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Before the Committee on Natural Resources,
Legislative Hearing on H.R. 4315, (Hastings), "*21st Century Endangered Species Transparency Act*,: H.R. (Lummis), "*Endangered Species Recovery Transparency Act*," H.R., 4317 (Neugebauer), "*State, Tribal and Local Species Transparency and Recovery Act*," and H.R. 4318 (Huizenga), "*Endangered Species Litigation Reasonableness Act*."
April 8, 2014

My name is Karen Budd-Falen. I grew up as a fifth generation rancher and have an ownership interest in a family owned ranch west of Big Piney, Wyoming. I am also an attorney specializing in environmental litigation (including the Endangered Species Act). I represent the citizens, local businesses, and rural counties and communities who may not necessarily be the defendants in litigation under the Endangered Species Act ("ESA") but who absolutely feel the consequences that are the results of endless ESA litigation. My clients, friends and family have to live with the results of the species' listings and critical habitat determinations; my clients, friends and family also pay the litigation fees to feed the litigation machine.

If I had to select one word to describe the bills before you today, it would be honesty. As it currently stands, there are only two ways for the general public to get information related to why a species was listed or critical habitat was designated under the ESA, or whether attorney's fees were paid related to ESA litigation. With regard to the basis for listing or critical habitat determinations, the only publically available source of information is through filing a Freedom of Information Act ("FOIA") with the U.S. Fish and Wildlife Service ("FWS") or the National Marine Fisheries Service ("NMFS") asking for the data. While a listing or critical habitat rulemaking published in the Federal Register may describe "why" the FWS or NMFS believed that listing or critical habitat designation was appropriate or prudent, the agencies do not have to publish sources of the "best scientific and commercial data" used to make their decisions. Unless federal court litigation is filed and an administrative record is produced, the "best scientific and commercial data" is only available through FOIA, at a cost of $24.00, $42.00; and $61.00 per hour for search and managerial review time, $.15 per page for black and white copies and $.90 per page for color copies. Maps and odd size reproductions cost more. *See* 43 C.F.R. Part 2, Subpart G.

Public information regarding payment of attorneys' fees for ESA litigation is equally difficult to access. Although it is possible to publically search federal court data bases through PACER [Public Access to Court Electronic Records], those searches are based upon individual federal courts and only by party name. The public then has to research the docket sheet for each case to determine if attorney's fees were paid and why. There is a service charge that has to be paid to be able to search PACER and downloading any document bears an additional cost. This is very difficult and expensive for taxpayers who are footing the bill for the attorneys' fees payments.

In reviewing these four bills and moving away from the hype that even the subject of the ESA seems to provoke, there is nothing evil or right-wing about this legislation. These bills change nothing of substance to the requirement that Congress commanded the federal agencies to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and "to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1532(b).

The proposed legislation can be described as follows:

HR 4315 requires that the information and data used to list species as threatened or endangered and make critical habitat decisions be put on the Internet. It does NOT require the FWS or the NMFS to gather more, different or additional data; it does not change the existing requirement that the "best available scientific and commercial data" be used; it does not add to the citizen suit provisions or create a new cause of action to sue to change the listing process; it does not include any new deadlines. Under this bill, deference will still be owed to the federal agency regarding what to consider as the best scientific and commercial data available. *See Hawksbill Sea Turtle v. Fed. Emergency Mgmt. Agency*, 11 F.Supp.2d 529, 549 (D.Vi.1998). The bill also does not require that only "peer" reviewed or published information be considered nor does it require that the FWS or NMFS conduct new studies or await the completion of new studies and analysis. *See California Native Plant Soc'y v. Norton*, 2004 WL 1118537 (S.D. Cal. Feb. 10, 2004). This bill merely requires that the FWS and NMFS take the "best scientific and commercial data available" supporting their decision scan it onto the Internet. If litigation is filed related to the listing or critical habitat decision, this data has to be produced for the administrative record anyway. HR 4315 does nothing to change that. This bill is not a radical change to the ESA.

