

20060605 SCB meeting minutes

New officers!!!

Pete Epanchin– president

Christina Liang– vice president

Michael Branstetter– secretary

Becky Niell – treasurer

Talks during meetings have been a big hit, so we'll continue that next year. Please forward ideas for speakers to the new officers and keep abreast of updates via the website.

Also, email Rodd (trkelsey@ucdavis.edu) if you are interested in joining Andrew Fulks in kayaking down Cache Creek removing invasive species on selected dates this summer.

Endangered Species Act (ESA) reauthorization – a presentation by Holly Doremus

What does it mean? It hasn't been reauthorized since 1988. There's no sunset on the ESA's substantive provisions – they keep going. But, reauthorization, which was Congress's plan for updating the ESA and authorizing funding so that the agencies would not be at the mercy of the federal budget process. Since 1988 the ESA has been funded by annual budgeting. In 1999 there was a federal moratorium on listing species, so the hope is that a reauthorization would pull us out of the re-budgetting mire for a while.

Every five years was the original plan – and yes, you could skip an entire presidential cycle, in theory.

ESA passed in 1973 and substantially re-amended in 1978, 82, and 88. In 1997 it was almost reauthorized – there was a bipartisan bill supported by the Clinton administration that didn't go anywhere because interest groups on both sides of the issue didn't like it.

Why does this matter?

The ESA has been one of the most controversial laws in recent years. There are about 1300 domestic species on the list – 300 threatened, 1000 endangered, and 280 species are considered candidates. FWS wants to list these candidates but doesn't have the resources to do it. Of those approx. 50% of listed species in the US have 80% or more of their habitat on private lands. That means that we have to do something about use of private lands if these species will survive and that's what makes this bill so controversial.

17 species have recovered according to FWS – by Holly's count only about 11 of those species have recovered. Some, like Pombo, use these numbers to declare the ESA a failure. 25-35 have been delisted due to extinction.

According to FWS, \$1.2 billion was spent by federal and state agencies on conservation of endangered species in 2003.

That expenditure is heavily concentrated on a small number of species.

Political system:

Bill introduced, referred to committee with set jurisdiction

House: resources committee

Senate: environment and public works committee

Hearings, votes, etc are held if they feel like it – then they send it on to the floor for consideration.

If the floor approves they send it to the other chamber (house or senate). But either chamber can't tell the other what to do, so the other chamber doesn't have to work on that bill. If the two chambers pass different bills they have to go to a conference, because before it goes to the president there has to be consensus. That conference is appointed by the leadership of the two houses.

Then the bill has to go back to the two chambers to be voted on. If passed it goes to the president to either sign or veto.

Leadership of the house and senate control who is on those committees, and the party that controls the houses has the majority of membership in either committee. The chair of those committees decides when meetings will be held on what topics.

Outside of this there are appropriations committees that control the budgeting process.

TESRA – Threatened and Endangered Species Recovery Act. Brainchild of Richard Pombo, congressman from Tracy and chair of the House Resources Committee. His family are landowners and he doesn't like the current ESA. In Sept. he unveiled TESRA (88 pages in GPO format). Introduced, the resources committee voted 2 days later to send it on, 2 days later passed in the House. Now introduced into the Senate.

What does it do? The text is on THOMAS (website of the library of congress – HR 3824).

→ What is the best available science? NOAA and FWS are required to use the “best available science”, which is up to the agencies and they decide on a case-by-case basis. Pombo's bill would require that the Dept. of the Interior issue regulations on how to determine the best available scientific data and they have to ensure compliance with the best available scientific data – empirical and peer reviewed.

→ Listing of distinct population segments (DPS) – ESA allows listing as subspecies, species, or distinct population segments (e.g. how salmon are listed in evolutionary significant units). A congressional report, when listing this way was approved, suggested this be done carefully. Pombo's bill states that DPS listings be made sparingly.

