The Keystone Working Group on Endangered Species Act Habitat Issues

Final Report
April 2006

About The Keystone Center

The Keystone Center is a neutral, nonprofit, public policy and education organization with a distinguished history of convening diverse stakeholders, brokering productive information exchanges, building consensus, and creating applied solutions to seemingly intractable policy problems. For three decades, The Keystone Center has provided neutral assistance to the public, private, and civic sectors. Through a methodology of "Dialogue by Design,"[1] stakeholders, technical information, and high-quality social and political processes are joined in a way that we believe produces smarter and more durable solutions. Past Keystone Dialogues have resulted in new policies for federal facility siting, chemical weapons disposal, Superfund cleanups, prescription labeling, regional energy transmission, and other key public policy issues. The Keystone Center is headquartered in Keystone, Colorado, and has offices in Washington, D.C.; Denver, Colorado; Boston, Massachusetts; and Santa Fe, New Mexico. For more information, see www.keystone.org.

[1] See www.keystone.org/spp/keystone_dialogues.html.

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Executive Summary

On May 18, 2005, The Keystone Center received a letter from a bipartisan group of six U.S. Senators[2] requesting that it convene and facilitate a cross-sector working group on the habitat provisions of the Endangered Species Act (ESA). Serving as a neutral and independent facilitator, Keystone brought together a high-caliber and diverse group of 24 individuals from the environmental and regulated communities to tackle these contentious issues. (See Appendix A for a list of participants.) Working group participants came to the table in their individual capacities and with distinctly different experiences and perspectives. Despite genuine and significant differences of opinion, participants worked together collaboratively and with an absence of the rancor that sometimes characterizes discussions about the ESA. As requested by the six Senators, the group sought to provide its "best consensual guidance" around three questions, as follows.

1. As currently written and implemented, is the ESA adequately protecting and conserving the habitat that listed species need to recover?

Working group participants believe that the ESA could more effectively protect and conserve the habitat that species need to recover. While broadly agreeing that the ESA could function better, perspectives in the group varied as to the reasons why. This in turn led to divergent suggestions for potential improvements to the ESA. Some perceive that the ESA by its nature must wait until a species is in critical condition, often with its habitat almost entirely depleted, before attempting to address habitat protection and species recovery. Many identified the lack of adequate funding as a central limiting factor for the ESA as currently written and implemented. Participants generally agreed that various transactional inefficiencies can be a key pitfall for the ESA. Many felt that significant limitations to the effectiveness of the ESA stem from its inability to achieve an optimum interplay between regulations and incentives. Through discussion, it became clear that perspectives about the value and role for regulation within the context of protecting habitat varied significantly within the group.

2. If not, how can the ESA be improved to better conserve habitat and help species recover?

Working group participants agreed that if new measures could be identified that would both improve the effectiveness of habitat conservation efforts for species and reduce the burden upon landowners and other regulated interests, those new approaches should be embraced. Participants made a concerted effort to identify and evaluate ideas that could achieve these twin objectives, and they believe that improvements to the ESA will ultimately need to be built on the following principles.

[2] The signatories included Senators Chafee, Clinton, Crapo, Inhofe, Lincoln, and Jeffords. The letter can be viewed at www.keystone.org/spp/env-esa.html.

- **Applying Three Tests**. A consensus-based set of revisions to the ESA must improve current law in three ways. It must: (a) enhance the recovery of listed species; (b) reduce regulatory burdens and costs (including the time and money needed for making decisions) for affected parties; and (c) increase the willingness and ability of nonfederal parties to promote the recovery of listed species.

- **Providing Greater Focus on Recovery**. Currently, critical habitat is supposed to be designated at the time of listing. Identification of the habitat that species require to recover is better done in the context of recovery planning, however, after more rigorous analysis and deliberation have been completed.

- **Optimizing Regulations and Incentives**. Regulation is necessary and worthwhile; however, it can be made less burdensome for the regulator and the regulated and more effective for the species. Wherever possible, the goals of species protection and recovery should be achieved through incentives rather than regulation.

- **Improving Cooperation**. The twin goals of the ESA, and the criteria by which its success or failure is ultimately gauged, are the prevention of extinction and the fostering of recovery. The Act's success can be facilitated by improving cooperation and reducing friction between private, governmental, and NGO interests in the implementation process.

- **Distinguishing Risk Analysis from Risk Taking**. Recovery planning is, as a whole, an iterative process. However, the question of *what* the risks of extinction are for a given species should be based upon the best-available scientific data and judgments; the question of *how much* risk should be taken or avoided is a policy decision informed by economic, social, and cultural factors, as well as scientific considerations.

- **Ensuring Adaptability**. Recovery planning is not a once-and-forever activity but typically changes depending on the state of the species and the availability of information. Various forms of adaptive management are therefore essential to effective and intelligent recovery planning.

- **Providing Agencies with Money**. An effective ESA will require adequate funding for operation and implementation. In addition to sufficient baseline funding, efficiencies should be sought through the strengthening of partnerships among the federal government, tribes, and states.

3. What specific changes and recommendations can the regulated and NGO communities jointly recommend, advocate for, and help to implement?

Most working group participants felt that the concept holding the most promise for consensus would likely include: New provisions for integrating habitat protection and conservation into the ESA; a greater focus on the function, content, scope, and mechanics of recovery plans; clarification or modification of the §7 standard; more effective incentives for nonfederal parties; new sources of funding for better coordinated and more workable ESA provisions pertaining to

habitat; and a clearer, more effective role for the states. Hence, the working group explored the advantages and drawbacks associated with replacing the current "critical habitat" framework with one that would: Boost the role of incentives; centralize the role of recovery and recovery planning; and revise the §7 consultation standard. Participants discussed various aspects of these three points in considerable detail, with the understanding that they were contingent and interconnected elements. In some cases, agreement in one area was predicated on the outcome of one or both of the other two; this was particularly true with respect to the §7 consultation standard and the role of recovery.

Incentives

Working group participants believe that an attractive incentives program will be integral to advancing the goals of both conservation interests and the regulated sector. Effective incentives would expand the prospects for improving the biological status of listed species and potentially reduce (though likely not eliminate) the extent to which regulatory measures—which have certain limitations and tend to engender greater conflict—will be needed to achieve recovery. Conversely, without an effective incentives program it would be markedly more difficult to advance the goals of the group. In the report, working group participants offer specific recommendations on incentives relating to Farm Bill measures, voluntary cooperative agreements, tax incentives, and streamlining.

Recovery Planning

Recovery may be thought of as a listed species reaching a point where it will exist over a socially and biologically meaningful timeframe. Recovery plans are documents prepared for listed species that detail the specific actions needed for recovery. The working group consistently underscored the need for scientifically sound, financially reasonable, and adaptive recovery plans. Participants explored questions that would need to be addressed if recovery plans were to assume greater importance under the ESA. A number of participants felt that at least some of the questions were difficult to address in isolation and depended in part upon other issues (e.g., whether or not any revisions to the §7 standard would be recommended). Should recovery assume a more centralized position in the Act, participants felt it important that Congress articulate a policy as to what "recovery" means. Federal agencies would then need to translate this national policy into regulation, guidance, and practice. At an operational level, defining recovery may mean establishing some acceptable level of risk, or some approach to risk that can be adapted on the ground in different places and for different species but that remains explicit and transparent. These issues, along with a number of ideas for potentially strengthening the mechanics of recovery planning, are discussed in greater detail in the report.

Regulatory Issues

While the Keystone working group reached a solid consensus on many aspects of the incentives topic and identified issues needing to be addressed in recovery planning, its greatest challenge centered on the question of whether changes to the ESA's regulatory requirements could achieve the twin goals of producing a more effective and less burdensome conservation program. Participants devoted considerable effort toward developing a recommendation aimed at

reorienting the §7(a)(2) standard to a focus on species recovery. The report describes the various issues and dimensions that the working group felt were important in considering any possible revisions to the §7 standard.

Introduction

The Endangered Species Act (ESA) has been due for reauthorization since 1992. Debates over the ESA have been divisive, however, occasioning considerable frustration on all sides. Many stakeholders with an interest in the ESA have wearied of the ceaseless friction and fighting and feel an urgency to find lasting resolutions—particular to the increasingly contentious and costly habitat-related issues.

In early 2005, The Keystone Center—which worked on ESA issues to good effect in 1995[3]—received strong signals from a wide range of stakeholders that the time was right to bring reasoned voices together to explore possible solutions to the impasse. These signals culminated in a May 18, 2005, letter from a bipartisan group of six U.S. Senators[4] requesting that Keystone convene and facilitate a cross-sector working group on the habitat provisions of the ESA.

Serving as an independent convener and facilitator, Keystone brought together a high-caliber and diverse group of 24 individuals to tackle these contentious issues. Dubbed "The Keystone Working Group on Endangered Species Act Habitat Issues," the group included participants from environmental and conservation organizations as well as the "regulated communities," including the forest products, agriculture, utility, and homebuilding industries.[5] (A list of working group participants and staff can be found in Appendix A). The participants came to the table with distinctly different experiences and perspectives; however, they all shared a passion for making the ESA work better. The Keystone Center commends the group for the many selfless hours of work it dedicated to grappling with issues that are scientifically and legally complex and that give rise to strongly held feelings and values. Despite genuine and often significant differences of opinion, members of the group worked together collaboratively and with an absence of the rancor that on occasion characterizes discussions about the ESA.

This report portrays the working group's deliberations, which were carried out over the course of four months, three plenary sessions, and a number of subgroup meetings. While the report attempts to accurately convey "the sense of the group," it would be impossible in a single report to satisfy fully each participant's preferences as to content and presentation. All participants had the opportunity to review the report in draft form, however, and The Keystone Center has incorporated or otherwise reflected participants' comments insofar as possible. In numerous cases, participants aimed to accomplish a similar result with their comments but proposed different wording or approaches. In those instances, we attempted to blend the thoughts together as cohesively as possible. In other cases, the comments were inconsistent with each other; where that occurred, we tried to craft language that was fair to the diversity and strength of the views expressed.

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[3] See The Keystone Center, *Keystone Dialogue on Incentives to Protect Endangered Species on Private Lands: Final Report*, Report #53 (Keystone, CO: The Keystone Center, 1995).

[4] The signatories include Senators Chafee, Clinton, Crapo, Inhofe, Lincoln, and Jeffords. The letter can be viewed at www.keystone.org/spp/env-esa.html.

[5] To some extent the term *regulated communities* understates the full panoply of economic and social interests who are potentially adversely affected by ESA regulation. The term includes those with an interest in the multiple-use management of federal land whether or not they are "regulated" in a formal sense.

To ensure an open and candid dialogue, participants presented their personal opinions in the deliberations. Therefore, no aspect of this report should be construed as representing the official positions of any of the organizations affiliated with working group members.

The Working Group's Purpose, Objectives, and Context of Inquiry

From the outset, the explicit goal of The Keystone Working Group on ESA Habitat Issues was to seek a new common ground on the protection, maintenance, and enhancement of habitat needed to stabilize and recover threatened and endangered species in the United States. As requested by the six Senators, the working group sought to form its "best consensual guidance" around the following questions:

1. As currently written and implemented, is the ESA adequately protecting and conserving the habitat that listed species need to recover?
2. If not, how can the ESA be improved to better conserve habitat and help species recover?
3. What specific changes and recommendations can the regulated and NGO communities jointly recommend, advocate for, and help to implement?

This report is organized into three primary sections that correspond to these three questions.

Working group participants believe it should be possible to improve the ESA's effectiveness for species at risk, make government activities more efficient, and reduce the costs and burdens to regulated parties. Furthermore, participants believe that addressing all three of these issues—the biological needs of the species, the efficiency of government, and the concerns of those most directly affected by the Act's provisions—is the only practical way to move forward if the goal is to do so in a more consensus-based manner. It would not be difficult to recommend measures to address one set of interests without regard to the other two. The challenge has been to search for areas of common ground that address the needs of all three types of interests.

As explained more fully in the body of the report, the group focused its time and energy toward exploring whether it could reach consensus on a concept that would replace the current "critical habitat" framework. Due to a combination of factors and pressures, the group did not find itself able to craft a single, comprehensive, consensus-based approach. It did, however, clarify the elements that would need to be addressed to reach agreement. In addition, it reached agreement in several specific areas described in the report. Perspectives varied within the group regarding how significant the differences were surrounding the issues that remained unsettled. Some felt that agreement might be within reach with more time and work, while others believed that some key areas could not be resolved at this juncture.

The Process

The working group process took place in four phases, as follows.

1. **Participant Selection**. Working closely with several key regulated and conservation community leaders, The Keystone Center identified working group candidates who would provide a representative range of viewpoints, perspectives, expertise, and interests. Specifically, individuals were recruited who:
   - are knowledgeable about the ESA;
   - have standing and recognition among the interest groups they broadly represent;
   - believe that new and creative thinking is needed at this time; and
   - were willing to engage in disciplined, give-and-take discussions.

