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TO: **Conservation Colleagues**

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RE: **H.R. 3824, Rep. Pombo's "Threatened and Endangered Species Recovery Act"**

The Endangered Species Act bill introduced yesterday by Rep. Richard Pombo (R-CA) would drastically scale back this nation's commitment to conserving its endangered wildlife and habitats for future generations. This memo explains some of its most damaging provisions in the bill.

1. Pombo's Choice: Unfettered Habitat Destruction or Big Payoffs to Developers

In two deceptively-worded sections ("Written Determination of Compliance," pp. 53-55, and "Eligibility for Aid," pp. 57-58), the Pombo bill would force wildlife agencies to choose between abandoning enforcement of the Endangered Species Act's prohibition against taking endangered species - the provision that has given rise to collaborative habitat conservation planning across the country – or writing large checks to pay developers to comply with the law.

Although conservation and industry groups widely support providing incentives funding for landowners to carry out voluntary conservation measures, this bill ignores this opportunity for consensus legislation. Instead, the Pombo bill promotes a developer entitlement scheme that would make the Endangered Species Act's "safety net" of protections unworkable.

The Pombo bill would allow developers to proceed with environmentally harmful projects without carrying out any of the offsetting habitat conservation measures ordinarily required by the Endangered Species Act if federal wildlife agencies are unable to evaluate these projects within a 90 day review period. The bill would force the wildlife agencies -- the U.S. Fish and Wildlife Service and National Marine Fisheries Service ("Services") -- to accept the developer's characterization of the project's impacts and deny them the ability to request additional information from the developer.

Under the bill, if one of the Services is unable to determine within 90 days whether the project would violate the Endangered Species Act, the project would go forward. Large tracts of habitat could be destroyed without any offsetting conservation measures, potentially putting endangered wildlife species on an irreversible path toward extinction.

If the Service determines that the project would violate the Endangered Species Act and seeks to protect some of the affected habitat, the Service would then become obligated to pay the developer for any foregone profits. Thus, for example, if the Service allows a subdivision to be built on all of a 2,000-acre tract except a 10-acre riparian habitat area used by an endangered toad, the developer would be entitled to a federal government check for any profits not earned on the last 10 acres - even if the overall project is highly profitable.

This payoff is misleadingly characterized in Pombo's bill as a "grant" program. In fact, it is a legal entitlement given to developers regardless of financial need or conservation merit. In fact, unlike typical grant programs, a developer who receives a check under this program makes no commitment to manage land for conservation purposes in return.

The impact of Pombo's bill on wildlife agency budgets would be devastating. Even after the Service's available funds have been depleted due to developer payoffs, the Service would remain legally obligated to pay the remainder of any pending developer claims in the next fiscal year. Already struggling with anemic budgets, wildlife agencies would be thoroughly hamstrung by this new budgetary obligation.

Rep. Pombo has not provided any estimate of the impact of his bill on the taxpayer, but it could be substantial. The Office of Management and Budget (OMB) estimated that the direct spending costs of the 1995 House-passed ESA and wetlands "takings" bill would be $28 billion over seven years. This estimate was very conservative because, as then-OMB Director Rivlin testified, it did not include claims from unscrupulous developers who would "game the system," purposefully bringing themselves within the regulatory scheme with implausible development plans so that they could set up a claim for automatic payment. Pombo's bill would encourage such gamesmanship, since the Service would be obligated to pay regardless of whether the developer has the financial capacity or government approvals needed to carry out its proposed project.

If the Pombo bill's provisions requiring payoffs to developers were to become law, it would establish a precedent that could be used to weaken a vast array of other health, safety and environmental protections and programs.

2. Wildlife Agency Reviews of Federal Actions Would Be Bypassed

Perhaps the most important "safety net" provision of the Endangered Species Act is the requirement that all federal agencies consult with the Service concerning the harmful impacts of their actions on threatened and endangered species. This provision ensures that federal agencies "look before they leap" into projects that may irreparably damage valuable habitats and determine, with the expert advice of the Service, whether their projects will cause "jeopardy" to a threatened or endangered species or "adversely modify" its critical habitat. *See* ESA § 7(a)(2); *see also* Parts 3 and 4 below. This provision encourages federal agencies, industry groups and other stakeholders to develop collaborative solutions that address both conservation and development needs. For

example, it is through the consultation process that the Service and other stakeholders address the needs of both endangered fish and agricultural water users in Rep. Pombo's district.

The Pombo bill allows federal agencies and industry groups to bypass this carefully-developed set of consultation rules and expedite federal projects that harm wildlife. According to the bill, the Secretary of Interior or Commerce may identify entire categories of federal actions that would satisfy the Endangered Species Act simply by complying with unspecified "alternative procedures." The bill imposes no minimum standards for these alternative procedures, thus allowing a potentially vast array of destructive federal activities to evade the normal wildlife agency reviews and to go forward quickly without any significant offsetting conservation measures.

3. Critical Habitat Protection Would Be Eliminated

Of all the Endangered Species Act's provisions, only the critical habitat feature makes it absolutely clear that federal actions cannot destroy habitat needed for endangered species recovery. Although other provisions of the Act protect some habitat, they have been interpreted as not protecting all of the habitat needed for recovery. The Act's critical habitat feature has helped with the turnaround of a host of endangered species. An example is the whooping crane, which was threatened by federal dam projects along the Platte River in Nebraska until the critical habitat protection was used to bring about a collaborative solution – a multi-stakeholder conservation trust that has helped acquire over 10,000 acres of riparian habitat while dam operations moved forward. The Pombo bill ignores the crucial role of critical habitat protection, repealing it from the Act altogether (pp. 7-10.)

