seek appropriate peer review and reconsider the decision or action based on such compliance actions.

Modifies the definition of "Permit or License Applicant" to mean, for purposes of Section 7 consultations as "any person that has applied to such agency for a permit or license or for formal legal approval to perform an act."

Defines the term "Jeopardize the Continued Existence" for purposes of consultation under Section 7 to mean that the "action reasonably would be expected to significantly impede, directly or indirectly, the conservation in the long-term of the species in the wild."

SECTION 4- Determinations of Endangered Species and Threatened Species

Clarifies the factors for listing under Section 4(a)(1) to specify that: (1) the present or threatened destruction, modification, or curtailment of habitat or range is "by human activities or by competition from other species, drought, fire or other catastrophic natural causes"; and (2) the factor addressing inadequacy of existing regulatory mechanisms includes a review of efforts made by federal agencies, foreign nations, and state and local governments to protect the species.

Clarifies that the determination to list a distinct population segment of any species as endangered or threatened should be done only sparingly.

Applies the standard of "best available scientific data" to the listing decision under Section 4(b).

Requires the Secretary's five year status review under Section 4(c) to utilize information collected during newly established Congressional biennial reporting process as well as any other information the Secretary considers relevant.

SECTION 5- Repeal of Critical Habitat Requirements

Section 5 repeals the critical habitat requirements in current law.

SECTION 6- Petitions and Procedures for Determinations and Revisions

The Secretary's determination that a petition may be warranted can only be made if the petitioner has provided the Secretary with all information cited in the petition.

Modifies the notice provisions to provide that the Governor, as well as the appropriate State agency, receives notice of a proposed listing determination or revision.

Provides that: (1) a complete record of all information concerning the proposed listing determination or revision must be made available on a publicly available website; (2) the posted information must include any status review and information, information referred to in the proposed regulation, and all information submitted by third parties; and (3) the Secretary must withhold any document consistent with the requirements of Section 552 of the Administrative Procedures Act.

Provides that any withdrawal of a proposed listing determination or revision must be accompanied by written findings explaining such withdrawal.

Clarifies that the emergency provisions set forth in Section 4(b) (7) only apply to listing determinations and requires that the Governor as well as any affected State agency be provided notice of the emergency regulation.

SECTION 7- Reviews of Listings and Determinations

Provides that status reviews that propose a change in the species status must have taken into consideration either: (1) the objective, measurable criteria identified in the recovery plan which, if met, would result in a downlisting or delisting decision; (2) for species with no recovery plan or established downlisting or delisting criteria, the listing determination factors under Section 4(a); (3) a finding of a fundamental error in the initial determination; or (4) a determination that the species is no longer an endangered or threatened species or in danger of extinction based on an analysis of the listing factors under Section 4(a)(1).

SECTION 8- Protective Regulations

Modifies the Section 4(d) rules for issuance of regulations related to threatened species by making the issuance of such regulations permissive rather than mandatory and focused solely on the limiting of such regulations to the application of "take" prohibitions for such threatened species. The Secretary must support the application of take prohibitions with a written statement of reason for applying the particular prohibition. Also, the Secretary may apply a specific 4(d) regulation to more than one species "only if the specific threats to, and specific biological conditions and needs of, the species are identical, or sufficiently similar to warrant the application of identical prohibitions."

SECTION 9- Secretarial Guidelines; State Comments

The State comment provisions of Section 4 are modified to clarify that a Governor or State agency may comment on proposed actions. The provisions of Section 4 relating to recovery plans and the monitoring of recovered species, have been deleted from this Section and are addressed in Section 12.

SECTION 10 - Recovery Plans and Land Acquisions

Moves the recovery planning provisions of the Act to Section 5.

Applies priority for species most likely to benefit from plans (See Section 5(b)) to development of recovery plans.

Establishes a schedule for publication of new and revised recovery plans after enactment as follows:

- For species listed after enactment, a recovery plan is required within 2 years of the listing determination;

- For species: (1) with no recovery plan as of enactment, and where the Secretary finds that such a plan would promote the conservation and survival of the species; or (2) with a published recovery plan as of enactment where the Secretary determines revisions are warranted—then a new or revised recovery plan should be issued, to the maximum extent practicable, based on a priority ranking system established by the Secretary that takes into consideration the scientifically-based needs of the species. Deviations from the priority schedule must be reported and explained to Congress in the Biennial Report.

