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Testimony on "The Endangered Species Act:

How Litigation is Costing Jobs and Impeding True Recovery Efforts"

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Mr. Chairman, members of the House Committee on Natural Resources, thank you for this opportunity to express my views on Endangered Species Act litigation.

The flaws behind the Endangered Species Act are numerous and well-known. Rather than provide incentives for conservation and environmental stewardship, the Endangered Species Act punishes those whose property contains land that might be used as habitat by endangered and threatened species. The statute's success rate is dismal, at best–few species that are classified as endangered or threatened ever return to recovered, healthy populations. Further, expansive and inflexible Endangered Species Act regulation by federal agencies often frustrates innovative local and state conservation efforts, with the result being greater conflict and less compromise.

These structural defects raise serious concerns over the Endangered Species Act's efficacy as a conservation statute and demonstrate that the statute provides little meaningful benefit to endangered and threatened species.

However, the statute's structural defects that victimize Americans in environmental litigation are particularly troubling. The Endangered Species Act elevates species protection above human well-being, benefitting extreme environmentalists and encouraging them to seek low-cost court victories at the expense of individual Americans as well as federal agencies throughout the country.

Specifically, environmental groups take full advantage of the Endangered Species Act's lenient citizen plaintiff standard. "Any person" may sue under the statute, a broad provision which has led to what the U.S. Fish and Wildlife Service has recognized as a litigation crisis.

Once environmental groups enter the courtroom, they enjoy precedent that stacks the deck in their favor. It is not difficult to win an Endangered Species Act lawsuit, but of equal concern is that courts often impose draconian and unhelpful remedies that harm businesses and property owners. The disturbing logic here is that the Endangered Species Act requires such results, no matter the costs. The fact that the Endangered Species Act generously authorizes attorneys' fees to prevailing parties further encourages environmental groups to take an overly aggressive approach to litigation without regard for the costs imposed on public and private parties.

With these structural defects in place, environmental groups would be foolish not to exploit them. Considering the state of the Nation's economy and the continuing onslaught of Endangered Species Act litigation, these defects certainly deserve the attention of the American people.

<u>The Endangered Species Act's Lenient Standard for Becoming a Citizen Plaintiff</u>

Numerous environmental groups thrive on bringing repeated Endangered Species Act cases to federal courtrooms. The Endangered Species Act is especially appealing to serial litigants because it provides that "any person may commence a civil suit" under the statute. 16 U.S.C. § 1540(g)(1). Justice Scalia has criticized this expansive citizen suit provision as "an authorization of remarkable breadth when compared with the language Congress ordinarily uses," noting that in other environmental statutes, Congress has used more restrictive tests for citizen plaintiffs. *Bennett v. Spear*, 520 U.S. 154, 164-65 (1997). Some courts have gone so far as to rule that the Endangered Species Act authorizes animals themselves to sue in their own right. *See Marbled Murrelet v. Pacific Lumber Co.*, 880 F. Supp. 1343, 1346 (N.D. Cal. 1995) ("[A] protected species under the Endangered Species Act . . . has standing to sue 'in its own right'" to enforce provisions of the Act.).

To be sure, courts still demand that plaintiffs satisfy Article III of the Constitution by requiring a "case or controversy" before adjudicating a case. But the Endangered Species Act's otherwise minimal pleading requirements have resulted in what the U.S. Fish and Wildlife Service has described as a "cycle of litigation" that is "endless, and is very expensive, thus diverting resources from conservation actions that may provide relatively more benefit to imperiled species." 71 Fed. Reg. 58,176, 58,176 (Oct. 2, 2006).

