NAHB
NATIONAL ASSOCIATION OF HOME BUILDERS

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TESTIMONY OF

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ON BEHALF OF THE

THE NATIONAL ASSOCIATION OF HOME BUILDERS

UNITED STATES SENATE
COMMITTEE ON ENVIRONMENT & PUBLIC WORKS
SUBCOMMITTEE ON FISHERIES, WILDLIFE, AND WATER

HEARING ON

INCENTIVES FOR PRIVATE LANDOWNERS UNDER THE ENDANGERED SPECIES ACT (ESA)

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Chairman Chafee, Ranking Member Clinton, and members of the subcommittee, the National Association of Home Builders (NAHB) appreciates the opportunity to share our views with the Senate Environment and Public Works Committee, Subcommittee on Fisheries, Wildlife, and Water, on Incentives for Private Landowners under the Endangered Species Act (ESA).

NAHB represents over 220,000 member firms involved in home building, remodeling, multifamily construction, property management, housing finance, building product manufacturing and other aspects of residential and light commercial construction. Nationwide, our members are committed to environmental protection and species conservation, however, oftentimes well-intentioned policies and actions by regulatory agencies result in plans and programs that fail to strike a proper balance between conservation goals and needed economic growth. In these instances, our members are faced with significantly increased costs attributed to project mitigation, delay, modification, or even termination.

Importantly, NAHB's members are citizens of the communities in which they build. They seek to support the economy while providing shelter and jobs, partner to preserve important historical, cultural and natural resources, and protect the environment, all while creating and developing our nation's communities. As such, home builders support the U.S. Fish and Wildlife Service's and NOAA Fisheries' (collectively, the Services) efforts to protect and conserve species that are truly in need of protection. A vital component of any conservation effort, however, is to ensure the proper balance of each species' needs with the needs of the states and communities in which it is located. One element necessary to consider in evaluating this balance is whether or not the ESA is meeting its goal of species restoration and recovery. And what's more, has it worked *well*? Has it been an efficient and effective means by which to address the myriad of threats that endangered and threatened species face?

As of July 6, 2005, there were 1,264 U.S. species listed as endangered or threatened under the ESA. Since the Act's inception in 1973, a total of 40 species or subpopulations have been removed from the list. Of those 40, only 10 are U.S. species that have been sufficiently nursed back to health to qualify as "recovered." Nine have gone extinct. The rest of the species are a mixture of U.S. and international creatures that for one reason or another, be it the availability of new information or an amendment to the Act itself, no longer qualify for listing under the ESA. Unfortunately, species are added to the list much, much easier than they are removed.

NAHB believes that unfortunately, even after all these years, the mechanisms employed by the ESA to protect endangered and threatened species are oftentimes awkward and rudimentary. For private landowners and developers, they involve a certain set of prohibited acts and regulated actions that are disproportionately burdensome and onerous. Further, individual landowners often lack the funding and relevant expertise to best protect the species under their particular care. For the majority of the ESA's history, however, there was little if anything under the Act to actively encourage landowner cooperation, those proactive steps needed to aid the recovery of listed species or pre-empt a species from being listed in the first place. And these glaring shortfalls threaten to hamstring the ESA in the coming years. NAHB believes that only by addressing these concerns now, proactively, will species conservation efforts be successful.

In evaluating strategies to update and strengthen the ESA, NAHB believes that two key components or strategies within the Act warrant particular attention, the awkwardness of outdated regulatory provisions and the success of conservation incentives. While the ESA harbors several unnecessarily burdensome and duplicative regulatory provisions badly in need of modernization, such as the designation of critical habitat, it has also given rise to resounding conservation success through the use of incentives like Habitat Conservation Plans (HCP). Only by taking stock of the ESA's successes and failures, those provisions that should be updated or revised and those that should be retained as well as expanded, can implementation of the Act be made more effective.

I. Regulatory provisions under the ESA must be updated

In the regulatory arena, the ESA continues to remain much more of a proverbial stick than a carrot. Despite its disproportionate reliance on a relative few private landowners to maintain the extraordinary public good that is biodiversity conservation in this country, there remain very few incentives to encourage active landowner cooperation. Especially in areas where land costs and land values are high and where species conservation and economic growth and development are intertwined, there is a virtual dearth of programs that allow landowners and businesses to even begin to recoup or recapture the costs of voluntary conservation actions. Complicating issues further is the unfortunate reality that the ESA is burdened by a number of disincentives that actively *discourage* landowner cooperation. Such is plainly not a recipe for continued success. Although many aspects of the ESA warrant reexamination, the provisions below are of particular concern to the nation's home builders.

