

September/October 2005

Vol. XVI, no. 5

COMMENTARY

"Fixing" the Endangered Species Act

By Jim Motavalli

There was some speculation that he wouldn't actually appear, but there, in a polo shirt, sat House Natural Resources Chairman Richard Pombo (R-CA), just inches away from Sierra Club Executive Director Carl Pope.

The setting was the Society of Environmental Journalists (SEJ) conference, held this year in Austin, Texas, and surely the belly of the beast as far as Pombo is concerned. Though SEJ journalists come from all political perspectives, there's a natural tendency to think that anyone covering the environment is inherently sympathetic to a green viewpoint. Not surprising, then, that there was controversy when Robert Kennedy, Jr. got a standing ovation at last year's conference. (Bill Moyers was similarly received this year, with somewhat less controversy.)

One expects fireworks at events like this. The Iraq War debate between two seasoned British orators, MP George Galloway and writer Christopher Hitchens, certainly contained enough firepower to fuel a dozen conflicts. (Hitchens was the clear winner, in my view, but others may have warmed to Galloway's fruity bombast.)

As it happened, politeness ruled. *Washington Post* reporter Juliet Eilperin was the soul of impartiality, praising Pombo's service as the youngest committee chairman ever, and offering him kudos for his 229-193 House win on Endangered Species Act (ESA) revisions. She even praised Pombo's press secretary, Brian Kennedy, for actually returning her calls.

Pope failed to go for the jugular and instead agreed with a point Pombo made in his opening remarks. Pombo similarly held his fire, and the pair mostly talked around each other. Pope made clear he opposes the ESA revisions, but he attacked the broad scope of Pombo's ideas rather than the man sitting next to him. Pombo, who not only looked like a "regular guy" but also talked like one, made the notion of gutting the nation's environmental laws seem like nothing less than pragmatic policy.

It was left to Pat Parenteau, a law professor and director of the Natural Resources Law Clinic at Vermont Law School, to enumerate the Bush administration's multiple-front environmental assault. Indeed, Parenteau was so incensed he seemed to barely get his words out before the next sentence was formed.

I talked to Parenteau after the panel, with a special emphasis on Pombo's ESA revisions and what they will mean if the bill becomes law. (Passage in the Senate is considered problematic, but the ESA is by no means assured of victory there, even with major doubts from Senator Lincoln Chafee and others.)

"Pombo's bill may have some redeeming qualities—there is at least some funding for incentives—but for the most part it's really awful," Parenteau says. "It provides money for people whose land has been taken by the ESA, but in fact there never actually has been such a 'taking.' No one has ever successfully sued and proved that the ESA took their property. The only case that could be cited revolves around California's Tulare Lake, where irrigation waters were held back to protect Chinook salmon and delta smelt, but the Bush administration settled in favor of the plaintiffs."

The idea of "takings" is at the heart of not only Pombo's revisions to the ESA, but also to Pombo's stated reason for serving in Congress. "You've got to pay when you take away somebody's private property," he says. Pombo told everyone who would listen that his family's ranch in Tracy, California had been designated critical habitat for the San Joaquin kit fox. The claim won him a lot of sympathy. Here's a report from a typical California daily: "Pombo, a Tracy rancher, first entered politics because of his strong feelings against the way the Endangered Species Act was implemented—several species live on land either he or his family owns. He has tried to rework the act ever since he was elected in 1992." The poor guy even testified before the Senate Environment Committee about the grim ordeal his family went through.

The truth is somewhat different. Pombo's land is not protected fox habitat, a fact confirmed by Mollie Beattie, former head of the U.S. Fish and Wildlife Service. Pombo then backtracked slightly, according to Faultline.org, at first claiming it "may have been one of his neighbors' ranches." Finally, the website reports, "After having it pointed out to him that no critical habitat had been declared anywhere for the fox at that point, he caved."

There's more. Pombo also cites the case of Kern County farmer Taung-Min Lin, who was accused in 1994 of illegally killing and destroying the habitat of the threatened Tipton kangaroo rat. Pombo's version: "20 armed federal agents stormed his farm, arrested Mr. Ming-Ling [sic] and confiscated his tractor for allegedly running over a few Tipton kangaroo rats." In fact, Faultline.org says, Lin had repeatedly refused to answer letters explaining how he could take the rats legally,

and had ignored informal warnings and visits. The huge impact on Lin amounted to little more than a \$5,000 fine and a short suspension of farming rights.