Requires recovery plans to include: (1) objective, measurable criteria for delisting and downlisting decisions; (2) site-specific and other measures including intermediate measures that would achieve the delisting/downlisting criteria; (3) estimates of the expected time and costs of site-specific and other measures identified in the recovery plan; (4) where practicable, estimated costs for any recommendations (if made) to acquire "specific areas that are of special value to the construction of the species" on a willing seller basis; and (5) the identification of any such specific areas of special value to the conservation of the species. To the extent a recovery plan

covers more than one state, the delisting/downlisting criteria required under Section 5(c)(1) must be identified on a state by state basis.

Provides that the delisting or downlisting criteria required under Section 5(c)(1) must be based on the best available scientific data. If insufficient best available scientific data exists to determine the criteria, then interim conservation criteria and measures that are likely to improve the state of the species must be identified and the recovery plan must be reviewed no later than 5 years to determine if the criteria and measures can be identified. If the criteria became determinable, then the recovery plan must be revised to include such criteria within 2 years of that determination.

Encourages the recovery team or Secretary to develop and include alternative measures on the recovery plan with an emphasis on those that are at least costly.

Provides that until a recovery plan is issued or revised pursuant to Section 5, areas previously designated as critical habitat will be treated as "specific areas that are of special value to the conservation of the species."

Requires the Secretary to promulgate regulations establishing the criteria and process for selecting recovery teams including: (1) ensuring the necessary size and composition of the team to timely complete the recovery plan; (2) representation of affected constituencies (environmental, social and economic impacts considered); (3) operating procedures and recordkeeping requirement; and (4) ensuring rigorous evaluation of scientific and economic matters addressed in the recovery plan. The Secretary also must establish guidelines for any determination that a recovery team is not necessary.

The Secretary must provide biennial reports to Congress on the status of all domestic endangered and threatened species and the status of efforts to develop and implement recovery plans. The report must included assessments of significant changes in species' status <u>and</u> a measurement of the degree of confidence in each species' reported status.

Public notice and comment for new and revised recovery plans is required. All information presented during the public comment period must be considered prior to plan approval. Also, comments of a Governor or State agency must be responded to in the final recovery plan determination.

Provides that relevant best available scientific data contained in a recovery plan must be considered in any analysis undertaken pursuant to Section 102 of the National Environmental Policy Act (NEPA).

Provides that the Secretary may enter into an agreement with a federal agency to implement measures identified in a recovery plan. The implementation agreement must be subject to public notice and comment. A program or project covered by an implementation agreement will not be considered non-binding guidance.

Provides that, except with programs or projects covered by an implementation agreement, nothing in a recovery plan shall be construed to establish regulatory requirements or have an effect other than as non-binding guidance.

Establishes Species Recovery Agreements. This section authorizes the Secretary to enter into voluntary agreements with landowners who agree to carry out activities that protect or restore habitat and contribute to recovery of endangered or threatened species in exchange for payments or other compensation.

- Priority shall be given to agreements that apply to areas identified in recovery plans as specific areas that are of special value to the conservation of the species.

- Agreements shall be for not less than five years, and may be extended upon the mutual consent of the parties. Transfer of the property shall terminate the agreement, unless the new owner agrees to continue the agreement or seeks a new agreement.

Authorizes Species Conservation Contract Agreements. This section authorizes the Secretary to enter into voluntary agreements to carry out conservation practices that benefit species that are endangered or threatened, species determined to be candidate species, or species subject to comparable designations under state law. Agreements shall be for 10, 20 or 30 years, with cost share payments that increase as the duration increases.

- The Secretary is directed to establish priorities for the selection of conservation rental agreements based on a series of factors including the size of the acreage and the potential of the land to contribute significantly to recovery, the number of covered species, and the degree of urgency for implementation of conservation practices for the covered species.

- The Secretary shall into agreements if the person possesses the financial capability and commitment to adhere to the agreement.

- Agreements shall terminate upon the transfer of the property, unless the new owner agrees to be bound by the agreement or seeks a new agreement. The agreement may be renewed by the mutual consent of the parties.

Technical assistance and management training to persons entering into a Species Recovery Agreement or Species Conservation Contract Agreement is provided.

A Species Recovery Agreement or Species Conservation Contract Agreement will be deemed to meet the requirements of Section 10(a)(1) and be granted incidental take authorization for activities identified in such agreements.

The Secretary or another federal agency may not use regulatory authority to coerce a person's participation in a Species Recovery Agreement or a Species Conservation Contract Agreement.

SECTION 11 - Cooperation with States

Allows a cooperative agreement entered into with a State under Section 6(c) to also cover candidate species or any other species that the Secretary and the State determine is at risk of being listed as threatened or endangered.

- The incidental take statement covering a cooperative agreement shall apply to all covered species and to the State and any landowners enrolled in any program contemplated by the cooperative agreement.

