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SUBMITTED TO THE UNITED STATES SENATE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

"A PERSPECTIVE ON THE ENDANGERED SPECIES ACT'S IMPACTS ON THE OIL AND GAS INDUSTRY"

THE HONORABLE BARBARA BOXER, CHAIRMAN
THE HONORABLE JAMES M. INHOFE, RANKING MEMBER PRESIDING

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Mr. Chairman and members of the Committee, my name is Dru Bower-Moore and I am a regulatory specialist in Wyoming for Devon Energy Corporation where I specialize in public land issues. I have worked in the public lands field for over 18 years and previously held the position of Vice President for the Petroleum Association of Wyoming. In these positions, I have dealt extensively with issues affecting industries ability to access and develop public lands of which the Endangered Species Act plays a significant role. We would like to thank the Committee on Environment and Public Works for the opportunity to testify at this field hearing regarding "A Perspective on the Endangered Species Act's Impacts on the Oil and Gas Industry" and for the opportunity to offer ideas for improving the current law.

Devon Energy is a leading U.S.-based independent oil and gas exploration and production company with significant operations in the Intermountain West, offshore, the Gulf of Mexico and in the mid-continent region. Although we do have international operations, 90% of our production is focused on North America.

DEFINING THE ENDANGERED SPECIES ACT PROBLEM

Devon supports the original purpose of the Endangered Species Act (ESA), which was to provide protection for species that have been proven through peer-reviewed science to be threatened with extinction. However, the Endangered Species Act, as currently implemented by the U.S. Fish and Wildlife Service (FWS) is not achieving this purpose. Congress needs to act to reform and improve the listing and de-listing components of the law and prevent its abuse by special interest groups.

In order to operate on federal lands, both the lessee and the applicable federal agency must comply with a myriad of laws designed to protect the environment. Devon works closely with

federal agencies to comply with requirements of the Federal Land Policy and Management Act (FLPMA), the National Environmental Policy Act (NEPA), and ESA, among others, before beginning any operations on federal lands. Under Section 7 of ESA, federal agencies are required to consult with the FWS if candidate, proposed, threatened, or endangered species and their habitat have been identified in the area within which a project is proposed. The environmental analysis for a proposed project (and required impact mitigation) can become complex and costly given the number of issues that Bureau of Land Management (BLM) is required to address. Add in the analysis of the project area for the occurrence of species of concern or its habitat [currently 138 candidate, 4 proposed, and 607 threatened endangered species (figures as of August 2007 from the U.S. Fish and Wildlife Service website)], and the project costs escalate as do the mitigation requirements. Species do not need to occur in the project area to be covered by the analysis if suitable habitat exists; therefore, additional conservation measures are most often required by the agency.

The consultation process between the land managing agencies and the FWS, which can include the development of a biological assessment, biological opinion, or both, determines whether such a project may affect a candidate, proposed, threatened, or endangered species and, if necessary, includes recommendations for the protection of the identified species and its habitat. Although there have been improvements in the last several years, in some states this integral step has become a bottleneck preventing the timely processing of permits. Because of the vast number of lawsuits filed against FWS, the very funds FWS needs to carry out these critical duties are being diverted to defend litigation. Without consultation and the necessary documentation from FWS, BLM and other federal agencies are prevented from acting in a timely fashion on a proposed project, leading to unnecessary delays. We urge Congress to enact reforms to prevent such frivolous lawsuits; thereby, freeing FWS to carry out those duties that will truly serve the purposes of the ESA.

ENDANGERED SPECIES ACT EFFECTS ON LANDOWNERS

The Endangered Species Act, unlike some other federal laws, applies generally to both private and federal lands. However, ESA does not provide federal agencies with the authority to inventory private lands for the potential existence of threatened or endangered plant or animal species. Despite this lack of authority, federal agencies have been able, in the case of split estate situations (federal mineral/private surface), to require a federal lessee to inventory the private surface and provide such information to the federal agency. In the absence of such information, the land managing agency assumes a "worst case scenario" and devises additional protection measures and stipulations to be placed on the oil and gas project based on this assumption. This places unfair burdens on both the private surface owner and the federal lessee. Moreover, it creates unnecessary conflict between the federal mineral lessee and the private surface owner. The ESA should be revised to clearly state that no federal agency has the authority to require an inventory of private surface merely because a proposed project is covering the underlying federal minerals. In the absence of such a reform, a federal mineral lessee is placed in the position of having to obtain information, oftentimes against the wishes of the applicable private surface owner, that the federal agency has no right to obtain.