2. **Issue Scoping**. In order to help frame the issues, develop meeting protocols, and design the process, Keystone conducted one-on-one interviews with most of the confirmed participants. Key findings from these preliminary interviews can be found in Appendix B.

3. **Meetings**. The deliberations took place over the course of three plenary meetings and multiple subgroup meetings. The initial plenary took place November 2-4, 2005, in Keystone, Colorado. Three subgroups emerged from this meeting—one considering "recovery plan mechanics," another "legal implications," and the third "incentives." Each subgroup convened several times prior to the second plenary meeting, which took place December 5-7, 2005, in Shepherdstown, West Virginia. The third and final full-group meeting took place on January 24, 2006, in Washington, DC. Finally, a subgroup met on February 13, 2006, to discuss and explore options for revisions related to Section 7 of the ESA, on interagency consultation (hereinafter referred to as "§7").

4. **Letter and Report Drafting**. After completion of the meetings, The Keystone Center crafted a letter providing an overview of the group's discussions and conclusions. That letter, which was delivered to the six Senate signatories on February 17, 2006, is posted at www.keystone.org. This report, which is an expansion of the initial letter, was developed by The Keystone Center in collaboration with working group members. It marks the culmination of the project.

Protocols

At the outset of the first plenary, participants reviewed and refined a set of "operating protocols," which they then agreed to follow throughout the process. The protocols outlined objectives, roles, responsibilities, and a number of discussion principles. Within this framework, participants had the opportunity to develop a common understanding of the issues, explore respective interests, and clarify options to help inform future action by decision-makers. The complete set of operating protocols can be found in Appendix C.

Caveats and Limitations

The working group presents its conclusions in this report with a sense of restraint and realism, borne of long experience with the ESA. Discussions about the ESA involve a difficult-to-untangle mix of values, science, and politics, along with economic interests. At one level, the

group recognized that the issues under discussion do not stem from a fundamental conflict of values. None in the group sought to diminish the nation's biological heritage, just as none had an inherent objective of increasing the regulated sectors' costs and burdens. As a practical matter, however, the ESA is caught between an ecological reality (species need habitat for survival and recovery) and a political reality (much of that habitat is privately owned, used by private interests for economic gain, or dedicated to a range of uses responsive to other societal interests), which has resulted in conflicts between species protection and other interests. No "magic bullet" will address all concerns fully nor make political and legal disputes about the habitat provisions of the ESA a thing of the past. Working group participants believe, however, that it should be possible to reduce the overall level of conflict by focusing on areas of mutual gain, diminishing posturing and caricature, and managing those disputes that will inevitably arise.

This report comes with three primary caveats.

1. **Working Group Composition**. The Keystone Center realizes that not all knowledgeable and thoughtful voices from either the regulated or the environmental communities (or other interest groups) participated in these discussions. To keep the group to a reasonable size, Keystone sought to find strong voices that could speak their minds, knowing that many individuals holding variations on those views could easily have joined the discussions. Keystone understands that others can and should offer valuable critiques of their own, and encourages those voices to be heard.

2. **Absence of a Joint Fact-Finding Phase**. Due to limitations in time and resources, this effort did not include the kind of joint fact-finding phase that The Keystone Center often employs in its policy dialogues. Joint fact-finding can help to establish a technical, scientific, and economic empirical foundation among diverse interests. In this case, time and funding did not permit a longer exercise, and working group members had already immersed themselves in factual discussions and debates in many other forums.

3. **Conceptual Nature of the Conclusions**. The Keystone Center and the working group itself acknowledge that this report contains largely conceptual—though promising—ideas. These ideas are not offered in the form of wordsmithed agreements that will be directly translatable into legislation. Rather, they will require further thinking and elaboration in order to be fully practicable.

Question 1:
As currently written and implemented, is the ESA adequately protecting and conserving the habitat that listed species need to recover?

Working group participants believe that the Endangered Species Act could more effectively protect and conserve the habitat that species need to recover. In so thinking, the group does not in any way mean to diminish the numerous accomplishments of the ESA to date nor belittle the diligent work of those in both the private and public sector who are implementing this challenging law.

Reasons Why

While working group participants broadly agreed that the ESA could function better, their perspectives varied as to the reasons why such improvement was needed. Those with an environmental perspective tended to emphasize that existing and potentially restorable habitat for listed species is being lost and degraded despite the provisions of the ESA, such that some species continue to decline and prospects for the recovery of others is less than it should be. Those with a landowner or regulated interest emphasized the burden—in terms of cost, delay, and uncertainty—that they sometimes face as a result of ESA-related efforts to conserve habitat that is privately owned and/or used for other purposes.[6]

Specifically, the following issues were raised as potentially influencing the ESA's ability to function as effectively as it might.

1. **Scope and Context**. Many in the group underscored first that the ESA is ill-equipped by itself to address the bedrock habitat needs of species, because, under the Act, federal officials must wait until a species is in critical condition, with its habitat depleted, before attempting to address recovery. The unfortunate consequences, many feel, are that species recovery efforts are less likely to succeed, and a few landowners may shoulder the burden of trying to remedy a situation largely caused by many others over time.

   Several participants noted that, while the ESA may be effective in protecting individual species through prohibitions on "take" (§9 of the law), it does a poorer job of protecting the habitat that imperiled populations need for recovery. Participants broadly agreed that large-scale habitat needs are at the heart of the Senators' first question, and that the ESA in its current form cannot carry this burden alone. Many pointed to the need to bolster habitat protection through additional conservation measures by state and local governments, the

[6] Referring to "environmental interests" and "regulated sector interests," while convenient shorthand, may be too facile. Neither the environmental nor the regulated perspective is monolithic, and during the course of the dialogue a number of "mixed marriages" of ideas occurred as various issues and options were discussed.

development of better land-use planning tools within the Act, private-sector efforts, and other regulatory and/or non-regulatory programs.

2. **Resource Issues**. Many participants identified inadequate funding as a central limiting factor for the ESA as currently written and implemented. Even conceptually sound recommendations for improvement would in most cases be of little practical value if not sufficiently underwritten. Deficiencies in the resources available to acquire habitat, particularly where conservation is not compatible with other uses, as well as resources available for implementation of the Act, were cited as key contributors to the ESA's inability to function as effectively as it might. Another factor mentioned was that a portion of agency funds are dedicated to activities that some perceive as not providing great benefit to species.

3. **Transactional Costs**. Participants generally agreed that transactional inefficiencies can be a key pitfall for the ESA. Various types of cost concerns associated with falling under the purview of the ESA can serve as a disincentive to protection and recovery by creating an incentive for landowners to avoid identifying listed species on their property. At the same time, excessive and inefficient bureaucratic processes can further dilute already-scarce resources.

4. **Regulation and Incentives**. Many participants felt that significant limitations to the effectiveness of the ESA stem from its inability to achieve an optimum interplay between regulation and incentives. In terms of regulation, much of the discussion centered around the §7 consultation standard. Some participants cited an on-going lack of clarity in how §7 language should be translated into practice, as well as a perceived inflexibility in the critical habitat provisions. Others pointed to inconsistencies between §7 and §10 as a source of consternation. For some, the problem lay in the implementation of the regulatory provisions; these participants posited that the application of the ESA has not comported with the original intent of Congress. Many participants pointed to what they view as shortcomings on the part of the ESA to harness, through augmented incentives, the necessary cooperation of private landowners. Finally, some in the group were concerned with not only a lack of adequate financial incentives, but also a failure to utilize fully the regulatory incentives that do exist.

The Role of Regulation

Working group participants recognized that individuals' assumptions regarding the appropriate role of regulation influence their views about what it means for the law to be functioning "adequately." Through discussion, it became clear that participants hold significantly differing perspectives regarding the role for regulation within the context of protecting habitat. Some of the ideas, which by and large are not mutually exclusive, put forward regarding the role of regulation in the ESA include the following.

- An ESA program that either relied solely upon regulation or eschewed regulation entirely would prove ineffective over the long term. Therefore, regulation is both essential and not sufficient to effect species recovery.
- Regulations should serve as the backstop or "safety net" onto which incentives are built.

- The need to rely heavily upon regulation is a sign of failure.
- Regulation might be viewed more favorably by some elements of the regulated community if it were geared toward the greatest offenders, so as to aid entities who fully perform their ESA duties while disproportionately affecting their underperforming competitors.
- There is a need to strike the right balance between predictability and flexibility within the regulatory scheme.

Participants generally agreed that regulation is necessary and worthwhile, but can be made less burdensome for regulators and regulated parties as well as more effective for species. This concept regarding the role of regulation in the ESA was adopted as Key Principle #3 in the following section.

Question 2:
How can the ESA be improved to better conserve habitat and help species recover?

Just as diagnoses differ as to the causes of the ESA's shortcomings, so do the preferred remedies. Working group participants found it much easier to agree that the status quo should be improved than to reach consensus on how that ought to be accomplished. All participants agreed, at least in principle, that if new measures could be identified that would both improve the effectiveness of habitat conservation efforts for species and reduce the burden on landowners and other regulated interests, those new approaches should be embraced. The working group made a concerted effort to identify and evaluate ideas that could achieve these twin objectives.

The working group contemplated whether to reply to the second and third questions by proposing adjustments to the current system, or by recommending more significant conceptual changes to the ESA. Ultimately, the group chose to attempt the more difficult latter option. Participants emerged from their first meeting in Keystone with the view that "building a better mousetrap" might yield substantially greater and more durable benefits than "tweaking" the existing ESA regime.

Outlined below are key principles developed and used by working group participants in their discussions about a new conceptual approach. The following section, on Question 3, provides detail regarding the group's attempt to develop such an approach.

Key Principles

During the course of its discussions, the working group either explicitly or implicitly relied upon several key principles to help guide its search for solutions. Among the most important of these principles were the following.

1. **Applying Three Tests**. A consensus-based set of revisions to the ESA must improve current law in three ways. It must:
   a. Enhance the recovery of listed species.
   b. Reduce regulatory burdens and costs (including the time and money needed for making decisions) for affected parties.
   c. Increase the willingness and ability of nonfederal parties to promote the recovery of listed species.

2. **Providing Greater Focus on Recovery**. Currently, critical habitat is supposed to be designated at the time of listing. Identification of the habitat that species require to recover is better done in the context of recovery planning, however, after more rigorous analysis and deliberation have been completed. This assumes that associated questions regarding regulatory standards, efficient allocation of resources, and the geographical extent of habitat can be addressed to a degree adequate for diverse stakeholders.

3. **Optimizing Regulations and Incentives**. Regulation is necessary and worthwhile; however, participants felt that regulatory standards and procedures in the ESA can be made less burdensome for the regulator and the regulated and more effective for the species. In the interest of fostering agreement across a diverse set of policy perspectives, the group sought means of achieving the goals of species protection and recovery through incentives rather than regulation, wherever possible. Robust incentives are needed to conserve the habitat that species need to recover; they also serve to decrease reliance on regulation. Incentives need further refinement, augmentation, and expansion if species recovery is to be effective and successful. Both incentives and regulation should be complemented by a scientifically sound and publicly credible recovery planning process.

4. **Improving Cooperation**. The twin goals of the ESA, and the criteria by which its success or failure is ultimately gauged, are the prevention of extinction and the fostering of recovery. The Act's success can be facilitated by improving cooperation and reducing friction between private, governmental, and NGO interests in the implementation process. Measures that detract from or are inconsistent with achieving such cooperation should be a major focus of reform efforts.

5. **Distinguishing Risk Analysis from Risk Taking**. Recovery planning is, as a whole, an iterative process. However, the question of *what* the risks of extinction are for a given species should be based upon the best-available scientific data and judgments; the question of *how much* risk should be taken or avoided is a policy decision informed by economic, social, and cultural factors, as well as scientific considerations. This distinction must be reflected in decisions related to the habitat that species need to achieve recovery.

6. **Ensuring Adaptability**. Recovery planning is not a once-and-forever activity but typically changes depending on the state of the species and the availability of information. Various forms of adaptive management are therefore essential to effective and intelligent recovery planning. At the same time, it is important to provide some level of certainty to those who participate either voluntarily or through regulation. When recovery plans are revised, the process must again incorporate the highest level of deliberation.

7. **Providing Agencies with Money**. An effective ESA will require adequate funding for operation and implementation. In addition to sufficient baseline funding, efficiencies should be sought through the strengthening of partnerships among the federal government, tribes, and states. If accomplished successfully, this will free time, dollars, and personnel to focus on the biological needs of species, with the further salutary benefit of reducing litigation.

Question 3:
What specific changes and recommendations can the regulated and NGO communities jointly recommend, advocate for, and help to implement?

Having concluded for a variety of reasons that the Endangered Species Act's habitat provisions could be improved, and having identified some key principles to set the framework for developing solutions, the working group began to examine an approach that would move away from the current critical habitat framework to one that would:

1. centralize the role of recovery and recovery planning;
2. boost the role of incentives; and
3. revise the §7 consultation standard.

