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THE NEED FOR IMPROVEMENTS AND MORE INCENTIVES IN THE ENDANGERED SPECIES ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON RURAL ENTERPRISES, AGRICULTURE & TECHNOLOGY

OF THE

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HOUSE OF REPRESENTATIVES

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CONTENTS

WITNESSES

	Page
Pombo, Rep. Richard (CA-11), Chairman, U.S. House of Representatives Resources Committee	3
Wells, Mr. Mike, Chief of Water Resources, Missouri Department of Natural Resources	5
McNally, Ms. Nancy Macan, Executive Director, National Endangered Species Act Reform Coalition	8
Peterson, Mr. Bob, President, Ohio Farm Bureau Federation, American Farm Bureau	11
Wiseman, Mr. Larry, American Forest Foundation	13
Kostyack, Mr. John, Director, Wildlife Conservation Campaigns and Senior Counsel, National Wildlife Federation	15

APPENDIX

Opening statements:	
Graves, Hon. Sam	27
Prepared statements:	
Wells, Mr. Mike, Chief of Water Resources, Missouri Department of Natural Resources	29
McNally, Ms. Nancy Macan, Executive Director, National Endangered Species Act Reform Coalition	32
Peterson, Mr. Bob, President, Ohio Farm Bureau Federation, American Farm Bureau	50
Kostyack, Mr. John, Director, Wildlife Conservation Campaigns and Senior Counsel, National Wildlife Federation	54

THE NEED FOR IMPROVEMENTS AND MORE INCENTIVES IN THE ENDANGERED SPECIES ACT

THURSDAY, SEPTEMBER 15, 2005

HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON RURAL ENTERPRISES, AGRICULTURE AND TECHNOLOGY
COMMITTEE ON SMALL BUSINESS
Washington, DC

The Subcommittee met, pursuant to call, at 9:36 a.m. in Room 2261, Rayburn House Office Building, Hon. Sam Graves [Chairman of the Subcommittee] presiding.

Present: Representatives Graves, Christensen, Fortenberry, Grijalva, Udall

Chairman GRAVES. Good morning. I want to welcome everybody to this hearing. It is the Subcommittee on Rural Enterprise, Agriculture and Technology and the Small Business Committee.

Today we are going to be discussing the Endangered Species Act and the need to protect individual private property rights. I do appreciate everybody's participation in this hearing. I know a lot of folks have come from a great distance and I do appreciate that very much.

The Endangered Species Act was created in 1973 with the purpose to recover our nation's most endangered and threatened species. Although well intentioned, the Act has failed at its purpose, recovering approximately one percent of the listed species.

However, over the span of 30 years, the scope of the Endangered Species Act has expanded greatly. Currently, there are a total of 1,264 listed species, compared to just 109 when the Endangered Species Act was passed into law.

Now the increased scope of the ESA is impeding on the rights of landowners, with 80 percent of those species dwelling on lands owned and operated by farmers and ranchers.

The situation involving the Missouri River has piqued my interest in the Endangered Species Act. The Court has ruled that the ESA supersedes Congressional intent to provide for flood control and navigation along the Missouri River, which Congress enacted in 1944.

This has brought great distress to the region because of the uncertainty this ruling creates. In order to protect the habitat and increase the spawning habits of protected species on the river, the

Army Corps of Engineers has the authority to lower or raise water levels at points that would not support navigation.

This uncertainty in river flows in the past has caused major shippers to cancel their Missouri River operations and has caused extreme alarm for farmers in the Missouri River flood plain. Missouri farmers and small business owners have to live with these uncertainties year in and year out.

The financial burden this uncertainty creates is just another problem facing farmers in Missouri who continually face season after season of drought and rising energy prices.

Shipping costs by barge traffic is the cheapest and most efficient form of transportation for farmers. However, if the Missouri River cannot support navigation, farmers will have to find other more expensive modes of transporting their goods. This additional expense would be detrimental to their survival.

Farmers themselves, in my opinion, have become an endangered species, with only two percent of the population undertaking this important enterprise.

I consider myself a conservationist. I am a farmer by trade. It is in my best interest to preserve the ecosystem on my property, but I don't want to have to limit my harvest because of an endangered weed located on my property, especially when my family depends on a successful season.

I would like to see the Endangered Species Act work, but it is time to update this broken law and improve it so we can recover more species while preserving the rights of our property owners.

This is why I have introduced H.R. 3300, the Endangered Species Improvement Act. My bill seeks to create a voluntary program that provides incentives and compensation to landowners who participate in the recovery of endangered species.

Through this bill, it is my hope that landowners' rights will be preserved, more endangered species will be recovered, and a positive working relationship between the landowner and the government is going to be fostered.

Far too often, the landowner will try to cover up the fact that the endangered species is located on their property. Through HR 3300, it is my hope that this will end and landowners will welcome the opportunity to recover protected species.

Offering incentives will encourage participation and rid the negative feeling associated with the Endangered Species Act. Far too often, we get into "the shoot, shovel, and shut up" situation if you do find a species on your property.

Again, it is important to me that we consider the impact of landowners, farmers, and small businesses when making plans to recover species. We must find ways to work with people and not against them so we can all achieve our goals.

I think increased incentives is part of the solution. As a member of the Small Business Committee and Chairman of the Subcommittee on Rural Enterprise, Agriculture and Technology, I believe it is my job to see that farmers and small business owners are protected during the debate.

I turn now to Mr. Fortenberry.

[Chairman Graves opening statement may be found in the appendix.]

Mr. FORTENBERRY. Not at this time, Mr. Chairman. Thank you very much for your support on this.

Chairman GRAVES. Thank you very much. We have got panel one, which is going to be Congressman Richard Pombo, who is Chairman of the Resources Committee, who has jurisdiction over ESA, and Mr. Pombo, thanks for being here. I appreciate it.

STATEMENT OF THE HONORABLE RICHARD POMBO, CHAIRMAN, U.S. HOUSE OF REPRESENTATIVES RESOURCES COMMITTEE

Mr. POMBO. Well, thank you. Thank you, Mr. Chairman. I appreciate you holding this hearing and your attention to this issue.

We find ourselves in a situation with the Endangered Species Act where it is a law that is generally supported by the public. Saving, preserving, conserving our nation's endangered species, our wildlife, is a moral value that we as Americans share.

The problem that we face is that with the Endangered Species Act, we have a law that is a failure. It has not worked in the way that it was originally intended when it was passed 30 years ago.

The idea was is that we would recover species. Currently, we have close to 1,300 species which have been listed as endangered on the list, and out of that, less than 10 have been recovered.

Of those 10 that have been removed from the list, I would argue that probably half of them never should have been put on the list to begin with because of their inadequate science that was used in a listing process.

We also have a law where over three-quarters of the species which are listed, 77 percent, either have declining populations or Fish and Wildlife doesn't know what status the species is in.

That cannot be defended. A law such as that that is not working for its stated purpose is something that desperately needs to be updated. It is something that we as Congress have the responsibility to look at and change.

At the same time, we have had a number of conflicts with private property owners and economic development because of the way that the Act is implemented.

What we are trying to do in Congress right now is update the law, modify it so that it does a better job of recovering species. It puts the focus on recovery and at the same time removes some of the conflicts.

One of those ways and taken from a bill that was introduced by you, Mr. Chairman, is dealing with the incentives.

Right now, there is a built-in negative incentive that exists under the law. It is looked at as a negative if a property owner has an endangered species on their property, whether it is a plant, an animal, an insect, or what have you that has been listed as an endangered species.

They see that as a negative and they do what they can in terms of managing the property to not attract endangered species, to not protect the habitat, which works exactly the opposite way in terms of trying to work towards recovery of that species.

If you change those incentives, if you make it a positive for that property owner, you will have property owners managing their property differently.

One of the things that we have looked at quite extensively is a system or a series of grants and aid and tax incentives that would make it possible for someone to maintain an improved habitat on their own property, therefore increasing the amount of habitat for an endangered species and have the government be a partner with that.

Nearly 90 percent of the listed species have the majority of their habitat on private property. Because of that, the property owner has to be a partner. They have to be part of the solution. We can't continue to do it the way that we are doing it right now.

We have also seen and looked at other countries and the way that they have dealt with their wildlife and where they have had successes and not had successes.

The biggest successes that we have found anywhere are ones that have positive incentives that make it an economic incentive for the property owner to conserve species and conserve habitat. That is the kind of thing that we need to change.

We are also looking at in terms of the science that is used under the Act ways that we can improve the level of science. There is a lot of debate today about the level of science that is used under the Endangered Species Act.

It is a much lower bar than any of our other environmental laws that are in force, and raising that bar so that we have greater confidence in the science it used not only makes it easier to implement the Act, but it also gives us much greater confidence in the recovery plans and habitat plans, habitat conservation plans that are adopted in order to recover those species.

Also looking at the whole issue of critical habitat, what is actually necessary to recover a species? I think the focus needs to be placed on recovery and not on land use control.

We have seen over the years the Act has become more about land use control and less about recovery. We are trying to change that focus. We are trying to put the focus on recovery, what is necessary to bring those species back to a sustainable population. What kind of things do we need to do? What habitat is necessary to make that happen?

Those are the kind of things that we are changing in the law. We are working on a bill right now. We have been working for several months negotiating with members of the Committee, and it looks like within the next several days we will be able to put a bill together that will be introduced as a bipartisan bill with the majority of the Committee's support and be able to move that, and that is the direction that we would like to go.

Finally, I would just say, Mr. Chairman, that because of legislation like the bill that you introduced and others, we have been able to pull from a lot of different members a lot of different ideas as to ways to improve this and been able to incorporate much of that in the bill and the draft bill that we are working on now.

I believe because of that, we will have the kind of legislation that when it becomes law is something that they can implement and it will actually work, which is what all of our goal is.

So thank you for inviting me to be part of this hearing here this morning. I thank you for focusing the attention of the Committee on what is a very important issue.

Chairman GRAVES. Thank you very much. I appreciate you being here. I know you are busy and are going to have to run off. This is very important to small business, and unfortunately, too many times, it gets in the way of businesses doing what they need to be doing and that is running their business. But I do appreciate you coming in today and testifying.

Mr. POMBO. Thank you very much.

Chairman GRAVES. I want to point out too for the record all the statements made by members and the witnesses are going to be placed in the record in their entirety.

We will go ahead and seat the second panel now. Thanks, Mr. Chairman, for being here.

[Brief pause.]

Chairman GRAVES. Thank you all for appearing today. Again, I know some of you have traveled a long ways and I do appreciate that very much, coming in, and I look forward to hearing your testimony.

What we will do is basically just let everybody give their opening statement. Then we will open it up for questions, which I know that I have a few. Propriety is fairly informal.

We don't use the timing mechanism. We tell everybody they have five minutes, but if you have something to say, I want you to say it and so we usually don't depend on the timers too much. In fact, we don't even have them here today. So we will see how it works out.

First, we have got Mike Wells with us today. He is Chief of Water Resources with the Missouri Department of Natural Resources out of Jefferson City. Mike, I appreciate you being here and thanks for coming and I look forward to your testimony.

STATEMENT OF MIKE WELLS, MISSOURI DEPARTMENT OF NATURAL RESOURCES

Mr. WELLS. Thank you. Good morning, Mr. Chairman and the Committee. My name is Mike Wells, and I am Deputy Director of the Missouri Department of Natural Resources and the Chief of Water Resources for the State of Missouri.

The Department of Natural Resources is the agency that has statutory responsibility to the state's water resources.

As Chief of Water Resources, I represent the state in all interstate water issues. I want to thank Congressman Graves for inviting me to give testimony this morning on this very important issue.

Let me begin by saying the State of Missouri is truly concerned about protecting endangered species and the natural habitat along our rivers.

In fact, we were one of the earliest proponents for increasing funding for habitat restoration projects in and along the Missouri River, which is an issue we continue to support.

However, we take issue with the manner in which the Endangered Species Act is being applied in the management of the Missouri River.

Instead of the flow changes that are being proposed, we strongly believe there are common sense ways to protect the species without harming citizens who live and farm along the Missouri River or who rely on the river for their livelihoods.

The Missouri River is a vital resource for the State of Missouri, providing drinking water to over two million of our citizens, cooling water for our utilities, waters to support navigation, unique recreational opportunities, and a valuable fish and wildlife habitat.

We are concerned that changes in the management of the river which some have characterized as necessary to comply with the Endangered Species Act will be harmful to many of these uses.

In December 2003, the U.S. Fish and Wildlife Service released an amended biological opinion which found that the U.S. Army Corps of Engineers' operations of the Missouri River would cause jeopardy for the pallid sturgeon, an endangered fish.

Far too little is known about the pallid sturgeon, its life history and its needs. Yet, the Endangered Species Act is being administered in a very prescriptive manner when more reasonable courses of actions seem to be available.

The Service has mandated certain actions based on questionable science and with little or no regard for the significant adverse environmental impacts and economic consequences of the action.

These mandates include a summer low flow and spring rise. The Service demanded a period of low flow during the summer even though scientists have shown that this would produce minimal benefits for the species.

Habitat restoration projections undertaken by the Corps of Engineers has created 1,200 acres of shallow water habitat since 2003.

This habitat precluded the need, at least for now, for summer low flows. This alternative action was much less harmful to the other uses than the flow changes.

In their opinion, the Service also indicated a spring rise was needed as a spawning cue to ensure the continued survival of the pallid sturgeon.

The Service prescribed a spring rise despite the fact that fishery scientists had indicated that water temperature and photoperiod and not flow may be the controlling factors for pallid sturgeon spawning.

Even today, the Service continues to insist on the manmade spring rise which would increase river levels by one to three feet during May and June.

The Missouri River is free-flowing for more than 800 miles below Gavins Point Dam, which is the lowest of the six dams of the Missouri River reservoir system, to the confluence of the Mississippi near St. Louis.

More than 550 of these miles are within the State of Missouri. Water released from Gavins Point Dam can take 10 to 12 days to travel this distance.