If the law were revised to prohibit a federal agency from requiring an inventory of private surface before being able to act on an application to develop the underlying federal minerals, this would also serve to alleviate the concerns of the private surface owners regarding misuse of this information by other private parties and organizations. Even if Congress does not prevent the collections of such information, it should protect such information from misuse. Private parties should not be able to submit a Freedom Of Information Act (FOIA) request to a federal agency to obtain ESA survey information gathered on private lands as that documentation should be held in confidence unless the landowner agrees to release the

information. Congress has already established this precedent in other laws, and it should enact a similar provision here to protect private property rights.

Congress could provide further relief to both a federal mineral lessee and an affected private surface owner by providing incentives to the private surface owner to allow access to its property. A reform of this nature would have a two-fold benefit. First, it would encourage the recovery of potentially threatened and endangered species by providing the information necessary to truly assess the status of a species. Second, it would remove one of the conflicts between private surface owners and federal mineral lessees.

INCENTIVES FOR VOLUNTARY PROGRAMS

Any reform of ESA should also include incentives for landowners and other public resource users to implement conservation measures on public lands. Notwithstanding the fact that the proposal to list the Mountain Plover was withdrawn in September 2003, several companies, including Devon, chose to be proactive with respect to protection of the species and its habitat. This group of companies approached FWS and began to negotiate a Memorandum of Understanding (MOU) to cooperate in "good faith" and in a timely manner to develop a Candidate Conservation Agreement with Assurances (CCAA) for the Mountain Plover and the White-tailed Prairie Dog in Wyoming and Colorado. The CCAA would have provided assurances that if the Mountain Plover or White-tailed Prairie Dog were eventually listed as threatened or endangered, the FWS would not impose conservation measures on the agreement participants that were more stringent than those already agreed to by the parties. Because of the nature of landownership in the area to be covered by the CCAA, it would have been applicable to both federal and private lands since sixty-six percent (66%) of the mineral and forty-nine percent (49%) of the surface estate is managed by federal agencies in Wyoming.

As the MOU was being finalized, the FWS published in the *Federal Register* a final rule (Safe Harbor Agreements and Candidate Conservation Agreements with Assurances; 69 Fed. Reg. 24084, 24092 – 24094 (May 3, 2004) (codified at 50 C.F.R. parts 13, 17) that virtually eliminated the ability we had to be proactive, and removed any incentive to protect a candidate species through the development of a CCAA. The final rule stated that Candidate Conservation Agreements with Assurances could only be developed on private lands.

Congress must provide leadership in promoting voluntary efforts to conserve species and its habitat regardless of landownership. When 49% of the surface and 66% of the mineral estate in Wyoming are managed by federal agencies who then lease these resources to others for development, the law must provide conservation opportunities to those who have leases to use either the surface or the mineral estate. If voluntary efforts to conserve a species are limited to solely privately owned lands, a valuable conservation tool will be needlessly removed. Although FWS is moving toward the recovery success of a few species under ESA, Congress should take all possible steps to provide avenues of conservation. Assurances and incentives to private entities, both landowners and energy companies, implementing voluntary conservation measures must be a part of ESA as this provides an essential tool to prevent the potential loss of a species and its habitat through a collaborative effort of private and public entities.

PETITIONS TO LIST A SPECIES

The Endangered Species Act, during its 30-year history, has produced minimal success for recovery of a species once designated as threatened or endangered. Yet, FWS is inundated with Petitions to list species. Citizen nominations for proposed additions to the list of species protected under ESA pose substantial problems not only for FWS, which must respond to the

Petitions, but also for other federal agencies, states, lessees and private landowners. To be clear, the problem is ***not*** protection of truly threatened or endangered species, rather, it is the fact that ***anyone*** can submit a Petition to list a species, and the law currently contains no requirement that such a Petition be supported by use of the best scientific and commercial data. Regardless of the science, or lack thereof, supporting a Petition, the FWS has 90-days to respond. In the absence of specific information, agencies typically give equal consideration to *proposed* and *candidate* species even though ESA's specific requirements regarding species status, distribution and habitat information are incomplete. The protective measures of ESA do not apply to the proposed species and its habitat. The protections of ESA are limited to those species actually listed as either threatened or endangered. However, in practice, the federal land management agencies actually impose ESA protections to candidate and proposed species in addition to those truly threatened or endangered.

The FWS should not be required to spend precious staff time on Petitions lacking scientific merit. We urge Congress to amend ESA to provide a threshold requirement regarding the information filed in support of a Petition to list. Unless and until that threshold is met, FWS would not be required to act on a Petition. This approach would have a two-fold benefit. First, it would ensure that the information required to begin the listing process would be at least as stringent as the information required to de-list a species. Second, it would potentially free FWS from some of the frivolous lawsuits with which it is currently bombarded; thereby, allowing funds that would have otherwise been expended to defend the lawsuits to be used to carry out those activities that would truly serve the purposes of ESA.