Working group participants discussed various aspects of these three points in considerable detail, with the understanding that they were contingent, interconnected, interdependent elements. In some cases, agreement in one area was predicated on the outcome of one or both of the other two; this was particularly true with respect to the §7 consultation standard and the role of recovery. That said, most participants felt that the concept that had the best prospects for consensus would likely include the following elements:

- New provisions for integrating habitat protection and conservation into the ESA
- Greater focus on the function, content, scope, and mechanics of recovery plans
- Clarification or modification of the §7 standard
- More effective incentives for nonfederal parties
- New sources of funding for better coordinated and more workable ESA provisions pertaining to habitat
- A clearer, more effective role for the states

From its first meeting in November 2005 through the completion of this report, participants worked to see if a viable and acceptable new concept could be built along these lines. Specifically, the working group explored whether it would be possible to replace the current critical habitat provisions with a system that would:

- Increase the extent and effectiveness of incentives.
- Make the recovery plan the "hub" to guide efforts to improve the status of threatened and endangered species, promote down- or de-listing when possible, appropriately inform decisions under §6, §7, and §10 of the Act, and help guide the allocation of available incentives.
- Reword §7 to remove the "adverse modification" concept and develop a new single standard that focuses on species recovery issues and is formulated to ensure focused, reasonable, and appropriate application.

Requisite for this approach to succeed would be defining the meaning of "recovery," developing more specific guidance for recovery planning teams, and providing more attention to the means of identifying the habitat necessary for species recovery. Moreover, significant uncertainties existed within the group regarding how various aspects of the draft concept would operate in practice or be translated into agency regulation or guidance, let alone how it might be interpreted judicially. Should a concept along these lines ultimately prove viable, a number of details will need to be worked out in order to achieve greater clarity and prevent unintended ambiguities.

The balance of this report is dedicated to outlining the details of the working group's discussions and proposals with regard to this concept. This is addressed in three sections: (1) Incentives, (2) Recovery Planning, and (3) Regulatory Issues.

Incentives

Although the ESA notes the need for incentives in its introductory findings, its core provisions are largely regulatory in nature; they seek to prevent harmful impacts to species at risk by prohibiting certain activities. While such regulatory prohibitions have kept some number of those species from becoming further endangered, they may not, by themselves, be capable of making imperiled species more abundant, widespread, or secure. To accomplish those objectives—some or all of which will be required in order to recover listed species—requires incentives that go beyond simple compliance with the law.

An attractive incentives program is integral to advancing the goals of both conservation interests and the regulated sector. In this regard, working group participants developed specific recommendations relating to Farm Bill measures, voluntary cooperative agreements, tax incentives, and streamlining. Recommendations in each of these four areas are outlined in this section.

Effective incentives would expand the prospects for improving the biological status of listed species. Incentives would also potentially reduce (though likely not eliminate) the extent to which regulatory measures—which have certain limitations and tend to engender greater conflict—will need to be relied upon to achieve recovery. Conversely, without an effective incentives program it would be markedly more difficult to advance the joint goals of the group.

Farm Bill Measures

Habitat protection by private landowners could be enhanced by amending or administratively changing the implementation of the 2002 Farm Bill. For example, the law's Conservation Reserve Program (CRP) could serve as an important tool for conserving habitat if the selection criteria and re-enrollment rules were refined. Also, Congress made wildlife one of the goals of the Farm Bill's Environmental Quality Incentives Program (EQIP), and the U.S. Department of Agriculture (USDA) responded at the national level by making at-risk species a national conservation priority. Only .6% of EQIP dollars has flowed to specific wildlife habitat practices, however, and only a portion of that has been for at-risk species. A number of common-sense

improvements would make EQIP a far more successful tool for species conservation. Dollar for dollar, the Farm Bill's Wildlife Habitat Incentives Program (WHIP) has done more to enhance habitat for at-risk species than any other program. Nonetheless, low funding limits the program's ability to provide strong conservation incentives and limits the technical support available to landowners. The Healthy Forest Reserve Program (HFRP), which specifically targets endangered wildlife, is another highly promising program for endangered species. Unfortunately, this program has not received funding since its authorization.

Below is a list of specific proposals offered by the Keystone working group that would make the Farm Bill more supportive of conservation measures to protect habitat that species need for recovery. The list is organized into legislative actions and administrative actions, though the individual items are listed in no particular order.

Proposed Legislative Actions

1. **Provide Exemption to the Adjusted Gross Income Provision**. The 2002 Farm Bill included a requirement that any individual or entity determined to have an average adjusted gross income (AGI) that exceeds $2.5 million is ineligible for Farm Bill benefits during the applicable year, unless 75% of that income is derived from farming, ranching, or forestry operations. These AGI limitations affect many of the ranchers and farmers interested in participating in conservation programs that benefit endangered species and their habitat. For example, a large percentage of farmland in Hawaii is concentrated in just 100 large farming operations. Many of the most significant lands for the restoration of endangered species are virtually impossible to enroll under Farm Bill programs because of AGI limitations. Therefore, to enable all interested landowners to participate in habitat conservation measures, remove the AGI provision in the Farm Bill or provide an exception to AGI limitations if the projects benefit endangered species via habitat restoration.

2. **Raise or Eliminate the Annual Cap on Rental and Incentive Payments under the Conservation Reserve Program**. Many landowners are willing to dedicate lands for conservation practices when provided a fair rental payment as compensation. The $50,000 annual cap on rental payments and incentives in the CRP appears to limit participation to 600-1,200 acres per year, thereby discouraging larger landowners from taking part. Therefore, raise or eliminate the annual cap if projects benefit endangered species or habitat that species need for recovery, to enable larger landowners to enroll more lands into the program. Larger blocks of habitat would provide far greater benefits in terms of meeting conservation goals. This measure will also shorten the time required for securing participation in the program.

Proposed Administrative Actions

3. **Reduce or Eliminate the Cost-Share Requirement for State Fish and Wildlife Agencies to Enter into Technical Assistance Agreements to Support Endangered Species Conservation Programs**. Many state fish and wildlife agencies would be willing to assist in the delivery of Farm Bill programs that would benefit endangered species (e.g., EQIP, the CRP, WHIP, and the Wetland Reserve Program) if more technical assistance grants were

made available via the removal or reduction of the cost-share requirement. Removing this requirement would capitalize on the agencies' local expertise related to endangered species and habitat protection as well as aid coordination with regional conservation efforts. Without this assistance, the delivery of many important Farm Bill programs that benefit endangered species is substantially hindered.

4. **Reduce Landowner Cost-Share Requirements for Farm Bill Program Projects that Support Threatened and Endangered Species and their Habitat**. The landowner cost-share requirements in the Farm Bill are similar to those required by the Department of Interior. For the Farm Bill, reduce these cost-share requirements for practices that support threatened and endangered species and their habitat, in order to encourage participation by private landowners in Farm Bill programs.

5. **Revise Selection Criteria for the CRP by Allowing for a Single Goal as Criterion for Selection**. At present, CRP lands are evaluated for selection using a composite approach that seeks to balance multiple goals (e.g., the prevention of soil erosion and improvement of wildlife habitat, water quality, and air quality) on each parcel of land. Given this approach, CRP enrollments often only moderately accomplish each goal. It makes more sense to enroll lands that can contribute critical wildlife habitat regardless of whether they are erodible or contribute to water quality goals; similarly, it makes sense to enroll the most critical lands for water quality and soil erosion purposes even if their wildlife benefits are modest. Thus, revise the selection criteria for the CRP so that lands critical to a single purpose or goal can be enrolled, instead of balancing the different goals of the CRP on each parcel of land.

6. **Revise Selection Criteria for the CRP to Include Location as a Consideration**. CRP selection criteria have for the most part ignored the role of location. But no factor is more important in determining the benefit of potential CRP lands to wildlife. Location includes both the part of the country and the parcel's position in relation to other kinds of land. Therefore, factor location into the calculation when determining which lands to enroll in the CRP.

7. **Allow Re-Enrollment in the CRP for Valuable Lands Only**. Grant re-enrollments only for the CRP lands that are deemed most valuable.

8. **Provide Targeted Opportunities for Continuously Enrolling Lands that Benefit At-Risk Species in the CRP**. The USDA could create a series of continuous enrollments of 100,000 or more acres to benefit specific species. For example, several landowners in South Texas are willing to enroll land in thorn scrub, which could provide critical habitat for the endangered ocelot. Even 5,000 to 10,000 acres of CRP lands in this area could provide significant habitat benefits. Therefore, create targeted opportunities for continuously enrolling lands in locations and under conditions that would benefit at-risk species. The USDA's Farm Service Agency, which administers the CRP, should invite states or groups of states to submit proposals for such enrollments, map the areas appropriate for enrollment, and describe the kinds of plantings and management needed to produce valuable habitat.

9. **Consider the Needs of Listed Species in Plantings in CRP Enrollments**. Enrollment in the CRP requires that certain types of vegetation be planted as groundcover. In some areas, the choices available to landowners for compliance with CRP requirements may be inconsistent with the habitat needs of listed species. For example, trees have sometimes been planted in suitable habitats for the bog turtle, an endangered species that requires wet meadow with abundant sun and little tree cover. Therefore, advise CRP participants of the groundcover options that will restore habitat for at-risk species.

10. **Revise the Ranking Criteria for the Environmental Quality Incentives Program**. EQIP ranking criteria have discouraged good wildlife proposals through mechanical problems. Proposals to build manure management facilities, control soil erosion, remove weeds, and enhance wildlife are all ranked on one sheet. Since manure management is a greater emphasis than wildlife virtually everywhere, manure management proposals outscore wildlife proposals. Therefore, decide upfront how much money each resource concern should receive instead of grouping all possible resource concerns into one index. With this new concept, a producer proposing a manure management facility could gain a better score than a rival proposal by adding a minor wildlife practice, such as a food plot or a small wetland.

11. **Enhance Funding for the Wildlife Habitat Incentives Program, and Reduce the Cost-Share Requirement for Projects that Provide Exceptional Habitat for At-Risk Species**. Provide more funding to WHIP to protect habitat that species need for recovery, give the USDA's Natural Resources Conservation Service the authority to provide 100% cost-share and incentive payments for projects that provide exceptional habitat for at-risk species, and explicitly establish at-risk species as the program's priority.

12. **Increase Healthy Forest Reserve Program Funding to Support Family Forest Owner Conservation Efforts**. Increase funding for the HFRP so that family forest owners receive financial support through Farm Bill conservation programs to provide a host of critical ecosystem services, such as habitat, clean water, and clean air.

13. **Increase Forest Stewardship Program (FSP) Funding and Reduce Cost-Share Percentages.**

14. **Provide a Percentage of WHIP/FSP/HFRP to Support Large Landowners' Conservation Efforts**. Encourage the voluntary participation of large landowners in the recovery process for endangered and threatened species by allocating a percentage of WHIP/FSP/HFRP for use by any landowner, regardless of income level or annual funding limitation. This allocation could provide cost-sharing assistance, funding for conservation easements, or outright land acquisition projects that provide species recovery benefits.

15. **Provide Automatic Re-Enrollments**. The CRP and other programs authorized by the Farm Bill typically involve contracts with landowners that last for a period of years and then require re-enrollment. Because these contracts are awarded on a competitive basis, there is no guarantee they will be renewed. Therefore, provide automatic re-enrollment for CRP and other Farm Bill program contracts if the projects are benefiting threatened and endangered

species. Automatic re-enrollment will recognize the benefits provided to listed species and will encourage producers to continue to provide those benefits.

Cooperative Agreements

Current law does not explicitly authorize cooperative conservation agreements between landowners and the federal government for the conservation or improvement of habitat and species. With more than 80% of listed species occupying private lands, landowner cooperation is essential for the recovery of listed species. Several innovative programs have been developed to provide incentives for private landowners to enhance the survival of listed species on their lands. There is a need to legislatively authorize these in a way that still allows for innovation and flexibility. Legislation to authorize such programs would hopefully provide encouragement for agencies to enter into more cooperative conservation arrangements than they have thus far. This section contains three proposals for legislative action regarding cooperative agreements, in no particular order.

1. **Increase Funding for the Landowner Incentives Program (LIP), Partners for Fish and Wildlife Program, and Private Stewardship Grants Program (PSGP), and Coordinate with Farm Bill Programs and Tribal Landowner Incentives Programs**. LIP is administered by the states, while the Partners Program and PSGP are administered by the U.S. Fish and Wildlife Service (FWS). These programs provide cost-share dollars to private landowners to conserve rare and threatened and endangered species. It is also important to set aside a percentage of funds for planning and administrative purposes. These programs should be coordinated with Farm Bill programs and Tribal Landowner Incentives programs.