Once water is released from Gavins Point Dam, it cannot be retrieved. Given that local rainfall has caused the Missouri River to rise up to 10 to 12 foot in less than 24 hours in our state, it would be unwise to implement an artificial spring rise that would add additional feet of water to the river during the spring.

An artificial spring rise would compound interior drainage and flooding problems for our farmers and communities along the river.

In most years, the State of Missouri already experiences natural spring rises. With spring being the time of the year when Missouri floodplain farmers are already at the greatest risk at being flooded,

artificially adding even more water to the river in the spring will only intensify this risk.

The Missouri River's floodplain encompasses approximately one million acres in Missouri. Much of this is prime farmland.

Any manmade or artificial spring rise that puts floodplain farmers and riverside communities at greater risk of being flooded is counter to the 1944 Flood Control Act.

Congress expressly established the Missouri Reservoir System to control flooding, not to flood farmers.

In light of this fact and the uncertainty about the pallid sturgeon needs, it is illogical for the federal government to implement a plan that would increase the risk of flooding.

The Service is characterizing the artificial spring rise which they speculate will only benefit approximately 200 miles immediately below Gavins Point Dam as an experiment. The federal government should not be conducting experiments that threaten people's livelihoods.

The range of the pallid sturgeon includes over 1,600 miles of the lower Missouri and Mississippi River and a significant reach of the Yellowstone River in Montana that all have spring rises, natural spring rises now.

By focusing on habitat development in and along these reaches, the Service and the Corps could take advantage of reaches of river that have more natural hydrographs. This would avoid the contentious issues related to flow while providing benefits to the pallid sturgeon.

It is unreasonable for the federal government to consider a flow plan that may only benefit the pallid sturgeon for less than a 200-mile reach of the Missouri River.

A common sense application of the Endangered Species Act would suggest that the federal government should concentrate research and recovery efforts on the nearly 1,600 miles of river that already have a spring rise instead of conducting an experiment which could harm downstream citizens.

Let me reiterate that the State of Missouri is truly concerned about protecting endangered species and natural habitat along our rivers, but we believe that there are common sense ways to protect the species without harming our citizens. We rely on the Missouri River for many uses.

I thank you for this opportunity to testify and I would be glad to answer any questions.

[Mr. Wells' testimony may be found in the appendix.]

Chairman GRAVES. Thank you, Mr. Wells. I appreciate your testimony.

Next we are going to hear from Nancy McNally, is that correct?

Ms. MCNALLY. That is correct.

Chairman GRAVES. Executive Director of the National Endangered Species Act Reform Coalition here in Washington. I appreciate you coming over and I look forward to your testimony.

STATEMENT OF NANCY MACAN MCNALLY, NATIONAL ENDANGERED SPECIES ACT REFORM COALITION

Ms. MCNALLY. Thank you. I appreciate the opportunity to be here, Mr. Chairman, delegates to the Committee and Mr. Fortenberry.

As everyone knows and we talked about a great deal, the Endangered Species Act was enacted over 30 years ago with the promise that we can do a better job of protecting our species and the habitats on which they depend.

Today, over 30 years later, on behalf of the National Endangered Species Act Reform Coalition, I bring that same message back to the Subcommittee. We can and must do better.

We have learned many lessons over the past three decades about how and what can be done to protect the endangered and threatened species.

One of those important lessons that we have learned is that all too often, the ESA has created conflict where partnership and cooperation has been needed.

N.E.S.A.R.C. is pleased to testify this morning about ways to introduce incentives into the process that will allow landowners and property owners to voluntarily cooperate in species protection efforts, which we continue to believe is one of the most effective ways to ensure that we address the species' needs.

We also want to take the opportunity before I go any farther to commend Subcommittee Chairman Graves on your leadership on the introduction of H.R. 3300, the Endangered Species Improvements Act of 2005.

N.E.S.A.R.C. supports H.R. 3300, and we believe it introduces a critical new element to the ESA by providing financial incentives for landowners to develop species recovery agreements that will protect and restore habitat for listed and candidate species.

We are very pleased to note Chairman Pombo testified this morning that he is looking to include measures like yours into the product that they are putting together for consideration by the Resources Committee, and we certainly have been an advocate for that inclusion. We think it is an important piece of legislation.

Before I go any farther, let me step back and briefly describe NESARC. The National Endangered Species Act Reform Coalition members come from a wide range of backgrounds.

Among our ranks are farmers, ranchers, cities and counties, water districts, rural irrigators, electric utilities, forest and paper operators, mining companies, aggregate companies, homebuilders, and other businesses and individuals throughout the United States.

What our members have in common is that they have been impacted by the implementation of the Endangered Species Act and they want to update and improve the Act.

Attached to my testimony is a NESARC white paper that was developed last year after an extensive dialogue with our members.

We stepped back from a long debate that has been fraught with polarization over the years and said, what do we really need to do going forward?

We have a lot of experience under the Act. We need to look at the successes that we have had in species protection, and we need

to look at the roadblocks that we have experienced and see what we can take away and learn from both the successes and those failures and look for ways to improve the Act so that we can draw upon the successful areas and make those more the norm than the exception with implementation of the Act.

We identified several key issues that our members would like Congress to consider, and I am going to quickly go through them because everyone has a copy of the white paper.

First and foremost, we wish to expand and encourage voluntary conservation efforts by landowners. We found that a universal concern with the Act is that it does not fully promote and accommodate voluntary conservation efforts.

A critical element of updating and improving the Act must be the development of additional voluntary conservation programs that encourage landowners to participate in species conservation efforts.

These incentives can take the form of voluntary species recovery agreements as you have outlined in H.R. 3300, and there are a number of other approaches that can be adopted as well.

We are not looking at one particular goal as incentive but believe we need to look at a variety of incentives that would work. Modifying existing programs like Safe Harbor Agreements is also something that the Coalition has looked at.

Second, we believe we must give the states the option of being on the front line of species conservation. We need to take advantage of state and local expertise and abilities by providing more flexibility so that states can facilitate voluntary efforts to protect and enhance species population.

Third, we believe Congress should increase funding for voluntary and state programs for species conservation. We need to financially support the voluntary programs and state and locally run initiatives that are critical to ensure species recovery.

Fourth, we must encourage prelisting measures. We need to promote efforts like the collaborative efforts by states, local governments, and private parties to develop most recently the sage grouse protection program to address species' circumstance before they have to be listed under the ESA. Bring the parties together early on and see what we can do to be helpful to the species before it gets to that critical point.

Fifth, we must establish recovery objectives. Establishing recovery objectives will give us a goal to work toward, and when that goal is reached, the species will be removed from the list.

Next, we must improve habitat conservation planning procedures and we would seek to codify the current no surprises policy.

The HCP process has the potential to be a success story, but too often, property owners are stymied by the delays and the cost of getting approval of the HCP.

Landowners involved in conservation efforts need to know that when they enter into these agreements, a deal is a deal, and that is why we would like to codify no surprises.

Finally, and this should go without saying it is so obvious, we must ensure an open and sound decision making process. The ESA must be open to new ideas and data.

We need a decision making process that allows for full public participation, better data collection, and independent scientific re-

view to support the listing, critical habitat, and recovery provisions under the Act.

While each of these elements that we have outlined is important, the need to encourage cooperative conservation activities by landowners deserves special attention.

We are pleased that you are focusing in on that in the hearing this morning. What many people do not recognize is that protecting species in their habitat requires financial support, it requires time, it requires technical expertise.

So we support H.R. 3300 as introduced precisely because it recognizes these complexities and addresses the key considerations that arise in species conservation efforts by landowners.

Specifically, we are very pleased that H.R. 3300 takes a voluntary approach to conservation efforts. We think that is critical to bring landowners into these types of agreements.

We believe that financial incentives for participating landowners is critical as well. One of the biggest hurdles for conservation activities is identifying ways to fund the work that must be done.

A required element of the species recovery agreements authorized under your legislation, Mr. Chairman, is the provision of compensation by the Secretary.

This will help ease the financial burden on landowners for developing the necessary protection and restoration activities.

While we all recognize that funding is a difficult question, when we try to figure out where that funding will come from, we do believe that it is critical that as we all look towards this national goal of protecting species, we share in that burden of the cost.

Finally, 3300 provides technical assistance, again, one of those things that probably is stating the obvious but sometimes gets lost in the rhetoric of the debate.

Most landowners are not biologists and few, if any, will have expertise to independently identify the appropriate measures needed to help species on their property.

Providing technical assistance, as H.R. 3300 does, and management training will increase the likelihood of enrollment and ultimately create a broader, more effective program. So we believe that is critical.

For more than a decade, Congress has struggled with the question of what, if any, changes to the ESA should be made. In the interim, landowners and businesses have had to take the existing Act and make it work.

It has been time-consuming, expensive, often frustrating, and the successes have been limited. While many species' populations have stabilized, maintaining the status quo is just not good enough.

We need to find a way to do a better job of conserving our species. We need to find new and more effective ways to reach this goal of the ESA.

N.E.S.A.R.C. urges this Committee and the remainder of the House and the Senate to take stock of the lessons we have learned today and the successes that we have had in order to identify important improvements that are necessary to make the Act work better in the future.

We appreciate your leadership in looking at the voluntary incentives as one component of that. Thank you.

[Ms. McNally's testimony may be found in the appendix.]

Chairman GRAVES. Thank you very much.

Next we have Bob Peterson, who is President of the Ohio Farm Bureau Federation, and he is here also representing the American Farm Bureau Federation. You come to us from Sabina, Ohio and I appreciate you being here. Thanks for coming.

STATEMENT OF BOB PETERSON, OHIO FARM BUREAU FEDERATION

Mr. PETERSON. Thank you. Glad to join you. I need to applaud you on your pronunciation. You are the only person I know that can pronounce Sabina correctly the first time out.

Good morning. I am Bob Peterson. I am a grain and livestock farmer. I have the pleasure of serving as the President of Ohio Farm Bureau and then with American Farm Bureau board of directors.

I also appreciate the opportunity to be here today to talk about the needs for more and better incentives under the Endangered Species Act. I ask that my written statement be submitted for the record.

The need for these incentives is readily apparent when you realize that almost 80 percent of listed species occur, to some extent, on private lands.

Almost 35 percent occur exclusively on private lands, meaning that they are totally dependent on the actions of private landowners for their continued existence.

Most of these lands are agricultural lands. Cooperation of private landowners is essential if the Endangered Species Act is to be successful.

Farmers and ranchers enjoy the benefits of having wildlife on their lands. Most farmers and ranchers are already taking measures on their own to protect listed species and habitats. They need the tools to be able to do it better.

Many landowners would like to protect listed species, but the Endangered Species Act as currently written makes that difficult.

Most farmers and ranchers are also small businessmen and businesswomen who can least afford any adverse impact from endangered or threatened species on their lands. The Endangered Species Act does not address the needs of many small businesspeople.

We support H.R. 3300 because it provides a framework for an Endangered Species Act cooperative conservation program that addresses the needs of small businesses such as farmers and ranchers. We commend the Chairman for introducing the bill.

The Farm Bureau has long supported the use of cooperative conservation as a way to implement the Endangered Species Act. We are convinced that cooperative conservation is a win, is a way to make the Act work for both landowners and for species, producing a win-win situation for both.

The Ohio Farm Bureau plays a leadership role in collaborative efforts with government agencies and other organizations to develop and implement voluntary, flexible conservation programs that provide a wildlife habitat for land and aquatic species.

Our sleek, environmental assessments and water quality testing programs have resulted in landowner engagement and a multitude

of working land conservation initiatives benefiting the listed species.

The White House recently sponsored a conference on cooperative conservation in St. Louis in which the American and Ohio Farm Bureaus participated.

We were heartened by the commitment from the Administration's top officials from five cabinet-level departments, the Interior, Agriculture, Commerce, Defense, and EPA.

The need for greater flexibility in the Endangered Species Act was among the most cited changes that were needed.

We believe that H.R. 3300 provides farmers and ranchers the flexibility they need to meet their land-use goals while at the same time providing effective protection for listed species.

The voluntary species recovery agreements specified in the bill allows both the landowner and the government agency the flexibility to craft an agreement that will provide maximum benefits to both species and the landowner.

A voluntary incentives-based program should be responsive to the needs and concerns of private landowners.

Some are concerned with the impact the estate taxes will have on their ability to pass the operations along to future generations. Some others are concerned about maintaining a cash flow that would allow them to meet the bank loan payments and other obligations. Some are concerned about whether they will they be able to continue to operate with the listed species on their property.

An effective program should include a choice of direct payments, estate tax or property tax or other tax deductions or credits or simply the removal of ESA disincentives or restrictions. One size does not fit all.

Other elements that are essential parts of any cooperative conservation program include it must incorporate working landscapes and not be strictly a set-aside program.

It must provide certainty to landowners, and once an agreement is in place, no additional management obligations or restrictions will be imposed.

It must provide incidental-take protection to landowners who enter cooperative conservation agreements. Lands covered by cooperative conservation agreements must be excluded from critical habitat.

Critical habitat designation would be a duplication in terms of cooperative conservation agreements.

I thank you for holding this hearing on this important and timely issue. I look forward to answering any questions that you may have later.

[Mr. Peterson's testimony may be found in the appendix.]

Chairman GRAVES. Thank you, Mr. Peterson.

Next we have Larry Wiseman with the American Forest Foundation here in Washington. I appreciate you being here. I look forward to your testimony.

STATEMENT OF LARRY WISEMAN, AMERICAN FOREST FOUNDATION

Mr. WISEMAN. Thank you, Chairman Graves. Along with spending a lot of time in Washington, I spend a lot of time working with members of our American Tree Farm System.

The American Tree Farm System encompasses about 80,000 individuals, families mostly, who are engaged actively in the most significant of enterprises, growing trees.

Our members manage together about 35 million acres of America's forest land. Together with four and a half million other individuals, they own about two-thirds of America's forest land.

In other words, families and individuals are the majority owners of America's woodlands, not the feds, not the states, not industry, but families, all of them working in small enterprises in most of the states of the union.

Like many small enterprises, most of the decisions that these folks make about their business are made around the kitchen table.