Indeed, in its October 2006 critical habitat designation for the Alameda whipsnake, the Service noted that such designations generally are "the subject of excessive litigation," and that "[a]s a result, critical habitat designations are driven by litigation and courts rather than biology, and made at a time and under a time frame that limits our ability to obtain and evaluate the scientific and other information required to make the designation most meaningful." *Id*. The Service was clear that excessive Endangered Species Act litigation has compromised the integrity of the statute:

> We have been inundated with lawsuits for our failure to designate critical habitat, and we face a growing number of lawsuits challenging critical habitat determinations once they are made. These lawsuits have subjected the Service to an ever-increasing series of court orders and court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget. This leaves the Service with little ability to prioritize its activities to direct scarce listing resources to the listing program actions with the most biologically urgent species conservation needs.
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> The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits, to respond to Notices of Intent (NOIs) to sue relative to critical habitat, and to comply with the growing number of adverse court orders. As a result, listing petition responses, the Service's own proposals to list critically imperiled species, and final listing determinations on existing proposals are all significantly delayed.
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> The accelerated schedules of court-ordered designations have left the Service with limited ability to provide for public participation or to ensure a defect-free rulemaking process before making decisions on listing and critical habitat proposals, due to the risks associated with noncompliance with judicially imposed deadlines. This in turn fosters a second round of litigation in which those who fear adverse impacts from critical habitat designations challenge those designations. The cycle of litigation appears endless, and is very expensive, thus diverting resources from conservation actions that may provide relatively more benefit to imperiled species.

Id.

More recently, the Service has asked Congress to set a limit on the number of species it is authorized to consider under the Endangered Species Act petition process. Without any such limit, the tactic for environmental groups appears to be "the more, the merrier" when it comes to Endangered Species Act listing petitions. After all, given the statute's expansive citizen suit

provision, multi-species petitions make sense because the Service's inability to manage an overload of documents means only that the petitions will be settled in court, with the attendant attorney's fees. As Gary Frazer, the Service's assistant director for endangered species, has noted, "[t]hese megapetitions are putting us in a difficult spot, and they're basically going to shut down our ability to list any candidates in the foreseeable future." Todd Woody, *Wildlife at Risk Face Long Line at U.S. Agency*, N.Y. TIMES, April 20, 2011, at A1. Mr. Frazer likewise recognized that if "all our resources are used responding to petitions, we don't have the resources to put species on the endangered species list. It's not a happy situation." *Id*.

The consequences of the Endangered Species Act's friendly citizen suit provision are thus clear, albeit counter-productive. Citizen plaintiffs' easy access to courts has come at the cost of meaningful recovery and environmental progress.

Endangered Species Act Litigation Can Bring Handsome Rewards

The Endangered Species Act's attorney's fees provision defies common sense because it allows an environmental group to obtain attorney's fees even when a lawsuit is brought over a recovered and healthy species that has been recommended by the Service for delisting. In most litigation, "parties are ordinarily required to bear their own attorney's fees–the prevailing party is not entitled to collect from the loser." *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001) (citation omitted). Federal courts "follow a general practice of not awarding fees to a prevailing party absent explicit statutory authority." *Id*. (citation and quotation omitted).

The Endangered Species Act, however, provides that courts "may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate." 16 U.S.C. § 1540(g). This is an extremely charitable provision, especially considering that environmental plaintiffs need not fear an award of attorney's fees to the opposing party in the event they do not prevail. *See Ocean Conservancy, Inc. v. Nat'l Marine Fisheries Serv.*, 382 F.3d 1159, 1161 (9th Cir. 2004) ("Under the ESA, defendants are not entitled to costs and fees unless the plaintiff's litigation was frivolous.") (citation omitted).

The Endangered Species Act attorney's fees provision leads to absurd results. In *Center for Biological Diversity v. Marina Point Development Co.*, a California business currently faces the prospect of paying the Center for Biological Diversity and another environmental group more than $1 million in fees and costs without proof of harm to any species. In that case, the anti-development plaintiffs sought and received an injunction to stop a commercial project based on claims the project would harm listed bald eagles. However, the U.S. Fish and Wildlife Service had already determined that bald eagles were fully recovered and should be delisted

and that the challenged project would have no effect on the species. And, in fact, while the case was on appeal in the Ninth Circuit, the case became moot when the Service removed bald eagles from the list of threatened and endangered species altogether. But, while the Ninth Circuit recognized that the property owners activities did not violate the Endangered Species Act, it nonetheless ruled that the Center was entitled to fees under the statute, since the delisting of the bald eagle occurred while the Center's dubious district court victory was on appeal. *See Center for Biological Diversity v. Marina Point Dev. Co.*, 566 F.3d 794 (9th Cir. 2009).

