The Proposed Barrasso Bill Would Undermine the Endangered Species Act

1. The Barrasso bill is all about politics, not science, and especially not improving the conservation of endangered species.

2. This partisan bill was openly written to promote the agenda of the Western Governors Association and 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).

3. It shields critical decisions to list and delist species from judicial review (Section 102), precluding the ability of the public to hold federal decision makers accountable to the law.

4. 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.

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 105), and to exercise federal authority under the ESA "in conjunction" with states (Section 103).

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 102);

    b. Imposes arbitrary and dysfunctional requirements that state and local officials nominated by Governors equal or exceed federal officials on recovery teams (Section 102);

    c. Relegates scientists, the heart of any science-based recovery effort, to an afterthought requiring majority approval by the state-dominated recovery team (Section 102);

d. Requires unanimous agreement among members of recovery teams to change the goals of a recovery plan, giving states a veto over needed flexibility to respond to changed circumstances, new scientific understanding, or increased peril facing a species (Section 102);

e. Requires federal efforts to reintroduce endangered or threatened species to comply with state permit requirements, giving states a veto over reintroduction (Section 106) (not a hypothetical threat — New Mexico in the past few years attempted to use arbitrary state permit requirements to block federal releases of Mexican gray wolves);

f. Mandates that federal agencies give "great weight" to state views in acquiring federal land to conserve species, giving states a virtual veto over land acquisition needed to protect habitat (Section 104);

g. Declares state information to be "the best scientific and commercial data available," (Section 101) exhorts federal officials to give state comments greater weight than comments submitted by any other individual or entity (Section 103), including scientific experts, and requires the Secretary of the Interior to provide written explanations to affected states whenever federal officials do not act in accordance with state wishes (Section 301);

h. Invites state officials to grade federal employees in the performance of their duties under the ESA and to reward federal workers whom the states view as appropriately attentive to their interests (Section 109).

The ESA Already Provides a Solid Framework for State Involvement

The effort to give states a dominant role under this federal law threatens basic protections for imperiled species; it is also unnecessary, since states already have multiple opportunities to participate in and provide information to decision-making and recovery actions under the law. 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 the decision making under the ESA was re-emphasized in 2016 when the FWS reissued the federal policy regarding the role of state agencies in ESA activities. 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 Simply 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:

        1. Only 4% of states have authority to promote the recovery of imperiled species
        2. Only 5% of spending on imperiled species is by the states
        3. Only 10% of states have significant habitat safeguards
        4. Only 16% of states require the involvement of state agencies with relevant expertise
        5. Only 36% of states protect all animal and plant species listed under the ESA
        6. Only 54% of states require that listing decisions be based on sound science
        7. Stunningly, two states – Wyoming (Sen. Barrasso's home state) and West Virginia – have no state legislation protecting endangered species at all.

    b. Some states lack the political will to protect endangered species, or are openly hostile to their protection:

        1. 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. The U.S. Court of Appeals for the 10th Circuit vacated the injunction, allowing FWS to proceed. The Barrasso bill would require FWS to comply with state permitting requirements, allowing New Mexico once again to veto recovery efforts for the Mexican gray wolf (Section 106).
        2. 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. Recently, the state's Wildlife Resources Commission

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

approved a resolution urging the FWS to abandon the reintroduction program altogether;

3. 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.

Forcing the states into domineering roles in every aspect of the implementation of the ESA is a recipe for disaster.

The 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 401) (FWS has already developed and is implementing such a workplan), but exempts FWS from otherwise complying with statutory deadlines for listing species under the ESA for seven years after the workplan is adopted (Section 401); 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 its habitat destroyed by development (Section 102). 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 states (and other affected parties) to intervene in ESA cases should presumptively be granted (Section 304) and requiring that states be included in all settlement discussions (Section 107).

2. 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 102); and

    b. It shields state information and data from disclosure at the request of states (Section 302), even while it forces the FWS to give such information "great weight" in decision-making under the ESA (Section 303).

The 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 mandates that the FWS or NMFS establish recovery goals, include population goals and habitat needs, at the time of any listing (Section 102). The agencies often lack the scientific information to establish such recovery goals at the time of listing, however; the listing determination is appropriately focused on the imminence and significance of threats that may endanger the existence of species. Establishing recovery goals requires considerable subsequent scientific assessment. Requiring that recovery goals be established at listing thus will likely delay listing and protection for vulnerable species facing extinction.

2. When states take the lead in developing recovery plans, the bill requires the state to develop a draft recovery plan within 1 year, potentially forcing hasty and incomplete scientific assessment of the proper strategies to successfully address threats to a species (Section 103).

3. The bill sets recovery goals in stone, requiring unanimous agreement of a state-dominated recovery team to change any goal regardless of best available scientific understanding (Section 102).

4. 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 102). 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 responsibilities. 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.

5. 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 (Section 203).

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