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Hearing on the Endangered Species Act

Senate Subcommittee on Fisheries, Wildlife, and Water

Statement
by
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Mr. Chairman, members of the committee, I wish to thank you for this opportunity to express my views on the efficacy of the Endangered Species Act.

In its 32-year history, the Act has been successful at demonstrating our general lack of understanding of the physical and biological needs of at risk species and the functions of diverse ecosystems. Of the approximately 1,300 species listed as threatened or endangered under the Act, only a few have warranted delisting and even fewer have been recovered. According to the United States Fish and Wildlife Service's online database, http://endangered.fws.gov/, 16 species were delisted due to original data errors, 9 became extinct, and 15 are deemed recovered.

Whether these 15 species recovered because of the ESA is a matter of some controversy. Some experts argue that several species designated as recovered should never have been listed as threatened or endangered or were recovered because of independent action by states, private foundations or other laws that affected the species. For example, a global switch from the use of whale oil to kerosene likely saved the gray whale while pesticide bans and vigorous conservation efforts by private foundations are credited for the recovery of the American peregrine falcon.

Even if the recovery of all these species is ascribed to the ESA alone, it is still a dismal showing for more than 30 years of effort and billions of dollars in expense. Clearly, our approach to species protection must change.

The overriding problem with the ESA is that it doesn't balance species protection with human needs.

As a people, we have a moral imperative to secure a meaningful quality of life for present and future generations—society must both protect the environment and provide for economic

growth. It is the obligation of elected officials to ensure these ends are achieved by fair and orderly means. While protecting the environment and maintaining a robust economy are not mutually exclusive, the federal government has, for the most part, failed to provide a proper balance. As a result, we live in a system that in some cases encourages the destruction or overuse of our natural resources and in other cases nurtures the pursuit of marginal environmental benefits at disproportionate social costs. In its implementation, the ESA does not strike a balance between competing economic and ecological values, nor is it protective of human rights.

The ESA was adopted as crisis legislation to address extreme circumstances. Shortly after Congress passed the ESA in 1973, the United States Supreme Court declared the ESA the most comprehensive legislation ever passed by any nation for the protection of species and concluded Congress intended that enforcement of the statute must occur "whatever the cost." *See Tennessee Valley Authority v. Hill*, 437 U.S. 153, 176-184 (1978). This type of "species first, people last" reading of the ESA gives more power to the federal government than any other environmental law. To protect threatened and endangered species under the ESA, federal officials exert regulatory authority over land and water resources all across the country where listed species exist and dictate the use of these resources often without regard to state, local, or private ownership or needs.

This approach pits people against species, environmentalists against landowners, and urban communities against rural communities. Further, strict application of the ESA has resulted in some unfortunate, even frightening outcomes. For example, homeowners in Texas have been threatened by the Fish and Wildlife Service with criminal charges if they erect fences on their property in the habitat areas of the Golden-cheeked warbler, a small bird. Likewise, homeowners in California have been warned that clearing brush away from their houses for fire protection in gnatcatcher habitat will subject them to substantial fines or imprisonment.

In the Klamath River Basin, at the California-Oregon border, federal officials withheld water from farmers in a drought year to increase river flows for protected fish. Although Klamath farmers helped to pay for the water storage and delivery system, and the federal government was obligated by contract to deliver irrigation water to nearly 1,400 families to irrigate approximately 230,000 agricultural acres, water delivery was stopped. Nearly all crops were lost, along with hundreds of families' income and their planting capacity for the next season. Agricultural land dropped in value by ten fold from $2,000 an acre to $200. As assets shrank, so did hopes for college and retirement.

In New Mexico, the reintroduced Mexican Wolf preys on cattle while ranchers trying to protect their herds risk prosecution for harming the protected species. In the Northwest, protected species of owls have decimated the timber and lumber industries and the livelihoods of thousands of employees. In a depressed neighborhood in southern California, eight protected Delhi Sands flower-loving flies delayed for a year a much-needed medical facility and cost local taxpayers $4.5 million to move the site.

