Committee on Resources

Witness Testimony

TESTIMONY OF WILLIAM R. MURRAY

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On Behalf of

American Forest & Paper Association

on

H.R. 3160

"Common Sense Protections for Endangered Species Act"

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Before the

Committee on Resources

United States House of Representatives

STATEMENT OF WILLIAM R. MURRAY

Mr. Chairman and members of the Committee, thank you for the opportunity to testify today on

H.R. 3160, the "Common Sense Protections for Endangered Species Act."

I am William Murray, Natural Resources Counsel of the American Forest & Paper Association (AF&PA). AF&PA is the national trade association of the forest, pulp, paper, paperboard, and wood products industry. We represent approximately 130 member companies which grow, harvest and process wood and wood fiber; manufacture pulp, paper and paperboard products from both virgin and recovered fiber; and produce solid wood products. The association is also the umbrella for more than 60 affiliate member associations that reach out to more than 10,000 companies. AF&PA represents an industry which accounts for more than eight percent of total U.S. manufacturing output. It directly employs about 1.4 million people and ranks among the top 10 manufacturing employers in 46 states. AF&PA member companies, as a condition of membership, must also commit to conduct their business in accordance with the principles and objectives of the *Sustainable Forestry Initiative (SFI)* program.

Congress enacted the Endangered Species Act (ESA) to protect endangered and threatened species, a goal which we support. We believe the principles behind the Endangered Species Act represent those qualities which make our society the finest in the world. In fact, Objective 4 of the *SFI* program requires AF&PA members to: "Enhance the quality of wildlife habitat by developing and implementing measures that promote habitat diversity and the conservation of plant and animal populations found in forest communities." However, believing in these principles and writing a law that works are two entirely different matters.

As its operating premise, the Endangered Species Act mandates protection of the species to the point of its recovery, without regard to the interaction of these steps with the rest of society. Humans are part of the diversity of nature and are one of the natural elements that is capable of causing changes, sometimes dramatic change, in the environment. Humans have modified the natural environment in North America for hundreds, if not thousands, of years. A recent example is the virtual elimination of wildfire from the environment in the Southeast. A number of species, some of which are now listed under the Endangered Species Act, were dependant on these fires for their existence. Recovery of these species by restoration of their original habitat would mean the return of the widespread fires upon which the species thrive, a circumstance which would have devastating consequences for the people who live and work in this area. Yet, some would argue that is the literal mandate of the Endangered Species Act.

The Endangered Species Act, often called the "pit bull" of environmental laws, grants sweeping powers and authority to federal agencies for endangered species protection. It is weighted heavily in favor of species protection at the expense of all other considerations. AF&PA's goal is to make the ESA work for species and people. AF&PA urges reauthorization of the ESA based on the valuable lessons gained from 27 years of experience with the Act under the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS)(together, the "federal wildlife agencies or "agencies").

I.

H.R. 3160 updates the Endangered Species Act in several key areas which we believe are essential to provide for a workable law. For example, this legislation would:

- improve the quality of the science and the process to be used for listings;

- remove the inefficiencies and inequities from the consultation process;

- provide a strong legislative foundation for policies which recognize the importance of including, rather than excluding, private landowners in species conservation efforts; and

- enhance the recovery process.

Many of these provisions in the bill address particular concerns of AF&PA members. I have highlighted these below and added suggestions to strengthen the bill where appropriate.

Listings. Title I of the bill provides needed improvements in the listing process. The petition process has historically not required the submission of quality scientific information by the petitioner to support listing. The bill codifies and tightens many recent improvements.

The bill greatly broadens the role of the States in the listing process. The States have responsibility over most wildlife and fish within their boundaries. It only makes sense to provide a role for this expertise when considering whether a species should be listed.

We applaud the provisions in section 2 which assure that listings are based on quality science. While we have disagreed on occasion with the quality of the science which has been used, we nonetheless believe the listings must be kept in the scientific arena. We have long supported the concept that proposed listings should be subject to independent peer review, the normal process for scientific studies. H.R. 3160 directs this, and as an important component, requires the Secretary to summarize and respond to the peer review in the final listing. We disagree with those who criticize peer review of listing as a process which will unduly delay listings. However, two outside factors will affect the success of peer review. First, the Secretary and the agencies must consider peer review as helping their deliberations on the status of a species, rather than as a hindrance. They must begin planning for peer review early in the process of preparing a proposed listing. Second, Congress must demonstrate its commitment to quality science through peer review by annually appropriating sufficient funds.

