ESA CONSULTATION IMPEDIMENTS TO ECONOMIC AND INFRASTRUCTURE DEVELOPMENT

OVERSIGHT HEARING

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

OF THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTEENTH CONGRESS

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OVERSIGHT HEARING ON ESA CONSULTATION IMPEDIMENTS TO ECONOMIC AND INFRASTRUCTURE DEVELOPMENT

Tuesday, March 28, 2017
U.S. House of Representatives
Subcommittee on Oversight and Investigations
Committee on Natural Resources
Washington, DC

The Subcommittee met, pursuant to notice, at 10:02 a.m., in room 1324, Longworth House Office Building, Hon. Raúl Labrador [Chairman of the Subcommittee] presiding.

Present: Representatives Labrador, Radewagen, Bergman, Johnson, González-Colón, Bishop; McEachin, Huffman, Clay, and Grijalva.

Also present: Representatives Beyer and Tsongas.

Mr. LABRADOR. Good morning. The Subcommittee on Oversight and Investigations will come to order. The Subcommittee is meeting today to hear testimony on ESA consultation impediments to economic and infrastructure development. Under Committee Rule 4(f), any oral opening statements at hearings are limited to the Chairman, the Ranking Minority Member, the Vice Chair, and the Vice Ranking Member.

Therefore, I ask unanimous consent that all other Members' opening statements be made part of the hearing record if they are submitted to the Subcommittee Clerk by 5:00 p.m.

Hearing no objection, so ordered.

Also I ask unanimous consent that the gentleman from Arkansas, Mr. Westerman; the gentlelady from Massachusetts, Ms. Tsongas; the gentleman from California, Mr. Lowenthal; and the gentleman from Virginia, Mr. Beyer, be allowed to sit with the Subcommittee and participate in the hearing.

Hearing no objection, so ordered.

I will now recognize myself for 5 minutes for an opening statement.

STATEMENT OF THE HON. RAÚL R. LABRADOR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IDAHO

Mr. LABRADOR. Many, including myself, strongly believe that the Endangered Species Act, last authorized nearly 30 years ago, is in serious need of reform. That is a priority that I expect the full Natural Resources Committee, under Chairman Bishop's leadership, to explore later this Congress.

Today's hearing will examine one specific section of the Act, and provide more evidence of just how dysfunctional and problematic the Endangered Species Act, and its implementation by the Federal Government, has become.

Nearly every imaginable action with a Federal nexus—including thousands of activities critical to the development of our Nation's infrastructure, energy, and resources, must undergo a Section 7 consultation with the Fish and Wildlife Service, the National Marine Fisheries Service, or both. This includes activities such as building and maintaining roads, bridges, schools, water facilities, hydropower dams, electrical transmission lines, grazing, mining, forest thinning, and even fire suppression efforts.

Because so much discretion is left to these Federal agencies to determine whether a species is present, how they may be impacted by the project, and what must be done to avoid impacts, the regulatory impediments are sweeping.

Worse, even when project applicants have, in good faith, sought to follow the Section 7 process, the threat of litigation always looms, and can impact the results of the process. Such unnecessary litigation does not help protect species and, instead, serves only to enrich private interests, draw resources away from conserving species and habitats, and prevent the law from working as intended.

Indeed, the ESA has become a lawyer's dream. Lawsuits extort mitigation requirements that are unrelated to projects as the price to complete consultation. Lawsuit after lawsuit can result in blocking a project entirely, and taxpayers foot the bill, paying tens of millions of dollars in attorneys' fees and grants to certain groups to file endangered species lawsuits. One of the groups testifying here today, the Defenders of Wildlife, has been party to more than 80 ESA-related lawsuits in just the 5 previous years.

In theory, project applicants should expect to navigate, or at least be given certainty of, the outcome of the consultation process within 135 days or less; but that is rarely what happens. Projects are stalled, Federal agencies force costly surveys or studies, and often require questionable or unattainable mitigation measures, sometimes at a cost of millions of taxpayer dollars, all due to Section 7. Consultations are frequently handled inconsistently between service regions, and are often delayed by local service employees.

We will hear testimony today about one egregious example of a mining project, that would have generated many local jobs and benefits to rural Montana, that was held up in the processes for 30 years due to the Services' shifting requirements during its Section 7 consultation.

A 2015 study found that 20 percent of formal consultations undertaken by the Fish and Wildlife Service between 2008 and 2015 went well beyond the statutory 135-day time frame.

The National Marine Fisheries Service has a far worse record, with just over 70 percent of their formal consultations exceeding required deadlines. In addition, the Services often unilaterally delay the start or the end of consultation, sometimes requiring projects to undergo years of studies, lengthy extensions, and negotiations before starting the clock on the consultation process.

Inconsistency, increased process and legal costs, and a lack of certainty about the consultation process severely hinders our Nation's ability to provide necessary public services, and discourages investment in critical projects needed to boost our economy.

Reform is needed to improve consistency between regions, adherence to timelines, and to hold the employees of the Services accountable for completing consultations in an efficient, timely, and effective manner.

I look forward to hearing from the witnesses today, and I am appreciative of their willingness to share their stories and expertise regarding the flaws in the ESA consultation process.

[The prepared statement of Mr. Labrador follows:]

PREPARED STATEMENT OF THE HON. RAÚL R. LABRADOR, CHAIRMAN, SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

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Indeed, the Endangered Species Act has become a lawyer's dream. Lawsuits extort mitigation requirements that are unrelated to projects as the price to complete consultation. Lawsuit after lawsuit can result in blocking a project entirely. And, taxpayers foot the bill, paying tens of millions of dollars in attorneys' fees and grants to certain groups to file endangered species lawsuits. One of the groups testifying here today, the Defenders of Wildlife, has been party to more than 80 Endangered Species Act-related lawsuits in just the past 5 years.

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Mr. LABRADOR. The Chairman now recognizes the Ranking Member of the Subcommittee, Mr. McEachin, for 5 minutes for an opening statement.

STATEMENT OF THE HON. A. DONALD MCEACHIN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. MCEACHIN. Thank you, Mr. Chairman. Today's hearing is the latest in a series of attempts by the Majority to blame bedrock environmental laws for holding up infrastructure projects, despite copious amounts of evidence to the contrary.

As we will hear from the Minority witness today, the vast majority of Federal agency consultations under Section 7 of the Endangered Species Act are completed in only a few days. If a consultation takes longer, it is because there is a good reason. A proposed action could drive a species of life off the face of this planet. When a species disappears, the world becomes a poorer and less interesting place, because we have lost a unique and valuable piece of God's creation.

Imagine a world without a bald eagle, which is with us today because of the Endangered Species Act protections. Would that be a better world? Would anyone here prefer it?

When a species is lost, there are also concrete harms to human beings. What if a plant has medicinal properties? What if an animal has genes that could help us cure disease? If a species disappears, we lose the chance forever to study and learn from its biology or behavior.

So, when we fail to adequately protect endangered species, we are throwing away something priceless and irreplaceable. We are throwing away opportunities to better understand our world, and to make life better for ourselves and for our children.

That is why it is very important that we keep strong, effective processes in place. Make no mistake, the Section 7 consultation process and the ESA, in general, have been incredibly effective in preventing extinction. Ninety-nine percent of all species that have received ESA protections are still with us today, and ninety percent are on track to meet their scientifically-developed recovery goals.

We should not be tearing down these processes or writing in loopholes. Instead, we should be building on the successes that they have produced. Unfortunately, that is not the path that the President or the Majority has signaled. Donald Trump has proposed debilitating cuts to the agencies that conduct Section 7 consultations, instead of giving them additional funding to process the requests more quickly.

In countless ways, we need a healthy, rich, sustainable environment. Policies that degrade the environment may be cheap or easy today, but in the long run we all pay the price.

Economic development, including the construction and the maintenance of infrastructure, should be compatible with the conservation of wildlife, fish, plants, and biological diversity in general. The

ESA ensures that it is, and Section 7 consultations are a big reason why.

Tired talking points claiming that complying with the Act kills jobs and unnecessarily impedes economic growth are simply not grounded in reality. The U.S. economy has more than tripled since the ESA was passed, from $5 trillion in 1973 to $16 trillion today. Keeping continued growth that requires Federal Government permitting or action from harming threatened and endangered species is the very least we can do to be good stewards of God's creation.

Mr. Chairman, thank you, and I yield back.

Mr. LABRADOR. I will now introduce today's witnesses.

Mr. Doug Stiles is the General Manager for the Hecla Mining Company in Idaho, which is located in my district. Hecla is an important presence in our community, and I am really happy to welcome Mr. Stiles to this hearing.

Mr. Ronald Calkins is the President of the American Public Works Association.

Mr. Ya-Wei Li—I hope I pronounced that right—is the Vice President for Endangered Species Conservation, and Director of the Center for Conservation Innovation at Defenders of Wildlife.

And Mr. Jonathan Wood is Staff Attorney with the Pacific Legal Foundation.

Let me remind the witnesses that under our Committee Rules, oral statements must be limited to 5 minutes, but your entire written statement will appear in the hearing record.

In regards to testimony and questions, our microphones are not automatic, so you will need to press the talk button before speaking into the microphone. When you begin, the lights on the witness table will turn green. When you have 1 minute remaining, the yellow light will come on. Your time will have expired when the red light comes on, and I will ask you to please conclude your statement.

I will also allow the entire panel to testify before questioning the witnesses.

The Chair now recognizes Mr. Stiles for his testimony.

STATEMENT OF DOUG STILES, GENERAL MANAGER, HECLA MINING COMPANY, COEUR D'ALENE, IDAHO

Mr. STILES. Chairman Labrador, Ranking Member McEachin, and distinguished members of this Committee, my name is Doug Stiles, and I am the General Manager of Hecla Montana, a wholly owned subsidiary of Hecla Mining Company. I have worked in environmental compliance, permitting, and operations management for over 20 years. Hecla Mining Company is the oldest precious metals mining company in North America, and the largest silver producer in the United States. We successfully operate the Greens Creek Mine, which is located outside Juneau, Alaska, partially within the Admiralty Island National Monument.

Today, I am testifying on behalf of Hecla Mining Company, owners of the Rock Creek and Montanore underground mining projects, located in the northwest corner of Montana. These projects have been in the Federal NEPA and ESA permitting process for over 30 years. These projects represent some of the largest undeveloped copper and silver mineral resources in the United States.

Development of these resources has the potential to provide hundreds of middle-class wage jobs to an area that has led Montana in unemployment for decades. The projects are underground, with very clean ore bodies and small environmental footprints.

Why this long, and what can be done to improve the process? Those are the topics of my testimony.

From 1998 to 2011, the Rock Creek project received three biological opinions, one supplemental biological opinion, and five legal challenges. All but the first biological opinion came to the same no-jeopardy conclusion.

The Ninth Circuit, which is widely known to give deference to wildlife, unanimously upheld the last biological opinion, stating that grizzly bears were better off with the mine than without it, given the robustness of the required mitigation plan.

Today, the Fish and Wildlife Service is again completing a biological opinion on the project, even though the project plan has not changed substantially in 30 years, and is analogous to a neighboring mine which operated for 30 years without significant environmental impact.

The Montanore project formal consultation began in 2009, and the final biological opinion was released 5 years later in 2014. Findings here were the same as Rock Creek: no jeopardy.

Combined permitting experience at both projects highlight four key impediments. One, constant litigation upon completion of any agency decision adds direct and indirect time and costs. The Rock Creek project litigation and fear of litigation were the prime drivers for completing three decisions that all came to the same no jeopardy conclusion, and it is the primary driver for why the project is currently in its fifth consultation.

Two, projects mired in lengthy permitting review timelines get saddled with new information that triggers renewed ESA consultation and further delay. The unending permit-litigate-permit loop.

Three, there are no consequences for failure to adhere to statutory consultation time frames. In none of the five combined consultations did the Fish and Wildlife Service meet completion deadlines.

And fourth, a single individual within the agency can have an outsized effect on the consultation process. The transfer of one biologist caused a 12-month delay in one biological opinion. And, in another case, the opinion of one agency biologist delayed consultation completion by years.

Affirming ESA protection where it is needed, while encouraging responsible, timely project permitting, are not mutually-exclusive goals. We present the following policy considerations.

First, legal reform—and this begins with Equal Access to Justice. The current system is abused by non-profit organizations pursuing procedural litigation on emotional issues in cases disconnected from the Act's original purpose. The guarantee of litigation following an agency decision has added decades to the permitting timeline and millions of dollars to permitting costs, with no benefit to the species.

Second, more reliance on the action agency biological assessment conclusions. In our cases, the Fish and Wildlife Service has repeatedly came to the same conclusion as the action agency, the U.S. Forest Service, only years and millions of dollars later.

Third, streamline reconsultation initiation. After reaching a decision, any changes that must be addressed should only focus on those specific items that changed, not the entire process anew.

Fourth, inclusion of state experts in the consultation process, as they have valuable, firsthand knowledge of local species status and what does and does not work to protect them.

We firmly believe that improved agency coordination in a more efficient permitting process can ensure the protection of threatened and endangered species and allow for responsible economic growth. These are not mutually exclusive goals. As observed by the Ninth Circuit, the Rock Creek project would provide more benefit to threatened and endangered species than the current status quo.

Thank you for the opportunity to testify before you today.

[The prepared statement of Mr. Stiles follows:]

PREPARED STATEMENT OF DOUGLAS STILES, GENERAL MANAGER, HECLA MINING COMPANY, COEUR D'ALENE, IDAHO

INTRODUCTORY STATEMENT

Chairman Labrador, Ranking Member McEachin and members of the Committee, I would like to sincerely thank you for inviting me to testify before you today on this very important issue. My name is Doug Stiles and I am General Manager for Hecla Montana, a wholly owned subsidiary of Hecla Mining Company. Hecla Mining Company (NYSE: HL) is the oldest precious metals mining company in North America and was established in 1891 in northern Idaho's Silver Valley. We are the United States largest primary silver producer, third largest producer of lead and zinc, and a leading gold producer. We currently have U.S. operations and projects in Alaska, Idaho, Colorado and Nevada and over the past 2 years completed the acquisition of the proposed Rock Creek and Montanore silver-copper mining projects in Montana.

We appreciate this Committee's attention and willingness to listen to various perspectives on how the ESA consultation process is, or in some cases is not, working as intended. Hecla Mining Company, the people who depend upon natural resource extraction to support themselves, and the very species that the ESA was enacted to protect, are encouraged by possible policy changes to improve the consultation process. We firmly believe that improved agency coordination and more efficient permitting processes can ensure the protection of threatened or endangered species and allow responsible natural resource development; these are not mutually exclusive goals. For example, Hecla Mining Company's Greens Creek Mine in southeast Alaska is located partially within the Admiralty Island National Monument and adjacent to the Kootznoowoo Wilderness Area. The project is home to the largest density of brown bears in North America (ESA threatened grizzly bears in the lower 48) and five species of Pacific salmon. For 30 years, this mine has operated in harmony with, and had little impact on, the natural environment. We understand what it takes to operate in environmentally sensitive areas. It is with this backdrop that I will now describe the ESA consultation process has contributed to the tortuous permitting process that has befallen the proposed Rock Creek and Montanore mining projects in northwest Montana.

The Rock Creek and Montanore projects have been in the permitting process for more than 30 years. Like our Greens Creek mine, these projects are in an environmentally sensitive area, home to ESA listed species grizzly bears and bull trout. The surface effects of both projects are adjacent to the Cabinet Mountains Wilderness area and partially located on land managed by the U.S. Forest Services (FS), with each project requiring consultation with the Fish and Wildlife Service (FWS) on threatened and endangered species. The consultation processes have been lengthy, topics of litigation and contributed significantly to the long permitting delays experienced with these projects. The case studies on the ESA consultation process from these two projects will be illustrative to the Committee and serve to highlight what we see as key consultation issues that, if properly addressed, could not only expedite

the permitting process but also provide greater protection for local communities and the species that the ESA is supposed to protect.

While each project has seen its own unique permitting challenges, the combined permitting experience highlights four key consultation deficiencies.

- **There are no consequences for failure to adhere to the statutory timeline**. The statutory time frames for completion of formal consultation and issuance of a biological opinion were not met in either of the cases described below.
- **A single individual within the agency with a personal bias or agenda can have an outsized effect on the consultation process**. As highlighted by the Rock Creek experience, the transfer of one biologist resulted in almost a 12-month delay in the consultation process. Other issues regarding individual personnel and specific agendas are evident in the Montanore record and other projects with which I have been involved. The opinion of one person within the agency can drive consultation biases which then require significant time and resources to unwind, if that is even possible.
- **Projects mired in long permitting review timelines can get further saddled with "new information" that triggers renewed ESA consultation and yet further delay**. This issue applies to both ESA consultation and the National Environmental Policy Act (NEPA) permitting process. This is one of the key reasons why the Rock Creek project has been in permitting for over 30 years despite the proposed action not significantly changing and the agencies repeatedly confirming a "not likely to jeopardize" threatened or endangered species finding.
- **The Rock Creek project highlights the damage our litigious permitting process has inflicted**. Near constant litigation combined with the need to review anew all resource areas every time any part of a decision is remanded, only lengthens the process and brings fresh litigation fodder to the table.

ROCK CREEK—PROJECT DESCRIPTION AND BACKGROUND

The Rock Creek Project (Rock Creek) is a proposed underground copper/silver mine located in Sanders County, Montana. Rock Creek was first proposed by Asarco in 1986 with the filing of a Plan of Operations with the U.S. Forest Service. This disturbance footprint is less than 500 acres with most (300+ acres) occurring on private property located within an existing disturbance and utility corridor.

The ore body lies beneath the Cabinet Mountains Wilderness and was discovered prior to passage of the Wilderness Act of 1964. The Act provides the right to mine valid existing mining claims. The characteristics of the ore body are unique in that the host mineralization is quartzite or, after processing, beach sand. Rock Creek also is unique in that another mine (the Troy Mine) located approximately 14 air miles away within the same ore body, was permitted, constructed, and operated for almost 30 years with no significant environmental impacts. In fact, water quality from the Troy Mine shows no evidence of acidification and the closure plan that was updated and approved by both State and Federal agencies (including the EPA) does not require active water treatment. As with almost any natural resource development project in the United States, the Rock Creek project has been opposed by a collection of litigants almost since day one. The proposed project also has not changed substantially in the 30+ year permitting process.

Formal ESA consultation on the Rock Creek mine began in 1998—almost 20 years ago; however, the project record indicates that interagency communication regarding potential project effects to threatened species began as early as 1986. From this perspective, both the FS and FWS have been looking at the potential impacts to threatened and endangered species at Rock Creek for over 30 years. Given the length of time this project has been under review you may think that the project impacts must be significant. Nothing could be further from the truth. As described above, the mine is underground in a benign ore body with less than 500 acres of total surface disturbance, none of which is within the Wilderness and most is some 3 miles away from the wilderness boundary.

In 2011, the Ninth Circuit Court of Appeals reviewed the 2007 biological opinion. In their unanimous decision upholding the FWS decision, the Ninth Circuit stated that the mitigation plan was so robust that the Fish and Wildlife Service concluded that it "*would in fact improve conditions over the long-term over the existing conditions, ultimately promoting the recovery of the [local] grizzly bear population*." Getting to this point; however, required decades of Agency review including numerous

delays and litigation—all for a project which has not significantly changed in description since conceptually proposed in 1984 and formally proposed in 1987. A chronology of key ESA-related consultation and associated litigation follows.

- On July 31, 1998, the FS, as action agency, initiated formal consultation with the FWS regarding effects on grizzly bears and bull trout. On December 19, 2000 (2.5 years later) the FWS issued its first biological opinion for the project. Only after repeated requests from the company to the Montana congressional delegation, State agencies, and FWS leadership did the FWS provide the staff and resources necessary to complete the initial biological opinion. Per historical documentation, at least 12 months of this delay can be attributed to the transfer of one FWS employee, the biologist leading the effort, and the lack of FWS urgency in replacing that one individual. In the case of the Rock Creek project, the statutory ESA requirement for a 90-day consultation period was ignored.
- On May 9, 2003, the FWS issued a new biological opinion resulting from threatened litigation which concluded no jeopardy opinions for grizzly bear and bull trout. The grizzly bear biological opinion included a mitigation plan which required Rock Creek to acquire 2,450 acres of FWS identified mitigation land to compensate for project impacts, among other substantial mitigation measures. At this point, consultation had been underway for almost 5 years without having seen the inside of a courtroom.
- On July 10, 2003, the same collection of litigants who threatened to sue in 2001 again filed suit against the FWS. This time; however, the FWS chose to defend their work and the matter proceeded to the U.S. District Court for Montana. On March 28, 2005, the court set aside and remanded the 2003 BO back to the FWS for reconsideration.
- On October 11, 2006, the FWS re-issued a biological opinion based on further consideration in accordance with the 2005 court remand and considering "new information" that became available since the previous 2003 biological opinion was issued. In other words, the FWS not only responded to issues raised by the court in the 2005 remand, but they also included any "new information" that may have been found since the 2003 biological opinion was issued—a consistent and chronic cause of permitting delays under both NEPA and the ESA.
- On September 2007, the FWS issued a supplemental biological opinion which reiterated the previous "no jeopardy" opinions and concluded that formal consultation was not required.
- On March 26, 2010, the U.S. District Court upheld the FWS biological opinion while remanding portions of the EIS back to the FS for reconsideration. Plaintiffs subsequently appealed to the Ninth Circuit Court of Appeals.
- On November 16, 2011, the Ninth Circuit unanimously upheld the District Court decision affirming the 2007 opinion. After three biological opinions, one supplemental biological opinion, and five legal challenges (including one trip to the Ninth Circuit which stated that grizzly bears are better off with the proposed mining project), not only did the conclusions not change, but the FWS consultation history is not yet complete.
- On February 15, 2017, the FWS again initiated formal consultation on the Rock Creek project because of "new information" and an expansion of bull trout critical habitat that happened in 2010. Both the "new information" and expansion of critical habitat resulted from the lengthy permitting time frames associated with project. Because the last supplemental biological opinion was completed in 2007—10 years ago—without a Record of Decision, Rock Creek is forced to undergo again another round of formal consultation and new or supplemental biological opinion for reasons related mostly to the length of time it has taken the Agencies to complete project permitting.

The latest round of ESA consultation resulted from a supplemental EIS process the FS began to address the District Court remand back in 2010. In that 2010 ruling, the court found only four relatively minor issues that the FS were instructed to address. However, because the EIS was last completed in 2001, the FS decided it was necessary to update the impact assessment of all key resource areas. As one can imagine, technology and rules had changed during the preceding 10 years which has resulted in a supplemental EIS taking over 6 years—it began in 2011 and is ongoing today—longer than most initial EIS's in spite of the fact that updated modeling (required only because of technological advances in computer modeling) showed less impacts to ground water quantity than the original EIS. This highlights

one of the key issues with the permitting/litigation/permitting cycle prevalent in almost all natural resource projects today—even when projects have been assessed, updating impact assessments for no other reason than the passage of time frequently result in extended permitting time frames and fresh litigation fodder.

MONTANORE—PROJECT DESCRIPTION AND BACKGROUND

The Montanore Project (Montanore) also is located in northwest Montana approximately 5 air miles from Rock Creek within the same, benign geological formation. Also like Rock Creek, Montanore is a proposed underground copper/silver mine with limited surface footprint and has been in the permitting process for decades. Project permitting has taken many regulatory turns resulting not from changes to the project's Proposed Action, but from changes in the position of the Agencies with respect to how impact analyses should proceed. While I understand the focus of this hearing is on the ESA consultation process, I would like to review some of the NEPA history and decisions made by the FS—the ESA action agency.

The permitting process for the Montanore project began in 1989. In that year, Noranda (project proponent) obtained an exploration license from the state of Montana to conduct surface disturbance activities on 18 acres of private property and construct underground exploration facilities. Work commenced soon after obtaining the exploration license and included the construction of limited buildings and approximately 14,000 feet of an underground exploration tunnel. Construction ceased in 1991; however, project permitting efforts continued.

In 1993, the FS issued a Record of Decision approving further exploration, construction, operation, and reclamation of the full mining project. **To summarize, by the end of 1993, Noranda had received all key permits necessary to fully develop the Montanore mine**, they had completed surface disturbance on 18 acres of private property and they had developed approximately 14,000 feet of an underground exploration tunnel. For reasons not exactly known, Noranda stopped project development in 1993 and let many of the acquired permits expire. In 2002, Noranda notified the USFS that it was relinquishing its "authorization to operate" (1993 Record of Decision) the Montanore Project.

- In January, 2005—only 3 years after the operating permits were relinquished—new owners of the Montanore Project submitted plans to both the FS and Montana DEQ to restart exploration activities that had been halted in 1991. In early August 2006, the FS determined that a road use permit, and associated NEPA, would be needed to re-initiate exploration activities on private property. The FS determined that an Environmental Assessment (EA) would be appropriate for the requested road use permit. The decision to complete an EA on just the exploration activities precipitated initial FWS ESA consultation, which is chronicled below.
- On August 9, 2006, the FS began informal consultation with the FWS on the pending Montanore project. Following several meetings between the two agencies to discuss the project, the FS submitted a biological assessment (BA) to the FWS.
- On October 16, 2006, the FS requested concurrence from the FWS with their findings of "not likely to adversely affect" either grizzly bear.
- On May 4, 2007, the FWS initiates formal consultation with the FS on the Montanore project as the FWS did not agree with the initial findings of the BA despite several meetings between the two agencies from August to October. In correspondence to the Forest Supervisor, FWS states that a final biological opinion is due "*135 days later on September 16, 2007*."
- On September 28, 2007, the FWS submitted a draft biological opinion to the FS which found "not likely to jeopardize the continued existence of grizzly bear"—the same conclusion reached by the FS 1 year earlier. At this point, the opinion covered only the first phase of the Montanore Project which evaluated activities occurring on previously disturbed private property.
- On December 14, 2007, the FWS submitted a second draft biological opinion which continued to find "not likely to jeopardize the continued existence of grizzly bear."
- On May 23, 2008, the FWS submitted a third draft biological opinion which continued to find "not likely to jeopardize the continued existence of grizzly bear."
- Sometime in 2008, the FS determined that the entire Montanore mining project was a "connected action", and the best NEPA approach was to complete a new EIS on the entire Montanore project—exploration, mine construc-

tion, operation, and reclamation. Recall that an EIS and associated Record of Decision was completed in 1993 on this very same project. This decision by the FS led to a stoppage of FWS consultation work following the May, 2008 biological opinion pending release of a draft EIS.

- In May 2009, informal consultation was initiated with FWS comments on the Draft EIS.
- Between May 2009 and July 2011, at least eight meetings and associated correspondence transpired between the agencies as the FS consulted with the FWS in preparation of its biological assessment (BA) which would kick-off the formal consultation process.
- On July 5, 2011, the FS provided the FWS with a BA and requested formal consultation on the Montanore project.
- On February 17, 2012 (7 months later) the FWS determined that the BA supplied by the FS was inadequate, despite over 2 years of coordination with the FS in preparation of the BA.
- On February 25, 2013, after at least seven additional meetings between the agencies, the FWS accepted the BA and began formal consultation.
- On March 31, 2014, the FWS released the final biological opinion for the Montanore Project, almost 5 years since the beginning of information consultation AFTER completing a biological opinion on part of the project from 2006–2008.