Would require economic analysis of the impacts of listing, which is now specifically forbidden. Must also do analysis of the National Security impacts.

→ Listings can be started by FWS or citizens sending a petition to FWS – virtually all the species have been listed by citizen's petition.

Pombo's bill makes it harder to petition by requiring you provide all the information with your petition that your petition is based on.

→ Pombo bill would remove critical habitat designations, which are seen as costly.

Critical habitat has regulatory significance only to actions with a federal nexus (Section 7). Private landowners encounter this when they apply for federal permits.

Instead of critical habitat we would require that recovery plans identify specific areas, but there's currently no deadline on recovery plans. Pombo bill does require a 2-year deadline for recovery plans. About 1000 of the currently listed species have recovery plans.

Under Pombo's bill you lose Section 7 consultations. Recovery plans have no regulatory significance. So there would be absolutely no effect of these areas of special value on public land.

Federal agencies would continue to have to consult. There would still be the "no jeopardy provision", so on federal lands endangered species would still trump public uses.

Section 7 – 2 sections

No jeopardy, no adverse modification of critical habitat – the FWS considers these the same thing currently for operating practices.

Jeopardy means an action that appreciably reduces the chances of survival and recovery in the wild.

Section 9 – other key regulatory provision (no take).

Section 10 – authorization of incidental take – governs take on private lands. To get this it's a federal action so section 7 applies, so section 7 is the key regulatory factor.

Other major action of the Pombo bill is the establishment of economic rewards for private conservation actions. Currently you set aside preserve land to make up for the loss due to your development. Pombo's bill would do away with the Section 10 permit process. Landowners would get written statement of compliance – local FWS office would have 180 days to consider action and would authorize action. Currently we can sue for non-compliance, but under Pombo's bill, any landowner with authorization could not be sued. If a landowner were denied compliance, the price of not undergoing development would have to be paid to the landowner.

This would likely decrease the number of permits.

Change to section 7 consultation process – review of actions. What is the action? Pombo's bill would explicitly say that you only get to look at the marginal impacts of the new actions.

EG. Dams. Columbia River – operated continually (federal nexus). Courts have said that the presence of the dam is part of the action, judge in Portland adamant recently that consideration of dam removal should be included, not just marginal effects of flow change. Pombo bill would prevent that kind of scrutiny.

People who oppose actions will be shut out of consultation process.

Pesticide use currently ok'd by EPA. This bill would prevent consultation with FWS on pesticide use for 5 years of section 7 consultation if the EPA has already listed it.

Who's making these decisions? EPA's pesticide office is mainly concerned with industry and human health effects, and they don't require tests on amphibians, for instance, of aquatic herbicides. That's what we lose with out section 7 consultation on those.

Pombo bill would also eliminate the "God squad".

Pombo's bill got through, not just on party lines. The current House of Representatives is currently very anti-environment. Now in the senate since September – tells us something about its prospects. There's a senate subcommittee on fisheries, wildlife and water chaired by Lincoln Chafee of Rhode Island. One of the few Republican elected officials in Rhode Island and doesn't want his name on anything that's gutting the ESA. He and Hillary Clinton asked the Keystone Center for advice (NGO in Colorado for mediation) on ESA reforms that everyone would agree on, but no one could agree on the answer. Had they come up with something Chafee would've introduced it. Chafee won't let it out of subcommittee.

End-run attempt – the finance committee of the senate (taxes bonds, etc) Mike Crapo of ID has introduced an anti-ESA bill to run-around Chafee emphasizing tax breaks for developers. Introduced at the beginning of this year, and the finance committee has better things to do (repeal of the death tax, making the Bush income tax breaks permanent). Environment and public works has other priorities as well (Katrina, Yucca Mtn., MTBE).

ESA reform isn't going anywhere in the senate between now and Nov., in Holly's opinion.

Inhofe (OK) likes the Pombo bill, but cant' get bill through committee through Chafee. The Republicans are increasingly worried about losing control of either the House or the Senate. No Republican is allowed to interfere with the reelection prospects of Chafee for that reason.

