Analysis of Senator Crapo’s S. 2110
As Introduced December 15, 2005
Crapo Bill Undermines the Endangered Species Act

On December 15, 2005, Senator Mike Crapo (R-ID) introduced S. 2110, the so-called “Collaboration and Recovery of Endangered Species” bill. Cosponsors of the bill are Thomas (R-WY), Allard (R-CO), and Lincoln (D-AR). Like the Pombo bill, H.R. 3824, that was passed by the House on September 29, 2005, the Crapo bill is a major attack on wildlife conservation and a give-away to developers and the extractive industries. The Crapo bill would cut the heart out of the Endangered Species Act, America’s safety net for plants and wildlife on the brink of extinction. Below are some of the worst provisions of the Crapo bill, in the order they are presented in the bill.

Existence of State Conservation Plan Allows Habitat Destruction without Consultation (pages 3-8)
The Crapo bill would allow incidental take of candidate species and destruction of their habitat, even after the species is listed as threatened or endangered, if those activities are listed in a cooperative agreement between the Secretary and the state. Current law requires federal wildlife agencies to review each project that involves incidental take or destruction of habitat of listed species. The Crapo bill would eliminate that requirement if there is a federal-state cooperative agreement that “remains an adequate and active program for the conservation of endangered species” (page 4, line 8). In other words, the existence of a general state conservation agreement for a candidate species would authorize individual developers to destroy habitat and take the species with no further consultation on individual actions, even after the species is listed as threatened or endangered.

Allows 3-Year Delay on Listing Petitions (pages 11-12)
The Crapo bill would extend the deadline to 3 years for federal wildlife agencies to respond to listing petitions. Current law requires the agencies to issue a proposed listing rule within one year of receiving a listing petition. This extension adds considerable delay to a process already severely behind schedule due to political appointees interfering in and deliberately delaying scientific decisions.

Eliminates Mandatory Timelines to Designate Critical Habitat (page 14)
The Crapo bill would require that critical habitat is designated “[e]ither 3 years after the date on which a recovery program is commissioned, or in accordance with the schedule described in paragraph (4), and in no case later than 5 years after the date on which an endangered species is listed…” (page 14, line 15). Current law requires that critical habitat is designated concurrently with listing a species, but critical habitat designation is often significantly delayed. However, the Crapo bill would set no mandatory deadline for the commissioning of recovery programs. Furthermore, the Crapo bill would deliberately make enforcement of the 5-year deadline impossible by specifically exempting the Secretary from any court orders to enforce the legal deadlines for species listings, critical habitat designations, and recovery plans (see pages 16-21, below).

Indefinite Use of Inadequate Provisional Recovery Goals (page 15)
The Crapo bill would require the Secretary to publish “provisional recovery goals” at the time of listing, when the scientific understanding of the biological needs of the species may be very poor, and explicitly restricts federal wildlife agencies from updating those goals until a recovery plan is adopted. However, the Crapo bill provides no deadline for the recovery planning process (See pages 16-21, below). Therefore, the provisional recovery goals would likely be in place for many years. To make matters worse, the provisional recovery goals are authorized to include delisting criteria that will not be the result of careful scientific study regarding recovery of the species, but will instead be based on limited understanding and political expediency.

Increases Political Interference in Listings, Critical Habitat, and Recovery Plans (pages 16-18)
The Crapo bill would allow the Secretary to prioritize listings, critical habitat designations, and development of recovery plans based on “the degree to which recovery efforts would minimize conflicts with…construction, development projects, jobs, private property, or other economic activities” (page 18, line 6). Current law requires that listings are based solely on the biological needs of the species. The Crapo bill would allow the Secretary to assign low priority to and indefinitely postpone listings, critical habitat designations, and recovery
plans that would interfere with industry interests. Even then, the Crapo bill would not require the Secretary to actually address the prioritized actions (see pages 16-21, below).

Eliminates Clear Deadlines and Implementation Requirements (pages 16-21)
The Crapo bill would extend mandatory timelines to list species as threatened or endangered and to designate critical habitat, and would provide no deadlines for commissioning recovery programs or issuing recovery plans. Instead of clear, enforceable deadlines, the Crapo bill would allow the Secretary to develop a prioritization system for listings, critical habitat designations, and recovery plans and allow the Secretary to revise the priority rankings. Although the Crapo bill would require the Secretary to “establish a schedule of all decisions under this subsection… based on the priority ranking system described in paragraph (3)” (page 19, line 6), the Secretary would not be required to implement that schedule. In fact, the Crapo bill includes no requirement to implement the actions identified in the schedule.

Furthermore, the Crapo bill would allow the Secretary to continually revise the schedule in response to newly filed petitions (including delisting petitions) and by “elevating the priority of a recovery plan that receives financial or other commitments from a non-Federal sponsor,” (page 21, line 5). Thus, the Crapo bill would encourage and facilitate political manipulation of priorities for species listings and recovery planning and the allocation of funding by allowing the Secretary to reset priorities based on each petition and funding offer (see also pages 16-18, above).

