

Topic 1: Endangered Species Act Consultation Process

Oversight hearing before the House Natural Resources Committee

Summary:

The Endangered Species Act (ESA), enacted in 1973, is one of the most significant federal environmental laws and provides a structured framework with the aim to protect and help recover endangered species and their habitats. The ESA is also among the most controversial environmental laws, partly because dwindling species and related ecosystem decline tend to be associated with human economic interests, often pitting the protection of individual species and their habitat against public and private use of land. Furthermore, one of the primary tools of the act for mitigating adverse impacts to species and ecosystems, known as the "Section 7 consultation process", is much criticized for being inefficient and inconsistent (Section 7 refers to part of the ESA which is codified as 16 U.S.C. Section 1536(a)(2)). The consultation process requires any agency taking an action that might affect an endangered species to first obtain the review and approval of either the National Oceanic and Atmospheric Administration (NOAA) or the Fish and Wildlife Service (FWS) before proceeding.

In an effort to streamline this contentious process, the Bush Administration completed a new federal rule in 2008. The final rule, issued December 16, 2008, clarified key definitions in the act, and adjusted the way the consultation process is used. Rather than requiring agencies to always enter into a Section 7 consultation when an activity could conceivably impact an endangered species, the new rule allowed the agencies increased discretion to determine for themselves when a consultation is necessary. One of the early actions of the Obama Administration (March 4, 2009) was to issue a Presidential Memorandum effectively telling all federal agencies to ignore the new rule while the Departments of the Interior (DOI) and Commerce determine whether the rule should be modified. The rule was formally repealed May 4, 2009 and the ESA regulatory process is being re-examined by NOAA and DOI. The rules are currently under review and several bills currently in Congress address changes to the ESA.

Recent debate regarding the ESA focuses on changes to the consultation process and the act's applicability to global warming. Supporters of the Bush-era rule claim that it makes the consultation process more efficient without reducing protections for endangered species. Others claim that the rule effectively makes consultation optional and thus greatly reduces the force of the law. There is also disagreement over whether or not climate change can be considered a manmade adverse impact to endangered species and thus, whether or not the ESA applies to emitters of greenhouse gases, regardless of their proximity to endangered species. Many of the policy arguments associated with the ESA turn on the definitions of terms in the original statute, such as "jeopardy," "adverse modification," "effects of the action," "action area," and "standard of causation," all of which determine when, where, and to what extent the Act comes into effect.

The Committee is exploring the appropriate role of the interagency consultation process in protecting endangered species and is considering codifying the process in law. The Committee seeks witness input on the consultation process. Witnesses are specifically asked to address the question: *"Should the Section 7 consultation process should be updated or reformed?"*

In addition witnesses are asked to comment on:

- the definitions of "action area"
- the appropriate standard of causation (i.e., the definition of "effects of the action")
- the informal consultation process
- flexibility for "low effect" consultations
- whether and how to incorporate consideration of external forces, including climate-driven changes, that might adversely affect target species and habitats.

Coaches: Victoria Fabry, Laura Meyerson,

Witnesses: Margot Gerritsen, Luis Zambrano Gonzalez, Madhu Khanna, Jingle Wu

Topic 2: Natural Resource Adaptation to Climate Change

Legislative hearing before the Senate Commerce, Science and Transportation Committee on "The American Clean Energy and Security Act," (H.R. 2454)

Summary:

The American Clean Energy and Security Act, or H.R. 2454, aims to help the United States achieve energy independence and reduce the impacts of climate change by restricting emissions of greenhouse gases through a cap-and-trade system, facilitating the transition to a cleaner energy economy, and funding science and policy initiatives to help communities and ecosystems adapt to climate change. Though the bill passed the House of Representatives on June 26th, the vote was close and the bill is expected to face challenges in the Senate. Subtitle E of H.R. 2454 addresses adaptation to climate change. Subpart C, "Natural Resource Adaptation" seeks to enable natural resources "to become more resilient, adapt to, and withstand the impacts of climate change and ocean acidification."