Most tragically, a federal government report documents actual loss of human life from concerns over ESA compliance. During a wildfire in the Cascade Mountains of the State of Washington, confused Forest Service officials, fearful of violating the ESA, delayed for hours before allowing firefighting helicopters to scoop water from a river to help trapped firefighters because the river was habitat to protected fish. The government admits that this delay was an "influencing factor" behind the death of four firefighters.

These examples underscore the problems created by an inflexible law that fails to balance human needs and species protection.

Unfortunately, the societal costs of species protection under the ESA are hidden and unknown to the public. But any meaningful discussion of the effectiveness of the ESA must include a consideration of such costs.

From time to time the Fish and Wildlife Service produces a report summarizing expenditures for ESA implementation. One of these reports, the *Three-Year Summary of Federal and State Endangered Species Expenditures, Fiscal Years 1998-2000*, was reviewed by the nonprofit Property and Environment Research Center (PERC). PERC's review revealed that actual ESA expenditures were huge and grossly understated. *See Accounting for Species: The True Cost of the Endangered Species Act*, Randy T. Simmons and Kimberly Frost, http://www.perc. org/pdf/esa_costs.pdf .

Among other things PERC found the following errors and omissions in the government's report:

- Although the government estimated federal expenditure for species protection for fiscal year 2000 of $610.3 million, the actual cost was probably four times that amount.

- The estimated total cost to taxpayers for ESA-related activities for the 11 year period from 1989 to 2000 of more than $3.5 billion is closer to the actual cost taxpayers pay *each year* for these activities.

- Not all agencies report ESA expenditures and many under report those expenditures.

- "Other costs absorbed by state and local governments and private parties are not reported at all" and run in the billions.

See Accounting for Species, at i-ii.

Examples of these "other costs" not reported include costs for implementing species recovery (e.g., $650 million for a Habitat Conservation Plan (HCP) in San Diego County,

California); costs from ESA-related interference with building schools, hospitals, roads, and other infrastructure (e.g., delay of $55 million high school in Vista Murrieta, California, at a cost of over $1 million); economic impacts from federal regulation of 38 million acres of private land (e.g., costs of critical habitat for the California gnatcatcher alone estimated at an average $300 million a year); enormous private costs such as development project denials, delays or changes (e.g. up to $120 million in project modifications for California vernal pool critical habitat designation); social costs from regulatory burdens placed on agriculture, water use, forest management, mineral extraction, and recreation (e.g., crop losses in the Klamath Basin of Oregon in 2001 exceeding $50 million); loss of jobs (e.g., at least 130,000 jobs and more than 900 forest product facilities closed since mid-1990 to protect the northern spotted owl); and, reduction of business activities, tax revenues, property valuation (e.g., ESA-mandated water reductions in the Westlands Water District cost the California economy more than $218 million and 4,500 jobs statewide and a loss of federal revenue of $2.3 million). *Id.* at 1-11. *See also*, *The Economic Costs of Critical Habitat Designation: Framework and Application to the Case of California Vernal Pools*, by David Sunding, Aaron Swoboda and David Zilberman, February 20, 2003, at 25-35 (over 90% of total costs of critical habitat designation for California vernal pool species are due to project modifications, $118 -$120M), http://www.calresources.org/admin/files/crmichreport.pdf

The PERC authors conclude that the costs of implementing the ESA are far greater than the government reports and that the ESA may waste taxpayer dollars because only a few species benefit from government ESA expenditures: "Fifty percent of reported expenditures are for seven species, just 0.6 percent of the ESA list." *Accounting for Species* at v.

Bringing these costs of species protection to light is vital to an intelligent debate about the efficacy of the ESA. Those who are not aware of the social costs of species protection cannot make an informed choice about how to expend our finite economic and natural resources. Evidence shows that when people do know of the costs of environmental protection their priorities often change. Notable events in New Mexico and elsewhere illustrate the point.