A. The designation and regulation of critical habitat

Of all programs implemented under the ESA, critical habitat has emerged as one of the most controversial and litigation-prone. And while NAHB believes that habitat conservation is an important component of species conservation, the question remains as to whether the regulatory provisions outlined in the critical habitat designation process can effectively manage the lands and waters on and in which listed species reside. The Services have stated that the critical habitat designation process is broken, and that the designation of critical habitat consumes precious agency resources while providing limited benefits to listed species.[1] NAHB agrees.

Furthermore, litigation has skewed the Service's long-held interpretation for evaluating the impact of activities occurring within designated critical habitat. Lawsuits in the 5th

[1] "In 30 years of implementing the ESA, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of conservation resources. The Service's present system for designating critical habitat is driven by litigation rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic costs. The Service believes that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit to the species most in need of protection." (Final Designation of Critical Habitat for Four Vernal Pool Crustaceans and Eleven Vernal Pool Plants in California and Southern Oregon. 68 Fed. Reg. 46684 (August 6, 2003)).

and 9th Circuits[2] have challenged the regulatory definition of adverse modification, the standard by which the Services review activities taking place in critical habitat. In the absence of a clear definition of this term, the true role of critical habitat, and indeed the true impact of critical habitat on private landowners, is unclear. Congress should consider whether legislation is required to fully remove any and all confusion.

Several other elements of critical habitat likewise warrant attention and review. One particularly troublesome aspect is the potential duplicative overlay of critical habitat over Habitat Conservation Plans (HCPs) and other voluntary management agreements. If an approved HCP falls within critical habitat, it may be subject to additional regulatory requirements and red tape (or "overlay") of critical habitat that have little or no benefit to listed species. Any incentive to enter into an HCP is lost if the area at issue is also subject to regulation under the critical habitat provisions of the ESA. While NAHB applauds the recent efforts by the Services to exclude existing HCPs from specific critical habitat designations, critical habitat "overlay" must be consistently and continually eliminated from land areas already subject to government–approved or pending plans in order to further encourage stewardship through the HCP process. Provisions to achieve this goal have been included in H.R. 1299, the Critical Habitat Enhancement Act, sponsored by Congressman Dennis Cardoza (D-CA). NAHB fully supports this important legislation.

NAHB also believes that the commonsense designation of critical habitat depends on the availability of full and complete economic analyses, as well as the full involvement of local landowners and stakeholders. In the past, the Services have incorrectly assumed that critical habitat added no additional costs over species listing, and dismissed the statutory requirement under Section 4(b)(2) of the ESA to conduct an economic analysis of designating lands as critical habitat.[3] The failure of the Services to document the impact of their regulatory actions, as required by the ESA, represents a crucial shortfall in the implementation of the Act. While the last few years have seen an improvement in the process by which the Services conduct these required economic analyses, H.R. 1299 includes specific language which would ensure that economic analyses are sound and complete by requiring that the direct, indirect, and cumulative economic effects of critical habitat designations are considered.

B. Use of sound science

Private landowners, who have been burdened with carrying out many of the responsibilities of the ESA, have repeatedly questioned the science behind the decisions made by the federal agencies implementing the Act. The aggregate results of erroneous ESA decisions are broad, negatively affect the housing market and the national economy, and at times damage the very species we are trying to protect.

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[2] See *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434 (5th Cir. 2001), *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service*, 378 F. 3d 1059 (9th Cir. 2004).

[3] *See, e.g., New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277 (10th Cir. 2001), *National Ass'n of Home Builders v. Evans*, No. 00-CV-2799, 2002 WL 1205743 (D. D.C.).

Listing a species and designating critical habitat under the ESA requires the use of the "best scientific and commercial data available." However, there is no definition for this phrase in the ESA, or in the regulations implementing the Act. Consequently, species can be listed based solely on a single petition if it is deemed to be the best scientific data available. Critical habitat can likewise be designated without truly knowing which areas are essential to conservation and with incomplete datasets somehow qualifying for best available data. Additionally, once a species is listed, the Services often ignore additional or new science that supports the de-listing of species. For example, the Bald Eagle, at home across the entire lower 48, is widely viewed as being recovered. Still, it remains on the ESA, some 6 years after initially being proposed for delisting.[4]

The listing of species under the ESA and the subsequent designation of critical habitat for those species must be based on reliable, accurate and solid biological and scientific data. For these reasons and more, NAHB support the passage of legislation that would ensure that sound science is used in ESA decisions.