Recent petitions to list the Greater Sage Grouse and the White-tailed Prairie Dog are prime examples of Petitions filed without adequate supporting scientific information. Industry trade organizations, of which Devon is a member, submitted detailed, scientific comments

challenging both petitions. In both instances, industry after a careful review of the petitions by qualified experts, found that the petitions contained numerous flaws, errors, inaccuracies, contradictions, misstatements, misrepresentations, unsubstantiated positions and biased opinions. Petitions of this nature do not rise to the level of scientific sufficiency to warrant any action by the FWS, much less a positive 90-day finding. The standards for filing a Petition and granting a positive 90-day finding must be raised to require adequate, peer-reviewed science.

Furthermore if the FWS issues a "positive finding" it negatively impacts states, landowners and resource users because a species is elevated to a new level of protection even though it has not been formally listed as candidate, proposed, threatened, or endangered, and despite the fact that the Petition may not be supported by sound, scientific evidence demonstrating the need to list. Once a Petition has been filed, state and federal agencies have internal policies that elevate the animal or plant to a "Sensitive or Special Status Species" worthy of additional protection. This standard is then applied during the NEPA process with the potential result that mitigation measures to protect the species may be imposed. Once a Petition is filed, the species is treated as *de facto* endangered before FWS has completed its analysis. While this action results in a heightened level of protection to prevent listing under ESA, such protection and its attendant costs may not be warranted if the 90-day finding is not supported by sound, scientific evidence.

In addition, special interest groups are not only filing Petitions with the FWS to list a particular species with meager, if any, supporting scientific data, such groups are also seeking to have federal agencies manage species habitat (whether the species is proposed for listing or not) as an Area of Critical Environmental Concern (ACEC). An ACEC designation usually carries additional restrictions on mineral development.

The standards for filing a Petition to list and for issuing a 90-day finding must be more stringent, and FWS must be forced to undertake an analysis of the actual scientific data provided. Before a petition to list is granted a positive finding decision, it must be based upon the most current, viable, reliable, and accurate scientific data available. We urge Congress to amend ESA to provide a threshold level for information required to support a Petition to list; thereby the decision to list a species would be based on the same stringent standards as a decision to remove a species from the list.

RECOVERY OF SPECIES

Congress must make FWS accountable for the timely implementation of a recovery plan once a species is listed. One way to achieve this is to mandate that a recovery plan be developed concurrently with FWS' decision to list a species. Presently, the agency decides to list a species, and then it determines the recovery levels for the species. FWS can often take years after the listing before issuing a recovery plan. It is far more logical to require the recovery plan to be formulated at the same time the species is listed. The recovery plan should also be required to identify population goals for a species' recovery and protection of its critical habitat. Currently, species are being listed for which there is little or no information about their populations or required habitats.

If FWS does not have the information upon which to base a recovery plan how can it validly determine that a species is threatened? Therefore, we urge Congress to revise ESA to require the formulation of a recovery plan concurrently with a decision to list and to require that once the population objective in the recovery plan has been met, "hard release" language would provide that the species be automatically de-listed.

The ESA should also be reformed to allow consideration of isolated, but thriving species' populations. While we agree the FWS should be required to analyze a species throughout its entire range, it may not be necessary to list and protect a species as threatened or endangered range-wide. Not all populations may warrant the same level of protection in all areas, and ESA must provide flexibility in the management level for the species in different geographic locations.

FRIVOLOUS ENVIRONMENTAL LITIGATION

Another important ESA reform issue to consider is litigation by "special interest groups" whose sole purpose is to delay or prevent development of natural resources. In Wyoming, virtually all lease sales, and most all of the project level EA's or EIS's, including geophysical projects, have been protested, appealed, or challenged at the agency level and in federal court based on asserted violations of ESA and habitat destruction issues. The same is true for the other Rocky Mountain States.

Clearly, ESA has become the "tool" of choice to prevent oil and gas development on federal lands without regard for the increased costs and delays in decision-making by land management agencies and the resultant impacts on the United States taxpayers and others who use the public lands. The cost of "ESA abuse" is high and litigation is abundant. Because federal oil and gas lessees have contractual rights and obligations to develop federal minerals, lessees are often required, or elect to intervene in these lawsuits to defend their rights. Intervention in these lawsuits obviously costs additional time and financial resources that could be put to better use developing domestic energy sources. If Congress enacts some of those reforms Devon has advocated here today, in particular requiring a threshold level for filing a petition to list and a 90-day finding, we believe such reforms will be a step in the right direction to preventing such abuses of ESA.