The city of Albuquerque, New Mexico, has over 500,000 residents and sits near the Rio Grande River. Since the 1960s the city has spent millions of taxpayer dollars to secure water rights from the river to ensure its needs are met well into the future. However, this future was jeopardized when a suit was brought in federal court claiming that drought conditions reduced water flow in the river and put the silvery minnow, a protected fish, at risk. When the district judge and then a circuit court of appeal ruled the ESA required Albuquerque to compensate by diverting its own limited water supply to increase river flows for the fish, a huge public outcry was heard. New Mexico officials, including Democrat Governor Bill Richardson, and Republican United States Senator Pete Domenici, supporters of the ESA, were now calling for intervention by the United States Supreme Court.

In the midst of this controversy over how limited water supplies should be used, for people or fish, the Albuquerque Journal commissioned a survey of New Mexicans' opinions of

the ESA. The Journal asked: "Thinking of recent developments in New Mexico involving the Endangered Species Act, such as efforts to protect the Rio Grande silvery minnow, do you think the Act goes too far, does not go far enough, or is working as it should?" Sixty-nine percent said the Act goes too far while 15% said it is working as it should, and only 6% said it does not go far enough. This was an abrupt change from previous surveys.

Similar trends in public opinion were noted in an Associated Press article published on April 4, 2005, by Jim Wasserman, which reported increasing bipartisan concern in the California Legislature over the impact of that state's environmental protection laws on home ownership. According to the article, there is a growing momentum to change the law to facilitate home building. "A majority of Californians can no longer afford to buy homes, prompting some lawmakers to lament that their generation may be the state's first unable to provide a better life for its children."

Species protection, "whatever the cost," does not ensure a better life for future generations. To many, there are other values of equal or greater worth, like home ownership. Species protection, "whatever the cost," does not even ensure species protection. This is the travesty of the ESA; it has not resulted in a significant improvement in the condition of threatened and endangered plants and wildlife.

However one weighs the relative importance of environmental protection and quality of life, all should agree that our finite economic and natural resources should not be wasted. But that appears to be happening under the ESA.

For years the Fish and Wildlife Service has argued that the designation of critical habitat provides little or no additional protection to listed species but involves great cost:

> In 30 years of implementing the ESA, . . . the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of conservation resources. The Service's present system for designating critical habitat is driven by litigation rather than biology, limits our ability to fully evaluate the science involved, . . . and imposes huge social and economic costs. The Service believes that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit to the species most in need of protection.

68 Fed. Reg. 46684-01 (Aug. 6, 2003).

Because Congress has not responded to the Agency's repeated calls for greater discretion in the use of critical habitat as a conservation tool, continued litigation is likely to drive the Agency's critical habitat program. The ESA requires the designation of critical habitat for all listed species, with few exceptions, but this has been done for only 25% of the 1,264 threatened and endangered species listed nationwide. Activists have sued to compel the Fish and Wildlife

Service to designate critical habitat for literally hundreds of species. The Agency complains, however, that these court actions leave the Service with inadequate time and resources to properly identify critical habitat, resulting in overly broad designations. This was the case with the Alameda whipsnake.

When the Fish and Wildlife Service designated over 400,000 acres of critical habitat for the Alameda whipsnake in four California counties, in response to a court challenge, the Agency openly acknowledged it included areas that were not essential to the conservation of the species:

> We recognize that not all parcels within the proposed critical habitat designation will contain the primary constituent elements needed by the whipsnake. Given the short period of time in which we were required to complete this proposed rule, and the lack of fine scale mapping data, we were unable to map critical habitat in sufficient detail to exclude all such areas.

65 Fed. Reg. 58933, 58944 (Oct. 3, 2000).

The deficiencies did not stop there, however. The Agency also failed to adequately consider the economic impacts of the critical habitat designation. Although the critical habitat included highly populated areas of the State of California in the midst of a housing shortage and costs associated with critical habitat were estimated at $100 million for the University of California, and a like amount for the mining industry, and state and local agencies identified severe limits that would flow from critical habitat affecting fire and flood protection activities, the Service concluded the designation of critical habitat for the Alameda whipsnake would have no significant economic effect.

In response, Pacific Legal Foundation attorneys, representing home builders, small businesses and local landowners, challenged the critical habitat designation in court. In *Home Builders Association of Northern California v. United States Fish and Wildlife Service*, 268 F. Supp. 2d. 1197 (E.D. Cal. 2003), a federal court invalidated the critical habitat designation for the Alameda whipsnake and remanded the matter to the agency to redesignate the critical habitat and redo the economic analysis.