Increasingly, as I have sat and drank tea, sweetened and unsweetened tea in various parts of the country with these folks, I sense a recognition among them that the decisions made in hearing rooms like this will have as much impact on the future of their enterprise as the decisions that they make around the kitchen table.

For that reason, we are very pleased and honored to be here today, because it isn't often that people recognize the valuable role that family forest owners, most of whom are not farmers, most of whom aren't ranchers, play in supporting rural economies in rural environments.

Indeed, fully two-thirds of the fiber that is grown to support our wood and paper industries in the United States are grown by these family enterprises.

That industry in turn supports about a million plus jobs, many in rural communities, many among the most important sources of jobs for those rural communities.

So what happens to family forest owners, what they can and can't do, has a profound impact not just on the environment and the economy but also on the culture and heritage of rural America, so we very much appreciate the opportunity to be here.

Most of our members, when we talked to them about why they own land put wildlife recreation aesthetics as their primary reasons for owning land.

Very often, many of the folks in Ohio and elsewhere who are members of the American Tree Farm System will say that their goal is to leave the land better than they found it and then to continue that heritage of stewardship by their family.

Many of them actually welcome the opportunity to manage for endangered species. What happens, sadly, as the other witnesses have pointed out, is that they often lack the knowledge and the technical skills and most importantly, the resources to implement the practices that are needed for these ecosystem services.

Just to give you an example, there was an article in USA Today on Tuesday featuring one of our members, Judd Brooks, a tree farmer in Mississippi who has spent the last 30 years creating a beautiful forest, I have been on it myself, 2,100 acres, and he was managing it not just for income and an asset but also as gopher

tortoise habitat, one of the critical endangered species in that part of the world.

Post-Katrina, Judd's trees were all lying on the ground, and he has no way of supporting the restoration that will be needed not just to put his enterprise back together again but to continue the work that he had been doing with us and with other organizations to protect the gopher tortoise and associated habitats.

Whatever the motives for owning forests, family forest owners need cash flow. They need income to pay taxes and insurance to invest in the future of their land.

If they believe that endangered species protection is going to tip their cash flow the wrong way, many of those who have the opportunity to sell for development at hugely inflated prices will choose to do so, and that is bad for the environment.

Now some owners of course may choose that as a potential land use and we certainly endorse that. That is their right and perhaps within the context of their family or obligation.

However, many would want to stay on the land, and they would view species conservation not just as something that is important to them but as a service they provide to the public.

They believe that that service is not only valuable to the public; it is a service that is worthy of public support. Share the costs of endangered species protection through incentive programs.

You are familiar with many of the incentive programs that exist today for forest and species conservation. They are meager. They are confusing. There was some $4 billion in unfunded applications for conservation projects last year, and of those that were funded, a very, very tiny fraction went towards forest conservation.

Many of these folks just aren't on the radar screen in some states. Under the EQIP program, which is the largest federal conservation incentive program, less than two percent nationwide of expenditures were directed at forest conservation practices.

Given that about half the rural land in the U.S. is forested, not farmed or ranched, that suggests that we have a disparity that we have to understand.

H.R. 3300, let me compliment you, Chairman Graves. It is the first time I was able to pick up a piece of legislation, read it from page one to page two, just two pages, and understand exactly what you were getting at. I was very impressed. Even I could understand it.

It addresses a lot of concerns that our people have with endangered species policies. It addresses regulatory uncertainty. We like the notion of a contract which specifies which practices will be used.

It addresses the notion of simplicity. Right now, people don't know where to go, who to call. Once they get in the door to a program, there are so many applications and committees and requirements and priority listings that very often, they just say I quit. The program's simplicity is an enormous virtue and one that we see clearly demonstrated in H.R. 3300.

There are a few things that we would like to see improved in endangered species policy generally. Some of the issues that surface in H.R. 3300 that we draw your attention to, many of our owners plan for the long haul.

They plan for 30, 40, 50, 60, 70, and 80 years and then they cross their fingers and hope a hurricane doesn't come. Insurance isn't available for these folks, generally.

We appreciate that H.R. 3300 recognizes those existing operations within the context of an SRA. However, some people may want to change their operations, and we hope that, over time, they would be able to do so through an SRA that had some flexibility in that regard.

Model agreements, that is an interesting idea. It is a tough one, I think, one that we would counsel some flexibility for.

A lot of different species are out there and management practices will vary from region to region, state to state, even site to site, so some flexibility needs to be built into that.

The length of the agreement, five years, is short. Our members are deeply interested in not obligating their great, great, great, great-grandchildren to agreements that they make tomorrow.

So perpetuity is obviously too long, but five years may be a term not quite long enough to address some of the species' considerations that have to be addressed at the forest level.

Lastly, I'm worried about outreach and education. Although the witnesses have talked about the importance of technical assistance and resources, currently the Department of Interior, Fish and Wildlife Service has lowered the funding available for outreach and education, focusing their dollars on acres restored on particular properties.

That is easy to count. Acres are easy to count, but in so doing, by not funding outreach and education, they undermine one of the most important ways that new practices and new technologies move from place to place in rural America, and that is the peer-to-peer mentoring and the outreach and education that can magnify an investment in 100 acres through a change in practices on 10,000. I would encourage you to think of that as you continue.

With that, sir, let me thank you for the opportunity to testify on behalf of our 80,000 members.

Chairman GRAVES. Thank you very much, Mr. Wiseman.

Next we are going to hear from John Kostyack, who is the Director of the Wildlife Conservation Campaign and the Senior Counsel for the National Wildlife Federation here in Washington, is that correct? I appreciate you being here very much. Thank you.

STATEMENT OF JOHN KOSTYACK, NATIONAL WILDLIFE FEDERATION

Mr. KOSTYACK. Thank you for having me, Chairman Graves, and Chairman Graves, Congressman Udall, Congressman Grijalva, and Delegate Christensen, I really appreciate the opportunity to testify today.

The bill that is the focus of this hearing, H.R. 3300, the National Wildlife Federation believes is an excellent starting point for addressing the needs for better endangered species conservation incentives.

We support this bill, subject to a few suggested improvements, which I would like to get into in my testimony today.

First, I would like to address some of the myths and facts about the Endangered Species Act and its accomplishments, because that is how we opened up the hearing.

We heard Mr. Pombo stating that the Endangered Species Act is a failure and that it is sort of the predicate for everything we do from here.

That is contrary to the data. We have been researching this issue, studying it, looking at it, talking to people around the country who are implementing this law, looking at the statistics generated by the U.S. Fish and Wildlife Service and NOAA Fisheries, and it has been a remarkably successful law, especially considering the limited resources that have been provided, as we have heard from the previous witnesses.

Here are three crucial facts based completely upon U.S. Fish and Wildlife Service statistics that no one has contested.

Roughly 99 percent of the species ever protected by the Endangered Species Act are with us today. In large part due to the Endangered Species Act, they have been kept from disappearing into extinction. They were headed toward extinction. The Endangered Species Act came along. Today, they are here for our children and our grandchildren.

Number two, of the species whose condition is known, 68 percent are stable or improving. Mr. Pombo focused heavily upon the unknown condition as in one whose condition is unknown, blamed that on the Endangered Species Act, assumed all of those are headed to extinction.

Well, the fact is the fact that we don't know the condition of some species is not the fault of the Endangered Species Act. In fact, the Endangered Species Act has spurred more research on wildlife than any other law or program, but we have a situation where there is inadequate funding, and that is not the fault of the Endangered Species Act that we don't have the funding needed to identify the condition of those remaining species.

The third statistic is perhaps the most important one. When species are protected by the Act, their condition stabilizes and improves over time.

In other words, yes, you can find a significant number of species that are declining in the five or 10-year period after listing, but if you look at the period over time, if you look at the individual five-year segments, every time you look at another five-year segment, you find that more and more species are joining those categories of stable and improving in the Fish and Wildlife Service recovery reports. That is fundamental. The Act is working.

Now we have wildlife icons such as the gray wolf, the Yellowstone grizzly, our nation's symbol, the bald eagle, and these are major success stories with increase in populations thanks to the Endangered Species Act that we should all be celebrating.

We have other species like the whooping crane, black-footed ferret, California condor that at the time they were listed by the Endangered Species Act, they were at the absolute brink of extinction.

Today, their numbers are rebounding where you can go out there, and I have done with my kids, go out there and enjoy these species, and it is another thing that we should be out there celebrating. They were on a glide path to extinction when the Endan-

gered Species Act came along. We have turned them around. Let us celebrate that fact.

It is not just the species. We have habitats that benefit. The ecosystems that people depended upon, not just wildlife, for drinking water, clean air, flood protection, quality of life, recreation, these remain functional, oftentimes in large part to the Endangered Species Act.

The critics of the Act were focusing primarily on a single statistic, the fact that only a handful of species have recovered to the point where they can be delisted, but the main factors that lead to the fact that we have not gotten to recovery and delisting for most species are ones that are unrelated to the performance of the Endangered Species Act.

There are three. One, inadequate funding. We heard about it from all these witnesses. It is a perennial problem.

Two, slow biological processes. If the reproductive phase of a species in wildlife is 50 years, then you can't expect to turn that species around in 10 years.

Most species, the median amount of time they have been on the endangered species list is 15.5 years, and if you look at the recovery plans of all the listed species, the experts on these species are all saying median time for recovery 30, 40, 50-year range.

So to blame the Endangered Species Act on the fact they have not gotten to the point of recovery and delisting is just ignoring that biological fact.

Finally, the Endangered Species Act contemplates in a very common-sensical way that if you are going to remove the protections of the Endangered Species Act due to recovery, you need to have adequate regulatory mechanisms in place so the species doesn't immediately slip back toward extinction and completely squander all the investment we made in that recovery.

It is not the fault of the Endangered Species Act that we do not have an alternative safety net in place for so many species that are approaching the point of recovery.

So these are all factors beyond the control and influence of the Endangered Species Act that makes it essentially a difficult but right now inalterable fact that we don't have a lot of species delisted.

Now let us talk a little bit about H.R. 3300, because I really do want to focus on what is positive. Today, we have a bill that I think is extremely encouraging.

The Endangered Species Act certainly would benefit from Congressional attention in certain areas, and the area where attention is most needed is the very area targeted by H.R. 3300, the lack of sufficient funding and technical assistance for private landowners and others who are interested in carrying out recovery actions.

The Act does have a number of provisions calling for recovery actions, but it doesn't specifically address the need that we just heard from these other witnesses, the farmers, the private landowners, small businesses who are particularly on working landscapes who want to help make recovery happen but lack the funding and the technical know-how to do so.

This is crucial, because as we have heard from the other witnesses, roughly 80 percent of all the listed species rely in part on private lands for their survival and recovery.

Leaving those habitats alone is just not enough. Protecting them from harmful activities won't do it. For most endangered species, we are going to need active restoration and management. That means lighting prescribed fires; removing invasives; building wildlife crossings over roads that are leading to so much mortality and fragmenting habitats; planting, repairing, and vegetation.

These measures are all costly. Private landowners and others are not likely going to be able or willing to take them without a helping hand from the government.

So, for that reason, National Wildlife Federation supports H.R. 3300 with a few modest changes, because this is the bill that addresses that fundamental challenge we have.

But there are five changes we would like to recommend, and I will go through them quickly. I go into them in much more detail in our written testimony.

First and perhaps most important, the species recovery agreements, which I think is a great concept, that has to be a line with the recovery plans that are already being prepared and approved pursuant to Section 4[f] of the Endangered Species Act.

The way the bill is written right now, the Secretary conceivably could be approving agreements that are completely at odds with the recovery plan.

Recovery plans are the blueprint that are supposed to be directing all of our resources to the management and restoration of these species. The last thing we want to do is jeopardize the investment we have made in the recovery plans. Oftentimes, they are prepared over a series of years, enormous stakeholder involvement from conservation and industry groups, lots of resources.

We don't want to then start approving agreements that are inconsistent with what was just completed in the recovery planning process. We would recommend that the SRAs be aligned with recovery plans.

Second, the role of states should be acknowledged by simply including them among the qualified recipients of species recovery agreements.

They are often in virtually every state the crucial player in management and restoration of imperiled species, and they should be on the ground floor of this species recovery agreement innovation.

Third, the language relating to integrated with existing operations, we think that is an unnecessary limitation.

I think consistent with what some of the other witnesses were saying, species recovery agreements are completely voluntary, and so there is no reason to place that limitation on the types of SRAs that landowners can proceed with.

Fourth, and this is perhaps an oversight, the two types of species that are currently qualified to benefit from these agreements are listed and candidate species, candidates presumably because they have already been deemed warranted for listing.

But there is another category of species that also have been deemed warranted for listing known as the proposed for listing cat-

egory, and we suggest they be added as well. We think that is a pretty minor and technical amendment.

Finally, just for not only good government, but to benefit landowners, we think there ought to be a database at least on the Internet, perhaps available in paper or hard copies as well, of all species recovery agreements that are approved.

That is basically going to be the knowledge base that landowners and conservationists can turn to to build on for their own innovations and also hopefully will improve transparency, which we have been lacking in a lot of these grant programs and ensure the tax dollars are wisely spent.

Let me just wrap up. We are hopeful that H.R. 3300, with these targeted improvements, will herald a new era in species conservation.

It is going to take meaningful funding. It is one thing to authorize. You then need to follow up with the appropriations, and when I heard that number about 4 billion, my jaw dropped, but I guess it shouldn't be too surprising to have $4 billion worth of conservation projects waiting out there that are unfunded, and that is significant. That needs to be addressed.

But if we want to save our nation's endangered wildlife for future generations, we are going to have to lend a helping hand to private landowners, so we commend Chairman Graves for moving forward this bill.

At the same time, we just want to leave with one cautionary note. Congress cannot think that it can use these voluntary incentive programs to replace the safety net protections of the Endangered Species Act. It is these mandatory protections that help to keep hundreds of species from disappearing into extinction.

They have fostered collaborate exercises all across the country that would never have happened without the Endangered Species Act.