- The cooperative agreement may provide for monitoring and monitoring assistance for candidate species and recovered species.

- The Secretary must periodically review the cooperative agreement and make changes necessary to maintain conservation of the listed species.

- Requires that any cooperative agreement program to enroll private land or water rights must be on a voluntary basis only.

Expands the review requirement for Section 6 agreements from an annual review to a 3 year review period.

Clarifies that cooperative agreements are subject to the consultation requirement of Section 7 when: (1) first executed; and (2) where a renewal of the agreement addresses not previously covered species or new information (meeting the best available scientific data criteria) indicates that the agreement may have an adverse effect on the species that had not been previously considered.

Allows the Secretary to suspend a cooperative agreement after consultation with the Governor of the affected State if the periodic review determines that the cooperative agreement is no longer an adequate and active program for conservation of the listed species covered by the agreement. The Secretary may terminate a cooperative agreement if: (1) a State has not amended or revised a suspended cooperative agreement within 180 days; or (2) as part of a Section 7 consultation, the Secretary determines that continued implementation is likely to jeopardize the continued existence of a listed species and such cooperative agreement is not amended to incorporate a necessary reasonable and prudent alternative.

SECTION 12- Interagency Cooperation and Consultation

Applies the best available scientific standard to consultations.

Allows for alternative procedures (established by regulation) by which specific agency actions or categories of agency actions can be reviewed consistent with the consultation standards under Section 7(a)(2).

- The incidental take statement and authorization provided for under Section 7(b)(4) and (now) section 7(e) shall only apply if the Secretary finds or concurs that the incidental take standards have been met.

- The Secretary must suggest or concur in any reasonable and prudent alternative required under Section 7(b)(3) which is developed through the alternative procedures.

- Alternative procedures already promulgated (e.g. FIFRA counterpart regulations) are valid.

The jeopardy analysis conducted under Section 7(a)(2) is limited to considering only the effect of any agency actions that are distinct from a baseline of all effects upon the species that have occurred or are occurring prior to the action.

Requires that a proposed biological opinion be provided to an affected permit or license applicant prior to the conclusion of the consultation. Both the Federal agency and permit or license applicant have the right to comment on the proposed biological opinion. A final opinion must be provided to both the Federal agency and permit or license applicant with public notice issued.

Terms or conditions included in an incidental take statement under Section 7(b)(4) must be roughly proportional in extent to the impact of the identified incidental take. The required terms must be capable of successful implementation and consistent with the objectives of the Federal agency and the permit or license applicant to the greatest extent possible.

Terminates the Endangered Species Committee Process, aka the "God squad."

SECTION 13- Exceptions to Prohibitions

Modifies the habitat conservation plan (HCP) requirements of Section 10(a)(2) to require that a submitted HCP include: (1) objective, measurable biological goals to be achieved for the species and specific measures to achieve those goals; (2) monitoring measures; and (3) adaptive management provisions "necessary to respond to all reasonably foreseeable changes in circumstances that could appreciably reduce the likelihood of the survival and recovery of any species covered by the plan."

Modifies the criteria for approval of an HCP to include: (1) consideration of the period required to complete the principal actions; (2) the extent to which the HCP enhances the conservation of the species; (3) the adequacy of information; (4) the length of time necessary to implement and achieve benefits; and (5) the scope of the plan's adaptive management.

Requires that terms and conditions required by the Secretary for approval of the HCP must be roughly proportional to the impact of the incidental take, capable of successful implementation and consistent with the objective of the applicant to the greatest extent possible.

Adopts and codifies the No Surprises/Assurances Policy. If a permit holder is in compliance with the terms of the incidental take permit, the applicable HCP and any incorporated agreement, then the Secretary may not require the holder, without consent, to adopt new minimization, mitigation or other measures for covered species except due to changed circumstances.

- For changed circumstances identified in the permit or HCP, new measures are limited to those set forth in the permit or plan for such circumstances.

- For "not identified" changed circumstances, the new measures cannot involve the commitment of any additional land, water or financial compensation not otherwise committed or the imposition of additional restrictions on land, water or other natural resources otherwise available for development or use under the permit and HCP.

The Secretary shall have the burden of proof in demonstrating and documenting, with the "best available scientific data", the occurrence of any changed circumstances.

Permits issued before the date of enactment that contain provisions that do not materially differ in effect from the No Surprises terms (above) shall continue in force and effect and regulations promulgated prior to enactment that do not materially differ in effect from the terms of the No Surprises provisions shall remain in effect unless and until they are amended.

