A Brief Guide to the "Written Determination" and Private Property "Aid" Provisions of H.R. 3824[1]

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H.R. 3824, "**The Threatened and Endangered Species Recovery Act**," approved by the House Resources Committee on September 22, would add two new features to the Endangered Species Act (ESA) to create property owner immunities and cash entitlements.

Section 12(d) -- Written Determination of Compliance

Section 12(d) of the bill adds **Section 10(k)** to the ESA to create a process in which any "property owner" may at any time request the Secretary (of Interior or Commerce) to make a written determination that a "proposed use of the owner's property" that is lawful under "State and local law" will not result in a "take" of protected species prohibited by Section 9(a) of the ESA. The request is "deemed to be sufficient" if it includes a description of "the nature, the specific location, the lawfulness under State and local law, and the anticipated schedule and duration of the proposed use," a demonstration that "the property owner has the means to undertake the proposed use" and any "anticipated adverse impact" on listed species that the property owner "reasonably expects to occur as a result of the proposed use." The Secretary "shall provide" a written determination whether the proposed use will result in a prohibited "take" no later than 180 days from the request. The requester "may grant," but is not required to grant, a written extension of this deadline for an additional 180 days; however, the Secretary may extend the period by up to 180 days if "seasonal considerations make a determination impossible" within the period. If the Secretary fails to provide a written determination within the prescribed period, the Secretary "is deemed to have determined" that the use is compliant. Any action taken by the property owner in "reasonable reliance" on a written determination of compliance or "deemed" compliance is not a violation of the ESA. A determination of compliance remains effective for 10 years (or for 5 years for a "deemed" determination). The Secretary may withdraw a determination of compliance only if "because of unforeseen changed circumstances" the continuation of the use would "preclude conservation measures essential to the survival" of a listed species. The "written determination" provision "shall not apply with respect to agency actions that are subject to consultation under section 7" of the ESA.

Section 13 – Mandatory "Aid" to Property Owners

Section 13 of the bill amends **Section 13** of the ESA to create new provisions for both discretionary "grants" and mandatory "aid" to private property owners*. This analysis addresses only the mandatory "aid" provisions.* **Subsections (a)** and **(d)** provide that the Secretary "shall award" cash to owners whose "proposed use" would not comply with Section 9(a). The Secretary must pay "no less than the fair market value of the use that was proposed by the property owner," if the owner has filed a request for money within 180 days after the written determination and foregoes the use, which would have been lawful under state and local laws. Under **subsection (f)** the Secretary "shall" enter into negotiations with the owner within 30 days of the request for payment, to determine how to "document" the "foregone proposed use" and if unable to reach agreement, then within 60 days of the request the Secretary shall determine how to document it "with the least impact on the ownership interests of the property owner." Under **subsection (g)** the term "fair market

[1] This analysis is provided for informational purposes only and does not represent a position of the Environmental Law Institute on the legislation.

value" is defined as the "fair market value of the foregone use of the affected portion of the private property including business losses" and must be determined within 180 days "of the documentation of the foregone use" jointly by "two licensed independent appraisers," one selected by the Secretary and one by the owner. If they fail to agree, the Secretary and owner shall "jointly select a third licensed appraiser whose appraisal within 90 additional days shall be binding" on both parties. The Secretary is directed to adopt regulations regarding selection of the "jointly selected appraisers." Under **subsection (e)** the Secretary is required to pay within 180 days after the owner's request, or after the conclusion of these processes to resolve documentation or fair market value.

Analysis

The bill contains no ripeness requirement

The bill would allow a property owner to initiate the written determination process at any time for any proposed use. Unlike compensation procedures under the U.S. Constitution or eligibility requirements for federal funding under other government programs, there is no requirement that the "proposed use" be in place or be "ripe" for review. For example, a proposed use might consist only of a development concept plan that has not undertaken the permitting processes required to make it viable "but-for" the potential ESA determination. Under the bill, the Secretary would be compelled to commit staff and make determinations within 180 days for mere proposals rather than for projects that have demonstrated investment-backed expectations.