In fact, one of them is on the Missouri River. We have had a multi-state, basin-wide collaboration to save that river, to essentially keep it a living river, that perhaps would never have happened without the Endangered Species Act.

So the only way to make the Endangered Species Act work and to have a productive Endangered Species Act reauthorization debate is to recognize the tremendous value provided by both the voluntary incentive programs and the Act's safety net features.

Thanks for the opportunity to testify. I would be happy to answer questions.

[Mr. Kostyack's testimony may be found in the appendix.]

Chairman GRAVES. Thank you, Mr. Kostyack.

I do have a couple of things I want to get some clarification on with the various parts of the testimony, and I am going to start with Ms. McNally.

You mentioned the safe harbor agreement. Could you explain that in a little bit more detail?

Ms. MCNALLY. Sure, Mr. Chairman. There are two policies that were put in place during the Baffid Administration, safe harbor agreements and the notice to parties of policy, both of which would give the landowner some certainty that when they enter into an

agreement with the government for protection of a species and its habitat that that would be protected for a period of time.

Again, one of the things we personalize with businesses today is that landowners need some certainty. One of the things that we hear when we go out and talk to folks about this is, as you have heard from witnesses today, we want to protect the species.

We want to be good stewards. We want to be able to do the right thing, but we need to know what the right thing is, and we need to know if we ask to delay and we delay that we are not going to get in trouble for it or find out later that we should have done C or D.

So they are agreements that are administrative policies now that are in place that would bring some of that certainty to this process, and our members have worked over time to codify this and will be working on the policies.

Chairman GRAVES. Could you also explain, you talked a little bit about and touched on it, the prelisting and how it would improve the ESA?

Ms. MCNALLY. One of the things that we have often talked about and I think John would actually agree with this is that the Endangered Species Act is when a species is in crisis, then we look at putting in place a lot of regulatory mechanisms to protect that.

Frankly, that is where a lot of our conflict arises as we go forward. The ultimate goal and I think everybody agrees that the ultimate goal is to make sure that we do as good a job as possible of preserving the species and preserving the habitat where necessary to preserve the species.

Let us get ahead of the curve. Let us not wait until we are in that crisis situation where all the regulatory mechanisms have to come into place.

So, for instance, with the sage grouse, which you will assess potentially I think it was listed in 13 states, with a lot of regulatory restrictions.

The landowners came together, the property owners, the states, the local governments, and they worked with the federal government to say how can we put into place now a program that we all agree will help protect the sage grouse going forward before we get to that point where it has to be listed and triggers all the regulatory mechanisms.

That has been incredibly successful. If you bring people around the table at the beginning of the process and invest them in the process where they feel like they are part of decision making in terms of what to do to protect the species, you not only get a great deal more investment from the landowners in the process, I believe you get a better outcome for the species.

One of the things that people have chafed against is feeling like once the Endangered Species Act's hammer, for lack of a better word, comes down, that they don't want to be subject to it. They don't want to deal with it.

If you make them a part of the process before the species is listed, I think you just have a much better atmosphere going forward with a lot better results for the species. So we would like to see those types of actions implemented going forward.

Chairman GRAVES. Mr. Wells, you mentioned and we all know it is at least those of us in Missouri know, the changes to the Missouri River and the drastic changes in terms of what we are doing with flow. It is affecting the entire river from one end to the other, you know, and we are doing that, those drastic changes, for basically and you mentioned the 200-mile stretch.

You might explain that in a little bit more detail what is taking place and what they are hoping for. Just a little bit more detail.

Mr. WELLS. Okay. Well, as I mentioned, in the State of Missouri, you know we are in the lower river, especially where the Platte River comes in in Nebraska, which is about 200 miles below Gavins Point Dam, which is the lowest dam.

We get a significant spring rise every spring. So we have a spring rise there. That is the spawning cue for the pallid sturgeon, and then from that point where the Platte comes in all the way down the Mississippi and Atchafalaya actually, its all the range for the pallid sturgeon.

We have at least 1,600 miles of river already available. We just need to work on habitat and find out what we need to be doing in this part of the river.

Let us do our experimenting here where we already have natural spring rises. Let us not do the artificial spring rise.

The area right below Gavins Point Dam right now, again, is about 200 miles before it hits the Platte River is the area we are focusing on now.

We have been told this is a controlled experiment. In other words, you can release water out of Gavins Point Dam at a certain time of the year and all the researchers can be lined up to see what it looks like when this comes out.

It is a little more difficult, obviously, down on our part of the river around Jefferson City and Boonville in those areas where you don't know when you are going to get the rise, so you have got to be out there all the time during the spring of the year and monitoring.

So I think that is part of the difficulty, but it also puts our farmers and our cities at a greater risk of being flooded.

Just a good example, this spring, as you well know, the river was very low for a period of time, and then late May, early June, we had a significant rise, about 12 foot at St. Joe overnight in the middle of May, and it stayed there for an extended period of time.

During that period of time, we had quite a bit of local rainfall. It didn't go over any levees, so we didn't flood anybody out by going over levees, but our drainage gates were closed.

From the time we got the rain on the Tarkio and some of the other tributaries, all this water backed up, and we estimated we lost or damaged about 100,000 acres of crops in the spring from the natural spring rise.

So that is the fear that our people downstream have with it. If you add an additional increment of water on that or if you extend that period of time, you just increase the risk of flooding.

Chairman GRAVES. Is anybody paying attention to the interior drainage issues? You know, when a lot of people think about what is being done to the Missouri River, for instance, they think just in terms of that river, that it is just going to affect that river.

You touched on interior drainage. The fact is we have tributaries that are flowing into that river everywhere, and they do back up. Those flood gates close or whatever tributary it is just backs up and water, for the most part, you know, doesn't move.

It does backflood all of those areas, and nobody seems to be paying a whole lot of attention to that. It affects people, miles and miles off of the Missouri River just from the backup of those interior drainages. Is anybody studying that?

Mr. WELLS. Well, I don't know how much studying is being done. One of the things that our staff did this spring and summer in collaboration with the Missouri Levee and Drainage District Association, we went out and tried to get elevations on as many of the outflow pipes as we could and tried to then talk with the people that live along the river who understand the river and know what stage say at St. Joe their gates start to close.

So we developed what we called interior drainage constraints. In other words, when the river is at a certain stage, the gates start to close, and one of the things we have always been concerned about is that you can look downstream and the river can be down and say well, this is a good time to release water. It affects St. Joe in that it takes about four days for it to get there. But we do have a pretty good forecast. So one of the things we said, look at the seven-day forecast and let us include interior drainage constraints.

If we are going to have to do a spring rise and obviously we are still opposed to a manmade spring rise, but if we have to do one, let us look downstream and look at the interior drainage situation, see where the river stages are, and we can provide that information to the Corps of Engineers and Fish and Wildlife Service.

I think it needs to be fine-tuned obviously. Because we worked this summer, we didn't have time to really maybe fine-tune it as much as say we could, but they have that information. We provided them what we call interior drainage constraints, so that information is available.

Chairman GRAVES. Mr. Grijalva.

Mr. GRIJALVA. Thank you, Mr. Chairman.

Just a brief comment and a couple of questions just for my clarification.

I want to thank the Chairman for the opportunity to deal with a piece of legislation that opens up the opportunity for party agreements in terms of species recovery.

I think that is a good opportunity. Aside from all of the rhetoric that we are hearing all over the place about the Endangered Species Act, this does open a door for opportunity and I appreciate that very much.

On the Endangered Species Act itself, I believe very strongly that the Act has a strong legacy in this country, a legacy of good work.

It is a necessary Act, and this discussion today is not to replace the Endangered Species Act but to open up for voluntary agreements between parties, and I think that is a good opportunity.

I was just going to ask, if I could, Ms. McNally, just one question.

Ms. MCNALLY. Mm-hmm.

Mr. GRIJALVA. In your view, as the species recovery agreement that is outlined in H.R. 3300, back to my point, do you think that replaces ESA, in your opinion?

Ms. MCNALLY. Absolutely not.

Mr. GRIJALVA. So if a landowner or business doesn't participate voluntarily in a recovery or let us say the Secretary doesn't acknowledge that species recovery agreement—

Ms. MCNALLY. It would continue to be subject to the same—

Mr. GRIJALVA. Okay. All right. Thank you. Those are my questions. Thank you, sir.

Chairman GRAVES. Dr. Christensen?

Dr. CHRISTENSEN. Thank you. I am not a member of this Subcommittee. I am a member of Small Business, but as ranking on Parks Subcommittee on the Committee of Resources, I really wanted to be here to hear the testimony on H.R. 3300, which seems to be a modest proposal that might provide another tool to protect endangered species while giving more protection to private property land rights.

But we have to be concerned because the Act is important and has a great legacy that we don't weaken it in the process.

I wanted to just highlight two of the problems, one of which Mr. Kostyack mentioned, but two of the biggest problems that I think we face with Endangered Species Act are one, the funding.

In 2003, the Fish and Wildlife Service had said that approximately 153 million would be needed to address the current backlog of listing and critical habitat obligations, and our budget for 2006 is just 18.1 million for the listing and critical habitat designations.

In addition to that and probably related, we are very behind on critical habitat designations and recovery plans so that only 38 percent of those listed have both.

So we are really behind, and I wonder if this is not more of a problem than the types of requirements that are placed on landowners.

I guess I would have two questions. One is to you, Mr. Wells, because you raised the issue about the pallid sturgeon and perhaps that we are not looking at the entire river that could help the sturgeon to survive and protect its life and its habitat.

In that area, is there a critical habitat designation and a recovery plan in place? Because you question the science and—

Mr. WELLS. Yes, there is. I don't know all the details about it, but I think that most would agree and even the people who have worked on it that it needs to be updated. I think it is dated. It just appears that in the last five or six years we have really started to do quite a bit of research on the pallid sturgeon, and there is a lot, as the scientists say, there is a lot more we don't know about the life cycle of pallid sturgeons than we do know.

I think that is one of the things that concerns us most is we have got various prescriptions of I guess measures being proposed here or being mandated, not proposed, when there are a lot of things we don't really know yet about it.

So we do support additional research I think and probably an updated recovery plan.

Dr. CHRISTENSEN. Has the Fish and Wildlife Service been consulted on this? Because in preparing recovery plans, they go through a peer review process with independent peer reviews and the GAO has cited that their process is sound.

Mr. WELLS. Well, just to give you an example on the Mississippi River, we deal with both Missouri and Mississippi obviously in our state, the recovery plan on the Mississippi is much more precise, if you will and the accomplishments are greater there. They have accomplished more.

So I think we are just, on the Missouri, we are just behind a little bit in getting to the point of understanding the species and getting a recovery plan that is perfect today.

Dr. CHRISTENSEN. Thank you. I think, you know, some kind of consultation with the Fish and Wildlife Service, you know, perhaps could end up in resolving some of those.

Again, back to wanting to be certain that we are not weakening the Endangered Species Act, my original plan was to ask is the critical habitat conservation agreement more stringent than the species recovery or not, but Mr. Kostyack made several recommendations, one of which is that any SRA meet the requirements of the established recovery plan under ESA.

Do any of you have any disagreement with that proposed amendment, or do you have any disagreement with having any voluntary species recovery agreement be required to meet the established recovery plan under ESA?

Ms. MCNALLY. I don't believe so on its face, although I would like to reflect on that and we have to look at first of all the species that don't currently have recovery plans and not tie it to the fact, not make it contingent upon a recovery plan, because we certainly want to be able to have species recovery agreements even for those species lacking recovery plans.

Mr. WISEMAN. I would concur with that. One of the other factors that would have to be considered in aligning these SRAs with the recovery plans is very often the recovery plans cover large landscapes, and most of the folks who are going to be affected by this bill own very small tracts, and the scope and scale issues that arise when you try to take a plan that was designed for 100,000, most people, hundreds of thousands of acres, and apply it to a, you know, 40-acre tract are pretty daunting.

You have to take that into account as you try to see how best to align the two, but clearly you want everybody to be pulling in the same direction.

Dr. CHRISTENSEN. Well, my concern also, Mr. Chairman, would be given the fact that it requires some funding associated with this bill and we are behind in funding for the requirements in the ESA, I just wonder if the funding is not there, the bill does no good.

It requires incentives, and I just have some concerns about funding this proposal given the fact that we are not funding what is required under ESA presently.

Chairman GRAVES. Mr. Peterson, will you talk to me about critical habitat and how that affects a farming operation, in particular if you obviously have a threatened or endangered species or the critical habitat to support that particular species?

Mr. PETERSON. It certainly has the ability to stop your farming on your farm. Can the government take without the opportunity to be paid for that taking?

My father and brother certainly don't have the number of endangered species in Ohio as is in the west, but it certainly has the po-

tential if you own a 100-acre tract of land that you farm, there is an endangered species there and the demand to the claim is large enough that you would not be able to farm.

I would like to suggest that maybe a better way to handle some of that is what we are doing in Colorado. We have the mountain clover where a farmer is willing to open up their ground and say let us find them, show us where they are and went through and they flagged all the mountain clover, and they have allowed the farmer to farm around those nests, preserving the nests, making sure the habitat was there for the animal to continue to survive and thrive in an agricultural landscape.

It also allows the farmer to continue to farm in that area, continue to work his land. I think that is important.

Probably the best thing that happened in the process was the farmer had to buy in. There is buy-in and interest in preserving the habitat and so that is important.

Chairman GRAVES. This program or at least what I am proposing I think fits in very well with exactly what you just pointed out. That is a good example. That is a real good example.

I do think that we need incentive programs rather than, the situation we have now, because it is a taking is what it is in many cases. It is exactly that, and many times you have a business or a farm that that is their livelihood and the success of their operation depends on being able to work that property.

Then when they are told they can't do that, the responsibility becomes the recovery rather than the operation. It is a problem.

Dr. Christensen, do you have any more?

Dr. CHRISTENSEN. No.

Chairman GRAVES. Well, I appreciate everybody coming in today very much. I know many of you traveled a long ways.