We also applaud the requirement for the identification, and subsequent collection, of data which is necessary to determine whether the assumptions on which the Secretary based the listing remain valid. However, the bill does not establish a deadline by which the Secretary must collect and consider the additional data. We recommend that the Secretary publish in the *Federal Register* the results of this consideration and the schedule of actions within 3 years of publication of the final. This will allow collection and consideration of the data to coincide with preparation of the Recovery Plan, but remain a separate process. The provision should make clear that the Secretary is expected to issue a determination whether there remains sufficient data to support the listing.

The bill focuses the agency on use of empirical and field tested data. In the past, the agency has relied too readily on computer models and assumptions. While these tools have a role, we believe that the damage to the Secretary's credibility from over reliance on computer models and assumptions far outweighs any benefit provided by listings which lack hard data.

Title I contains two additional provisions which should provide more understanding and lessen controversy. One would allow listing of a population only where a State has done so, but State does prohibit take of listed species. The second would require publication of an economic and social impact analysis at the time a species is listed. Such an analysis should provide needed information and serve as the preliminary analysis of these impacts for consideration during preparation of the Recovery Plan. However, we recommend that a draft analysis be published for public review and comment either at the time the listing is proposed (or six months later), with the final analysis due at the time of final listing, or at the time the final listing is published, in which case a final analysis would be due six months later. The Secretary would be directed to respond to the public comments.

Consultation. Title II amends section 7 to improve the consultation process. We support the bill's effort to bring some certainty to what can be a lengthy and cumbersome discussion. We particularly support the new provisions that (1) provide some reality for consultations involving private land by requiring evidence of the presence of a species, (2) recognize that federal agencies may only act within the authority given them by Congress, and (3) require conditions on incidental take statements be proportional to the anticipated take. Also, the bill provides affected citizens a real opportunity to participate in the consultation process. Frankly, we have little hope that a Presidential exemption process will ever work, but applaud the effort to eliminate the current ineffectual one and at least try something new.

This Title also contains a much needed improvement for management of public lands. A decision by the U.S. Court of Appeals for the Ninth Circuit, *Pacific Rivers Council v. Thomas*, needlessly complicated this management by requiring a halt to all site-specific activity on a national forest when a new species is listed until the Forest Service consults with the Secretary on the need to amend the existing forest plan. Even though site-specific activities would undergo individual consultation on their affect on the newly-listed species, the Ninth Circuit interpreted the Endangered Species Act to require they be halted until the plan-level consultation was completed. The bill would allow the site-specific activity to proceed, provided it meets the criteria of ESA section 7(a)(2), that is, it is not likely to jeopardize the continued existence of the listed species or destroy or adversely modify designated critical habitat.

We suggest inclusion of a provisions recognizing that the term "likely to jeopardize the continued existence" of a listed species means the effect of the proposed action on the *entire* species, not merely the individual members directly affected. (Take of the individual members is addressed in the incidental take statement.) Agency staff have been known to blur this distinction in consultations, particularly informal consultations. A statutory reminder would be helpful.

Legislative Foundation for Private Landowners. H.R. 3160 would enact into law two existing policies which are critical to the continued involvement of private landowners in conservation of listed species -- "no surprises" and "safe harbor agreements."

Many landowners intend to use or manage their land for a period of years. Forest landowners, for example, will establish a management strategy designed to produce income over the growing cycle of the trees, called a rotation, which in some cases may be as long as 80 or 100 years. These landowners are willing to discuss how this land will be managed, provided they receive the certainty that the business decision they make today is likely to be constant for the life of the intended use, such as the rotation of the affected trees. Indeed, they might be willing to adjust their management in return for more certainty.

