Committee on Resources

Witness Testimony

TESTIMONY OF

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EARTHJUSTICE LEGAL DEFENSE FUND

ON H.R. 3160

AMENDMENTS TO THE ENDANGERED SPECIES ACT

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COMMITTEE ON RESOURCES

U.S. HOUSE OF REPRESENTATIVES

Chairman Young and Ranking Member Miller, thank you for inviting me to testify on H.R. 3160, the "Common Sense Protections for Endangered Species Act."

I'm here today on behalf of two organizations. First, I am Chair of the Endangered Species Coalition, which represents more than 400 conservation, scientific, business, and religious organizations. Our diverse coalition supports stronger protections for our nation's imperiled species, so it should come as no surprise to you that the Endangered Species Coalition definitively opposes HR 3160.

Second, I'm Senior Legislative Counsel for Earthjustice Legal Defense Fund, the law firm for the environment. Over the past 27 years, Earthjustice, which you may have known as the Sierra Club Legal Defense Fund, has brought the most important environmental protection lawsuits in the country. We represent more than 500 clients, including fishermen, tribes, conservationists and citizen groups. We have been at the center of major battles to protect the air we breath, the water we drink, the communities we live and work in, the special places we enjoy, as well as our nation's endangered and threatened wildlife. So it should come as no surprise that Earthjustice Legal Defense Fund also opposes HR 3160.

The Endangered Species Coalition and Earthjustice have long supported Congressman Miller's bipartisan ESA reauthorization proposal - H.R. 960, the Endangered Species Recovery Act (ESRA). We are disappointed that there has never been a hearing on ESRA, which has more cosponsors and was originally referred to this committee in 1997, and again in early 1999. For your convenience, I have included with my testimony a side-by-side analysis that compares HR 3160 with HR 960 and the current ESA.

HR 3160 MAKES NO SENSE FOR THE AMERICAN PUBLIC

Both of the organizations I represent today support fair consideration of all views when it comes to endangered species. The Endangered Species Coalition and Earthjustice Legal Defense Fund specialize in

helping Americans participate in day-to-day endangered species management decisions. Because it squelches balanced public input and discourages certain people from participating in the process, the Common Sense Protections bill makes no sense for the American public.

HR 3160 Gives Special Rights To Some

HR 3160 gives special rights to corporations and others to sue to stop federal protection for a declining species. Under this bill, parties opposing new listings would have special rights in court. But if you didn't agree with the government's decision not to list, you would be out of luck. The standard of review in Section 104, called "de novo" review, would nullify the normal level of deference that the courts now give the expert biologists at Fish and Wildlife Service and the National Marine Fisheries Service. Under Sections 101 and 104 of this bill, the government would have to meet a higher standard to justify a listing decision, higher than it would to justify a no listing decision.

HR 3160 also gives a special right of intervention to anyone who has even the most attenuated or vague economic interest in an ongoing suit. Under the U.S. Constitution, anyone may intervene if they have an interest in case or controversy. But Section 302 of this bill changes that right to allow anyone who claims any kind of economic interest to have a greater right to intervene in an ESA case. Thus, an investment company in New Jersey may have a greater right to intervene in a salmon case in California than the person who lives by the salmon river and has a biological or personal interest in the case.

HR 3160 Limits Public Review of Development Permits

HR 3160 removes the only mandatory avenue for public input into the formation of Habitat Conservation Plans (HCPs). HCPs now cover more than 21 million acres of non-federal endangered species habitat in the U.S. Timber companies, private developers, even whole states operate under HCPs that last decades and sometimes cover hundreds of listed species. Often the only means for community involvement is through the National Environmental Policy Act (NEPA) process. HR 3160 does not help conservationists or private property owners by eliminating NEPA public notice and comment periods. Keep in mind that Section 303 of the bill eliminates the consideration of neighboring landowners' interests in an HCP.

On top of that, Section 303 of the bill places another roadblock to citizen participation by placing a 45-day limit on citizen suit challenges to HCPs. We've already seen how this ticking clock provision significantly blocks citizen participation in the Magnuson-Stevens Act. Without proper public notice and comment, 45 days is hardly enough time get a copy of the pemit document from Fish and Wildlife Service, much less formulate an opinion on it.

In federally managed areas, in our oceans, and for federally funded and permitted projects, there are limited opportunities for public participation in the endangered species decision making process. Usually the only chance for public input is after a decision has been made. That is why ESRA (HR 960) requires documentation and public access to agency records of these decisions. It doesn't make sense to open up the process to only one part of the public; Section 201 of HR 3160 gives permit holders (such as grazing permittees, timber corporations, commercial fishing companies, and mining companies) sneak previews of agency decisions, and the ability to politically pressure those decisions.

HR 3160 Makes Endangered Species Habitat A Secret

The best way for landowners, communities, corporations, counties, states, and federal land managers to find endangered species habitat is to look at a critical habitat map. HR 3160 adopts some of the language found in ESRA (HR 960) - such as making critical habitat more of the recovery planning process -- but then the bill substitutes the mandatory "shall" with the voluntary "may." Private property owners and environmentalists agree that critical habitat designations help long-term planning decisions and encourage public participation. So, it doesn't make sense that HR 3160 (Section 410) makes critical habitat designation

a purely voluntary program.