This issue has become very important to me because of what is happening back home on the Missouri River and what is going on particularly with interior drainage.

Very few people are actually taking a close look at that, and a lot of folks don't realize that when you implement procedures that it affects a lot more folks than maybe those, in the river's case, than those directly alongside the river.

It affects miles and miles back up, and then when you have got government agencies that can't even figure out which direction or they are arguing over which direction, in this particular case, Forest or Fisheries and Wildlife and the Corps of Engineers, they can't come to an agreement on what should happen. Then you have even more uncertainty and a lot of landowners that don't know what to do.

But I have become very involved in this issue and we would like to find some sort of common ground. It doesn't have to be all or nothing.

That is the reason we came up with the incentive program, and we will continue to work to make it workable and include it hopefully in the ESA reauthorization, with Chairman Pombo. We are working with him on that, and again I do appreciate all your input.

Please stay close to this process and give us your suggestions. I do appreciate it. Thank you all for coming in, and this hearing is adjourned.

[Whereupon, at 10:54 a.m., the Subcommittee was adjourned.]

SAM GRAVES, MISSOURI
CHAIRMAN

JOHN BARROW, GEORGIA
RANKING MINORITY MEMBER

Congress of the United States
House of Representatives
109th Congress
Committee on Small Business
Subcommittee on Rural Enterprises, Agriculture and Technology
2361 Rayburn House Office Building
Washington, DC 20515–6319

Opening Statement

Good Afternoon and welcome to this hearing of the Subcommittee on Rural Enterprises, Agriculture and Technology. We will be discussing the *Endangered Species Act* and the need to protect individual private property rights. I appreciate everyone's participation in today's hearing.

The *Endangered Species Act* was created in 1973 with the purpose to recover our nations most endangered and threatened species. Although well intentioned, the act has failed at its purpose, recovering approximately 1 percent of its listed species. However, over the span of 30 years, the scope of the *Endangered Species Act* has expanded greatly. Currently, there are 1,264 total listed species compared to just 109 when the *Endangered Species Act* was passed into law. Now, the increasing scope of the *Endangered Species Act* is impeding on the rights of landowners with 80 percent of those species dwelling on lands owned and operated by farmers and ranchers.

The situation involving the MO River is what has peaked my interest in the *Endangered Species Act*. The courts have ruled that the *Endangered Species Act* supersedes Congressional intent to provide for flood control and navigation along the MO River, which Congress enacted in 1944. This has brought grave distress to the region, because of the uncertainty this ruling creates. In order to protect the habitat and increase the spawning habits of protected species on the river, the Army Corp of Engineers has the authority to lower or raise water levels to points that would not support navigation. This uncertainty in river flows, in the past, has caused major shippers to cancel their MO River operations, and has caused extreme alarm for farmers in the MO River flood plain. MO farmers and small business owners have to live with these uncertainties year in and out.

The financial burden this uncertainty creates is just another problem facing farmers in Missouri who continually face season after season of drought and rising energy prices. Shipping crops via barge traffic is the cheapest and most efficient form of transportation for farmers. However, if the MO River can not support navigation, farmers will have to find other, more expensive modes of transporting their goods. This additional expense would be detrimental to their survival. Farmers themselves have become an endangered species with only two percent of the population undertaking this important enterprise.

I consider myself a conservationist. I am a farmer by trade and it is in my best interest to persevere the ecosystem of my property. I don't want to have to limit my harvest, because of an endangered weed located on my property, especially when my family depends on a successful season. I would like to see the *Endangered Species Act* work, but its time to update this broken law, and improve it so we recover more species while preserving the rights of our private landowners.

This is why I have introduced H.R. 3300, the *Endangered Species Improvements Act*. My bill seeks to create a voluntary program that provides incentives and compensation to landowners who participate in the recovery of endangered species. Through this bill, it is my hope that landowner's rights will be preserved, more endangered species will be recovered, and a positive working relationship between the landowner and government will be fostered.

Far too often a landowner will try to cover up the fact that an endangered species is located on their property, but through H.R. 3300 it is my hope that this will end and landowners will welcome the opportunity to help recover a protected species. Offering incentives will encourage participation and rid the negative feeling associated with the *Endangered Species Act*.

Again, it is important to me that we consider the impact on the landowners, farmers, and small business owners when making plans to recover species. We must find ways to work with people and not against them so we all achieve all our goals, and I think increased incentives is part of the solution. As a member of the House Small Business Committee and Chairman of the Subcommittee on Rural Enterprise, Agriculture and Technology it is my job to see that our farmers and small business owners are protected during this debate.

I now turn to the ranking member, Representative Barrow for his opening remarks.

STATEMENT OF MIKE WELLS, CHIEF OF WATER RESOURCES
STATE OF MISSOURI

Before the U.S. House of Representatives Committee on Small Business, Subcommittee on Rural Enterprise, Agriculture and Technology
The Need for Improvements and More Incentives in the Endangered Species Act

September 15, 2005

Good morning Mr. Chairman. My name is Mike Wells; I am Deputy Director for the Missouri Department of Natural Resources and Chief of Water Resources for the State of Missouri. The Missouri Department of Natural Resources is the agency that has statutory responsibility for the state's water resources. As Chief of Water Resources, I represent the state in all interstate water issues. Thank you Congressman Graves for inviting me to give testimony on this important issue.

Let me begin by saying that the State of Missouri is truly concerned about protecting endangered species and natural habitat along our rivers. In fact, we were one of the earliest proponents for increased funding for habitat restoration projects in and along the Missouri River – a position we continue to support. However, we take issue with the manner in which the Endangered Species Act is being applied in the management of the Missouri River. Instead of the flow changes being proposed, we strongly believe that there are common sense ways to protect the species without harming citizens who live and farm along the Missouri River or who rely on the river for their livelihoods.

The Missouri River is a vital resource to the State of Missouri, providing drinking water to over 2 million of our citizens, cooling water for our utilities, water to support navigation, unique recreational opportunities, and valuable fish and wildlife habitat. We are concerned that changes in the management of the Missouri River, which some have characterized as necessary to comply with the Endangered Species Act, will be harmful to many of these uses.

In December 2003, the U.S. Fish and Wildlife Service (Service) released an Amended Biological Opinion (Opinion) which found that the U.S. Army Corps of Engineers' (Corps) operations of the Missouri River would cause "jeopardy" for the pallid sturgeon, an endangered fish. Far too little is known about the pallid sturgeon, its life history and its needs. The Endangered Species Act is being administered in a very prescriptive manner, when more reasonable courses of

action seem to be available. The Service has mandated certain actions based on questionable science with little or no regard for the significant adverse environmental and economic consequences of the action. These mandates included a summer low flow and a spring rise. The Service demanded a period of low flow during the summer even though scientists have shown that this would produce minimal benefits for the species. Habitat restoration projects undertaken by the Corps that created 1,200 acres of shallow water habitat precluded the need for a summer low flow. This alternative action is much less harmful to other uses than flow changes.

In their Opinion, the Service also indicated that a "spring rise" was needed as a spawning cue to ensure the continued survival of the pallid sturgeon. The Service prescribed a "spring rise" despite the fact that fisheries scientists have indicated that water temperature and photoperiod, and not flow, may be the controlling factors for pallid sturgeon spawning. Even today, the Service continues to insist on mandating a man-made "spring rise," which would increase river levels by one to three feet during May and June.

The Missouri River is free-flowing for the more than 800 miles from below Gavins Point Dam (the lowest of six dams on the Missouri River mainstem) to the confluence of the Mississippi River at St. Louis. More than 550 of these miles are within the State of Missouri. Water released from Gavins Point Dam can take from 10 to 12 days to travel this distance. Once water is released from Gavins Point Dam, it can not be retrieved. Given that local rainfall has caused the Missouri River to rise by up to ten or twelve feet in less than twenty-four hours, it would be unwise to implement an artificial "spring rise" that would add from one to three more feet of water to the river. An artificial "spring rise" would compound interior drainage and flooding problems for farmers and communities along the river.

In most years, the State of Missouri already experiences natural spring rises. With spring being the time of year when Missouri floodplain farmers are already at the greatest risk of being flooded, artificially adding even more water to the river in the spring will only intensify this risk.

The Missouri River's floodplain encompasses approximately 1 million acres in Missouri, much of which is prime farmland. Any manmade or artificial "spring rise" that puts floodplain farmers and riverside communities at greater risk of being flooded is counter to the 1944 Flood Control Act. Congress expressly established the Missouri Reservoir System to control flooding. In light of this fact and the

uncertainty about pallid sturgeon needs, it is illogical for the federal government to implement a plan that would increase the risk of flooding.

The Service is characterizing the artificial "spring rise," which they speculate will only benefit the approximately 200 miles immediately below Gavins Point Dam, as an experiment. The federal government should not be conducting experiments that threaten people's livelihoods. The range of the pallid sturgeon includes over 1,600 miles on the lower Missouri and Mississippi Rivers and a significant reach of the Yellowstone River in Montana that all have natural spring rises. By focusing on habitat development in and along these reaches, the Service and Corps could take advantage of reaches of the rivers that have more natural hydrographs. This would avoid the contentious issues related to flow while providing benefits to the pallid sturgeon.

It is unreasonable for the federal government to consider a flow plan that may only benefit the pallid sturgeon for less than a 200-mile reach of the Missouri River. A common sense application of the Endangered Species Act would suggest that the federal government should concentrate research and recovery efforts on the nearly 1,600 miles of river that already have a spring rise, instead of conducting an experiment which could harm downstream citizens.

Let me reiterate that the State of Missouri is truly concerned about protecting endangered species and natural habitat along our rivers, but we believe that there are common sense ways to protect the species without harming our citizens who rely upon the Missouri River for other uses.

Thank you for the opportunity to testify before this committee. At this time I would be glad to answer any questions.

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Nancy Macan McNally
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National Endangered Species Act Reform Coalition (NESARC)

Testimony
Before the Subcommittee on Rural Enterprise,
Agriculture and Technology
Committee on Small Business
House of Representatives

"The Need for Improvement and More Incentives in the Endangered Species Act"

September 15, 2005

The Endangered Species Act (ESA) was enacted in 1973 with the promise that we can do a better job of protecting and conserving our nation's resident species and the ecosystems that support them. Today, over thirty years later, on behalf of the National Endangered Species Act Reform Coalition (NESARC) I bring that same message back to this Subcommittee—we can, and must, do better. We have learned many lessons over the past three decades about how and what can be done to protect endangered and threatened species and it is time to update and improve the ESA to reflect those lessons.

One lesson that has been learned is that, too often, the ESA has created conflict where partnership and cooperation has been needed. For that reason, NESARC is pleased to testify before this Subcommittee on ways to introduce incentives that allow landowners to voluntarily cooperate in species protection efforts. We also would like to take the opportunity to commend Subcommittee Chair Graves on the introduction of HR 3300, the Endangered Species Improvements Act of 2005. NESARC supports HR 3300 and believes it introduces a critical new element to the ESA by providing financial incentives for landowners to develop species recovery agreements that will protect and restore habitat for listed and candidate species. In addition, NESARC is encouraged by the continued efforts of Resources Committee Chairman Richard Pombo to develop bipartisan legislation updating and improving the ESA. We hope that specific proposals such as HR 3300, as well as the efforts of Representative Dennis Cardoza on critical habitat and Representative Greg Walden on improvements to the use of science in ESA decisions, are reflected in any legislation considered by the Resources Committee during this Congressional session. Further, we look

forward to working with members of the House and Senate to find common ground on ways to update and improve the ESA.

NESARC is an organization of more than 100 national associations, businesses and individuals that are working to develop bipartisan legislation that updates and improves the ESA. NESARC members come from a wide range of backgrounds. Among our ranks are farmers, ranchers, cities and counties, water districts, rural irrigators, electric utilities, forest and paper operators, mining companies, homebuilders and other businesses and individuals throughout the United States. What our members have in common is that they have been impacted by the operation of the ESA. As this Subcommittee recognizes, the burdens and rewards of protecting listed species are often borne, in a very large part, by individuals and small business owners. For the ESA to effectively protect endangered and threatened species we need the support of those who are being asked to make the sacrifices. The reality is that, without the support and active commitment to the protection of listed species by the landowners, businesses and communities where the species reside, the chances of success are slim. We need to learn from the experiences of those who are faced with the real-world decisions on how to make a living and still protect species if we are to make the Act work better.

Attached to my testimony is a NESARC white paper outlining a new approach to ESA legislation. In sum, a new approach is needed to change the focus of the debate from a clash over existing terms and programs to the development of new tools that improve the Act. We need new provisions of the Act that encourage recovery of listed species through voluntary species conservation efforts and the active involvement of States. This new approach can and should maintain the goal of species conservation. Simultaneously, we must recognize that species conservation and recovery will only be accomplished if we can find ways to

provide stakeholders the tools and flexibility to take action and, most importantly, certainty that quantifiable success will be rewarded by the lifting of the ESA restrictions.

NESARC has identified several key elements that should be considered as Congress considers legislation to update and improve the ESA:

- **Expand and Encourage Voluntary Conservation Efforts by Landowners --** A universal concern with the Act is that it does not fully promote and accommodate voluntary conservation efforts. Many landowners want to help listed species, but the ESA doesn't let them. A critical element of updating and improving the Act must be the development of additional voluntary conservation programs that encourage landowners to voluntarily participate in species conservation efforts. These incentives can take the form of voluntary species recovery agreements (as proposed under HR 3300), reserve programs similar to the Conservation Reserve Program under the Farm Bill; tax incentives; loan or grant programs similar to the Partners for Wildlife program as well as other similar incentive programs. Further, existing programs like the Safe Harbor Agreements should be codified.