This suit provided no benefit to any species but imposed enormous costs on a private company without any proof of violation. Common sense dictates that the property owner should not have to pay for a statutory violation that it did not commit, but the Endangered Species Act's attorney's fees provision has enabled precisely this result. Surely, this is not what Congress intended.

Did Congress really intend for the Endangered Species Act to be imposed "whatever the cost"?

Thanks in part to the Endangered Species Act's litigation incentives discussed above, the Natural Resources Defense Council (NRDC), Earthjustice, and other environmental groups sued in 2005 to shut down critical California water projects in order to supposedly protect an insignificant fish called the delta smelt, a species that until then had generated little interest outside the extreme environmental community. NRDC and Earthjustice won their lawsuit, leading to an unprecedented water supply crisis for the San Joaquin Valley and Southern California. *See NRDC v. Kempthorne*, No. 1:05-cv-1207-OWW-GSA, 2007 U.S. Dist. LEXIS 91968 (E.D. Cal. Dec. 14, 2007) (findings of fact and conclusions of law re: interim remedies).

Yet, just a few years later, after the U.S. Fish and Wildlife Service capitulated to the environmental community and issued a formal delta smelt management regime that caused still more water supply uncertainty, the same federal judge who had previously ruled in favor of NRDC and Earthjustice ruled against them and the government, holding that the U.S. Fish and Wildlife Service had gone too far in its misguided effort to protect the delta smelt, and finding that federal staffers engaged in bad faith in attempting to defend delta smelt Endangered Species Act restrictions. *See Delta Smelt Consol. Cases v. Salazar*, 760 F. Supp. 2d 855 (E.D. Cal. 2010) (invalidating 2008 Delta smelt Biological Opinion), *and San Luis & Delta-Mendota Water Authority v. Salazar*, No. 1:09-cv-407-OWW, Reporter's Transcript of Proceedings (Sept. 16, 2011) (finding agency bad faith), *available at* http://plf.typepad.com/files/9-16-11-motion-to-stay-final-1.pdf (last visited Dec. 1, 2011).

But what caught legal scholars' attention was Judge Wanger's remedy for the U.S. Fish and Wildlife Service's Endangered Species Act violations. Despite the protests of NRDC and Earthjustice, Judge Wanger took a common sense approach and considered the harm that would result from allowing the illegal delta smelt regulations to go forward. In his August 31, 2011, decision to enjoin delta smelt-based water restrictions, Judge Wanger ruled that where the imposition of flawed ESA regulations would "affirmatively harm human communities through the reduction of water supplies and by reducing water supply security in future years," it is appropriate for courts to balance this human hardship against the needs of protected species. As Judge Wanger wrote, "[i]f such harms cannot be considered in the balance in an ESA case, it is difficult to envision how a resource-dependent [party] would ever" prevail on an injunctive relief motion in an Endangered Species Act case. *In re Consol. Delta Smelt Cases*, No. 1:09-cv-407-OWW, 2011 U.S. Dist. LEXIS 98300, at *178 (E.D. Cal. Aug. 31, 2011).

While Judge Wanger's decision to consider human hardship in the delta smelt case deserves praise, it may seem remarkable that there was ever a question over the court's authority to consider the human costs of ill-advised Endangered Species Act regulation. Unfortunately, Judge Wanger's decision to balance the hardships and consider the public interest in natural resources is the exception in Endangered Species Act cases, not the rule. More often than not, courts give the benefit of the doubt to environmental groups and the hundreds of species they represent, regardless of the circumstances. The deck is stacked such that environmental groups have an incentive to sue even when there would be little to no benefit to a species from litigation, and even though the harm and financial toll of such litigation may be great.

One may ask, then, how this came to be–how are environmental groups able to argue with almost universal success that courts should consider the consequences their decisions have on endangered species, but at the same time claim that courts have no authority to consider the effects their decisions will have on those who actually bear the brunt of the Endangered Species Act, *i.e.*, landowners and natural resource users?