II. Incentive-based programs under the ESA must be preserved

The most important incentive that Congress can give home builders is regulatory certainty. At some point in the regulatory process, builders need to know that there will be no more "bites at the apple" from either the Services or, just as importantly, private litigants. Indeed, the concept of certainty is a virtual prerequisite to encourage the cooperation of home builders, developers, and other private landowners in conservation activities under the ESA.

It goes without saying that private landowners and developers represent a vital component to ensuring species conservation – over 70% of the land in this country, excluding Alaska, is privately owned. Compound this fact with the simple observation that 95% of all ESA-listed species have at least a portion of their habitat occurring on non-federal lands, with 19% occurring *only* on non-federal lands, and the role of the private landowner in species conservation becomes all the more apparent.[5] In 1982, Congress recognized that private property owners were instrumental to long-term species conservation efforts, but that many regulatory uncertainties posed challenges to their participation. Congress also recognized that the level of certainty regarding the costs and terms of an HCP should be honored by the federal government throughout the HCPs implementation. More than a decade later, the "No Surprises" policy was implemented. However, HCPs remain the subject of litigation by groups seeking to overturn the policy. To ensure that the courts do not undermine "No Surprises", Congress should confirm its original intent and codify the existing policy as part of the ESA to give private property owners, state and local governments, and community organizations the necessary certainty to continue their species conservation efforts.

HCPs can help to bridge the gap between two often competing public policy objectives -- housing and community growth and protecting and conserving habitat. Indeed, a NAHB

[4] 64 Fed. Reg. 36453 (July 5, 1999).
[5] Wilcove, D., M. Bean, R. Bonnie, and M. McMillan. 1996. Rebuilding the ark: toward a more effective Endangered Species Act for private land. Environmental Defense Fund, Washington, D.C. *cited in* Hilty, J and A.M. Merenlender. 2003. Studying biodiversity on private lands. *Conservation Biology* 17: 132-137.

analysis of the U.S. Fish and Wildlife Service HCP database indicates that, as of 2003, the three fastest growing regions in the country, the Southeast, the Southwest, and the Pacific regions, combined have over 61% of the nation's housing starts and nearly 94% of the nation's HCPs.[6] While the following examples provide tangible, specific insights into the conservation benefits of several HCPs in the state of California, they are but a snapshot of the substantial environmental benefits of the hundreds of HCP planning efforts found across the country:

East Contra Costa County Habitat Conservation Plan (Contra Costa County, California). Although it has yet to be finalized, the 175,804 acre East Contra Costa County Habitat Conservation Plan has been in development since 2000, and is slated to cover 28 listed and unlisted species. The Home Builders Association of Northern California (HBANC) has been actively involved throughout the planning process, despite an anticipated $20,000 or higher per acre habitat acquisition and maintenance fee (levied in addition to other impact fees that exceed $75,000 per house). The builders' support, despite such a hefty fee, is directly tied to the HCP's promise of regulatory certainty -- builders are being told where to build and where not to build, are being informed of their obligations up front, and are even being offered the hope of permit streamlining.

Central/Coastal Natural Community Conservation Plan (Orange County, California). This plan, approved in July 1996, establishes a 37,000-acre habitat reserve system encompassing a large percentage of the coastal sage scrub system in a portion of Orange County, thus providing for the protection of California gnatcatcher and other sage scrub -dependent species. This HCP also created a ten million dollar endowment for the purposes of ongoing management of the reserve area. This HCP illustrates the unique ability of HCPs to protect and conserve habitat that would otherwise remain unregulated under the taking prohibitions as many thousands of acres preserved in the Central/Coastal Natural Community Conservation Planning Program (NCCP) reserve system are beyond the regulatory reach of Section 9 of the ESA.[7] A similar plan is in development for the southern portion of the County.

San Diego County Multi-Species Conservation Plan (San Diego, California). This plan was approved by the Service in June 1997. It establishes a 165,000 acre reserve system in southern San Diego County. The reserve is established and funded principally through contributions by the development community. The plan is implemented through detailed "sub-area" plans within the various land-use jurisdictions in San Diego County.

Western Riverside Multi Species Habitat Conservation Plan (Riverside County, California). The Western Riverside Multi Species Habitat Conservation Plan is a multi-jurisdictional planning program that includes the County of Riverside and 14 local jurisdictions. The plan covers 146 species. State and federal funds, as well as development impact fees, will help purchase 153,000 acres to supplement 350,000 acres already publicly owned or protected. The resulting 500,000 acre reserve will provide habitat areas, as well as corridors allowing animals to travel throughout their ranges.