- **Give the States the Option of Being On the Front Line of Species Conservation --** In 1973, the National Wildlife Federation testified before Congress that "[s]tates should continue to exercise the prime responsibility for endangered species" and "should be given the opportunity to prepare and manage recovery plans and retain jurisdiction over resident species." Thirty-plus years later, the Western Governors' Association, in a February 25, 2005 letter noted that "[t]he [ESA] can be effectively implemented only through a full partnership between the states and the federal government" and asked Congress to "give us the tools and authority to make state and local conservation efforts meaningful." NESARC supports giving States a wider role in facilitating landowner/operator compliance with the Act and, ultimately, the recovery of species. States have significant resources, research capabilities and coordination abilities that can allow for better planning of species management activities. Further, States know their lands and are often better situated to work with stakeholders to protect and manage the local resources and species.

- **Increase Funding of Voluntary and State Programs for Species Conservation** -- A significant amount of federal funding for ESA activities is presently tied up in addressing multiple lawsuits and the review of existing and new listing and critical habitat proposals. In contrast, actual funding for on-the ground projects that will recover species is limited. Federal funding priorities need to be re-focused to active conservation measures that ultimately serve to achieve the objectives of the Act. Further, we need to financially support the voluntary, community-based programs that are critical to ensuring species recovery.

- **Encourage Prelisting Measures**. -- Recently, a nationwide coalition of state and local governments, stakeholders and conservation organizations worked together to develop a comprehensive sage grouse conservation program that has been able to stand in the place of a listing of that species under the ESA. Landowners, State and local governmental agencies should be encouraged to develop and implement programs for species that are being considered for listing. The protections afforded by <u>all</u> such programs (including existing activities) should be considered in determining whether a listing is warranted or whether such voluntary programs, other federal agency programs and State/local conservation efforts already provide sufficient protections and enhance species populations so that application of the ESA is not necessary.

- **Establish Recovery Objectives** -- We need to be able to identify and establish recovery objectives. Knowing what ultimately must be achieved is a critical first step in understanding what must be done. Since the goal of the ESA is to assure recovery of endangered and threatened species, implementation of the ESA should reward progress when it is made toward recovery. There must be a determination of specific recovery goals necessary to reach the point where a species can and will be downlisted or delisted—and there must be certainty in such a goal so that the goal is not continually shifted to perpetuate a listing.

- **Strengthen the Critical Habitat Designation Process** --We need to strengthen the critical habitat designation process by ensuring that these designations are supported by sound decision-making procedures, do not

overlap with existing habitat protection measures (such as habitat conservation plans, safe harbor agreements or candidate conservation agreements, and other state and federal land conservation or species management programs) and rely on timely field survey data.

- **Improve Habitat Conservation Planning Procedures and Codify "No Surprises"** -- The HCP process has the potential to be a success story, but too often property owners are stymied by the delays and costs of getting HCP approval. HCP approval should be streamlined, and the HCP process must be adapted so that it is practical for the smaller landowner. Further, landowners involved in conservation efforts need to be certain that a "deal is a deal." The "No Surprises" policy must be codified under the Act and cover all commitments by private parties to voluntary protection and enhancement of species and habitat—not just HCPs.

- **Ensure an Open and Sound Decision-Making Process** -- The ESA must be open to new ideas and data. By providing for better data collection and independent scientific review, we can ensure that the necessary and appropriate data is available. In addition to making sure we have better information upon which to act, we need a decision-making process that allows for full public participation in the listing, critical habitat and recovery decisions. It has been my experience that providing full and open access to the decision-making processes—beyond simply the submission of letter comments—through mechanisms like stakeholder representatives and data collection programs provides a much more diverse and ultimately stronger record from which to act.

While each of these elements is important, the need to encourage cooperative conservation activities by landowners deserves special attention. Over 80 % of all endangered and threatened species reside on private property. At the same time, most property owners—and especially farmers and small business operators—do not have significant financial resources from which to fund conservation efforts. What many people do not recognize, however, is that protecting species and their habitat requires not only financial support, but also time and technical expertise. NESARC supports HR 3300, as introduced by Subcommittee Chair Graves,

precisely because it recognizes these complexities and addresses key considerations that arise in species conservation efforts by landowners:

- First, ***HR 3300 allows for voluntary conservation efforts***. The ESA has a multiplicity of procedures and prohibitions from Section 7 consultation requirements to "take" prohibitions under Section 9. What it has been missing is a truly voluntary program that encourages landowners to protect and restore habitat and contribute to the recovery of listed species. HR 3300 leaves no doubt regarding its voluntary nature providing that the Secretary or other federal agencies may not require a person to enter into a species recovery agreement as a "term or condition of any right, privilege, or benefit" or have such an agreement be a precondition to the Secretary or federal agency taking a specific action or refraining from action—as the case may be. This protection against coercion is important because it invests the landowner with the *choice* to participate.

- Second, ***HR 3300 provides financial incentives to participating landowners.*** One of the biggest hurdles for conservation activities is identifying ways to fund the work that must be done. A required element of the species recovery agreements authorized under HR 3300 is the provision of compensation by the Secretary. This will ease the financial burden upon landowners for developing the necessary protections and restoration activities.

- Third, ***HR 3300 provides technical assistance***. Most landowners are not biologists and, few if any, will have the expertise to independently identify the appropriate measures needed to help species on their property. HR 3300 makes the development of species recovery agreements easier by authorizing the Secretary to provide technical assistance and management training provided by the Secretary and requiring the development of model forms of agreements that identify a range of possible management practices. It is important that as many landowners as possible have the opportunity to participate in the voluntary conservation programs. Providing technical assistance and management training will increase the likelihood of enrollment and ultimately create a broader, more effective program.

For more than a decade, Congress has struggled with the question of what, if any, changes to the ESA should be made. In the interim, landowners and businesses have had to take the existing Act and make it work. It has been time-consuming, expensive and often frustrating--and the successes have been limited. Today, less than one percent (1%) of all listed species in the United States have been recovered. While many species populations have stabilized, maintaining the status quo was not the intent of the Act. We must find new and more effective ways to reach the ESA's goal of recovering species. NESARC urges this Committee to take stock of the lessons we have learned and successes that have been achieved in order to identify the improvements that are necessary to make this Act work better in the future.

November 16, 2004

IMPROVING THE ESA
A POTENTIAL NEW APPROACH

BACKGROUND

A growing number of federal, state and local government policy-makers and private citizens recognize shortcomings in the current version of the Endangered Species Act and are calling for Congress to improve the Act. For example, the Washington Post editorialized that improvements to the Act are needed stating that:

> The key to the act's future is flexibility and a more cooperative attitude. Rather than declaring the act "broken," opponents would do better to heed the example of the Texas ranchers who have agreed to encourage the growth of endangered species' habitat in exchange for more control over their property, or the regulators who have tried to introduce greater clarity and certainty to the rules. Clearly, the act would benefit from constructive congressional attention: The law could be made simpler, the costs more predictable. Unconstructive attention, however, will just lead to more antagonism and lawsuits. (*Washington Post Editorial, December 29, 2003).*

Despite such calls for improving the Act, a legislative stalemate exists. On one hand, the actual authorization for the Act expired in October 1992 with Congress (for the past ten years) carrying forward the implementation of the Act solely through annual appropriations. On the other, legislative reform efforts that also would reauthorize the Act have failed to gain the necessary political support in both the House and Senate to be enacted into law.

Over the years, those in the public and private sector that are subject to the restrictions of the Act have pursued reform by calling for a series of specific changes to the existing provisions of the Act arguing that some standards and requirements are vague or overly restrictive and inflexible. At the same time, those that support the current Act argue that no changes are necessary other than an increase in federal funding of species recovery efforts and more aggressive implementation and interpretation of the Act by the federal agencies. For over a decade, these two factions have clashed, finding little, if any, common ground and resulting in the adoption of no improvements to the

Act. It is not likely that a continued clash over specific changes to the current sections of the Act will result in an improved Endangered Species Act in the foreseeable future.

A POTENTIAL NEW APPROACH

A new approach is needed to change the focus of the debate from a clash over existing terms and programs to developing new tools that improve the Act. One solution is to enact new provisions of the Act that encourage recovery of listed species through voluntary species conservation efforts and the active involvement of States. This new approach would maintain and further the goal of species conservation. Species conservation and recovery justifies the need for additional flexibility to ensure that recovery and delisting of species can and does occur.

Below is a description of a new proposal to update and improve the Act that would focus on the goal of saving and enhancing species, engaging private landowners, state departments of fish and wildlife and local governmental agencies on the front lines of species conservation, and ensuring that federal funding for species conservation focuses on these incentive-based programs. The potential new approach consists of the following major elements:

1) Giving the States the Option of Being On the Front Line of Species Conservation

Issue: States should have a wider role in facilitating landowner/operator compliance with the Act and, ultimately, the recovery of species in order to remove the restrictions of the ESA. States have significant financial resources, research capabilities, and coordination abilities that can allow for better planning of species management activities. Further, States are often better situated than federal agencies to develop and maintain cooperative efforts between stakeholders to protect and manage the local resources and species.

Proposal: Create an alternative path for species and habitat conservation efforts in lieu of the restrictive, and limited, provisions of ESA Sections 7, 9 and 10. Allow state (or local) governments to facilitate voluntary landowner/operator efforts to protect and enhance species. Participants in an approved State program would be

granted incidental take authorization and activities consistent with the State program would not be subject to any additional reviews under Section 7. Several ***critical elements*** must be considered:

(1) *Voluntary participation* by landowner/operators

(2) *Eliminate duplicative reviews*—A single Section 7 consultation review should occur regarding the overall State program. Once that is complete, no additional Section 7 consultations should be required for participants as long as activities are consistent with approved State program.

(3) *Ensure certainty* – Participants in the State programs must receive incidental take authorization so that they are not exposed to "take" enforcement under Section 9 for activities consistent with the State program.

(4) *Encourage use of non-regulatory mechanisms*- If restrictions are placed on a participant's activities, the Secretary must demonstrate that no non-regulatory alternatives existed to achieve the same effect for the species.

(5) *Emphasize collaboration between the landowners/operators and the State*-- Affected stakeholders must be afforded the right to fully participate in the development of the State program.

(6) *Appropriate Standards for Program Approval* – Establish specific standards for Secretarial review and approval of program with review focused on the ability of the State's program to contribute to achieving the established recovery objectives for the listed species within that State's borders.

(7) *Flexibility* – Allow State programs to cover both listed and candidate species and involve multi-State efforts.

(8) *No Surprises* --Provide "No Surprises" type assurance that participation in the program will be sufficient for compliance with ESA Sections 7 and 9.

(9) *Recognize Common Interests and Avoid Conflicts* – Programs that minimize the social and economically adverse impacts on communities are more likely to garner the public support necessary to be effective.

The State program could take a range of forms—each with their own unique characteristics and benefits. In each case, the elements noted above should guide the development of the legislative proposal. Among the options that exist are:

Options	*Scope*
Modified Cooperative Agreement/ Management Agreements	Modify existing provisions of Section 6 to facilitate development of State cooperative agreements and management agreements. Allow for federal grants or other funding of state efforts under the cooperative agreements and/or management agreements.
Authorize Programmatic Activities	Allow Secretary to conduct Section 7 consultation on a set of state-wide programmatic activities (e.g. best practices for timber management) that would result in incidental take authorization for participants employing such practices.
Voluntary Species and Habitat Enhancement Program	Alternative path for voluntary species recovery efforts within State borders. Voluntary participants not subject to Section 7 consultation requirement and receive incidental take authorization for efforts consistent with program.
Statewide HCP	Modify Section 10 to specifically allow State to develop and implement multi-jurisdictional habitat conservation plan.

2) Expanding and Encouraging Voluntary Conservation Efforts

Issue: A universal concern with the Act is that it does not fully promote and accommodate voluntary conservation efforts. A critical element of updating and improving the Act must be the development of additional voluntary conservation programs.

Proposal: Voluntary conservation efforts should be promoted by: (i) codifying the Administration's programs for Safe Harbor Agreements and ESA Mitigation Banks; (ii) establishing a Critical Habitat Reserve Program (similar to the Conservation Reserve Program established under the Farm Bill); and (iii) enacting separate legislation providing tax incentives to promote species conservation efforts on private property.

3) Focused Funding of Voluntary and State Programs.

Issue: A significant amount of federal funding for ESA activities is presently tied up in addressing multiple lawsuits and the review of existing and new listing and critical habitat proposals. In contrast, actual funding for on-the ground projects that

will recover species is limited. Federal funding priorities need to be re-focused away from bureaucratic decisions and to active conservation measures that ultimately serve to achieve the objectives of the Act.

Proposal: Re-focus species conservation funding to support the voluntary programs and State-led initiatives described above including the establishment of dedicated funding streams supporting voluntary conservation efforts and State/local initiatives. Other potential improvements could include the development of a tax "check off" to support species conservation efforts in the taxpayers' particular State or the authorization of an "ESA Stamp" that is dedicated to supporting local conservation efforts.

4) Encouraging Prelisting Measures

Issue: Too often the ESA is hurriedly invoked without consideration of other state, local and private efforts that can and will do a better job of protecting and improving species populations. In determining whether listing of a species is necessary, the existing Act only provides for a limited consideration of State programs that protect species and does not allow the Secretary to consider voluntary programs implemented by private landowners that also protect and enhance species and their habitat.

Proposal: State and local governmental agencies as well as private landowners should be encouraged to develop and implement species and habitat programs for species that are being considered for listing. The protections afforded by all such programs (including existing activities) should be considered in determining whether the listing is warranted or whether such voluntary programs, other federal agency programs and State/local conservation efforts already provide sufficient protections and enhancement species populations that application of the ESA is not necessary. As part of such determination, the Secretary also must consider whether the designation of a species as threatened or endangered will hinder or damage existing voluntary conservation efforts and/or State/local programs that protect such species.

5) Establishing Recovery Objectives

Issue: If a listing of a species is necessary, then we need to identify what is actually required. The present Act does not require the establishment of recovery objectives. Knowing what ultimately must be achieved is a critical first step in understanding what must be done. If the Act is to be successful, there must be a determination of specific recovery goals necessary to reach the point where a species can be downlisted or delisted.