HR 4316 similarly only adds a requirement for reporting of data that should already be available. This bill requires a report on attorney's fees and costs for ESA-related litigation. Again, this bill does not change the citizen suit provision of the ESA to add or subtract the amount or type of litigation that can be filed; this bill does not take away any of the Department of Justice's authority or ability to settle litigation at any point, this bill does not bypass the "existing legal safeguards" ensuring that the federal government follows its procedural and legal mandates, including ensuring that deadlines are met. *See* Testimony of Robert V. Percival, Before the House Committee on Oversight and Government Reform, Hearing on "Mandate Madness: When Sue and Settle Just Isn't Enough," June 28, 2012. In his testimony, Professor Percival opines that the citizen suit and Administrative Procedures Act ("APA") waivers of sovereign immunity to allow litigation against the federal agencies are "desirable and favored by public policy," and that "existing legal safeguards preclude collusive litigation." HR 4316 does nothing to dispute or change any of those arguments. The bill simply requires reporting of existing litigation and attorney's fees payments to the public. It should not be a radical notion for the public to know how much is being paid by the federal government and to whom the check is written.

HR 4317 is equally benign. This bill states that the FWS and NMFS must cooperate and consult with State agencies with regard to the data that the federal government considers, and that ESA listing decision-makers consider data submitted by State and local governments and Indian tribes. State and local governments and Indian tribes have significant interest and expertise in protecting plant and animal species and habitats, particularly given that they have local conservation district managers, state game management agencies, and tribal government resources to use for this task. It seems exceedingly arrogant for the federal government to not want to coordinate with these local experts. Other federal statutes, such as the National Environmental Policy Act, require coordination and consultation with State and local governments and Indian Tribes; the ESA should be no different and federal biologists should take advantage of this important local knowledge.

As with H.R. 4315, HR 4317 does not define "best scientific and commercial data available" nor does it require the FWS of NMFS to wait until the State or local government or Indian tribe develops independent data. The terms "cooperate" and "consult" do not give State and local governments or Indian tribes any type of "veto power" over the federal agencies nor do these terms regulate the requirements of the ESA to a subservient position with regard to State, local and Tribal interests. The federal cases that define "cooperate" cite to the dictionary definition of the term from the Webster's New International Dictionary which defines the term as "to work together." *See Long Term Capital Holdings v. United States*, 330 F. Supp. 2d 122, 168 (D. Conn. 2004) *aff'd sub nom. Long-Term Capital Holdings, LP v. United States*, 150 F. App'x 40 (2d Cir. 2005).

The federal courts define "consult" by stating:

> *Merriam–Webster's Collegiate Dictionary* defines "consultation" as "the act of consulting or conferring," and it defines "consult" as "to deliberate together," among other things. *See Merriam–Webster's Collegiate Dictionary* 268 (11th ed.2005). *The American Heritage Dictionary of the English Language* similarly defines "consultation" as "[t]he act or procedure of consulting" and defines "consult" as "[t]o seek advice or information of" or "[t]o have regard for; consider." *The American Heritage Dictionary of the English Language* 286 (1978).

Makua v. Gates, 2008 WL 976919 (D. Haw. Apr. 9, 2008) *order clarified*, 2009 WL 196206 (D. Haw. Jan. 23, 2009).

Consulting and cooperating with State governments, local governments and Indian tribes does not change the mandates or substance of the ESA, but it ensures that all data and information is available to the FWS and NMFS so that they can make the best decision they can.

Finally, HR 4318 caps the hourly fee that attorneys can charge for ESA litigation filed pursuant to the ESA citizens suit provision at the same rate as the hourly fee allowed under the Equal Access to Justice Act ("EAJA"). 28 U.S.C. § 2412(D)(2)(a)(ii). Although the citizens suit provision waives sovereign immunity for ESA litigation related to alleged violations of ESA section 4 (cases related to species listing, critical habitat designation, development of recovery plans and special rules), litigation filed against the federal government related to other ESA provisions are not subject to the citizens suit provision. For example, a substantial amount of litigation related to the ESA stems from charges that the federal government is violating the section 7 consultation requirements of the ESA. 16 U.S.C. 1536(a)(2). Sovereign immunity for those suits is waived pursuant to the Administrative Procedures Act ("APA"); attorney's fees for cases brought pursuant to the APA are paid under the EAJA. EAJA statutorily sets the attorney's fees cap at $125.00 per hour. If the purpose of litigation enforcing the ESA is truly species protection driven, is seems very inequitable for attorneys litigating ESA section 4 cases to receive "unlimited" hourly fees, although those attorneys litigating the equally important ESA section 7 consultation provisions only receive $125.00 per hour. This bill would not stop litigation, change any of the causes of action possible under either the ESA citizens suit provision or the APA enforcing the provisions of ESA section 7; it just treats all ESA plaintiffs' counsel equally.