Prior to 1993, a landowner had no certainty with respect to the Endangered Species Act. Then Secretary Babbitt announced he would include a "no surprises" commitment in habitat conservation plans (HCPs) under the ESA. In other words, landowners could rely on the fact that the lands they agreed to set aside for the species would remain constant over the life of a plan. If more land, or other changes, becomes necessary, it is the government's responsibility to fund what is needed. With this change, the number of approved plans increased by over 1000% in three years.

This policy must be put into the statute, and H.R. 3160 would do so. Despite the fact that this concept of certainty has given protection to hundreds of endangered species. Several environmental groups have challenged in federal court the Secretary's authority to adopt this policy. This successful concept should be protected from litigation by enactment into law.

The millions of private forest landowners manage their land under a wide variety of needs and philosophies. We have always urged Congress to enact an array of mechanisms to address their concerns. Some of these would be specifically tailored to the tree farmers and other "nonindustrial" landowners who own 60% of the forest land nationwide -- approximately 288 million acres. Others would be suitable for the larger, "industrial" landowners who own about 14% of nation's forest land.

In addition, recent experiences of members of AF&PA who are attempting to develop HCPs - even those members that have had great success in securing incidental take permits in the past - provide persuasive evidence that the habitat conservation planning process has lost much of the focus and momentum it once had. The strong cooperation between landowners and the government in habitat conservation planning that developed during the mid-90's now appears to be dissipating. The policies and energy that made the process workable are being challenged by litigation or eroded by newer interpretations or new policies. The result is that a significant number of HCPs - certainly in terms of acreage - have reached a standstill. Many landowners, including members of AF&PA, are questioning whether their continued participation in the habitat conservation planning process can be justified.

The most significant problems experienced by landowners arise from debilitating process, excessive demands, and loss of certainty. They include:

- Loss of leadership and staff dedicated to the processing each HCP.
- Increasingly lengthy time frames for developing HCPs and issuing incidental take permits.
- The too frequent inability of the Services to reach timely "closure" on key issues and to avoid the reopening of already closed issues.
- Tremendous escalation in the already expensive cost of HCP preparation.
- The Service's encouragement of, but failure to support, multi-species HCPs.
- Increasing advocacy of standardized HCP provisions that sacrifice good science for administrative efficiency, such as automatic mitigation ratios.
- Imposition of significant burdens and obligations to achieve broad species' recovery objectives not applicable to private landowners under the ESA and beyond what is reasonably related to the landowner's future potential impacts on the species.
- Litigation and policies that have the potential to undermine the degree of certainty that is provided by the "No Surprises" rule.
- The failure of the agencies to develop an effective, broadly used alternative or streamlined process to

enable small landowners who cannot afford HCP preparation costs to receive incidental take permission.

Many of these issues are addressed by H.R. 3160, such as the deadlines established for review of HCPs, the limits on mitigation that may be required and the recognition that consultation and further environmental analysis are not necessary. However, to address the remaining issues, and to provide a variety of relief mechanisms, we suggest that the Committee consider adding provisions in Title III which provide for such things as low effect habitat conservation plans, habitat reserve agreements, and multiple species habitat conservation plans. We also urge inclusion of language which specifically recognizes that HCPs are not intended to achieve recovery. NMFS particularly demands that HCPs achieve "properly functioning habitat," a recovery concept which imposes "ideal" habitat conditions on a single landowner without regard to the extent of the impacts on covered species that the landowner's future operations would actually cause. While the mitigation proportionality provision would help alleviate this particular problem, an overall statement concerning the inapplicability of recovery to private land is equally important.

We recommend that the Committee should also consider providing authority for candidate species conservation agreements, particularly since H.R. 3160 focuses considerable attention on the role of the States in endangered species conservation. Whenever the federal wildlife agencies have attempted to enter one of these agreements with a State in order to provide conservation measures for a species without a listing under the ESA, the effort has been overturned in court. Most recently, the agencies proposed listing a distinct population of Atlantic salmon because litigation had been filed challenging the conservation agreement with the State of Maine that had avoided a listing.

Much is said about the role of science in HCPs. HCP critics raise the alarm that "HCPs are not based on science." For starters, this flies in the face of the fact that some of the best science on endangered and threatened species is being accomplished today in the context of HCPs. At bottom, however, this criticism ignores the fundamental fact that HCPs are more than scientific documents -- they are business plans. AF&PA agrees that available scientific data should be used in developing the management and mitigation measures for HCPs. We do not believe, however, that any useful purpose is served if each HCP becomes a written compendium of every known fact about a species. Demands for such encyclopedic content breed unnecessary costs and delays.

