

**TESTIMONY OF ROBERT V. PERCIVAL
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BEFORE THE HOUSE COMMITTEE ON
NATURAL RESOURCES
HEARING ON
PROPOSED AMENDMENTS TO
THE ENDANGERED SPECIES ACT**

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My name is Robert V. Percival. I am the Robert F. Stanton Professor of Law and the Director of the Environmental Law Program at the University of Maryland Francis King Carey School of Law. Thank you for inviting me to testify today. For more than two decades I have been the principal author of the most widely-used environmental law casebook in U.S. law schools, *Environmental Regulation: Law, Science & Policy* (Wolters Kluwer Law & Business, 7th ed. 2013). I have taught Environmental Law for more than a quarter century and I also teach Constitutional Law, Administrative Law and Global Environmental Law.

I. THE ENDANGERED SPECIES ACT REFLECTS OUR HIGHEST MORAL ASPIRATIONS

The Endangered Species Act (ESA) is the product of a remarkable, bipartisan consensus concerning the moral imperative of preserving biodiversity. In his Special Message to Congress on February 8, 1972, President Richard Nixon called on Congress to enact “legislation to provide for early identification and protection of endangered species,” to “make the taking of endangered species a Federal offence for the first time,” and to “permit protective measures to be undertaken before a species is so depleted that regeneration is difficult or impossible.”¹ Congress responded by enacting the ESA by an overwhelming, bipartisan majority. The legislation passed the Senate by a vote of 92-0 on July 24, 1973. On September 18, 1973, the House approved its own version of the bill by a vote of 390-12. The final legislation that emerged from a joint conference committee was agreed to by the Senate unanimously on December 19, 1973 and by the House by a vote of 355-4 on December 20, 1973. President Nixon signed the ESA into law on December 28, 1973.

The ESA is a profoundly “pro-life” piece of legislation. It creates a presumption that humans should avoid activity that would harm endangered species and that federal agencies should avoid actions likely to jeopardize species’ continued existence. The ESA has been recognized as one of the most profound

¹ Richard M. Nixon, Special Message to Congress Outlining the 1972 Environmental Program, Feb. 8, 1972 (<http://www.presidency.ucsb.edu/ws/index.php?pid=3731>).

moral accomplishments of the human race because it recognizes that we have an ethical obligation to preserve all of God's creation.²

In its first major decision interpreting the ESA, the U.S. Supreme Court declared the Act to be "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."³ It explained that "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."⁴ As an illustration of "the seriousness with which Congress viewed this issue," the Court specifically cited the ESA's "provisions allowing interested persons to petition the Secretary to list a species as endangered or threatened and bring civil suits in United States district courts to force compliance with any provision of the Act."⁵

Despite strong public support for the ESA,⁶ it often has been a target for political attacks because the costs of species protection measures are more visible and immediate than the more diffuse, long-term benefits of preserving biodiversity. Yet the bipartisan majority that enacted this landmark legislation rejected the notion that species should be sacrificed to political expediency. As the Supreme Court explained in *TVA v. Hill* "Congress was concerned about the *unknown* uses that endangered species might have and about the *unforeseeable* place such creatures may have in the chain of life on this planet."⁷ Thus "the plain intent of Congress in enacting" the legislation "was to halt and reverse the trend toward species extinction, whatever the cost."⁸

Balanced, scientific evaluations of the ESA have consistently endorsed its basic principles. Evaluating more than two decades of experience with the ESA, the National Research Council in 1995, in a report commissioned by Congress, found that "the ESA is based on sound scientific principles."⁹ It concluded that "there is no doubt that it has prevented the extinction of some species and slowed the decline of

² Roderick F. Nash, *The Rights of Nature: A History of Environmental Ethics* (Univ. Wisc. Press 1989). See also Evangelical Environmental Network, *On the Care of Creation: An Evangelical Declaration on the Care of Creation* (1994) (http://www.earthcareonline.org/evangelical_declaration.pdf).

³ *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978).

⁴ *Id.* at 194 (1978).

⁵ *Id.* at 181.