The answer stems from the Supreme Court's notorious 1978 Supreme Court decision, *TVA v. Hill*. *TVA* concerned whether the Tennessee Valley Authority could proceed with the opening and operation of the nearly complete Tellico Dam project, notwithstanding the fact that the dam's operation would either eradicate the nearly extinct snail darter species or at the very least destroy the fish species' critical habitat. Although environmental groups contended that the Endangered Species Act required the injunction of the Tellico Dam, the district court declined to do so due to the amount of public money that had already been spent on the project, noting that "[a]t some point in time a federal project becomes so near completion and so incapable of modification that a court of equity should not apply a statute enacted long after

inception of the project to produce an unreasonable result." *Hill v. TVA*, 419 F. Supp. 753, 760 (E.D. Tenn. 1976), *rev'd*, 549 F.2d 1064 (6th Cir. 1977) (citation omitted).

The Supreme Court, however, did not agree with the district court and enjoined the Tellico Dam project from going forward. Despite recognizing that "[i]t may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than $100 million," the Court concluded that "Endangered Species Act require[d] precisely that result." *TVA v. Hill*, 437 U.S. 153, 172-73 (1978).

TVA's long-term impact, however, is found not in the result it reached, but in the precedent it set. In his majority opinion, Chief Justice Burger purported to discern Congress's will in enacting the Endangered Species Act by suggesting a legislative intent that is found nowhere in the text of the statute: "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." *Id*. at 184. Similarly, "the plain language of the Act, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as 'incalculable.'" *Id*. at 187.

Even more starkly, Chief Justice Burger suggested that Congress divested federal courts of their traditional equitable discretion in Endangered Species Act cases. According to the Court, there was no "mandate from the people to strike a balance of equities on the side of the Tellico Dam. Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities . . . ." *Id*. at 194.

TVA's draconian language provided ammunition for environmental groups to use the Endangered Species Act to deprive property owners and resource users of their rights, while at the same time preventing courts from considering the hardship resulting from such an unbalanced approach. According to this view, *TVA* represents Congress's intent that the Endangered Species Act restricted federal courts' traditional equity jurisdiction. Yet in actuality, Congress did no such thing, even though it was fully capable of including an explicit provision that mandates the restriction of federal courts' traditional equity jurisdiction. *See generally* Brandon M. Middleton, *Restoring Tradition: The Inapplicability of* TVA v. Hill*'s Endangered Species Act Injunctive Relief Standard to Preliminary Injunctive Relief of Non-Federal Actors*, 17 Mo. Envtl. L & Pol'y Rev. 318, 351 (2010).

Indeed, *TVA*'s precedent has led environmental groups to routinely argue that the economic impacts of an Endangered Species Act injunction are irrelevant, and that courts are forbidden from considering economic hardship when fashioning injunctive relief. *See id*. at 322. The effort to exploit *TVA* has largely been successful. The Ninth Circuit, for example, holds that Congress "removed from the courts their traditional equitable discretion in injunction proceedings of balancing the parties' competing interests. The 'language, history, and structure' of the ESA demonstrates that Congress' determination that the balance of hardships and the public interest tips heavily in favor of protected species." *Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1510-11 (9th Cir. 1994) (citing *TVA*, 437 U.S. at 174 and citation omitted).

Similarly, in the First Circuit, courts hold that "[a]ltough it is generally true that in the preliminary injunction context that the district court is required to weigh and balance the relative harms to the non-movant if the injunction is granted and to the movant if it is not," that is not the case in Endangered Species Act litigation, as "that balancing has been answered by Congress' determination that the 'balance of hardships and the public interest tips heavily in favor of protected species.'" *Strahan v. Coxe*, 127 F.3d 155, 171 (1st Cir. 1997) (quoting *Burlington N. R.R.*, 23 F.3d at 1510).