The regulatory processes described above have been complicated, expensive, and time consuming. The companies involved with these permitting efforts have spent millions of dollars and invested countless hours to permit these two projects as have the lead Federal agencies.

KEY ISSUES FROM ROCK CREEK AND MONTANORE ESA CONSULTATION

At this point, it is worth summarizing the key issues identified above as impediments to the Rock Creek and Montanore ESA consultation processes.

1. Although the ESA contains statutory time frames for completion of formal consultation and issuance of a biological opinion, they were not met in either of the cases described above. There are no consequences to the agency for failure to adhere to the statutory timeline. Both the ESA consultation and NEPA processes need defined timelines with consequences for not adhering to those timelines. The consultation processes endured by our projects have spanned decades.
2. Individual technical staff within the FWS can have an outsized effect on the consultation process as highlighted by the Rock Creek experience, where the transfer of one biologist resulted in almost a 12-month delay in the consultation process. In both projects, the FWS came to the same conclusions as the FS in determining no jeopardy, but it required years of further review to get to that point. In none of these processes were state agencies or project proponents, who have strong scientific expertise and are required to implement certain stipulations, involved in any meaningful way. States possess broad trustee and police powers over fish, wildlife and plans and their habitats. Unless pre-empted by Federal authorities, states possess primary authority and responsibility for protection and management of fish wildlife and plants and their habitats.
3. The Rock Creek project highlights an issue for not only ESA consultation but NEPA permitting as well: the requirement to incorporate “new information” identified during an active permitting process. The Rock Creek project has been in permitting for over 30 years and in great part this is due to the repeated consultation conducted under the ESA because of “new information.” Nevertheless, the conclusion of these assessments has not changed nor has the proposed project. Arguably, the only change over the course of the 30-year permitting process has been the passage of time.

4. The Rock Creek project highlights the extreme economic damage that our litigious permitting process has inflicted. A study by SNL Metals (2016)[1] shows that every 7- to 10-year delay in project permitting decreases the net present value of a project by over 30 percent. Near constant litigation with existing incentives to litigate combined with the need to review anew all resource areas every time any part of a decision is remanded by a court only lengthens the process and brings fresh litigation fodder to the table.

POLICY CONSIDERATIONS

To address the issues highlighted above, we present the following recommended policy changes that we believe would significantly reduce impediments to economic and infrastructure development for the Committee's consideration.

Reform the Equal Access to Justice Act

The one area that would have the greatest overall impact on improving and streamlining the permitting process is legal reform. While we present other recommendations for policy changes, almost every permitting challenge encountered is either directly or indirectly the result of litigation. The Rock Creek and Montanore case studies demonstrably illustrate how ESA process and litigation has been a detriment to both economic development and the species that the ESA is supposed to protect. A key driver to this litigation has been the Equal Access to Justice Act (Act). The Act was originally intended to present small business owners and individuals access to the court system, but has been abused by non-profit organizations pursuing procedural litigation on emotional issues in return for excessive attorneys' fees in cases totally disconnected from the Act's original purposes. The Act has been fuel for the fire to grind to a halt Federal agency decision making, wear out project proponents, and reduce much needed economic development. But the costs to the government for such litigation go beyond award of legal fees, and include staff resources in preparing and supporting litigation, re-doing environmental impact statements or ESA biological opinion, etc. A 2011 study found that for every $1.00 paid out in fee award, the Department of Justice spend $1.83 in personnel and administrative costs.[2] The costs to the action agency were not included in this estimate.

While reforms to the Act have been proposed over the years, now is time to again consider changes to return the Act to its original intent. Congress should consider:

- Clarify direct and personal monetary interest in the adjudication,
- Reduced exemptions to the statutory cap on attorneys' fees, and
- Revise the net worth cap.

These measures would put a serious damper on how much EAJA pays outs in cases while retaining a reasonable fee for most cases, including most EAJA uses such as small business, Social Security and Veteran's Claims claimants.

More Reliance on the Action Agency Biological Assessment Conclusions

In many cases, the Action Agency's (the Forest Service in our case) initial biological assessments reach the same conclusion as the biological opinion well in advance. Like state wildlife agencies, the Action Agencies possess technical expertise with local, on-the-ground experience. In the Montanore example, the record indicates that significant consultation delay occurred because individuals with the FWS held firm beliefs the project should not move forward even though the FS experts had reached a different conclusion. More reliance on those Action Agency conclusions and expertise in concert with state inclusion would significantly shorten the consultation process and help to avoid situations where one person's beliefs impede timely project decision making. To remove impediments to economic and infrastructure development, Congress should consider:

- Requiring the consultation agency to follow the conclusions derived from biological assessments. In cases where the consultation agency may not agree with biological assessment findings, the consultation agency should be required to defend their position through a peer panel which includes the Action Agency and state experts.

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[1] SNL Metals & Mining (2015). *Permitting, Economic Value and Mining in the United States*. Prepared for the National Mining Association.

[2] U.S. Gov't Accounting Office, GAO–11–650 (2011). *Environmental Litigation; Cases Against EPA and Associated Costs Over Time*. Cited in: Baier, Lowell E, (2012). *Reforming the Equal Access to Justice Act, Journal of Legislation:* Vol. 38: Iss. 1, Article 1. Available at http://scholarship.law.nd.edu/jleg/vol38/iss1/1.

Streamline Re-initiation of Consultation

In cases where an Agency has completed either a consultation process or NEPA assessment, any changes that must be assessed should only focus on those specific items that have changed. There should be statutory or regulatory prohibition on having to assess anew the entire project. In the cases described above, decades have been spent assessing impacts already evaluated and revisiting settled decisions simply because of the passage of time and Agency fear of litigation.

In the cases described above, continued project permitting delays have negatively impacted both the rural communities of northwest Montana, but also the threatened species themselves.

Recall that both the FWS and Ninth Circuit stated that the Rock Creek project grizzly bear mitigation plan is, in fact, a recovery plan that improves prospects for the species. To streamline the permitting process, Congress should consider:

- Requiring in statute that once project impacts have been assessed through the issuance of a final NEPA document (EIS, EA) and/or biological opinion, future assessments due to legal remand or other administrative process need only look at those specific items that were remanded or otherwise administratively modified. Changes to the proposed action by the project proponent would not be subject to this exclusion.
- Reviews due only to the "passage of time" or "fear of litigation" should not be valid reasons for further Agency analysis.

Inclusion of States in the ESA Consultation Process

In most cases, state wildlife agencies are charged with implementing ESA mitigation plans but have no meaningful input into the consultation process. The state wildlife agencies also have much more local, on the ground knowledge than their sister Federal counterparts; however, current ESA statute minimizes the involvement of state agencies in the consultation process. This not only leaves key consultation expediting resources off the table, but removes a valuable source of local species knowledge and mitigation plan implementation expertise. Congress could consider:

- Requiring the consultation agencies expand their policy on state cooperation beyond the current scope. Presently, state involvement during consultation is limited to providing the consultation agency with an "information update" prior to preparation of the final biological opinion.

Improve the Overall Permitting Process

Project permitting delays result from more than just the ESA consultation process. Meaningful permitting reform requires a holistic review of key permitting processes followed by the implementation of policy or legislation designed to strip system inefficiencies and incentivize timely completion of agency work. To that end, Congress should consider:

- Swift passage of *The National Strategic and Critical Minerals Production Act of 2017* which was introduced earlier this year by Representative Mark Amodei (R-NV) in partnership with Senator Dean Heller (R-NV)."
- Action Agency line officer annual performance review should include timely processing and implementation of (1) mining projects and (2) adherence to statutory process completion deadlines. Neither are currently included in annual review of FS line officers or district ranger performance assessments when considering promotion or raises.

CONCLUSION

Removing permitting impediments to economic and infrastructure development starts with litigation reform and continues through to streamlining the various agency permitting processes. As demonstrated by the Rock Creek and Montanore projects, natural resource project permitting in the United States is a broken system with devastating economic and species impacts. Hecla Mining Company and many other responsible miner operators continue to demonstrate that mining is compatible with the environment—we've been doing for 30 years at our Greens Creek Mine in Alaska and it was clearly demonstrated by the Troy Mine in northwest Montana.

Society demands responsible stewardship of our natural resources and those demands are often carried over to project approval requirements—as demonstrated by the grizzly bear recovery program requirement for the Rock Creek project. In many cases, project approval would improve conditions for a threatened species while also

bringing much needed economic development to rural America. Instead of providing these multifaceted societal benefits, these projects are mired in a 30-year + permitting process. It is long past time to fix the broken natural resource permitting process.

QUESTIONS SUBMITTED FOR THE RECORD BY REP. LABRADOR TO MR. DOUG STILES, GENERAL MANAGER, HECLA MINING COMPANY

Question 1. Please respond to Ranking Member Grijalva's assertion that the Montanore and Rock Creek projects do not have the support of the community.

Answer. Both projects have strong support of the local communities, members of the Montana State legislative delegations, and all Montana State Congressional members (attached). Project support is well documented during public project presentations and in the written comments received during the EIS public comment periods, with some key example project support letters attached.

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The following documents were submitted as attachments to Mr. Stile's response. These documents are part of the hearing record and are being retained in the Committee's official files:

—January 7, 2016 Letter to Steve Bullock, Governor of Montana from Senator Daines and Congressman Zinke

—April 13, 2016 Letter to Michael Huffine, Kootenai National Forest from Senator Keenan

—June 7, 2016 Letter to Chris Savage, Forest Supervisor, Kootenai National Forest from Senator Tester, Senator Daines, and Congressman Zinke

—Letters of Support from City of Libby City Council Members; Montana State Senators Curtiss, Bennett, and Vincent; Lincoln County Commissioner Anthony Berget; Sanders County Board of Commissioners; Libby School District; Lincoln County Board of Commissioners; Mineral County Board of Commissioners; and Ms. Carla M. Parks, Thompson Falls, MT

Question 2. Please explain how these projects will or will not impact wildlife, water quality, and recreational opportunities in the region.

Answer. Potential project impacts to wildlife, water quality, and recreational opportunities are well documented in the voluminous Environmental Impact Statements (EIS) developed for each project. First, it is important to keep the relative size of each of the projects in context with macro environment and understand the nature of the proposed projects.

Wildlife

Both projects are underground mines with limited surface disturbance. The disturbance areas for the Montanore and Rock Creek projects are 1,565 acres and 445 acres, respectively. Both projects are in the Kootenai National Forest (KNF) which has a total area of 2,200,000 acres. Combined, these projects will disturb approximately 0.09 percent the land within the KNF. It should also be noted that approximately 400 acres of the Rock Creek disturbance occurs on private property which is located adjacent to an existing highway and railroad.

Each project is also required to develop and implement monitoring and mitigation plans, including bull trout and Grizzly bear enhancement programs. This includes purchase of private lands for wildlife enhancement and mitigation. Combined, the projects are required to obtain 7,878 acres of private land to offset 1,609 acres of affected lands that will be designated as primary wildlife habitat. Most of the land designated for mitigation is currently productive timberland that will lose future timber production value and associated local economic benefit. Because of the substantial wildlife habit mitigation requirements, these projects will provide a net benefit to wildlife, including grizzly bears.

Water Quality

Both projects are required to implement mitigation projects designed to enhance aquatic habitat and improve the existing system including the closure of existing roads which contribute significant sedimentation to area streams. Both projects will have surface water discharge permits issued pursuant to the Clean Water Act. Permit limits are very stringent and advanced water treatment is required. The Montanore EIS (Kootenai National Forest, 2016, p. 453) states "The analysis

presented in the BA (USDA Forest Service 2013a) concluded that potential impacts from peak flow changes, water quality changes, and fish passage were considered to be negligible or beneficial to bull trout habitat populations." For Rock Creek the currently projected discharge would be approximately 400 gallons per minute of treated water into about 8.9 million gallons per minute in the Clark Fork River (or a ratio of 1:20,000).

The geochemistry of both projects is unique in that the host mineralization is mostly comprised of quartzite or hardened beach sand. The ore bodies are the same as the nearby Troy Mine which operated for the better part of 30 years with no significant environmental impacts. Mine water quality from the Troy Mine is very good with no indication of significant mineral oxidation. In 2012 an EIS was completed on an updated closure plan for the Troy Mine. The EIS concluded that perpetual, active water treatment would not be required (Kootenai National Forest, 2012, p. 12).

Recreational Opportunities

As part of the required grizzly bear mitigation program, the closure of some open roads is a requirement of both projects. This could decrease vehicular access to some portions of the National Forest thereby reducing motorized recreational opportunities in favor of grizzly bear habitat. Neither project is visible from the Cabinet Mountains Wilderness (CMW) area and both are located several miles from the CMW boundary. No significant impact to the wilderness experience is predicted from either project.

Question 3. Please explain where these projects currently stand in the state and Federal permitting processes.

Answer. Neither project is currently authorized to commence work although both have been approved at some point in the past. At this time, we are working with the Agencies to complete the myriad of requirements (outlined in the referenced Record of Decisions (below)) necessary to begin the Evaluation Phase.

Montanore

The latest round of permitting for the Montanore Project began in 2005. The project received a Record of Decision (ROD) from the U.S. Forest Service (FS) and a separate ROD from the State of Montana in February 2016. A group of NGO plaintiffs filed lawsuits challenging the FS Record of Decision (ROD). And at the same time, a similar group of litigants (including Defenders of Wildlife) filed suit against the Fish and Wildlife Service (FWS) challenging the legality of their biological opinion (BO). Oral arguments in these two cases concluded on March 30 of this year and we expect a ruling from the Federal District judge by mid-April 2017.

Rock Creek

The Rock Creek Project is currently undergoing a third round of NEPA evaluation and a fifth round of FWS-ESA consultation. The FS is completing a Supplemental EIS (SEIS) for the Rock Creek Project, a process which began in 2011. As of April, 2017 the FS is anticipating release of the Final SEIS and draft ROD in early June 2017. This begins the FS Objection process (36 CFR 218) which is anticipated to take at least 6 months to complete. Should this schedule hold, we would expect to see a final SEIS and ROD for the Rock Creek Project in early 2018.

As mentioned in my written testimony, the FWS has recently begun formal consultation for a fifth time. This process officially began on March 24 and, per statute, formal consultation should be completed on June 22, 2017 with written opinion completed on August 8, 2017. In recent conversations with the FWS, this schedule is not likely to be kept as they will not even start on the consultation work until the end of June, 2017 due to a lack of FWS staff resources and higher priority projects.

Question 4. Please respond to Ranking Member Grijalva's assertion that "significant differences" in development of the projects over time have been so substantial as to require litigation.

Answer. Neither project has changed substantially since they were first proposed in the late 1980s and early 1990s. The Rock Creek project 2001 EIS and associated ROD authorized the same project that is currently undergoing a supplemental EIS. There have been no significant changes to the project disturbance footprint or extraction methodology proposed by either the Agencies or Project Proponents. The SEIS was prepared by the FS to address three relatively minor deficiencies found by the U.S. District Court in 2010 on a legal challenge to the 2003 FS ROD. (Kootenai National Forest, 2015, p. i). The selected alternative in the SEIS is the same as was selected in the FS 2001 ROD.

The Montanore project was originally approved by the FS in 1993. A revised project description was presented in 2005. Project changes approved in the ROD were largely focused on moving the tailings impoundment to reduce impacts to existing stream channels and elimination of land application of excess water in favor of treatment and discharge to surface waters. These changes were required by the Agencies and resulted in less project impacts at the expense of increased Project cost and longer permitting timeline. As with Rock Creek, there have been no significant changes to the project disturbance footprint or extraction methodologies by the project proponents.

Question 5. You mentioned in your written testimony that your consultation took so long that it had to be reinitiated on your project due to the time elapsed. Can you explain what happened in greater detail, and any suggestions you may have to improve consultation re-initiation requirements?

Answer. This question seems to be referring to the Rock Creek project; therefore, the detailed response presented below will focus only on that project.

In this case, the time lapse between consultation was the result of litigation and precipitating additional NEPA analysis. Prior to the current consultation, the most recent Rock Creek supplemental BO was issued in September 2007. The FS began the development of the Rock Creek SEIS in May 2011 in response to District Court remand of the ROD on NEPA grounds. The SEIS is still in process today.

Since the 2007 BO, bull trout monitoring, mitigation, and general aquatic research has continued, all generating additional data. In addition, more robust groundwater modeling conducted to support the SEIS revealed potential impacts in drainage areas that were not specifically mentioned in the 2007 BO—although the overall potential impact from the updated modeling was significantly *less* than the potential impacts analyzed in both the 2001 EIS and 2007 BO. In early 2015, the collection of Rock Creek litigants filed a petition with the FWS to re-initiate consultation based on the "new information" obtained by the ongoing area monitoring described above. In response to the litigant's petition, the WS stated that they would not reinitiate consultation at that time, but would wait for release of the draft SEIS to make a final re-initiation determination. During the draft SEIS public comment period, several groups submitted comments to the FS requesting that they ask the FWS to re-initiate consultation because of this "new information."

In response to the comments received and after evaluating the "new information" the FS informed the FWS that they believed formal consultation was not required. The FS reasoned that the new information would not materially change the impact assessment and that the updated modeling results, showing significantly less overall impact, did not rise to the level necessary to reinitiate formal consultation. Ultimately, the FWS disagreed with the FS and chose to re-initiate formal consultation on the project in early 2017.

Recommendation

From this experience a general ESA policy recommendation would be to eliminate the need for re-initiation of consultation if no material changes to the proposed project have been made by the proponent. The concept of "freezing the design" is employed in project management and construction. This means that at some point, all changes to the proposed plan are made and no further changes will be accepted so that final engineering can be completed. A similar concept would work for environmental analysis. Once a project plan has been finalized and accepted by the Agencies for analysis, all analysis work is based on both the accepted project AND environmental laws, regulations, and data in place *at that time*. Any "new information" or regulatory change occurring after project acceptance would not be evaluated against the project. Implementation of this concept would be only one tool to disincentivize litigants from constantly litigating projects simply to drag out the permitting process for seemingly unending analysis, eventually wearing-down project proponents.

Question 6. In your opinion, do the Services make full use of the expertise and perspective of the states? Should Congress examine the possibility of involving states more in the listing, consultation, and management process?

Answer. No, I do not believe that the Services currently make full use of state expertise or perspectives. Based on our experiences, more state involvement in listing, consultation, and management process would have likely streamlined the process. If nothing else, states have additional technical resources and local knowledge that the Services could take advantage of to expedite consultation processes.

Mr. LABRADOR. Thank you, Mr. Stiles.
The Chair now recognizes Mr. Calkins for his testimony.

STATEMENT OF RONALD J. CALKINS, PRESIDENT, AMERICAN PUBLIC WORKS ASSOCIATION, WASHINGTON, DC

Mr. CALKINS. Good morning and thank you, Chairman Labrador and Ranking Member McEachin for holding this hearing and inviting me to participate. My name is Ron Calkins. I was the Director of Public Works for Ventura, California for 17 years, and I am currently the President of the American Public Works Association.

This is an organization dedicated to providing public works infrastructure and services to millions of people in small and large communities across our country. Our 29,000 members plan, design, build, operate, and maintain our Nation's vast infrastructure assets, which are essential to our economy and way of life. We are pleased to be here today to share with you some of the challenges the public works professionals face when dealing with the balance between protecting endangered species and protecting the health, safety, and welfare of our communities.

Ventura has a population of 110,000; it is located on the coast, about 60 miles north of Los Angeles, and happens to be bordered by two rivers: the Ventura River and the Santa Clara River. In the early 2000s, Ventura was sued on one hand to keep water in the Ventura River, and about the same time was sued to remove water from the Santa Clara River, both in an attempt to protect the same endangered species, the steelhead trout. This dichotomy has been very confusing and sends many mixed messages.

On the Santa Clara River, Ventura has discharged highly treated wastewater to the mouth of the river for over 50 years. The Santa Clara River has been designated as habitat for the steelhead. Studies show that our treated wastewater is of higher quality than the water that naturally occurs in the estuary.

In 2008, the state began working on the renewal of our wastewater discharge permit. Due to pressure from a non-governmental organization, "Heal the Bay," the state was considering the discharges into the estuaries cease. However, NMFS and Fish and Wildlife were both concerned that an end to the discharge would threaten the steelhead trout. With conflicting views, Ventura was required to conduct even more studies. Since then, three rounds of multi-year scientific studies costing $4 million have lasted 9 years, and they are just now wrapping up. We are hoping to define the necessary project and start the NEPA process and ESA consultation later this year.

On our other river, the Ventura River, it has provided drinking water to our community since the mission was founded in the late 1700s. Congress authorized the construction of Casitas Dam on Ventura River tributary in 1956 to provide the area with a more stable water supply. The lake capacity is 254,000 acre-feet. A diversion channel was built to carry Ventura River water to the lake, since the lake is located on the tributary. In 1997, NMFS listed the steelhead trout as endangered on the Ventura River, even though it is on the southern fringe of the population habitat.

In 1999, the consultation process started after a lawsuit by Cal Trout. Four years later, NMFS issued the biological opinion

requiring construction of a fish ladder, which was completed in 2006, at a cost of $9 million.

The biological opinion also requires a bypass of between 30 and 150 cfs in various circumstances. The bypass requirement has resulted in a long-term average annual loss of 1,100 acre-feet of drinking water each year. NMFS is expected to reopen the consultation process later this year, and many fear that this will require additional flows to be bypassed without any demonstrated benefit to the endangered species.

In spite of a relatively wet winter in California, we are still in a severe drought, especially in Ventura and Santa Barbara Counties. Many years and millions of dollars have been spent to provide scientific data to accommodate what is required by the ESA. We fear additional water bypass will be required without any proven benefit for the species, particularly at a time when we are still in a severe drought.

In closing, we need a better balance between the protection of endangered species and the ability to implement important public works and infrastructure projects, especially when public safety and health is threatened by lack of water supply.

Public works professionals are up to the challenge of satisfying community needs with limited resources; and we offer to be a resource as the Committee considers modernizing this legislation to ensure scarce taxpayer funds are well spent and our communities are protected. Thank you.

[The prepared statement of Mr. Calkins follows:]

PREPARED STATEMENT OF RON CALKINS, PRESIDENT, AMERICAN PUBLIC WORKS ASSOCIATION, WASHINGTON, DC

The American Public Works Association (APWA) is pleased to provide the following statement to the House Natural Resources Oversight and Investigations Subcommittee hearing on the Endangered Species Act Consultation Process.

APWA is an organization dedicated to providing public works infrastructure and services to millions of people in rural and urban communities, both small and large. Working in the public interest, APWA's more than 29,500 members plan, design, build, operate and maintain our vast water infrastructure network, as well as other key infrastructure assets essential to our Nation's economy and way of life. We wish to offer our assistance to the Subcommittee and Full Committee on any matter related to public works and infrastructure.

Healthy and prosperous communities require the construction and maintenance of infrastructure. As the stewards of infrastructure, we are concerned that the consultation process with Federal agencies, during Federal permitting, can prolong maintenance and repairs to critical public safety infrastructure. We support Federal protections of endangered species which balance the needs of the species with the need for public works professionals to build and maintain public safety infrastructure. Further, we support Congress modernizing the ESA so the public is protected from natural disasters while ensuring adequate protections for threatened species.

THE CONSULTATION PROCESS: INCONSISTENT AND WASTEFUL

Good morning, and thank you, Chairman Labrador and Ranking Member McEachin for holding this hearing and inviting me to participate. My name is Ron Calkins; I am formerly the Public Works Director for Ventura, California, and served in that role for 17 years. I am also the current President of the American Public Works Association. APWA is an organization dedicated to providing public works infrastructure and services to millions of people in small, large, rural, and urban communities across our country. Working in the public interest, APWA's more than 29,500 members plan, design, build, operate and maintain our Nation's vast infrastructure assets, which are essential to our Nation's economy and way of life. We are especially pleased to be here today to share with you some of the challenges that public works professionals face when dealing with the balance between

protecting endangered species and implementing important public works and infrastructure projects to protect the health, safety and welfare of citizens of the United States. As I am sure you are aware, the Endangered Species Act, while well-intentioned, has had negative impacts from time to time on caring for our Nation's infrastructure.

Ventura has a population of 110,000 on the Pacific coast and is located about 60 miles north of Los Angeles. Two rivers, the Ventura River and the Santa Clara River border the city. In 2003, Ventura was sued to keep water in the Ventura River, and at the same time was sued to take water out of the Santa Clara River—both in an attempt to protect the Steelhead Trout. As you can see this can be very confusing and sends many mixed messages.

Ventura has discharged highly treated water to the mouth of the Santa Clara River for over 50 years. This estuary is habitat for both Steelhead Trout and the Tidewater Goby—both of which are on the endangered species list. Scientific studies have shown that the treated wastewater is of higher quality than the water that naturally occurs in this estuary. In 2008, the state of California began working on the renewal of the discharge permit. Due to pressure from a non-governmental organization, Heal the Bay, the state was considering requiring that discharges into the estuary end. However, National Marine Fisheries Service (NMFS) and the U.S. Fish & Wildlife Service (FWS) were both concerned that an end to the discharge would threaten the Steelhead Trout. With conflicting views, Ventura was required to conduct a study. Three rounds of multiyear scientific studies costing $4 million lasted 9 years, and are just now being wrapped up. After 9 years of study, Ventura is just now hoping to define this project and start the National Environmental Protection Act (NEPA) review and Endangered Species Act (ESA) consultation processes later this year.

Another illustration of how the ESA has caused confusion, delays and increased costs to important public works and infrastructure projects deals with drinking water. The city of Ventura faces significant challenges with its drinking water source from Lake Casitas. Congress authorized the construction of Casitas Dam on Coyote Creek in 1956 to provide the area with a stable water source and has a capacity of 254,000 acre-feet. The Los Robles Diversion Channel was built to carry Ventura River water to the lake since the lake is located on a tributary of the main river. In 1997, NMFS listed the Steelhead Trout as endangered on the Ventura River, even though the river is on the southern fringe of the population habitat. In 1999, the consultation process started after a lawsuit was filed by Cal Trout. The process did not end until 2003 when NMFS issued the biological opinion, requiring the construction of a fish ladder to allow upstream travel of the steelhead to the habit. The passage was completed in 2006 at the cost of $9 million.

As part of the biological opinion, the district was required to bypass 50 cubic feet per second, down from the standard 170 cubic feet per second during the "initial period." This bypass requirement has resulted in a long-term average annual loss of 1,100 acre-feet of drinking water each year. NMFS has extended this time beyond the initial 5 years because of the drought. NMFS is expected to reopen the consultation process later this year. Many in the community fear that this consultation process will require that additional flows be bypassed without any demonstrated benefit to the endangered species.