The concern that litigation, rather than biology or science, would overtake the ESA is nothing new. In fact, settlement agreements like the multi-district settlement agreements in 2011 are not new. *In Re: Endangered Species Act Section 4 Deadline* Limitation, Misc. Action No. 10-377 (EGS), MDL Docket No. 2165. Just over ten years ago, the Clinton Administration's U.S. Fish and Wildlife Service issued its Final Listing Priority Guidance because, even at that time, pending and threatened litigation was "diverting considerable resources away from the Service's efforts to conserve endangered species." *See* Notice of Listing Priority Guidance, 61 Fed. Reg. 24722-02, 24724 (May 16, 1996). That notice was published because the Service wanted to publically announce that it would not "elevate the priority of proposed listings simply because they are the subjects of active litigation. To do so would let litigants, rather than expert biological judgment, control the setting of listing priorities." *Id*. at 24728.

The publication of that guidance was based upon a 1992 Clinton negotiated settlement agreement with Plaintiffs Fund for Animals and Defenders of Wildlife that required the FWS to resolve the conservation status of 443 candidate species by publication of a proposed listing or a notice stating why listing was not warranted[1]. *Fund for Animals et al v. Babbitt*, 92-cv-800 (D.D.C. April 2, 1992). The complaint was never answered by the Justice Department. Rather a settlement agreement was negotiated, and attorney's fees of $67,500 were paid. In 1996, the Fund for Animals revived the same litigation to seek a court ordered compliance with the original settlement agreement because the FWS could not keep up with the ambitious decision-making schedule. *Fund for Animals et al v. Babbitt*, 92-cv-800 (Motion filed by Plaintiffs enforcing the settlement agreement, docket 19 (August 19, 1996)). Again, no

[1] This is exactly the same requirement as the current Center for Biological Diversity and WildEarth Guardians multi-species settlement agreements, although the current multi-species settlement includes 1053 ESA actions.

answer was filed by the Justice Department, but a new schedule for the remaining decisions was negotiated and another $24,500 was paid in attorney's fees. It was then that the U.S. Fish and Wildlife Service issued its Final Listing Priority Guidance to ensure that the work of agency's biologists would not be driven by litigation. *See* 61 Fed. Reg. 24722-02, 24728 (stating that "The Service will not elevate the priority of proposed listings for species simply because they are subjects of active litigation. To do so would let litigants, rather than expert biological judgments, control the setting of listing priorities. The Regional Office with responsibility for processing such packages will need to determine the relative priority of such cases based upon this guidance and the 1983 listing priority guidance and furnish supporting documentation that can be submitted to the relevant Court to indicate where such species fall in the overall priority scheme.")

The events leading up to the 1996 Listing Priority Guidance Federal Register notice are eerily similar to the 2011 multi-species Obama settlement agreement with the Center for Biological Diversity and WildEarth Guardians. The litigation in both cases was filed by environmental groups who were not satisfied with the pace of decisions issued by the FWS or NMFS. Rather than answering the litigation, the Justice Department entered in to settlement agreements committing the federal agencies to strict time deadlines for making decisions that either list species or determine that listing is not warranted. Decisions to place the species on the "warranted but precluded" or on the candidate list are not allowed under either the 1992 or 2011 settlement agreements. Between the settlement agreement in 1992 and the motion to force compliance with the settlement agreement in 1996, the FWS determined, on its own, that it could not comply with the settlement time schedule and its regular workload. 61 Fed. Reg. at 24726 (noting that if the Service were to devote its budget to compliance with the settlement agreement, it would be devoting no resources to the final listing decisions of the 243 species that were proposed for listing at the time. "This course of action would also result in a still larger backlog of proposed species awaiting final decision.").

Still other FWS notices decry the concern over the immense amount of ESA litigation. For example, in the proposed rules listing the Spalding's Catchfly (plant) as threatened, the Service stated that because of "litigation demands" even though the petition to list was presented on November 16, 1998, action was not taken until December 3, 1999. 64 Fed. Reg. 67814-02 (December 3, 1999). The plant was not finally listed as threatened until October 10, 2001. 66 Fed. Reg. 51598-01 (October 10, 2001) (again citing litigation demands as one of the reasons for the delay). Even as recently as 2010, the Service noted that "resource demands associated with litigation" delayed the finalization of the draft recovery plan for the bull trout. 75 Fed. Reg. 2270-01 (January 14, 2010). Any claim that the current pace of litigation does not impact implementation of the ESA is simply not borne out by the FWS' own documents.