This has lead to further litigation. Recently, Pacific Legal Foundation attorneys filed suits in federal court challenging the critical habitat designations of 42 species in 42 counties of the State of California covering almost 1.5 million acres. Each of these designations was promulgated as a result of a court action and suffers from the same deficiencies as the critical habitat for the Alameda whipsnake—the designations are over broad and the economic analyses are inadequate.

Thus, the ESA critical habitat requirement is, at best, inefficient, and, at worst, wasteful, on two fronts. First, according to the very agency tasked with the responsibility for protecting listed species, the designation of critical habitat provides no meaningful protection to the species

beyond the protections already provided by other provisions of the Act, such as the Section 9 take provision which prohibits anyone from harming a listed species. This was also the conclusion of the district court in *Home Builders*. While the environmental intervenors argued that the invalid critical habitat designation should be left in place for the protection of the Alameda whipsnake, the court found *no evidence* that setting aside the critical habitat would have any harmful effect on the species.

And, second, the critical habitat requirement breeds endless litigation that diverts limited resources from true conservation efforts.

If Congress is committed to improving the ESA, it must consider a resolution of the critical habitat controversy. Congress should consider other aspects of the ESA as well.

For example, protection for land owners is essential to the successful implementation of the Act. Approximately 75% of all listed species have habitat on private property. *See Accounting for Species* at 10. As a result, the use of that property is drastically curtailed, if not prohibited altogether. But property owners are not compensated for this loss of use. This is counterproductive because it discourages landowner cooperation and voluntary conservation. *See id*.

Under the ESA, landowners can be "prosecuted, fined, jailed, and ordered to pay restitution" if they harm a listed species without federal approval. *Id*. "Harm" is widely defined and may include modification of species habitat. *Id*. In effect, the federal government exercises a veto power over land use activities in species habitat. The impact on landowners is severe. *See* Sunding, Swoboda & Zilberman. As United States Supreme Court Justices Antonin Scalia and Clarence Thomas argued in dissent in *Babbitt v. Sweet Home Chapter of Communities for Great Oregon*, 515 U.S. 687, 714 (1995), such restrictions "impose[] unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use."

Providing landowners compensation or other economic incentives, when their land is taken out of productive use and left in its natural state, is not only fair but, constitutionally required. After the Klamath tragedy, that resulted in such heavy loss of crops and livelihoods, local farmers brought a $1 billion dollar suit in the Court of Federal Claims seeking restitution under the Just Compensation Clause of the Fifth Amendment. According to the United States Supreme Court, "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."—Like species protection.

Besides encouraging landowner cooperation and satisfying fundamental notions of fairness, compensating landowners serves another important societal purpose; it acts as a restriction on federal power by limiting the incentive of the government to take more land than it

needs for wildlife conservation. Under the ESA, the federal government essentially "acquires" land at no cost. With the stroke of a pen private property becomes protected habitat, with all its attendant restrictions. The natural result of a government that regulates without cost is a government that regulates without end.

Aside from these general observations that species protection should involve a balance between economic growth and ecological goals, between people and wildlife, I wish to point the committee to other areas of concern within the ESA that merit consideration.

1. <u>"Best Available" Scientific Evidence</u>

The ESA requires the listing of threatened or endangered species, and the designation of "critical habitat," based only on the "best available" scientific evidence. *See* 16 U.S.C. § 1533. However, both the implementing agencies and the courts have interpreted "best available" to mean any evidence whatsoever. This has resulted in unnecessary listings and overly broad "critical habitat" designations. For example, in a July 15, 1998, study entitled *Babbitt's Big Mistake*: *The Real Story Behind the Endangered Species Recovery Announcement*, the National Wilderness Institute documented the following.