AF&PA also does not support the contention of some that an HCP may be inappropriate whenever there are significant gaps in science. There are and always will be gaps in knowledge, and how significant such gaps may be often is not known until long after they are identified. There are at least two reasons that denial of HCP coverage in the face of uncertainty is inappropriate. First, we adhere to the tenet that, if the government knew enough to list a species, they know enough to address it in an HCP. Second, even if significant species-specific data are not available, often there are data concerning the general habitat requirements of other, similar species, and those available data can be used to craft an HCP that moves management toward protection of the target species. Furthermore, situations in which scientific gaps are identified could also be candidates for reasonable adaptive management provisions.

Judging by the text of H.R. 3160, the authors understand the true nature of a HCP, as well as their importance as a conservation tool.

Enhanced Recovery Process. Title IV of H.R. 3160 presents a completely revised process for the development and implementation of recovery plans. We have long advocated that recovery plans should be

the focus of conservation efforts by the federal government, These plans should address the biologic needs of the species, the economic and social consequences of fulfilling those needs, and the financial and scientific capabilities of achieving recovery. The bill goes a long way toward accomplishing this.

We particularly support the expanded membership of the recovery team required in the bill. We believe it is essential to include not only scientific experts, but representatives of all relevant fields and affected interests, particularly landowners who are likely to have specific information about habitat conditions. We also agree with the authors that each recovery plan should consider alternative measures to achieve the goal and the benchmarks, which balance biology, time frames and economic dislocations. These provisions will require the Secretary to consider the impacts of recovery and to analyze strategies which will lessen or avoid social and economic disruptions.

In Title IV, H.R. 3160 would move the designation of critical habitat from the listing stage to the recovery stage. Critical habitat, as currently provided in the ESA and implemented by the two federal wildlife agencies suffers from several problems. The FWS believes that critical habitat "is not an efficient or effective means of securing the conservation of a species," particularly as compared to the controversy it causes and to the "monetary,. administrative, and other resources it absorbs." *Final Determination of Critical Habitat for the Southwestern Willow Flycatcher*, 62 Fed. Reg. 39129, 39131 (July 22, 1997). In its annual Listing Priority Guidance, FWS has ranked critical habitat designation as the lowest priority. Indeed, the agencies have designated critical habitat for less than 20% of listed species, despite decisions from the U.S. Courts of Appeal for the 9th and 10th Circuits curtailing their ability to find designation is not prudent. *Natural Resources Defense Council v. U.S. Department of the Interior*, 113 F.3d 1121 (9th Cir. 1997); *Forest Guardians v. Babbitt*, 164 F.3d 1261 (10th Cir. 1999).

The ESA directs the Secretary to take into account the economic impact before designating critical habitat and to exclude land if the benefits of exclusion outweigh the benefits of designation, provided extinction will not result. However, in their economic analyses, the agencies only consider the "incremental" impacts over and above those caused by the actual listing. Since listing must be based solely on biologic factors, the government rarely, if ever, considers the full economic effects of actions under the ESA. Perhaps as a result, there has not been extensive use of the authority to exclude land.

The only statutory role for designated critical habitat is provided by ESA section 7(a)(2). This paragraph requires federal agencies, in consultation with the Secretary, to ensure that their activities are not likely to jeopardize the continued existence of a listed species "or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, as critical." The agencies have defined "destruction or adverse modification" and "jeopardize" in substantially the same terms, thus combining the consultation criteria into one. 50 C.F.R. 402.02.

The Services acknowledge that designation of critical habitat has no statutory effect on private land, unless the landowner seeks an action from a federal agency, such as a permit or funding. Indeed, FWS excluded all private land from the critical habitat for the northern spotted owl. (As the Services insinuate themselves into the permitting programs delegated to the States, such as the National Pollution Discharge Elimination System under the Clean Water Act, the number of permits for activities on private land resulting in some form of consultation may well increase.) Nonetheless, designation produces a map with lines drawn by a federal regulatory agency. Most landowners, and their bankers, find it difficult to believe that the lines mean nothing. Indeed, NMFS recently touted the lines as a benefit of designation because it helps "focus Federal, tribal, state and private conservation and management efforts in such areas." *Designated Critical Habitat: Central California Coast and Southern Oregon/Northern California Coasts Coho Salmon*, 64 Fed, Reg.

