



# Public Employees for Environmental Responsibility

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## **PEER Analysis of Sen. Barrasso Discussion Draft “Endangered Species Act Amendments of 2018” Examination of Selected Provisions July 2018**

### **I. Provisions Hobbling the ESA**

#### ***A. Faith-Based Recovery (§202)***

The draft declares voluntary cooperative agreements as “regulatory mechanisms.” Since these agreements are voluntary, there would be no legal recourse if ESA protections are subsequently ignored.

#### ***B. Political Deference over Science (§101)***

1. Improper Presumption for State-Supplied Data. Comments submitted by States should not be “afforded greater weight” than comments from any other individual or entity, including peer-reviewed science.
2. Source Trumps Merit. “Best scientific data available” should not include all information provided by states, tribes, or local governments, nor should it include traditional knowledge provided by tribes. This is a huge departure from scientific integrity standards.
3. Exclusion Loophole. The draft states that “best scientific and commercial data available” should not be “deficient in fact” – a confusing term in this context and lacking precision. Excluding best scientific data that is allegedly deficient in fact could open up the door to eliminating peer reviewed data that should be used.
4. Self-Serving Industry Data. Another exclusion is for information “inconsistent with other credible... commercial information”. Because commercial information is typically provided by organizations with economic interests at stake this could serve as an invitation for industry to concoct studies to screen out credible science at odds with commercial priorities.
5. Impacted versus Affected State. The definition of “impacted state” includes any state where a threatened or endangered species is “believed to occur.” A belief that a

species is present is not based on best scientific data available, and would allow states with no real interest to weigh in on listing and recovery decisions.

***C. State Role Questionable. (§103)***

Delegating authority for conservation and recovery of wildlife to the states is questionable. First, many of the states do not have the resources to develop and implement recovery plans. Second, wildlife and critical habitat cross state borders. For example, activities upstream and out of state of an endangered species habitat can greatly affect that species downstream. Thus, a federal role is required and should not be subordinated.

***D. Recovery Team Concerns (§102)***

The draft uses a “recovery team” including several members appointed by Governors. This inserts politics into what should be a scientific endeavor.

Allowing a recovery team to modify a recovery goal, habitat objective, or other criterion based on “new science, new technology, new management practices, new resources” is counterintuitive. Any “new” method or technology is, by its definition, relatively untested, and should not be relied on to make critical decisions about the survival of a species. Proven technologies would no longer be new.

Further, the exemption from the Federal Advisory Committee Act would allow recovery teams to meet in secret.

***E. State Veto on Experimental Populations (§106)***

Giving states approval authority over boundaries for introduction of experimental populations is tantamount to a veto power. Under this provision for example, Wyoming could, and almost surely would, have blocked grey wolf reintroduction to Yellowstone National Park.

***F. Delisting as Unreviewable Death Sentence (§102)***

The draft declares that the decision to delist would not be a final action until a five-year monitoring period is over. This would act to prohibit judicial review for five years, a period during which the species would become extinct or lose the potential for future viability.

***G. Deadlines Skewed (§§102, 401)***

The draft provides a short (90 day) deadline to delist but 7-year no-action period on petitions to list or designate habitat.

***H. Secret Science Questionable (§301)***

Exemptions from the Freedom of Information Act would allow some critical information driving ESA determinations to remain secret.

***I. Vague New Information Category (§301)***

The draft gives “tribal traditional knowledge” a deferential legal status and places a burden on the Secretary to explain rejection of any tribal position. It is not stated whether traditional knowledge is empirical in nature, or cultural/religious, or why this deference is appropriate in this legal context. Nor is it clear what would be the basis for resolving different tribes with conflicting traditional knowledge.

***J. Futility as Basis for Non-Listing (§503)***

The draft appears to be opening a new legal basis to deny protection to a species in jeopardy via a Secretarial determination that listing “would not improve the population of the species.” This could give rise to the troubling scenario of deliberate ESA nonfeasance serving as a de facto ESA exemption.

**II. Other Provisions of Concern**

***A. Ceding Wildlife Authority (§105)***

The draft declares all federal wildlife management authority in parks, refuges and other federal lands void, by giving states “primary authority...to manage wildlife” even on federal preserves. The only reserved federal wildlife management authority would be the ESA.

***B. Presumptive State Veto on Federal Land Acquisitions (§104)***

The draft requires the Secretaries of Interior, Commerce and Agriculture to consult with states and give “great weight” to state comments “in determining whether to carry out the proposed acquisition.

***C. Foreign Endangered Species Plantations (§ 502)***

The draft authorizes a study of using foreign lands as habitat for listed species (such as establishing a Florida panther colony in Central America). Protecting habitat of a listed species outside the U.S. will not help protect the habitat of such species in the U.S.

***D. Cooperation versus Cooption (§109)***

The draft would have U.S. Fish & Wildlife Service employees rated on cooperation with “farming, ranching, home building” and “industry trade groups” as well as “sportsmen,” state and local governments. Good comments could earn them special commendations.

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