Views on the proposed adaptation policies vary. Some question the need to fund natural resource adaptation, claiming either that climate change has been exaggerated, that nature is robust and does not need adaptation assistance, or that the expense is otherwise unjustified. However, most debate regarding natural resource adaptation focuses on how best to go about promoting it. Some complain that the sum of dedicated funds is insufficient. Others express concern over how the new panel and strategy might interact with existing programs, like the Climate Change Science Program created under the Climate Change Research Act of 1990, or regular departmental resource management plans. Questions have also been raised regarding whether the interagency structure set up by the bill is the best means of coordinating adaptation efforts. As in many federal undertakings that involve science and technology, there is worry that a bureaucratic approach, when combined with the self-interest and inertia of effective adaptation strategies. Others argue that a federal approach is the only way to effectively coordinate on a scale that matches the problem and prevent perverse incentives from driving "inappropriate" approaches to the problem.

Subpart C proposes providing guidance and the coordination of government agencies through the establishment of a national Natural Resources Climate Change Adaptation Panel and Natural Resources Climate Change Adaptation Strategy. It also proposes to make data more complete and accessible through the establishment of a National Wildlife Habitat and Corridors Information Program. The Senate is taking up the bill and is considering making changes to the Natural Resource Adaptation title.

The Committee seeks input on the National Strategy and the Natural Resources Adaptation Science and Information sections. In particular:

- Is this the right approach to support adaptation?
- Does the current language set reasonable and actionable timelines for review and development of science and adaptation plans?
- What science do we need to support this adaptation planning?
- What resources (funding, facilities, etc) do we need to meet these science needs?
- Are there specific approaches that should be emphasized or discouraged?
- Are the USGS and NOAA the appropriate agencies to be leading the science program?
- Should other agencies be involved in this process, and if so, how?

Coaches: Simon Donner, Gretchen Hofmann,

Witnesses: Kevin Arrigo, David Breshears, Whendee Silver, Dov Sax, Karen Seto

Topic 3: Platte River Recovery – Balancing Freshwater Resource Use with Species Recovery

Legislative hearing before the House Natural Resources Committee on "The Platte River Recovery Implementation Program and Pathfinder Modification Authorization Act," (H.R. 1462).

Summary

The Platte River in Nebraska is one of the major rivers of the U.S. plains region and originates in the Rocky Mountains of Colorado and Wyoming. The Platte River is both a home to several endangered species and a vital source of water in a region of water scarcity; the three states through which it flows have been fighting over its water for more than half a century. An opportunity arose to resolve interstate conflicts and promote the recovery of the river basin when several facilities came up for re-licensing in the late 1980s and early 1990s, the most notable of these being the Kingsley dam in 1994. These re-licensings all required consultation under the Endangered Species Act. As a way to avoid lengthy court battles and take proactive steps towards reconciling water use needs and ecosystem recovery before final recommendations were made under the ESA, the governors of the three states and the secretary of the Interior formed a Cooperative Agreement in 1997 to collaboratively resolve resource management issues. The agreement establishes the Platte River Basin Recovery Program, a plan that aims to allow continued water use and development along the Platte River while complying with the Endangered Species Act.

Proponents of the plan believe the cooperative nature of the agreement will head off conflict and result in management of the system that is more effective. Critics of the plan, whether they are conservationists or water users, largely complain that it has compromised too much to the interests of the opposite party and will either further endanger species that are already in decline or protected, or will deny water users the resources they need to continue to operate or develop their land and associated economic activities. Some concerns remain that the program may be too monolithic to respond to changing needs and conditions and that external natural forces and human uses could undermine its success.

H.R. 1462 would allow the Governance Committee, formed under the Cooperative Agreement and composed of representatives of the three states, the Bureau of Reclamation, the Fish and Wildlife Service, water users, and conservation groups, to implement the Platte River Basin Recovery Program to recover three endangered species of birds and one threatened species of fish in the Platte River basin.

If passed, H.R. 1462 authorizes over \$150 million for implementation of the first increment of the program, through 2020. As it finalizes the legislation, the Committee seeks input on:

- Whether the program concept and structure is appropriate as a guide for river system management efforts
- Guidelines for land and water use within the Platte River system to meet the overall program goals, i.e., to ensure that irrigation and consumption support habitat (and associated species) recovery and are consistent with water quality and safety goals
- Whether the program elements and objectives are appropriate and sufficient to meet the overall Program goals
- How and when success or failure of the program can be evaluated, including appropriate science and monitoring needs
- Appropriateness of, and guidelines for, long-range planning of adaptive management of the system in the face of external drivers of change (including climate) to the river system and associated ecosystems.

Coaches: Anne Chin, Rashid Sumaila

Witnesses: Brendan Bohannon, David Lea, Paige Novak, Jeanne VanBriesen