will spread both to states and to terrorist groups, and when nuclear power again appears to be playing an increasingly significant role, IAEA's work is of incalculable importance.

In his will, Alfred Nobel wrote that the Peace Prize should, among other criteria, be awarded to whoever had done most for the ''abolition or reduction of standing armies''. In its application of this criterion in recent decades, the Norwegian Nobel Committee has concentrated on the struggle to diminish the significance of nuclear arms in international politics, with a view to their abolition. That the world has achieved little in this respect makes active opposition to nuclear arms all the more important today.

THREATENED AND ENDANGERED SPECIES RECOVERY ACT OF 2005

SPEECH OF

HON. JIM COSTA

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Thursday, September 29, 2005

The House in Committee of the Whole House on the State of the Union had under consideration the bill (H.R. 3824) to amend and reauthorize the Endangered Species Act of 1973 to provide greater results conserving and recovering listed species, and for other purposes:

Mr. COSTA. Mr. Chairman, I rise today to clarify the intent and importance of language in H.R. 3824 regarding the discretionary nature of recovery plans under the ESA. Language in TESRA states that, ''Nothing in a recovery plan shall be construed to establish regulatory requirements.'' This important language will ensure that, as is currently the case, recovery plans cannot be used as a regulatory ''hammer'' on private landowners or others. Let me elaborate.

The ESA § 4(f) states that the Secretaries of Interior and Commerce ''shall develop and implement recovery plans'' for listed species, ''unless . . . such a plan will not promote the conservation of the species.'' This responsibility has been delegated to the U.S. Fish and Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration Fisheries Service (NOAA Fisheries) (collectively, the Services).

Thus, as a general matter, the ESA compels the Services to develop recovery plans. While FWS and NOAA Fisheries are under a general duty to develop a recovery plan for listed species, the federal courts are in unanimous agreement that the contents of a recovery plan are discretionary with the Services. Recovery plans do not impose legal obligations or requirements on anyone—not on private landowners, not on local or state government units, and not even on the federal government itself. Rather, the case law makes clear that recovery plans are guidance documents.

For example, the 11th Circuit Court of Appeals rejected the argument of an environmental group that would have ''elevate[d] the 1987 [Florida panther] recovery plan into a document with the force of law.'' *Fund for Animals* v. *Rice*, 85 F.3d 535,547 (11th Cir. 1996). The 11th Circuit wrote that ESA § 4(f):

> ''makes it plain that recovery plans are for *guidance purposes only*. . . . By providing general guidance as to what is required in a recovery plan, the ESA 'breathe[s] discretion at every pore.' ''

Id. (emphasis supplied), citing *Strickland* v. *Morton*, 519 F.2d 467, 469 (9th Cir. 1975)).

FWS itself has taken the position that recovery plans have no binding effect. Courts have agreed with the agency's position. For example, in *Biodiversity Legal Found.* v. *Norton*, 285 F.Supp. 2d 1 (D.D.C. 2003), environmental groups argued that the recovery plan for the Cape Sable Seaside sparrow had a binding impact to compel revisions to the species' critical habitat. FWS asserted that '''the content of Recovery Plans required under ESA § 4(f) is not binding upon the Service, so cannot create a legal duty.'" Id. at 13. The district court, citing the 11th Circuit's opinion in Fund for Animals (discussed above), agreed with FWS. It ruled that the sparrow's recovery plan ''was merely a guidance, which FWS had discretion to follow.'' Id.

Similarly, environmental groups claimed that the recovery plan for certain whale species was deficient because it failed to include substantive, mandatory requirements. The court disagreed, holding that ''[c]ase law instructs that [FWS is] correct in [its] assertion that the content of recovery plans is discretionary.'' *Strahan* v. *Linnon*, 967 F.Supp. 581, 597 (D.Mass. 1997), *aff'd*, 187 F.3d 623 (1st Cir. 1998). The court recognized that FWS is under a statutory duty to develop a recovery plan ''to the extent that it is feasible and possible,'' but that ''requirement does not mean that the agency can be forced to include specific measures in its recovery plan.'' *Id.* at 598. Environmental groups also argued that the recovery plan for the Perdido Key beach mouse *must* include an expansion of the species' critical habitat. The court, aligned with all of the other opinions on the topic, rejected the environmentalists' argument because ''the contents of the [recovery plan] are discretionary.'' *Morrill* v. *Lujan*, 802 F.Supp. 424, 433 (S.D.Ala. 1992).

