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COMMON SENSE AMENDMENTS TO THE ENDANGERED SPECIES ACT

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Sportsmen and wildlife conservationists have a vital stake in the Endangered Species Act (ESA) originally passed in 1973. The Act has been a success and provided needed protection to an array of species. In some cases, species have been restored and no longer need the statute's special protections. The law is part of the American tradition of wildlife conservation and management begun early this century and fostered by sportsmen ever since. Since its initial enactment, the ESA has been reauthorized five times; the sixth reauthorization is due in 1993.

Unfortunately, specific parts of the Act are being applied in a fashion that is beginning to seriously threaten traditional wildlife management activities as well as hunting opportunities at home and abroad. Animal rights extremists are learning to use specific features of the ESA to advance their radical agenda.

The following paper outlines a set of "common sense" amendments to achieve modest reform of the Act. The central theme of these reforms is to change specific features of the statute so that the animal rights radicals, and their friends within government, cannot pervert the ESA to attack and diminish wildlife conservation programs, sport hunting opportunities, and traditional

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wildlife management. A better ESA and enhanced support for endangered species protection from America's traditional conservationists -- hunters and anglers -- will be the result of these needed amendments.

I. WILDLIFE MANAGEMENT EFFECTS EVALUATION

PROBLEM -- Many ESA decisions can have enormous impacts on scientific wildlife management and sport hunting. These decisions include (1) listing (i.e., protecting) a species as threatened or endangered, (2) designating critical habitat, (3) determining what activities constitute an illegal "taking" of a listed species, and (4) action related to implementing CITES. We have seen many recent actions or proposed actions that will directly impact hunting. Examples include black bear listings, argali sheep listings, various habitat management restrictions, effects on turkey reintroduction programs, and proposed wolf reintroduction in Yellowstone. Unfortunately the law does not require that the consequences of listing and other actions on hunting and wildlife management be specifically examined. The National Environmental Policy Act (NEPA) mandates review of general environmental effects via an environmental impact statement (EIS) but no specific review of effects on hunting is directed.

SOLUTION -- We propose a common sense amendment: statutorily direct the U.S. Fish and Wildlife Service (FWS) or the National

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Marine Fisheries Service (NMFS) to review the impacts on hunting, fishing, and fish and wildlife management of proposed actions related to listing, critical habitat designations, taking determinations and CITES. This will ensure that the possible effects of ESA actions on hunting and hunters are simply identified, studied, and considered. The amendment is purely procedural and would not alter the standards that govern listing.

Sportsmen deserve the courtesy of having impacts on their interests specifically considered and made part of the administrative record. Especially since sportsmen pay most of the bill for this nation's wildlife conservation efforts including non-game and endangered species programs.

See section 2 of H.R. 2027 and S. 1440.

II. FISH AND WILDLIFE CONSERVATION AND MANAGEMENT PROJECTS

PROBLEM -- The ESA prohibits the "taking" of protected species. The term "taking" includes harass, harm, etc., or attempt to engage in such conduct. The FWS has defined "harm" to prohibit any unintentional acts, including habitat modification, which "annoys" protected species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. 50 C.F.R. § 17.3. The FWS has determined that under this definition

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of harm, alterations of habitat can be deemed to be a prohibited taking even if no listed animal or fish suffers any physical harm.

This definition of harm can result in the criminalization of innocent activities which might affect the habitat of listed species. Some of these activities include wildlife management projects and could result in criminal prosecutions against fish and wildlife officials as well as members of private conservation organizations.

This threat is real. One set of court decisions has already found that certain game management programs constituted a taking. (Palila v. Hawaii Department of Land and Natural Resources, 639 F.2d 495 (9th Cir. 1981), 852 F.2d 1106 (9th Cir. 1988)). The same decisions ordered Hawaii to exterminate a huntable population of mouflon sheep that had been carefully reintroduced and managed because of the purported effect on the endangered palila -- a finch like bird. Management programs to control insect infestations have been declared a taking. Across the country landowners have been threatened with prosecution if they engage in habitat alterations. Fisheries management initiatives by State agencies have been nixed. Wildlife management projects sanctioned by State agencies and private conservationists have run afoul of the ESA. It is only a matter of time before someone conducting a wildlife enhancement project (e.g., wetland creation for ducks, special timber management for grouse and woodcock or turkey, burning for quail,

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special plantings for deer, etc.) finds themselves subject to prosecution.

A single U.S. Attorney sympathetic to the animal rights movement or a FWS hostile to traditional wildlife management has the authority to act against State agencies and private conservationists.

Animal rights radicals can attack against wildlife management efforts with their own ESA lawsuits. The citizen suit section of the law allows anyone to sue to stop a project that might "harm" (i.e., "annoy") a listed species. Moreover, anyone can sue to compel the government to act against such projects and their backers.