The longer it goes the more likely it is that this dies.

What if Chafee's reelected?

Chafee wants to do some kind of ESA reform in a moderate way. 1997 bipartisan ESA reform bill was sponsored by Dirk Kempthorn (Secretary of the Interior) and Lincoln Chafee's father. S-1180 in 1997 from the 105<sup>th</sup> Congress. This will likely be the model for the next reform bill.

A Congress runs for two years and bills can't run between, so this bill will die in Nov.

In Senate, committees are appointed by seniority, the House less so since Newt Gingrich's days. So Senate committee chairs are unlikely to change.

Empirical, peer review of science is wolf in sheep's clothing – will heavily constrict use of science. Currently listings and recovery plans are peer reviewed. Study by the accounting office found that peer reviewers only change >1% of FWS decisions. Pombo bill will require FWS pay for peer review as well.

Preference for empirical data will clamp down on modeling, but most listing decisions use at least one population evaluation. Can't have empirical data on how a process will affect a species before the process is underway.

Yes, peer review is good, but in this case it would be used to add more time to the process. National Academy would have to produce a list of who the experts are.

Would also have to use modeling in areas on private land that couldn't be surveyed.

What about support for listed species that aren't popular, aren't supported, and cause many of these regulatory problems? Unfortunately, there will likely not be a conversation about this.

Congress people from '73 have said that they didn't realize what section 7 said. In 1978, the listing controversies were harvestmen standing in the way of water development. So charisma isn't necessarily a requirement.

The rhetoric of extinction resonates powerfully, but the actual practice of conservation will likely remain biased.

Questions going forward:

How do you balance regulation and incentives on private land?

Could bill be pushed through after election? Likely not, and if there was an attempt there would likely be a filibuster (only takes 40 to block a vote). Hillary Clinton and Barbara Boxer are fans of the current ESA.

Standards for scientific analysis?

How important is it to achieve recovery?

Funding – needs to be rationalized. Need to get out of yearly appropriations cycle.

Recovery = delisting. Qualify for the list if endangered or threatened. Recovery plans have a step-down process, targets for endangered to threatened, threatened to listed – these are decided by the recovery team. The recovery plans don't speak to threats the species will face if it comes off the list. Problem with the bald eagle → if taken off the ESA they'll no longer have sufficient protection on private lands.

FWS is required to determine the effects of delisting, but the discussion of the effects is inadequate.

This just happened to the island fox. Since it's on federal land, there was no critical land designated, but the national park is now being considered for transfer to the military. Also doesn't take into account the management on private lands.

Of \$1.2 billion, some is regulatory operation of FWS units.

What is the role of the states? So far they have had a limited role in ESA implementation. So far only state engagement is a form of engagement that would slow down the process.

Proposal to exempt military from environmental laws – not coming from the Pentagon, but from ideologues in the Congress. MMPA, and can't designate military lands as critical habitat.

Many species will likely never recover. Looking at delisting is not a good measure. If we want species to survive we'll likely have to care for them forever. Said to a certain extent within the FWS. Babbitt proposed delisting of 25 species to prove effectiveness of ESA, but that hasn't happened because they won't do well without the law.

What if Pombo's bill was just focused on removing critical habitat? Critical habitat doesn't do much, but we need something to protect habitat. You need to have recovery habitat. The FWS has defined critical habitat and no jeopardy as the same thing – three courts have told them that it is illegal, but the regulations remain in place. In the Ninth circuit, you have to worry about effects on habitat that would effect survival as separate from just survival, but currently that's not how FWS operates.

Does funding come up during reauthorization discussions? Not often enough. Opponents to the Pombo bill have raised this issue. Congress often will pass actions but not designate new funds for those actions.

Substantive ESA reform will not likely take place with a stealth rider, though the removal of critical habitat designations could be down that way.