

Committee on Natural Resources

Rob Bishop Chairman
Mark-Up Memorandum

September 8, 2017

To: All Natural Resources Committee Members

From: Majority Committee Staff—Melissa Beaumont, Christine Harsha
Subcommittee on Oversight & Investigations (x5-7107)

Mark-Up: **H.R. 3131 (Rep. Bill Huizenga)**, To amend the Endangered Species Act of 1973 to conform citizen suits under that Act with other existing law, and for other purposes.
September 12 & 13, 2017; 1334 Longworth House Office Building

H.R. 3131 (Rep. Bill Huizenga), “*Endangered Species Litigation Reasonableness Act*”

Summary of the Bill

H.R. 3131, introduced by Rep. Bill Huizenga (R-MI-02) on June 29, 2017, amends the citizen suit provision of the Endangered Species Act (ESA) to conform to the Equal Access to Justice Act (EAJA) (28 U.S.C. § 2412). H.R. 3131 would standardize the awarding of attorneys’ fees in suits by private parties against the federal government—aligning ESA’s fee-shifting provision requirements with those of EAJA, a general fee-shifting statute that authorizes awards of attorneys’ fees to private parties prevailing in litigation against the federal government.

Cosponsors

Rep. Cole, Tom (R-OK), Rep. Cramer, Kevin (R-ND), Rep. Gosar, Paul A. (R-AZ-4), Rep. Jones, Walter B., Jr. (R-NC), Rep. LaMalfa, Doug (R-CA), Rep. Luetkemeyer, Blaine (R-MO), Rep. Pearce, Stevan (R-NM), Rep. Thompson, Glenn (R-PA), Rep. Tipton, Scott R. (R-CO).

Background

In the United States, parties to litigation traditionally pay their own court costs and attorneys’ fees.¹ However, fee-shifting statutes permit awards of litigation costs to plaintiffs in certain circumstances and the Equal Access to Justice Act (EAJA) authorizes a “prevailing party” to collect attorneys’ fees in litigation against the federal government.² EAJA also provides that “attorney fees shall not be awarded in excess of \$125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.”³

¹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-417R, LIMITED DATA AVAILABLE ON USDA AND INTERIOR ATTORNEY FEE CLAIMS AND PAYMENTS 7 (2012), available at <http://www.gao.gov/assets/600/590084.pdf>.

² 28 U.S.C. § 2412 (2015).

³ *Id.* § 2412(d)(2)(A).

Under the citizen suit provision in the Endangered Species Act (ESA) a court can award costs, including attorneys' and expert witness fees, to private parties.⁴ However, ESA's fee-shifting provision places no cap on hourly attorneys' fees and does not require a litigant to "prevail" in order to recover attorneys' fees.

In setting attorneys' fee rates, courts apply the "lodestar" method by multiplying the hours reasonably expended by a reasonable hourly rate. The reasonable hourly rate accounts for "the rate prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation," often in private practice.⁵

Special interest attorneys representing environmental groups argue that their expertise is "specialized" to justify substantial, uncapped fees.⁶ Some special interest attorneys have collected fees as high as \$750 taxpayer dollars per hour.⁷ According to records from the Department of Justice, at least two such attorneys have garnered more than \$2 million in attorneys' fees by filing ESA suits.⁸ The taxpayer-funded Judgment Fund serves as the source for ESA-related attorneys' fees payments.⁹

H.R. 3131 would require ESA litigants to abide by the same rules as others bringing suit against the federal government, requiring plaintiffs to prevail in order to collect attorneys' fees, as well as impose the \$125 fee cap set by EAJA.¹⁰ Capable environmental attorneys are no longer rare or specialized to the point where uncapped attorneys' fees are justified. While this legislation does not restrict aggrieved parties' ability to seek redress in court, it removes an incentive for litigious plaintiffs to request large fee awards and safeguards taxpayer dollars against abusive litigation tactics.¹¹

⁴16 U.S.C. § 1540(g)(4).

⁵*Conservation Law Found. of New England, Inc. v. Watt*, 654 F. Supp. 706 (D. Mass 1984).

⁶ENDANGERED SPECIES ACT CONG. WORKING GROUP, 113TH CONG., REPORTS, FINDINGS AND RECOMMENDATIONS 32 (2014), available at https://naturalresources.house.gov/uploadedfiles/esa_working_group_final_report_and_recommendations_02_04_14.pdf.

⁷JORDAN LOFTHOUSE, RYAN M. YONK & RANDY T. SIMMONS, EQUAL ACCESS TO JUSTICE ACT 12, available at <http://www.strata.org/wp-content/uploads/ipePublications/Final-Print.pdf>; RaeLynn Ricarte, *Taxpayers Foot the Bill of Resource Lawsuits*, DALLAS CHRON., May 13, 2014, <http://www.thedalleschronicle.com/news/2014/may/13/taxpayers-foot-bill-resource-lawsuits/>

⁸ENDANGERED SPECIES ACT CONG. WORKING GROUP, *supra* note 6, at 31.

⁹*Id.* at 32.

¹⁰H.R. REP. NO. 113-540, pt. 1, at 2 (2014).

¹¹*Id.* (For example, an attorney representing Center for Biological Diversity in a lawsuit to block construction of a San Diego elementary school based on the existence of a fairy shrimp argued that the "prevailing San Diego market rate" for his attorneys' fees was reasonable due to his special expertise in challenging ESA habitat conservation plans, vernal pools, and his skill in preparing documents. He charged more than \$400 per hour in the final six years of litigation, including \$450 per hour in the years that the project was delayed. With his own fees totaling over \$150,000, he and two other attorneys were granted \$650,000 in federal funds by the court. Similarly, in 2012 plaintiffs were awarded \$940,000 in legal fees for litigation between 2000 and 2004, and an additional \$950,000 for litigation between 2004 and 2008 for a case involving Salmon and dams operated by the Bonneville Power Administration. The plaintiffs' attorneys' fees included rates of \$200 to \$350 per hour, as well as \$100 per hour for interns helping with the case. In 2014, three of the same attorneys representing the involved plaintiffs filed a third application for attorneys' fees, this time arguing for attorneys' fees at rates of \$500, \$475, and \$400 per hour. These requested rates more than doubled in just a few years' time).