There is a strong policy justification for finding that recovery plans are discretionary: namely, to allow FWS to allocate its scarce resources as it sees fit. ''Congress recognized that the development of recovery plans for listed species would take significant time and resources. It therefore provided in the ESA that the Secretary could establish a priority system for developing and implementing such plans. This priority system *allows the Secretary broad discretion to allocate scarce resources* to those species that he or she determines would most likely benefit from development of a recovery plan.'' *Oregon Natural Resources Council, supra,* 863 F.Supp. at 1282–83 (emphasis supplied).

To conclude, in a rare show of agreement among court interpretations of the ESA, the federal judges that have addressed this point have all agreed that recovery plans are simply discretionary guidance documents, with no binding effect. It is clearly the intent of H.R. 3824 to not only remain consistent with this established line of precedent, but to codify this important fact.

CONFERENCE REPORT ON H.R. 2360, DEPARTMENT OF HOMELAND SECURITY APPROPRIATIONS ACT, 2006

SPEECH OF

HON. MARK UDALL

OF COLORADO

IN THE HOUSE OF REPRESENTATIVES

Thursday, October 6, 2005

Mr. UDALL of Colorado. Mr. Speaker, I rise in support of the FY 2006 Homeland Security Appropriations conference report. This bill does not fully address our homeland security needs. Still, it provides vital funds to make our country safer, and so I will support it today.

Total funding in the bill is increased from this year's levels. Specifically, the bill increases funding over the requested levels for immigration and for customs and border protection. The agreement also provides $1.5 billion, 35 percent more than current funding, for science and technology programs.

I am pleased that the conferees adopted an important amendment offered by Rep. DAVID OBEY that requires the Department of Homeland Security (DHS) to provide details on how money appropriated for responding to Hurricanes Katrina and Rita is spent. I am a cosponsor of H.R. 3737, a bill that would create a Special Inspector General for Hurricane Katrina Recovery who would have oversight over all federal Hurricane Katrina emergency funding. While the Obey amendment doesn't go as far as this legislation, it is a significant step forward.

I am also pleased that the conference report includes funding to help states comply with the REAL ID Act. Estimates are that complying with the Act will cost the states between $100 million and $500 million over the next 4 years. Since the majority saw fit to push the REAL ID provisions through Congress, it is important that Congress also provides funding to do the job.

Still, I'm concerned about shortfalls in the bill. It cuts fire grants by $60 million (8 percent) below FY 2005, even as a recent survey found that fire departments all over the country aren't prepared to respond to a haz-mat incident and lack equipment. The bill also cuts State and local domestic preparedness grants by $585 million (19 percent) and Urban Area Security Initiative grants by $270 million (26 percent) below FY 2005 levels. Funding for communications equipment for first responders is cut from the levels in the bill the House passed in May, before Katrina struck—from $27 million to $15 million. The bill does provide additional funding for border patrol, but the number of agents still falls 1,000 short of the 2,000 called for in the Intelligence Reform bill. Since September 11th, just 965 additional border patrol agents have been hired—less than a 10 percent increase in 4 years.

The conference report fails to provide much more than basic funding for the security of rail and public transportation systems because DHS has not yet spent funds it was allocated last year. Despite the fact that passenger rail in the U.S. carries about five times as many passengers each day as do airlines, this bill only includes $36 million for ground transportation security and $150 million for State grants to protect mass transit systems, as compared to $4.6 billion for aviation security. I'm very concerned that crucial security upgrades to our rail and public transportation