2. **Codify Safe Harbor Agreements**. Amend §10a of the ESA to include the following:

   "Section 1539. Exceptions [ESA Section 10]
   (a) Permits
   (1) The Secretary may permit, under such terms and conditions as he shall prescribe, any act otherwise prohibited by section 1538 of this title for scientific purposes or to enhance the propagation of, or otherwise produce a net conservation benefit for, the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j) of this section; or…"

   This recommended change would clarify the authority of the Secretary to issue permits that authorize the implementation of Safe Harbor Agreements. In 1999, the FWS and the National Marine Fisheries Service (NMFS) issued a joint policy regarding the use of Safe Harbor permits to encourage property owners to carry out voluntary conservation efforts on their nonfederal property. This policy provided such property owners with an assurance that voluntary conservation efforts would not result in new or additional restrictions on the use of their property, beyond those (if any) that applied to the property immediately before the Agreement. Under the 1999 policy, Safe Harbor Agreements have been effectuated by the issuance of "enhancement of survival" permits under §10(a)(1)(A) of the ESA. Although similar assurances could be (and have been) given to property owners under other provisions

of the ESA, the rationale for doing so pursuant to §10(a)(1)(A) is straightforward. Under the policy, an Agreement must be expected to produce a "net conservation benefit" for the species to which it applies, and anything that produces a net conservation benefit for a listed species will clearly enhance its survival.

At present, more than 300 property owners participate in Safe Harbor Agreements, and many additional agreements are under development. Notwithstanding the successful use of this new conservation tool, some have expressed the view that without more explicit language in the ESA, the possibility exists (though very remote) that someone might successfully challenge the Services' authority to approve Safe Harbor Agreements. The minor amendment here responds to that concern by incorporating directly into §10(a)(1)(A) the "net conservation benefit" standard for approval of Safe Harbor Agreements found in the Services' joint policy. The intent of this change is not to limit or preclude the use of §10(a)(1)(A) permits for any purpose for which they have heretofore been used. Any action that would have been authorized on the basis of its enhancing the survival of a listed species will be able to be authorized on the basis of its producing a net conservation benefit for that species.

The Safe Harbor program increases the willingness of private landowners to participate in voluntary habitat conservation efforts, and has been highly successful where it has been utilized. The use of Safe Harbor Agreements should be increased, especially for areas where it has been underutilized, such as aquatic habitat for anadromous fish species.

3. **Increase Nontraditional Section 6 Funding for Habitat Conservation Planning and the Development and Implementation of Safe Harbor and Similar Voluntary Conservation Agreements**. Funding for the preparation of Habitat Conservation Plans (HCPs) has been instrumental in helping local governments and other HCP participants gather the best-available scientific information and develop large regional conservation plans. HCP land acquisition funding has also contributed significantly to species conservation through habitat acquisition designed to complement existing HCP preserves.

   Most Safe Harbor Agreements commit a property owner to carry out beneficial management activities on his property (e.g., prescribed burning, planting of native vegetation, control of exotic species, etc.), the costs of which are sometimes substantial. No funding exists in the ESA to help property owners develop or implement Safe Harbor Agreements. With increased funding, more private property landowners would be willing to participate in the program.

Tax Incentives

Modest changes to the tax code could produce significant benefits for the conservation of endangered species habitat. The various proposals presented below suggest a number of tax incentives to help conserve critical habitat and habitat identified in recovery plans. The recommended tax benefits should be directed at actions that conserve habitats that have special conservation value for endangered species. The following proposals would all require legislative action, and they are presented in no particular order.

1. **Eliminate the Capital Gains Tax on Sales to "Conservation Buyers" of Habitat that Species Need for Recovery**. A conservation buyer could be either a governmental or nongovernmental interest, provided the buyer is in some way committed to keeping and managing the land consistent with its value as habitat that species need for recovery.

2. **Provide Equal Value Basis for Exchanged Habitat that Species Need for Recovery**. Establish the basis of land received in exchange for habitat that species need for recovery as equal to the value of that habitat when exchanged for other land from a conservation buyer.

3. **Recognize No Capital Gains when Selling Easements to Conservation Buyers**. Recognize no gain on the sale of an easement that contains habitat that species need for recovery if the owner sells it to a conservation buyer, when the terms of that easement are consistent with keeping and managing the land as habitat necessary for species recovery. Permanent easements should yield a higher tax benefit than temporary easements.

4. **Provide State Credits for the Above**. Treat the amount of state tax levied on gains as a credit against federal income tax owed for all of the above proposals.

5. **Provide Local Property Tax Credit against Federal Income Taxes for Agreements to Protect Habitat that Species Need for Recovery**. When an owner of habitat that species need for recovery enters into an agreement satisfactory to both federal and state conservation agencies to manage that habitat in a manner consistent with its value as habitat necessary for recovery, treat local property taxes paid on the property as a credit against federal income taxes, and allow expenses incurred in carrying out management measures required by the agreement as deductible against federal income taxes.

6. **Provide Estate Tax Deductions, Deferrals, Exemptions, or Credits for Landowners Participating in Cooperative Agreements**. The biggest impediment to farmers and ranchers passing their lands to the next generation remains the estate tax. Therefore, reduce, exempt, defer, or credit estate tax liability when landowners voluntarily enter in a cooperative ESA agreement during the term of the agreement. Higher benefits should be correlated with more permanent agreements. This provision should: (1) Provide for the deferral of estate taxes for the period that a cooperative agreement is in force and is being performed in good faith; (2) reduce the valuation of a piece of land participating in a cooperative agreement by 5% for the specific purpose of calculating the tax (if the species moves off the property or is considered recovered, the agreement shall be considered to have been completed and the property exempted from estate tax); and (3) define qualified property as both lands from agreements entered by the landowner prior to death and agreements entered by an executor after death.

7. **Provide Income Tax Credits for Working Landscapes**. Active management of species habitat by "working landscapes" is a viable tool for aiding the recovery of listed species. Therefore, establish tax incentives for voluntary efforts to enhance habitat that do not involve set-asides. Income tax incentives might include:
   - **Non-recognition as income any amounts received under incentives programs**.

Amounts received as grants under the Landowner Incentive Program, Private Stewardship Grant Program, or any of the Farm Bill programs should be excluded from income for tax purposes.

- **Income tax credits for money spent by landowners**. Most incentive programs that incorporate "working landscapes" involve some form of cost-sharing requirement. Treatment of such expenses as ordinary deductions does not adequately reimburse the landowner for the amounts paid. To encourage the use of such incentives, landowner expenses for species conservation programs should be allowed as a credit on federal income taxes.

Streamlining

By making agency processes as efficient as possible, resources can be freed to devote to on-the-ground conservation efforts. Thus, improving and streamlining the efficiency of agency processes as much as possible should produce both species conservation benefits and reduced burdens for those who are subject to those processes. This section contains four proposals for administrative actions relating to streamlining, in no particular order.

1. **Establish Target Administrative Timelines for Processing Permit Applications associated with Habitat Conservation Plans, and Provide Sufficient Funding to Meet those Target Timelines as well as Existing Statutory Deadlines**. No timelines currently exist for the processing of applications for Habitat Conservation Plan §10 permits. The lack of sufficient agency staffing and timelines creates a disincentive for landowners and others to participate in the HCP process, especially since the §7 consultation process has established deadlines and appears less subject to delay. Because the FWS and NMFS currently lack sufficient resources to meet existing deadlines for many ESA decisions, working group participants decided against recommending enforceable statutory deadlines for processing HCP permit applications. However, they concluded that it would be highly desirable for the agencies to establish administrative timelines for processing such applications.

   The FWS and NMFS should thus administratively establish target timelines for processing permit applications associated with HCPs. They should, for instance, let permit applicants know whether a submitted application is complete within 30 days of receipt, and make a final decision on an application within 180 days of receiving a complete application. To meet those timelines, as well as existing statutory deadlines relating to listing, critical habitat, and §7 consultations, it is essential that the agencies seek, and Congress provide, sufficient funding.

2. **Provide Safe Harbor Assurances for Participants in Various Cost-Share Programs**. A variety of cost-share conservation programs administered by the Departments of Interior and Agriculture have the potential to contribute to the conservation of endangered species by creating, restoring, or enhancing habitat. These programs include (as mentioned previously) the Partners for Fish and Wildlife Program, the Landowner Incentives Program, the Private Stewardship Grants Program, and several Farm Bill conservation programs. The potential of these programs to contribute to the conservation of endangered species has not been fully

realized, however, due in part to landowner concerns about potential land use restrictions that may result if their voluntary habitat improvement efforts attract endangered species.

Although Safe Harbor Agreements can satisfactorily address these landowners' concerns, there is a need for a more efficient mechanism than individual permits for each participating landowner. The FWS and NMFS should use their existing authorities—under either §7 or §10—to extend such assurances programmatically to participants in these voluntary programs. Participants should be thus assured that they can return their enrolled lands to their prior condition and use after the end of their contract terms.

3. **Support State Conservation Agencies' Involvement in Measures to Conserve Species and Habitat**. State fish and wildlife agencies have significant biological and management expertise that can augment and expand on federal efforts to protect the habitat of listed species and foster their recovery. The working group supports a clearer, more effective role for the states in conserving imperiled species and their habitat by improving cooperation and partnerships between the states and the federal government.

   State involvement may prove particularly effective in developing and implementing species and habitat conservation mechanisms that reduce economic, social, and other costs while still resulting in equal conservation benefits. The working group endorses efforts to facilitate, encourage, and support the participation of state fish and wildlife agencies in implementing the ESA, including providing biological data and expertise on habitat conservation measures, developing and implementing recovery plans, and acquiring and managing lands, waters, or interests therein. In addition, the states should take a more active role in devising measures to direct attention and resources to species before they become endangered or threatened. Such steps would take advantage of the experience, expertise, and other strengths of state conservation agencies, in partnership with federal natural resource agencies, in implementing the ESA.

   As a further step in this direction, the working group suggests allowing the states and federal agencies to develop implementation agreements to coordinate resources, time, and effort at the program level or species-specific level.

4. **Provide Funding for the Implementation of State Comprehensive Wildlife Strategies**. Since fiscal year 2002, Congress has provided more than $350 million for the State Wildlife Grants Program. Pursuant to this program, all states recently completed proposed comprehensive wildlife conservation strategies (also known as "state wildlife action plans"). These documents identify species and habitats of greatest conservation concern in the states and outline strategies to achieve their conservation. A major emphasis of the program and the resulting action plans is on preventing species from becoming threatened or endangered. To the extent that state wildlife action plans prompt conservation efforts for rare or declining species and their habitats before those species become endangered, it may be possible to avert future ESA listings and the conflicts that sometimes attend that process.

   With the recent completion of state wildlife action plans by all states, the State Wildlife Grants Program is transitioning from support of plan development to implementation. Only if

adequate funding for plan implementation is secured will it be possible to realize the potential of the action plans to protect the habitats of species otherwise trending toward endangerment. Thus, continued funding of the State Wildlife Grants Program, at a level commensurate with the goals set forth in the state wildlife action plans, could usefully complement the habitat conservation measures of the ESA.

Incentives Proposals on which Agreement Was *Not* Reached

The following group of proposals did not secure the full support of the working group, because the ideas in question failed to address adequately key constituency interests, and/or time constraints did not allow the opportunity to discuss and flesh out the concepts in depth.

Several proposals included additional suggestions related to the Farm Bill, such as:

- Ranking wildlife proposals at the state level, where state and federal wildlife agencies typically contribute personnel who can assist in such efforts
- Encouraging higher cost-share payments from states in the EQIP program for landowners willing to enhance their habitat for endangered species
- In the Grassland Reserve Program, placing the primary emphasis on permanent easements

Certain proposals also included additional suggestions related to cooperative agreements and tax incentives. These included:

- Developing legislation to authorize other cooperative agreements or "species recovery agreements" (in addition to Safe Harbor Agreements) between landowners and the FWS or NMFS that would benefit listed or candidate species and/or their habitat in exchange for some benefit to the landowner. The terms of the agreement would be negotiated between the landowner and the agency. The authorizing legislation should provide the greatest degree of flexibility to both the landowner and the agency to craft an agreement that accomplishes the goals of the landowner and at the same time provides a positive benefit to the species. It should also be sufficiently general to recognize existing programs.
- Authorizing federal tax deductions for donations of conservation easements pertaining to water.

Finally, the proposals included several suggestions for streamlining the implementation of the ESA, such as:

- Developing an expedited process for "low effect" HCPs
- Integrating §7 and §10 by: (1) streamlining the §7 consultation conducted on the HCP permit decision to preclude duplicative analysis of covered species, and (2) eliminating a requirement for future §7 consultations for activities covered by an existing HCP
- Using a broader and more flexible application of the 4(d) authority to ensure that states that have adequate management programs for rare species are not penalized for lack of effort or result elsewhere, thereby providing an incentive for states to supply adequate management
- Requiring the Secretary to begin the de-listing process when species reach recovery goals

- Codifying the "no surprises" assurances and establishing an HCP insurance fund to support "no surprises" assurances
- Expediting procedures to encourage the exchange of habitat in federal ownership that is not essential to species recovery for habitat that is essential for species recovery but is not currently in federal ownership
- Increasing the Federal Advisory Committee Act (FACA) exemption in the ESA so that all interactions with resource agencies on ESA coordination and collaboration would be exempt from FACA
- Integrating federal programs focused on invasive species and climate change with the ESA

Recovery Planning

The ultimate goal of the ESA is the conservation of endangered and threatened species and the ecosystems on which they depend, in order to achieve recovery. The goal of any endangered species recovery program and recovery plan is to bring an endangered or threatened species to the point where the protections of the ESA become unnecessary. "Recovery plans" are documents prepared for listed species that detail the specific actions needed for recovery. Thus, in theory, recovery plans should provide a blueprint for private, federal, and state cooperation in the conservation of threatened and endangered species and their ecosystems.