> Historically data error has been the most common actual reason for a species to be removed from the endangered species list. Species officially removed because of data error include: the Mexican duck, Santa Barbara song sparrow, Pine Barrens tree frog, Indian flap-shelled turtle, Bahama swallowtail butterfly, purple-spined hedgehog cactus, Tumamock globeberry, spineless hedgehog cactus, McKittrick pennyroyal and cuneate bidens. While officially termed 'recovered,' the Rydberg milk-vetch and three birds species from Palau owe their delisting to data error (*see* Delisted Species Wrongly Termed Recovered by FWS, p. 16). Many other currently listed species have been determined to be substantially more numerous and to occupy a much larger habitat than believed at the time of listing (*see* Environment International, Conservation Under the Endangered Species Act, 1997).

Publications, Studies, Reports, Legislative Briefs at http://www.nwi.org

"Best available" data is often not peer reviewed. Currently, the agencies use peer review on an informal, ad hoc basis. This has proven inadequate as events in the Klamath area have shown. In 2001, the Biological Opinion for the Klamath Project concluded that any water diversions for irrigation purposes would jeopardize listed salmon and sucker fish, although numerous claims were made that the Biological Opinion ignored more reliable data that showed that water diversions would not jeopardize the fish. Based on this conclusion, the Bureau of Reclamation prohibited all water diversions from the Klamath Project to Klamath area farmers who depend on irrigation water from the project. A firestorm of protests followed calling on the Administration to take a closer look at the data for 2002. In response, the Administration

subjected the data to "peer review" by the National Academy of Sciences. An expert scientific committee of that body subsequently determined that the 2001 Biological Opinion was faulty because the "best scientific and commercial data" showed that water diversions for irrigation would not jeopardize the listed fish.

2. Proof of Harm

Section 9 of the Endangered Species Act prohibits the "taking" of any endangered or threatened species. 16 U.S.C. § 1538(a)(1)(B). However, the Act allows a "taking," when authorized, if the "taking" is incidental to, and not the purpose of, carrying out an otherwise lawful activity. *See* 16 U.S.C. § 1539(a)(1)(B). The term "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The term "harm" was interpreted by regulation to mean:

> an act which *actually* kills or injures wildlife. Such act may include significant habitat modification or degradation where it *actually* kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3 (emphasis added).

This interpretation was upheld by the United States Supreme Court in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), but the United States Fish and Wildlife Service has attempted to "read out" the requirement of *actual* injury in its day-to-day implementation of the Act. For example, in *Arizona Cattle Growers' Association v. United States Fish and Wildlife Service*, 273 F.3d 1229 (9th Cir. 2001), the Service argued that it could prohibit grazing on federal land without any proof of harm to any species. Although this argument was rejected by the court, the Service has not embraced the court decision.

3. Private Lands v. Public Lands

Even when public lands alone will provide sufficient habitat to conserve a threatened or endangered species, the government designates vast amounts of private property as "critical habitat"—primarily because it has little incentive not to. The Alameda whipsnake is a perfect example. When the whipsnake was listed as a threatened species, the United States Fish and Wildlife Service reported that only 20% of the snake's known habitat was on private land and that this land was not essential to the conservation of the species. 65 Fed. Reg. 58935. However, when it designated "critical habitat," pursuant to court order, the Service included not only occupied habitat but "potential" habitat that did not contain the physical or biological features essential to the conservation of the species. This resulted in the inclusion of 248,270 acres of private land, or 61% of the total "critical habitat" area of 406,598 acres. *Id*. at 58937. Numerous "critical habitat" designations have been successfully challenged in court as overly broad.

This practice of regulating private property that is not essential to the conservation of the species imposes unfair and unnecessary regulatory burdens on private citizens. Millions of acres throughout the Nation have already been designated "critical habitat," and more will follow.

4. Existing Federal Contracts

To protect listed salmon and sucker fish in California and Oregon, in 2001 the Bureau of Reclamation breached its decades-old contract to provide irrigation water to Klamath farmers from the Klamath Water Project that was built to provide such water. This resulted in a drastic loss of jobs and livelihoods when local farmers were unable to water their crops on farms that had been productive for generations. The harsh impacts on the local community and the ensuing demonstrations (not to mention the tense standoff with federal authorities at the main pumping station) was widely publicized. A suit against the federal government for up to $1 billion in damages was filed in federal court. *Klamath Irrigation District v. U.S.* (Fed Claims, No. 01-591 L). Thus, federal agencies have broken their contractual obligations, or violated other laws, to comply with the ESA.