In spite of a relatively wet winter in CA, we are still in a severe drought, especially in Ventura and Santa Barbara counties. Many years and millions of dollars have been spent to provide scientific data to accommodate what is required by the Endangered Species Act. The process is so lengthy that the circumstances influencing the water levels vary considerably, leading to agencies making decisions without the most relevant scientific data. We fear additional "take" without any proven benefit for the species, particularly in a time when we are still in severe drought.

Further, aside from the increase in costs, are the risks to human life. In 1986, Reclamation District 784 (RD 784) in California attempted to repair a levee along the Feather River and Federal approval was needed to proceed. In 1990, the Army Corps of Engineers agreed, but 6 years passed before approval would be granted for construction to start. RD 784 spent more than $10 million on ESA mitigation for the elderberry beetle before the bidding process began. On January 2, 1997, the levee broke, killing three people and flooding 25 square miles. RD 784 determined that the lag in repairs and the mitigation itself contributed to the levee's failure. The mitigation for the beetle stopped maintenance of the levee, such as crack repair and clearing brush.

Last, another example of increased costs in complying with the ESA happened in 2012 when the Texas Department of Transportation planned to build an underpass connecting Loop 1604 and Texas Highway 151 in San Antonio. Unfortunately,

biologists working at the site found a spider listed as endangered, the Braken Bat Cave Meshweaver. FWS listed the spider as endangered in 2000. Texas Department of Transportation (DOT) had to halt the project for 2 years as changes were made. The final cost for the needed changes totaled $44 million. The original project cost was $15.1 million. A nearly $30 million increase in costs is a significant expense at a time when the Highway Trust Fund is insolvent.

MODERNIZATION IS IMPERATIVE

APWA believes that we need to modernize the Endangered Species Act in a way that balances species protection with the need to care for essential public works services and infrastructure. Such legislation should contain full integration of sound scientific and economic principles which ensure that habitats and species can be preserved in harmony with critically needed public projects. Reform legislation should respect the original intent of the Act, which is the protection and recovery of species. APWA strongly supports environmental preservation and protection of species determined to be threatened or endangered by balanced, integrated approaches that are applied openly with equity, prudence, and foresight. APWA believes it is imperative that varying interests work smarter together, to develop and implement open, collaborative strategies for achieving balance among the many competing demands of modern life. In the public policy arena relating to endangered species, APWA encourages complete consideration of the social and economic, as well as the environmental, impacts of habitat designations and preservation strategies.

There is a need to balance endangered species and habitat preservation with the infrastructure development, operation, and maintenance needs of local citizens. Such a local, balanced approach will provide the best options for preservation, growth, and management of our invaluable natural resources, as we continue to work together to carry out the mandates required of us all to serve the needs of American citizens. The implementation of programs has resulted in a process that has caused delays, prohibitions, and added costs for infrastructure development, operations, and maintenance. Local or municipal infrastructure projects sometimes, of necessity for safety, health, and the welfare of citizens, affect habitat relating to fish, wildlife, and species that may be determined to be threatened or endangered. In some cases, municipalities have been prevented from operating, managing, and maintaining their infrastructure and other municipal facilities in a timely and efficient manner. Also, in some cases, critically needed infrastructure projects are stalled or prohibited entirely because of bureaucratically imposed processes that fail to achieve goals mandated by legislation. At issue is the need to reform the Endangered Species Act to build stronger partnerships, to reduce delay and uncertainty for states, local governments, private industry, and individuals; and to provide greater administrative flexibility that minimizes disruption and harmful socio-economic effects while continuing to conserve and preserve America's priceless environmental heritage.

In detail, APWA specifically recommends the following:

- That the process for resolving appeals be reformed to encourage timely resolution. We support the inclusion of specific administrative time limits in the reform legislation.
- That the law open all aspects of the decision process to verifiable peer review, improved data collection and field testing of data—to tap the country's best wisdom in resolving these issues. Endangered species decisions must be based on verifiable, sound, and objective scientific data.
- That national priority is given to aggressive pre-listing incentives for affected governments and landowners, to avoid negative impacts of the act and to improve conservation.
- That the post-listing consultation and decision-making process include full partnership for affected states, local governments, and private property owners—including habitat designations, conservation, and recovery plans, so that decisions can be made with full collaboration and cooperation.
- That the law allow the existing Federal exemption process to allow interested parties consultation with the U.S. Department of the Interior to determine whether a proposed action will jeopardize a species. If the species is determined to be in jeopardy, economically feasible and prudent alternatives for its preservation should be considered.
- That preservation programs make effective use of limited public and private resources by focusing on groups of species dependent upon the same habitat.

- That public education programs be required at all levels to provide various stakeholders with an understanding of the issues.
- That species relocation is permissible so that constructions can go forward in a prudent fashion.
- That an exception to waive studies when building, maintaining, or operating critical infrastructure is provided to protect public health and safety in dire situations.

IN CONCLUSION

We need a better balance between the protection of endangered species and the ability to implement important public works and infrastructure projects—especially when public safety and health is threatened by a lack of water supply. These resources belong to the people, and local needs should drive their management. Public Works professionals are up to the challenge of satisfying community needs with limited resources. We offer to be a resource as the Committee considers modernizing this legislation to ensure scarce taxpayer funds are well-spent and communities are protected. Thank you.

QUESTIONS SUBMITTED FOR THE RECORD BY REP. LABRADOR TO MR. RONALD CALKINS, PRESIDENT, AMERICAN PUBLIC WORKS ASSOCIATION

Question 1. Please elaborate on the impact that consultation and other Endangered Species Act related processes have upon maintenance of our Nation's infrastructure. Can maintenance be deferred because of consultation hurdles, and how does such deferred maintenance impact public safety?

Answer. Extended consultation processes delay much-needed repairs of critical infrastructure systems and greatly increase costs, at a time when there isn't enough money available to adequately invest in the economic health and safety of our communities.

The ability to repair and/or replace damaged or aging groundwater wells that extract shallow groundwater from Ventura River have been problematic. We have been unable to build replacement wells along the river bank and/or to install new conveyance pipelines that cross the Ventura River that are necessary to continue our historical water extractions. It is nearly impossible to acquire the necessary permits and to get all the environmental clearances. The potential loss of this supply source along with competition over other sources (depleted groundwater basins) is forcing us to look to other resources such as Potable Reuse in the near term and potentially desalination in the future. These are very expensive capital projects. Potable Reuse alone will cost at least $152 million to design and construct. The per unit cost to produce this water is also about two to three times more expensive than water from river and groundwater extraction.

Last, I have received the following responses to issues of deferred maintenance from the American Public Works Association's members. I have kept their responses as they provided:

From a member in Florida: Repaving of a roadway (450-feet long) in southern Sarasota County has been held up due to a Gopher Tortoise (listed as threatened in Florida) burrow in the ROW of a road that has been in place for 50 years. Although, the burrow does not appear to be an active one, Florida Fish and Wildlife (FFWCC) is requiring that we excavate the burrow and relocate any tortoise found prior to paving. The delay (4 weeks) and cost (less than $3k) for this one road is relatively minor. However, when this gets multiplied by the hundreds of roads that we will be resurfacing in this area (platted home sites, but prime Gopher Tortoise habitat) in the near future, the costs and the delays become significant. Our resurfacing contracts generally run in the $2 to $3 million range and last for 3 months. It is estimated that the delay may add 6 to 9 months to the contracts. Increased costs have not been fully estimated, but are expected to add 40 to 50 percent to the overall costs and will include:

- Staff and consultant time to coordinate with the FFWCC
- Time and expense for excavation and relocation for individual burrows
- Costs for additional mobilization and demobilization events for the piecemeal work that the repaving contractor will be doing
- Extended inspection time
- Higher material costs for smaller irregular volumes

Another example is replacement of an existing 90-year old bridge within 300-feet of a Bald Eagle nest in a highly urbanized area limited to having construction occur outside the nesting period (October 1 to May 15). Florida removed the Bald Eagle from the state list of threatened species in 2008. However, there are still many regulations that need to be followed. Due to protracted negotiations for access easements with adjacent landowners, we have had to delay the start of the project from last year to this year. Since the bridge is structurally deficient and serves an isolated area, this puts the residents in danger of having their access to home eliminated if the bridge were to fail prior to replacement.

From a member in Colorado: "Having worked as a State environmental regulator for 20+ years with the Colorado Department of Public Health and Environment in the 1980s and 1990s, and then another 15 years with the Colorado Department of Transportation through 2015, I've been on both sides of Endangered Species Act issues. In my experience, project delays—including maintenance activity delays are more related to human impacts, political debates and lack of funding than compliance with the Endangered Species Act. In my opinion, the current overall regulatory framework is necessary and reasonable. However, maintaining individual competence and availability has been an issue—on both sides of the fence. When regulatory agencies have responsibilities that overwhelm their ability to respond, or involve issues they have no detailed guidance or training on—delays occur. When project proponents have little or no understanding of the regulations—or a desire or motivation to comply with them—delays occur. To me, the answer is education, being provided with adequate resources, and a devotion to guiding principles for all involved. As a professional engineer, one of my guiding principles is to protect and maintain public health, safety and welfare. For me and many others, that includes helping to insure we preserve a healthy and diverse environment for ourselves and future generations. Human beings are capable of exterminating species—we have witnessed this—and there is no coming back from extinction. We should not allow ourselves to feel pressured into going backwards in time—or neglecting or forgetting the progress we have made on so many fronts. We can work together to make processes more efficient."

From a member in Texas: "In 1969–70 while serving as Asst. Director of Public Works in Texarkana, Texas I participated in permitting one of the early COE newfangled permits for working in the floodplain. The field work and permit application was carried out by me and two guys from the COE. We walked and surveyed the Swampoodle and Boggy Creek floodplain identifying flora and fauna that may be impacted by improving the floodway so no more people would get killed.

In about 12 months all the engineering and permitting work was done and we began to seek funding for the approved process. With the leadership of the Mayor and Council over the years, guided by the COE, improvements were made and no more people died in our studied and designed floodplain. That's the way things worked 47 years ago. Instead of 1 year, we now take 10 to 15 years to make that same decision in similar circumstances throughout the United States."

From a member in Illinois: "In my 25 years of experience working in northeast Illinois, most infrastructure maintenance projects are not delayed by endangered species act consultation. By definition, maintenance is performed on existing infrastructure assets that will have little to no further impact on endangered species. That's not to say that there won't be situations where endangered species will delay some larger, more elaborate maintenance projects, but as long as the risk to the endangered species is real, we need to ensure that infrastructure projects are performed with as minimal impact as possible. The biggest challenge I have seen comes when there are lengthy studies needed to verify the existence or threat to an endangered species. Perhaps in areas where endangered species are thought to exist, and lengthy studies are needed to verify it, the Federal or State government could perform these studies in advance to help minimize the time delays when a project comes up."

From a member in California: "Thank you for reaching out and asking the Engineering community to share their experience with the Endangered Species Act. Out here in Riverside County (Southern California) we have the Department of Fish and Wildlife that acts similarly to the ESA. Fish and Wildlife was created in California to protect game and other animals. But now it is used in regulating development and maintenance impacts to existing ephemeral streams (flows only during rain events). Oftentimes, these drainage courses are dry 95 percent of the time. Fish and Wildlife informed us that a "maintenance permit" is required in order to remove vegetation that is blocking the inlets and outlets of the culvert crossings. As a result, the culverts have silted out and have lost up to 90 percent of their ca-

pacity. The estimated cost of obtaining and paying annually is hundreds of thousands of dollars per year. Cites across America do not have funds for maintenance permits let alone maintenance of their existing infrastructure. Cities in Southern California must also obtain regulatory permits for impacts to ephemeral streams from Army Corp of Engineering (401 permit) and California Regional Water Quality Control Board (Regional Board 404 permit). These three regulatory permits can add hundreds of thousands of dollars and delay projects (public and private) 18 months. Plus add 5 years of maintenance and monitoring for replacement habitat that must be created at 3:1 ratio and higher. Any relief from the current administration would be greatly appreciated. It is a huge concern and development impact that must be addressed. Government has over-regulated the ESA to the point where we have allowed insignificant impacts to be deemed significant."

From a member in Tennessee: "I have a current specific issue that is important relative to this topic. Our city has a significant amount of sanitary sewer systems, primarily our main interceptors that are gravity systems. This means that most were constructed to run parallel to streams and other natural storm water conveyances in the 1970s and 1980s long before the wetland designations existed. Given the importance and financial significance of this infrastructure and with other recent developments, such as the 96-inch interceptor failure at S. Cypress Creek and the subsequent discharge into McKellar Lake, it is then critical that Public Works has sufficient, dedicated, and maintainable forms of ingress/egress/accessibility so that we can reasonably inspect, survey, maintain, and make repairs to this infrastructure."

From a member in Kansas: "We have a current bridge replacement project over a river which straddles the state line between Kansas and Missouri. The bridge has been closed for about 7 years due to damage caused by a truck. Due to a couple of endangered bat species being found in Missouri, tree removal was required during the winter. The project will not be ready to begin construction until late summer, so the City had to hire a tree removal company to do the tree removal outside of the construction contract. Interestingly, no tree removal limitation was required on the Kansas side of the river, apparently the state line acts as a fence. This is an example of how the Endangered Species Act impacts construction/maintenance projects either in timing or additional contracting effort."

From a member in Oregon: "I work as a consultant with a county in Oregon. They were threatened with a lawsuit under ESA requirements for damaging habitat critical to the Fenders Blue Butterfly. I have copied sections of the final report, prepared by the County's consultant below. The County's Road Maintenance Habitat Conservation Plan (HCP) was developed for the U.S. Fish and Wildlife Service (USFWS) by the County to allow the County to receive an incidental take permit under the Endangered Species Act Section 10(a)(1)(B) for Fender's Blue Butterfly (Icaricia Icarioides Fenderi) and Kincaid's Lupine (Lupinus oreganus), a host plant for the butterfly. These two species, which are listed under the Endangered Species Act, could be affected by the County's road maintenance activities and would be covered under this HCP. An incidental take permit would allow the County to continue to perform its otherwise lawful road maintenance activities, which have the potential to affect the covered species (Fender's Blue Butterfly and Kincaid's Lupine). The incidental take permit will be in effect for 30 years.

Fender's Blue Butterfly is an endangered species of butterfly that only occurs in the Willamette Valley, in which the County is situated. Fender's Blue Butterfly is dependent on the presence of the threatened Kincaid's Lupine, which the butterfly uses as a host plant. In this county, Fender's Blue Butterflies lay eggs only on Kincaid's Lupine, and the young caterpillars remain on the lupine to feed.

Road maintenance activities are conducted pursuant to the County's mission to provide essential services to the residents, businesses, and visitors of the County specifically, to maintain county roadways to protect public safety and to enhance the quality of life in the community. The County right-of-way is divided into two distinct sections based on the activities performed in these sections of right-of-way: (1) the first 1.52 meters (5 feet) from the shoulder of the road to the back of the ditch, referred to as the "Potential Impact Zone" and (2) the remaining 4.57 meters (15 feet) from the back of the ditch to the end of the right-of-way, referred to as the "No Impact Zone." The Potential Impact Zone represents the area where normal maintenance activities occur. The No Impact Zone represents the area where normal maintenance is not performed.

The effects analysis identifies activities that may result in both direct and indirect effects on the covered species. Fender's Blue Butterfly and Kincaid's Lupine could be affected by county maintenance activities. Although Fender's Blue Butterfly could

be directly affected (e.g., death) by encounters with equipment or trampling, most of the effects of the covered activities would likely be indirect effects associated with effects on Kincaid's Lupine and other plant species used as nectar sources. Direct effects on the Fender's Blue Butterfly could result from larger road improvement projects. Depending on project timing, adult Fender's Blue Butterfly, caterpillars, or larvae could be affected. Mowing and herbicide application have the greatest opportunity to directly adversely affect listed plants and therefore indirectly adversely affect Fender's Blue Butterfly.

Mowing and herbicide application activities also have the greatest potential to benefit plant species indirectly by removing competition and increasing sunlight on the ground. Brushing can also have positive effects since it allows more sunlight to reach the plants. Selective vegetation management would benefit listed plants and prairie habitat by reducing competition and promoting the expansion of Kincaid's Lupine and prairie habitat. This potential expansion of Kincaid's Lupine and prairie habitat would indirectly benefit the Fender's Blue Butterfly.

Other activities, including tree and shrub removal, hand seeding, drainage activities, cleaning or replacing culverts, emergency earth removal, or sign posting operations may affect Kincaid's Lupine by trampling or disrupting plants in a confined area where the disturbance occurs. Road improvement projects, such as widening and bike path development, would have effects similar to those described above. However, these effects would encompass a larger footprint. Dust abatement and deicing are conducted at specific locations on County roads. Information on lignosulfonates, used for dust abatement, indicates that it can be harmful to plants, stunting growth and turning leaves brown (EPA 2002). Only small sections of the road are treated with lignosulfonates. Sanding would be unlikely to result in effects to the listed species due to the very low proportion of salt included in the sand mixture. Deicing and dust abatement may affect listed plants and butterfly habitat near the edge of the shoulder or from the ditch to the road; however, this is not an area where Kincaid's Lupine are generally found. As surveys were conducted, some plants were found in this area, but it is not expected to support large numbers of prairie plants or covered species.

The County considered a No Action Alternative, which included not pursuing an incidental take permit for road maintenance. Under the No Action Alternative, the County would not be able to perform road maintenance activities along roadsides or complete road improvement projects that could result in potentially adverse effects on the covered species. This alternative was not selected because, over time, lack of maintenance could lead to dysfunctional, unsafe and/or impassable roads.

The County is now committed to maintaining special maintenance zones (restricting timing and types of activities), as well as regular re-inspections of the county to monitor the spread of Lupine on County roads."

Question 2. Not only does protracted consultation and litigation draw Federal taxpayer money away from conservation and other government functions, but it also negatively impacts taxpayers and communities at the local level. How much did your city spend on preparing and undergoing consultation and litigation? Did this expenditure cause financial strain on the city?

Answer. Yes, there has been a tremendous strain on our City both in terms of costs and delays. Regarding the treated wastewater discharge to the Santa Clara River, the debate between the Feds and the State on whether the discharge should continue (to protect the Steelhead) or cease resulted in 9 years of additional scientific studies at a cost of $4 million. We have also spent roughly $600,000 in litigation costs in response to a lawsuit from Heal the Bay and the Wishtoyo Foundation that aims to eliminate our discharge to the estuary.

On the Ventura River, we have spent roughly $1.4 million in litigation costs defending our water rights that go back over 100 years. Santa Barbara Channel Keepers is trying to curb our water extraction rights in response to the ESA. Litigation is ongoing and the ultimate cost for litigation is expected to increase.

Yes, these expenses have caused financial strain to the city of Ventura. Water and wastewater rates have and will continue to increase significantly—not only to pay for these costs but to build and operate new water supply projects as a result.

Question 3. In your written testimony, you mentioned Santa Barbara and Ventura counties spending a significant amount on scientific data to satisfy Endangered Species Act requirements. Can you elaborate more on what that has entailed and the burden that has placed on those localities?

Answer. Both Ventura and Santa Barbara counties are struggling with diminished water supplies due to a severe drought. Northern California has seen marked improvement in drought conditions this winter, but not this part of the state.

The need for increasingly comprehensive scientific studies seems to be never-ending. A non-governmental agency or permitting agency is always requesting that more data be collected and for more analysis to be conducted. The design and construction of infrastructure projects is the quick and easy part. Getting all the environmental approvals and permits is simply taking too long (many years or even decades) because it's very difficult to satisfy or "convince" regulatory agencies that impacts to endangered species can and will be mitigated for a project.

Question 4. The city of Ventura's consultation issues are representative of issues encountered by your membership nationwide. Can you elaborate on challenges facing public works projects in America as they relate to the Endangered Species Act, and explain any suggestions you may have for improving the process.

Answer. One thing that comes to mind is that regulatory agencies need to staff themselves more appropriately for better turn-around time. Many agencies are understaffed and/or they have difficulties in recruiting and retaining qualified and experienced employees that can do a better job of assisting agencies in successfully acquiring the necessary permits.

Also, consultation decisions are often delayed by requests for more scientific studies, and then decisions have been made by NMFS that seem to ignore the very data that was required. Peer review would make sure that restrictions on agencies really do benefit the endangered species rather than halting projects for other motives, such as stopping development.

Mr. LABRADOR. Thank you. The Chair now recognizes Mr. Li for his testimony.

STATEMENT OF YA-WEI (JAKE) LI, VICE PRESIDENT, ENDANGERED SPECIES CONSERVATION; DIRECTOR, CENTER FOR CONSERVATION INNOVATION, DEFENDERS OF WILDLIFE, WASHINGTON, DC

Mr. LI. Mr. Chairman, Mr. Ranking Member, and other members of the Subcommittee, thank you for inviting me to testify today. I am Jake Li, the Vice President of Endangered Species Conservation at the Defenders of Wildlife.

I have worked on the ESA for the regulated community and now for a conservation organization. In my experience, consultations have helped to conserve endangered species by reducing the harmful effects of Federal projects on listed species and their habitats; and they have done so without being unduly burdensome, as a whole.

These conclusions are supported by a study that my colleague and I completed and published in the *Proceedings of the National Academy of Sciences* in 2015. That study is the most comprehensive ever conducted on U.S. Fish and Wildlife Service consultations. We analyzed the results of all 88,290 consultations recorded by the Fish and Wildlife Service from 2008 through April of 2015, and we found that nearly 93 percent of all consultations were informal. In other words, they did not require the more extensive formal consultations reserved for projects that are deemed likely to harm species.

We also found that no project was stopped because of the Service concluding that a project would jeopardize a species or adversely modify critical habitat. In fact, the Service worked with Federal agencies to avoid finding jeopardy or adverse modification in all but two consultations; and even those projects could proceed. So, an astonishing 99.9977 percent of all consultations ended without jeopardy or adverse modification.

What we have is a system that is almost always able to avoid irresolvable conflicts. This is a real testament to the ESA's inherent flexibility to find mutual solutions through the administrative process.

The duration of consultations is another debated issue. Our study found that, from the time a Federal agency provides the Service with enough information to start a consultation, the median duration of informal consultations was 13 days; and for formal consultations, 62 days. Both are much less than the 135 days allowed by regulation without a mutual extension.

This is a remarkable accomplishment, if you consider the insufficient funding for the Service's consultation program. In fact, on a per-species basis, and after accounting for monetary inflation, congressional funding for the consultation program was lower in 2015 than in 2001.

Of course, not every consultation fell within the 135-day time frame. Nearly 1,400 exceeded that time frame, but there are often good reasons for this. Some involve very complex projects with hundreds of species. Sometimes a NEPA assessment is intertwined with the ESA consultation.

I also have, right here, examples of consultations that were delayed because of erroneous information provided by applicants, or because of the Fish and Wildlife Service needing to wait around for comments from an applicant or a Federal agency.

Let's also put those 1,400 consultations into context. They represent less than 2 percent of all 80,290 consultations. So, for a law that has been chronically under-funded, a departure of only 2 percent is downright remarkable. Defenders sees no reason that Congress needs to amend Section 7 to address the issues that we have heard about today. There is no systematic flaw with how Section 7 is laid out. In fact, I have heard nothing today, other than examples of some of the most complex or controversial consultations.

But, by and large in our study, those consultations do not represent the vast majority of projects that undergo Section 7 consultations. And for those minority of projects with extensive delays or heightened conflicts, Congress can, in fact, help. It can properly fund the Service so that the agency can do two really important things: the first is to fully staff the Section 7 program and provide better management direction to its staff for highly controversial or highly complex projects; the second is to develop the next generation of Section 7 policies, rules, and day-to-day practices that work even better for wildlife and people.

Thank you, and I would be happy to answer questions.

[The prepared statement of Mr. Li follows:]

PREPARED STATEMENT OF YA-WEI LI, VICE PRESIDENT, ENDANGERED SPECIES CONSERVATION AND DIRECTOR, CENTER FOR CONSERVATION INNOVATION, DEFENDERS OF WILDLIFE, WASHINGTON, DC

Chairman and members of the Subcommittee, thank you for the invitation to testify today about Section 7 of the Endangered Species Act (ESA). I am Ya-Wei Li, the Vice President of Endangered Species Conservation and the Director of the Center for Conservation Innovation at the Defenders of Wildlife, an organization dedicated to protecting and restoring imperiled animals and plants in their natural communities. For 70 years, Defenders has pursued this goal by working with partners in the field; securing and improving state, national, and international policies

that conserve wildlife; and upholding legal safeguards for wildlife in the courts. We represent more than 1.2 million members and supporters.

I have worked on Section 7 consultations from several vantage points. Before coming to Defenders, I was an attorney in private practice handling Federal and State environmental matters, including under Sections 7 and 10 of the ESA. At Defenders, I have continued working on Section 7 issues by helping to ensure that consultations serve their conservation goal effectively and efficiently. In my experience, consultations have generally worked as they should. They have played a vital role in promoting the recovery of ESA-listed species by reducing and even offsetting the adverse effects of Federal projects on those species and their habitats. Consultations are thus indispensable to fulfilling the ESA's mandates of preventing extinction and achieving recovery. Further, there is no compelling evidence that these conservation gains have come at the expense of jobs or the economy at the national level. With rare exceptions, Federal agencies have completed consultations in a reasonable time frame by adopting conservation measures that are economically and technologically feasible to implement.

These conclusions are supported by a peer-reviewed study my colleague and I published just over a year ago in the *Proceedings of the National Academy of Sciences*.[1] That study is the most comprehensive ever conducted on U.S. Fish and Wildlife Service (FWS) consultations. We evaluated the results of all 88,290 consultations recorded by FWS from 2008 through April 2015, and found that no project was stopped because of FWS concluding that a project would "jeopardize" a species or "destroy or adversely modify" critical habitat—the two prohibitions of Section 7. In fact, FWS worked with Federal agencies to minimize impacts on species and to avoid finding jeopardy or destruction/adverse modification in all but two consultations (and even those projects were ultimately approved). Put differently, an astonishing 99.9977 percent of consultations ended with neither of these findings. Further, and as explained in detail later, nearly 93 percent of the projects required only "informal" consultation rather than the more extensive "formal" consultation reserved for projects that are likely to harm a species or its critical habitat. For most consultations, all the coordination, review, evaluation, negotiation, and document preparation was completed in a timely manner. We found that from the time a Federal agency provided FWS with enough information to initiate a consultation, the median duration of informal consultations was 13 days and formal consultations was 62 days—both considerably less than the 135 days allowed by regulation without the agreement of the consulting agency.

Although there are always opportunities to improve how laws are implemented, any refinements to the consultation process can be accomplished solely through administrative reform made possible by fully funding the endangered species programs of FWS and the National Marine Fisheries Service (NMFS). There is no need for legislative change for Section 7 to achieve its important purpose or avoid major economic impacts.