Restricts Judicial Review of Delays in Listings and Critical Habitat Designations (pages 16-21)
The Crapo bill would strip the federal courts of the power to require the Secretary to complete listing decisions or critical habitat designations in a timely manner: “No court shall have the power to require the Secretary to complete an action inconsistent with the schedule established” (page 21, line 5). Thus, the Secretary could ignore court-ordered deadlines indefinitely simply by raising the priority of other actions and then claiming that the court-ordered action is inconsistent with the revised schedule. In effect, citizen groups would be barred from challenging failures to protect species and habitat because the courts would not be allowed to order implementation of any other schedule or deadlines. Although the bill requires existing court-ordered deadlines to be included in the priority schedule (page 20, line 7), the Secretary could indefinitely ignore those deadlines by revising the priorities and schedules.

Discourages Listing the Most Imperiled Species (page 17)
The Crapo bill would allow the Secretary to assign lower listing priorities to species that are less likely to recover, based on “the likelihood of achieving recovery” (page 17, line 7), thus allowing the Secretary to delay listing and the associated protections to species that are at highest risk of extinction. The Crapo bill would also allow the Secretary to assign lower listing priorities to species for which there has not been extensive research and documentation of the species in the past, based on “the quality and quantity of available information” (page 17, line 9). This policy provides a perverse incentive that discourages the agencies from gathering data on species they have overlooked in the past, even as those species continue to decline.

Ignores Hundreds of Endangered Species with No Recovery Plans (pages 17-21)
The Crapo bill fails to require the development of recovery plans for threatened and endangered species currently without recovery plans. The hundreds of threatened and endangered species without recovery plans would continue to lack recovery goals and adequate funding.

Ignores Hundreds of Endangered Species with No Habitat Protections (pages 17-21)
The Crapo bill fails to require the designation of critical habitat for the hundreds of threatened and endangered species that currently have no critical habitat designated. There would continue to be no protection of the habitat necessary for the recovery of these species.

Ignores Hundreds of Candidate Species Waiting for Listing (pages 17-21)
The Crapo bill fails to require the listing of the hundreds of imperiled species on the Candidate list waiting for listing as threatened or endangered species. There are currently 286 plants and animals on the Candidate list, which has no time limit and provides no legal protections.
Gives “Collaborative Groups” Control of Federal Funds (Pages 18-19, 23-24)
The Crapo bill states that “[i]f a collaborative group described in clause (i) uses non-Federal funds to carry out actions that support the completion of the pending action for the species, the Secretary shall facilitate the pending action to a commensurate extent” (page 18, line 23). This is likely to be interpreted as requiring the Secretary to provide dollar-for-dollar matching funds for the non-Federal funds provided for these actions if the Secretary finds that a “collaborative group” meets the definition of an “executive committee.” Although the executive committee is supposed to “reflect a cross-section of interests” (page 23, line 21), there is no requirement that these collaborative groups must be open to all interested parties, and could overwhelmingly or exclusively represent commercial interests. The Crapo bill would then allow these well-funded collaborative groups of commercial interests to demand Federal matching funds. These limited Federal funds should instead be used as determined by the federal wildlife agencies to best benefit species protection and recovery.

Allows Collaborative Groups to Rewrite Scientific Decisions in Recovery Plans (pages 21-28)
The Crapo bill would create a convoluted recovery planning process that allows industry to rewrite and overrule the decisions of wildlife experts. It would create “executive committees” made up of individuals with “an economic, social, or professional interest in the recovery of the species” (page 24, line 9) that would have the authority to edit and revise the recovery plan, in some instances giving them the final say on the recovery plan developed by scientists and agency biologists. The executive committee would also develop a “work plan describing the collaborative and voluntary efforts that the executive committee recommends to contribute to the recovery of the applicable species” (page 25, line 1), thereby allowing the collaborative group, rather than the scientific experts of the recovery team or the federal wildlife agencies, to set implementation priorities.

Ensures that Recovery Plans Are Unenforceable (page 27)
The Crapo bill explicitly states that recovery plans shall be “non-binding and advisory.” This ensures that the actions and goals set forth in the recovery plan will be unenforceable. In other words, implementation of the actions set forth in recovery plans could be postponed indefinitely.

Allows Destruction of Prime Habitat in Exchange for Less Valuable Habitat (pages 30-43)
The Crapo bill would create a highly convoluted “conservation bank” system that allows developers to destroy endangered species habitat in exchange for purchasing credits to protect habitat elsewhere. The current system of habitat mitigation requires federal review of each mitigation exchange to ensure the survival and recovery and the species, but the Crapo bill would recreate it as a market-based system and sets no standards for habitat mitigation. The Crapo bill requires the Secretary to manage the conservation banks “in a manner that balances the biological conditions of…species…and habitat; with economic free market principles…”(page 36, line 14). Also, the Crapo bill ambiguously defines “out-of-kind” mitigation as “involving the same species or habitats, but in a different service area” (page 39, line 18), apparently to allow the destruction of habitat for one species to be mitigated by acquiring mitigation credits for another species. Even if this ambiguity were resolved, the Crapo bill would allow developers to destroy prime habitat in areas of prime commercial development in exchange for marginal habitat in areas of lower commercial value. More likely, this provision would allow unmitigated destruction of habitat for highly imperiled species in areas of prime commercial development.