Recovery plans identify down-listing (interim) and/or delisting goals for a listed species. Once a species reaches its goals, the resource agencies consider removing it from the list. To delist a species, the relevant federal agency follows a process similar to the one for listing. It assesses the population and its recovery achievement; evaluates the existing threats; and seeks advice from species experts and other members of the public. To assess existing threats, the agency must determine that the species is no longer threatened or endangered based on the five statutory listing factors:

- Is there a present or threatened destruction, modification, or curtailment of species habitat or range?
- Is the species subject to over-utilization for commercial, recreational, scientific, or educational purposes?
- Is disease or predation a factor?
- Are there inadequate existing regulatory mechanisms in place outside of the ESA (taking into account efforts by the states and other entities to protect the species or habitat)?
- Are other natural or manmade factors affecting its continued existence?

If the resource agency determines that the threats have been sufficiently reduced, it initiates the delisting process with a proposed rule, solicitation of public comment, and a final decision.

The Keystone working group consistently underscored the need for scientifically sound, financially reasonable, and adaptive recovery plans. Recovery may be thought of as a listed species reaching a point where it will exist over a socially and biologically meaningful timeframe; this general characterization may be defined and described scientifically in terms of extinction risk. The working group agreed that the task of establishing an appropriate level of

risk to distinguish protected species from those deemed recovered should be informed by scientific judgments. However, the final decision of how much risk a species should face before it receives protection under the ESA remains primarily a value judgment driven by factors (e.g., policy issues, economics, and social values) other than science alone. Hence, recovery plans and the recovery planning process must involve intelligent consideration and decision-making that integrate scientific and policy choices, in keeping with the goals of the ESA.

During the Keystone process, a subgroup of the larger working group explored questions that would need to be addressed if recovery plans were to assume greater importance under the ESA. In general, subgroup participants found these questions to be complicated and difficult. It should be emphasized that both the subgroup and the full working group felt that at least some of the questions were difficult to address in isolation and depended in part upon other issues (e.g., whether or not any revisions to the §7 standard would be recommended). Among the questions were the following.

1. What does the term *recovery* mean, both biologically and from a legal/regulatory standpoint?
2. Should a risk assessment approach be adopted and, if so, how might risk assessment be integrated effectively into recovery planning? What are the advantages and drawbacks of the various ways of describing and considering risk?
3. What is meant by the concept of *recovery habitat* and, if that term is used, how should it be defined?
4. What are the elements of a recovery plan?
5. What useful options might be extracted from previously drafted legislation (e.g., the Kempthorne and Pombo Bills) with respect to recovery plans and recovery planning?
6. What is the appropriate role for scientists and science (particularly risk assessment) in recovery planning?
7. What should be considered in terms of the "mechanics" of recovery planning (e.g., team composition, timeframes, etc.)?

Should recovery assume a more centralized position in the ESA, the group felt it important that Congress articulate a policy as to what "recovery" means. Federal agencies would then need to translate this national policy into regulation, guidance, and practice. At an operational level, defining recovery may mean establishing some acceptable level of risk, or some approach to risk that can be adapted on the ground in different places and for different species but that remains explicit and transparent.

The group did not progress to a point where it could test for consensus about the precise role of recovery plans in managing and protecting listed species; however, it did identify several central themes related to the nature of recovery plans. For example, participants recognized that recovery planning in many cases would need to address both occupied and unoccupied habitat needs in some fashion, although it did not reach consensus on how best to do so. There was considerable (though not universal) sentiment within the group that while recovery plans should not be stand-alone, enforceable regulatory documents, they should meaningfully inform and serve as reference documents for other ESA actions, such as consultations under §7(a)(2); avoidance of take prohibitions under §9, issuance of incidental take permits and agreements

under §10; state program approvals under §6; and efficient and effective use of landowner incentives programs (i.e., obtaining the greatest good for the money).

The remainder of this section captures the ideas and perspectives that participants discussed with regard to three key areas relating to recovery plans: The meaning of "recovery" and "recovery habitat" from a biological perspective; a characterization of the possible elements of a recovery plan, drawing from several pieces of proposed legislation insofar as possible; and some issues related to recovery plan mechanics (e.g., team composition, timing). The section concludes with a summary of key consensus points and unsettled issues.

Characterizing the Concept of "Recovery"

The ESA does not explicitly define "recovery." Rather, it somewhat tautologically states that a species is recovered when it is no longer "likely to become [in danger of extinction] within the foreseeable future throughout all or a significant portion of its range"(16 U.S.C. 1532(19), 1532(6)). Subgroup participants thought of recovery as the process by which the decline of an endangered or threatened species is arrested or reversed and threats removed or reduced so that the species' long-term survival in the wild can be reasonably ensured. This characterization can be thought of as moving the question from one of defining recovery to one of assessing the risk of extinction. A species' risk of extinction will never be zero—there will always be some possibility of extinction over all but the shortest of time horizons—with the result that recovery cannot be unambiguously defined on the basis of scientific information. A "recovered/not-recovered" bright-line dichotomy, while perhaps a necessary legal construct, does not always track well with ecological reality.

Determining acceptable risk—and therefore the criteria on which to gauge progress toward an achievement of recovery—involves policy and value judgments in addition to scientific information. The group agreed, as noted above, that settling upon an actionable degree of risk is not purely a science-based decision. However, science can provide estimates of risk associated with different recovery criteria, as well as insights into management practices that may diminish the risks of extinction and promote recovery. Hence, determining an acceptable level of risk remains largely a values-based decision but one that can be informed by the realities of nature.

Subgroup participants discussed several ideas about how to address this issue in a workable fashion. Some promoted establishing a "norm" for an acceptable level of risk outside the context of any particular recovery plan. In addition, some felt that a recovery goal for a particular species may depart from the norm one way or another for sound reasons explicitly stated in the recovery plan; others were reticent about allowing departures, because of concern about the significant inconsistencies that may result. One option discussed would be for Congress or the Secretaries to define the norm in a general way (e.g., "extinction would be unlikely over three human generations"), which would then be translated into more concrete terms through agency regulation, guidance, and practice. An alternative option would be to require that each recovery plan explicitly describe the risk framework utilized in developing the plan, without any general risk standard imposed on all plans in advance.

Were Congress or the Secretaries to establish a norm as policy, the group discussed how general or specific it ought to be. Some proposed that it should not be a hard standard of mathematical precision, for several reasons. First, it would be daunting to achieve political consensus on an explicit hard target. Moreover, an explicit risk standard could open a new front of litigation over recovery plans, given the state of the science for most species (e.g., debates about whether the risk level is just above or just below some numerical level). In addition, as noted above, some believe that real-world and valid circumstances can justify deviations—in both directions. However, others looked more favorably upon Congress establishing (or adopting) a more specific, science-based norm. Those holding this perspective did not feel that the political difficulty of doing so should invalidate what they saw as an otherwise good idea. Furthermore, some felt that a clear standard could result in more-settled, rather than less-settled, jurisprudence on this issue.

In general, subgroup participants agreed that risk does provide a useful "frame" for considering the unavoidable subjectivity surrounding the determination of recovery goals. While the group agreed that consideration of risk is an inherent aspect of recovery planning, perspectives differed about how that would be best accomplished. Some favored having recovery criteria identify a specific level of risk (or safety) that, once attained, would trigger the delisting process. Others, while supportive of defining recovery more coherently, raised doubts about the utility of relying too heavily on quantitative risk analyses.

Some in the subgroup felt it important that recovery teams: (1) consider and analyze alternative recovery measures, including least-cost measures; (2) describe the impacts of the alternative measures on the overall economic cost of the plan, as well as to specific industries and geographic regions; and (3) identify the extinction risk over the life of the plan under various alternative scenarios. This economic and risk analysis would be set forth in the draft plan and would available to the public for review and comment before the plan is approved by the Secretary. However, other participants thought that an extensive alternatives analysis would not be necessary in all cases, and they expressed concern about the time and cost involved with doing so. As noted above, some questioned the level of accuracy associated with specific risk projections, feeling that numerical analyses can create a false perception of rigor. From this perspective, while such analyses may look "scientific" and quantitative, they may at times rest upon debatable judgments and opinion. In addition, some felt that while rigorous, defensible risk analyses were theoretically possible, developing them may in some cases cost more in terms of time and data collection than the benefit gained from the greater level of precision.

Subgroup participants generally thought there to be two elements involved in delisting a species and concluding it recovered: (1) the population must have increased or, at least, stabilized at a point that it is both sufficiently large and dispersed to reduce the risk from a stochastic event to an acceptable level; and (2) there should be sufficient security against either the recurrence of the threats that prompted the listing, or of new risks, so that the species is unlikely to slip back into a threatened status.

Some in the subgroup stated that, in practice, a delisting proposal should be able to demonstrate that the species and the habitat upon which it relies for long-term survival are insulated from significant threats. The necessary habitat would need to be arranged in a pattern to provide the

landscape or regional diversity essential to a species' sustainability. Some cautioned that delisting may be inadvisable if based solely on reaching abstract population goals without an accompanying assessment of occupied habitat, suitable but unoccupied habitat, and the current and likely future threats to both. A species' long-term survival in the wild cannot be considered assured if the species is dependent on dysfunctional or highly manipulated habitat, or habitat that is subject to significant current or future threats.

Threshold values for the biological criteria for recovery will vary by species. Even if a common risk criterion were widely agreed upon, this would translate into on-the-ground conservation action differently depending upon the circumstances of each species. For example, the prescriptions for recovery, including habitat aspects, would likely not be similar for a plant with a narrow range and a widely roaming predator. Determining the specific management actions required to achieve a given risk criterion would be the task of the recovery team.

Some participants suggested that a flexible, sliding-scale measure for identifying and then benchmarking recovery would be more effective than attempting to pinpoint a set risk level. Such an approach would be aimed at revealing both the direction a species is heading (toward or away from recovery) as well as the rate (fast or slow) of the movement. Similarly, some suggested that rather than struggle with trying to identify the "correct" level of risk, the recovery plan could contain a scientific assessment of what the potential risk (or margin of safety) is under what is being proposed. This could then figure significantly in the review and approval process.

Moreover, some participants cautioned that recovery and delisting should not be the sole yardstick with which to measure success. Progress and success can result by other means, such as stabilizing a population. While having species reach the point where they no longer need the protections of the Act should remain the final goal, some listed species will need long-term if not perpetual care, and the law should not be faulted for failing to achieve what is, at least currently, unrealistic.

Habitat Issues in Recovery Planning

Under the ESA, the term *critical habitat* means the specific areas within the geographical area occupied by the threatened or endangered species, at the time it is listed in accordance with the provisions of §4 of the Act, on which are found those physical or biological features (1) essential to the conservation of the species, and (2) which may require special management considerations or protection; as well as specific areas outside the geographical area occupied by the species at the time it is listed, if the Secretary determines that such areas are essential for the conservation of the species.[7]

Critical habitat is required to be designated on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. Critical habitat must be designed concurrently with making

[7] It was anticipated that critical habitat would not include the entire geographical area that can be occupied by the listed species except in unusual circumstances. Also, note that "conservation" at the end of this definition means "recovery" (i.e., the point at which the measures provided pursuant to the Act are no longer necessary).

a listing determination unless the Secretary deems that: (1) it is essential to the conservation of the species that the regulation implementing such determination be promptly published, or (2) the critical habitat of the species is not then determinable, thereby extending by one year the final regulation designating, to the maximum extent prudent, such habitat.

The agencies have not been provided sufficient resources to comply with the critical habitat designation requirements of the ESA, and have not always felt such designations were prudent or determinable. Consequently, there is a large backlog of listed species for which critical habitat remains undesignated. This in turn has triggered litigation that has drained available resources further. In practice, some critical habitat designations have been expensive, controversial, and time-consuming. Moreover, because activities on nonfederal lands within critical habitat may be affected directly and indirectly by the designation, landowners may be adversely affected and thus often perceive the designation of critical habitat as a disincentive to species conservation on their lands.

The subgroup explored how habitat issues might be approached if they were addressed during the recovery planning phase rather than under the current critical habitat designation process. In simple terms, "recovery habitat" would be the area on the landscape necessary for a listed species to reach an appropriate population size and geographic distribution so that it meets whatever criteria had been determined necessary for it to be deemed "recovered." In practice, this would translate into identifying where on the landscape habitat important to achieving recovery exists, the amount of such habitat required, and its spatial distribution. This information would typically be most clearly represented by a map.