⁶ During the spotted owl controversy in 1992, voters supported the ESA by a margin of 66 to 11 percent. When asked to choose between protecting species or savings jobs and businesses, species protection was favored by a margin of 48 to 29 percent. Sawhill, *Saving Endangered Species Doesn't Endanger the Economy*, *Wall. St. J.*, Feb. 20, 1992, at A15

⁷ 437 U.S.

at 178-79.

⁸ *Id.* at 184.

⁹ National Research Council, *Science and the Endangered Species Act* 4 (1995).

others.”¹⁰ In a letter to the U.S. Senate in March 2006 a group of 5,738 biologists praised the ESA and criticized proposals to weaken its protections. The biologists noted that the ESA had contributed to “significant progress” in species protection. They stressed the importance of the ESA’s emphasis on “best available science” and they criticized proposals to mandate the use of non-scientific factors to delay or block listing decisions, designations of critical habitat or implementation of species recovery plans.¹¹

II. INADEQUATE FUNDING HAS JEOPARDIZED IMPLEMENTATION OF THE ESA. IMPOSITION OF ADDITIONAL UNFUNDED MANDATES ON AGENCIES WOULD ONLY EXACERBATE THIS PROBLEM.

A fundamental problem with implementation of the ESA has been the chronically inadequate funding that has been afforded the federal agencies charged with implementing the Act. Since it was last reauthorized in 1992, the ESA has been implemented through annual appropriations that have been inadequate to enable the agencies promptly to comply with their statutory responsibilities.¹² This has made the agencies targets for lawsuits seeking to compel them to perform their non-discretionary duties. Until Congress provides adequate funding to enable federal agencies to discharge in a timely fashion their responsibilities for listing endangered species, for consulting with other federal agencies concerning their conservation obligations for listed species, and for promoting species recovery efforts, the current pattern of litigation is likely to continue.

The imposition of additional unfunded mandates on the agencies would only exacerbate existing problems of inadequate agency resources. Three of the four bills under consideration at this hearing would create new statutory responsibilities for the agencies implementing the ESA without increasing the already-inadequate funds available to them.

H.R. 4315 would require publication on the Internet of the basis for determinations that species are endangered and threatened. This is unnecessary given the agencies’ existing statutory obligation under the ESA and the Administrative Procedure Act (APA) to provide public notice of proposed and final agency actions in the Federal Register, which is available on the internet, and to describe and evaluate the reasons and data upon which agency actions are based.¹³

¹⁰ Id.

¹¹ Letter from 5,738 Biologists to the U.S. Senate Concerning Science in the Endangered Species Act, March 2006 (http://www.ucusa.org/assets/documents/scientific_integrity/biologists_california.pdf).

¹² Donald C. Baur, Michael J. Bean & William Robert Irvin, A Recovery Plan for the Endangered Species Act, 39 *Env’tl L. Rep.* 10006, 10010 (2009).

¹³ See ESA § 4(b)(3)(B), 16 U.S.C. § 1533(b)(3)(B) (“the Secretary shall promptly publish such finding in the Federal Register, together with a description and

H.R. 4316 would require the Secretary of Interior annually, in consultation with the Secretary of Commerce, to gather and to submit to Congress detailed data concerning not only every citizen suit brought under the ESA, but also every notice letter informing the agency of an alleged violation of the Act. This data would include not only direct expenditures by the agencies on any aspect of preparation for, or conduct of such litigation, but also estimates of employee time devoted to such activities. The bill targets only citizen suits and does not require reporting of the costs of responding to oversight requests by congressional committees, which have been quite substantial.¹⁴ By focusing solely on the costs of performing agency duties under the ESA, without any consideration of the benefits of such actions, this data would contribute to a distorted view of the value of the ESA.

H.R. 4317 would dictate that the “best scientific and commercial data available” include “all such data submitted by a State, tribal, or county government.” If this is interpreted to mean that any data submitted by such a government must be deemed to be the “best scientific and commercial data available,” the requirement would constitute an improper effort by Congress to dictate scientific judgments. If instead it means only that when governments submit scientific and commercial data that is indeed the best available it will be considered as such, it is unnecessary because this is already permissible under existing law.