Low threshold for requesting a determination, with high return to requester, will generate many requests

The adoption of a very low threshold for requesting written determinations (any property at any time with regard to any proposed use) is likely to lead to thousands of filed requests annually. Because the bill provides that the result of filing a request is always either (a) immunity or (b) a cash payment, requests could be filed for any project regardless of its potential for affecting endangered species. It is likely that lawyers who did not advise their clients to make a precautionary ESA 10(k) filing for every routine housing and commercial development, forestry activity, agribusiness, or other activity (even in areas not known to have endangered species) would be committing malpractice. Federal staffing for these reviews would need to be substantially increased. Indeed, the availability of such review may involve federal officials in many more land issues than is currently the case.

Changed circumstances

The missing of the 180-day deadline or a written determination that a proposed action will not result in a take of species immunizes the owner against liability for a violation based on any action in reasonable reliance thereon. There is no provision for rescission of a merely *erroneous* determination or one based on fraud or mutual mistake (even if essential for conservation and with payment to the owner), but only a withdrawal where "unforeseen *changed* circumstances" prevent conservation actions essential to survival of the species. Apparently unforeseen *unchanged* circumstances regardless of impact, or changed circumstances that result in unforeseen takes but do not jeopardize survival of the species (as opposed to a population) remain binding. Thus, the risk of error or fraud falls on the species.

Threshold for requests complicates interaction with ESA Section 7

The bill is ambiguous as to the connection between these provisions and ESA section 7, which requires federal agencies to consult with the Secretary to determine whether an action authorized, funded, or carried out by the agency is likely to jeopardize the continued existence of a listed species. According to the bill, the written determination

section "shall not apply with respect to *agency* actions that are subject to consultation under section 7." Thus, a conflict may arise if a private owner requests a written determination for a proposed use and does not apply for, or only later applies for, a permit subject to section 7 consultation. If the owner receives immunity, is it still valid if consultation imposes conditions? Is the owner still required to comply with consultation conditions? And if the owner seeks payment rather than pursuing the project, to what extent is "fair market value" affected by potential mitigation provisions that could have been required after consultation if consultation was never initiated?

"Fair market value" procedures are ambiguous

The new section 13 provides for payment of "not less than the fair market value of the *use* that was proposed by the property owner" rather than for any diminution in value of the *property.* This unusual draftsmanship may not allow the government to offset the remaining value of the property for an array of other uses. Nor does the aid provision appear to include an offset for development costs that would have been incurred to develop the proposed use; for example, a proposed housing development whose fair market value as a proposed use might be $10 million but whose planning, permitting and construction costs might have been $8 million, would apparently be entitled to the former figure. (Indeed the bill compensates for any "business losses" in *addition* to compensation for the value of the use).

The bill's appraisal procedures do not specify who pays for the appraisals, nor the procedures by which two independently selected appraisers are to arrive at a joint figure. The bill does not provide for any review if the first two appraisers agree but the U.S. government does not; but it also does not expressly make a joint figure binding. At the same time, the provision for a third appraiser does not require that the third appraiser's figure bear any relationship whatever to the two preceding appraisals (it may be higher or lower than both, apparently); but that appraiser's result is made binding on the federal government and owner, apparently even if erroneous in some respect. The bill directs the Secretary to promulgate regulations only regarding "*selection* of the *jointly* selected appraisers," which leaves these issues all unresolved.

The bill's definition of "fair market value" requires compensation for foregone use of the "affected portion" of property, apparently requiring that it be considered in isolation from the parcel as a whole. This is the converse of federal law governing "just compensation" for constitutional impairments of property rights.

Claim against the treasury

The bill characterizes the mandatory obligation to pay property owners as "aid" and contains no provision for a judicial cause of action or clear coverage of such obligations under the Tucker Act, 28 U.S.C. 1491 (conferring jurisdiction and waiving sovereign immunity of the United States for certain claims against the government). The result may produce substantial litigation, especially when disputes arise over whether payment is due, as well as fair market value. Creation of a new claim-based compensation requirement is ordinarily considered by Congressional committees with jurisdiction over the federal judiciary.

Use "lawful under state and local law"

The provision that the proposed use is entitled to payment if lawful under state and local law does not recognize that some uses are unlawful or are limited by *federal* laws, such as the Clean Water Act, RCRA, Federal Power Act, and other laws. In addition, regardless of whether a use is lawful or not, a *property* interest may be limited by federal, state, or common law. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) provided that even claims for total losses of value are not entitled to compensation under the Constitution when the limitation reflected background principles of law including property law, nuisance and other background principles including, for example, the federal "navigation servitude" (citing *Scranton v. Wheeler*, 179 U.S. 141 (1900).)