
LEGISLATIVE ALERT

May 30, 2003

Defense Authorization Legislation Marks First ESA Reform Battle This Congress Conference Committee To Consider ESA Reform Language Next Week

Last week, Congress took its first foray into ESA reform issues for the 108th Congress during the consideration of the fiscal year 2004 Department of Defense (DoD) authorization bill. First, in the House of Representatives, Resources Committee Chairman Richard Pombo (R-CA) and Rep. Elton Gallegly (R-CA) led an effort to include language in the DoD bill modifying the standard for designation of critical habitat from the present standard of “to the maximum extent prudent and determinable” to a standard of “to the maximum extent necessary.” This change would have applied to all critical habitat designations—not just those affecting DOD-controlled lands. Second, both the House and Senate considered exemptions from ESA regulations for certain defense-related activities on DoD-controlled lands.

Chairman Pombo and Rep. Gallegly kicked off their efforts by including a modification of the critical habitat standard to the “maximum extent necessary” as part of H.R. 1835, legislation approved by the House Resources Committee. This language was then incorporated by the House Armed Services into the defense authorization bill (H.R. 1588). However, due to opposition to the inclusion of the critical habitat language in a defense authorization bill, the critical habitat standard modification later was removed through a manager’s amendment on the floor of the House. At the request of Chairman Pombo and other members, NESARC members lobbied for the need to debate and change the critical habitat designation standard.

Both the House and Senate versions of the DoD authorization legislation do, however, include (differing) ESA exemptions for defense-related activities. The original proposal in both the House and Senate was essentially to amend the ESA to include a provision prohibiting the designation of critical habitat on “lands or other geographical areas” owned, controlled, or designated for use by the Department of Defense that are subject to an Integrated Natural Resources Management Plan under the Sikes Act. The House Defense Authorization bill, as approved, maintained the original language. However, the Senate version (S. 1050) was amended during floor consideration to provide that the exemption from critical habitat designations would only apply in instances where the Secretary of the Interior makes written findings that the Sikes Act resource management plan effectively conserves the endangered or threatened species and that adequate funding exists for the implementation of the resources management plan. This places a significantly higher standard for exercising the defense-related activities exemption. Both the House and Senate versions also amend the required considerations for designation of critical habitat to include assessment of the impact on national security.

For the first time since 1988, Congress is poised to act on a permanent modification of the ESA. Further, this would be the first ESA-related legislation enacted since the temporary flood control exemption was passed in 1997. Congress’ deliberation on the critical habitat language and the defense-related activities exemption once again puts a spotlight on the need for ESA reform by demonstrating that reform can be successful if the right groundwork is laid and if support is gained from across the political spectrum. As we continue to work for reforms to the ESA, it is important that NESARC members use the legislative efforts on the DoD’s ESA exemption to point out that the problems that DOD confronted with the ESA are equally applicable to all other resource users.

The House of Representatives and Senate are expected to go to conference on the defense authorization legislation sometime after they return from the Memorial Day Recess on June 2nd.

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