III. CONGRESS SHOULD NOT AMEND THE ATTORNEY FEE-SHIFTING PROVISIONS OF THE ESA

The ability of citizen groups and businesses to go to court to hold agencies accountable is one of the most important features of our legal system that makes it the envy of the world. It has been absolutely critical to ensuring that our federal environmental laws are implemented and enforced in a manner consistent with statutory directives, as the Supreme Court noted in its landmark *TVA v. Hill* decision.¹⁵

evaluation of the reasons and data on which the finding is based.”) and ESA § 4(b)(4), 16 U.S.C. § 1553(b)(4) (mandating that the informal rulemaking provisions of the APA, 5 U.S.C. § 553, apply to regulations issued under the ESA), and ESA § 4(b)(8) (requiring that publication in the Federal Register of any listing regulation “shall include a summary by the Secretary of the data on which such regulation is based and shall show the relationship of such data to such regulation.”).

¹⁴ See Letter from Secretary of Interior Sally Jewell to Chairman Hastings, January 15, 2014 (http://www.eenews.net/assets/2014/01/16/document_daily_04.pdf) (estimating that the Department of Interior spent more than 19,000 staff hours and nearly \$1.5 million responding to 27 document requests from this committee).

¹⁵ 437 U.S. 153, 181 (citing the ESA’s “provisions allowing interested persons to petition the Secretary to list a species as endangered or threatened and bring civil suits in United States district courts to force compliance with any provision of the Act.”)

The citizen suit provision contained in Section 11(g) of the Endangered Species Act¹⁶ mirrors those contained in the other major federal environmental statutes.¹⁷ It authorizes the court to “award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.”¹⁸ In *Ruckelshaus v. Sierra Club*,¹⁹ the Supreme Court interpreted similar language in the citizen suit provision of the Clean Air Act to require success on the merits before a party can become eligible for an award of attorneys fees.

The attorney fee-shifting provisions Congress has enacted in nearly all the federal environmental laws are designed to enable ordinary citizens to ensure that the laws are implemented and enforced.²⁰ Despite claims to the contrary, citizen suits have proven to be essential to effective implementation of the ESA²¹ and the other major federal environmental statutes. Thus, there is no justification for measures to discourage such actions.

H.R. 4318 would replace the existing standard for awarding attorneys fees under the ESA with a more restrictive standard contained in the Equal Access to Justice Act (EAJA). Rather than allowing judges to award “reasonable” fees to prevailing parties when “appropriate,” as authorized under existing law, this amendment would single out ESA citizen suits and subject them to below-market fee caps under the EAJA. There is no justification for removing citizen suits brought under the ESA from the same fee-shifting standards applicable to the other major federal environmental laws. As noted above, *Ruckelshaus v. Sierra Club* already restricts attorneys fee awards to prevailing parties. Thus, H.R. 4318 is merely a measure designed to make it more difficult for citizens to hold government agencies accountable for failing to implement the ESA.

IV. CONCLUSION

The ESA is a landmark piece of legislation that was the product of an overwhelming, bipartisan consensus concerning the importance of preserving biodiversity. Congress authorized citizen suits to hold agencies accountable for violations of the Act. Measures to impose additional unfunded mandates on

¹⁶ 16 U.S.C. § 1540(g).

¹⁷ See generally, Congressional Research Service, Award of Attorneys’ Fees by Federal Courts and Federal Agencies, June 20, 2008.

¹⁸ 16 U.S.C. § 1540(g)(4).

¹⁹ 463 U.S. 680 (1983).

²⁰ Robert V. Percival & Geoffrey P. Miller, “The Role of Attorney Fee Shifting in Public Interest Litigation,” 47 Law & Cont. Problems 235 (1984), available online at: <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3755&context=lcp>

²¹ Laura Peterson, Lawsuits Not Hurting Endangered Species Act – FWS Director, Greenwire, July 5, 2012; Berry Bosi & Eric Biber, Citizen Involvement in the U.S. Endangered Species Act, 337 Science 802 (Aug. 2012).

agencies implementing the ESA will only make it more difficult for them to carry out their statutory responsibilities. There is no justification for replacing the ESA's attorneys fee-shifting provision that currently mirrors those contained in virtually every other major federal environmental law.