[6] http://www.nahb.org/hcp

[7] For a more comprehensive discussion of the NCCP effort in southern California, *see* Committee on Scientific Issues in the Endangered Species Act, *Science and the Endangered Species Act*, (NATIONAL ACADEMY OF SCIENCES 1995), at 84-89.

Importantly, all of the above HCPs include voluntary commitments by private landowners to accept significant restrictions on the use of their land and to make other contributions to habitat conservation. In the Central/Coastal NCCP, for example, the major landowner agreed to dedicate for permanent protection 21,000 acres of land to habitat conservation purposes. These dedications are occurring well in advance of the development that is authorized under the NCCP. Thus, the conservation benefits of the plan will be realized in advance of the impacts of the development authorized by the plan.

III. Incentives must be broadened in scope and availability

Recent realization of the vital role that private landowners play in endangered species conservation has led to an associated increase in the number of tools available to encourage their cooperation. Unfortunately, the availability of these few tools barely scratch the surface of what is truly needed to both fully encourage private landowner cooperation and sufficiently protect species under the care of the ESA.

A. Increase the Availability of Incentives

Proactive, incentive-based conservation tools help to integrate species needs into long-range individual and community development plans, a process that lends itself to more flexible, efficient, and effective conservation strategies than the traditional species-by-species approach. In particular, HCPs, Safe Harbor Agreements, and Conservation Banking initiatives have all emerged as possible avenues by which to conserve endangered and threatened species while working with or alongside private landowners. From the home builders' perspective, HCPs have become integral components of species conservation efforts nationwide, and despite ongoing legal challenges to components of the HCP program, are one of the few regulatory mechanisms under the ESA that are supported by a wide-variety of environmental and industrial interests. Conservation Banking has likewise gained in popularity over the last few years and, with it, the presence of endangered species in some areas has been transformed from a liability into an asset. Across the country, interested parties have set up conservation banks to protect the red-cockaded woodpecker, the gopher tortoise, and several species of vernal pool plants and animals, just to name a few.

Unfortunately, participation in these programs is by no means an inexpensive undertaking, especially when dealing with regional, multi-species plans. Because the benefits of species protection accrue to the public at large as well as the property owner, there is no reason why the costs of conservation should not be shared. Recognizing this, there are currently funding opportunities for states and territories under the Habitat Conservation Planning Assistance and HCP Land Acquisition Grant programs. Unfortunately, very few options exist to provide funding assistance for small property owners. To encourage private landowner participation in the HCP program, as well as other voluntary programs and agreements, and garner the greatest possible benefits, financial options must be considerably improved and expanded.

While providing extensive conservation benefits, other incentive-based programs such as Safe Harbors and Candidate Conservation Agreements remain difficult or unwieldy undertakings for builders and developers. Although their use by other industries and interests provide very real and tangible success stories, efforts need to be made toward creating and implementing additional tools and programs that can be used by the development community. Oftentimes working in areas of high land values and with smaller parcels under a patchwork of ownerships, home builders face different "real-world" requirements and pressures than other private landowners or industries. Crafting policies to meet these unique needs, emphasizing flexibility in development and certainty in implementation, can only further conservation efforts under the ESA.

The few aforementioned programs offer some avenues for cooperation under the ESA, but there remains a critical need for expanded incentive-based species conservation policies and programs. Streamlined permitting processes, regulatory certainty, and financial incentives all deserve serious consideration if the ESA is ever to be truly successful in meeting its goals of protecting this nation's biological heritage. Under the onerous weight of inflexible outdated command-and-control regulations and requirements, the ESA will continue to be more about controversy than conservation from the private landowner perspective.

B. Decrease the Number of Disincentives

The availability of incentives under the ESA is but one component needed to promote increased cooperation amongst private landowners and developers. The removal of disincentives under the Act remains an equally important aspect of commonsense conservation policy. By minimizing the threat of litigation, streamlining the permitting process, and decreasing the risk of increased future liability for proactive conservation efforts, incredible headway can be made into lowering the "cost of doing business" under the ESA.