HR 3160 (Section 103) also prohibits the Secretary from publicly disclosing the location of privately owned endangered species habitat, unless that landowner consents. This doesn't make sense for neighboring landowners, who would certainly want notification that their land could become protected habitat in the future, or for local planning authorities who need to make long-term decisions.

HR 3160 Gives Special Preference to State Governors

An eagle, trout, butterfly, cactus or bear usually does not receive federal protection unless the species' home states failed to do their part to protect their resident wildlife. So it doesn't make sense that HR 3160 gives those same states special preference in endangered species decisions. For example, Section 101 would allow a hostile Governor to block a listing decision for years, even giving him or her the ability to repeatedly appeal the decision. Section 201 would allow a Governor to influence management decisions on federal lands, such as National Forests. And HR 3160 (Section 101) would transfer federal protection of species endemic to a state, back to that state even if it did a poor job of protection in the first place.

HR 3160 MAKES NO SENSE FOR SPECIES RECOVERY

Both of the organizations I represent today want to recover, and eventually delist, our nation's imperiled wildlife. Unfortunately, HR 3160 makes no sense for species because it strangles recovery measures with bureaucracy, and weakens legal protections with loopholes for federal agencies and corporations.

HR 3160 Lets Federal Projects Run Amok

The Army Corps of Engineers and U.S. Forest Service could find many ways to duck endangered species protections under Section 201. By allowing agency core "missions" (such as damming rivers, or maximizing forest harvest) to trump the ESA, the bill would make most mitigation programs extinct. And the Fish and Wildlife Service would be hog-tied because it could only step in if it could prove that significant numbers of animals or plants would be lost - more of an extinction goal than a recovery one. If that wasn't enough, biologists would be hampered by strict requirements to keep economic costs to a minimum. With additional loopholes for "routine maintenance and operations" as well as speculative emergencies, HR 3160 would let federal projects run amok.

In contrast, ESRA (HR 960) improves the existing ESA by strengthening the checks and balances on taxpayer-funded agencies. While federal actions already undergo review to ensure minimal impacts on endangered species, federal agencies should also make efforts to further recovery or consider the cumulative impacts of their actions. ESRA requires federal agencies to help plan for species recovery and then implement those plans within their jurisdictions. ESRA also requires agencies to consider the impacts of their actions on imperiled species in other nations.

HR 3160 Gives Private Developers Special Deals

As I mentioned before, Habitat Conservation Plans (HCPs) authorize development and other habitat destruction on millions of acres of endangered species habitat in this country. Unfortunately, Section 303 of HR 3160 would allow applicants to approve their own permits. Mitigation requirements would be whatever the developer or timber company thinks is reasonable, and the permits would be locked in -with no changes under ANY circumstances, including no adaptive management - for unlimited amounts of time.

In contrast, ESRA (HR 960) significantly revises the Administration's current "No Surprises" policy, which allows private landowners to alter or destroy endangered species habitat under a long-term unmodifiable permit. ESRA ensures that the initial permit is as good as it can be up front, and that the developer file a performance bond to cover the costs of all reasonably foreseeable circumstances (such as wildfires, plant

diseases, and other natural events that can have devastating impacts on weakened populations of wildlife). Then ESRA sets up a Habitat Conservation Plan Trust Fund to cover all other unforeseeable costs -- a safety net for landowners and species -- while allowing changes to the permit when needed to protect species.

ESRA also encourages ecosystem planning on a regional basis. Ecosystems do not run along political boundaries, so multi-species, multi-landowner plans are essential to ensure recovery. ESRA encourages regional governments to cooperate together, allows groups of private landowners to pool resources, and allows local governments to administer habitat plans.

Finally, ESRA helps small landowners by streamlining the permit process and establishing an Office of Technical Assistance. ESRA allows the small landowners that have a minimal impact on endangered species to benefit from a quick and easy permit process and to receive planning assurances.

HR 3160 Takes Recovery Out of Recovery Planning

Recovery Plans are supposed to set out the fastest, most reliable plan to achieve endangered species recovery. But not under HR 3160. The least cost is the bottom line, and a group of economists, wise use lawyers, and property owners with direct economic conflicts would make up the recovery planning team. Section 401 allows recovery plans to be replaced by "functional equivalents" (such as giant HCPs) or to be taken over by hostile state governors.

To be fair, ESRA and HR 3160 do have a few things in common. Both establish deadlines for recovery plans and require objective, measurable criteria, biological goals, and site-specific management actions. However, ESRA requires affected federal agencies to develop and implement a "Recovery Implementation Plan," and ESRA requires balanced participation on recovery teams.

These are just a few examples of where HR 3160 does not make sense for Americans or for our imperiled biological diversity. While the Endangered Species Coalition and Earthjustice Legal Defense Fund appreciate the opportunity to comment on this proposal, we believe that a fair hearing on ESA reauthorization should include a discussion of HR 960, the Endangered Species Recovery Act, as well.

Thank you, Mr. Chairman. I welcome any questions you have on either of these bills.

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