5. "Reasonable and Prudent Alternatives"

Section 7 of the Act, 16 U.S.C. § 1536, allows the "taking" of a threatened or endangered species if "reasonable and prudent alternatives or measures" are adopted to mitigate the impact of a federally approved project. This means a project can go forward with alterations designed to minimize impacts on protected species. However, the terms "reasonable and prudent alternatives or measures" are not defined in the Act. As a result, federal agencies often impose "alternatives" or "measures" that simply nullify the proposed project without rejecting it outright as the law requires.

For example, when the Bureau of Reclamation considered "reasonable and prudent alternatives" for the Klamath Irrigation Project, the Bureau did not consider alternative ways of providing irrigation water to the Klamath farmers, the very purpose of the project, but rather coopted the project for the sole purpose of providing water for protected fish. Likewise, federal agencies often require "reasonable and prudent measures" that are not economically feasible for the project applicant, such as the use of expensive fish screens by a small water irrigation district. Such "alternatives" or "measures" may be environmentally "prudent," but they are not "reasonable" if they cannot be carried out consistent with the purpose of the project.

If the project, as proposed, cannot be made sufficiently protective of threatened and endangered species by the application of "reasonable and prudent alternatives or measures," then section 7 requires that the agency deny approval of the project. But the agency may not redefine the project under the guise of "reasonable and prudent alternatives or measures." The clear intent of section 7—to facilitate otherwise legal projects that would not jeopardize a species with sensible modifications—has been compromised.

6. Economic Impacts Analysis

The Act requires the government to designate "critical habitat" at the time of listing a species as threatened or endangered. 16 U.S.C. § 1533(a)(3). The habitat designation must be based on the best scientific data available, but—unlike the listing of a species—only "after taking into consideration the economic impact, . . . and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). According to the House Report on the Endangered Species Act Amendments of 1982:

> Whether a species has declined sufficiently to justify listing is a biological, not an economic, question. For this reason, the Committee eliminated all economic considerations from the species listing process. Desirous to restrict the Secretary's decision on species listing to biology alone, *the Committee nonetheless recognized that the critical habitat designation, with its attendant economic analysis, offers some counter-point to the listing of species without due consideration for the effects on land use and other development interests. For this reason, the Committee elected to leave critical habitat as an integral part of the listing process . . . .*
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> H.R. Rep. No. 567, 97th Cong., 2d Sess., *reprinted in* 1982 U.S.C.C.A.N. 2812 (emphasis added).

In its economic analyses of "critical habitat," the United States Fish and Wildlife Service has generally only considered the incremental economic impacts on the regulated community that flow from the designation itself. In such cases, the Service has concluded that these impacts are either not significant or nonexistent. Thus, instead of providing the "counter-point" that Congress intended, the Service has reduced the economic analysis to a meaningless exercise. However, in a case called *New Mexico Cattle Growers Association v. United States Fish and Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001), a federal court of appeals rejected the incremental impacts approach the Service employed and concluded a meaningful analysis must also include the economic impacts on land use caused by the listing. But, this precedent is not followed by the Service in other circuits.

7. Essential Habitat

The Act defines "critical habitat" to include *only* those areas actually occupied by the species that are *essential* to the conservation of the species as well as those areas that are unoccupied by the species, at the time of listing, that the Secretary determines are *essential* for the conservation of the species. 16 U.S.C. § 1532(5). However, the United States Fish and Wildlife Service and NOAA Fisheries have virtually never made such a finding. Rather, they tend to rely on the species' historical range and routinely include potential or merely possible habitat areas in the "critical habitat" designation. In effect, they take the term "essential" to mean nothing more than "desirable." This failure of the agencies to follow the statutory criteria

undermines the intent of the Act, to limit the scope of "critical habitat," and imposes unnecessary burdens on the regulated community.