Recently, there have also been claims that ESA litigation costs are "not a concern under the Endangered Species Act." *See* Center for Biological Diversity ("CBD") March 29, 2014. In support of its claim, the CBD cites two studies that it simply did not read. First the August, 2011 Governmental Accountability Office ("GAO") study entitled

"Environmental Litigation Cases Against EPA [Environmental Protection Agency] and Associated Costs over Time" shows a dramatic increase in litigation against the EPA from 2009 to 2010. Because the EPA does not administer the ESA, it is not a surprise that ESA litigation against the agency is limited. The two ESA cases reported against the EPA dealt with claims that the EPA had failed to comply with the section 7 consultation requirements of the ESA. One environmental group, Northwest Environmental Defense Center, was paid $40,000.00 in 2010; the CBD was paid $405,000.00 for its section 7 consultation case against the EPA in 2007. Because these cases involved ESA section 7 claims, the attorney's fees were paid based upon the Equal Access to Justice Act. Additionally, the 2011 GAO report complained, "Justice [Department] maintains separate, decentralized databases containing environmental case litigation and does not have a standard approach for collecting and entering data. Without a standard approach, it is difficult to identify and summarize the full set of environmental litigation cases and costs managed by the department agency wide."

The second GAO study cited by the CBD, "USDA Litigation, Limited Data Available of USDA Attorney Fee Claims and Payments," March 26, 2014 also does not support the CBD's claims. That study noted that there is no central internal or external tacking of attorney fee payments within the Department of Agriculture ("USDA"). With regard to ESA litigation, again because the Department of Agriculture does not implement the listing and critical habitat provisions of the ESA, litigation relates to alleged violations of the ESA section 7 consultation provisions. Of the 33 USDA agencies, 29 do not track attorney's fees payments at all, even though some of those agencies have been sued for alleged violation of ESA section 7 consultation requirements. *See, e.g., Buffalo River Watershed Alliance et al v. United States Department of Agriculture et al*, 13-cv-450 (E.D.Ark, August 6, 2013) (claiming that a loan decision backed by the USDA's Farm Services Agency[2] and the Small Business Administration violated the section 7 consultation provisions of the ESA). Clearly this report cannot be said to support the proposition that ESA litigation is "not a concern."

The CBD press release, dated March 26, 2014, fares no better. This press release was based on a 276 page spread sheet run released by the Department of Justice ("DOJ") listing litigation summaries in cases defended by the Environment and Natural Resources Division, Wildlife Section of DOJ. The spread sheets are titled "Endangered Species Defensive Cases Active at some point during FY09-FY12 (through April 4, 2012)". Although the DOJ release itself contained no analysis, my legal staff calculated the following statistics:

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[2] The Farm Services Agency is one of the USDA agencies that does not track attorney's fees payments.

Total Number of Cases Filed	573
Total Number of Cases in which Attorney's Fees were Paid	183
Total Cases Filed by Environmental Group	489
Total Cases Filed by Industry Group, Local Government or Water District	19
Number of filed by Individuals Who Did Not Seem to be Tied to any Group	65
Total Attorney's Fees Paid	$52,518,628.93

And while the payment of $52,518,628.93 of American taxpayer's money over an approximate three year period seems high, use of the FOIA has shown that the DOJ does not keep an accurate account of the cases it defends. For example, in 2009, my firm sent a FOIA request to the DOJ asking for the amount of litigation defended and attorney's fees paid to a named environmental group based upon litigation against the federal government filed in the Federal District Court for the District of Idaho. The Justice Department responded with what it believed were all cases that met the criteria, a total of 67 cases in all. Reviewing those cases, according to the Justice Department's list, this environmental group received approximately $900,000 in attorney's fees in nine years. However, when the list provided by the Justice Department was compared with the actual PACER documents from the Federal District Court of Idaho, it was discovered that the Department failed to account for an additional 23 cases filed by this single group in the District Court in Idaho. We also discovered that this single group had received $1,150,528.00 in tax payer dollars over the applicable period. This is just one illustration that shows that the DOJ run sheets attached to the 2014 CBD press release do not account for all the litigation filed or the attorney's fees paid.

I would thank this Committee for holding this hearing and for starting the discussion related to the ESA. The FWS website, as of April 5, 2014, shows that 1337 species have been listed, but only 30 recovered. While the advocates can argue about whether the Act is working, these bills at least make the decisions more apparent and transparent to the American public and the bill-paying taxpayers.

Thank you.