First and foremost, the specter of critical habitat threatens the viability of individual HCP efforts and endangers the larger program as a whole. Using the East Contra Costa County HCP as an example, the HCP planning area overlaps with proposed critical habitat for the California red-legged frog, the California tiger salamander, the Alameda whipsnake, and already designated fairy shrimp habitat. Although several environmental groups have taken an active role as stakeholders in the HCP development process, other, litigation-driven organizations have not. Following the aforementioned *Gifford Pinchot* case that called the conservation obligation of critical habitat into question, home builders are loathe to commit to the HCP process knowing that a lawsuit will almost certainly be filed over the regulatory review and protection requirements of critical habitat by non-participants to the plan.

To compound matters even otherwise-interested landowners and developers are at times discouraged from participating in species conservation programs when faced with uncertain permit approval timelines, unacceptable associated permitting costs, or inflexible regulations. For example, analysis of the FWS database indicates that, on average, the HCP approval process takes nearly two years (*642 days or 1.76 years*) from HCP development to FWS permit issuance. More than half of this time (*399 days*)

occurs during the informal review and discussion stages surrounding development of the HCP prior to its submittal. In fact, for some NAHB members in Alabama, approval times for half-acre HCPs extended well beyond three years. For small builders, such delays are not just costly, but can be crippling to a business. The development of an HCP is clearly a significant undertaking. Without certainty or predictability in the approval process, or enforceable review deadlines, costs can be driven so high as to discourage their widespread use.

One possible solution to reduce the number of disincentives is to ensure that recovery obligations are not transferred to private landowners. H.R. 1299 takes a step in this direction by clearly stating that recovery plans are non-binding guidance. Serious consideration should also be given to reforming and revising programs such that interested parties are not flat-out penalized for their proactive conservation efforts. Although a mere beginning, exempting voluntary conservation actions, including HCPs and Safe Harbor Agreements, from the onerous restrictions of critical habitat is one such reform that would do well to quell remnant fears of future regulation and encourage further enrollment in these important programs. Again, H.R. 1299 takes great strides in this direction, and NAHB strongly reiterates its support of the bill. With specific regard to the HCP program, including hard and fast deadlines would help to encourage landowner participation. Such mandated time frames would provide property owners with predictability and a greater understanding of the time and expenses required under the HCP permitting process, thereby encouraging further participation in the program.

C. Adopt a Cost-Effective Approach to Regulation

Beyond increasing the number of incentives available to private landowners and decreasing the number of disincentives, enforcement of ESA regulations and provisions should fully incorporate a cost-effectiveness approach. By weighing the economic costs and biological benefits of ESA actions and their alternatives, least-cost solutions can be reached. This will minimize costs and distribute burdens most fairly across the spectrum of affected communities, industries, firms, and landowners, all the while meeting species conservation goals. Whether pertaining to critical habitat designation, mitigation requirements, or recovery planning, determining the least-cost approach would conserve precious human and financial resources while reducing the impact to both the regulated community and the Services alike.

One clear mechanism to reduce redundancies and increase efficiencies is to increase coordination and consolidate the various non-ESA programs that both regulate land use and help to promote and fund proactive species conservation programs. Incorporating other regulatory programs into the HCP planning process, upfront, such as U.S. Army Corps of Engineers Section 404 wetlands permits, would streamline the permitting process and vastly increase the tangible incentives available to participating landowners and developers. Furthermore, although there is a universal body of work to benefit and conserve endangered and threatened species being done under the rubric of other state and federal laws, plans, and programs, tying these actions back to the day-to-day regulatory requirements of the ESA remains a murky undertaking. To use the U.S. Fish and Wildlife Service's Partners program as an example, coordinating Partners-funded restoration projects with individual Section 7 consultations or HCPs could expand the

reach and scope of any mitigation undertaken as a result of the ESA's regulatory requirements. As a result of such coordination, an increased availability of agency expertise and funding could allow the landowner to make increased contributions to species conservation over minimum requirements.

Conclusion

Mr. Chairman, in conclusion, NAHB believes the time is right to update and modernize the ESA so that it can work better for species and landowners. Landowner incentives can, and should, be a vital component of any legislation to improve the Act. For the majority of the ESA's history there has been little if anything under the Act to actively encourage landowner cooperation. These glaring shortfalls threaten to hamstring the ESA in the coming years. NAHB accordingly believes that only by addressing these concerns now, proactively, will species conservation efforts be successful.

Chairman Chafee, and members of the Committee, I thank you for your consideration of NAHB's views on this matter, and hope that as a result of your efforts, and that of this Congress, endangered species conservation in this country becomes less about litigation and gridlock and more about common-sense conservation policies and programs.