Today, a primary reason for costly Endangered Species Act litigation and the injunction even of "green" energy projects can be found in *TVA*'s instruction that Congress placed endangered species above all other concerns, including humans. When a federal court stopped the development of a wind energy project in West Virginia two years ago due to alleged threats to the endangered Indiana bat, it repeatedly cited *TVA* and opined that "Congress, in enacting the ESA, has unequivocally stated that endangered species must be afforded the highest priority." *Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540, 581 (D. Md. 2009). In California, the same attorneys who forced the injunction of the West Virginia wind project are now attempting to prevent the City of San Francisco from engaging in flood control efforts at a municipal golf course, supposedly because flood control harms the California reg-legged frog. Of course, the environmental attorneys' argument is based largely on *TVA*, as they claim that *TVA* prevents the district court from balancing the hardships of increased flooding against the needs of a local amphibian. *See* Plaintiffs' Reply in Support of Motion for a Preliminary Injunction at 22 n.21, *Wild Equity Inst. v. City & County of San Francisco*, No. 3:11-cv-000958-SI (N.D. Cal. Nov. 4, 2011).

Based on the environmentalists "species protection whatever the costs" approach to the Endangered Species Act, it should come as no surprise that Judge Wanger's recent limitation of the *TVA* rule has found disfavor with the environmental community. While Judge Wanger allowed water users to at least have an equal voice in the delta smelt proceedings,

NRDC and Earthjustice have appealed, arguing that the "district court's view of *TVA v. Hill* is wrong," and that the court "improperly balanced" the water supply impacts of Endangered Species Act regulation against delta smelt habitat concerns. *See* Appellants' Opening Brief at 18-19, *San Luis & Delta-Mendota Water Auth. v. Salazar*, No. 11-17143 (9th Cir. Oct. 19, 2011).

Keeping in mind Judge Wanger's admonition that, in the context of delta smelt water supply impacts, "[i]f such harms cannot be considered in the balance in an ESA case, it is difficult to envision how a resource-dependent [party] would ever" prevail on an injunctive relief motion in an Endangered Species Act case, the environmental community's protest of even the slightest limitation of *TVA* demonstrates just how much they depend on the decision's troubling precedent in cases where they seek to forestall economic development and human needs. Courts, in general, recognize the extreme viewpoint of environmentalists, but all too often they punt on engaging in a balanced approach to the Endangered Species Act. Instead, the blame for the harsh realities of Endangered Species Act litigation is placed on the legislative branch, as it was Congress who purportedly ordered that endangered species be afforded "the highest of priorities," no matter the costs.

It is misplaced, of course, for courts to blame Congress on an approach to injunctive relief never imagined or sanctioned by the legislative branch. But although the harms resulting from the "whatever the cost" approach are all too real for property owners and resource users faced with an Endangered Species Act lawsuit, addressing the problem is fortunately not difficult. As the Supreme Court itself recognized in *TVA*, "[o]nce Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought." *TVA*, 437 U.S. at 194.

Thus, if Congress were to determine that the Supreme Court's interpretation of the order of priorities under the Endangered Species Act is incorrect, and that the human species is entitled to at least as much priority as allocated to any other animal species, then litigation will shift more towards a balanced approach that at least gives property owners and resources users an equal voice in the courtroom. Abandoning the "whatever the cost" mandate would deprive the environmental community of one of their greatest litigation weapons, and would result in less of a perverse incentive for regulated parties to protect endangered species. Moreover, allowing for a full balancing of harms and consideration of the public interest would not preclude environmental groups from obtaining an injunction in all Endangered Species Act cases, but would instead enable a more balanced approach to the statute that better comports with traditional notions of equity and fairness.

Conclusion

Incentives matter. Unfortunately, when it comes to the Endangered Species Act, the incentives favor the environmental community without providing a meaningful benefit to the species that the statute seeks to protect.

This is especially so in the context of Endangered Species Act litigation. Numerous environmental groups enjoy successful practices that depend on Endangered Species Act restrictions of property owners, natural resource users, and government agencies alike. This is a testament to how much the statute encourages and fosters Endangered Species Act lawsuits.

Unless lawsuits become more difficult to bring and draconian injunctions more difficult to obtain, the disturbing trend of endless and ongoing Endangered Species Act litigation is likely to continue.

I wish to thank the committee for the opportunity to provide this testimony and hope this analysis will assist the committee as it deliberates improvements to the Endangered Species Act.