

September 28, 2005

To the Honorable Members of the U.S. House of Representatives:

RE: H.R. 3824, THE "THREATENED AND ENDANGERED SPECIES RECOVERY ACT"

Dear Representative,

We the undersigned professors of environmental law and natural resources respectfully urge the Members of the House of Representatives to cast a "nay" vote on passage of H.R. 3824, the "Threatened and Endangered Species Recovery Act" ("TESRA").

The Endangered Species Act has played a leading role in balanced federal efforts to conserve species for nearly 32 years. In 1973, the United States took a bold step toward halting the erosion of the globe's ecosystems and the species they harbor by passing the ESA. In the three decades since then this country has set a notable example – admired around the world — showing how a modern industrial society can progress without destroying its natural capital. Hundreds of species, such as the California condor, whooping crane and black-footed ferret, have been rescued from extinction. Yet many of the legislative proposals in H.R. 3824 threaten to undermine this legacy as well as the bill's own stated purpose of fostering recovery of threatened and endangered species.

Enactment of H.R. 3824, which was introduced September 19, and is reportedly being brought to the House floor this week, would rank among the most sudden, drastic, and significant negative changes to American environmental law over the past three decades.

We suggest that it is worth taking appropriate time to fully analyze and consider the many changes being proposed in this bill, and respectfully urge the Members of the U.S. House of Representatives —

1. to hold hearings on the bill in its current form so that we and other citizens with experience with the Act and endangered species public policy can share our analysis and experience with the Congress;
2. to delay a floor vote on this bill until Members of the House – as well as the public – have an opportunity to more fully analyze and discuss the changes it proposes to the Endangered Species Act;
3. to evaluate carefully whether the specific provisions of TESRA would or would not serve to achieve the affirmative goal implied by the bill's title, i.e. the timely recovery of species in danger of extinction; and
4. to assess alternatives to the provisions proposed in H.R. 3824 that hold promise for improving legal protections for the recovery of threatened and endangered species, as well as strengthen existing incentives for private parties to contribute to the conservation of these species, while at the same time avoid placing substantial new financial and administrative burdens on the federal agencies responsible for managing programs to protect imperiled species.

The more than 115 teachers who have signed this letter, from more than 35 states, collectively represent more than 1500 years of researching and teaching in universities, and a thousand years of law practice on behalf of a wide array of private, governmental, and public interest entities, studying, writing, speaking about, and working with environmental law, including efforts to implement and enforce the Endangered Species Act effectively in the public interest.

We do not mean to imply by our comments that the ESA is not in continuing need of careful assessment and improvements to insure that the United States remains at the forefront of innovative efforts to protect and recover species and the ecosystems that support them. It is important to keep in mind, however, that biodiversity resources are both vital and fragile. Rash or ill-considered actions today could limit the biological wealth of many generations of Americans to come.

Members of the House should allow additional time to conduct hearings on the present bill and to consider the merits of proposed amendments to the ESA.

House Resources Committee Chair Richard Pombo introduced H.R. 3824 barely more than one week ago; the Committee marked up and passed the bill only three days later. Touted as being on a “fast track,” “TESRA” could come up for a vote on the House floor only a few days after its swift passage out of the Resources Committee. One of the things we strive to teach our students is to carefully and thoughtfully analyze all possible ramifications of arguments they advance and positions they advocate.

Late last week, a group of prominent Republican Members of the House advanced a similar idea by writing a letter urging their colleagues to slow down consideration of TESRA in order that Members be able to give greater consideration to its many far-reaching amendments. We wholeheartedly agree with this wise counsel. H.R. 3824 would substantially alter virtually every aspect of one of the nation’s most prominent and significant environmental laws, as well as establish a broad legislative precedent that private property holders are entitled to financial payments for the effects of federal regulation. However, in the short time period since TESRA’s introduction, many House Members have not had time to even understand all of the bill’s provisions, let alone discuss these proposals among themselves and their constituents.

It should be noted, moreover, that an expert panel composed of ESA scholars and practitioners from a wide array of backgrounds has been convened by the non-partisan Keystone Center. The report to be issued by this group in the next few months will undoubtedly be useful in evaluating possible changes to the statute. Members of the House should consider whether TESRA is likely to succeed in improving threatened and endangered species’ chances for recovery.

The title of the bill, and repeated statements by the Chairman of the House Resources Committee, indicate that that a primary motivating goal of H.R. 3824 is to improve the rate of species recovery.

Based on analyses of the provisions of this bill, however, we are concerned that a number of the changes proposed by the bill will not actually serve to advance this laudable aim. In the paragraphs below, we note several illustrative examples, not an exhaustive list, of troubling features of H.R. 3824 that raise concern.

