TESTIMONY OF
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BEFORE THE HOUSE COMMITTEE ON NATURAL RESOURCES
OVERSIGHT HEARING ON
DEFINING SPECIES CONSERVATION: TRIBAL, STATE AND LOCAL STEWARDSHIP vs. "SUE AND SETTLE" PRACTICES
JUNE 4, 2013

My name is Patrick Parenteau. I am professor of law and senior counsel to the Environmental and Natural Resources Law Clinic at Vermont Law School. I have been actively involved in the practice of environmental law for almost forty years. My career spans every facet of environmental law. I have held senior positions in the non-profit sector with the National Wildlife Federation, in the federal government as general counsel with EPA Region One, in state government as Commissioner of the Vermont Department of Environmental Conservation, in the private sector as of counsel with the law firm of Perkins Coie, and in academia as director of the environmental law program at VLS. I have substantial experience with the subject matter of this hearing. I was involved in some of the earliest and most important cases under the Endangered Species Act; I testified in the legislative hearings on the amendments to the Act in 1978, 1979, and 1982; I have appeared in all four proceedings before the endangered species exemption committee created by the 1978 amendments; I served as special counsel to the US Fish and Wildlife Service in the northern spotted owl exemption proceedings; I have commented on a number of rulemaking sunder he Act and have published numerous articles on its successes as well as its shortcomings.

I would like to thank Chairman Hastings and Representative Bardallo for providing me this opportunity to share the following observations on the subject of today's hearing.

I THE EXTINCTION CRISIS IS REAL AND THE COOPERATION AND COMMITMENT OF ALL PARTIES –PUBLIC AND PRIVATE, FOR PROFIT AND NOT FOR PROFIT— IS REQUIRED TO MEET THE CHALLENGE.

The consensus of the scientists who study species and ecosystems is that we are in the midst of the sixth great extinction rivaling the five mass extinction events in

earth's history.[1] A poll by the American Museum of Natural History found that 7 in 10 biologists believe that mass extinction poses a colossal threat to human existence, a more serious environmental problem than even its contributor, global warming, and that the dangers of mass extinction are woefully underestimated by most everyone outside of science. Professor EO Wilson (*The Diversity of Life*) has calculated that human caused extinction rates are between 100 and 1000 times the natural background rate of extinction and could climb as high as 10,000 times in a few decades. According to the latest IUCN "Red Book," of the 40,168 species that the 10,000 scientists in the World Conservation Union have assessed, 1 in 4 mammals, 1 in 8 birds, 1 in 3 amphibians, and 1 in 3 conifers are at risk of extinction. The peril faced by other classes of organisms is less thoroughly analyzed, but fully 40 percent of the examined species on the planet are in danger, including up to 51 percent of reptiles, 52 percent of insects, and 73 percent of flowering plants. Here in the US the number of species listed under the ESA has grown to over 2000, and hundreds, perhaps thousands more are candidates for listing.

The causes of this dramatic loss of biological diversity are well known: habitat loss; invasive species; pollution; unsustainable harvests of marine life; and, looming ever larger, climate disruption. The truth is that humans exert a profound effect on the earth's ecosystems and evolutionary processes. The good news is that humans can change the way they use land and water and other natural resources and thereby reduce their impact on natural systems. However it will take an unprecedented level of cooperation and commitment among all levels of government and all stakeholders in order to halt and reverse the march towards extinction.

As the title of this hearing indicates tribal, state and local governments all have important roles to play in species conservation. So does the federal government and so do the other nations of the world. It is not either/or; it is all of the above. There are many examples of how each level of government contributes to conservation. The Nez Perce Tribe assumed management of the gray wolf recovery process in Idaho. The Columbia

[1] See Millennium Ecosystem Assessment, Ch. 4 Biodiversity, 3 (2005); available at http://www.unep.org/maweb/en/Index.aspx The study found that over the past few hundred years humans may have increased the species extinction rate by as much as three orders of magnitude. The study also found that 60 percent of the world's ecosystem services assessed have been degraded or are being used unsustainably.