Proposal: In order to enhance and improve efforts for species conservation, the Secretary would be required to determine objective and quantifiable recovery objectives that can serve as guideposts for voluntary conservation efforts. Once the recovery objective is met, the Secretary shall delist or downlist that species. The determination of a recovery objective for a listed species should be based on the best scientific and commercial data available. Further, the Secretary must review and revise the recovery objective five years after listing. Any significant changes to the recovery objective should be subject to notice and comment.

6) Improving Habitat Conservation Planning Procedures and Codifying "No Surprises"

Issue: Habitat conservation plans (HCPs) have been one of the few mechanisms of the Act that have allowed for private conservation efforts. However, the authorization for HCPs is limited to a single sentence in the Act that provides no guidelines, timelines or standards. Further, the Administration's efforts to ensure a level of regulatory certainty in the commitments required under HCPs has been the subject of repeated lawsuits that disrupt and undermine the HCP program.

Proposal: The Act should separately and more comprehensively address HCPs to ensure that the program allows for timely and more certain implementation of these voluntary programs. In addition to streamlining the approval of HCPs (including any required interagency consultations or communications), more consistency must be provided in the development of mitigation standards and necessary elements of HCPs. The mitigation standard for HCPs should be set at a level that meets the HCP goals

while providing for minimal interference with planned or existing activities covered by the HCP. Moreover, the "No Surprises" policy must be codified under the Act and procedures established which ensure that other federal and state agencies do not inappropriately preempt or interfere with the administration or implementation of an approved HCP.

7) Ensuring an Open and Sound Decisionmaking Process

Issue: A frequent criticism of the Act is that its implementation is hindered by poor decisionmaking procedures that rely upon inadequate scientific data. Further, affected stakeholders are often excluded from key elements of the decisionmaking process, which creates a level of distrust and uncertainty.

Proposal: Listing and critical habitat designations must be based upon the best scientific and commercial data available, with an open and deliberate process of collecting and analyzing such data. The proposal would require that the compilation of scientific and commercial data (including field surveys) on species and its habitat be performed by a panel of qualified individuals including federal and state agency personnel as well as public volunteers. Further, such data should meet the requirements of the Information Quality Act and its guidelines. Public comment should be received on the data sources to be used, collection methodology, criteria for determining data accuracy and the ultimate data compilation. Where there has been little or no public comment or participation in the data compilation efforts, then peer review should be required to ensure the sufficiency of the data developed for the listing determination.

8) Removing the Litigation Bottleneck

Issue: The Act is hampered by a multiplicity of lawsuits challenging agency decisions as well as allegations of inaction by the federal government. Rather than spending federal funds on recovering species, Interior and Commerce ESA budgets are dominated by costs related to litigation. Moreover, the Act is increasingly being "run" by the priorities established through litigation rather than a measured

establishment of priorities determined by the Secretary as most effectively protecting and enhancing listed species.

Proposal: The programs established under this proposal would be subject to a single "challenge" period in a United States District Court located in the State where the subject species is located. These review procedures would be similar to the provisions recently adopted under the Healthy Forest Initiative (a new federal law streamlining forest thinning practices). In order to have standing to challenge an agency action, the party would have had to (1) participated in all necessary public proceedings and comment periods on the particular decision; and (2) provided specific written comments raising its concerns/objections to the Secretary during the decisionmaking process. The courts would be directed to expedite consideration and review of any such challenges.

APPLICABILITY OF CORE PRINCIPLES

The program discussed above envisions the enactment of new provisions of the Act. However, a number of the elements embodied in this proposal such as increasing stakeholder participation, establishing sound decisionmaking procedures and removing litigation bottlenecks can be applied on a broader basis as well. Expanding such reforms to all actions under the Act would allow for comparable treatment between the existing Act and the new programs envisioned under this proposal.

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American Forest and Paper Association
Washington, D.C.

American Forest Resource Council
Portland, Oregon

American Public Power Association
Washington, D.C.

Animas-La Plata Water Conservancy District
La Plata, New Mexico

Anza Electric Cooperative, Inc.
Anza, California

Apache County
St. Johns, Arizona

Arizona Municipal Power Users' Association
Phoenix, Arizona

Art Homes
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Association of California Water Agencies
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Bar Eight Cattle Co., Inc.
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Basin Electric Power Cooperative
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Codington-Clark Electric Cooperative, Inc.
Watertown, South Dakota

Colorado River Energy Distributors Association
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Colorado River Water Conservation District
Glenwood Springs, Colorado

Colorado Rural Electric Association
Denver, Colorado

County of Boise
Idaho City, Idaho

County of Catron
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County of Eddy
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Dugan Production Corporation
Farmington, New Mexico

East River Electric Power Cooperative
Madison, South Dakota

Eastern Municipal Water District
San Jacinto, California

Edison Electric Institute
Washington, D.C.

Empire Electric Association, Inc.
Cortez, Colorado

Exeter Irrigation District
Exeter, California

Flathead Electric Cooperative
Kalispell, Montana

Frank Raspo and Sons
Banta, California

Garkane Power Association, Inc.
Richfield, Utah

Garrison Diversion Conservancy District
Carrington, North Dakota

Helix Water District
La Mesa, California

High Plains Power, Inc.
Thermopolis, Wyoming

Holy Cross Electric Association, Inc.
Glenwood Springs, Colorado

Idaho County Light and Power
Grangeville, Idaho

Idaho Mining Association
Boise, Idaho

Industrial Minerals Association – North America
Calverton, Maryland

Intercounty Electric Association
Mitchell, South Dakota

International Council of Shopping Centers
Alexandria, Virginia

Kern County Water Agency
Bakersfield, California

Lyon-Lincoln Electric Cooperative, Inc.
Tyler, Minnesota

Marine Industries Association of South Florida
Fort Lauderdale, Florida

Merced Irrigation District
Merced, California

Mid-West Electric Consumers Association
Denver, Colorado

Morgan County Rural Electric Association
Ft. Morgan, Colorado

National Association of Conservation Districts
Washington, D.C.

National Association of Counties
Washington, D.C.

National Association of Home Builders
Washington, D.C.

National Association of Industrial & Office Properties
Herndon, Virginia

National Association of Realtors
Washington, D.C.

National Grange
Washington, D.C.

National Marine Manufacturers Assn.
Chicago, Illinois

National Mining Association
Washington, D.C.

National Rural Electric Cooperative Association
Washington, D.C.

National Rural Water Association
Washington, D.C.

National Stone, Sand and Gravel Association
Washington, D.C.

National Water Resources Association
Arlington, Virginia

Nebraska Farm Bureau Federation
Lincoln, Nebraska

Niobara Electric Association
Lusk, Wyoming

Northern Electric Cooperative, Inc.
Bath, South Dakota

Northwest Horticultural Council
Yakima, Washington

Northwest Marine Trade Association
Seattle, Washington

Otero Electric Cooperative, Inc.
Cloudcroft, New Mexico

Panoche Water District
Firebaugh, California

Public Lands Council
Washington, D.C.

Rancho California Water District
Temecula, California

Raspo Farms
Banta, California

Rawhide Outfitters
Salmon, Idaho

Renville-Sibley Cooperative Power Association
Danube, Minnesota

Rushmore Electric Power Cooperative, Inc.
Rapid City, South Dakota

Salt River Project
Phoenix, Arizona

San Isabel Electric Association
Pueblo, Colorado

San Joaquin County Citizens Land Alliance
Tracy, California

San Joaquin River Exchange Contractors Water Authority
Los Banos, California

San Luis Valley Rural Electric Cooperative, Inc.
Monte Vista, Colorado

San Luis Water District
Los Banos, California

Sangre De Cristo Electric Association, Inc.
Buena Vista, Colorado
Southwestern Power Resources Association
Edmond, Oklahoma

Southwestern Water Conservation District of Colorado
Durango, Colorado

Sulphur Springs Valley Electric Cooperative
Willcox, Arizona

Teel Irrigation District
Echo, Oregon

Texas Aggregates and Concrete Association
Austin, Texas

Texas Crushed Stone Company
Georgetown, Texas

Toll Brothers, Inc.
Huntingdon Valley, Pennsylvania

TRICO Electric Cooperative
Tucson, Arizona

Tri-State Generation & Transmission Association, Inc.
Denver, Colorado

Tulelake Irrigation District
Tulelake, California

Upper Yampa Water Conservancy District
Steamboat Springs, Colorado

Washington State Potato Commission
Moses Lake, Washington

Washington State Water Resources Association
Yakima, Washington

Weber River Water Users Association
Sunset, Utah

Wells Rural Electric Company
Wells, Nevada

Western Energy Supply and Transmission
Denver, Colorado

Western Montana Electric Generation and Transmission Cooperative, Inc.
Missoula, Montana

West Side Irrigation District
Tracy, California

Wheat Belt Public Power District
Sidney, Nebraska

Whetstone Valley Electric Cooperative, Inc.
Milbank, South Dakota

Wilder Irrigation District
Caldwell, Idaho

Williamson County
Georgetown, Texas

Wyoming Water Development Association, Inc.
Laramie, Wyoming

Wyrulec Company
Lingle, Wyoming

Y-W Electric Association, Inc.
Akron, Colorado

NESARC
Updated September 14, 2005

STATEMENT OF
THE AMERICAN FARM BUREAU FEDERATION
TO THE
SUBCOMMITTEE ON RURAL ENTERPRISES, AGRICULTURE AND TECHNOLOGY
HOUSE COMMITTEE ON SMALL BUSINESS
REGARDING
INCENTIVES UNDER THE ENDANGERED SPECIES ACT

September 15, 2005

Presented by,
Bob Peterson
President of Ohio Farm Bureau Federation

Good morning. I am Bob Peterson, a grain and livestock farmer from Sabina, Ohio. I also serve as the president of the Ohio Farm Bureau Federation and I also serve on the American Farm Bureau Federation board of directors. I appreciate the opportunity to be here today to talk about the need for more and better incentives under the Endangered Species Act (ESA).

The need for these incentives is readily apparent when you realize that almost 80 percent of listed species occur, to some extent, on private lands. Almost 35 percent occur exclusively on private lands, meaning that they are totally dependent on the actions of private landowners for their continued existence. Most of these lands are agricultural lands. Cooperation of private landowners is essential if the Endangered Species Act is to be successful.

Farmers and ranchers enjoy the benefits of having wildlife on their lands. Most farmers and ranchers are already taking measures on their own to protect listed species and habitat. They need the tools to be able to do it better.

Many landowners would like to protect listed species, but ESA as currently written makes that difficult. Once a species is added to the list, the act imposes requirements for landowners to consult on any action involving a federal agency and also imposes strict prohibitions against "taking" listed species.

There are several programs available to help species before they are listed. Once a species is listed, however, those opportunities are greatly diminished. Most farmers and ranchers are also small businessmen or businesswomen who can least afford any adverse impacts from endangered or threatened species on their lands. ESA does not address the needs of small businesses.

ESA currently allows landowners to mitigate the impacts of any disturbance to listed species on their property by entering into a Habitat Conservation Plan (HCP).

Unfortunately, this process is primarily for larger landowners. Development of an HCP requires extensive scientific studies that are costly to complete. It also requires a great deal of time to complete and have approved. Service review of a proposed HCP can take months or years.

These costly and time-consuming requirements for development of an HCP place it outside the reach of most small businesses; it is generally unavailable for smaller landowners. Farmers and ranchers can neither afford the time it takes to complete an HCP nor the money it takes for scientific studies or mitigation.

We support H.R. 3300 because it provides the framework for an Endangered Species Act cooperative conservation program that addresses the needs of small businesses such as farmers and ranchers. We commend the chairman for introducing the bill and working to secure a better way of resolving endangered species issues for farmers, ranchers and other small businesses.

There are many examples of farmers and ranchers joining together to enhance species habitat before species are listed. Farmers and ranchers in 11 western states are cooperating with federal, state and local officials, as well as with other landowners in local working groups to protect the greater sage grouse. Also, the Colorado Farm Bureau participates in a program that has protected the mountain plover on agricultural lands.

Farm Bureau has long supported the use of cooperative conservation as a way to implement the Endangered Species Act. We are convinced that cooperative conservation is the way to make the Endangered Species Act work for both landowners and for species, producing a "win-win" situation for both.

The White House recently sponsored a conference on cooperative conservation in St. Louis. We were heartened by the commitment from the administration's top officials from five cabinet-level departments (Interior, Agriculture, Commerce, Defense and the Environmental Protection Agency). Over a thousand people representing a variety of interests and different parts of the country came together to discuss cooperative successes and make suggestions on how to improve the process.

Participants overwhelmingly cited the need for greater statutory flexibility as one of the main changes needed. The Endangered Species Act needs to be amended to provide greater flexibility to farmers, ranchers and others to protect listed species on their private lands. To their credit, many private landowners are participating in innovative programs such as safe harbor that allow them to accomplish some of the objectives of helping species while at the same time meeting their land management goals. However, more and greater flexibility is needed.

We believe that H.R. 3300 provides farmers and ranchers the flexibility they need to meet their land-use goals while at the same time providing effective protection for listed species. The voluntary species recovery agreements specified in the bill allows both the landowner and the government agency the flexibility to craft an agreement that will

provide maximum benefits to both species and landowner. The bill also allows the agency to offer compensation that might include tax incentives or fewer restrictions as well as direct payments. We recognize that these incentives must be authorized by Congress.

A basic premise for an effective cooperative conservation program is that it must incorporate working landscapes and not be strictly a set-aside program. Some landowners may be willing to set aside forest lands or other areas for longer periods of time for species habitat; others will need to keep habitat lands in production. Both options should be available to landowners.

A cooperative-based program might replace the existing emphasis on ESA enforcement with positive incentives for landowners to manage species or habitat on their land. Landowners who work on the land every day would be able to actively manage species and habitat on a day-to-day basis through partnership agreements with the federal government. Landowners would take actions to benefit species because they *want* to, not because they *have* to. Species would benefit from active habitat management and landowners would benefit as well.

A voluntary, incentives-based program should be responsive to the needs and concerns of private landowners. Those needs and concerns can vary significantly among farmers and ranchers. For example, some are concerned with the impact that estate taxes will have on their ability to pass the operation along to future generations. Some are concerned about maintaining a cash flow that will allow them to meet bank loan payments and other obligations. Some are concerned about whether they will be able to continue to operate with a listed species on their property.