24049, 24050 (May 5, 1999). While this statement carries no threat of regulatory action, it exemplifies "targeting" the land which in turn generates the controversy.

The agencies have recently proposed changes that would increase the opportunities for mischief involving critical habitat. 64 Fed. Reg. 31871 (June 14, 1999). In this document, the agencies propose expanding critical habitat to include unoccupied habitat and habitat necessary for recovery. They also proposed descriptions of critical habitat, rather than maps. NMFS demonstrated this for the upland portion of coho salmon critical habitat where it merely designated the "adjacent riparian zone." In the preamble to the rulemaking, NMFS described these zones as any area adjacent to designated riverain critical habitat which contains certain functional qualities, leaving landowners guessing as to the location and extent of qualifying zones. *Id*.

Given the overall disarray of the critical habitat concept and the lack of support from the expert agencies, we recommend that it be merged entirely into the recovery plan. Critical habitat continues to drain resources from the agencies as litigation mounts. It is now apparent that agencies will expand this drain dramatically through their new policies, which will correspondingly create even more controversy. Retaining critical habitat as a separate rulemaking process makes no sense if the ultimate goal is recovery. H.R. 3160 only changes the timing of designation by moving it from the listing process to the recovery process. The Committee should amend the bill to eliminate critical habitat as a separate process and allow the agencies to focus their limited resources on recovery, particularly if the bill is amended to allow public comment on the economic impact analysis.

Finally, we would prefer that existing recovery plans be required to comply with the provisions of the new section 5 by a specific date. The bill exempts both existing plans and plans which have been released for public comment but not adopted at the time of enactment of the bill into law. Plans adopted prior to enactment of the bill must be reviewed within 5 years, but there is no requirement that they ever be revised. We are particularly concerned about draft plans. First, there is no requirement that they ever be reviewed since they are neither plans adopted prior to enactment nor approved under the new section. Moreover, the Secretary may have released a draft plan for public comment some years ago, but never issued a final plan. For example, the recovery plan for the northern spotted owl was released for public comment in April 1992 but has never been adopted as final. Under the bill, any recovery plan for the owl would be exempt from the new procedures. These gaps should be fixed when the bill is considered by the Committee.

II.

Finally, there are two areas which we believe should be addressed in this legislation.

Enforcement. If you drive your car in excess of the posted speed limit, you know you have broken the law and could legitimately receive a ticket. If you break into a building and take goods or money, you know you have broken the law and face possible arrest. However, under the Endangered Species Act, if you farm your land or harvest your trees, you face prosecution if a federal bureaucrat speculates that you might break the law. These bureaucrats will advise you repeatedly that you will break the law by managing your land, referring to some vague study which may or may not be based on empirical data. They may even drag you into a federal court and try to prove their case to a judge. Landowners are usually helpless in the face of these escalating threats of prosecution.

The Committee should include in the bill clear direction to remind the bureaucrats, and citizens who would file these lawsuits, that the burden is on them to prove a "take" has occurred or will occur, and that this

requires proof of "an actual death or injury" to specific members of the species. Such a provision would encapsulate the Supreme Court's decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon,* thus eliminating such concepts as "reasonably likely" to take and emphasizing a causal connection between the action and the take.

Programs Delegated to States. One area not addressed by the bill is State action. The bill would substantially increase the role of States in the conservation of listed species. At the same time, the bill does not address the recent efforts by the Secretary and the Environmental Protection Agency which would enmesh State programs with additional federal bureaucracy and which would dramatically reduce States' ability to run their water quality programs.