Several participants emphasized that a species is normally listed when its population size becomes small, which often means that it no longer occupies much of its former range. In order for a species' population size to increase to the point of recovery, it may need to expand into currently unoccupied habitat. If a sufficient amount of this habitat does not remain suitable for the listed species, then the prospects for recovery are diminished. The identification of habitat needed for recovery is a particular challenge for species with complex life histories, such as those that have distinct habitat requirements depending upon their life history stage or the time of the year (e.g., migratory animals with distinct breeding and winter ranges). In such cases, recovery habitat may need to include the requirements for successful breeding, migration, and survival on the wintering grounds.

In practice, the elements and processes that characterize a species' habitat are often poorly known. Usually better documented is the relation between the occurrence of the species on the landscape and the vegetation structure and composition in the neighborhood of these locations. As a result, the designation of vegetation community types has often been used as a surrogate for a species' habitat. Defaulting to vegetation type as a descriptor of a species' habitat has a long history in ecology—vegetation is much easier to measure and characterize than prey resources or nest sites, for example. Moreover, detailed vegetation maps exist for most parts of the country, based on either extensive ground surveys or remotely sensed (e.g., satellite) imagery.

Outline of Recovery Planning Elements

The group generally believes that recovery plans should in some fashion assess risk, focus on reducing threats to species, be developed by teams of a manageable size and sufficient diversity to include needed expertise and representation, as well as include provisions for monitoring and reporting to evaluate the plan's effectiveness. The group's recovery planning subgroup reviewed and compared recent legislative proposals, including S. 1180 ("Kempthorne Bill") and H.R. 2834 ("Pombo Bill"), as a starting point for identifying the elements of enhanced recovery planning.

The subgroup noted the considerable congruence between the two bills when it came to habitat issues, as well as some differences. The subgroup also identified several areas not explicitly covered in either bill but that might merit further discussion. Neither the subgroup nor the full working group discussed these ideas fully nor formulated any specific recommendations with respect to them. The following were among the issues *not* addressed in the bills.

- Establishment of interim milestones where information is lacking to determine a recovery goal, reviewable on a periodic basis (e.g., every five years)
- Provisions with respect to recovery habitat, including the role of recovery teams; a definition of "requisite for recovery;" a plan approval process; issues related to the timing of habitat designation; factors to be considered in identifying and designating habitat; whether or not to continue exclusion authority; the status of previously identified critical habitat; and the identification of special value areas
- Appropriate provisions for resource agencies to consult with states, tribes, and regional land use agencies
- Augmentation of the plan implementation phase with species recovery agreements, and monitoring of delisted species for some defined period (e.g., five years)

Recovery Planning Process

Given the working group's focus on what constitutes recovery, the role of habitat in recovery, and the elements of a recovery plan, it engaged in only a preliminary discussion regarding the process by which recovery plans should be developed. There was general consensus among participants that recovery planning to date has been ad hoc and too much in the eye of the beholder. Participants envisioned a recovery planning approach that would: Frame recovery objectives and predict the effect of recovery plan implementation based on risk assessment (though the nature of the assessment remained an open issue); articulate some across-the-board guideposts about what constitutes recovery and how recovery plans ought to be developed; find ways to reduce the specter of dueling scientists in administrative and judicial venues; and remain mindful of practical implementation issues and what should be handled by statute vs. regulation vs. agency guidance.

Some group members felt it would be helpful to articulate a generally applicable recovery goal and then ask the recovery planning team to translate it into what is needed on the ground for a specific species. An important part of that translation process could be informed by scientists about the expected level of risk that would exist under different recovery plan scenarios.

Participants discussed the need to resolve the inherent tension between having some sort of consistent recovery standard that can be applied across the board (with the perceived advantage being that people will know what they are supposed to do and not wrangle anew about threshold questions at the outset of each recovery plan) and having a certain amount of flexibility and discretion (with the perceived advantage being the ability to adjust to real-world issues and avoid bright-line litigation magnets). Moreover, some suggested that while the goal should be the same in all cases (i.e., species recovery to a point where the law's protections are no longer needed), the recovery plan need not articulate every step needed to reach that objective, particularly when it cannot be realized in the foreseeable future. The plan could instead set forth what needs to be done in, for instance, the ensuing five years to move toward the goal and/or reach certain interim milestones on the road to recovery.

Subgroup participants thought that, had time allowed for a more thorough evaluation of the issue, a discussion predicated on the elimination of critical habitat might lead to a construct in which recovery planning would involve several key phases: (1) Risk assessment (i.e., a determination of current and projected risk levels and how those would be affected by different recovery plan scenarios); (2) evaluation of recovery plan alternatives and selection of a proposed plan, informed by scientific, social, and policy factors; and 3) a review and approval process.

One illustration of such an approach would be to have a recovery team, composed of both species experts and stakeholders interested in or affected by efforts to recover that species, which could develop (though a transparent process) a set of alternatives aimed at achieving recovery. For each alternative, the team would outline the likelihood of achieving recovery over a specified timeframe and include an analysis of the economic, social, and other impacts (both positive and negative) of management efforts to achieve the alternative's specified level of certainty of the species' existence over time. The relevant agency—FWS or NMFS—would then, again through a transparent process, decide to adopt one of these alternatives or develop a new or blended alternative. After the resource agency has made a decision that specifically defines recovery parameters for a particular species, scientists should help to identify management measures that are necessary to achieve the established goals. Protection of habitat (i.e., the extent and configuration of habitat anticipated as being necessary to achieve the goals of the recovery plan) will often be an important element of achieving recovery of a listed species. While the above general sequence attracted support within the subgroup, the group did not discuss, let alone agree on, a number of important practical issues, including timing, level of detail, and intersection with regulatory decision points.

Some participants favored an approach wherein the development of a recovery plan would start with an analysis, conducted by scientists, that would then be considered by a range of stakeholders—the idea being that scientific decisions should be based on factual information, not preferences or consensus. Others expressed concern that failing to involve affected stakeholders from the outset could lead to various practical and political problems, forego the potential benefits that come from education and communication between scientists and non-scientists, as well as reduce the prospect of early buy-in from a range of parties.

After some discussion, participants generally agreed that the recovery plan development process, as articulated through statute, regulation, and policy, should aim to satisfy several objectives,

including: Establishing a transparent and understandable process; obtaining the benefits of communication and education among various parties; creating conditions for buy-in; preventing avoidable controversy while managing that which is unavoidable; and ensuring the integrity of scientific decisions. The group agreed that further discussion was needed to explore how to knit these various legitimate interests together.

The working group also flagged the issue of how recovery plans for various species interact with each other. What does one do when the management or recovery measures for one species conflict with another? Participants generally felt that it would be necessary to develop a multi-species plan to reconcile conflicts to the greatest degree possible and make choices based on the information and issues at hand.

Summary of Consensus Points and Issues in Need of Further Discussion

Participants generally agreed that the role of scientists should be both protected and limited. Scientific assessments ought to be protected from influence from non-scientific matters (e.g., economic implications), while at the same time scientists should not be the arbiters of policy judgments (e.g., what level of risk is acceptable, or what amount of expenditure for species recovery is reasonable).

While participants held various ideas about the exact process by which recovery plans ought to be developed (e.g., how and when stakeholders and scientists should interact), they generally agreed that the recovery plan development process needs to satisfy several objectives, including: Maintaining a transparent and understandable process; accruing the benefits of communication and education between various parties; creating conditions for durable buy-in; preventing avoidable controversy while managing that which is unavoidable; and ensuring the integrity of scientific decisions. The group also agreed that further discussion was needed to explore how to mesh these various legitimate interests together.

There was some discussion and support for the idea that the ESA's progress and success can, in some circumstances, be measured by means in addition to recovery and delisting, such as stabilizing a population where full recovery is not feasible in the foreseeable future. Moreover, participants agreed that while the goal should be same in all cases (species recovery to a point where the law's protections are no longer needed), the initial recovery plan need not articulate every step needed to reach that objective. It could set forth what needs to be done in, say, the ensuing five years to move toward the goal and/or reach certain interim milestones on the road to recovery. The working group was not able to develop this idea fully but agreed it might merit further discussion.

The subgroup grappled with the threshold issue of "what do we mean by recovery?" There seemed to be a shared sense that one problem with the current law is that there is no clear standard for what constitutes recovery—it is a circular construct that a species is "recovered when it is recovered" or "recovered when it no longer needs the protection of the Act." The group explored several ways of trying to remedy this issue.

- One idea was that it is important to have an explicit, consistent definition of what constitutes recovery, and this ought to be as quantitative as possible (e.g., "a species is recovered when it reaches a 5% risk of extinction in an ensuing 100-year time period"). Under this view, the definition of recovery applies more or less across the board, with no or limited exceptions. A perceived advantage of this approach is that it gives scientists clear tasks (e.g., identifying what habitat needs exist in order to achieve the articulated risk threshold). Less clear is whether all recovery plans would be directed toward meeting a common definition of recovery or whether recovery plans might adopt a different goal (i.e., predicated on either a lower or higher level of risk) due to other factors (e.g., practicality, economics).

- Other participants tend to agree that "recovery" is not clearly defined but are uneasy about trying to use risk as an inflexible and explicit driver of the process. Some of these concerns seem scientifically based (e.g., a concern about the possibility of false precision), while others relate to implementation issues (e.g., there may be good reasons for constructing recovery plans on somewhat of an ad hoc basis). Some also fear that obtaining a more precise view of risk would cost significant time and dollars and provide marginal benefit over what could be done with a more qualitative analysis.

It remained uncertain if the group, with more discussion, could arrive at consensus on a risk-based approach that found a workable balance between the tensions of consistency vs. flexibility and specificity vs. generality.

The working group also discussed the role of mapping habitat, but did not reach any conclusions about whether or how it should be incorporated into the recovery planning process. Some felt that maps were essential in order to identify habitat in a spatially explicit way; others wondered if there might be a way to address habitat necessary for recovery without drawing lines on a map (e.g., identifying requisite habitat characteristics that could be applied case-by-case). The group realized that drawing lines on a map would help to create more certainty but also may raise questions and concerns for some parties.

Finally, the group discussed but did not reach conclusions regarding important specifics that would need to be addressed if the identification of habitat that listed species need to recover took place during the recovery planning phase instead of the current critical habitat process. The questions that remain include the following: Is the idea of "recovery habitat" a workable construct, sufficiently different and better than "critical habitat" to merit further exploration? Should habitat necessary for species recovery be designated concurrent with the development of a species recovery plan? Should it be designated based on the best scientific data available, with consideration of economic or other relevant issues? Should it identify those habitat areas, both occupied and currently unoccupied, that if protected in some suitable manner ultimately would allow the agency to determine that the species is no longer endangered or threatened? Should it allow for earlier identification of habitat—either concurrent with a listing determination or in some abbreviated narrative format if necessary to avoid extinction or for other reasons? How would situations be handled in which critical habitat designations already exist or, conversely, where a recovery plan has been issued without any habitat designations (i.e., whether and how to "grandfather" existing situations)?

Regulatory Issues

While the Keystone working group reached a solid consensus on many aspects of the incentives topic and identified issues needing to be addressed in recovery planning, it encountered more difficulty regarding the question of whether changes to the ESA's regulatory requirements could achieve the twin goals of producing a more effective and less burdensome conservation program. The group devoted considerable effort toward developing a recommendation aimed at reorienting the §7(a)(2) standard to a focus on species recovery. (And in this context participants again felt it important that Congress articulate what "recovery" means.) Participants also grappled with various ways to replace the current "adverse modification" language and reword the jeopardy standard to encompass the "recovery" concept. Much of the discussion centered around whether it would be desirable and possible to devise language that would ensure that the test for an effect on recovery would be of sufficient certainty and significance to advance the ESA's goals without imposing undue burdens. The group engaged in detailed and difficult discussions about whether and how this might be best accomplished, and thought it possible to address some key points if agreement could be reached on other related issues; however, some of the other issues remained unresolved.

This section spells out further some of the context and discussion points addressed by the working group with regard to regulatory issues.

Context

The principal regulatory prohibitions of the ESA are: (1) the prohibition against "taking" endangered (and sometimes threatened) wildlife, (2) the prohibition against federal agencies authorizing, funding, or carrying out actions that are likely to jeopardize the continued existence of any listed species, and (3) the prohibition against federal agencies authorizing, funding, or carrying out actions that are likely to result in the destruction or adverse modification of critical habitat of any listed species.

The take prohibition applies to everyone, including private persons, federal agencies, and others. The other two prohibitions set forth in §7(a)(2) of the Act apply only to actions authorized, funded, or carried out by federal agencies. The statute does not define the phrase "jeopardize the continued existence of," although regulations of the Interior and Commerce Secretaries have long defined this phrase with reference to the expected impacts of a federal action on "the survival and recovery" of a listed species in the wild. "Survival" remains undefined in the statute and the implementing regulations, and current regulations define "recovery" only as the point at which listing is no longer appropriate. Ambiguities in the meaning of these key terms, coupled with the use of the conjunctive "and" rather than the disjunctive "or" in the phrase "survival and recovery" have given rise to some uncertainty about the meaning and application of the standard.