8. Mitigation v. Recovery

Section 10 of the Act requires a permit applicant to provide a "conservation plan" that includes the steps that will be taken to "minimize and mitigate" the impacts of any incidental "taking" that may result from the proposed project. 16 U.S.C. § 1539(2)(A)(ii). This conservation plan must also include "such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan." *Id*. Although the "purposes of the plan" clearly relate back to the requirement to "minimize and mitigate" the impacts of the incidental "taking," the United States Fish and Wildlife Service and NOAA Fisheries have taken this provision as carte blanche to impose any and all measures these agencies desire. In addition to the required mitigation, these agencies typically mandate through the conservation plan that the applicant also pay fees or provide land for habitat enhancements that go way beyond the remedial needs of the project. In effect, these agencies distort the Act to push the cost of conservation and recovery onto the private citizen. Under the Act and other laws, the government itself, and not the applicant, has the responsibility to provide for the general conservation and recovery of threatened and endangered species. "Mitigation" measures that exceed the impact of a project in type or extent violate the applicant's constitutional protections. *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Although private applicants are required to "minimize and mitigate" the effects of their conduct on listed species, they do not have a duty, like the government, to provide resources for the general conservation or recovery of the species.

9. "Adverse Modification"

The designation of "critical habitat" has major repercussions for private landowners, the States and the Nation. By way of example, "critical habitat" has been designated for only a portion of California's more than 290 federally-listed threatened and endangered species, but those habitat designations include large areas of the State (i.e., probably between 12 and 15 million acres or 12% to 15% of the area of the state). By the time "critical habitat" is designated for all these listed species, the State of California will likely have been blanketed many times over. "Critical habitat" for a single species, like the California red-legged frog, can include millions of acres.

Under section 7 of the ESA, federal agencies must ensure that any activities they authorize, fund, or carry out are not likely to "result in the destruction or adverse modification" of "critical habitat." 16 U.S.C. § 1536(a)(2). The term "adverse modification" is not defined by the Act and is subject to varying interpretations. And although federal regulations require such modification to be "substantial," even small changes have been challenged by environmental litigants. As a result, the use of land, public or private, that is designated "critical habitat" can be severely limited, or prohibited altogether without affording significant protections to listed

species. Congress tried to avoid the onerous impacts of "critical habitat"—when it amended the ESA in 1978—by limiting the scope of the designation to "essential" habitat areas. However, federal regulators continue to designate overbroad "critical habitat" areas while environmental litigants argue that "adverse modification" should preclude even minor changes to the land.

10. "Distinct Population Segments"

The Act defines "species" to include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. 1532(16). The term "distinct population segment" has no definite meaning and has allowed the United States Fish and Wildlife Service and NOAA Fisheries to expand or contract a regulated population by arbitrarily drawing either a large circle or a small circle around the target species. This has resulted in inconsistent and arbitrary designations of "distinct population segments" that have no relation to generally accepted biological standards. For example, rather than designating genetically identical Pacific Coast salmon as one species, the government divided them up into separate geographic groups based on a novel definition of distinct population segments called "Evolutionarily Significant Units" or "ESU's." ESU's can be as small as a specific stream or as large as several watersheds. In contrast to the salmon, however, the agency decided that Puget Sound orcas did not constitute a population segment distinct from their cousins in Alaskan waters. In effect, these agencies are taking the broad language of the Act and inventing their own biology that is both uncertain and scientifically unjustified.

11. State and Local Enforcement

Lawsuits against local, state, and federal agencies are proliferating based on the premise that regulations or permits issued by these agencies either "take" (16 U.S.C. § 1538(a)(1)(B)) a listed species or constitute a "solicitation" (16 U.S.C. § 1538(g)) to "take" a listed species in violation of the Endangered Species Act. For example, in April, 2002, the Center for Biological Diversity filed suit against the Environmental Protection Agency claiming that the mere registration of certain pesticides by that agency violates the "take" provision of the ESA because those pesticides could be used to harm threatened and endangered species, notwithstanding the use of such pesticides in an unlawful manner is prohibited. *See Center for Biological Diversity v. Whitman* (N.D. Ca. No. C02-1580CW). Similar suits have been filed around the country. *See Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997) (finding state's commercial fishing regulations exacted a "taking" of the Northern Right Whale under the ESA); *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991) (finding Forest Service's management of timber stands was a "taking" of the red-cockaded woodpecker in violation of the ESA); *Defenders of Wildlife v. EPA*, 882 F.2d 1294 (8th Cir. 1989) (holding that the EPA's registration of pesticides containing strychnine violated the ESA); and *Loggerhead Turtle v. County Council of Volusia County*, *Florida*, 896 F. Supp. 1170 (M.D. Fla. 1995) (holding that county's authorization of vehicular beach access during turtle mating season exacted a "taking" of the turtles in violation of the ESA).