Habitat degradation, fragmentation, and destruction are the leading causes of species decline and extinctions. Congress in the ESA sought to halt and reverse habitat loss in part by requiring designation and protection of critical habitat for most listed species. “TESRA” proposes to eliminate critical habitat protection altogether in favor of a cursory provision for identification of areas of “special value” to listed species. The bill does not define the term “special value,” nor does it provide these areas with specific protections. Recent decisions by federal appellate courts have made it clear that the ESA’s requirements to designate and protect critical habitat are directly linked with protection of species recovery. Eliminating the Act’s critical habitat provisions would remove from the statute one of its key provisions that deals directly with the leading cause of species decline and is expressly linked to species recovery. Though critical habitat has generated considerable controversy, as well as litigation by both conservation organizations and property owner and economic groups, we believe that legislative efforts to diminish the divisiveness of this issue should proceed with full analysis and awareness of critical habitat’s importance to species recovery.

In addition to critical habitat, recovery plans obviously can – and should – play a leading role in efforts to recover protected species. The bill, however, includes language that indicates that these significantly important recovery plans henceforth will have no regulatory effect.

Additionally – like humans – many species facing extinction may suffer adverse effects as a result of exposure to pesticides, fungicides, and rodenticides. In situations where these chemicals may pose a threat to threatened and endangered species, the ESA treats them as it does other activities with adverse impacts to species’ survival and recovery. “TESRA,” however, would simply exempt registration of pesticides and the

like from the statute for a period of five years, thus putting outside the reach of federal regulation chemicals that threaten the recovery – or even continued existence – of listed species.

There are a host of additional proposed changes in H.R. 3824 that may adversely affect rather than advance programs to recover listed species. For instance, the bill would define “jeopardize the continued existence” of a listed species as significantly impeding the species’ long-term existence, without defining what constitutes the “long term.” The bill would modify the Act’s consultation process by requiring that impacts of proposed federal actions be analyzed without consideration of prior existing “baseline” adverse impacts on the species. It allows for unspecified “alternative procedures” to the current consultation process, with no requirement of standards or enforceability. The proposed bill, moreover, would make it substantially more difficult to add species to the threatened and endangered lists.

Over the past decade there have been many innovative ideas for ways to improve protections for protected species, particularly those species on non-federal land. A number of these concepts have been actualized on the ground through administrative implementation of the ESA. Recent discussions have centered on ways to use incentives and cooperative agreements to encourage non-federal property holders to help protect and recover listed species. There are many success stories across the nation of the ESA being used to help solve rather than create conflicts, from cooperative water management agreements in New Mexico that increase protections of aquatic species while decreasing conflicts among water users to ground-breaking urban planning efforts in cities such as San Diego and Tucson that provide for orderly growth while including provisions for greenspaces that both conserve biodiversity and enhance communities’ livability.

The “TESRA” bill, however, threatens to stifle innovative uses of such tools by proposing a quite drastic landowner payment scheme that, if enacted, would for the first time create a federal entitlement system for property holders that not only goes far beyond the requirements of existing law, but would also mandate that FWS and NMFS either look the other way when activities kill or injure listed species or provide payments to property owners that could add many billions of dollars to the mounting federal deficit.

Habitat and species that occur on non-federal land are essential for the recovery of the majority of listed species protected by the ESA. We encourage discussion of ways to find a suitable balance between regulatory and incentive-based measures to conserve these species and habitats. The unprecedented federal entitlement provisions for landowners proposed by H.R. 3824 unfortunately would be likely to have the practical effect of substantially diminishing species conservation efforts on non-federal land.

Conclusion

In 1973, the United States took a bold step toward halting the erosion of the globe’s ecosystems and the species they harbor by passing the Endangered Species Act. In the three decades since then this country has set a notable example – admired around the world — showing how a modern industrial society can progress without destroying its natural capital. Hundreds of species, such as the California condor, whooping crane and black-footed ferret, have been rescued from extinction. Yet many of the legislative proposals in H.R. 3824 threaten to undermine this legacy as well as the bill’s own stated purpose of fostering recovery of threatened and endangered species. We thus urge Members of the House to see that Congress and the public have sufficient time in hearings and public policy reviews to assure that potential changes to the ESA, using new and innovative approaches as well as proven regulatory schemes, can enable the law to continue to conserve biological diversity and societal welfare for future generations.

Respectfully submitted,

*Over 110 Law Professor signatories as of Wednesday, Sept. 28, 2005.**

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