AN OVERVIEW OF THE CONSULTATION PROCESS

Because of its intricacies, the consultation process is often misunderstood. At the heart of the process is the requirement that all Federal agencies ensure that the actions they fund, authorize, or carry out are not likely to "jeopardize" a species or "destroy or adversely modify" critical habitat. Depending on the species involved, Federal agencies consult with FWS or NMFS to fulfill this mandate. Consultations typically start as discussions between the Service and a Federal agency if the agency has determined that its proposed action "may affect" a listed species or designated critical habitat. This informal consultation ends if the Service determines that the activity is "not likely to adversely affect" a species. Otherwise, formal consultation is required.

During formal consultation, the Service evaluates whether the proposed action will violate the prohibitions on jeopardy/adverse modification. If neither of these outcomes is likely but incidental "take" is expected, the Service will offer "reasonable and prudent measures" to minimize the harmful effects of the action. If jeopardy/adverse modification is likely, the Service must suggest "reasonable and prudent alternatives"—conservation measures that avoid jeopardy/adverse modification by reducing or partly offsetting the harm from the proposed action. In the rare instances where these alternatives are unavailable, Section 7(g) allows a project proponent to ask a special Endangered Species Committee (also known as the "God Squad") to exempt the project from complying with the jeopardy/adverse

[1] Malcom J, Li Y-W (2015) Data contradict common perceptions about a controversial provision of the U.S. Endangered Species Act. Proc Natl Acad Sci USA 112(52):15844–15849.

modification prohibitions. Formal consultations end with a Service "biological opinion," which must be finalized within 135 days after formal consultation begins, unless an extension is agreed on.

THE VITAL ROLE OF SECTION 7 CONSULTATIONS FOR SPECIES RECOVERY

The goals of the ESA are to protect species from potential extinction, and to recover those species so that they no longer need the protections of the ESA. For many species, these goals are impossible to achieve without managing the human activities that threaten their survival. Section 7 is vital to this regulatory framework because it provides the legal backstop against Federal activities that are likely to jeopardize species or destroy or adversely modify critical habitat. These protections are especially important for the hundreds of species found mostly on Federal lands and for plants, which now make up 57 percent of all U.S. listed species and which are not protected by the "take" prohibition in Section 9 of the ESA. Without Section 7, most of these plants would receive very limited protections under the ESA.

The destruction or adverse modification prohibition deserves special recognition because it is the ESA's only protection for critical habitat. The Services have designated thousands of square miles of critical habitat, and the prohibition transforms those polygons on a map into tools for recovery. Because habitat loss and fragmentation affect over 80 percent of U.S. listed animal species and over 70 percent of U.S. listed plant species, critical habitat can play a vital role at controlling this primary threat. And as climate change becomes a larger impediment to recovery, unoccupied habitat will become increasingly important to help species adapt to shifting ranges and habitat. The adverse modification prohibition is one of the few tools in the ESA that can protect unoccupied habitat. If properly implemented, Section 7 can help preserve options for recovery decades from now.

THE ESA IS FLEXIBLE ENOUGH TO AVOID IRRECONCILABLE CONFLICTS

There is no compelling argument that legislation is needed to resolve a specific conflict under Section 7 or to make Section 7 more effective for wildlife and people. There are three main reasons for this. First, the ESA is among our most concise and flexible environmental laws. The statute provides the Services with ample discretion to devise rules, policies, handbooks, and other tools to help Federal agencies fulfill their mandates of preventing extinction and recovering species, while accommodating development consistent with those goals. Safe harbor agreements, candidate conservation agreements, and habitat conservation plans are all examples of innovations that arose from the ESA's flexibility. Section 7 has similarly benefited from this flexibility. An example is the use of programmatic consultations, which enhances conservation by allowing the Services to evaluate the cumulative effects of all projects nested under a Federal program. Programmatic consultations are also more efficient: in our study of FWS consultations, we found that project-level formal consultations covered by a programmatic consultation had a median length of 24 days compared to 62 days for all other formal consultations. Other examples of flexibility include the Services' ability to define key concepts such as jeopardy, and key processes such as the standards for triggering informal consultations.

Another reason legislation is unnecessary is that the ESA administrative process provides ample opportunities to resolve conflicts. Section 7 is called "interagency cooperation" for a reason: Federal agencies are expected to work cooperatively with the Services to find mutual outcomes for species and project proponents. During informal consultations, for example, an agency is encouraged to work with FWS to develop measures to avoid, minimize, and offset the effects of its proposed project. In nearly 93 percent of FWS consultations, this process succeeded at averting the need for formal consultation. In the remaining 7 percent of consultations where formal consultation was necessary, FWS was nearly always able to negotiate additional conservation measures to avoid jeopardy/adverse modification.

The administrative process offers the flexibility not only to forestall irreconcilable conflicts on individual consultations, but also to constantly improve the entire consultation program. One especially promising approach is to incentivize Federal agencies to carry out their duty under Section 7(a)(1) of the ESA to help conserve listed species. Some Federal agencies have recently expressed interest in this approach, which would involve the agencies using Section 7(a)(1) to implement conservation measures before they would need to consult with FWS under Section 7(a)(2). The benefits from these early measures can reduce the need for subsequent formal consultation and even avoid jeopardy/adverse modification findings. An excellent example is the Army Corps of Engineer's 2013 Conservation Plan for the Lower Mississippi River. The document describes a host of conservation actions that the Corps could implement under Section 7(a)(1) to avoid, minimize, and offset the ad-

verse impacts of its flood management and ship navigation activities on three listed species. On its own, the Conservation Plan does not oblige the Corps to do anything. But 5 months after the plan was finalized, the Corps committed to implement the conservation measures as part of its Section 7(a)(2) consultation on the same flood management and navigation activities. That consultation resulted in an expedited biological opinion, in which FWS treated the Section 7(a)(1) conservation measures as a component of the Section 7(a)(2) activities. Because of this direct connection between Sections 7(a)(1) and 7(a)(2), FWS concluded no jeopardy/adverse modification. If other Federal agencies follow this approach, they too could reduce or avoid conflicts during subsequent consultations while contributing to species recovery.

The third reason the administrative process is appropriate and adequate is that Congress has already created off-ramps within Section 7 to avoid irreconcilable conflicts. As an initial matter, a Federal activity that results in the "incidental take" of a species can proceed if it implements the reasonable and prudent measures described in the biological opinion. In those rare circumstances where the amount of take would jeopardize a species or adversely modify critical habitat, the Service develops reasonable and prudent alternatives that, if implemented, allow a project to proceed without violating the ESA. By regulation, those alternatives must be "economically and technically feasible" for the project proponent to implement. If alternatives are not available, the God Squad may exempt a project from complying with Section 7. This exemption has existed for nearly 40 years, but the God Squad has convened only three times and granted an exemption twice. The rarity of exemptions suggests that Federal agencies are almost always able to defuse conflicts using the normal consultation process.

CONSULTATIONS IN PRACTICE

Ever since the Supreme Court in 1978 decided *TVA v. Hill*, which temporarily halted the completion of the Tellico Dam on the Little Tennessee River, Section 7 has garnered a reputation as a blunt hammer that has halted countless projects and upheaved local communities. But does this reputation reflect reality? Have anecdotal accounts, cherry-picked case studies, and outliers driven the public dialogue? My colleague and I have provided the most comprehensive answer to this question in our peer-reviewed paper analyzing the results of all 88,290 FWS consultations from 2008 through April 2015. We found that a staggering 92.3 percent of those projects were resolved through informal consultations; only 7.7 percent required the detailed analysis of formal consultations. That is, most projects required nothing more than a relatively cursory analysis by FWS to comply with Section 7. Of those projects that required formal consultation, only two (0.0023 percent) resulted in jeopardy, one of which also resulted in destruction/adverse modification of critical habitat. That consultation involved a U.S. Forest Service proposal to apply fire retardants on national forests. After the project was revised, FWS concluded no jeopardy/adverse modification. The second consultation with a jeopardy conclusion focused on the effects to the delta smelt from a water management project in California's Central Valley. But even that project could proceed if the permittees adopted reasonable and prudent alternatives to minimize and partially offset the adverse effects of the project. Thus, no project was stopped because of FWS finding jeopardy/adverse modification during the nearly 7.5-year study period.

Our findings are similar to those from two earlier studies. The first evaluated all 73,560 FWS consultations from 1987 to 1991.[2] That study found only 2,000 projects requiring formal consultation and 350 jeopardy findings, 63 percent of which were attributable to two consultations. Of those 350 projects, only 18 were ultimately blocked, canceled, or terminated because of Section 7. Most of the remaining jeopardy opinions applied to projects that complied with Section 7 by adopting reasonable and prudent alternatives or other conservation measures. The second study analyzed 4,048 biological opinions for fish species from both Services between 2005 and 2009, and likewise found that jeopardy/adverse modification conclusions were rare (7.2 percent and 6.7 percent of formal consultations, respectively).[3] These results help explain why no agency has invoked the God Squad since 1992.

Another debated issue is the duration of consultations. Some consultations do require years to complete, but they are often for highly complex projects and may involve hundreds of species. Time is needed to gather data about the species, negotiate conservation measures, and draft a comprehensive biological opinion that is

[2] Barry D, Harroun L, Halvorson C (1992) For conserving listed species, talk is cheaper than we think: The consultation process under the Endangered Species Act.

[3] Owen D (2012) Critical habitat and the challenge of regulating small harms. Fla L Rev 64: 141–199.

scientifically sound and legally defensible. Often, an environmental impact statement under the National Environmental Policy Act is also required for the proposed project. The criticisms of consultations often focus on these types of projects because they are amenable to soundbites loaded with sweeping generalizations about the entire ESA. But our study found that those consultations are outliers. From the time a Federal agency provides FWS with enough information to initiate a consultation, the median duration of informal consultations was 13 days and formal consultations was 62 days. Only 1,381 formal consultations (20 percent) exceeded the 135-day limit prescribed in Services regulations, and many of those had agreed upon extensions. Even programmatic consultations, which are extensive consultations on program-level projects or plans, had median durations of 13 days for informal consultations and 82 days for formal consultations. Although some consultations (probably appropriately) required far more time than others to complete, most were finalized in a reasonable time frame. This is a remarkable accomplishment considering the inadequate funding for FWS's consultation program. In fact, on a per species basis after adjusting for inflation, congressional funding for the program has declined since 2011 and was lower in 2015 than in 2001.[4]

The near absence of jeopardy/adverse modification findings discredits many of the claims about the onerous nature of consultations, but also raises some question about whether Federal agencies are applying this tool rigorously enough to conserve listed species. To some extent, the low number of jeopardy/adverse modification findings is likely the result of Federal agencies learning to plan and propose projects that minimize harm to listed species. Some agencies are indeed proposing projects with reduced impacts because they are coordinating more closely with FWS to shape the projects well before consultations begin, as I noted above. This approach is desirable because it can reduce conflicts without diluting conservation outcomes. But it is difficult to believe that this explanation applies to all consultations conducted over the 7-year period we studied, considering that some involve highly controversial projects proposed by organizations concerned primarily with achieving their project purposes. In those situations, I am concerned that FWS—in the face of persistent budget cuts, increasing workload, and mounting political pressure to minimize the economic impacts of endangered species conservation—may be approving projects that should have been further altered to comply with the conservation standards of the ESA. There may also be internal pressure within the agency to avoid jeopardy/adverse modification findings. But such concerns with agency practice can be addressed through proper management or administrative direction, and do not warrant legislative change.

INVESTING IN ADMINISTRATIVE IMPROVEMENTS TO THE CONSULTATION PROCESS

We know that endangered species recovery has been woefully underfunded and that funding is a critical component of ESA success.[5] If Congress wants consultations to work better for wildlife and the regulated community, it needs to properly fund the Services to implement the ESA and carry out administrative reforms. In recent years, the agencies have already completed several key rulemakings. These include revisions to the rule on programmatic consultations. Increased funding will enable other improvements to expedite consultations and enhance their conservation effectiveness. Below are just four examples from dozens I could offer:

- Implement the two recommendations of the Government Accountability Office to improve FWS's institutional knowledge and understanding of the effects of Section 7 projects on species: create databases to track all monitoring reports required from consultation and cumulative take for all species affected by formal consultations.[6] Current technologies allow the agency to implement these recommendations at a significantly reduced cost and to make the information publicly available. Besides improving FWS's knowledge, these databases can simplify planning and reporting by project proponents.
- Develop better maps of where species are likely to occur so that project proponents have enough information to decide whether and how to avoid and minimize impacts to species before they begin a consultation. This upfront planning will expedite consultations by giving proponents the option to propose projects with reduced impacts on species.

[4] https://cci-dev.org/analysis/ESA_funding/#funding_trends.

[5] Gerber, LR. (2016) Conservation triage or injurious neglect in endangered species recovery. Proc Natl Acad Sci USA 113(13):3563–3566.

[6] Governmental Accountability Office (2009) The U.S. Fish and Wildlife Service Has Incomplete Information about Effects on Listed Species from Section 7 Consultations.

- Expand the use of programmatic consultations to expedite project-level consultations and to improve the Services' ability to assess the cumulative effects of those consultations. In our study of FWS consultations, we found that although program-level consultations take slightly longer than standard consultations (82 days vs. 62 days), subsequent formal consultations on project-level consultations require far less time than standard formal consultations (24 days vs. 62 days).
- Finish developing the FWS Information, Planning, and Consultation (IPaC) System, which will expedite informal consultations by automating certain aspects of the process. Given that over 90 percent of consultations are informal, a functional IPaC system could save the government vast resources in the long term and improve the consistency of informal consultations.

The Services do not need to carry the weight of these administrative reforms on their own. Many conservation organizations and other stakeholders are ready and able to help the agencies with this effort. At Defenders of Wildlife, for example, we recently created the Center for Conservation Innovation, which focuses on using technology, science, and interdisciplinary approaches to pioneer pragmatic, innovation solutions to endangered species conservation. Advances in data storage and management, satellite imagery, and other technologies can make most of these four recommendations cheaper and easier to implement than ever before. Rather than legislation, these and other promising approaches will make consultations more effective for wildlife and people.

A ROLE FOR CONGRESS

Section 7 is often considered the most important component of the ESA because it prohibits Federal agencies from threatening a species' existence while offering the built-in flexibility to resolve the overwhelming majority of potential conflicts with human activities. This combination has contributed to the increasing number of species achieving recovery without the need to stop infrastructure projects or convene the God Squad. Can Congress help improve Section 7 implementation? Absolutely, but not by changing the ESA. Instead, Congress can fully fund the ESA, including the Section 7 consultation program, so that this visionary law can realize its full potential.

QUESTIONS SUBMITTED FOR THE RECORD TO MR. YA-WEI LI, VICE PRESIDENT OF ENDANGERED SPECIES CONSERVATION, DEFENDERS OF WILDLIFE

Questions Submitted by Rep. Labrador

Question 1. Please disclose all Endangered Species Act related cases that Defenders of Wildlife has filed, and/or been party to, since 2005.

Answer. To the best of my knowledge, our ESA-related cases are as follows. For some cases, I have included additional information from our internal databases.

2005/2006

- Tulare Lake Basin Water Storage District v. United States of America (state water rights/ESA)
- Defenders of Wildlife v. Middle Rio Grande Conservancy District, State of New Mexico, U.S. Fish and Wildlife Service, Army Corps of Engineers and Bureau of Reclamation (Silvery Minnow/Rio Grande/ESA)
- Spirit of the Sage Council, et al. v. Norton (No Surprises Assurance/ESA)
- Center for Biological Diversity v. Norton (California Spotted Owl ESA Listing)
- Castlewood Products, et al. v. Norton (CITES/ESA-Illegal Logging amici curiea—DC)
- Defenders v. Norton (Lethal Take Permits Issued under ESA Section 10(a)(1))
- Defenders v. NMFS (North Atlantic Right Whale)

2007

- Defenders v. Hall, Norton (Exclusion of Three Species of African Antelope from ESA Prohibitions)
- Defenders of Wildlife v. Norton (Lynx listing/critical habitat)
- Home Builders Association of Northern California, et al. v. U.S. Fish and Wildlife Service, et al. (Critical habitat for vernal pool species)
- Defenders v. U.S. Army Corps of Engineers, Environmental Protection Agency and U.S. Fish and Wildlife Service (Cactus Ferruginous Pygmy Owl)
- Defenders, et al. v. National Park Service, et al. (Off-road vehicle use at Cape Hatteras National Seashore)
- Tucson Herpetological Society v. Norton (Flat-Tailed Horned Lizard Listing)
- Northwest Ecosystem Alliance v. Norton (Cascades Grizzly)

2008

- National Association of Home Builders et al., v. Babbitt (Cactus Ferruginous Pygmy-Owl/Listing and Critical Habitat Challenge)
- Defenders of Wildlife v. Hall (Northern Rockies Wolf Delisting)
- Defenders of Wildlife v. Schafer, Civ. No. 08–2326 (N.D. Cal)
- Sierra Forest Legacy v. Pendleton, Civ No. 08–4240 (N.D. Cal)
- Save San Onofre Coalition v. Gutierrez, Civ No. 08–1470 (S.D. Cal.)
- Defenders of Wildlife v. Martin, Civ No. 05–248 (E.D. Wash.)

2009

- Defenders v. NMFS (ESA Violations from Right Whale ship strikes)
- Center for Biological Diversity, et al. v. Kempthorne (Challenge to Section 7 ESA Rules)

2010

- Save San Onofre Coalition v. Gutierrez (S.D. Cal. 08–1470)
- In re: Polar Bear ESA Listing and 4(d) Rule Litigation (Multidistrict litigation docket No. 1993)
- TWS et al. v. Dep't of the Interior
- Defenders v. Schafer, Civ No. 08–2326 (N.D. Cal)
- Sierra Forest Legacy v. Pendleton, Civ No. 08–4240–SC (ND Cal)
- Colorado Envtl Coalition v. Kempthorne, 09–cv–00085–JLK (D. Colo)

2011

- Defenders v. Minerals Management Service, No. 10–254–WS–C (S.D. Al)
- Defenders v. BOEMRE, No. 11–12598–F (11th Cir.)

2012

- Defenders v. NPS, FWS
- In re: Polar Bear ESA Listing (D.C. Cir. No. 11–5353)
- Sierra Club et al. v. Kenna et al., No. 2:12–cv–00974–JAM–DAD (E.D. Cal.)

2013

- Defenders, et al. v. BP P.L.C. et al. (MDL–2179)
- Defenders, et al. v. Jewell et al. (1:13–cv–00919–RC)
- In re: Polar Bear ESA Listing and 4(d) Rule Litigation (1:08–mc–00764–EGS)
- In re: Polar Bear ESA Listing (11–5353)
- Citizens for Balanced Use, et al. v. Maurier, et al. (Montana Supreme Court, DV–2012–1)
- Defenders of Wildlife, et al. v. BLM, et al. (2:12–cv–02578–CAS–DTB)
- Friends of the Swainson's Hawk and Defenders v. County of Fresno (CA Superior Court in Fresno County)
- Cape Hatteras Access Preservation Alliance v. Salazar (2:13–cv–00001–BO)

- Defenders v. NPS, FWS (2:07–cv–00045–BO)
- Northwest Coalition for Alternatives to Pesticides, et al. v. EPA (Western District of Washington, 10–01919–TSZ)
- Dow AgroSciences, LLC v. NMFS (4th Circuit, No. 11–2337)
- Sierra Club, et al. v. Kenna, et al. (9th Circuit, 13–15383) (Golden eagle and California condor)
- Red Wolf Coalition v. N.C. Wildlife Resources Commission (Wake County Superior Court, 12–CV–012626)
- Defenders, et al. v. Jewell, et al. (US District Court for the Middle District of TN, 2:13–cv–00039)
- Defenders v. Salazar (D.C. District Court, 1:12–cv–01833–ABJ)
- The Aransas Project v. Texas Commission of Environmental Quality (5th Circuit Court of Appeals 13–40317)

2014/2015

- Defenders, et al. v. Jewell (Eastern District of Tennessee, 3:13–cv–00698)
- Black Warrior Riverkeeper v. U.S. Army Corps of Engineers, et al. (Northern District of Alabama, 2:13–cv–02136)
- Defenders, v. U.S. Fish and Wildlife Service, et al. (1:14–cv–150–CKK)
- Defenders, et al. v. Jewell (D.C. District Court, 1:13–cv–00919–RC)
- Sierra Club, et al. v. Kenna, et al. (9th Circuit, 13–15383)
- Center for Biological Diversity v. EPA, (DC Circuit, 14–1036)
- The Aransas Project v. Shaw, et al., (5th Circuit, 2:10–CV–75)
- Center for Biological Diversity v. Kelly (District of Idaho, 1:13–cv–00427)
- Oceana v. BOEM (12–0981–RC)
- Friends of the River, et al. v. U.S. Army Corps of Engineers, et al. (Eastern District of California, 2:11–cv–01650–JAM–JFM)

2015/2016

- Georgia Aquarium v. Pritzker, et al. (N.D. Georgia, 1:13–cv–03241–AT)
- Defenders, et al. v. Jewell, et al. (N.D. Oklahoma, 1:14–cv–1025)
- Defenders, et al. v. U.S. Army Corps of Engineers, et al. (D. Montana, Great Falls, 4:15–cv–00014–BMM)
- Center for Biological Diversity, et al. v. Jewell, et al. (D. Arizona, 4:14–cv–02506–RM)
- Center for Biological Diversity, et al. v. EPA (DC Circuit, 15–1054)
- U.S. Fish and Wildlife Service, et al. v. People for the Ethical Treatment of Property Owners (10th Circuit, 14–4151)
- Defenders v. Jewell (N.D. California, 3:15–cv–04351–THE)
- Defenders v. U.S. Fish and Wildlife Service, 5:16–cv–1993 (LHK); Sierra Club v. CDFW, BS 161458

Question 2. Please disclose the amount of attorneys' fees paid to the Defenders of Wildlife under the Equal Access to Justice Act, or the Justice Fund, for each case filed, and/or each case for which Defenders of Wildlife has been party to, since 2005.

Answer. Defenders does not maintain an archive that tracks the amount of reimbursements associated with any particular case. As a result, we can provide only the date and amount of reimbursements. Further, we only have records starting from 2009 because we did not formally track our reimbursements before then.

If outside counsel represented us in a case, reimbursement fees typically go to them. If our in-house staff attorneys represented us in a case, reimbursement fees typically offset their salary. Many of the amounts listed below represent attorneys' fee awards, but some represent reimbursements for expenses paid by Defenders and our co-plaintiffs before or during litigation.

DATE	AMOUNT
2/20/2009	$15,908.00
2/20/2009	9,231.00
2/20/2009	71,548.00
3/23/2009	321.42

4/29/2009	1,500.00
4/29/2009	13,214.43
6/15/2009	37,000.00
6/19/2009	5,500.00
7/21/2009	45.68
10/02/2009	1,643.61
10/15/2009	16,375.00
10/15/2009	514.64
1/20/2010	853.75
1/20/2010	27,271.00
1/22/2010	1,748.38
3/15/2010	669.35
3/18/2010	939.74
11/30/2010	15,000.00
3/08/2011	281.55
4/04/2011	22,834.35
4/15/2011	21,000.00
11/07/2011	39,000.00
3/14/2012	10,000.00
8/31/2012	10,500.00
9/14/2012	61,119.50
11/28/2012	8,095.00
11/28/2012	66.61
11/28/2012	3,238.00
11/28/2012	26.65
11/28/2012	4,857.00
11/28/2012	39.97
1/17/2013	16,517.67
1/17/2013	6,607.06
1/17/2013	9,910.60
1/25/2013	13,825.50
1/25/2013	5,530.20
1/25/2013	8,295.30
2/06/2013	7,856.82
2/06/2013	3,142.73
2/06/2013	4,714.09
8/06/2013	153.91
8/06/2013	61.56
8/06/2013	92.34
10/23/2013	10,000.00
12/02/2013	30,000.00
1/30/2014	5,533.00
4/11/2014	28,319.82
5/01/2015	1,060.74
11/20/2015	5,548.00
3/31/2016	15,424.21
5/19/2016	39.33
8/31/2016	799.67
9/22/2016	68,171.30
10/31/2016	75,879.72
10/31/2016	681.78
12/16/2016	1,163.80
Total	**$719,671.78**

Question 3. Please disclose whether your 2015 study incorporated formal consultations that were terminated or withdrawn prior to the conclusion of consultation. If so, how did you address these consultations when calculating duration averages? Please disclose the number of terminated or withdrawn formal consultations were there?

Answer. There were 33 formal consultations (0.5 percent of formal consultations) recorded as withdrawn in the FWS Section 7 database that we obtained. Of those, 25 were recorded as concluded on time, 4 were recorded as not on time, and 4 were unknown. The duration calculations included these consultations, which, because there were so few, had no effect on the estimates.

Question 4. In the methodology for your paper you state that: "[t]o evaluate the factors most likely to influence consultation duration, we removed 2,468 consultations (2.8 percent) with duration above the 98th percentile of all durations; these extreme values are strongly influenced by factors other than those recorded in [the] TAILS [database], and their removal dramatically improved the fit of the models." Regarding these removed consultations:

4a. Is it correct that these consultations were not included in your calculations of the median duration of informal and formal consultations? [Specifically, the calculations described in your methodology as follows: "We calculated median consultation durations and approximate 95 percent CIs of the median after removing missing data. Standard analysis of variance was used to test for differences in means among categories."]

Answer. No, that is not correct: all consultations were used in the median duration calculations. The 98th percentile consultations were excluded only from the linear model that associated predictor variables with consultation duration.

4b. Were the removed consultations taken from the universe of formal consultations, the universe of informal consultations, or the universe of informal and formal consultations combined?

Answer. The universe of all consultations.

4c. What were the "other factors" that contributed to these consultations with an "extreme" duration value?

Answer. The primary factor was whether a consultation was a reinitiation, but a small number may have been long-running consultations.

Question 4d. How were you able to determine the "other factors?"

Answer. By FOIA requests and by asking FWS biologists.

4e. How removed consultations with "extreme" values account for each of the "other factors" you identified?

Answer. The question is unclear. A basic tenet of any analysis is that the process generating the data is stable.

4f. Do the removed consultations, relative to those consultations retained, tend to be larger in scope and/or scale? If so, how many would fit this description?

Answer. We do not know the relative sizes of the consultations and cannot answer this question. To the best of our knowledge, these consultations are mostly reinitiations of prior consultations.

Question 5. In the dataset linked to your paper there were over 11,000 informal consultations with the elapsed time of 0 (zero) days. There were over 6,000 other informal consultations for which the elapsed time was 1 (one) day.

5a. Do these consultations reflect automated responses to IPAC queries, NLAA concurrences or some other factors? Can you provide a breakdown regarding the major factors that account for these 0–1 day informal consultations?

Answer. The number of automatic IPAC responses is likely very small: FWS has only recently started small pilots of the system in the southwest. The most likely cause is that there are no listed species present in the action area. A second cause may be actions that are clearly not likely to adversely affect listed species or their critical habitat, and thus can complete consultation immediately.