Previous Committee and House Activity and Legislation

In April 2014, the House Committee on Natural Resources passed an identical bill, H.R. 4318, followed by passage by the full House as section 5 of the Endangered Species Transparency and Reasonableness Act, H.R. 4315, in July 2014, by a bipartisan vote of 233 to 190. However, the bill did not receive a vote in the Senate. It was reintroduced in the 114th Congress as H.R. 2109.¹²

On June 28, 2017 the Subcommittee on Oversight and Investigations held a hearing on the impact of environmental litigation. Witnesses testified about the relationship of uncapped attorneys' fees on revenue generation and ongoing litigious efforts of environmental groups.¹³

On July 19, 2017, the Committee held a legislative hearing to examine H.R. 3131 and four other bills that reform the ESA to improve its implementation.¹⁴ During this hearing, witnesses testified to the substantial amount of resources the federal government must direct towards responding to lawsuits brought under ESA. Witness Kent Holsinger testified during the hearing that the U.S. Fish and Wildlife Service (FWS) often spends an excessive amount of time dealing with deadline lawsuits brought under the ESA and that the attorneys' fees collected by such litigants can be a significant drain on the agency.¹⁵ He further testifies that H.R. 3131 would help alleviate part of this burden faced by the federal government, as it would "remove one of the worst incentives for that very kind of litigation", where litigants are able to recover exorbitant sums in attorneys' fees due to the lack of a cap on fees under ESA.¹⁶

Section-by-Section Analysis of H.R. 3131

Section 1. *Short Title.* The title of the Act is "The Endangered Species Litigation Reasonableness Act"

Section 2. *Award of Litigation Costs to Prevailing Parties in Accordance with Existing Law.* Amends Section 11(g)(4) of the ESA to require awarding of fees in accordance with section 2412 of Title 28 of the U.S. Code, the Equal Access to Justice Act.

Cost

No CBO cost estimate is available at this time. However, CBO determined that a bill containing the same language in the 113th Congress, H.R. 4318, would have no significant effect on the federal budget. H.R. 3131 is intended to reduce payouts to those attorneys suing the federal government under the ESA.

¹² H.R. 2109, 114th Cong. (2015).

¹³ *Examining Policy Impacts of Excessive Litigation Against the Department of the Interior: Hearing Before the H. Comm. on Natural Resources Subcomm. on Oversight and Investigations*, 115th Cong. (2017).

¹⁴ Legislative Hearing of the Committee on Natural Resources on H.R. 424, H.R. 717, H.R. 1274, H.R. 2603, and H.R. 3131, July 19, 2017, 115th Cong. (2017).

¹⁵ *Id.*, at 131.

¹⁶ *Id.*

Administration Position

In written testimony prepared for a July 19, 2017 legislative hearing on five ESA reform bills, FWS Deputy Director Greg Sheehan stated that the Service supports the overall goals of these pieces of legislation, including H.R. 3131, to improve implementation of ESA and species recovery.¹⁷

Effect on Current Law (Ramseyer)

Showing Current Law as Amended by H.R. 3131

[new text highlighted in yellow; text to be deleted bracketed and highlighted in blue]

Section 11(g)(4) of the Endangered Species Act of 1973 (16 U.S.C. 1540 (g)(4))

§1540. Penalties and enforcement

* * * * *

(g) Citizen suits

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf-

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or

(B) to compel the Secretary to apply, pursuant to section 1535(g)(2)(B)(ii) of this title, the prohibitions set forth in or authorized pursuant to section 1533(d) or 1538(a)(1)(B) of this title with respect to the taking of any resident endangered species or threatened species within any State; or

(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be. In any civil suit commenced under subparagraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.

(2)(A) No action may be commenced under subparagraph (1)(A) of this section-

(i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation;

(ii) if the Secretary has commenced action to impose a penalty pursuant to subsection (a) of this section; or

(iii) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of any such provision or regulation.

¹⁷Legislative Hearing of the Committee on Natural Resources on H.R. 424, H.R. 717, H.R. 1274, H.R. 2603, and H.R. 3131, July 19, 2017, 115th Cong. (2017) (Statement of Greg Sheehan, Deputy Director, FWS).

(B) No action may be commenced under subparagraph (1)(B) of this section-

(i) prior to sixty days after written notice has been given to the Secretary setting forth the reasons why an emergency is thought to exist with respect to an endangered species or a threatened species in the State concerned; or

(ii) if the Secretary has commenced and is diligently prosecuting action under section 1535(g)(2)(B)(ii) of this title to determine whether any such emergency exists.

(C) No action may be commenced under subparagraph (1)(C) of this section prior to sixty days after written notice has been given to the Secretary; except that such action may be brought immediately after such notification in the case of an action under this section respecting an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants.

(3)(A) Any suit under this subsection may be brought in the judicial district in which the violation occurs.

(B) In any such suit under this subsection in which the United States is not a party, the Attorney General, at the request of the Secretary, may intervene on behalf of the United States as a matter of right.

(4) The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) [to any party, whenever the court determines such award is appropriate.] to any prevailing party in accordance with section 2412 of title 28, United States Code.

(5) The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Secretary or a State agency).