RELATED ISSUES

While ESA issues play a significant role in our ability to access and develop federal lands, there are other factors that impact our ability to produce energy in a timely manner. The National Environmental Policy Act (NEPA) process on public lands is exhaustive and is becoming more cumbersome over time. From the Resource Management Plan (RMP) stage to the Application for Permit to Drill (APD) issuance, there are at least four separate levels of NEPA analysis conducted, which includes consultation with several other cooperating agencies along the way. These NEPA documents (whether at the RMP or full field development phase) are taking longer to complete due to the added, and sometimes redundant, layers of analysis to determine impacts. Some EISs have taken six to seven years for approval meanwhile development is put on hold until the analysis is completed. This delay in issuing APDs while extensive NEPA is conducted is significantly impacting our ability to provide energy to consumers in a timely manner. The process needs to be more efficient and the provisions in the Energy Policy Act of 2005 worked to achieve this purpose for example statutory categorical exclusions [See the section labeled “Energy Policy Legislation].

In addition we are seeing more requirements in the RMP and full field development EIS Records of Decision for monitoring and adaptive management prescriptions through “performance based” standards. While in theory it may make sense to monitor the impacts oil and gas activity has on other resources and adapt as necessary, in reality the land managing agencies do not have the funding or the staffing to comply with their obligations; thereby, leaving all of us vulnerable to litigation. Congress must consider appropriating additional funds for the land management agencies to comply with these requirements and prevent unnecessary legal challenges.

ENERGY POLICY LEGISLATION

Many members of Congress did their part in passing the Energy Policy Act of 2005 to address the natural gas supply challenge by giving agencies a number of tools to allow them to process drilling permit requests in a more streamlined manner. Importantly, no environmental standard was waived nor was any step in the review process eliminated. Rather, Congress created several tools to allow agencies to process permits more efficiently.

The Intermountain West currently supplies over 25% of the nation's natural gas. The National Petroleum Council estimates that this region has 284 trillion cubic feet (Tcf) of technically recoverable natural gas, enough to supply all of Americas current household energy needs for 60 years. Tools such as categorical exclusions allow for more efficient use of these resources in the Intermountain West.

Devon Energy and other companies in the large independent sector have a record of investing more than we earn, and 100 percent or more of our total cash flow is reinvested to find and produce more energy. But we cannot risk making multibillion dollar decisions only to have royalty, tax or regulatory policies change – pulling project economics out from under us.

Instead of supporting laws that would assist industry in our ability to provide affordable energy to the citizens of this country and encourage less dependence on foreign energy, the House of Representatives recently passed the "Energy Policy Reform and Revitalization Act" (HR 3221). This legislation will effectively reduce funding and eliminate proactive steps to develop much needed energy resources, which in turn will slow the process and reduce supply. Congress should support laws that assume a good stable investment regime and

smooth government processes, which will promote continued investment in the development of this country's onshore and offshore oil and gas reserves. The United States Senate must maintain the "Energy Policy Act of 2005" provisions to prevent a decrease in energy supplies and an increase in costs to the consumer.

RECOMMENDATIONS

In conclusion, Devon Energy appreciates Congress's recognition of the important role the Endangered Species Act plays in allowing oil and gas exploration and development of federal lands to meet the growing energy needs of this nation. Devon recommends that Congress consider the following points:

- Provide adequate funding to FWS in order to prevent bottlenecks on consultations and to promote the timely processing of permits to provide the country with energy to meet increasing demands.
- Reform ESA to provide incentives for private property owners to allow access to their property for the limited purpose of evaluating the potential impacts of a proposed federal action.
- Reform ESA to promote voluntary efforts to conserve species and its habitat on federal lands by entities / lessees with contractual natural resource management responsibilities.
- Strengthen scientific justification criteria for listing Petitions to be as stringent as the scientific justification criteria required for the recovery and de-listing processes.
- Require recovery plans to be developed at the time the species is listed and include population goals in the listing proposal for species recovery and its critical habitat.
- Institute "hard release" language, which must be required by law, that would provide the species be automatically de-listed once population goals have been met.

- Appropriate adequate funds for implementation of recovery programs to avoid placing unnecessary monetary burdens on private entities.
- Reform ESA to provide flexibility in managing isolated populations in certain geographic areas to eliminate the “one-size-fits-all” requirements.
- Congress must consider appropriating additional funds for the land management agencies to comply with these requirements and prevent unnecessary legal challenges.
- The United States Senate must maintain the “Energy Policy Act of 2005” provisions to prevent a decrease in energy supplies and an increase in costs to the consumer.

Mr. Chairman and members of the Committee, thank you again for the opportunity to share with you Devon’s thoughts regarding “A Perspective on the Endangered Species Act’s Impacts on the Oil and Gas Industry” along with an examination on ways to improve the current law.