A well-crafted cooperative conservation program should, therefore, include a wide array of mechanisms to address those concerns. One size does not fit all. An effective program should include a choice of direct payments, estate tax or property tax or other tax deductions or credits, or simply the removal of ESA disincentives or restrictions. Removal of restrictions or disincentives can itself be an effective inducement for landowners to enter into conservation agreements.

In addition, there are certain elements that must be part of any voluntary cooperative conservation program.

First, the program must provide certainty to landowners that once an agreement is in place, no additional management obligations or restrictions will be imposed. The same "no surprises" policy that is available to habitat conservation plans should be available as well to all cooperative conservation agreements.

Secondly, government agencies must be able to provide incidental-take protection to landowners who enter cooperative conservation agreements. Landowners must have assurances that actions they agree to take to enhance species habitat will not be subject to prosecution if they result in the accidental harm to a listed species. These incidental-take

protections are provided for habitat conservation plans, and should also be provided for all cooperative conservation agreements.

Third, lands covered by cooperative conservation agreements should be excluded from critical habitat. Critical habitat is designed to protect essential habitat that requires special management. Cooperative conservation agreements provide that special management, and critical habitat designation would be a duplication of the terms of the agreement. Cooperative agreements will actually be more beneficial to species than critical habitat, because the habitat would receive active management.

I thank you for holding this hearing on this important and timely issue, and look forward to answering any questions that you might have.

TESTIMONY OF JOHN KOSTYACK
SENIOR COUNSEL AND DIRECTOR, WILDLIFE CONSERVATION CAMPAIGNS
NATIONAL WILDLIFE FEDERATION

BEFORE THE SUBCOMMITTEE ON RURAL INTERPRISE, AGRICULTURE AND TECHNOLOGY

HOUSE COMMITTEE ON SMALL BUSINESS

CONCERNING H.R. 3300, Endangered Species Improvements Act of 2005

September 15, 2005

Good morning, my name is John Kostyack, and I am here to testify on behalf of the National Wildlife Federation, the nation's largest conservation education and advocacy organization.

We appreciate this Committee's interest in providing landowners with new and better incentives to conserve endangered species. The bill that is the focus of this hearing, H.R. 3300, is an excellent starting point for providing those incentives. The National Wildlife Federation fully supports this bill, subject to a few suggestions for improvement.

Endangered Species Act: The Nation's Safety Net for Wildlife at the Brink of Extinction

Before discussing H.R. 3300 in detail, I thought it would be useful to speak broadly about the Endangered Species Act, the law that this bill would amend.

The Endangered Species Act is a remarkably successful law, especially considering the extremely limited resources that agencies have been provided for its implementation.

- Over 98% of species ever protected by the Act remain on the planet today.
- Of the listed species whose condition is known, 68% are stable or improving and 32% are declining.
- The longer a species enjoys the ESA's protection, the more likely its condition will stabilize or improve.

The most important thing for Congress to understand about the Endangered Species Act is this often-ignored fact: **It has worked to keep species from disappearing forever**

into extinction and, over time, it has generally stabilized and improved the condition of species. As a result, we have a fighting chance of achieving recovery, and more importantly, we are passing on to future generations the practical and aesthetic benefits of wildlife diversity that we have enjoyed.

Species that were once rapidly heading toward extinction, such as the whooping crane, black-footed ferret and California condor, would probably not be around today if not for the Endangered Species Act. Wildlife icons such as the gray wolf, Yellowstone grizzly and our nation's symbol, the bald eagle, now have increasing populations thanks to the Endangered Species Act.

The other key benefit provided by the Endangered Species Act, besides stopping extinction and halting and reversing population declines, is that it **protects the habitats that species depend upon for their survival**. The habitats protected by the Act are not only essential for wildlife, they are oftentimes the very natural areas that people count on to filter drinking water, prevent flooding, provide healthy conditions for hunting, fishing and other outdoor recreation, and provide a quiet and peaceful respite from our noisy and frenetic everyday lives.

The success of the Endangered Species Act is due in large part to the law's "safety net" provisions. These provisions require that we exercise caution with the nation's rich wildlife heritage, looking before we leap into habitat-disturbing activities and modifying those activities where necessary to prevent extinction.

Thanks in large part to these protections, we have a rich natural heritage to pass on to our children and grandchildren.

The Main Criticism of the Endangered Species Act is Misplaced

Critics of the Act focus primarily on the fact that only a handful of species have recovered to the point where they can be delisted. However, this inability to delist many species is due to factors beyond the influence of the Endangered Species Act.

First, restoring species and habitats requires funding. Substantial public and private dollars will be needed to create positive incentives for private landowners and others to restore habitats and manage them for the benefit of listed species. It is a failure of the various administrations and Congressional appropriators, not the Endangered Species Act, that adequate public funding has not been provided.

Second, as a matter of biology, achieving full recovery often takes a long time. The average period of time in which species have been listed under the ESA is 15.5 years. Recovery plans prepared by the leading experts on the species show that, regardless of which laws or programs are in place, this is not enough time restore habitats and rebuild populations. These plans show that listed species, which are usually severely depleted at the time of listing, typically cannot be brought back to the point of long-term viability for several decades or more.

Third, delisting requires putting in place non-ESA regulatory measures. For most listed species, there are no protections in place to prevent immediate habitat losses after the Endangered Species Act's protections are removed. In addition, most species require continuing management even after their population sizes and habitats have been restored to targeted levels. Conservation agreements with funding, monitoring and enforcement mechanisms must be negotiated with land managers to ensure that this management is carried out over the long run.

In summary, those who claim the ESA is broken due to the absence of a sizable number of delistings are ignoring the facts. The realities that impede quick recovery and delisting -- inadequate funding, slow biological processes, and the absence of any alternative safety net – are not the fault of the Endangered Species Act.

Any Update to the Endangered Species Act Must Provide Greater Incentives to Carry Out Actions that Help Species Recover

Like any law that has not been reauthorized for seventeen years, the Endangered Species Act would certainly benefit from Congressional review and strengthening. Having been involved in ESA implementation for nearly twelve years, and having participated in many studies and debates and discussions about how best to update the law, I can say with confidence that the area needing the most attention is the lack of financial incentives for private landowners and others interested in carrying out affirmative conservation measures that move species toward recovery

The Act wisely calls for affirmative conservation measures to promote recovery. For example, it directs the Secretary to implement recovery plans (section 4(f)), acquire land (section 5), and enter cooperative agreements with states (section 6). It also allows the Secretary to provide for affirmative conservation measures as part of the required mitigation for take of listed species under sections 7 and 10. However, it does not specifically address the situation where a private landowner or small business wants to make recovery happen on its working landscape, but lacks the funding and technical know-how to do so.

Farmers and other small businesses should be helped with funding and technical assistance to carry out conservation measures for listed species. Those who operate businesses on private lands are often in the best position to make recovery happen. They own or control many of the habitats on which threatened and endangered species depend for their survival. As the General Accounting Office has found, roughly 80 percent of listed species depend in part on private land habitats.

Simply protecting these habitats from unwise development will not be enough. To save our natural heritage, Congress will need to provide incentives for a host of affirmative conservation measures. Examples of the many affirmative conservation measures that will be needed to recover endangered species include prescribed fires for the birds, butterflies and many other species in fire-dependent ecosystems, removal and control of

invasive species, building wildlife crossing for species with habitats fragmented by roads, and planting vegetation along degraded rivers and streams relied upon by aquatic species.

To give a sense of the scope of the challenge, let's consider just two of the above-listed tasks: invasive species and restoration of fire regimes. According to a 1998 study, managing just the currently occupied habitats of listed species threatened by invasive species and the disruption of fire regimes would cost more than $3.2 billion per year in 1997 dollars. Without this level of support, approximately 60 percent of listed species could face continued declines or extinction, even if their habitats are nominally protected. D. Wilcove, L. Chen, *Conservation Biology* (December 1998), p. 1405.

Private landowners and others are not likely to be willing or able to undertake such costly management and restoration measures without a helping hand from government.

With Modest Changes, S. 3300 Would Provide a Useful Helping Hand to Private Landowners and Others Interested in Contributing to Species Recovery

S. 3300 addresses this need for a helping hand by authorizing the Secretary of Interior and Secretary of Commerce (the Secretary) to enter into a "species recovery agreement" (SRA) with private landowners and others to enable them to carry out management actions that contribute to the recovery of listed and candidate species. The bill authorizes compensation for these management actions and requires the Secretary to provide technical assistance and management training.

It should be noted that the Secretary already has the authority to operate grant programs to provide funding to private landowners and others for conservation of listed species. However, most existing conservation-oriented grant programs do not focus specifically on the needs of listed species and candidates for listing (those already deemed warranted for listing). By focusing on these species, H.R. 3300 can help ensure that landowners interested in conserving listed species are not forced to apply to grant programs not designed for them.

Two existing grant programs, the Private Stewardship Grants program and Cooperative Endangered Species Fund, focus on species listed under the Endangered Species Act, as well as candidates and those proposed for listing. However, both of these programs have match requirements that small businesses may not be able to meet. H.R. 3300 does not impose any requirements for financial or in-kind contributions, and instead focuses on getting the job done with the voluntary cooperation of the landowner.

Species listed under the ESA deserve priority attention from Congress because these are the parts of our natural heritage that are at the greatest risk of disappearing forever. It makes sense to secure recovery actions now before conservation options are reduced and become more costly. Leaving species at a severely depleted condition, where they are susceptible at any time to extinction events such as fires, floods and disease, is not a sound management strategy. H.R. 3300 properly recognizes the benefits of moving species toward recovery more quickly.

Ideally, Congress would pass a tax bill that provides incentives to carry out these kinds of actions, so that landowners can plan their activities into the future. Grant programs have the distinct disadvantage of being subject to appropriations, which are highly uncertain in this tight budgetary climate. However, until a tax change is enacted to provide incentives, the kind of grant program envisioned by H.R. 3300 is the only alternative.

Targeted Improvements Are Needed

To ensure that the effectiveness of the Endangered Species Act is not undermined inadvertently, the sponsors of H.R. 3300 should consider making a handful of very targeted amendments.

First, SRAs must be aligned with recovery plans approved pursuant to section 4(f) of the Act. Among the several consensus points that has emerged from the Endangered Species Act debate in recent years is the need to enhance recovery planning under the Act. Conservation, industry and state governmental organizations have called for expanding participation in recovery planning, and developing implementation agreements in which key agencies commit to helping carry out specific objectives outlined in recovery plans.

As currently written, H.R. 3300 makes no reference to the recovery planning process or to approved recovery plans. Thus, under H.R. 3300 the Secretary could conceivably approve an SRA that is at odds with a recovery plan that was carefully developed over a period of years by a diverse team of experts on the species. Recovery plans are the blueprint for the management and restoration of listed species, and the substantial investment of public and private resources into their preparation should not so easily be squandered.

H.R. 3300 should be amended to state that SRAs must be guided by, and consistent with, recovery plans approved pursuant to section 4(f). If the Secretary believes that the approved recovery plan is outdated and seeks to depart from it, she should be required to notify the public and provide a 30-day opportunity to comment on the proposed departure. Any approved SRA that departs from the recovery plan should be attached as an amendment to the final recovery plan.

Second, participation in SRAs should be available to the states. As currently written, H.R. 3300 excludes agencies or departments of a federal or state government from participation in SRAs. Although excluding federal agencies makes sense – funding of federal contribution to species recovery is provided through each agency's appropriations bill – excluding state agencies is inappropriate. Although the Cooperative Endangered Species Fund is currently available to the states for endangered species conservation, it is possible that SRAs will someday become the primary vehicle for the funding of non-federal recovery actions. States are an absolutely crucial player in the management and restoration of imperiled wildlife, and they should be on the ground floor of the SRA innovation.

Third, conservation actions that are not "integrated with existing operations" on the land should not be disqualified from inclusion in SRAs. As currently written, H.R. 3300 presumably disqualifies activities not integrated with existing operations because its sponsors seek to make clear that Congress is not advocating major changes in land management. However, because SRAs are completely voluntary, private landowners and others should not be prohibited from proposing SRAs that depart substantially from existing operations.

Fourth, H.R. 3300 should be amended to cover activities beneficial to species proposed for listing. As currently written, the bill applies only to activities benefiting listed and candidate species. Because "proposed" species have (like listed and candidate species) been deemed warranted for ESA protection, their condition has reached the level of urgency that warrants Congress's attention. H.R. 3300 should follow the approach taken in the two existing ESA-related grant programs, the Private Stewardship Grants program and Cooperative Endangered Species Fund, and focus on species proposed for listing under the Endangered Species Act, as well as listed species and candidates

Finally, the Secretary should be directed to maintain a database of SRAs, accessible via the internet. This will enable landowners and conservationists to determine which projects have successfully competed for the limited dollars available under the SRA program, and help them build on past innovations. In addition, it will enable everyday taxpayers to watchdog the wildlife agencies and ensure that they are wisely spending hard-earned tax dollars.

H.R. 3300 Should Supplement, Not Supplant, the Safety Net for Endangered Wildlife

In conclusion, the National Wildlife Federation is hopeful that H.R. 3300, with the targeted amendments suggested above, can herald a new era in endangered species conservation. To save the nation's endangered wildlife for future generations, Congress must lend a helping hand to private landowners who want to do the right thing.

At the same time, Congress must be careful not reduce the Endangered Species Act's safety net of habitat protections that have helped to keep hundreds of species from disappearing into extinction. Conservationists become concerned whenever we hear industry groups imply that incentives programs such as that proposed in H.R. 3300 will somehow replace the Act's mandatory habitat protections. The only way to make the Endangered Species Act work, and to have a productive Endangered Species Act reauthorization debate, is to recognize the tremendous value provided by both voluntary incentive programs *and* the Act's safety net features.

Thank you for the opportunity to testify today. I would be pleased to answer any questions you may have.

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