5b. How was it determined that they concluded in 1 day or less?

Answer. By looking at the data provided in TAILS.

Question 6. In the dataset linked to your paper there were over 827 formal consultations with "NA" recorded for the duration or "elapsed" time. (Excluded from the 827 are about 21 formal consultations that had a "NA" value and that were also were recorded as "emergency consultations.")

6a. Why do these formal consultations have no elapsed time?

Answer. Because the start of formal consultation or the conclusion date were not recorded. In some cases, these were missing because the consultation had not yet concluded (and some missing dates were included with a later data update from FWS).

6b. If these were formal consultations, how were they accounted for in your determination of duration?

Answer. They were excluded from summary calculations using the parameter 'na.rm = TRUE' in R's 'median' function.

6c. If these 827 records were determined not to be formal consultations, why and how so?

Answer. We did not conclude that the consultations were not formal, so the latter clause of the question does not apply.

Questions Submitted by Rep. Grijalva

Question 1. It was stated that the EAJA cap on attorneys' fees of $125 does not apply to environmental groups. Please explain under what circumstances the cap for attorneys' fees can be lifted. Does it apply only to environmental litigants? Does the court have the authority to reduce an attorney's fee award?

Answer. The Equal Access to Justice Act (EAJA) embodies our Nation's values of protecting legal rights, access to courts, and the rule of law, and is not limited to environmental litigants. In enacting EAJA, Congress recognized that individuals and organizations should "'not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved.'"[1] Parties may seek attorneys' fees under EAJA only when bringing cases not covered by a fee-shifting provision in another Federal law.[2]

The $125 hourly cap on attorneys' fees *does* apply to environmental groups. EAJA allows courts to lift the fee cap only in limited circumstances. Courts have discretion to consider whether "'a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.'"[3] General legal competence or even extraordinary but generalized litigation experience does not alone justify a higher fee.[4] Special factors require a strong showing, such as an identifiable practice specialty like patent law or foreign language skills necessary for the litigation.[5] In these situations, the EAJA fee was based on the reasonable market rate for the lawyers in that specialty.[6] Any EAJA fee can be reduced if the prevailing party's conduct was unduly and has unreasonably protracted the final resolution of the matter in controversy.[7]

Question 2. Who sets the reimbursement rates for attorneys' fees under the ESA citizen suit provision? Is Defenders of Wildlife allowed to "charge" whatever rate it wants, or have the courts set limits?

Answer. Congress long ago recognized that the government needs the public to help enforce America's laws, including those protecting civil rights, voting rights, and the environmental. Citizen suit provisions, including those in the ESA, serve this purpose. Private citizen, nonprofit organizations, and businesses from across the political spectrum can seek reimbursements under the ESA citizen suit provision.

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[1] *Marbury v. Madison*, 5 U.S. 137,163 (Marshall, C.J.) ("The very essence of civil liberty certainly consists in the right of every individual to claim protection under the laws, whenever he receives an injury. One of the first duties of Government is to afford that protection . . .. The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.")

[2] 28 U.S.C. § 2412(a)(1).

[3] *Sierra Club v. Secretary of the Army*, 820 F.2d 513, 517 (1st Cir. 1987) (quoting 28 U.S.C. § 2412(d)(2)(A)).

[4] *Pierce v. Underwood*, 487 U.S. 552, 572 (1988).

[5] *Id.*

[6] *See Nat'l Wildlife Fed'n*, 870 F.2d at 547.

[7] 28 U.S.C. § 2412(d)(1)(C).

Recognizing that such specialized cases can only be brought with the expertise of competent counsel, Congress has provided for "reasonable" market-based reimbursements of attorneys' fees for prevailing parties. These fees are thus limited by law, generally vetted by the courts, and based on prevailing market rates.[8] Thus, Defenders of Wildlife cannot seek reimbursements of whatever rate it wants.

The importance of the fee-recovery provisions lies beyond dispute. As the U.S. Supreme Court has recognized, if a citizen "does not have the resources" to pursue an enforcement action, "his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers."[9]

Question 3. A Republican Member stated that the "DOI doesn't have a mechanism to track awards of attorneys' fees." Can you please explain why and when that reporting mechanism was abolished?

Answer. Before 1995, EAJA required both the Administrative Conference of the United States (ACUS) and the Department of Justice (DOJ) to report data on EAJA awards from administrative and court proceedings, respectively. These reporting requirements were broadly supported but, as applied to the DOJ, eliminated by the Republican-controlled Congress in 1995.[10] EAJA had required the DOJ to report "the amount of fees and other expenses awarded during the preceding fiscal year" and to disclose "the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information."[11]

Question 4. Will you please explain the value of the citizen suit provision for ESA? Does litigation benefit species conservation, contrary to assertions by Republican Members and witnesses? Does Defenders of Wildlife "profit" from environmental litigation?

Answer. As explained in my response to Question 3, Congress long ago recognized the importance of enabling the public to help enforce certain Federal laws. ESA citizen suits help ensure that FWS listing, recovery, consultation, and incidental take permitting decisions further the ESA's goals of preventing extinction and recovering species. For example, when a conservation organization successfully challenges a Section 7 decision, the proposed project is sometimes modified to adopt stronger conservation measures. Those measures can directly reduce threats to affected species and expedite their recovery.

Some observers have claimed that citizen enforcement cases have derailed the ESA, but the most recent former director of the U.S. Fish and Wildlife Service, Dan Ashe, has rejected such claims.[12] "On the scale of the challenges that we face implementing the Endangered Species Act, litigation doesn't even show up on the radar screen," according to Ashe.[13]

Fee reimbursements make up only a small fraction of Defenders' overall budget. Our organization is in no way motivated by "profit" when deciding whether to pursue ESA litigation. Nothing in our litigation approval process even hints at profit, nor have I ever heard anyone mention this factor in our internal discussions about proposed litigation.

Question 5. Mr. Wood's written testimony states that the Ninth Circuit *Cottonwood* decision requires the "Forest Service to redo all of its comprehensive programmatic consultation complicating all timber projects related to it." Could you please elaborate? Is it as "complicating" as the witness would lead us to believe? How many industry projects have been halted as a result of programmatic consultation? What impact will *Cottonwood* have on future land management planning and endangered species conservation?

Answer. The *Cottonwood* decision requires the U.S. Forest Service to reinitiate Section 7 consultation on forest plans implicated in the revision of critical habitat for the Canada lynx. It is inaccurate to portray the consultation as a "redo" of the previous programmatic consultation because that consultation did not evaluate

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[8] *See, e.g.*, 5 U.S.C. §552(a)(4)(E)(i) (freedom of information); 15 U.S.C. §2060(c) (consumer-product safety); 29 U.S.C. §794a(b) (disability rights); 29 U.S.C. §2617(a)(3) (workers' rights); 42 U.S.C. §1988(b)(civil rights); 42 U.S.C. §5207(c)(3) (gun rights); 42 U.S.C. §7604(d) (clean air).

[9] *City of Riverside v. Rivera*, 477 U. S. 561, 575 (1986).

[10] *See* Pub. L. No. 104–66, 109 Stat. 707 (1995).

[11] 5 U.S.C. §504(e) (reporting requirements for the ACUS); 28 U.S.C. §2412(d)(5) (1994) (reporting requirements for DOJ).

[12] Laura Peterson, *Lawsuits Not Hurting Endangered Species Act—FWS Director*, GREENWIRE (July 5, 2012).

[13] *Id.*

whether the relevant forest plans would violate the Section 7 prohibition on "destruction or adverse modification" of critical habitat on National Forest lands. Further, the reinitiation would not literally "redo" the entire programmatic consultation because many parts of that consultation can remain the same.

The reinitiation would not be as complicated as Mr. Wood claims. My understanding is that the Forest Service and FWS should be able to complete the reinitiation without significant resource commitments. Limiting consultation to project-level actions, as some have suggested in response to the *Cottonwood* case, fails to capture the risks that may accrue to listed species and their habitat at broader spatial and temporal scales. It is thus a less effective and riskier way to implement the ESA.

We are not aware of any projects being halted because of a programmatic consultation. In fact, between 2008 and April 2015, FWS had found jeopardy on only two projects and adverse modification on only one project. Each of those projects, however, could proceed without violating the ESA if it adopted "reasonable and prudent alternatives."

FWS can manage the reinitiation of a programmatic consultation so that it results in little to no delay of individual projects. In addition, programmatic consultations often lead to more efficient project-level consultations. In our study of FWS consultations, my colleague and I found that the median duration of project-level formal consultation covered by a programmatic consultation was 24 days, compared to 62 days for all other formal consultations. This efficiency indicates that although a programmatic consultation may require more time to complete than a standard consultation, subsequent project-level consultations are often considerably faster than standard consultations.

The *Cottonwood* decision reinforces the value of smart planning under the ESA and is consistent with how FWS has interpreted for years the reinitiation provision of its Section 7 regulations. For these reasons, the decision is unlikely to dramatically change how the ESA applies to future land planning decisions. The current process for reinitiating programmatic consultations is designed to help create more effective and durable conservation outcomes for listed species and expedite project-level consultations.

Question 6. Mr. Stiles claimed in his testimony that state wildlife agencies have much more local, on the ground knowledge than Federal agencies, and recommends expanding the involvement of state agencies in the consultation process. Would this help Mr. Stiles get the Rock Creek Mine approved? Is it true that the Montana Department of Fish Wildlife and Parks believes that the Rock Creek Mine may jeopardize Bull trout in the Lower Clark Fork River?

Answer. Expanding the involvement of the Montana Fish, Wildlife, and Parks (MFWP) might actually impede the approval of the Rock Creek Mine project. MFWP has identified major defects in the environmental analysis for the project, particularly the omission of important information about the impacts of the project on bull trout. MFWP provided comments on the project's Draft Supplemental EIS (SEIS) pertaining to fisheries and wildlife resources.[14] Those comments critiqued the FWS's 2007 Biological Opinion for the Rock Creek Mine that covered the bull trout and the Forest Service's reliance on this document in its SEIS, highlighting the Federal agencies' failure to analyze more recent scientific information and their omission of several key issues related to bull trout impacts. For instance, MFWP questioned the Forest Service's suggestion in the SEIS that longer and more severe stream dewatering in Rock Creek (leading to more intermittent flows) would benefit the bull trout. MFWP also questioned the biological opinion's conclusion that the preferred alternative would not jeopardize the Lower Clark Fork core area bull trout population, as the project would harm critical habitat in the only two bull trout populations in the Cabinet Gorge Reservoir reach of the Lower Clark Fork core area. MFWP stated that "the Rock Creek project has potential to negatively impact Bull Trout in the [Lower Clark Fork River]. Negative impacts are predicted for critical habitat in the only two remaining Cabinet Gorge Reservoir Bull Trout populations." Because of these concerns, MFWP concluded that neither the biological opinion nor the SEIS has "adequately addressed potential Bull Trout impacts by not including recent research results, accepting uncertainties associated with limited modeling results, and approving likely ineffective mitigation measures," and recommended that the Federal agencies "re-evaluate these impacts." In short, while MFWP provided insightful comments based on its "local, on the ground knowledge" of bull trout, its

[14] *See* MFWP, Rock Creek Project Draft SEIS Comments (Apr. 18, 2016).

expanded involvement would not necessarily increase the chances of Federal approval of the Rock Creek Mine.

Question 7. Mr. Stiles also claimed that the Endangered Species Act is unnecessarily delaying the Montanore Mine. Yet, the FWS consultation process resulted in a "no jeopardy" finding. Further, the state of Montana has determined that it can't approve the full Montanore mine because it would violate state non-degradation laws that preclude the degradation of wilderness rivers and streams. Nevertheless, he recommends that the ESA be changed to "reduce impediments to economic and infrastructure development." Given that the "no jeopardy" finding essentially gives the mining project the green light with respect to ESA, and it is in fact state permitting that is preventing the project from moving forward, are changes to the ESA necessary to address Mr. Stiles' problem?

Answer. Mr. Stiles's testimony appears to present a contradiction. The ESA did not delay the Montanore Mine approval, as FWS issued two biological opinions in March 2014 that concluded the project would not jeopardize the bull trout or grizzly bear. A coalition of concerned citizens and organizations have challenged the no-jeopardy findings, but neither that challenge nor the consultation has delayed the project. Instead, as Rep. Grijalva notes, the state of Montana's non-ESA related concerns about water quality in the Cabinet Mountain Wilderness area are preventing project approval. In fact, the Montana Department of Environmental Quality refused to permit the project because the agency lacked enough data to determine whether the project would violate state water quality and non-degradation standards. Further, even if the pending challenge to FWS's no-jeopardy decisions under the ESA were to succeed, the state's concerns over water quality violations would still stand as an independent obstacle to permitting the project.

Question 8. The state of Montana calls comparison of the Rock Creek Mine proposal with the Greens Creek Mine "inaccurate and misleading." Mr. Stiles' testimony seems to contradict the state, a Federal court decision that I submitted for the record, and a Fish and Wildlife Service memo that I also submitted for the record. Do you agree with Mr. Stiles that the environmental impacts of the projects are comparable given the evidence to the contrary?

Answer. Defenders agrees with the state of Montana that comparisons between the two mines are "inaccurate and misleading." Greens Creek Mine is an underground silver mine on Admiralty Island in southeast Alaska. It is surrounded by the Kootznoowoo National Monument and Wilderness Area. The similarities end there. As MFWP has noted, the wilderness on Admiralty Island "is over 10 times the size of the Cabinet Mountains [sic] Wilderness and contains hundreds of spawning salmon populations" of which only a small number are impacted by the mine.[15] In contrast, the smaller Cabinet Mountain Wilderness contains only two viable bull trout populations, both of which are directly impacted by the Rock Creek Mine's proposed operations.[16]

Another difference is the mitigation requirements. The Greens Creek Mine was required to build and maintain a fish passage allowing anadromous fish (coho salmon) to access upper Greens Creek, as mitigation for the mine's destruction of important habitat in the headwaters reach of Tributary Creek. In contrast, the Rock Creek Mine Biological Opinion and SEIS contain limited mitigation measures (*e.g.*, reducing non-native fish populations, improving stream habitat, and removing culverts). MFWP reviewed the proposed actions and concluded that, because of practical constraints and local conditions, "[t]he mitigation activities discussed . . . are outdated, likely ineffective, and unsupported by recent research results." MFWP thus recommended that the Forest Service reconsider the proposed mitigation measures for impacts to the only two remaining bull trout populations in the Cabinet Mountain Wilderness.

Similarly, the bear population on Admiralty Island far outstrips that in the Cabinet Mountain Wilderness. The Tlingit name for Admiralty Island, Kootznoowoo, means "Fortress of the Bear"—the island has one of the densest populations of brown bears in the world, at one bear per square mile (with 1,600 total bears). In contrast, the Cabinet-Yaak Ecosystem, which encompasses the Cabinet Mountain Wilderness, contains as few as 42 individual grizzly bears.[17] The Montanore Grizzly Bear biological opinion cautioned that this population of grizzly bears "remains vulnerable to extirpation because of small population size."

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[15] *Id.*
[16] *Id.*
[17] FWS, Final Biological Opinion on the Effects to Grizzly Bears from the Montanore Mine, 39 (March 31, 2014) ("Montanore Grizzly Bear BiOp").

Finally, the Greens Creek Mine is the only mine with environmental impacts in its action area. The Rock Creek Mine and Montanore Mine, on the other hand, would represent twin mines on opposite edges of the Cabinet Mountain Wilderness boundary, effectively bookending the wilderness area. HECLA owns and would operate both mines, and its characterization of the Rock Creek Mine as a standalone project comparable to Greens Creek Mine is misleading. Based on the information about Greens Creek Mine, Rock Creek Mine would have very different effects on the wilderness character of the Cabinet Mountain Wilderness and the ESA-listed species there.

Question 9. Majority witnesses and Members claimed that individual employees at FWS with personal agendas were single-handedly holding up the consultation process and development and infrastructure projects? Is there any real evidence of this? How can personnel issues, to the extent that they exist, be addressed?

Answer. Although it is possible for certain FWS employees to hold up consultations, the Majority Members grossly mischaracterized our Section 7 study when they claimed that the study revealed a widespread problem with individual employees delaying consultations. This error is attributable to a misunderstanding of statistics. Our study shows that the identity of a consultation biologist accounts for, on average, only 0.25 percent of the variation in consultation duration. This is calculated using the mean-square column (MS) of Table 1 in our study. The Majority Members mistakenly used the sum-of-squares (SS) column for their conclusion. Let me illustrate this error through a more familiar example. Imagine you must decide which of two batters to use in a baseball game. One has had 20 hits in 20 at-bats, while the other has had 50 hits in 100 at-bats. You would want to choose the batter with fewer hits but a batting average of 1.00, not the batter with more hits but an average of 0.5. Using the average allows you to account for the total number of times a batter was at-bat. The same logic applies to interpreting the Section 7 data. You want to use MS because it accounts for the total number of FWS employees (over 1,200) who completed consultations. Using this method, we found that approximately 97 percent of the variation in consultation duration is attributable to whether a consultation was formal.

Any personnel issues can be handled by management direction, as is currently done. That only 0.25 percent of the variation in consultation duration is attributable to employee identity strongly suggests that the current practices work well.

Question 10. Majority witnesses and members claimed that ESA litigation has no benefit for species. Is that accurate? Can you give us examples of species that have been protected and are recovering because of litigation?

Answer. That claim is inaccurate. Successful citizen suits to enforce the ESA have delivered tremendous benefits to not only imperiled species but also local communities by maintaining a healthy environment. Examples include the following:

- ESA litigation targeting extensive road building and clearcutting on the Flathead, Targhee, and Gallatin National Forests in the 1990s established the key principle that road construction in grizzly habitat harms bears. This principle has been integral to managing habitat for the species in the Northern Rockies and has allowed its population to increase toward recovery.
- Recovery of the reintroduced wild population of Mexican wolves was derailed by Federal agency removal of wolves that predated on livestock. The removals were mandatory under what the U.S. Fish and Wildlife Service called "Standard Operating Procedure (SOP) 13." An ESA lawsuit resulted in a settlement that eliminated SOP 13 and allowed for more flexible management of wolves and for populations to grow again.
- ESA litigation has also brought tremendous benefits to West Coast salmon populations and the thousands of fishing jobs and Native American tribes that depend on healthy salmon runs. In fact, commercial fishermen and tribes are often plaintiffs in cases to enforce ESA protections for salmon because they understand that these protections are needed for their livelihoods. ESA litigation was key to successfully listing Columbia/Snake River salmon and Central Valley salmon (winter-run and spring-run Chinook) and then litigation to compel vital changes in dam and water export operations. Without this litigation, many of the salmon runs would likely have disappeared.
- In Hawaii, ESA litigation has helped catalyze vital ESA protections for hundreds of Hawaiian plants and dozens of Hawaiian and Mariana Islands animals. Litigation has also protected ESA-listed species in Hawaii from unauthorized "take" under Section 9 of the statute.

- In the Pacific Northwest, southern resident killer whales have benefited greatly from ESA litigation—first from litigation to catalyze much-needed ESA protections and more recently for protections to protect the whales from harmful human interactions and excessive sound.

Question 11. In his testimony, Mr. Calkins made light of the fact that conservation of two separate ESA listed species in the same river system necessitated different and sometimes conflicting strategies. Steelhead is a species managed by NMFS. Tidewater goby is a species managed by FWS. The perceived conflict between the Services is the result of potential habitat area for tidewater goby versus steelhead relative to discharge amounts. The life history of these two species are different in that tidewater goby thrive in shallower environments (less discharge), while steelhead require, among other things, a minimum depth of water (relatively more discharge volume). In a complicated situation like this, does the ESA Section 7 consultation process lead to better outcomes? Why? Is it true as Mr. Calkins testified that consultation has provided no demonstrable benefit for these species?

Answer. Contrary to the suggestion in this question, the habitat requirements of tidewater goby and steelhead are compatible. In many areas in California, both species evolved side-by-side in coastal lagoons, and both continue to thrive in those environments. Although the species have slightly different water-depth requirements, the amount of habitat for both species tends to increase with increased water discharge. Further, habitat depth in coastal lagoons is not always closely related to discharge levels. Narrow lagoons can be deep with low discharge and broad lagoons can be shallow despite much larger discharge. Tidewater goby and steelhead can continue to exist in the same environments, and managing to meet the needs of both species does not create an irreconcilable conflict.

While there is no conflict between the habitat needs of tidewater goby and steelhead, the species do have complex and interacting requirements. Section 7 consultations can be most valuable in a complicated situation like this. Consultation enables informed decision making based on the best available science, allowing agencies to understand and meet the needs of multiple species. And because Section 7 applies to all Federal agencies, it often brings stakeholders to the table in contentious situations where compromise or collaboration would otherwise be absent.

Where necessary, NMFS and FWS will each consult on the same proposed action, and the two agencies are generally adept at coordinating their efforts. For example, the consultations for the water operations in the Bay Delta show reasonably good coordination despite the extremely complicated and controversial nature of the operations. In most other consultations that involve both agencies, we never hear of problems because the agencies are coordinating effectively with each other.

I am not intimately familiar with the consultations that Mr. Calkins discussed, so it is difficult for me to assess how the species responded in that instance. In general, however, consultations are effective at preventing Federal agencies from threatening the survival of ESA-listed species. Consultations accomplish this goal in several ways. Before a consultation ever begins, many Federal agencies and their applicants plan projects with built-in measures that minimize and even offset the harmful effects of the projects. During informal consultations, the impacts of projects are often further minimized. Projects that require formal consultation are even further refined to ensure that they do not violate the jeopardy and adverse modification prohibitions. These refinements come in the form of "reasonable and prudent measures" and, for projects that trigger the jeopardy/adverse modification prohibitions, "reasonable and prudent alternatives." Partly because of the benefits of consultations, FWS recommended downlisting the tidewater goby in its 2007 5-year status review for the species.

Question 12. In his testimony, Mr. Calkins blamed consultation between FWS and the Texas Department of Transportation for significantly increasing the cost of a highway project. However, two letters from FWS to TXDOT show that TXDOT agreed to take voluntary conservation measures to avoid damaging the only known habitat of the endangered Braken Bat Cave Meshweaver, and that these measures made the project unlikely to affect the species. Further, it is clear from TXDOT documents that additional features unrelated to the consultation were added to the project, which accounted for a large part of the cost increases. Is this a case of the ESA being blamed for a problem it did not cause? Even if the ESA did result in some cost increases, should TXDOT be responsible for covering those instead of passing them along to society by driving a species into extinction? Why?

Answer. This is an example of project proponents not heeding warnings about the presence of an endangered species on a project site. Two years before the meshweaver (*Circurina venii*) was discovered in the Clandestine Cupola Cave

complex during highway construction, the Alamo Regional Mobility Authority mentioned the following in a public slideshow presentation:

> Of the species found [in the cave complex], one specimen is believed to be an unlisted blind cave spider . . .. However, because genetic data do not exist for the federally listed and protected species, it is possible that the spider found could be *Circuina (sic) venii*, a federally listed species. Therefore, based on this data, it is possible the project may affect, but is not likely to adversely affect, *Circuina venii*.[18]

In a December 2011 environmental document for the highway project, the project was again mentioned as "may affect, not likely to adversely affect" the species.[19] Despite these acknowledgments of the meshweaver's possible presence, road construction continued without adequate measures to avoid impacting the species. Had the project proponents planned more carefully for the species, the cost and duration of the project would have deviated less from original estimates. In discussing the consultation process with Federal agencies, I have found that incorporating conservation measures into the early phases of a project can often reduce the duration of consultations, avoid the need for formal consultation, and reduce the complexity of consultations.

As for who should bear the costs of conserving the meshweaver, Section 7(a)(2) places the responsibility on Federal agencies to ensure against jeopardy and adversely modification. Thus, the ESA reflects the normative judgment that Federal agencies or project applicants should absorb the costs of conservation measures that safeguard the survival of ESA-listed species. I agree with this judgment because it avoids creating an environmental "externality" by shifting the cost of extinction to society. In fact, economists often advise governments to adopt policies that "internalize" an externality, so that the cost of an activity falls on the person who chooses to carry out the activity.

Congress should also remember that the costs of complying with Section 7 are generally feasible for project proponents. "Reasonable and prudent measures" to minimize the extent of incidental take "can include only actions that occur within the action area" and "involve only minor changes to the project." In the rare event that FWS finds jeopardy or adverse modification, any "reasonable and prudent alternatives" must be "economically and technologically feasible" to implement.

Mr. LABRADOR. Thank you very much.

I will now recognize Mr. Wood.

STATEMENT OF JONATHAN WOOD, STAFF ATTORNEY, PACIFIC LEGAL FOUNDATION, ARLINGTON, VIRGINIA

Mr. WOOD. Thank you, Chairman Labrador, Ranking Member McEachin, and Full Committee Chairman Bishop, for the opportunity to testify on behalf of Pacific Legal Foundation on the impacts of ESA consultation on economic and infrastructure development. I submitted a longer written statement for the record, but I want to stress three points in my remarks today.

First, because consultation applies to every project that requires any sort of Federal permit or funding assistance, the impacts of consultation inevitably increase as the Federal Government grows.

Second, much of the delay and expense of the consultation process happens in so-called pre-consultation, which does not get counted by the agencies toward meeting those deadlines that were mentioned by the previous witness.

And third, the intuition that stopping or delaying activity inevitably helps endangered species is wrong. Often, consultation

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[18] http://www.valleymorningstar.com/news/local_news/article_9ebfe67c-d313-11e2-b44e-001a4bcf6878.html.

[19] *Id.*

delays or discourages activities that would actually benefit species, including necessary maintenance to infrastructure.

On the first point, the extensive delays caused by consultation are a clear result of the increase in the number of state and private activities that the Federal Government regulates, permits, and funds. As the Federal Government grows, more and more projects must go through consultation, placing even greater strains on the limited budgets that Federal agencies have available.

Unfortunately, the problem is going to get worse, not better, as recent regulations further increase the number of projects that must go through consultation. And many of those projects are the kinds that you were just hearing about, where they have a relatively narrow or limited Federal nexus and minor environmental impacts. But by putting so many of them through consultation, you sap agency resources and put even more traffic in the system, distracting the agency from being able to focus and timely process those major projects that really deserve further scrutiny. Adding more cars to already gridlocked traffic is no way to speed things up. The same is true with consultation.

For my second point, much of the delay in consultation occurs during pre-consultation. Although the statute sets firm deadlines by which the process must be completed, agencies do not count most of the time spent toward the deadline. A recent report from the University of Texas' Kay Bailey Hutchison Center for Energy, Law, & Business found that pre-consultation lasts 18 months or more, far in excess of the statute's 135-day deadline.

As an example, the Tule wind project in Southern California, which was designed to provide renewable energy to 60,000 homes, was held up for 10 months in pre-consultation and 11 months in formal consultation. Combined, that delay is almost five times the limit that Congress imposed.