River Intertribal Fish Commission has been working for decades to restore the depleted runs of Pacific salmon. The Yurok Tribe has been studying ways of reintroducing the California condor to their lands. The list goes on.

There are many examples of what states are doing as well: The California Natural Communities Conservation Program; the Oregon salmon management plan;[2] the network of state natural heritage programs in every region of the country;[3] the many statewide habitat conservation plans adopted under the ESA; and the fact that all but four states have adopted state endangered species acts modeled on the ESA;[4]

Local governments also have a key role to play in promoting smart growth, preventing sprawl, investing in green infrastructure through proper management and protection of floodplains, wetlands and open space. The very first habitat conservation plan was created in San Bruno County California to conserve the habitat of the San Bruno blue butterfly. Volusia County in Florida developed a comprehensive beech lighting program to protect nesting sea turtles. Austin Texas created one of the first multi-species HCPs to balance development and conservation goals. I am sure there are many more examples of local success stories that unfortunately do not get as much attention as the controversies that periodically erupt when development collides with the needs of species.

II THE ESA IS AN INDISPENSABLE TOOL IN THE SPECIES AND ECOSYSTEM CONSERVATION EFFORT

2013 marks the 40th anniversary of the ESA. To say that the Act has led a tumultuous life would be an understatement. A law first proposed by President Nixon and passed overwhelmingly in both the House and Senate has become a lightning rod for political attack. Too often these attacks have shed more heat than light on the issues and the genuine problems that do exist. The ESA is not a perfect law; nor are any of the other laws passed by Congress. But the flaws have more to do with how the law is implemented than how it is written. A full discussion of all the ways in which the administration of the Act could be improved as well as what amendments could actually

[2] Oregon Department of Fish and Wildlife http://www.dfw.state.or.us/mrp/salmon/
[3] NaturServ http://www.natureerve.org/visitLocal/
[4] American bar Association, Endangered Species Act: Law Policy and Perspective, 2d ed. Ch. 11 (2010)

strengthen the Act is beyond the scope of this presentation. Suffice to say I welcome the day when there can be a sober and objective analysis of ways in which the threats to species can be reduced and the ecosystems on which they depend can be better conserved while enhancing sustainable development and job creation goals.

For now however, it is clear that but for the ESA many more species would have gone extinct and many more would be doomed to that fate. According to the National Research Council, the ESA has saved hundreds of species from extinction.[5] Some of the more charismatic species rescued from the brink include the whooping crane, bald eagle, peregrine falcon, gray and red wolf, grizzly bear, and gray whale. A study published in the Annual Review of Ecological Systematics calculated that 172 species would potentially have gone extinct during the period from 1973 to 1998 if Endangered Species Act protections had not been implemented.[6] According to the U.S. Fish and Wildlife Service, of the listed species whose condition is known, 68 percent are stable or improving, and 32 percent are declining. The longer a species enjoys the ESA's protection, the more likely it is that its condition will stabilize or improve. The law has also helped to preserve millions of acres of forests, beaches, wetlands and wild places that serve as critical habitat for these species.

The point is that a national law is needed to deal with a problem as all-encompassing as extinction. Tribes, states and local governments have done a lot and could do much more but they cannot do everything necessary to manage wide ranging species like wolves and bears, let alone global species like turtles and whales. The threats to these species are increasingly global such as climate disruption. The response to these threats must be ecosystem based and occur on a landscape scale. As species and ecosystems cross political boundaries so too must the solutions. Species must a have a floor of protection to survive. Leaving protection to the uncertainties of a piecemeal approach and the geo-political differences that exist in the country will not work. A good example of this problem is the Dead Zone in the Gulf. It is caused by the runoff of nutrients form the vast Mississippi River watershed. No one state can fix the problem. The upstream states lack the incentive to incur the costs of

[5] National Academies Press, *Science and the Endangered Species Act*, 4 (1995)
[6] Mark W. Schwartz, "The Performance of the Endangered Species Act," Annual Review of Ecology, Evolution, and Systematics Vol. 39: 279-299 (2008)

controlling the runoff from their farms for the benefit of the downstream states and their fishing industry. The Clean Water Act provides a mechanism to address this kind of trans-boundary problem. Without a federal law little progress would be possible. The same is true is species conservation, perhaps even more so. It is difficult to judge the worth of individual species some with obscure names and no known commercial value. It is always easy to justify one more project that takes one more acre of shrinking habitat. Yet this whittling away of habitat, an acre at a time, is responsible for 85% of the species on the ESA list.[7] The larger the list grows and the longer it takes to implement real recovery efforts the greater the costs and disruption and the less chance there is for a promt recovery.