Over the past several years, the Environmental Protection Agency (EPA) has been attempting to push the States to "cooperate" more and more with the federal wildlife agencies on proposed individual state permits which may adversely affect a listed or proposed species and on the development of State water quality standards. First, EPA required that certain States, as a condition of obtaining the delegation under the Clean Water Act to issue point source discharge (NPDES) permits, agree to consult with the federal wildlife agencies. If, as a result of the consultation, the agencies and the State environmental agency were not able to reach agreement on appropriate terms for the proposed permit, EPA agreed to veto the permit and either issue it as a federal permit with conditions acceptable to FWS or refuse to issue it at all. In a lawsuit brought by AF&PA, the U.S. Court of Appeals for the Fifth Circuit overturned this effort. The court held that the Clean Water Act requires EPA to delegate the NPDES program to a state as long as the state program meets the enumerated statutory criteria, none of which pertain to the ESA. The court further held that section 7 of the ESA confers no additional authority on federal agencies beyond that granted by Congress in their governing statutes.

EPA is now considering an agreement with the federal wildlife agencies which would provide a mechanism for those agencies to become involved in the permit and water quality standard development process at an early stage. 64 Fed. Reg. 2742 (January 15, 1999). No one can object to FWS and NMFS providing the State permit-issuing entity appropriate information, including information on the presence of listed species. However, Congress has not imposed the ESA on the States, other than through the prohibited activities in section 9, such as "take." The Clean Water Act is designed to be implemented through State programs, with federal oversight merely to ensure consistency with national water quality goals. Federal agencies should not be allowed to impose these burdens on States, burdens that neither agency thought were appropriate for over 20 years, without careful consideration by Congress. We strongly recommend that the Committee include in H.R. 3160 a provision recognizing that, while States are free to consider information from the federal wildlife agencies, this is voluntary and the ESA imposes no requirement that States consult or meet with those agencies when implementing the Clean Water Act.

Once the State has completed the water quality standard, it must be submitted to EPA for approval. At this point, the EPA review and approval arguably becomes a proposed federal action subject to section 7 consultation. Similarly, States must submit lists of impaired waters and total maximum daily loads (TMDLs) required under section 303(d) of the Clean Water Act for EPA approval. Involvement of ESA consultation in what Congress intended to be State-run programs has the potential for disaster. All three agencies - EPA, FWS and NMFS - admit that these consultations are protracted, averaging 18 months. 64 Fed. Reg. At 2742. Already, environmental plaintiffs are demanding that EPA consult not only on the waters included by a State on its 303(d) list but also on the waters which the State determined should not be listed. *Friends of the Wild Swan v. EPA*, Civil No. 99-87 (D. Mt.). The irony is, of course, that these programs are intended to improve water quality, which will benefit all species.

While the provision in the bill regarding failure to meet consultation deadlines will help, there are 50 States required to submit revised water quality standards every 3 years, to submit 303(d) lists every two years and to prepare over 40,000 TMDLs. The sheer number of proposed actions will overwhelm the process and delay water quality improvements. Moreover, the bill does not address the problem of federal control through the ESA of a program that Congress intended to be State-run. We recommend that the Committee amend the bill to recognize that water quality standards and section 303(d) actions are for the improvement of water quality which will benefit species. As such, these EPA approvals should not be subject to consultation under ESA section 7; the federal wildlife agencies should at most provide comments.

III.

Conclusion. We support this bill as an important first step to update the Endangered Species Act to a law that actually achieves wide support for species conservation. We believe the bill will improve both protection of species and the ability of landowners to manage their land in the presence of listed species. We fail to understand how anyone can oppose such concepts as peer review, allowing landowners and applicants to participate in the process, analysis of alternatives recovery measures so as not to miss less disruptive methods, providing certainty as an incentive to conserve species and habitat.

As I indicated, we believe more needs to be done in order to fully update the Endangered Species Act. For example, we have not lost sight of the need to recognize and protect private property rights. The Fifth Amendment to the U.S. Constitution requires that landowners be compensated if the government takes their property for a public purpose. It is unfair -- it is un-American -- to impose the cost of the public purposes embodied in the Endangered Species Act on a few unlucky citizens. In this regard, we urge passage of H.R. 1142, the "Landowners Equal treatment Act of 1999" by Chairman Young.

On behalf of the American Forest & Paper Association, I appreciate the opportunity to offer our views on H.R. 3160, the "Common Sense Protections for Endangered Species Act." I would be happy to answer any questions you may have.

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