The final point I wish to make is that delaying or preventing projects can actually harm species. PLF client, Save Crystal River, has a project to restore habitat for manatee in Florida. That project had to go through consultation, which delayed it for several months, and the result was to put limits on the work that could be done that made it more expensive. Delays and burdens like this sap resources that could be better put to species recovery, and discourage the types of voluntary activity we desperately need to actively recover and manage endangered species.

Delaying infrastructure maintenance can also harm species. Last month, we all watched nervously as the Oroville Dam in Northern California nearly burst during a period of heavy flooding, threatening the lives and property of 200,000 people living below. Thankfully, that crisis was averted, but that situation should remind all of us that infrastructure maintenance and upgrades are necessary for public safety.

They are also necessary to protect the environment. As the flood waters receded, we learned of the full environmental impacts of that situation, including substantial erosion downstream and the stranding of endangered salmon. If the dam had failed, those impacts would have been worse. Yet, when the state began planning to repair and upgrade the dam, which would prevent similar environmental impacts in the future, Federal agencies immediately

raised consultation as an obstacle, threatening to delay or perhaps entirely discourage that necessary work.

Across the country, we have many dams, bridges, roads, and other infrastructure that are approaching the end of their engineered lives, and will soon need to be repaired or upgraded and go through consultation. So, now really is the time for this Committee and for the agencies to look at all of the tens of thousands of projects that go through consultation, despite the fact that they have a very minor Federal nexus and limited environmental impacts, so that the agency's limited resources really can be focused on those major Federal projects that are vital to our public safety and pose some threat to the environment.

Otherwise, if we allow these infrastructure projects not to be done, it is a threat both to public safety and the environment, because you will see some of this infrastructure fail.

Thank you again for the opportunity to present my views on this important subject, and I look forward to any questions from the Committee.

[The prepared statement from Mr. Wood follows:]

PREPARED STATEMENT OF JONATHAN WOOD, ATTORNEY, PACIFIC LEGAL FOUNDATION, ARLINGTON, VIRGINIA

The Endangered Species Act is known as the "pit bull" of environmental law.[1] For good reason. As many economic-development and infrastructure project proponents have learned the hard way, once the Endangered Species Act sinks its teeth into you, it does not let go easily.

The ESA consultation process, which applies to any project requiring Federal agency approval or funding and that "may affect" a listed species, is no exception.[2] The burdens of this process rise in lockstep with the growth of the Federal Government. As the number of activities the Federal Government regulates, permits, and funds increases, more projects must undergo consultation, straining agency resources, and slowing everything down. The statute and regulations forbid the commitment of resources until consultation concludes, meaning delays in the consultation process are delays for the project.[3]

Consequently, consultation is a significant obstacle to economic development and much-needed public-safety projects, imposing both delays and additional costs. By putting off projects, consultation can undermine public safety and ultimately harm species dependent on proactive conservation efforts or threatened by crumbling infrastructure.

Last month, for example, we all watched as Oroville Dam's main spillway failed during a period of extreme flooding in Northern California. It looked like the emergency spillway would fail too, threatening the lives and property of nearly 200,000 people living below the dam.[4] Thankfully, the emergency spillway held and that crisis was averted. But the experience should have brought home the importance of infrastructure maintenance and upgrades.

After the flood receded, California announced plans to repair and improve the aging dam. Immediately, Federal bureaucrats raised the specter of consultation, threatening to slow the repairs down, increase their costs, or block them entirely.[5]

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[1] *See* Timothy Egan, *Strongest U.S. Environment Law May Become Endangered Species*, N.Y. Times (May 26, 1992), http://www.nytimes.com/1992/05/26/us/strongest-us-environment-law-may-become-endangered-species.html?pagewanted=all (quoting Donald Barry of the World Wildlife Fund describing the ESA as "the pit bull of environmental laws" because "[i]t's short, compact and has a hell of a set of teeth").

[2] 16 U.S.C. 1536(a)(2).

[3] 16 U.S.C. § 1536(d); 50 C.F.R. § 402.09.

[4] *See* Samantha Schmidt, Derek Hawkins, & Kristine Phillips, *188,000 evacuated as California's massive Oroville Dam threatens catastrophic floods*, Wash. Post. (Feb. 13, 2017), *available at* https://www.washingtonpost.com/news/morning-mix/wp/2017/02/13/not-a-drill-thousands-evacuated-in-calif-as-oroville-dam-threatens-to-flood/.

[5] Letter from Rep. LaMalfa to President Trump re: Oroville Dam (Mar. 15, 2017), reproduced at http://www.gridleyherald.com/article/20170315/NEWS/170319778 (criticizing the demand for consultation and work restrictions because they "would delay repairs immeasurably and place workers at risk").

However, the environmental damage caused by the spillway failure shows that delaying infrastructure projects does not necessarily protect species. Delaying maintenance and upgrades can also threaten species and the environment by increasing the risk of serious infrastructure failure.[6]

As the Oroville Dam situation demonstrates, the intuition that species always benefit from stopping or shrinking human activity is wrong. When small towns put off maintenance of a dam, bridge, or road because the ESA would substantially increase costs and delay completion by several years, the environment can suffer more damage when that infrastructure fails than from the work it would have taken to fix it.

THE BURDENS OF THE CONSULTATION PROCESS GROW ALONG WITH THE SIZE OF THE FEDERAL GOVERNMENT

As demonstrated below, consultation delays much-needed projects and increases their costs, often in cases where potential impacts on a listed species are minimal. But, before getting to that issue, it is helpful to identify the most significant cause of the problem: the ever-growing size of the Federal Government.

Section 7(a)(2) of the ESA requires consultation for every "action authorized, funded, or carried out by" a Federal agency that may affect a listed species.[7] Therefore, the impact of the consultation process inevitably increases along with the number of state and private projects that require some type of Federal permit or funding assistance. The agencies that administer the ESA cite their limited resources as a cause of consultation delays.[8] However, delays are not simply a question of agency resources but also what demands are placed on those resources. Those demands increase as ever more projects are subject to consultation based on minor Federal involvement.

Today, a wide variety of private and state projects undergo consultation for precisely this reason. Even environmental groups acknowledge that the number of relatively harmless projects undergoing consultation delays the process for more significant projects.[9] The only long-term solution to this problem is to reduce the size of government or the types of activities subject to consultation, so that the agencies can focus on and quickly review those major Federal projects that most significantly affect species.

Unfortunately, the trend is going in the opposite direction. Both the agencies that administer the ESA and other Federal agencies have expanded their regulatory reach, increasing the number of projects subject to consultation. For instance, the U.S. Fish and Wildlife Service recently adopted a regulation that significantly increases the number of areas designated as critical habitat.[10] That regulation makes it even easier to designate lands that are unoccupied by a species and unsuitable to it as "critical habitat."[11] Since any project that may affect habitat undergoes consultation, this regulation threatens to increase further the number of projects that subject to consultation.

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[6] *See* Peter Fimrite, *Measures save young salmon after failure of Oroville Dam spillway*, SF Gate (Mar. 21, 2017), *available at* http://www.sfgate.com/science/article/Measures-save-young-salmon-after-failure-of-11015659.php (the Oroville Dam spillway catastrophe threatened nearly a billion endangered salmon); Kurtis Alexander & Tara Duggan, *Riverbanks collapse after Oroville Dam spillway shut off*, San Fran. Chron. (Mar. 4, 2017), *available at* http://www.sfchronicle.com/bayarea/article/Riverbanks-collapse-after-Oroville-Dam-spillway-10976144.php (describing the environmental damage in the wake of the near-collapse of the Oroville Dam).

[7] 16 U.S.C. 1536(a)(2).

[8] *See* Presentation by Kay Davy, NMFS, *Endangered Species Act Section 7 Consultation Process* (2017), *available at* http://asbpa.org/wpv2/wp-content/uploads/2017/01/Kay-Davy-NMFS-Protected-Resource-Division.pdf (explaining that backlog of informal consultations prevents NMFS from timely reviewing significant, formal consultation requests).

[9] *See* Wildlife Society, *Practical Solutions to Improve the Effectiveness of the Endangered Species Act for Wildlife Conservation*, Technical Review 05-1, 7-8 (2005), *available at* http://wildlife.org/wp-content/uploads/2014/05/ESA05-11.pdf (explaining that delays are largely due to the increase in the number of projects that must undergo consultation, despite very minor impacts).

[10] *See* 81 Fed. Reg. 7,214 (Feb. 11, 2016). A coalition of 18 states have challenged this regulation under the ESA. *See* Dennis Pillion, *Alabama, other states challenge Endangered Species Act critical habitat rules*, AL.com (Nov. 30, 2016), *available at* http://www.al.com/news/index.ssf/2016/11/alabama_challenges_endangered.html.

[11] Six judges from the Fifth Circuit recently criticized the practice of designating unoccupied, unsuitable lands as "critical habitat," observing that these lands could not properly even be considered habitat. *See Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, No. 14–31008 (Feb. 13, 2017) (Jones, J., dissenting).

Other recent innovations (some would say power-grabs) by the Service threaten to expand the burdens of consultation even more. For instance, the recent spate of listings of healthy species based on potential impacts of climate change has led environmentalists to call for consultation for any project that affects emissions.[12] The ESA is poorly suited to address climate change risk. Nevertheless, they want projects to undergo the "apparently pointless and paralyzing duty to consult on emissions with a Federal nexus" because it would be so burdensome that it might further other political ends.[13] Something has gone terribly awry when consultation has become a political chip to be played precisely because it burdens projects without benefiting species.

The Fish and Wildlife Service is not alone in extending its reach and thereby increasing the burdens of consultation. Anytime any other agency expands its power over private activity, it spills over into more projects undergoing consultation. For instance, the Waters of the United States (WOTUS) rule interpreting the reach of the Clean Water Act would increase the number of activities subject to permitting under Section 404 of that statute, which applies to any activity in areas deemed wetlands.[14] Already, many private development projects are substantially delayed because they require a Federal 404 permit, which triggers consultation.[15] This problem could be avoided if it were easier for states to take over this permitting authority, eliminating the need for Federal involvement any time a property owner builds a home, a farmer plows his field or builds a pond.[16] But in the 45 years since the Clean Water Act was enacted, only two states have successfully navigated the process to take over this authority.[17]

Similarly, the increased Federal role in funding local projects expands the burdens of consultation. Although federalizing the funding of local roads, local bridges, and other local public-safety projects raises substantial federalism concerns, the Supreme Court has generally upheld it from constitutional attack.[18] However, Congress should consider carefully whether it wants to subject every local infrastructure project to consultation based on this funding arrangement.

CONSULTATION IMPOSES DELAYS AND HIGHER COSTS ON ECONOMIC DEVELOPMENT AND PUBLIC-SAFETY PROJECTS

The ESA requires consultation to be completed within 135 days.[19] Even if that deadline were always met, consultation would still be a significant barrier for economic development and infrastructure projects. In a world where time is money, 5-month delays in construction are no small cost.

But consultation often takes more time than Congress intended, affecting a wide range of economic activity and public-safety projects. In a survey of Interstate Natural Gas Association of America members, nearly 70 percent cited the "timing or length of consultation process" as the biggest area of concern for ESA application and administration.[20] A few examples highlight the scope of the problem.

In Oklahoma, the consultation process held up a project between Muskogee County and the Cherokee Nation to straighten and improve a windy, dangerous road. The reason for the hold up: a single American burying beetle was found in

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[12] *See* Holly Doremus, *Polar Bears in Limbo*, Slate.com (May 20, 2008), *available at* http://www.slate.com/articles/health_and_science/green_room/2008/05/polar_bears_in_limbo.html.

[13] *See id*.

[14] The President recently issued an executive order calling for the reconsideration of this rule, so these impacts are presently only theoretical. *See* President Trump, *Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule* (Feb. 28, 2017), *available at* https://www.whitehouse.gov/the-press-office/2017/02/28/Presidential-executive-order-restoring-rule-law-federalism-and-economic.

[15] *Builders caught in crossfire of gnatcatcher habitat listing—Needless plan could delay or kill new housing and imperil species protection*, Nossaman.com (June 1, 2000), *available at* http://www.nossaman.com/builders-caught-crossfire-gnatcatcher-habitat-listing-needless.

[16] *See* Jonathan Wood, *How to promote federalism and reduce Clean Water Act abuse*, LibertarianEnvironmentalism.com (Mar. 13, 2017), *available at* https://libertarianenvironmentalism.com/2017/03/13/404-federalism/.

[17] *See* VA Department of Envtl. Quality Report, *Study of the Costs and Benefits of State Assumption of the Federal § 404 Clean Water Act Permitting Program* (Dec. 2012), *available at* http://www.deq.virginia.gov/Portals/0/DEQ/LawsAndRegulations/GeneralAssemblyReports/404_Feasibility_Study_2012.pdf (citing uncertainty over whether Federal agencies would approve state assumption as an obstacle).

[18] *But see Nat'l Fed. Of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2601–08 (2012) (striking down provisions of Obamacare as too coercive)

[19] *See* 16 U.S.C. 1536(b), (c).

[20] *See Suggestions on How to Improve the Endangered Species Act*, INGAA Foundation 15 (2007), *available at* http://www.ingaa.org/File.aspx?id=5691.

the 50-acre project area.[21] The consultation is expected to add $1,000,000 to the project's price tag and delay construction for a year, during which time the county's residents and the tribe's members will be stuck with the road's current, dangerous layout. The beetle is threatening human health in other ways too, since it has obstructed another Oklahoma project to build a road to a hospital.[22]

In California, the Valley elderberry longhorn beetle obstructed the Sutter Butte Flood Control Agency's efforts to upgrade 41 miles of levees along the Feather River. Because elderberry bushes grew along the river's edge, consultation had to be completed before the repairs could be made. Through consultation, the agency was required to undertake mitigation that cost $4,250,000—enough to fund an entire mile of levee improvements.[23] These costs were imposed even though the U.S. Fish and Wildlife Service determined in 2006 that the beetle had recovered and should no longer be listed.[24] Yet, 10 years and several lawsuits later, the Valley elderberry longhorn beetle remains on the list and continues to obstruct flood control projects and increase their costs.[25]

Consultation has also interfered with scientific research aimed at increasing public safety. In 2012, an expedition to map a major earthquake fault line off the Pacific Coast was delayed and had to be scaled back because of consultation.[26] The goal of that project was to increase our knowledge of the fault line and thereby better predict tsunami risks. Although NOAA initially approved the project, the agency withdrew its permission at the last minute to require consultation based on potential impacts to whales.

Consultation for projects in which the action agency has no direct interest can raise unique problems. Take, for instance, the experience of Liberty Mining.[27] In 1989, the company submitted a mining development plan to the Forest Service, which required consultation. In 1990, the Fish and Wildlife Service completed that consultation and informed the Forest Service that the project would not jeopardize the northern spotted owl. However, the Forest Service (which had no stake in the project) did not inform the company of this for 2 years, at which point consultation had to be reinitiated because of changes to the owl's habitat. The second consultation took another 2 years, again concluding that the mining project would not jeopardize the owl. The 4-year delay cost the company $22.5 million, which it was unable to recover from the agencies.

Although the ESA imposes deadlines for consultation, the Congressional Research Service has identified one of the ways that Federal agencies skirt this requirement.[28] According to U.S. Fish and Wildlife Service practice, the deadline only begins to run when the agency determines a submission is complete. If the Service wants more information, it can demand it and thereby put off the statutory deadlines indefinitely. As the CRS Report found, "Repeated requests for additional data have led to great frustration among Action Agencies and the non-Federal parties relying on them for permits, loans, sales, licenses, etc."

A recent report from the University of Texas at Austin's Kay Bailey Hutchison Center for Energy, Law, & Business found that this "pre-consultation" process

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[21] *See Endangered American Burying Beetle delays $6.5 million road project in Muskogee County, Oklahoma*, KJRH.com (Aug. 24, 2016), *available at* http://www.kjrh.com/news/state/endangered-american-burying-beetle-delays-65-million-road-project-in-muskogee-county-oklahoma; D.E. Smoot, *Road project delayed after endangered beetle found*, Muskogee Phoenix (Aug. 7, 2016), *available at* http://www.muskogeephoenix.com/news/road-project-delayed-after-endangered-beetle-found/article_22ec52ca-aebb-50d0-bdf5-192cb4874d78.html.

[22] *See* Darren DeLaune, *After beetles are accommodated, road to hospital begins*, MvskokeMedia.com (Mar. 3, 2017), *available at* http://mvskokemedia.com/after-beetles-are-accommodated-road-to-hospital-begins/.

[23] *See* http://www.regulations.gov/#!documentDetail;D=FWS-R8-ES-2011-0063-0037.

[24] *See* http://ecos.fws.gov/docs/five_year_review/doc779.pdf.

[25] The Valley elderberry longhorn beetle is not unique in this regard. The Service routinely ignores its scientists' determinations that species no longer merit listing. Forcing affected businesses and property owners to sue the agency as many as 3 or 4 times over many years to get the agency to finally act. *See* Jonathan Wood, *PLF files suit over caribou petition, the sequel*, PLF Liberty Blog (Mar. 14, 2014), *available at* http://blog.pacificlegal.org/plf-files-suit-caribou-petition-sequel/.

[26] *See* Keith Seinfeld, *Endangered orcas cause delays for major earthquake research*, KNKX.org (June 15, 2012), *available at* http://knkx.org/post/endangered-orcas-cause-delays-major-earthquake-research.

[27] *Aloisi v. United States*, 85 Fed. Cl. 84 (2008).

[28] Kristina Alexander & M. Lynne Corn, *Proposed Changes to Regulations Governing Consultation Under the Endangered Species Act (ESA)*, Congressional Research Service Report RL34641 (Sept. 23, 2008), *available at* http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL34641.pdf.

entails significant delays.[29] In interviews for that study, Fish and Wildlife Service staff self-reported that pre-consultation lasts 18 months or more, depending on the project (well in excess of the statute's outer limit of 180 days).[30] Despite this lengthy process, the Service chooses not to count this time toward the consultation deadline.[31] The report identifies several projects that were tied-up in pre-consultation for extended periods.

Take, for instance, the Tule Wind Project in Southern California, a renewable energy project intended to power 60,000 homes. The pre-consultation period lasted 10 months, during which the Fish and Wildlife Service requested a survey of the area for Quino checkerspot butterflies. But that was only the beginning of the project's delays. Once the Service deemed the submission complete, formal consultation took another 335 days. At the end of that protracted process, the Service determined the project was not likely to jeopardize the species.[32]

Or consider the Black Hills Western Properties Master Development Plan, an oil and gas development project. Although the Service reports that consultation officially took only 106 days, including the pre-consultation period shows that the actual delay was more than 250 days.[33]

The full extent of pre-consultation delays is unknown. This is because the Service declined a Government Accountability Office recommendation to develop data on pre-consultation.[34] But the problem is widely acknowledged.

In practice, the demands for evermore information during pre-consultation reflects how the agency uses the "best scientific and commercial information available" standard inconsistently. This is the same standard used to make decisions whether to list a species under the ESA. Yet, at that step, the Service does not consider lingering uncertainty an obstacle to asserting regulatory authority over a species. But when the same standard is used for consultation or delisting a species, the Service relies on uncertainty to delay its response or avoid giving up regulatory control.[35]

The evidence that consultation results in substantial delays and expense is clear. However, in 2015, two Defenders of Wildlife employees released a paper claiming to debunk the argument that consultation burdens economic development and infrastructure projects.[36] The headline from that report was that **zero** of the 88,290 consultations over the previous 7 years resulted in a project being denied, which the authors interpreted as evidence that consultation is no big deal.[37] The paper also acknowledged that **one out of every five** formal consultations exceed the deadlines set by Congress.[38]

Although the press touted the paper as proving consultation is not burdensome, the study is omits a great deal, giving an incomplete picture of the issue.[39] First, it omits delays during pre-consultation, a point which the authors implicitly con-

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[29] *See* Taylor, et al., *Protecting Species or Endangering Development? How Consultation Under the Endangered Species Act Affects Energy Products on Public Lands*, Kay Bailey Hutchison Center for Energy, Law & Business Paper NO. 2016–03 (Aug. 2016), *available at* https://repositories.lib.utexas.edu/bitstream/handle/2152/40956/2016_08_03_Protecting_Species_Endagering.pdf?sequence=2&isAllowed=y.

[30] *See id.* at 8.

[31] *See id.* at 36 (conceding that the Service's calculations "underestimate the total length of the consultation process").

[32] *See id.* at 65.

[33] *See id.* at 71.

[34] GAO, *Endangered Species Act: Many GAO Recommendations Have Been Implemented, but Some Issues Remain Unresolved* 3 (2008), *available at* http://www.gao.gov/new.items/d09225r.pdf (reporting that FWS & NMFS have not tracked the delays caused by "preconsultation" despite GAO recommendation).

[35] *See* 81 Fed. Reg. 59,962 (Aug. 31, 2016) (declining to delist the California gnatcatcher despite two scientific studies supporting delisting, which were prepared at the Service's suggestion, because of lingering uncertainty).

[36] *See* Jacob W. Malcom & Ya-Wei Li, *Data contradict common perceptions about a controversial provision of the U.S. Endangered Species Act*, 112 Proceedings of the National Academy of Sciences 15844 (Dec. 29, 2015), *available at* www.pnas.org/content/112/52/15844.full.

[37] This finding is similar to previous studies, which have consistently found that the vast majority of projects delayed by consultation are ultimately found not to be a threat to the species. *See* James Salzman, *Evolution and application of critical habitat under the Endangered Species Act*, 14 Harv. Envtl. L. Rev. 311 (1990) (reporting that ESA consultations only find that a project could jeopardize a species in 0.7% of the time).

[38] *See* Malcolm & Li, *supra* note 36.

[39] *See* Douglas Main, *Study erases misconceptions about Endangered Species Act, raises questions about enforcement*, Newsweek (Dec. 17, 2015), *available at* http://www.newsweek.com/study-erases-misconceptions-about-endangered-species-act-raises-questions-406553 (criticizing the Defenders of Wildlife study for failing to take account of the delays caused by consultation and the costs tied to changes that are made in response to consultation).

ceded.[40] This is a significant defect because, as a published criticism explains, "the Service has unilateral authority to determine when a consultation package is complete, and therefore when formal consultation commences." The authors of that criticism, who are experienced ESA lawyers, explained "in our experience, substantial time and resources frequently are expended before the Service agrees to initiate formal consultation."[41] Second, the Defenders of Wildlife paper looks only at projects rejected at the end of consultation and additional costs imposed at that late stage. However, this myopic focus ignores the projects that are pre-emptively abandoned or made more expensive by conditions imposed earlier, including in pre-consultation.[42]

The Defenders of Wildlife paper's limitations aside, the conclusion its authors draw is largely a matter of perspective rather than evidence. Another way to interpret the results is that, during the first 7 years of the Obama administration, nearly **100,000 projects** had to undergo time-consuming and expensive consultation even though **none** of them would likely jeopardize a listed species or its habitat. Making matters worse, nearly **1,300** major projects were delayed for more time than the law permits, even though they too would not likely jeopardize a species or its habitat. Looking at it from this perspective, the results reported in the paper hardly seem worth celebrating.

THE IMPACTS OF DELAYS ARE COMPOUNDED BECAUSE CONSULTATION MUST BE REINITIATED IF ANYTHING CHANGES

Delays resulting from consultation are doubly harmful to project proponents because they increase the risk that consultation must be reinitiated. Anytime there is a change in the project area, because a new species has been listed, habitat designated, or information about a species discovered, consultation must be redone. As the example above of Liberty Mining demonstrates, reinitiated consultation can be just as burdensome and time-consuming as the original consultation.

Many projects, particularly timber harvesting, are repeatedly held up by reinitiated consultation.[43] For example, Lone Rock Timber Company was unable to exercise a timber contract for 3 years because consultation had to be reinitiated three separate times.[44] Another timber project was delayed nearly a year and a half because of reinitiated consultation based on a new listing.[45]

The prospect of delaying projects by forcing consultation to be reinitiated creates bad incentives that encourage frequent change to the ESA species lists and critical habitats, as well as litigation from groups who oppose development projects. Unfortunately, the courts have largely sided with those bringing these lawsuits. In 2015, the Ninth Circuit ruled against the Obama administration in *Cottonwood Environmental Law Center v. USFS*,[46] and ordered reinitiation of consultation based on new developments where an agency action was already complete. The result: the Forest Service had to redo its comprehensive programmatic consultation, complicating all timber projects related to it. The group that brought the lawsuit, on the other hand, will likely turn a tidy profit, as it will be entitled to seek its attorneys' fees.

CONSULTATION ALSO HOLDS UP PROJECTS THAT BENEFIT THE ENVIRONMENT

As costly as delays from consultation are, many people intuitively assume that those delays benefit listed species. However, the intuition that preventing activity always helps species is wrong. Consultation also delays environmental regulation[47]

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[40] *See* Weiland, et al., *Analysis of data on endangered species consultation reveals nothing regarding their economic impacts*, 113 Proceedings of the National Academy of Sciences E1593 (Mar. 22, 2016), *available at* http://www.pnas.org/content/113/12/E1593.full.pdf (pointing out this problem with the paper); Malcolm & Li, *Reply to Weiland et al.: The point is to bring data to inform policy, not to rely solely on anecdotes*, 113 Proceedings of the National Academy of Sciences E1594 (Mar. 22, 2016), *available at* http://www.pnas.org/content/113/12/E1594.extract (failing to respond to the point).

[41] Weiland, et al., *supra* note 36.

[42] *See* Taylor, et al., *supra* note 2529 at 36 (explaining that most project modifications are imposed during "pre-consultation").

[43] *See* Jeremy Brian Root, *Limiting the Scope of Reinitiation: Reforming Section 7 of the Endangered Species Act*, 10 Geo. Mason. L. Rev. 1035 (2002).

[44] *See Lone Rock Timber Co. v. U.S. Dep't of Interior*, 842 F. Supp. 433 (D. Or. 1994).

[45] *See Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817 (Fed. Cir. 2010).

[46] 789 F.3d 1075 (9th Cir. 2015).

[47] Jesse Greenspan, *FWS, NMFS Sued for ESA Consultation Delays*, Law360.com (Aug. 3, 2010), *available at* https://www.law360.com/articles/184967/fws-nmfs-sued-for-esa-consultation-delays (environmentalists challenging consultation delays in approving water quality standards).

and projects that would benefit species, depletes agency resources that could be better put to proactive recovery efforts, and saps economic growth that could unleash even more resources for conservation.

For instance, consultation has frustrated PLF client Save Crystal River's efforts to restore manatee habitat in Florida. Save Crystal River is spending $50 million dollars to restore 80 acres of habitat that have been harmed by invasive algae growth, which crowds out the sea grass on which the manatee feeds. Consultation delayed this environmentally friendly project by months and imposed conditions that forbid Save Crystal River from working during much of the year, which unduly raises the project's costs.