Having a central repository of information and expertise about species and the efficacy of various recovery techniques is also beneficial and facilitates efforts by tribes, states and local agencies that wish to participate in conservation efforts. Of course this is a two way street. Federal agencies have much to learn from those who are closest to the resources and activities affected by the ESA.

III. "SUE AND SETTLE" IS A RED HERRING THAT DISTRACTS FROM THE CRITICAL NEED TO STRENGTHEN THE ESA'S RECOVERY MECHANISMS

I have read the Chamber of Commerce report "Sue and Settle: Regulating behind Closed Doors." While it makes for entertaining reading I find it badly misrepresents what actually happens in these cases.

First, "sue and settle" is an old story, and it has more to do with politics than reality. Not so long ago the George W. Bush administration was accused of entering into sweetheart deals with industry. My colleague Michael Blumm wrote a law review article documenting a number of these deals including one that sought to relinquish federal rights on public lands and extinguish wilderness study areas without conferring with congress as required by law.[8]

[7] Wilcove et al, "Quantifying Threats to Imperiled Species in the United States," Vol. 48, No. 8 (Aug., 1998), pp. 607-615

[8] Blumm, "The Bush Administration's Sweetheart Settlement Policy: A Trojan Horse Strategy for Advancing Commodity Production on Public Lands," Environmental Law Reporter, Vol. 34, p. 10397, May 2004

The Chamber report states:

> "Sue and settle occurs when an agency intentionally relinquishes its statutory discretion by accepting lawsuits from outside groups that effectively dictate the priorities and duties of the agency through legally binding, court-approved settlements negotiated behind closed doors—with no participation by other affected parties or the public.

Almost nothing in that statement is accurate. First, most of the cases cited involve actions seeking to enforce mandatory duties imposed by statute. In the case of the ESA nearly all of the cases involve citizen suits to enforce statutory deadlines such as the deadline for making decisions on whether to list a species or designate critical habitat. Where discretion is involved suits are brought under the Administrative Procedure Act (APA) and are subject to a standard of review that is highly deferential to the agency. In no case of which I am aware has an agency "intentionally relinquished its statutory discretion." Agencies may choose not to raise arguments they may have on jurisdictional or procedural grounds but that is not the same as relinquishing discretionary authority. Since the days of Attorney General Edwin Meese the Department of Justice has had a policy that explicitly forbids entering into agreements that either cede statutory authority or bind future administrations or congressional appropriations.[9] Every consent decree I've ever seen has a boilerplate provision explicitly stating that the agency retains all of its statutory discretion.

Second, though it is certainly true that settlement negotiations occur "behind closed doors," which is the only way cases can be settled, proposed consent decrees under the ESA and other environmental statutes must be published in the Federal Register, the public and affected parties are allowed to comment, and the judge must make a finding that the consent decree is in the public interest and is not contrary to law. I am aware of instances, including one case in which I was involved, where as a result of public comment a judge has declined to enter a decree and ordered the parties back to the negotiation table. Addition the DOJ has the statutory right to comment on

[9] AUTHORITY OF THE UNITED STATES TO ENTER SETTLEMENTS LIMITING THE FUTURE EXERCISE OF EXECUTIVE BRANCH DISCRETION June 15, 1999 http://www.justice.gov/olc/consent_decrees2.htm

ever consent decree in a citizen suit and object to agreements that compromiser federal interests. Courts pay particular attention to the views of DOJ in such cases.

