Silk Purse or Sow’s Ear?
The Pombo Bill and the Endangered Species Act

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After more than thirteen years of gridlock, a bill to reauthorize the Endangered Species Act (ESA) finally passed the U.S. House of Representatives on September 29, 2005. The bill, H.R. 3824, titled the Threatened and Endangered Species Recovery Act of 2005, was sponsored by one of the ESA’s most vociferous critics, Representative Richard Pombo (R-CA), chairman of the House Resources Committee. Pombo rammed his bill through the House with the speed of a Vegas wedding: introducing it, holding a hearing on it, marking it up in committee, and taking it to the House floor in less than two weeks.

While the House adopted Pombo’s bill by a vote of 229-193, the bill was nearly derailed by a bipartisan substitute sponsored by Representatives George Miller (D-CA) and Sherwood Boehlert (R-NY). The substitute was narrowly defeated by a vote of 216-206. A shift of a mere six votes on the substitute would have derailed Pombo’s bill.

Given the speed with which Pombo moved his bill through the House, its full impact on the ESA is only now becoming clear. A review of the bill reveals that it would undermine the fundamental protections of the ESA in several ways:

- Circumvents section 7 consultation. The Pombo bill circumvents the requirement in section 7 of the ESA that federal agencies consult with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service to insure that their actions do not jeopardize the continued existence of listed species. The Pombo bill authorizes the creation of unspecified “alternative procedures” to consultation, potentially allowing agencies to bypass consultation altogether. In addition, the Pombo bill exempts habitat conservation plans and associated incidental take permits from section 7 consultation.
- Exempts pesticide use and regulation. The Pombo bill exempts all use and regulation of pesticides from ESA requirements for at least five years, no matter how severe the impact on endangered species. Under the Pombo bill, compliance with the requirements of the Federal Insecticide, Fungicide, and Rodenticide Act is deemed sufficient to comply with the ESA.
- Eliminates habitat protection. The Pombo bill eliminates requirements for the designation and protection of critical habitat. While the Miller-Boehlert substitute also would have eliminated critical habitat, it replaced it with a requirement that habitat necessary for species recovery be identified in a recovery plan, it adopted a strong statutory definition making clear that any action that impairs the recovery of a species jeopardizes its continued existence, and it mandated that federal agencies consider the impact of their actions on such habitat during section 7 consultation. Those provisions, particularly the strong jeopardy definition, would have made recovery the central focus of the law, strengthening its effectiveness. The Pombo bill contains none of these safeguards, making the recovery of endangered species far less likely and the extinction of species far more likely.
- Undermines section 9 take prohibition and section 10 incidental take permit requirements. The Pombo bill simultaneously undermines two of the most important provisions of the ESA: the section 9 prohibition against take of endangered species and the section 10 requirements for incidental take permits. Under the Pombo bill, a developer can demand that the U.S. Fish and Wildlife Service determine, within 180 days, whether a proposed