Provides that an incidental take permit may be revoked due to changed circumstances only if: (1) the continued activity would appreciably reduce the likelihood of survival and recovery of the species in the wild; (2) 60 days notice has been provided; and (3) the Secretary is unable to, and the permittee chooses not to, remedy the adverse condition.

Public review of applications for exemptions or permits under Section 10 is extended from 30 to 45 days.

Experimental population provisions under Section 10(j) are now subject to a "best available scientific data" standard.

Provides that a property owner may request the Secretary to determine if a proposed use of the owner's property will comply with Section 9 (i.e. not result in a take of a listed species).

- The requesting property owner must describe: (1) the nature, location, anticipated schedule and duration of the proposed action; (2) incidental take of a listed species that is expected to occur; and (3) any other information the proposer chooses.

- The Secretary must provide a written determination within 90 days unless a written extension is granted by the requesting party.

- Failure to issue a determination within the required window deems the proposed use in compliance with Section 9.

- Property use that is subject to consultation under Section 7 consultation cannot be the subject of a review request.

- Actions that are determined to violate Section 9 are eligible for aid from the Secretary pursuant to newly established Section 16(c).

- Actions approved by a written determination or "deemed" approved for failure to act are not subject to liability for violations of Section 9.

SECTION 14- Private Property Conservation

Establishes a conservation grant program to promote voluntary conservation of species by private property owners and to provide assistance to alleviate the burden of imposed conservation measures.

Requires the Secretary to award aid to property owners who forgo use of their property following a written determination by the Secretary that a proposed use would not comply with Section 9's take prohibition. The property owner must request financial aid within 180 days of the determination. The amount of the Aid is to be no less than the fair market value of the forgone use of the affected portion of the property. The property owner is to establish the fair market value and ambiguities regarding fair market value are to be resolved in favor of the property owner. A forgone proposed use that is determined to be a "nuisance" pursuant to generally accepted nuisance and property law is not eligible for aid.

Fair market value is defined to mean "an amount equal to the fair market value of the foregone use of the affected portion of the private property including business losses." In cases where the fair market value is agreed upon, aid is to be provided with 180 days of the request. If an agreed upon fair market value cannot be arrived at within this timeframe, the Secretary has an additional 90 days to make a best and final offer.

Conservation grants to promote the voluntary conservation efforts by owners of private property that are supported by the property: (1) may not be used to fund litigation; (2) may not be used for the purchase of private property or leases or easements of more than 50 years; (3) must be directly contributed to specific conservation by increasing specific numbers or distribution; and (4) supported by the private property owners on whose grant funded activities are carried out.

Priority for grant issuance is: (1) promotion of conservation on non-federal property in conjunction with making economically beneficial and productive use of non-federal property; (2) promotion of techniques to increase distribution or population of listed species in non-federal property; and (3) activities that promote voluntary conservation.

Conservation grants are to be paid on the last day of the fiscal year after conservation aid has been awarded. Aid is paid in order of the date of request. Uncompensated aid (due to insufficient funds) remains an obligation in the future.

Annual reports are to be submitted for all aid and grants awarded.

SECTION 15- Public Accessibility and Accountability

Requires that the Secretary maintain a publicly accessible website that includes: (1) endangered and threatened species lists; (2) all final and proposed endangered and threatened species regulations issued under Section 4; (3) draft and final recovery plans; (4) the results of five year status reviews; and (5) all Reports and supporting data to Congress required under what would be Section 5 and the Annual Cost Analysis under Section 18. Requires the Secretary to provide the information in a format that it may be searched by the variables contained within the Report to Congress and Annual Cost Analysis reports.

SECTION 16- Annual Cost Analyses

Requires the Secretary to produce an annual report detailing the expenditures made by Federal agencies and the States primarily for the conservation of endangered and threatened species and those expenditures voluntarily reported by local government. Requires the Secretary to provide a means whereby local governments may electronically submit such data.

Provides that States shall not be eligible for financial assistance under Section 6 if the State does not provide to the Secretary an annual report on the preceding fiscal year expenditures by the State of received grants under Section 6 on a species by species basis as well as grant funds expended by the State that are not attributable to a specific species.

SECTION 17- Authorization of Appropriations

Authorizes such sums as are necessary for Fiscal Year 2006 to 2010 for Secretary of Interior. Authorizes sums as necessary for Fiscal Year 2006 and 2010 for Secretary of Agriculture to carry out functions and responsibility of the Department of Interior with respect to the enforcement of this Act and the convention which pertain the importation of plants.

SECTION 18- Clerical Amendment to Table of Contents

Establishes titles to Sections of the Act.

SECTION 19- Miscellaneous Technical Corrections

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