The final habitat-related prohibition of the ESA is the further requirement of §7(a)(2) that federal agencies ensure that the actions they authorize, fund, or carry out are not likely to result in the destruction or adverse modification of areas designated as "critical habitat" of any listed species.

When Congress enacted the ESA in 1973, it used the term "critical habitat" without definition. In 1978, Congress provided a complex and not altogether self-explanatory definition requiring that critical habitat for occupied areas contain physical or biological features essential to conservation and requiring special management or protection, and that unoccupied habitat could be designated only if essential to conservation. Congress also determined that critical habitat designations were the one area in the ESA where economic considerations and other relevant impacts could be considered. Thus Congress permitted the Secretaries of Interior and Commerce to exclude areas from critical habitat upon finding that the economic, national security, or other benefits of excluding an area outweigh the benefits of designating the area. Hence, in some cases, the designation process may protect some but not necessarily all habitat that a species may need for conservation or recovery.

The precise meaning of the requirement to avoid destruction or adverse modification of critical habitat remains uncertain. The joint regulations of the two Secretaries define the term "destruction or adverse modification" to mean an appreciable reduction in the value of critical habitat for both the survival and recovery of a listed species, just as the definition of "jeopardize the continued existence" does. Because of this, the conservation agencies have frequently struggled to explain how these two standards differ. Indeed, the agencies have at times explained the decision not to designate critical habitat for many listed species by arguing that since there was so little (or no) difference between the two standards, a designation of critical habitat was of little utility.

The holdings and reasoning of several recent court decisions have concluded that the regulatory definition of "adverse modification" is not valid because it does not include any consideration of effects on conservation or recovery. In response to those decisions, the Department of Interior has issued interim guidance and is believed to be working on a revision to the current regulatory definition.

Critical habitat designations focus attention on particular areas to both good and ill effect. They have also drawn criticism for either being too broad or too narrow. Some designations involve millions of acres, others just a few acres. To the extent that critical habitat designations identify particular areas especially important to the conservation of listed species, they increase the prospect of closer scrutiny of actions proposed to be carried out in such areas. Because the definition of critical habitat allows, under certain circumstances, the designation of areas not currently occupied by the species (such as those areas into which a species must expand if it is to recover), some designations may help to ensure that federal agency actions affecting such unoccupied areas undergo the interagency consultation process of §7. Absent the identification of such unoccupied areas in a critical habitat designation, certain actions may never undergo interagency consultation (though actual practice with respect to this matter appears to vary). Conversely, overly broad critical habitat designations run the risk of diverting scarce agency resources toward numerous consultations and away from other efforts aimed at species recovery. Finally, others have challenged the failure to strictly apply all the modifiers in the ESA's lengthy definition of "critical habitat" to certain habitat designations.

For many reasons, therefore, critical habitat designations have become attractive litigation targets for those who own, use, or wish to influence the use of those particular areas. Some suits litigate

the failure to designate critical habitat for particular species, while others challenge particular designations as being too broad or too narrow. Still others have challenged the adequacy of the economic analysis that the Secretaries are required to undertake when considering whether to exclude areas from a critical habitat designation. Both the regulated and conservation communities widely acknowledge that the effect of these lawsuits has, among other things, consumed a portion of the conservation agencies' resources, which might otherwise be allocated directly toward species recovery efforts throughout the country.

Key Discussion Issues

With that as background, the working group focused much of its attention on a few key and interrelated issues, summarized below. No implication is intended that the group reached a stand-alone consensus on any of the individual issues discussed below.

1. **Should the habitats necessary for recovery be mapped and, if so, should this mapping be integrated with recovery planning?** The notion underlying "critical habitat" is that particular habitat areas, subject to certain limited exemptions, require special attention in order to achieve recovery. These areas may include both occupied and currently unoccupied areas, provided the applicable regulatory standards are met. Critical habitat designations have been the mechanism for identifying such areas, and the special duty of federal agencies under §7(a)(2) to avoid adversely modifying or destroying those habitats represents the special attention the Act gives to their protection. The working group generally agreed on the need for long-term mechanisms to identify those areas necessary to the recovery of listed species, though the willingness of some to support this idea hinged upon agreement being reached on the related question of what the consequence of such identification would be.

   If one accepts—as is widely agreed—that habitat loss or degradation is the single greatest factor contributing to the endangerment of species, then some mechanism or strategy to secure the appropriate management of sufficient habitat is needed to attain the statute's goal of species recovery. Whether that strategy emphasizes habitat acquisition, regulation, incentives, or other measures, it will almost certainly be necessary in many cases to identify those areas most important to furthering recovery. The working group generally referred to these areas with the shorthand phrase *recovery habitat*, although the group did not define this term.

2. **Should habitats that are identified as necessary for recovery receive explicit, implicit, or no regulatory protection?** If recovery plans identify "recovery habitat," how, if at all, should the identification of such habitat factor into the assessment of the compatibility of a federal action with the requirements of §7(a)(2)? The working group discussed several potential options to this issue. They ranged from the explicit protection of recovery habitat to no protection of recovery habitat, and included options in which the identification of recovery habitat did not trigger direct regulatory consequences, and others that might implicitly protect recovery habitat (e.g., directing that in consulting on a proposed federal action the conservation agency be required to consider the impact of the action on any identified recovery habitat). There was also discussion of enlisting incentives to promote the

protection of recovery habitat. The group did not reach a consensus about this issue, although it did not conclusively rule out the possibility of doing so.

3. **Should the substantive standards of §7(a)(2) refer to expected impacts on recovery, survival, conservation, likelihood of extinction, or something else?** As discussed above, §7(a)(2) of the Act requires federal agencies to ensure that their actions are not likely to "jeopardize the continued existence" of any listed species and are not likely to destroy or adversely modify critical habitat. Regulations implementing these two standards require an assessment of the impacts of federal actions on both the "survival" and "recovery" of a listed species. The working group considered whether either (or both) of these concepts should continue to be the focus of the §7 inquiry, or whether some other formulation would offer a better touchstone. As described below, participants struggled to develop a new standard that relates directly to recovery.

   One fundamental goal of the ESA is to bring endangered and threatened species "to the point at which the measures provided" by the Act "are no longer necessary."[8] Some in the group felt that in light of this goal, it makes sense to base the standard governing federal agency actions on the impact of those actions on the recovery of a species.

4. **Should those standard(s) be qualified in some manner?** Were a standard applied to federal agency actions under §7(a)(2) that focused on recovery and avoidance of extinction, it would beg the important further question of how much (if any) negative impact on recovery and extinction risk is acceptable. The working group considered a wide range of possibilities for addressing impacts to recovery. At one end of that range, the standard would require federal agencies to ensure that their actions do not reduce the likelihood of recovery at all. At the other end is a standard that would require federal agencies to make certain that their actions simply not preclude the possibility of recovery. Proponents of the former argued that to allow federal agencies to reduce the likelihood of recovery will make achieving the ESA's goals less rather than more likely. If species recovery is, in fact, a national goal, then the Act should not allow the federal government itself to make that more difficult. Others viewed this formulation as both too demanding, in that it could create an impossible-to-meet standard, and problematic, as there could be many otherwise desirable federal actions unable to get over the bar.

   Proponents of a standard that would prohibit those federal actions that preclude the possibility of recovery suggested that such a standard was appropriate because it left open the possibility of achieving the Act's recovery goals through incentives, financial aid, and voluntary conservation efforts, and therefore was consistent with the Act's core purpose. Others felt such a standard would allow a series of federal actions that each would make the goal of recovery more and more unlikely, provided only that the possibility of recovery was not altogether precluded. That, they felt, would prevent the Act from ever recovering most species.

   Neither of these formulations provided a basis for consensus within the group. Participants consequently devoted extensive effort to examining various options less stringent than "no

[8] See ESA Sections 3(3) (definition of conservation) and 2(b) (purposes of the ESA).

reduction in the likelihood" of recovery and more protective than "not precluding" recovery. Although these efforts did produce formulations that were closer to one another, the group did not arrive at mutually satisfactory, specific language.

5. **What consideration should be given to indirect or cumulative effects of an action under consideration in assessing compliance with the standard?** Working group participants believed that whatever standard ultimately governs federal actions under §7(a)(2), it should continue to consider not only the direct and singular effects of each federal action, but also the indirect effects (e.g., from development induced by the construction of an interstate highway interchange), as well as the cumulative effects (including the effects of other foreseeable developments in the same area).

6. **What, if anything, should be said about mitigation in §7(a)(2)?** The working group discussed whether mitigation to offset the detrimental impacts of federal actions upon listed species should be required for incidental take during all §7 consultations, or only for jeopardy opinions, as is currently the case. Further, participants considered whether there should be a requirement to mitigate for recovery habitat, even in the case of neither take nor jeopardy being determined. This could come either in the form of a requirement for all §7s, or as a supplementary aspect to some more basic §7 duty.

   Some participants strongly opposed any approach under which mitigation would be mandatory, because of concerns about costs, the potential lack of fair, workable standards, and appropriate controls to guide federal agency staff. In addition, some expressed the concern that any sort of obligation to mitigate might constrain the flexibility to effect voluntary mitigation. While participants clearly did not reach agreement about whether and under what circumstances mitigation should be part of any new §7 standard, widespread support did exist to encourage the use of voluntary mitigation that had a clear nexus to species recovery.

7. **Should any change in the standards applicable to federal actions under §7(a)(2) be accompanied by a change in the standard for approval of habitat conservation plans under §10?** Much of the working group discussion focused on whether the standards of §7(a)(2) should be changed and, if so, how. A related issue is whether, if agreement on §7(a)(2) were reached, the standards for approval of habitat conservation plans in §10 should also be changed. At present, §10(a)(2)(B)(iv) provides that an incidental take permit for a habitat conservation plan be approved only if "the taking will not appreciably reduce the likelihood of survival and recovery of the species in the wild." This language was taken verbatim from the regulatory definition of "jeopardize the continued existence" as it stood in 1982, when Congress amended the Act to add habitat conservation plans. Thus, although Congress in 1982 chose to import the then-existing regulatory definition of "jeopardize" into §10 rather than use the term itself, it seems clear that Congress intended habitat conservation plans to be subject to the same standard as federal actions pursuant to the jeopardy language of §7(a)(2). Whether that equivalency should continue if §7(a)(2) were revised to make federal agency actions subject to a new standard (particularly a standard focused on the impacts on recovery) remained unresolved within group. Participants expected that any change to the §7 standard would, absent some explicit statement to the contrary, apply to §10

by virtue of the current agency practice of conducting §7 consultations on all §10 permit decisions.

Appendix A
Keystone Working Group Participants and Staff

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Appendix B
Initial Discussion Themes

The following text is from a PowerPoint presentation given by Keystone Center staff at the first plenary meeting of the working group, in November 2005. The text is composed of "discussion themes" that Keystone staff gathered from initial interviews with working group participants.

The great tragedy of science—the slaying of a beautiful hypothesis by an ugly fact. –Huxley
We will either find a way or make one. –Hannibal
Social tact is making your guests feel at home even though you wish they were. –Proverb of dubious provenance

Organization of the Presentation

- Soundings and Echoes
  --General Context
  --Scientific Issues
  --Other Key Comments

- Looking Downstream
  --Principles
  --Suggested Approaches

- Emerging Questions and Observations

Soundings and Echoes: General Context

- The debate about the ESA has become more intense, driven by competing narratives, dueling messages, and code phrases ("common sense" vs. "rollback").

- Prevalent litigation, lack of clear guidance in key areas, limited budgets, and an increasingly politicized debate has resulted in a process that is reactive, cumbersome, and involves high transactional costs.

- None suggested that the status quo could not be improved both in terms of protecting habitat for threatened and endangered species as well as addressing more effectively the concerns of those who feel adversely affected by the ESA.

- Nearly all recognize and acknowledge that emotions, issues of personal and professional identity, and values are factors in the discussion.

- ESA conflicts involve a difficult-to-untangle mix of values, science, and politics, along with economic interests. While people would weight the importance of these factors differently, most all agreed they were in play (e.g., no one argued that is was purely a scientific or purely a values-driven issue.)

- A frequently heard theme: The ESA generally and the habitat issues specifically suffer from widespread and persistent misconceptions and misunderstandings.

- Common sentiment that the group needs to be mindful of and informed by the Pombo and Miller bills while not feeling constrained by them.

- In times of heated debate, some tendency to caricature: ESA critics don't care about preserving biodiversity and circulate baseless "horror stories," while environmentalists treat the statute as an immutable holy cow and dismissively underplay real landowner concerns.

- A general recognition that the costs of conserving and recovering threatened and endangered species do not distribute themselves equally. Some disagreement about to what degree this is a fundamental fairness issue and to what extent these costs should be evened out.

- Litigation has significantly sidetracked the agencies from other ESA-related work.

Soundings and Echoes: Scientific Issues

- Most agree that conflicts about the current state and future direction of the ESA turned less on scientific issues and more on other factors (politics, economics, perceptions).

- General agreement within the group that the science supporting decisions should be defensible and transparent.

- Perspectives differ as to whether the current science employed by the agencies is generally adequate or suffers from substantial deficiencies due to time, staff, and budget constraints.