Save Crystal River's experience is no anomaly. Several years ago, I attended a presentation by a U.C. Davis Ph.D. student who was pursuing an experiment to recover California's endangered salmon. That project encourages rice farmers to permit salmon to occupy their flooded fields for crucial months during the species' migration to the ocean.[48] By giving young salmon access to more food at a crucial time in their development, the project led to much healthier salmon populations. When asked whether it was difficult to get farmers to cooperate, for fear that it might subject them to ESA regulation, the student responded "no." Instead, the biggest hurdle for the project was navigating the ESA regulatory process, including consultation.

Even infrastructure projects can be environmentally friendly if you compare them to what would happen if infrastructure were not properly maintained.[49] I began my remarks with the near-collapse of the Oroville Dam. In the weeks following the flood, the environmental impacts continued to mount. These impacts include substantial bank erosion downstream and stranded endangered salmon.[50] If the dam had burst, these impacts would have been even more significant.

Across the country, we have many dams, bridges, and roads that are approaching the end of their engineered life. If the slow, burdensome consultation process causes communities to delay necessary upgrades and improvements, then the environment and endangered species could ultimately pay the price when that infrastructure fails.[51]

CONCLUSION

We all want to see endangered species recover. The question, really, is how effective and efficient is consultation at contributing to that recovery. The evidence shows that consultation is a significant strain on economic development and public-safety projects, even though all or nearly all the projects do not jeopardize species. That suggests too many projects, particularly state and private projects with a *de minimis* Federal nexus, undergo consultation, sapping the resources of the agencies that administer the ESA. Because those resources cannot keep up with demand, consultation for major Federal infrastructure projects takes more time than Congress intended, much of that time hidden in so-called "pre-consultation."

When necessary infrastructure maintenance and upgrades are put-off because of these delays and costs, that can significantly harm species and the environment. The damage from infrastructure crumbling and failing can be far higher than the modest impacts of repairs and upgrades.

Ultimately, we need to rethink some of our assumptions about protecting species. The intuition that stopping human activity always benefits species is wrong. On the contrary, economic growth unleashes more resources for proactive conservation and

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[48] *See* Jacques Leslie, *The Sushi Project: Farming Fish and Rice in California's Fields*, E360.com (Oct. 29, 2015), *available at* http://e360.yale.edu/features/the_sushi_project_farming_fish_and_rice_in_californias_fields.

[49] *See* John Siciliano, *House tees up fight to limit endangered species rules*, Wash. Examiner (Mar. 1, 2017), *available at* http://www.washingtonexaminer.com/house-tees-up-fight-to-limit-endangered-species-rules/article/2616049; Jamie Johansson, *Oroville shows need for flood-control projects*, Monterey Herald (Mar. 4, 2017), *available at* http://www.montereyherald.com/article/NF/20170304/LOCAL1/170309920.

[50] *See* Peter Fimrite, *Measures save young salmon after failure of Oroville Dam spillway*, SF Gate (Mar. 21, 2017), *available at* http://www.sfgate.com/science/article/Measures-save-young-salmon-after-failure-of-11015659.php (the Oroville Dam spillway catastrophe threatened nearly a billion endangered salmon); Kurtis Alexander & Tara Duggan, *Riverbanks collapse after Oroville Dam spillway shut off*, San Fran. Chron. (Mar. 4, 2017), *available at* http://www.sfchronicle.com/bayarea/article/Riverbanks-collapse-after-Oroville-Dam-spillway-10976144.php (describing the environmental damage in the wake of the near-collapse of the Oroville Dam).

[51] *See* Nicola Ulibarri, *Oroville Dam's close call shows regulatory need to account for climate change*, Sac. Bee (Mar. 5, 2017), *available at* http://www.sacbee.com/opinion/op-ed/soapbox/article136339743.html (acknowledging that the 10-year delay in reauthorizing and repairing Oroville Dam is due in part to the consultation process).

recovery efforts. Regulations and consultations that restrict that growth without benefiting species are therefore doubly harmful.

QUESTIONS SUBMITTED FOR THE RECORD TO MR. JONATHON WOOD, STAFF ATTORNEY, PACIFIC LEGAL FOUNDATION

Questions Submitted by Rep. Labrador

Question 1. Please explain how the Endangered Species Act consultation process impacts the ability to maintain infrastructure, and to respond to emergencies involving infrastructure.

Answer. The ESA consultation handbook [1] generally forbids FWS from obstructing any effort to respond to an emergency, especially where human lives are at stake. FWS can make recommendations so that adverse impacts to species can be avoided. But, unlike for most other projects, the emergency response proceeds without delay.

Thus, rather than preventing emergency responses, the ESA consultation process likely affects emergencies by making them more likely. As I explained in my earlier written testimony, we have aging infrastructure around the country nearing the end of its engineered life. To avoid that infrastructure failing—and the emergency that failure would create—it is imperative that timely repairs and upgrades are done. However, the slow, bureaucratic consultation process discourages pre-emptive maintenance and upgrades, by making them more expensive and take longer to complete.

To ensure that this much-needed work can be done in a timely and cost-effective manner, ESA consultation should focus on those major Federal projects that require additional scrutiny. Every Federal agency has an independent obligation to ensure their actions do not jeopardize listed species or adversely modify habitat.[2] For small projects with a trivial Federal nexus and minor environmental impacts, this first layer of scrutiny is enough.[3] ESA consultation should be an additional look by FWS at major Federal projects with commensurately greater environmental impacts. It should not be a redundant layer of red tape applied to every project.

The burdens of consulting on every project that requires a Federal permit or funding add up. Consider, for instance, how difficult it is to timely complete a significant project while also monitoring an endless stream of e-mails. Although no individual e-mail eats up much of your time, the large number of minor distractions add up to make completing the significant project impossible. So to with consultation. FWS cannot quickly complete consultation for major projects because they are also doing consultations for an endless stream of minor projects with only a trivial Federal nexus and few environmental impacts. Individually, those consultations may not seem like much. But, like the e-mails, they are a significant drain on the Service's ability to focus on those relatively few projects that really require the additional layer of scrutiny.

Question 2. In your experience, what kind of challenge is presented when new listings require changes, such as the construction of a fish ladder, to infrastructure that was designed and built decades ago?

Answer. Modifying an existing structure is generally more expensive and difficult than changing the design of a new structure. Environmental law has long struggled with this difficulty, across many contexts. The Clean Air Act, for instance, treats existing pollution sources differently than new sources, precisely because it is more difficult and expensive to modify an existing plant than to incorporate fresh technologies in the design of a new plant.[4]

The same is true of modifications required after consultation. Ordinarily, this issue would not arise since the ESA forbids committing resources to a project that

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[1] *See* Fish & Wildlife Serv., Final ESA Section 7 Consultation Handbook, Ch. 8 (Mar. 1998), *available at* https://www.fws.gov/endangered/esa-library/pdf/chapter8.pdf.

[2] 16 U.S.C. § 1536(a)(2).

[3] *See* Jacob W. Malcom & Ya-Wei Li, *Data contradict common perceptions about a controversial provision of the U.S. Endangered Species Act*, 112 Proceedings of the National Academy of Sciences 15844 (Dec. 29, 2015), *available at* www.pnas.org/content/112/52/15844.full (acknowledging that hundreds of thousands of projects must go through consultation even though they do not jeopardize species).

[4] *See* Richard L. Revesz & Allison L Westfahl Kong, *Regulatory Change and Optimal Transition Relief*, 105 Northwestern U. L. Rev. 1581 (2011).

would make accommodating species concerns difficult until consultation concludes.[5] However, the recent expansion in the need for reinitiated consultation makes it more likely that consultation will require expensive and time-consuming after-the-fact modifications.

Question 3. In your written testimony, you mentioned *Cottonwood Environmental Law Center v. U.S. Forest Service*, in which the court determined that the Forest Service broke the law by not reinitiating consultation on an already-completed agency action. Given this interpretation of the ESA, can an agency ever really consider the consultation process over? What kind of effect might this potentially never-ending requirement to reinitiate consultation have upon agency planning capabilities and private investment in infrastructure projects?

Answer. The *Cottonwood Environmental Law Center v. U.S. Forest Service* decision will make consultation more burdensome and time-consuming by requiring more projects to go through additional consultations.[6] Tellingly, even the Obama administration opposed that decision, likely because it recognized the consequences a broad duty to reinitiate consultation would have for projects and Federal agencies. In my written testimony, I analogized the problems ESA consultation faces as a gridlock highway trying to add even more cars. More reinitiated consultations will further increase traffic and make consultation slower and more burdensome.

Question 4. In your written testimony you mentioned several instances in which consultation had to be reinitiated and the well-being of species or people were jeopardized as a result. Can you elaborate a bit more about situations in which reinitiated consultation was more harmful than helpful and do you have suggestions about how to improve reinitiated consultation processes? Do you believe lapse of time is an adequate basis for reinitiated consultation?

Answer. It makes sense to consider newly listed species or changes to critical habitat when those changes occur at a time when a project can reasonably be modified to accommodate them. But the economic impact of late modification—which, as explained above, will be greater for projects that have already been constructed—must also be considered. Ultimately, the most effective way to streamline consultation is to consider carefully how many of the hundreds of thousands of projects that currently go through it really need to. If consultation was limited to major projects, and thus only those projects were subject to reinitiated consultation, FWS could focus its limited time and resources where they could do the most good.

Questions Submitted by Rep. Grijalva

Question 1. For the last 5 years, how much of Pacific Legal Foundation's annual operating revenue was comprised of attorneys' fee awards or awards of costs? Please explain the hourly attorney rate that PLF requested from the court in each case and, if applicable, please note the hourly rate the court award or approved through settlement and why.

Answer. As the cover page notes, PLF's funding comes from its nearly 10,000 supporters, the vast majority of which are individual donors contributing in small amounts. PLF does not receive a substantial amount of attorneys' fees for its ESA litigation, largely because attorneys' fees are rarely available to individuals challenging illegal or excessive regulation. However, they are routinely given to groups seeking to expand ESA regulation.

Typically, PLF only receives attorneys' fees under the ESA when it sues Federal agencies to force them to act on their own scientists' recommendations that a species be downlisted or delisted. The U.S. Fish and Wildlife Service routinely ignores its own biologists' determinations that a species' status should be changed. In *Coos County Board of County Commissioners v. Kempthorne*, PLF challenged this practice, arguing that the Service must act on those determinations without requiring someone to go through the unnecessary exercise of filing a petition and follow-up lawsuits.[7] If the Ninth Circuit had agreed with PLF, this litigation would be unnecessary and PLF would not receive even these minimal fees. But, alas, it didn't.

Question 2. I have submitted for the record a stipulated settlement agreement filed on August 25, 2014 in the U.S. District Court for the Middle District of Florida that awards the Pacific Legal Foundation attorneys' fees and costs in connection with its lawsuit against the U.S. Fish and Wildlife Service under the Endangered Species Act. There are also many examples of PLF being awarded attorneys' fees

[5] *See* 16 U.S.C. § 1536(d).
[6] 789 F.3d 1075 (9th Cir. 2015).
[7] 531 F.3d 792 (9th Cir. 2008).

under the Equal Access to Justice Act. How much in attorneys' fees has PLF collected under either the Endangered Species Act, the Equal Access to Justice Act, Federal Rule of Civil Procedure 54(d) or any other applicable fee award relief applicable in environmental lawsuits?

Answer. Over the last 5 years, PLF has filed four such lawsuits, which the government did not defend (since it couldn't) and PLF received nominal fees. In 2016, for instance, PLF sued the Service for its failure to delist the black-capped vireo, a full 10 years after the Service's own biologists determined that it should.[8] As I explained in my written testimony, the Service's practice of ignoring its scientists unnecessarily subjects projects to consultation for species that no longer require the ESA's protections and, in some cases, haven't for years.

PLF has not received a substantial amount of attorneys' fees[9] for ESA litigation in any of the past 5 years:

- In 2016, PLF received a paltry $4,457.69 in attorneys' fees under the ESA, which was a mere 0.05 percent of PLF's funding.
- In 2015, PLF received no attorneys' fees for ESA litigation.
- In 2014, PLF received $8,700 combined for two ESA lawsuits, including the manatee case mentioned in the question. This was less than 0.07 percent of PLF's revenue that year.[10]
- In 2013, PLF received no attorneys' fees for ESA litigation.
- In 2012, PLF received $6,100 in ESA attorneys' fees, which was less than 0.07 percent of its revenue in 2012.

The meager amount of attorneys' fees that PLF has received from ESA litigation during each of the last 5 years accurately reflects how little PLF has historically received under this statute. Over the last 10 years, less than 0.2 percent of PLF's funding has come from ESA attorneys' fees. Simply put, PLF owes its ability to pursue its work to the generosity of its thousands of individual donors, not profit from excessive ESA attorneys' fee awards.

Mr. LABRADOR. I thank the witnesses for their testimony. I would like to remind the Members that Committee Rule 3(d) imposes a 5-minute limit on questions.

To begin questioning, I recognize myself for 5 minutes.

Mr. Stiles, thank you for traveling out here from Idaho to testify. It is always good to see you. Even though Hecla is based in Idaho, you have operations throughout the United States. I understand you are currently working on projects in Montana. How many jobs would your projects bring to rural Montana?

Mr. STILES. Thank you for the question, Chairman. Our projects combined we estimate would bring about 600 to 1,000 full-time jobs to northwest Montana, once in operation. Probably, to begin with, 50 to 60 each—a significant number of jobs in an area that leads the state of Montana in——

Mr. LABRADOR. You also testified that your project would actually help grizzly populations in that area. Is that correct?

Mr. STILES. Correct. The mitigation plans for these projects require us to purchase thousands of acres of mitigation land for grizzly bear. And, like I mentioned, the Ninth Circuit actually

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[8] *See* Press Release, Pacific Legal Foundation, *PLF suit prods feds to recognize black capped vireo's recovery* (Dec. 16, 2016), *available at* https://www.pacificlegal.org/releases/release-12-16-16-new-mexico-cattle-growers-association-v-jewell-12-622.

[9] These fees were negotiated as part of the settlement for each case. The settlements only include a total amount; they do not separate attorneys' fees from costs or set an hourly rate.

[10] *See* Press Release, Pacific Legal Foundation, *Prodded by PLF suit, feds agree to reconsider the manatee's "endangered" status* (July 2, 2014), *available at* https://www.pacificlegal.org/releases/7-2-14-Prodded-by-PLF-suit-feds-agree-to-reconsider-the-manatees-endangered-status; Jonathan Wood, *FWS finally acknowledges its illegal caribou listing*, PLF Liberty Blog (May 7, 2014), *available at* http://blog.pacificlegal.org/fws-finally-acknowledges-illegal-caribou-listing/.

ruled on the Rock Creek project and stated—concurred, actually, with the Fish and Wildlife Service—that the mitigation plans required by the projects are actually recovery plans. And if the company didn't provide the funds for those, then there essentially was no other funding available for it.

Mr. LABRADOR. Would the production from your projects also help Montana boost our domestic metal production and our economy?

Mr. STILES. Absolutely, yes.

Mr. LABRADOR. Is it correct to say that Montana residents, grizzlies, and indeed, our Nation have missed out on 30 years of benefits that these projects would have generated, due to consultation delays and incessant litigation?

Mr. STILES. I think that is a fair statement, yes.

Mr. LABRADOR. Mr. Stiles, have mining companies been deterred from developing projects in that region, due to the regulatory burdens imposed by the ESA? And are they instead choosing to invest in projects overseas?

Mr. STILES. Yes, the regulatory uncertainty in certain areas of the United States is simply too much for large-scale projects.

Mr. LABRADOR. Delays and consultation can jeopardize public safety, as well. In fact, Committee staff met with individuals from Williamson County in Texas to discuss how their booming population has been impacted by ongoing delays in consultation for roads due to endangered spider.

Mr. Wood, you also referred to this situation in your written testimony. Can you elaborate on how delays have impacted this and other public health and safety projects?

Mr. WOOD. Sure, absolutely. Any time you have a significant public safety project, it will have to go through consultation if the Federal Government is involved. And one of the points I stress in my written testimony is that that process cannot move quickly, and routinely exceeds the statutory deadline because the agencies have to process so many of these minor projects.

So, if you have a major highway project, a dam, a bridge, that is going to take far longer than it has to because of the excessive demands put on agency resources.

Mr. LABRADOR. Thank you. Mr. Calkins, you mentioned that the late consultation on a levee resulted in the death of three people and massive amounts of property damage. Is that correct?

Mr. CALKINS. That was not part of my testimony. No, sir.

Mr. LABRADOR. OK, that was in the written testimony.

Mr. CALKINS. Oh, I am sorry. Yes.

Mr. LABRADOR. How has protracted consultation impacted your members across the Nation? Do you have specific examples of other cases in which drawn-out consultation impacted your members' ability to serve the public?

Mr. CALKINS. Yes, sir. We have 29,000 members across the United States, and a lot of public works professionals all over the states have had difficulty with the time and the cost delays.

The examples I am mostly familiar with, of course, are from the Ventura County area. But we would be happy to provide more specifics for the Committee.

Mr. LABRADOR. OK. Last year, a Federal judge mandated that the entire system undergo a 5-year NEPA analysis, costing taxpayers and Pacific Northwest ratepayers some $40 million, and suggesting that removal of some of the dams is a potential outcome. And yesterday, a Federal judge granted some relief in yet another chapter of this litigation.

Mr. Wood, is this an example of ESA Section 7 consultation success?

Mr. WOOD. Absolutely. Litigation is a big part of all of the problems we see in the Endangered Species Act. It really has become a make-work for lawyers.

Mr. LABRADOR. OK. Mr. Li, do you agree with Mr. Calkins? At the end of his testimony he said that we need a better balance between the protection of endangered species and the ability to implement important public works and infrastructure projects. Do you agree with him?

Mr. LI. I disagree that we need a better balance. I think the Endangered Species Act provides an adequate process to balance those two objectives.

Mr. LABRADOR. That is what I thought. I just wanted to get that on the record. Thank you. I now recognize Mr. Grijalva.

Mr. GRIJALVA. Mr. Calkins, in your testimony you repeat the fable that the endangered species protections for the Valley longhorn elderberry beetle caused the failure of the levee on the Feather River in 1997. The creator of that story, a former Chairman of this Committee, began those misleading and unpopular attacks on the ESA back then.

The Department of the Interior, the Army Corps of Engineers, the Center Delta Water Agency, and the California Department of Fish and Game all rejected the idea that the levee failure had anything to do with the Endangered Species Act. Despite this overwhelming evidence to the contrary, do you still stand by the claim that ESA was responsible for the levee's failure? A yes or no answer, if you don't mind, sir.

Mr. CALKINS. A contributing factor.

Mr. GRIJALVA. So, that is a yes or a no?

Mr. CALKINS. Yes.

Mr. GRIJALVA. Thank you. Mr. Li, will you please briefly discuss why misleading assertions in this case and similar cases, the ones around the most recent incident at the Oroville Dam, get the whole picture of ESA consultation all wrong?

Mr. Stiles referred to litigants opposing and holding up Hecla's Rock Creek and Montanore mines in Montana. I believe Mr. Stiles is referring to the Clark Fork Coalition, the Save Our Cabinets group, Rock Creek Alliance, the Montana Environmental Information Center, community and regional groups opposed to actions that would irreparably harm local drinking water, fishing streams, wildlife, and recreation opportunity near these proposed mines.

For three decades, companies have been attempting to develop silver and copper deposits under the Cabinet Mountains in northwest Montana. And for three decades, company after company has failed to secure the support of the local communities and the necessary permits to operate Rock Creek and Montanore mines.

At the current time, the Rock Creek mine is held up because a judge ruled that the Forest Service approval did not comply with the agency's mining regulations. The Montanore mine, the state of Montana says the mine cannot be developed without violating state water quality requirements. While the Endangered Species played a role in the permitting process, and it rightfully should, it is clear that there are numerous other issues regarding mining impacts to water quality, wilderness, and local recreation that prevented the construction and the operation of these mines.

Why do you think it is easier for some to blame the ESA and the consultation process, instead of acknowledging that many of the concerns and reasons for the delay is the potentially destructive mining operation?

Mr. LI. That is a great question. In my experience, the Endangered Species Act is often a convenient scapegoat for other environmental problems. It is the law of last resort, and there is all this pressure to prevent extinction that falls on the Endangered Species Act because upstream laws and programs at the state and sometimes at the Federal level are not working adequately to prevent species from falling into risk of extinction. That is why I think we see a lot of that pressure on the ESA.

The other thing we also see is that it is not just endangered species issues, as you said. There are other environmental problems that sometimes are at play: clean water, clean air, and land for recreation. Oftentimes, the blame is on the Endangered Species Act, but there are these other factors that are also a problem.

Mr. GRIJALVA. And, while it is easy to categorize the group that is opposing them as merely litigants, this is a broad-based community opposition of magnitude and duration. And like you said, it suggests reasons beyond the ESA consultation that have, thus far, for three decades prevented the operation of these mines.

Mr. Chairman, if I may, I have three unanimous consent requests.

I ask unanimous consent to enter into the record a comment letter from the state's draft water pollution permit and the Fish and Wildlife Service memo to the Montana ore mine which shows, contrary to what we heard today, the current project proposal is significantly different from previous proposals with distinct applications for the Endangered Species Act and other water resources.

Also, an excerpt from the State Record of Decision in Montana in a court case which shows no project delays have occurred as a result of ESA. And, in fact, the state has determined that the project could not proceed past evaluation——

Mr. LABRADOR. Without objection, so ordered. I don't think we need to make an editorial——

Mr. GRIJALVA. It wasn't an editorial, it was an explanation.

Mr. LABRADOR. Thank you.

Mr. GRIJALVA. You are welcome. I yield back.

Mr. LABRADOR. I now recognize Mr. Johnson for 5 minutes.

Mr. JOHNSON. Thank you, Mr. Chairman. I apologize for being a little late this morning. I had another meeting. I would ask unanimous consent that the text of my opening statement be entered into the hearing record.

Mr. LABRADOR. Without objection, so ordered.

[The prepared statement of Mr. Johnson follows:]

PREPARED STATEMENT OF THE HON. MIKE JOHNSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Thank you, Mr. Chairman and thank you to our witnesses for being here today. On its face, Section 7 of the Endangered Species Act seems pretty straightforward—it provides clearly defined timelines the Federal agencies tasked with implementing the ESA must follow in order to advance projects that have a Federal nexus, which includes funding and permitting.

However, as you will hear today, Section 7's real-world operation is anything but straightforward. Through Section 7, the Fish and Wildlife Service or the National Marine Fisheries Service can delay projects indefinitely, years in many cases, simply by continually requesting additional information before allowing the formal consultation process to proceed. In addition, outside interest groups, often fundamentally opposed to development, use the courts as an offensive weapon, routinely suing the implementing agencies in order to further frustrate project development and drain taxpayer money away from conservation efforts.

The Section 7 consultation process has cost companies millions of dollars, deprived local economies of countless jobs, held up projects that were undertaken to protect public safety or to further species conservation goals, and in some cases dissuaded companies from even proposing a project in the United States—sending jobs and production efforts overseas.

This is not how the Endangered Species Act was intended to function. The Act can and should be modernized, and it should be implemented with transparency. I am confident that these goals can be accomplished through the work of this Committee.

I am looking forward to hearing from our witnesses today and to hear their suggestions for improving the Section 7 consultation process. Thank you once again for holding this very important hearing, Mr. Chairman, and I yield back the balance of my time.

Mr. JOHNSON. Thank you, and thank all you gentlemen for being here this morning. Mr. Wood, the Defenders 2015 article that we have in the record says this, "Consultations often require months or years to complete because of inadequate data on species which may suspend FWS's analysis until better data are collected and provided."

The question I have is, who decides whether an adequate level of data exists so that a consultation can proceed?

Mr. WOOD. The Fish and Wildlife Service.

Mr. JOHNSON. And the Defenders 2015 article also concluded that duration of consultation varied by region, and that the identity of the lead biologist on a consultation is the best predictor of variation in duration of consultation.

The question is, in your experience, is that a correct statement?

Mr. WOOD. I think that is right. Which bureaucrat you have reviewing your project makes a huge difference.

Mr. JOHNSON. OK. Well said. All right.

Mr. Stiles, you stated in your written testimony that a change in the local Fish and Wildlife Service employee resulted in a delay of more than a year. I am just wondering if you can elaborate on how the local office and its personnel impacted your project's consultation.

Mr. STILES. Yes. On that particular project—and this was going back several, several years, on one of the first consultations—the biologist who was working on that particular consultation was transferred to a different region or district. And it took the Service

over 12 months, with repeated requests from the company to congressional delegation folks, to the Fish and Wildlife Service themselves, to replace that individual. And it just didn't happen. So, in that case, the consultation just sat there.

Mr. JOHNSON. Thank you.

Mr. Wood, another one for you. In your experience, did local personnel, such as a lead biologist, have too great of an impact on the duration of a consultation? I am curious if you feel like one person can jeopardize a project based on their personal dislike of a project.

Mr. WOOD. They certainly have the ability to delay, because of the way they flexibly interpret the evidentiary standard, which I will note is the same one used for listing decisions. I think everyone would be outraged if the Service used this same sort of argument to refuse to make a determination whether to list an endangered species, citing the need for even more evidence. The same standard applies to both, yet the Service is interpreting it differently, depending on what is going to happen.

Mr. JOHNSON. Let me ask you. What consequences do either FWS or the National Marine Fisheries face if they fail to meet any of the ESA's statutory consultation deadlines?

Mr. WOOD. There is the possibility to sue if they take an exceedingly long period of time, but a project proponent would be ill-advised to do that, as it might anger the agency and perhaps impose more restrictions or preclude the project.

Mr. JOHNSON. Mr. Calkins, this one is for you. How was your relationship with local Service personnel? In your view, did they impact the duration of the project's consultation?

Mr. CALKINS. Yes, absolutely. And the passion to protect the species, I think they were either unwilling or unable to really look at the scientific data carefully and to balance the needs of the community.

Mr. JOHNSON. Thank you.

Mr. Li, I have one for you. You said this morning in your testimony that there is a chronic under-funding problem. I think those were your words. The question I have for you is kind of a criticism. I am sure you have heard it before. But from some things I read yesterday, your organization and its allies have filed more than 300 lawsuits since the Endangered Species Act was last reauthorized, and you have collected an estimated $21 million in legal fees, which are taxpayer dollars, of course. Sometimes it amounts to about $850 an hour for each of those attorneys.

Of course, that drains money away from conservation, as we all would recognize. The question is—by the way, you all have been accepting Federal grants at the same time—so I am just wondering how you respond to that criticism when you hear it.

Mr. LI. Sure. Our lawsuits are all designed to further conservation objectives. And we only get paid when we win. We do not file frivolous lawsuits, because it is not a good use of our resources.

As far as our grants from the Federal Government, in particular Fish and Wildlife Service, that actually goes to on-the-ground collaborative conservation, working with ranchers and others to find ways for human activities to co-exist with endangered species conservation.

Mr. JOHNSON. I am very familiar with prevailing party attorneys' fees, because I was a religious liberty litigator for almost 20 years. But I never charged, ever, in any case, more than probably $300 an hour, because I knew, ultimately, that was taxpayer dollars. You think $850 an hour for one of your attorneys is fair, when you are so concerned about conservation funding?