Authorizes “Provisional Permits” for Habitat Destruction without Review (pages 47-49)
The Crapo bill would allow the Secretary to issue a “provisional permit” authorizing “existing activities (except an activity that requires ground clearing) relating to the relevant land” (page 48, line 17) while the user applies for an incidental take permit. Thus, before the Fish and Wildlife Service has assessed the impacts of an action (such as logging, mining, or development) on an endangered species or evaluated the conservation plan, the user would be allowed to engage in any action short of land clearing, including the incidental take of the endangered species and adverse modification of critical habitat. Under current law, incidental take of an endangered species or adverse modification of critical habitat requires an incidental take permit from the Fish and Wildlife Service and often an authorized conservation agreement (such as a Habitat Conservation Plan). The Crapo bill would circumvent those requirements. The issuance of a provisional permit under the Crapo bill would require only that the developer completes a survey for the endangered species and begins implementing the conservation activities proposed in the application for the incidental take permit. However, the Crapo bill provides no definition or standards for such surveys. Also, there is no review or oversight of the developer’s plan or its implementation, and no assessment of whether the conservation activities will in any way mitigate
the harmful activities on the species. Furthermore, because the Crapo bill fails to define “ground clearing,” harmful activities such as logging and mining could potentially proceed under such a permit.

**Exempts Habitat Conservation Plans from Consultation and NEPA Review (pages 47-49)**
The Crapo bill states that if a Habitat Conservation Plan includes “1 or more site-specific recovery actions from a relevant approved recovery plan” (page 47, line 14), the HCP would be automatically exempt from section 7 Consultation of the ESA and review under the National Environmental Policy Act. In other words, as long as an HCP includes some action from a recovery plan for one species, regardless of the scope or harmful impacts of the activities being conducted, no Biological Opinion or Environmental Assessment would be required.

Under current law, consultation and NEPA review of HCPs are required to evaluate the impacts of a project on endangered species and the environment in general. By exempting HCPs from consultation and NEPA review, the Crapo bill would allow HCPs to be administered with a much poorer understanding of the impacts of a project, fewer opportunities to avoid and mitigate harmful impacts, and considerably less public oversight of environmentally harmful projects.

**Exempts Habitat Conservation Plans from Assessing Effects on Plants and Critical Habitat (page 47)**
By exempting Habitat Conservation Plans from section 7 Consultation if the HCP includes “1 or more site-specific recovery actions from a relevant approved recovery plan” (see pages 47-49, above), the Crapo bill would effectively exempt the user from having to determine and mitigate the action’s effects on endangered plants on private lands. Current law allows the destruction of endangered plants and their habitat on private lands, but requires HCPs to assess the impacts to endangered plants through Consultation. By exempting HCPs from section 7 Consultation, the Crapo bill also eliminates the assessment of the impact on critical habitats affected by the HCP, the mechanism that currently requires assessment of and mitigation for adverse modification of critical habitat of threatened and endangered plants. Thus, by exempting HCPs from section 7 Consultation, the Crapo bill would allow the unmitigated and unrecorded destruction of threatened and endangered plants and their habitat.

**Permit Applications Complicate Review of Prohibited Actions (page 48)**
The Crapo bill states that “[i]nformation submitted by an applicant in an application under this paragraph shall not be admissible in any action relating to a prohibited act under section 9” (page 48, line 23). This provision could greatly complicate the agency review of actions for prohibited acts if it is misused by developers to shield survey information from review of prohibited acts. Such a provision would need to clarify that agencies would be able to review such actions for prohibited acts based on independent verification of surveys and information.

**Restricts Wildlife Agencies from Updating Conservation Agreements (pages 50-53)**
The Crapo bill would take an extreme and flawed version of “No Surprises”—a highly controversial administrative regulation—and make it law. The federal wildlife agencies would be unable to update or revoke a permit issued in conjunction with a Habitat Conservation Plan that authorizes harm to an endangered species, even if new information indicates that the original plan was inadequate and even if it is causing the extinction of the species.

**Pays Off Developers to Not Violate the Law (pages 55-62)**
The Crapo bill would create tax breaks to compensate private landowners for conservation work done on private property. This would be a good idea, if the provision encouraged private landowners to voluntarily engage in conservation actions that increase or improve endangered species habitat. However, the Crapo bill purposely fails to limit these tax breaks to landowners who engage in active conservation, and provides no distinction between voluntary actions to conserve species and the mitigation already required by law. Therefore, land developers who are already required under current law to set aside some portion of their land from development would now be eligible for significant tax breaks. That is, instead of paying private landowners to create new habitat, the Crapo bill would primarily be paying developers to not destroy habitat they are already required to protect. This system would create no new habitat, and would be a huge give-away of scarce funds that would be better spent assisting private landowners in creating and enhancing habitat.