- The notion of "critical habitat" may be somewhat simplistic from an ecological standpoint, as requirements vary widely among species and may not remain static.

- Species vary widely vis-à-vis habitat needs. Some are threatened by other factors and are not habitat-limited; some have extremely limited ranges that must be protected; others need active habitat management and protection; some need habitat creation.

Soundings and Echoes: Other Key Comments

- ESA disputes are often cast as federal government vs. private landowners, but each of those parties has a valuable partner in the wings: The states.

- The current system can result in a fear of good deeds being punished (e.g., a suggestion that by entering into a formal agreement to go further than other parties to protect species a company might actually increase its exposure to lawsuits).

- Seek ways through the use of incentives so people would look for opportunities to protect species, be excited about having endangered species on their land.

- Producing better and clearer maps could cut in different directions: Create greater certainty, a value for many; however, lines on maps often fuels fears and anxieties as well.

- The ESA is caught between an ecological reality (species need habitat for survival and recovery) and a political reality (much of that habitat is privately owned), creating public trust vs. private property use types of conflicts.

- Think about a model in which listing is based solely on science and protection/recovery involves policy and political considerations.

- Both sides have some attachment to critical habitat. The "greens" see it as the sole portal to protect habitat, and for the "browns" it is the only place where economic analysis is done.

Looking Downstream: Principles

- Several guiding principles were actively supported or not opposed by working group members, including:

  - Affirm the ESA's goals and objectives
  - Address the concerns of entities regulated by the ESA
  - Recognize habitat protection as essential for the survival and recovery of most threatened and endangered species
  - Promote sound science supporting ESA decisions
  - Advocate for a transparent process by agencies
  - Seek the more meaningful involvement of states
  - Look to maximize benefits from incentives
  - Identify stable funding for ESA implementation
  - Find workable ways of sharing of implementation costs
  - Reduce the frequency of litigation

Looking Downstream: Suggested Approaches

- Unanimous support for identifying effective, workable incentives for landowners and others to protect habitat.

- Strong support for increasing the role of states both in terms of a prophylactic role (keeping species off the list) and a partner in implementing the statute.

- Considerable interest in a variety of formulations for linking critical habitat designations more with the recovery process and less with the listing itself.

- Some receptivity to the idea of eliminating the critical habitat construct altogether if a "better mousetrap" could be devised for ensuring necessary habitat for threatened and endangered species survival and recovery.

- Some suggestion that, regardless of how little or great the substantive modifications, the name "critical habitat" should be dropped as it has become a flashpoint term for many.

- Seek ways to manage better late-stage controversies that arise. Consider formalizing case-by-case dispute resolution rather than leaping immediately to litigation.

Emerging Questions and Observations

- Is the better approach to have a "mental clearance sale" and develop a new construct to the habitat issue, or to take the existing structure and modify it more modestly? ("Does critical habitat in its current form provide enough added value that it is worth the high transactional, legal, and regulatory costs?")

- What is the right balance and interactions between the carrots and sticks? How can more and tastier carrots be cultivated?

- Recognition that this is well-trod ground and not issues of first impression. How to draw upon all this thinking and expertise and not be constrained by it?

- What should the relationship be between the ESA and other laws? Is there a role in the ESA to prevent listing, or should those efforts fall elsewhere?

- What legal and/or scientific standards should be employed for listing?

- There are several "dimensions of tension" which have to be managed and resolved including:

  --Predictability/certainty vs. flexibility/adaptability
  --Incentives for compliance vs. compensation for harm
  --Scientific certainty vs. reliance on "best professional judgment"
  --Societal values vs. disproportionate costs

- Substantive aspects include both ecological and economic issues with the interests of the parties being in part shared, in part complementary, and in part opposed.

- What might be gained (and risked) by the parties, especially over the long term, by working together more closely? Is it possible to build on shared interests so that the inherent competitive/adversarial aspects occur within a larger collaborative undertaking?

Appendix C
Operating Protocols

I. Purpose

This Working Group, convened in response to a bipartisan May 18, 2005, letter from six United States Senators, will examine the Endangered Species Act ("ESA" or "Act") with particular attention to its habitat provisions. It shall seek to develop options congruent with the goals of the Act while effectively addressing concerns of those most affected by the ESA's requirements. In particular, the group will, insofar as possible, provide a consensus-based response to the three questions posed in the congressional letter:

1. As currently written and implemented, is the ESA adequately protecting and conserving the habitat that listed species need to recover?
2. If not, how can the ESA be improved to better conserve habitat and help species recover?
3. What specific changes and recommendations can the regulated and NGO jointly recommend, advocate for, and help to implement?

II. Working Group Composition

The Working Group is intended to represent a cross-section of interests while being of a scale that enables both efficiency and creativity. The Keystone Center has sought to bring together Working Group members who are knowledgeable about the ESA, have broad credibility, and are willing to engage in creative give-and-take discussions. Moreover, The Keystone Center has sought to assemble a group that can represent the expertise and interests of various perspectives including:

- Farming, ranching, and forestry
- Environmental organizations
- Various construction interests (e.g., homebuilders)
- Municipalities
- Utilities
- Wildlife conservation groups

Some members of the group have multiple affiliations, interests, and areas of expertise. In addition, the group includes biological, legal, regulatory, and economic expertise relevant to the issues under discussion.

III. Process and Schedule

The process will unfold in roughly three phases. Phase I involves identifying and convening a group of approximately 20 knowledgeable and thoughtful participants for the ESA dialogue as described in section II above. The Keystone Center will have conversations with the participants to understand the interests, ideas, hopes, and fears of each. Keystone will use the information gleaned from these discussions to help inform the framing and sequencing of the issues, as well as the design of the dialogue process.

Phase II, the heart of the matter, is the dialogue itself. It will involve an initial two-day meeting of the group in Keystone, Colorado, November 2-4, 2005, for the purposes of getting acquainted, reaching agreement on a process and timetable, deciding upon various protocols and guidelines, and exchanging information and viewpoints on the issues under consideration. The Keystone Center will, at the start of the meeting, provide some observations to the group based on the work done in Phase I.

A second meeting will be held December 5-7, 2005, most likely at a location near Washington, DC. As currently envisioned, this meeting will focus on the substantive issues and options and attempt to identify areas of agreement, points of departure, and options for addressing unresolved issues. The intended outcome of this phase will be to articulate a clear "sense of the group" as to the questions posed in the congressional letter.

Phase III will, time and resources permitting, be directed toward taking this "sense of the group" (which could range from slight to broad consensus, general concepts to specific proposals) to a broader range of parties with an interest in the issue. The idea is to confer with and seek advice from other key parties not directly represented in the dialogue but having a special interest in and knowledge of the issues at hand; this allows, among other things, any proposals generated by the Working Group to be vetted with wider audiences. The Working Group may reconvene, informed by this consultation process, to identify areas of final consensus, to describe unresolved issues, and to chart any of several different potential paths forward. The Keystone Center will develop a report (with a draft to be reviewed by the Working Group) to be submitted to the six Senators who signed the congressional letter.

IV. Roles

PARTICIPANTS

Participants in the Working Group will be expected to:

- Attend both two-day sessions;
- Adhere to the protocols adopted by the group;
- Engage in collaborative problem solving to address the range of interests brought to the table; and
- Work with their own groups, organizations, and constituencies to understand and articulate their interests, secure their on-going input and, as appropriate, build support for final proposals.

CO-CHAIRS

In addition to the neutral facilitation services provided by The Keystone Center, the group will also benefit from the guidance of two Co-Chairs who will serve as a small steering committee for the Working Group to help organize the agenda and process prior to, and in between, the meetings of the Working Group. The two Co-Chairs are Mr. Rodger Schlickeisen, President of Defenders of Wildlife, and Mr. Richard Burton, Senior Vice President, MeadWestvaco. In addition to their respective roles in their organizations, both are members of the Board of

Trustees of The Keystone Center. In any formal or informal polling for consensus, the Co-Chairs will not be considered formal members of the Working Group.

EXPERT CONSULTANTS

Any expert consultants (e.g., government agency personnel, academics, research scientists) asked to present and provide resource assistance to the Working Group will sit at the table with the Working Group members and participate in discussions; however, their role will be advisory as opposed to decision-making.

OBSERVERS

Meetings of the Working Group will be by invitation only. In addition to members, a limited number of specific individuals may be invited to observe the meetings. Observers will be required to adhere to the same protocols and meeting guidelines (see below) that apply to members.

FACILITATION AND PROCESS SUPPORT

The Keystone Center will provide neutral facilitation and overall process support to the project. In consultation with Working Group members, The Keystone Center will assist with the convening, agenda development, facilitation, logistical support, and coordination of and drafting of the meeting summaries and final report. The three facilitators supporting the Working Group will be Peter S. Adler, President of TKC; Doug Thompson, TKC Senior Associate; and Meg Kelly, TKC Associate. Additionally, the project will be supported logistically by Johanna Raquet, TKC Project Support Coordinator. Their contact information is as follows:

- Peter S. Adler, 970/513-5841 or padler@keystone.org
- Douglas A. Thompson, 508/468-5621 or dthompson@keystone.org
- Meg Kelly, 202/452-1591 or mkelly@keystone.org
- Johanna Raquet, 970/513-5839 or jraquet@keystone.org

V. Discussion Guidelines and Approach

GENERAL APPROACH

The ESA Working Group will approach their deliberations as collaborative problem-solvers seeking to produce consensus concepts and/or proposals that address, insofar as possible, the practical needs and interests of all participants. As necessary, the group will work jointly to educate and build understanding regarding the participants' values and interests related to the issue, while also developing a baseline understanding of essential scientific, technical, legal, economic, and political information.

Collaborative problem-solving is most successful when parties agree that their major interests have been heard and considered meaningfully, that other participants have made every effort to address their interests in any final proposals, and that the final proposals accurately characterize

any outstanding differences. The group will strive for consensus. For purposes of the Working Group, consensus is defined as, at a minimum, "no objections" or as being able to "live with" an outcome, perhaps in light of how it fits into a larger whole.

In an effort to achieve the greatest degree of consensus possible, the group will work to build proposals by identifying, exploring, and, in as much as possible, satisfying all key interests. When agreement is not possible, the group will work to accurately and respectfully understand and document the different perspectives at hand. The Keystone Center will use a variety of specific straw polling techniques to calibrate and then reflect the actual levels of consensus achieved by the Working Group.

GROUND RULES

The Working Group's protocols and interaction assumptions (proposed and to be ratified or modified at the first meeting) will follow a modified version of the "Chatham House Rule."[9]

- Discussions are "off the record" insofar as no one will represent the Working Group's collective views or positions without the agreement of the group itself.

- Formal hats are off to the greatest extent possible. It is expected that each person will be speaking individually rather than on behalf of their organization, company, or agency. While it is understood that participants cannot shed fully their institutional affiliations, it will be assumed that individuals are speaking for themselves unless they explicitly indicate otherwise.

- Anyone attending is free to use the information in the Working Group's deliberations but will not publicly represent the views of others present.

- All Working Group members are encouraged in discussions to "explore without committing." This further frees up the group to explore potential solutions without viewing those explorations as formal proposals.

- As pertains to specific discussions, Working Group members agree to:

    - Disclose interests
    - Listen fully to understand
    - Look for ways to address not only their own interests but those of others as well
    - Participate; share the floor; be concise
    - Look ahead—acknowledge the past but don't rehash it

[9] The Chatham House Rule is used worldwide to facilitate both free speech and confidentiality at meetings. Meetings may be held "on the record" or under "the Chatham House Rule." In the latter case, it may be agreed with the speaker(s) that it would be conducive to free discussion that a given meeting, or part thereof, should be strictly private. When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information or opinions disclosed to them, subject to two conditions: (a) neither the identity nor the affiliation of the speakers, nor that of any other participant at that meeting may be revealed, and (b) it may not be divulged that the information was received at that meeting.

- Be explicit and factual—ask for clarification if confused
- Let expertise fuel, not constrain, creativity ("beginner's mind")

MEETING SUMMARIES AND FINAL REPORT

The Keystone Center will be responsible for preparing summaries of the meetings with an eye toward capturing key issues, conclusions, and agreed-upon next steps. Members of the Working Group will have the opportunity to review and comment on draft meeting summaries prior to them being considered final.

The final report will be forwarded to the six signatories of the May 18th United States Senate letter. In addition, the final report will be available to other interested parties upon request.

Appendix D
Abbreviations

AGI	adjusted gross income
CRP	Conservation Reserve Program
EQIP	Environmental Quality Incentives Program
ESA	Endangered Species Act
FACA	Federal Advisory Committee Act
FSP	Forest Stewardship Program
FWS	U.S. Fish and Wildlife Service
HCP	Habitat Conservation Plan
HFRP	Healthy Forest Reserve Program
LIP	Landowner Incentives Program
NMFS	National Marine Fisheries Service
PSGP	Private Stewardship Grants Program
USDA	U.S. Department of Agriculture
WHIP	Wildlife Habitat Incentives Program