The Proposed Barrasso Bill Would Undermine the Endangered Species Act

Summary

1. The Barrasso bill is all about politics, not science, and will not improve the conservation of endangered species.
2. This partisan bill seeks to impose overweening and inappropriate state control over the most important processes to list, protect and recover imperiled species under the Endangered Species Act (ESA). It adds additional bureaucratic barriers to listing but removes barriers to delisting.
3. It shields critical decisions to delist species from judicial review, precluding the ability of the public to hold federal decision makers accountable to the law (Sections 204, 501).
4. It replaces the current listing process with a far lengthier process, whereby if a petition to list a species is found to be warranted, before listing the federal government must first work that species into a national listing work plan. Species would be given a priority classification, and under most such classifications the federal government could keep the species on the work plan for up to five years without taking action. Furthermore, the federal government can set and change priority classifications unilaterally, with no opportunity for judicial review (Section 501).
5. It replaces federal management of recovery planning and implementation with layers of recovery goal development, recovery plan development, and implementation plan development, each dominated by states (Section 203).
6. It weighs down the already over-burdened federal agencies endeavoring to protect and recover imperiled species with arbitrary and infeasible deadlines and requirements, making their jobs — and the prospects for conserving endangered species — even more daunting (Section 202).
7. It forces the federal government to abide by the terms of Candidate Conservation Agreements with Assurances entered into before March 21, 2017, no matter how effective (or ineffective) such agreements have been (Section 304).
8. It allows Safe Harbor Agreements to offer take protections to "adjacent property" as well as enrolled property, with no stated limit as to what counts as "adjacent" (Section 305), which needs a very nuanced approach.

The Barrasso Bill Inappropriately Shifts Responsibility for Implementing the ESA to the States

1. The bill makes its heavy-handed preference for states clear by requiring federal agencies to "acknowledge and respect the primary authority of state agencies to manage fish and wildlife within their borders," (Section 205), and to exercise federal authority under the ESA "in conjunction" with states (Section 202).
2. It contains multiple provisions giving states overriding control over the federal program to conserve endangered species. For example, it:
    a. Gives states the presumptive lead in determining whether a recovery team is established for a species, in leading recovery teams, and even in implementing recovery plans without federal participation (Section 203);

b. Gives states the unilateral authority to change recovery implementation plans they are the designated leads on, without federal oversight or public notice or comment when doing so (Section 203);
c. Provides that if the federal government does not create a recovery plan or implementation plan, states are given the authority to create and implement such plans themselves (Section 203);
d. Requires all members of an implementation team to have a "direct interest in the land in which the species is believed to occur" as that term is defined by the Secretaries of the Interior or Commerce. Such a definition would be explicitly required to include landowners and industry users of the land, but not necessarily include conservation groups, academic researchers, and other individuals and entities with interest in imperiled species but who do not have either a financial interest in the land or existing access to it for research or management purposes (Section 203).
e. Allows recovery teams to propose modifications to recovery goals only if three-fourths of state recovery team members agree (Section 203);
f. Requires the Secretary of the Interior to provide written explanations to affected states whenever federal officials do not act in accordance with state wishes on modifying recovery plans (Section 202); and
g. Forces the Secretaries of the Interior or Commerce to enter time-consuming and detailed negotiations with the states before releasing experimental populations of threatened or endangered species, even if such experimental populations would be released on federal lands (Section 206).

The ESA Already Provides a Solid Framework for State Involvement

The effort to give states a dominant role in implementing the ESA threatens basic protections for imperiled species; it is also unnecessary, since states already have broad opportunities to engage under the ESA. They can and do participate in recovery planning and implementation; they can and do offer information and recommendations on proposals to list species (the U.S. Fish and Wildlife Service (FWS) in 2016 promulgated regulations that require notification of states when a petition to list is filed precisely to ensure that states have an opportunity to provide relevant information), and their information, if scientifically sound, is already given great weight by the FWS and National Marine Fisheries Service.

The importance of the federal-state relationship and the broad invitation that federal agencies extend to states to participate in decision making under the ESA was also re-emphasized in 2016 when the FWS reissued the federal policy regarding the role of state agencies in ESA activities (81 Fed. Reg. 8663). But the ESA is a national commitment, and key decisions — such as whether to list a species, whether to reintroduce a species into areas where it has been extirpated, whether a recovery plan is adequate, and whether a species is recovered and should be delisted — ultimately and appropriately are reserved for federal officials.