Third, settlements like the ones in the "mega listing" cases cited by the Chamber do not "dictate the priorities and duties of the agency." Rather these cases enforce duties already embodied in the statute. Indeed if there was no duty there would be no lawsuit and no settlement. Moreover, the listing settlements do not dictate what the ultimate decision must be as to any particular species. Rather the settlements establish a reasonable timetable for making decisions that in some case are long past the statutory deadline.[10] Again if conservation is the goal the sooner a species gets listed the better the chances of recovery and the less costly and disruptive it will be for everyone.

Fourth, contrary to the arguments of some, is little evidence that ESA citizen suits distort agency priorities and actually impede recovery efforts. In one of the few empirical studies done on this question the authors actually concluded that the citizen suits targeted species facing higher threats than those identified by FWS as deserving of higher priority for listing.[11] The authors stated: "Among species in conflict with development citizen initiated species are significantly more threatened than FWS-initiated species."

Fifth, batch listings like those agreed to in the mega listing cases are actually more efficient than listing species one by one. Having a definite timetable with a cease fire agreement to allow the agencies to work through the backlog makes sense. The settlements in the listing cases have given the agencies more control over the process than they had before when they were constantly being sued for violating the law. The courts cannot simply condone statutory violations brought to their attention.

The Chamber report also alleges:

> "This process also allows agencies to avoid the normal protections built into the rulemaking process—review by the Office of Management and

[10] See FWS Listing Workplan to implement the settlements in CBD v FWS and WildEarth Guardians v FWS http://www.fws.gov/endangered/improving_esa/listing_workplan.html r

[11] Barry J. Brosi and Eric G.N. Biber, "Citizen Involvement in the U.S. Endangered Species Act," Vol. 337 **Science** (August 17, 2012)

> Budget and the public, and compliance with executive orders—at the critical moment when the agency's new obligation is created."

This is simply not true. Agencies must comply with the law as written by Congress, including the requirements for notice and comment rulemaking provided in the APA (5 U.S.C. §553). Courts must reverse agency actions that are contrary to law or undertaken without observance of legally required procedures (§5 U.S.C. §706). While agencies can commit to a schedule for performing their mandatory duties, they cannot settle litigation by making commitments concerning the substance of final regulations they will issue. Agencies have inherent authority to reconsider prior regulatory decisions so long as they have a reasoned basis for doing so. *Motor Vehicle Mfrs. Ass'n v. State Farm Automobile In. Co*., 463 U.S. 29, 56-57 (1983).

Courts do not simply rubber stamp these agreements. A good example is *Conservation Northwest v Harris*, No. 11-35729 (April 25, 2013), where the Ninth Circuit recently rejected a consent decree on the ground that it made a substantive change to the Survey and Management Standard of a the Northwest Forest Plan without going through the proper rulemaking process for making such a change.

IV. CONCLUSION

Congress has included citizen suits in a large number of environmental statutes including the ESA. Experience has shown that such suits are a critical component of the implementation of these laws.[12] These suits hold agencies accountable to the rule of law and to the will of congress. There is no merit to the charge that such suits are collusive. There are many safeguards built into the judicial process including the requirement that plaintiffs prove standing to even bring the case, the requirement that courts must approve settlements after taking public comments into account, and the requirements of the APA regarding rulemaking procedures such as notice and comment and reasoned explanations for changes in policy.

The success of the ESA depends on many things starting with adequate funding. As many commentators have noted, Congress needs to provide greater incentives to encourage habitat conservation. The agencies responsible for administering the Act,

[12] Robert L. Glicksman, "The Value of Agency-Forcing Citizen Suits to Enforce Nondiscretionary Duties," 10 Widener L. Rev. 353 (2004)

FWS and NOAA, have created a number of opportunities for tribes, states, local authorities and private parties to participate in the process. These include safe harbor agreements, no surprises guarantees, candidate conservation agreements, recovery credits and tax deductions, and conservation banking opportunities.[13] Those who genuinely want to engage in conservation can find many ways of doing so. There may well be disagreements over what is actually needed for any particular species but decisions must ultimately be based on the best available science.

Thank you. I would be happy to answer any questions.

[13] See FWS Endangered Species Program http://www.fws.gov/endangered/