To justify this repeal, Rep. Pombo claims that he has replaced critical habitat with a better habitat protection tool, set forth in the bill's recovery plan provisions. However, the Pombo bill merely states that recovery plans must identify areas of "special value" to the conservation of the species (p. 21.) Unlike the Act's current critical habitat feature, the Pombo bill does not require that recovery plans identify the habitats needed for conservation (*i.e.,* recovery) of the species. There is no definition of "special value." Thus, only a subset of the important habitats – those that do not stand in the way of powerful developers – may be deemed special enough to warrant designation in the recovery plan. The Pombo bill assigns the task of developing recovery plans to industry-dominated "recovery teams" (pp. 23-24) who are not likely to agree to a broad definition of "special value" habitats.

The Pombo bill also fails to require completion of recovery plans for the hundreds of listed species that currently lack them. (In contrast, the bill imposes a 2-year deadline for completing recovery plans for species to be listed in the future.) Although the Secretary of Interior or Commerce must develop a "tentative schedule" to develop recovery plans for those already-listed species (p. 19), they are only required to follow the schedule "to the maximum extent practicable" (pp. 19-20). In the absence of any mandate to complete

a recovery plan for these species, it is difficult to see how habitats of "special value" will be identified in a timely way.

The Pombo bill also falls short in protecting habitat needed for recovery because it does not actually protect the habitat areas to be identified in the recovery plans. Under the current Act, federal agencies are precluded from taking any action that "adversely modifies" designated critical habitat. The Pombo bill eliminates the "adverse modification" prohibition (p. 10) and provides no replacement mechanism for protecting habitat areas needed for recovery. In fact, it states that recovery plans are non-binding (p. 26) and deletes the Act's current requirement that recovery plans be implemented (p. 16), thus providing a green light for federal agencies to ignore the need to protect habitat areas identified as having "special value."

4. Protection Against Jeopardy Would Be Weakened

Another crucial "safety net" protection of the Endangered Species Act is the duty of federal agencies to ensure that their actions do not jeopardize the continued existence of threatened and endangered species. Pombo's bill would weaken this protection in at least two significant ways.

First, the bill defines "jeopardize the continued existence" as covering only those federal actions that would impede conservation of the species "in the long term" (p. 5). This new definition would open up a loophole allowing destructive federal projects to go forward unimpeded in and around endangered species habitat, causing immediate and tangible harm to the species, based upon a speculative argument that conservation in the long term is assured. For example, if a federal forest plan allows massive timber harvesting, making streams uninhabitable for endangered salmon, this new jeopardy definition could allow the plan to go forward based solely on its stated goal of long-term forest regeneration – even though the plan lacks any significant conservation measures to address the harmful short-term impacts that put the species at risk of extinction.

Second, the bill would force the Service to put blinders on considering whether a species is in jeopardy of extinction. Under the current Act, in evaluating a federal action's impact on a species, the Service must consider the "baseline" condition of the species at the time the action would be carried out. Thus, if a host of other projects are also negatively affecting the species, the Service must address the cumulative effects of the projects combined in evaluating whether the species is in trouble. The Pombo bill (p. 44) forbids the Service from taking these baseline conditions into account. It thus requires that the Service ignore reality on the ground and invent a fictional environment where the proposed action is the only current threat to the species' existence.

5. Protection of Threatened Species Would Be Weakened

Unlike endangered species, species listed as threatened under the Endangered Species Act do not enjoy the prohibitions of the Act's statutory take prohibition. (ESA § 9). Instead, the Act requires that the Service issue regulations as necessary to provide for the

conservation of the species. (ESA § 4(d)). Because of the crucial importance of protecting threatened species from habitat destruction and other forms of take, the Service has issued a default regulation pursuant to ESA § 4(d) extending the take protection to all threatened species except those (a small handful) for whom special rules have been crafted.

The Pombo bill eliminates this common-sense approach to threatened species. Under the Pombo bill, the requirement that the Service issue regulations as necessary to provide for the conservation of the species is repealed (p. 15). The current default rule extending the take protection to all threatened species is apparently also repealed; the bill requires that any regulation issued to protect threatened species must be issued on an individualized basis. Considering the enormous cost that would be entailed in issuing separate regulations for each threatened species, and the repeal of the statutory mandate to do so, the Service is unlikely to restore the necessary protections.

The take protection for threatened species stimulated developers to participate in multi-species habitat conservation planning in southern California for the California gnatcatcher and numerous other species. This conservation effort, which helped conserve thousands of acres of expensive real estate in a biodiversity hotspot, is often cited as a model for the rest of the country and the world. The Pombo bill would eliminate the Endangered Species Act protections that made large-scale HCPs happen.

6. Miscellaneous Additional Weakening Provisions

The Pombo bill has a host of additional provisions that would make the Endangered Species Act's goal of species recovery more difficult to accomplish. Among them:

- It calls for new regulations that define "best available science," allowing the Secretary of Interior to lock in politically-motivated definition of this key term rather than allowing scientists to continue to define it according based on evolving knowledge and information. (P. 3-4).
- It imposes a new definition of "distinct population segments," reducing the likelihood that species will be protected at the population level, even when such a proactive measure would be the most effective and least costly conservation strategy. (P. 6).
- It codifies the "no surprises" rule, which limits the ability to reopen permits for incidental take of listed species, without including tools, such as monitoring and adaptive management, that are widely recognized as necessary to rescue species declining toward extinction. (P. 51.)
- Habitat destruction is authorized, and consultation duties are waived, for activities carried out pursuant to newly-created state conservation agreements. The bill imposes no mitigation requirements or other minimum standards for these agreements. (P. 38)
- Numerous new bureaucratic hurdles are imposed on the Services, despite the already severe shortage of resources and the likelihood that substantial appropriations increases will not be forthcoming.