States Are Not Equipped to Play the Conservation Role Proposed

1. States lack the legal authority, the resources, and sometimes, unfortunately, the political resolve to implement the ESA:
    a. A 2017 study by the U.C. Irvine School of Law's Center for Land, Environment, and Natural Resources entitled The Limitations of State Laws and Resources for Endangered Species Protections[1] found that states do not have sufficient laws or resources to adequately protect endangered species:
        i. Only 4% of states have authority to promote the recovery of imperiled species;
        ii. Only 5% of spending on imperiled species is by the states;
        iii. Only 10% of states have significant habitat safeguards;
        iv. Only 16% of states require the involvement of state agencies with relevant expertise;
        v. Only 36% of states protect all animal and plant species listed under the ESA; and
        vi. Only 54% of states require that listing decisions be based on sound science.
2. Stunningly, two states – Wyoming (Sen. Barrasso's home state) and West Virginia – have no state legislation protecting endangered species at all.
    a. Some states lack the political will to protect endangered species, or are openly hostile to their protection:
        i. New Mexico's state government has been openly hostile to the federal effort to recover Mexican wolves. The state demanded that the FWS obtain a state permit before releasing Mexican gray wolves on federal lands as part of the recovery effort, and then denied the permit and sued FWS to enjoin the releases.
        ii. North Carolina's state government has also been openly hostile to the federal effort to reintroduce and recover red wolves in a five-county area around Alligator River National Wildlife Refuge. State efforts to expand coyote hunting in the Red Wolf Recovery Area despite the high likelihood of additional mortality for red wolves were struck down in both federal and state courts. A few years ago, the state's Wildlife Resources Commission approved a resolution urging the FWS to abandon the reintroduction program altogether;
        iii. When gray wolves were listed as endangered in the Northern Rockies both Idaho and Wyoming advocated for expanded lethal control of wolves and both states adopted minimally protective management plans. Federal courts repeatedly rejected Wyoming's wolf management plan, which allowed wolves to be shot on site in most areas of the state. Giving the states dominant roles in every aspect of the implementation of the ESA is a recipe for disaster.

[1] http://www.law.uci.edu/centers/cleanr/news-pdfs/cleanr-esa-report-final.pdf

The Barrasso Bill Would Diminish Public Accountability, a Central Tenet of the ESA

1. The Barrasso bill shields federal agencies from accountability to judicial review in several critical areas of decision-making:
    a. It requires FWS to develop a workplan for addressing candidate species being considered for listing (Section 501), when FWS has already developed and is implementing such a workplan. Critically, it exempts FWS from otherwise complying with statutory deadlines for listing species under the ESA for seven years after the workplan is adopted, or provide notice and opportunity for public comment on work plan priority classifications (Section 501); and
    b. It bars judicial review of decisions to delist species until the monitoring period required by the ESA is completed, precluding review of the soundness and lawfulness of delisting decisions for 5 years, during which an imperiled species may be subjected to hunting and have its habitat destroyed by development (Section 204).
2. These heavy-handed attempts to exclude the public from holding agency officials accountable for sound decision making are contrary to the rule of law and expose species to the threat of arbitrary and unreviewable actions that could jeopardize their existence. The bill also puts an arbitrary thumb on the judicial scales by declaring that efforts by state, local, and tribal governments to intervene in ESA cases should presumptively be granted and requiring that such parties be included in all settlement discussions (Section 402).
3. The Barrasso bill undercuts transparency and public input in other ways:
    a. It exempts decisions by the Secretary to revise recovery goals for a species from notice and comment rulemaking (and probably from judicial review) (Section 203); and
    b. It shields state information and data from disclosure at the request of states (Section 401).

The Barrasso Bill Would Make the ESA Unworkable

Finally, the Barrasso bill imposes arbitrary and immensely burdensome procedural requirements on already overburdened federal officials trying to conserve endangered species and demonstrates a fundamental lack of understanding of the recovery planning and implementation process.

1. The bill evidently contemplates requiring a recovery team to remain in place until a species is ultimately recovered and delisted, imposing extraordinary burdens on federal, state, and local officials and any scientists that are members of such a team (Section 203). Under current practice, recovery teams generally are established to develop recovery plans, and then dissolved, freeing the participants to focus on their official and scientific duties. It will be difficult to recruit competent scientists and public officials to participate in recovery planning under this heavy, long-term responsibility. In addition, given the duration of time that may elapse from listing a species to its recovery, it is unlikely that recovery team members will remain in their current positions or otherwise be available to participate throughout the recovery period.

2. The bill promotes the use of voluntary conservation agreements, but inappropriately requires that they be treated by the FWS not as voluntary measures but as binding regulatory mechanisms, allowing the FWS to decide that listing an imperiled species is not necessary, or that it is safe to delist a species, based on voluntary and unreliable agreements that cannot be enforced (Sections 303 and 304).

The Barrasso Bill Contains Few Provisions That Would Benefit the Conservation of Threatened and Endangered Species

Though some of aspects of the bill could arguably further the goals of the ESA, they are dramatically outweighed by the provisions that would gut the protections offered by Act, and could be easily passed on their own, as part of another bill, or through administrative rulemaking:

1. It would introduce gender-neutral language to replace the ESA's current use of masculine pronouns (Section 101).
2. It would specifically authorize recovery funding in the amount of $214 million per year from 2021-2025. This would, of course, depend on yearly appropriations (Section 701).
3. It would require recovery goals to include to the extent practicable, "objective and measurable biological criteria" (Section 203).
4. It would require the Secretaries to make certain information publicly available on the internet, specifically listing petitions, notices that the Secretary is considering proposing a species for listing as threatened or endangered outside a petition process, the best scientific and commercial data available that are the basis of listing decision, and complaints in legal actions brought against the Secretaries. The additional burden, however, on the agencies to post what may otherwise be publicly available information (or address copyright issues for other materials) would be significant.
5. It could increase efficiency through the widespread use of templates in conservation agreements (Section 306).

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