The courts also continue to expand the notion of prohibited taking under the ESA and subject more and more people and organizations to potential prosecution. This clear trend in the law is an open invitation to the animal rights extremists to press for prosecutions of fish and game agencies as well as private organizations (e.g., Ducks Unlimited, National Wild Turkey Federation, Ruffed Grouse Society, Trout Unlimited, etc.) whose wildlife management programs do alter habitat. Congress never intended this consequence of the law and the resultant chilling impact on important wildlife conservation and enhancement programs.

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SOLUTION -- The Act must be amended to ensure that wildlife management programs and operators are protected from unwarranted prosecution under the ESA. Activities that result in the wounding or death of protected species must not be sanctioned. However, projects that might merely "annoy" a listed species should not be subject to prosecution. Congress should amend the ESA to encourage such conservation programs as a way to benefit all species of fish and wildlife.

See section 3 of H.R. 2207 and S. 1440.

III. CITES AND SPORT HUNTING

PROBLEM -- U.S. government decisions and actions related to CITES (Convention on International Trade of Endangered Species) continue to drift toward an anti-hunting, anti-animal use philosophy. The critically valuable conservation role played by sport hunting programs is apparently not recognized by many U.S. officials. As a result, decisions are being driven by animal rights/anti-hunting considerations even if such decisions are detrimental to wildlife conservation.

In recent years, the FWS has failed to accept the determinations of countries of origin as to which of their animals are properly available for hunting and export/import. For example, in

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1992, the FWS has tried to adopt "guidelines" that enable it to second guess elephant conservation decisions made by Botswana, South Africa, and Zimbabwe. Furthermore, the FWS has sought to govern wildlife importation through the adoption of internal guidelines, not subject to public review.

SOLUTION -- The ESA must be amended to provide direction to FWS regarding the administration of the ESA and CITES to reflect the valuable role of sport hunting in conserving particular animal populations. The law should contain an express policy that the U.S. recognizes the valuable role that sport hunting plays in the conservation of wildlife.

In addition, the ESA must be amended to bring a halt to the FWS's "closed door" determinations and its attempt to play an omnipotent "Big Brother" to other sovereign countries. The U.S. should accept the determinations of other countries unless there is evidence that such determinations are clearly wrong or based on grossly inadequate data.

See section 4 of H.R. 2207 and S. 1440.

IV. FAIR NOTICE OF FOREIGN LAWS

PROBLEM -- In many wildlife law situations, it is unclear whether an individual must comply with a country's federal and

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provincial requirements, or one or the other, to be in compliance with U.S. law. A foreign country's distribution of authority and its effect on wildlife laws is often complex and amorphous. Moreover, it is easy to run afoul of foreign administrative requirements, such as permit provisions. Under present law, all foreign violations -- federal, provincial, or administrative -- can be treated as criminal acts in the U.S. This is true even if an American citizen had no knowledge of the alleged violation.

SOLUTION -- The ESA should be amended to clarify for which violations of foreign wildlife laws an individual will be held accountable under United States law. Only those laws which are related to wildlife conservation and can be clearly understood should carry criminal consequences within the U.S. Other foreign wildlife law violations should carry civil penalties. In addition, foreign administrative violations should also result only in civil liability in the U.S. It is completely unfair and unconstitutional to impose criminal liability on U.S. citizens for violating often arbitrary and unintelligible foreign rules and edicts.

See section 5 of H.R. 2207 and S. 1440.

V. ADJUDICATION AND PEER REVIEW

PROBLEM -- Under the current listing process, the Secretary of the Interior may decide of his own volition to list a species as

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threatened or endangered, or any interested person can petition the Secretary to do so. In either case, the Secretary makes the decision on whether or not to list a species based upon determinations (and often times data) generated internally by the FWS. There are often no public hearings in this decisionmaking process wherein the FWS data is open to scrutiny and challenge. There is also no provision for peer review of the FWS data by qualified outside experts. Argali sheep have now been listed even though many experts, including those within the range states, are persuaded that listing is unwarranted. There are allegations that FWS ignored or failed to consider the comments of the range states in deciding to list. Unfortunately there is now no way to know what data FWS actually considered and no way to challenge the scientific accuracy of FWS' conclusions regarding argali sheep.

Because the guts of the listing process is effectively closed to the public and to scientific peer review, its credibility can be suspect. The decisionmakers are not accountable to the public and support for decisions made within a "black box," with no detailed explanation of the factors evaluated or the weight given those factors, is necessarily limited. The lack of genuine public scrutiny and scientific evaluation can undermine public support for listing decisions.