None of the regulations or permits struck down in these cases were designed to harm listed species. Nor did they actually authorize the "taking" of a listed species in violation of the ESA. Rather, they were a legitimate exercise of agency power authorizing otherwise legal activities. In each case, any harm would be caused by an act of another. Congress could not have intended to hold government officials civilly and criminally liable for the illegal acts of another. Under these precedents, the Department of Motor Vehicles could be found in violation of the Act because someone who has a drivers licence issued by that agency uses his car to harm a threatened or endangered species. In our society individuals are presumed to know the law. It is common knowledge that the receipt of a permit does not absolve one of the responsibility of obtaining other necessary authorizations. Likewise, regulations or permits that authorize otherwise legal conduct that could result in the incidental "taking" of a listed species should require the actor, and not the agency, to avoid violating the ESA.

12. Permit Streamlining

The Act allows the "taking" of a listed species, by permit, if it is merely incidental to, and not for the purpose of, carrying out an otherwise lawful activity. *See* 16 U.S.C. § 1539(a)(1)(B). However, the cost of applying for a permit is high and often prohibitive for small landowners. For example, a permit application under section 10 of the Act requires the applicant to submit a conservation plan. Even the smallest conservation plan can exceed $50,000 in cost. This sum would far exceed the value of many projects that are likely to have no significant impacts on protected species. Consider the family in Humboldt County, California, that owns a small ranch in marbled murrelet territory. The family would like to cut a few trees on its property to augment its modest income. Although the protected birds do not nest in those trees, the family must first obtain an "incidental take permit" from the United States Fish and Wildlife Service. But the cost of the application is beyond the family's means and many times more than the value of the trees. Thus, the Act places heavy burdens on the regulated community without providing any meaningful protection to listed species. And although the United States Fish and Wildlife Service or NOAA Fisheries may provide some relief for small projects through their own regulations or practices, the Act itself makes no distinction between the level of detail required for an insignificant project like laying bricks for a backyard patio or a major project like the development of an entire subdivision.

13. Section 10 v. Section 7

The Act authorizes two separate means of obtaining federal authorization to "take" a protected species incidental to a lawful activity—sections 10 and 7. Section 10 allows private citizens to obtain "take" approval (Incidental Take Permit or ITP) by means of a costly and lengthy application, review, and permit process. 16 U.S.C. § 1539. Section 7 allows private citizens to obtain "take" approval (Incidental Take Statement or ITS) by means of a less formal, but often burdensome, consultation process. 16 U.S.C. § 1536. By their terms, section 10 *only* applies to projects that *do not* involve a federal agency whereas section 7 *only* applies to projects that *do* involve a federal agency. Both the Incidental Take Permit under section 10 and the

Incidental Take Statement under section 7 protect the applicant from liability for the incidental "take" of a threatened or endangered species and each may require substantial mitigation of project impacts. But although these two sections are directed at different types of project applicants, the United States Fish and Wildlife Service and the NOAA Fisheries claim that private project applicants who seek an Incidental Take Permit under section 10 are also subject to the requirements of section 7. *See Environmental Protection Information Center v. Pacific Lumber Co.*, 67 F. Supp. 2d. 1090 (N. D. Cal. 1999) (overruled on appeal at 257 F.3d 1071 (9th Cir. 2001)). Subjecting applicants to redundant permitting requirements is unnecessary and wasteful.

I wish to thank the committee for this opportunity to provide this testimony and hope this analysis will help the committee as it deliberates improvements to the ESA.

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M. REED HOPPER