Pombo and his colleagues also distorted a supposed "smoking gun" case involving federal officials supposedly planting Canadian Lynx fur in national forests to "prove" that habitat existed. But as Daniel Glick reported in *Outside* magazine, the fur (taken from a stuffed office bobcat) was actually sent to a lab to analyze the lab's testing procedures. "What emerges is not a scientific scandal but a case study in media-amplified demagoguery," *Outside* reported. "There is no evidence whatsoever to support either a conspiracy or a cover-up. The scientists didn't 'plant' lynx fur in the forests. They didn't plot to invoke the Endangered Species Act through falsified data. And even if they had, it wouldn't have worked, because any evidence of lynx would have to be confirmed with further research before new management decisions could be made."

On slender reeds like these a whole revision of the ESA was built, and passed through the House of Representatives. The bill would allow property owners to file for damages, but as Parenteau points out, "Of course if the money is there people will try to get access to it, but how will their cases be proven? The idea that this approach will somehow do the right thing for endangered species is ludicrous. The chances of it working out are impossibly small."

Parenteau says he would give up the admittedly flawed and very slow ESA process entirely if the federal government would simply stop subsidizing the destruction of endangered habitat through such big-ticket items as agriculture and irrigation payments, highway construction and energy boondoggles.

Pombo, claiming that he simply wants to do things the right way, says that the ESA as presently constituted has a "less than one percent" success rate for species recovery. "There is little evidence of progress in the law's 30-year history," he declares. But in fact, according to Environmental Defense, a peer-reviewed analysis concludes that more than 50 percent of U.S. species listed as endangered before 2000, and almost two-thirds of species listed for 13 or more years, are stabilized or are improving.

Environmental voices are being raised in opposition to Pombo's steamrolling ESA bill. Kieran Suckling of the Center for Biological Diversity (CBD) says that the revisions "systematically strip all of the recovery tools from the Act; for example, it eliminates 200 million acres of critical habitat, even though scientific studies show that species with critical habitat are recovering twice as fast as those who don't. Instead of having scientists decide what science is, a political appointee decides what science is. Hundreds of species are going to go extinct; it rips the safety net right out from endangered species."

In effect, the ESA revisions eliminate the whole concept of "critical habitat" (it's "86'd," according to Pombo aide Brian Kennedy). This dismays critics like Senator Lincoln Chaffee (R-RI). "If you gut the habitat you're really gutting the Act," he says. "This is a critical part of any recovery. Habitat is absolutely essential to any species."

The bill specifies that landowners with development plans will get answers within 180 days, with another 180-day extension possible. If the government can't marshal the facts in that time, the bulldozers start moving. If the feds try to interfere, they have to pay "fair-market value" for the property. The Interior Secretary (in this case, known property rights sympathizer Gale Norton), has the job of determining what constitutes "appropriate scientific data."

"The impact of Pombo's bill on wildlife agency budgets would be devastating," says the National Wildlife Federation. "Even after the U.S. Fish and Wildlife 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. Already struggling with anemic budgets, wildlife agencies would be thoroughly hamstrung by this new budgetary obligation."

Rachel Carson must be spinning in her grave, because another provision exempts pesticides from ESA review for five years. If DDT was causing bald eagle eggs to develop thin shells, as *Silent Spring* reported, the ESA would have nothing to say about it. "At a time when deformed frogs are being found in lakes and rivers across the nation, it is a dangerous travesty to exempt pesticides from environmental review," says Suckling.

The Endangered Species Coalition points out that the ESA has been successful in preventing the extinction of the American Bald Eagle, the California condor, Pacific Northwest salmon, gray wolf and American alligator. "The ESA is a safety net for wildlife, plants and fish that are on the brink of extinction," says Liz Godfrey, the coalition's program director. "The American public supports the ESA and wants it to remain strong."

That was the sentiment expressed by a strong *Miami Herald* editorial October 3. The revisions, the newspaper said, amounted to "a sell-out of the very creatures the law is supposed to protect. If the Senate were to go along with this bill, it would reverse three decades of progressive actions that have restored American Bald Eagles and condors, and Florida panthers, manatees and Key deer, to name a few."

Back at the SEJ forum, I stood in line to ask Congressman Pombo a question. As it happens, the line was cut off just before I made it to the mike, but had I been given a chance I would have asked him about his ludicrous parks bill (see last week's "Our Planet") and his claims about having been an ESA victim. Oh well. To be collegial, I'll give Pombo the last word here. The revisions, he claimed, "fix the long-outstanding problems of the Endangered Species Act by (1) focusing on species recovery (2) providing incentives (3) increasing openness and accountability (4) strengthening scientific standards (5) creating bigger roles for state and local governments (6) protecting private property owners and (7) eliminating dysfunctional critical habitat designations."

Editorial assistance from Mike LaTronica and Daniel Scollan.