The Department is also limited by this process. In very difficult issues, the lack of any adjudicative procedures or peer

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review process makes it hard to get the best scientific data available. FWS has sometimes had to rely on extra-legal procedures to resolve tough questions. Today it is looking at setting up a new biological determinations division to wrestle with tough scientific issues. The Department needs additional tools to help it with these issues.

SOLUTION -- The listing process should be amended to authorize the Secretary to employ, at his discretion, an adjudicative process wherein the public has an opportunity to scrutinize, evaluate, and challenge the decision to list a species. Public participation can ensure that all relevant factors are considered, proper weight is given to each factor, and the impact of listing or not listing is given due consideration and effect. This will result in a more reasoned decision and public support for a decision in which the public has played a central role.

This process is elective because the vast bulk of ESA listings are non-controversial and need not be subject to this kind of scrutiny. In difficult cases, the Department could employ these procedures -- used throughout government -- to get better information before it renders its decisions.

An independent peer review of the FWS studies and data can also ensure that the proper information is considered. Peer review is an accepted, standard practice of the scientific community to

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assure the credibility of studies/data. There is no reason this tool should not be available for subjecting FWS studies/data to critical scientific scrutiny.

See section 6 of H.R. 2207 and S. 1440.

VI. SUBSPECIES AND POPULATION CRITERIA

PROBLEM -- The ESA directs that "species" which are threatened or endangered be listed as protected under the terms of the Act. The term "species" includes any subspecies and, in the case of vertebrate species, any distinct population segment which interbreeds when mature. This license to list subspecies and population segments is problematic, because it can result in the protection of subspecies and populations that are still abundant generally. The problem is further exacerbated by the failure of the FWS to promulgate precise rules which either define "subspecies" or "distinct population segment" or establish objective criteria for determining when a "subspecies" or "distinct population segment" exists for ESA listing purposes.

This "splitting" of the term "species" into a virtually infinite number of subclassifications often results in application of the ESA to situations in which it originally was not intended to apply. For example, because most species are rare at the fringe of their natural ranges, many fringe populations are potentially

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eligible for listing even though the population inhabiting the central portion of the species' natural habitat is not threatened. Argali sheep are now protected and largely off-limits to hunters because some subspecies are alleged to be in marginal condition. It is only a matter of time before the animal rights radicals press for the listing of more marginal fringe populations of otherwise healthy huntable species. This coupled with the "look alike" rules could severely diminish domestic hunting opportunities.

The splitting of species into discrete, insular subclassifications for listing also results in different treatment of the same "species" listed for different parts of the country. For example, squawfish are protected in some states (i.e., the Colorado River system) and poisoned in others (i.e., the Columbia River system) to save other threatened species (i.e., salmon). The resulting dichotomy can detract from and hinder the overall purposes of the ESA to preserve unique species' gene pools. Increasing clamor for listing small subclassifications of populations can draw resources and attention away from species which are truly in danger and in the most need of protection.

SOLUTION -- Criteria for listing subspecies and populations should be made objective. The ESA should be amended to direct the Department of the Interior to establish specific criteria to determine when a group of animals is sufficiently distinct to qualify as a subspecies or population. Proponents seeking to list

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subspecies and populations should bear a reasonable burden of proof to establish that the group of animals in question is sufficiently distinct and valuable so as to warrant the comprehensive protection afforded by the Act.

See section 6 of H.R. 2207 and S. 1440.

VII. ESA FUNDING AUGMENTATION

PROBLEM -- With the rise of environmental awareness, there has been an increasing cry for more funding of the Federal endangered species program. Despite this cry for funding, no one has stepped forward with a workable funding proposal which enables non-hunters to contribute directly to this program.

The hunting/fishing sector has traditionally developed its own mechanisms, such as excise taxes, hunting/fishing licenses and duck stamps, to fund wildlife management programs. Today sportsmen are funding both game management programs and non-game efforts at the State level. Although some contributions to non-game come from tax checkoffs, the lion's share of funding is derived from license sales, hunting and fishing stamps, and other angler/hunter financed measures. Efforts should be made to develop similar programs which ensure that other wildlife supporters, including non-hunters, can financially support an enhanced ESA. It's time for the non-hunters

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to step forward and match the sporting community's century old financial commitment to wildlife conservation.

SOLUTION -- The ESA should be amended to direct a study toward developing a funding program patterned after those supported by sportsmen. The policy would provide that augmented ESA funding would not draw on monies generated by hunting or fishing activities. America's sportsmen -- the foremost wildlife conservationists -- are prepared to work with non-hunting conservationists (as opposed to anti-hunters who contribute nothing to our wildlife heritage) to find ways to augment funding for the ESA.

See section 7 of H.R. 2207 and S. 1440.