Mr. LI. I don't know the exact amount that we charge, and we would have to look into whether that is $850. I certainly don't get that much money at Defenders. So, we would have to get back to you on that amount, but that does not sound right.

Mr. JOHNSON. I would encourage you to talk to your attorneys, because I think that is not quite fair. I will yield.

Mr. LABRADOR. Thank you. I recognize Mr. McEachin for 5 minutes.

Mr. MCEACHIN. Thank you, Mr. Chairman.

Mr. Wood, although I have the privilege of being the Ranking Member, I am a rookie here. I am a freshman Member. I am not that familiar with your organization, so I would like to ask you a few questions about it, starting off with is it true that the Pacific Legal Foundation sues the Federal Government over its implementation of the Endangered Species Act?

Mr. WOOD. Yes.

Mr. MCEACHIN. Is it also true that your organization has received funding from the Koch Brothers?

Mr. WOOD. I am not aware of that. I know that less than 1 percent of our funding comes from big businesses.

Mr. MCEACHIN. Is it true that you have received funding from ExxonMobil?

Mr. WOOD. I believe we have received some donations in the past, but I don't know whether they give today.

Mr. MCEACHIN. How about this group—the American Enterprise Institute?

Mr. WOOD. I don't know whether they give any money to PLF.

Mr. MCEACHIN. OK. Mr. Chairman, I would like to submit for the record documentation supporting affirmative answers to these questions.

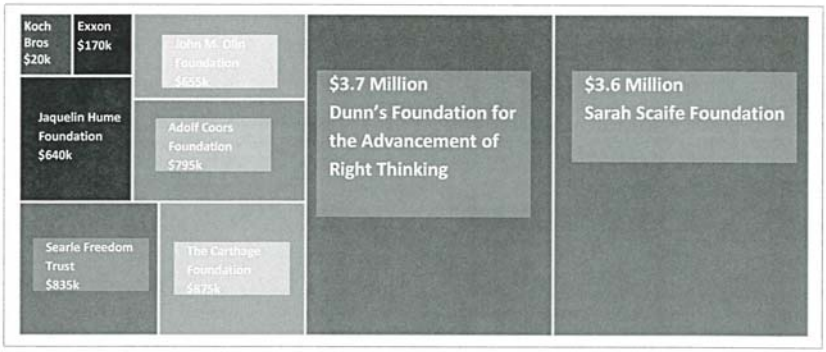
Mr. LABRADOR. Without objection, so ordered.

[The information follows:]

PACIFIC LEGAL FUND CONTRIBUTOR LIST

While most of the Pacific Legal Fund's (PLF) contributors are unknown, several major conservative funders have reported contributions to them, including the Koch Network, the Exxon/Mobil Foundation, the Adolf Coors Foundation, Dunn's Foundation for the Advancement of Right Thinking, and the Sarah Scaife Foundation.

Just a Few of the Pacific Legal Fund's Ultra Conservative and Corporate Donors . . .



Source: IRS 990 nonprofit tax forms via conservativetransparency.org/recipient/pacific-legal-foundation/

The organizations that give PLF money have a history of donating to groups that advocate for extreme pro-business and conservative views. For example, the Union of Concerned Scientists has highlighted ten organizations as "Global Warming Skeptics." [1] The conservative foundations that support PLF's work were also the key funders for each of the groups that the Union of Concerned Scientists identified as having a history of denying the existence of—or undermining demonstrable evidence for—climate change.

The same foundations that contributed money to the Pacific Legal Fund donated a whopping $193 million dollars to nonprofit organizations who advocate against global warming.[2] PLF's funders clearly wish to pollute the public debate with misinformation about environmental issues. The PLF and its ultra conservative and corporate donors want the same thing—to amplify a message that puts the interests of big business first and gives little thought to what will happen to America's treasured natural places.

Mr. MCEACHIN. Sir, do you believe it is hypocritical for you to criticize other organizations for suing the government to keep ESA protections in place, while your organization is busy trying to tear them down?

Mr. WOOD. I don't believe that is what we are trying to do. But the answer to your question is no, because we rarely get attorneys' fees when we successfully sue the government. The way it works is, essentially, only environmental groups get that. If you are representing a property owner or someone unfairly burdened, attorneys' fees are not available.

Mr. MCEACHIN. Mr. Li, the Majority likes to complain that Federal agencies are not completing consultations fast enough, but at the same time denies those agencies the resources they need to get the job done.

The latest example is this sign-on letter to House Appropriations requesting that they ignore Donald Trump's proposal to slash the budgets of the Interior and Commerce Departments, and instead fully fund the ESA-related work that these Departments do. The letter has been circulated widely to Members on both sides of the

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[1] http://www.ucsusa.org/global_warming/solutions/fight-misinformation/global-warming-skeptic.html#.WMgd_W8rJFE.

[2] Calculated using all IRS 990 nonprofit tax forms available for the organizations identified as global warming skeptics by the Union of Concerned Scientists. 990 IRS data includes contributions from 1985 to 2014 and was tabulated by conservativetransparency.org/.

aisle for several weeks, and now has 66 co-signers. Sadly, not a single one is a Republican.

I would like to submit this letter for the record.

Mr. LABRADOR. Without objection, so ordered.

Mr. MCEACHIN. Thank you, Mr. Chairman.

[The information follows:]

MEMORANDUM

From: The Honorable Donald S. Beyer, Jr.

Date: March 27, 2017

Support Funding for Endangered Species Conservation

CLOSING COB TODAY

Current Signers (66): Grijalva, DeFazio, Tsongas, Pingree, Polis, Huffman, Eshoo, Connolly, Eleanor Holmes Norton, McNerney, Foster, Wm. Lacy Clay, Norcross, Pascrell, Keating, Moulton, Garamendi, Cleaver, Yarmuth, Quigley, Heck, Brownley, Soto, Conyers, Napolitano, Schiff, DeGette, Kind, Speier, Matsui, Danny K. Davis, Sires, Welch, Wasserman Schultz, Velázquez, Lieu, Lewis, Barbara Lee, Cohen, Schneider, Lawrence, Beatty, Cicilline, Shea-Porter, Schakowsky, Cárdenas, Langevin, Doggett, Adam Smith, Payne, Lowenthal, Capuano, Cummings, Levin, Lofgren, Pocan, Nadler, Plaskett, Sánchez, Carolyn B. Maloney, Butterfield, Boyle, Costa, Hank Johnson

Dear Colleague:

Please join us in requesting that the House Appropriations Committee fully fund the endangered species functions of the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), the agencies responsible for implementing the Endangered Species Act (ESA).

We are deeply concerned by the trend of underfunding ESA implementation, hampering the ability of FWS and NMFS to perform the critical task of preventing the permanent loss of species and of ensuring depleted species' recovery. Inadequate funding jeopardizes the nation's ability to conserve the ecosystems upon which endangered and threatened species depend. It also fails to provide the infrastructure sufficient to both effectively recover federally-listed species and prevent the need to list newly-depleted species. Quite simply, continued underfunding will delay species protection, make recovery harder and more expensive, and result in more litigation.

Adequate funding and staffing are crucial to support timely decision-making based on the best scientific information and with effective public involvement They are also crucial to minimizing the risk of litigation regarding missed deadlines. Ultimately, full funding is necessary to protect the spectacular biological diversity we currently enjoy for many generations to come.

For additional information or to sign on, please contact Greg (greg.sunstrum@mail.house.gov) in Rep. Debbie Dingell's office or Kate (kate.schisler@mail.house.gov) in Rep. Don Beyer's office.

Sincerely,

Debbie Dingell,
Member of Congress.

Don Beyer,
Member of Congress.

Attachment: Letter

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March XX, 2017

Hon. KEN CALVERT, *Chairman*,
Hon. BETTY MCCOLLUM, *Ranking Member*,
House Subcommittee on Interior, Environment, and Related Agencies,
House Committee on Appropriations,
Washington, DC 20515.

Hon. JOHN CULBERSON, *Chairman*,
Hon. JOSÉ SERRANO, *Ranking Member*,
House Subcommittee on Commerce, Justice, Science and Related Agencies,
House Committee on Appropriations,
Washington, DC 20515.

Dear Chairman Calvert, Chairman Culberson, Ranking Member McCollum, and Ranking Member Serrano:

As you begin to consider fiscal year 2018 Interior and Commerce, Justice, Science Appropriations, we urge you to support robust funding for Endangered Species Act (ESA) listing, planning and consultation, species conservation and restoration, and recovery process.

In enacting the Endangered Species Act of 1973, Congress recognized that imperiled species of wildlife, fish, and plants "are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) employ, to great effect, a suite of mechanisms to carry out the law's aim of conserving endangered and threatened species and the habitat upon which they depend. Their efforts have successfully prevented the extinction of 99 percent of all species listed as threatened or endangered under the Act.

However, developing, coordinating, implementing, and managing all the recovery tools and partner activities in a cohesive and effective manner for species' recovery requires significant commitment and resources. Strong funding for Ecological Services supports FWS's work with partners at the state and local level both to recover listed species and to conserve candidate species and their habitats so that the need for listing is reduced or even eliminated. Similarly, funding for NMFS Protected Resources Science and Management program is crucial for the protection and recovery of imperiled marine species.

The need for increased recovery funding is evident from the over 400 U.S. listed species that lack recovery plans. Congressional appropriations for both recovery and consultation, already insufficient, have not kept pace with the number of listed species. Inadequate funding not only puts at risk the recovery of threatened and endangered species and conservation of their habitats; it also impedes FWS and NMFS's ability to apply the best scientific knowledge available in a timely review of listing decisions for species in need of protection. If Congress does not provide the funding increases necessary for FWS and NMFS to carry out their statutory obligations, the agencies may face greater exposure to litigation. More importantly, our Nation could lose even more of our precious wildlife heritage.

We request robust funding for ESA listing, planning and consultation, species conservation and restoration, and recovery in FY 2018. This is critical to recover and conserve our Nation's imperiled species and ultimately protect America's natural heritage.

Sincerely,

Mr. MCEACHIN. Mr. Li, while we know that Section 7 consultations save endangered species and rarely slow up development or infrastructure projects in any meaningful way, does the fact that the Congress keeps cutting agency budgets influence the time it takes Federal agencies to complete these and other crucial tasks?

Mr. LI. Emphatically, yes. As I said earlier, on the per-species basis, the Fish and Wildlife Service has received less and less funding to carry out consultations. That means less staff and less

resources to complete the consultations within the desired time frame.

Mr. MCEACHIN. And, Mr. Li, do you support additional funding for the Fish and Wildlife Service and the National Marine Fisheries Service to increase the agency's capacity to process consultation requests?

Mr. LI. We not only support it, we think it is absolutely vital to ensure that the ESA is functioning as it should to protect endangered species and to work for regulated entities.

Mr. MCEACHIN. Mr. Li, we have heard about the pre-consultation process from some other witnesses. Can you explain your understanding of this process and how it relates to informal consultations?

Is it reasonable to expect the Services to do this work in the absence of a complete consultation package from the action agency within the statutory timelines for formal consultation?

Mr. LI. No, it is not reasonable to expect the Service to do many informal and formal consultations without some level of pre-consultation discussion. Pre-consultations are the back-and-forth discussion prior to consultations to ensure that the paperwork and the necessary surveys are available, so that the consultation can be expedited and streamlined.

So, pre-consultations are not recorded as part of that official consultation duration, because it is more of a matter of an extension of the tactical assistance that occurs under Section 7.

Mr. MCEACHIN. And then very quickly, because our time is running out, Mr. Li, in your research have you found situations where consultations are delayed for reasons unrelated to the ESA?

Mr. LI. Absolutely. And there are many examples. Sometimes, other Federal laws are involved, NEPA—they are intertwined with the Section 7 process. In other instances, we have errors or delays on the part of applicants. They provide the wrong information to the Fish and Wildlife Service, so the Service has to start over. There are many reasons beyond the ESA for delays.

Mr. MCEACHIN. Thank you, Mr. Li.

Mr. Chairman, I yield back.

Mr. LABRADOR. Thank you. I recognize Mrs. Radewagen for 5 minutes.

Mrs. RADEWAGEN. I want to thank you all for testifying today before this Subcommittee. Thank you, Chairman Labrador and Ranking Member McEachin, for holding this hearing, and our Full Committee Chairman Bishop.

I represent American Samoa, a jewel of the Pacific some 2,500 miles south of Hawaii. We have many rare species of animals only found in our archipelago. These animals are important to the identity of American Samoa.

I have also seen firsthand what happens when bureaucrats from Washington, DC, seek to impose their rules on American Samoa, the other territories, and on Native American tribes without consulting the local Native population. A recent example of this, the Sauk-Suiattle Tribe near Darrington, Washington is very concerned with the impacts of grizzly bear reintroduction on their treaty fishing resources.

So, Mr. Li, your organization supports this reintroduction, in spite of the tribe's concerns. Is that correct?

Mr. LI. I would have to get back to you on our exact position. But for the purposes of the question, I can proceed assuming that it is yes.

Mrs. RADEWAGEN. And, Mr. Wood, given the impact the reintroduction may have on subsistence and other cultural needs of entities, such as the populations of the territories, do you think that the Endangered Species Act is at odds in some cases with our Nation's trust responsibility toward the territories and the people that live there?

Mr. WOOD. I think that is true for both the territories and the states. The ESA does federalize a lot of policy that was previously done at that lower level.

Mrs. RADEWAGEN. Thank you, Mr. Chairman. I yield back.

Mr. LABRADOR. Thank you. I now recognize Mr. Huffman for 5 minutes.

Mr. HUFFMAN. Thank you, Mr. Chairman. Mr. Calkins, I just wanted to ask you a quick question about the Ventura River.

As you know, the reason the Ventura River lost its steelhead run, which used to be an iconic steelhead run in Southern California, was the construction of Matilija Dam in 1947, which provided no fish passage. I know that as Public Works Director for the city, you at one point supported removal of the dam. I just wanted to inquire as to whether you still support removing that dam.

Mr. CALKINS. Absolutely.

Mr. HUFFMAN. Thank you. Do you believe, if the ESA had existed in 1947, that project would have proceeded a little more thoughtfully, and incorporated fish passage?

Mr. CALKINS. Yes, I do, and I wish it had.

Mr. HUFFMAN. Yes. Mr. Li, would you agree that if the ESA and its consultation processes were in effect in 1947, we would have a more functioning water system and natural environment on the Ventura River today?

Mr. LI. Absolutely. I think the ESA would have acted as a look-before-you-leap type of law, and would have allowed for fish passages and fish ladders.

Mr. HUFFMAN. Thank you.

Mr. Li, I want to stay with you for a moment. Some long-time advocates of repealing the ESA have recently resorted to something we see a lot: falsely scapegoating the ESA in emergency situations. We have seen this in the past with wildfires. We sometimes hear claims that the ESA is somehow preventing emergency responders from savings lives and property. After the fact, when we fact-check these things, they are always bunk. But it comes up time and again.

And recently, it has come up in connection with the Oroville Dam spillway problem in California. Some folks have argued that the National Marine Fisheries Service and the ESA have hampered the emergency repair, the emergency response. There is a letter going around that says this is a prime example of how the Endangered Species Act elevates fish and wildlife above human life and public safety, the usual stuff we hear.

However, this is completely false. The Department of Water Resources in California recently sent a letter confirming that ESA consultations have not in any way delayed emergency repairs. So, I just want to ask you, is it true, this claim that the ESA has somehow stood in the way of emergency repairs at Oroville Dam?

Mr. LI. It is emphatically not true. I have right here the letter from the California Department of Water Resources saying that, "The correspondence between NMFS and FERC did not affect the Department of Water Resources' ability to focus on health and safety."

If you read the NMFS letter, it provides mere recommendations that the Department of Water Resources was already planning to adopt.

Mr. HUFFMAN. In fact, during an emergency like this, the Endangered Species Act actually provides for consultation. But are the recommendations from that consultation even binding on the action agency?

Mr. LI. No, they are not. In fact, the Fish and Wildlife Service regulations specifically say, as does the handbook, that addressing the emergency response takes priority over addressing endangered species issues. After the emergency is handled, that is when the formal consultation or any other consultation would be resumed.

Mr. HUFFMAN. Yet, we continue to see these myths swirling about almost every time there is an emergency. So, instead of asking a question of the witnesses, I want to actually make a suggestion, a friendly suggestion, and maybe ask a question of the Chair.

As we go forward with this Endangered Species Act debate, it seems to me that we should try our best to do it on the basis of real facts, and not let this Subcommittee, or the main Committee, become an echo chamber of these myths, and these false scapegoating exercises. There is a way to do that.

When folks come in here with stories blaming the ESA for this or that, whether it is a levee failure or Oroville Dam repair delays that are not true, or any number of things, let's engage the Congressional Research Service. It is an independent, non-partisan entity that works for us to answer questions. Let's ask them to just fact-check stuff. Let's make sure that, as we go forward, let's have a great debate, but let's have it on the basis of facts, and not become an echo chamber for these myths and false scapegoating exercises. Would you agree to that?

Mr. LABRADOR. Why don't you ask the witnesses? You have a couple of witnesses that could actually disagree with Mr. Li.

Mr. HUFFMAN. I am more interested in the integrity of this Committee not dignifying a bunch of myths and falsehoods. We can do better than that.

Mr. LABRADOR. We have——

Mr. HUFFMAN. There is an easy way to do that.

Mr. LABRADOR. I think you have some witnesses who might be able to answer your question——

Mr. HUFFMAN. Could I ask Chairman Bishop, maybe, since I am not getting a response from the Subcommittee Chair—could we institute this simple fact-checking protocol, so that we can make policy on the basis of reality and facts?

Mr. LABRADOR. Your time has expired. Thank you very much.

Mr. Bergman.

Mr. BERGMAN. Thank you, Mr. Chairman, for holding this hearing; and thanks to the witnesses for taking time to be here today to talk about this relevant issue.

My first question is for Mr. Wood. Mr. Wood, the Endangered Species Act is intended to facilitate population recovery for listed, threatened, or endangered species. Is that correct?

Mr. WOOD. That is correct.

Mr. BERGMAN. When species recover, such occasions are considered a success of the Endangered Species Act. Recoveries are examples of the law actually working. Is that correct?

Mr. WOOD. Yes, among other things.

Mr. BERGMAN. States are responsible for managing non-listed wildlife within their borders. Is that correct?

Mr. WOOD. Yes.

Mr. BERGMAN. The Rocky Mountain Gray Wolf is an Endangered Species Act success story, at least in part. The wolf quickly exceeded population recovery goals, and the wolves were delisted by the Fish and Wildlife Services. The wolves, once delisted, were to be managed by the states under federally approved management plans that would allow populations to continue to thrive. Again, this is an example of the law working.

Yet, the Defenders of Wildlife launched a lawsuit that stopped management of the recovered wolves from being transitioned to the states. In fact, Congress had to pass a law in order to allow Montana and Idaho to manage their fully recovered wolf populations; and litigation still presents state management in Wyoming and the Western Great Lakes.

And this is only one such example of ongoing attempts by organizations, such as Defenders of Wildlife, to stop the law from being a success, to drain taxpayers' funds away from conservation and stewardship of our wildlife, and to line the pockets of their staff attorneys.

Mr. Wood, in your opinion, do these litigious organizations believe the Endangered Species Act is only a success if species are never delisted?

Mr. WOOD. Obviously, you would have to ask them that, but I think it does seem to fit with the model. The ESA litigation has become a profit process for many of these groups.

Mr. BERGMAN. Mr. Wood, what do you believe motivates constant litigation on the part of these groups, particularly when the law has worked as intended?

Mr. WOOD. Part of it, I am sure, is a concern for the environment. Also it is to increase or maintain Federal control.

One other point might be that profit incentive. As Mr. Li said earlier, he does not get paid as a member of the organization, what they charge the Federal Government in attorneys' fees. They are recovering more than the litigation costs groups like this.

Mr. BERGMAN. What suggestions do you have to improve the delisting process?

Mr. WOOD. I think the cleanest one is to demand that the Service begin actively acting on its own determinations from its scientists that species should be delisted. Under the current system, the

Service ignores its own scientists when they call for removing Federal restrictions.

Mr. BERGMAN. OK. And this is for any panelist. In your testimony, all of you discuss the problems with the formal consultation process, and how the 135-day limit can be somewhat ambiguous. Do you think, if there were clearly defined start times for the consultation process, meaning that the clock starts at a specific time, regardless of how many additional documents are needed, that that change would significantly affect the overall consultation process? If yes, how so?

Mr. STILES. I am not sure, Congressman. Based on my experience, I think the real issue has been the length of time in consultation, and just the ignoring of the statutory requirements with no consequence. I think you need some consequence for not adhering to some of those statutory completion times. I think what you are suggesting would absolutely help, but I don't think it would cure the problem.

Mr. LI. I will offer a quick perspective. I think, through administrative and policy improvements, if there is ambiguity about the start time of consultations, that can certainly be clarified very easily through public notice and comment rulemaking.

Mr. WOOD. I think it could clarify to fix a start time. And I think consultation—the evidentiary standards should work the same way for consultation as it does for listing decisions. As I said earlier, it would be an outrage if the Service did in listing decisions what it does in consultation and say, "We need more and more and more data in order to avoid making a determination."

Mr. BERGMAN. Thank you.

Mr. Chairman, I yield back.

Mr. LABRADOR. Thank you. I now recognize Mr. Beyer.

Mr. BEYER. Thank you, Mr. Chairman.

Mr. Li, in Mr. Wood's written testimony, he blames the Endangered Species Act for delaying work to restore the habitat for the Florida manatee. However, there are documents from the U.S. Army Corps of Engineers, one I would like to submit for the record, without objection.

Mr. LABRADOR. Without objection, so ordered.

[The information follows:]

DEPARTMENT OF THE ARMY,
JACKSONVILLE DISTRICT CORPS OF ENGINEERS,
GAINESVILLE, FLORIDA

April 30, 2015

Save Crystal River
209 Southeast Paradise Point
Crystal River, FL 34429
Attn: Robert Mercer

CEASE AND DESIST NOTIFICATION AND WARNING

Dear Mr. Mercer:

The Corps of Engineers (Corps) has obtained information from a complaint received on March 10, 2015 and subsequent investigation indicating unauthorized excavation activities are being conducted within Kings Bay and the Kings Bay canal systems. The activity is ongoing within Kings Bay and the canal systems connected to Kings Bay, in Crystal River, Citrus County, Florida.

As District Engineer it is my responsibility to protect the integrity of waters of the United States, including wetlands. The purpose of this letter is to notify you that the Corps has information indicating that you are responsible for the excavation of "muck" resulting in an increase in the navigable capacity of Waters of the United States conducted without the required Department of the Army authorization, and to warn you to cease and desist conducting such activity pending a resolution. It is also the purpose of this letter to inform you of the consequences for engaging in unauthorized activity and the potential options for resolving this matter.

Section 404 of the Clean Water Act, 33 U.S.C. § 1344, prohibits discharges of dredged or fill material into waters of the United States unless the work has been authorized by Department of the Army permit. Use of an aquatic harvester does not always result in a clean removal of material; some discharges take place with this method of work. The use of an aquatic harvester may result in more than incidental fallback that could result in a Section 404 violation. Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, prohibits the placing of any structure in, under, or over navigable waters of the United States and excavating from or depositing material into such waters unless the work has been authorized by a Department of the Army permit. Kings Bay and the connected canal systems are subject to the ebb and flow of the tides and are therefore Section 10 waters of the United States. The dredging of "muck" from Kings Bay and the connected canals constitutes work within a water of the United States.

In accordance with 33 CFR 326.3(c)(3), I am notifying you of potential consequences for violating these laws. Under the Clean Water Act you may incur civil penalties up to $37,500 per day of violation. Criminal penalties under the Clean Water Act include fines up to $50,000 per day of violation and imprisonment. Violation of the Rivers and Harbors Act of 1899 could result in criminal penalties (up to $100,000 for individuals and up to $200,000 in fines for corporations) and up to 1 year imprisonment, or both. Injunctive relief, such as restoration of the area affected by your activity, may also be granted for violations of either the Clean Water Act or the Rivers and Harbors Act.

On April 24, 2014 representatives of the Corps met with you and other representatives from Save Crystal River and witnessed very specific techniques to harvest living lyngbia algae from the bottom of a canal. Those specific techniques resulted in very low turbidity and little to no change in the navigable capacity of the canals. Furthermore, the type of material removed was living lyngbia algae and not "muck." Based on the specific harvesting techniques witnessed on April 24, 2014, the Corps sent Save Crystal River a policy letter, dated May 1, 2014, stating the lyngbia harvesting techniques shown during the April 2014 visit would not require a permit.

The May 1, 2014 letter also stated that "in the event that Save Crystal River is unable to utilize these specific techniques, or conditions arise that would cause these techniques to result in dredging/excavation or greater than de minimus discharge, a Department of the Army Permit may be required to continue working." Based on photographs and other information received by the Corps your ongoing work exceeds the scope of the activity described in the above referenced letter. Thus, if you wish to continue work that involves dredging or excavating those activities will require a Department of the Army permit.

It is in your best interest to halt the unauthorized activity immediately upon receipt of this notification and warning. If further activity is performed after receipt of this cease and desist notification and warning, I will seek the assistance of the Department of Justice to take immediate legal action to halt such activity. Although compliance with this notification and warning will result in a more favorable resolution of this matter than otherwise, compliance will not foreclose the Government's options to initiate appropriate legal action or to later require the submission of a permit application.

In order to help expedite resolution of this matter, please provide within 15 days of receipt of this notification and warning information concerning your activity in light of the requirements of the Clean Water Act and the Rivers and Harbors Act. Please provide any permits, exemptions, or other information or correspondence from other local, State and Federal agencies you may have obtained relevant to the activities referenced above. The Corps will request comments from appropriate Federal and State agencies in order to better evaluate your activity. In accordance with a Memorandum of Agreement between the Department of the Army and the U.S. Environmental Protection Agency (EPA) concerning federal enforcement of Section 404 of the Clean Water Act, a copy of this notification is being sent to the

EPA for review and coordination. Further information may be requested from you, as needed, in the future.

The information obtained from you and other agencies will be used to evaluate the activities for compliance with the above mentioned statutes and to determine the appropriate course of action to resolve any violations, including legal action, restoration of the affected area, and/or issuance of an after-the-fact permit in accordance with 33 CFR 326.3(e). If an after-the-fact permit is issued, you may appeal the permit and the jurisdictional determination in accordance with 33 CFR 331.

If you have any questions, please contact Shaun Gallagher in writing, via electronic mail at shaun.e.gallagher@usace.army.mil, regular mail at the letterhead address, or by telephone 352-372-9625.

Sincerely,

ALAN M. DODD,
Colonel, U.S. Army,
District Commander

Enclosure

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MEMORANDUM FOR RECORD

CESAJ-RD-PE (1200A)

31 July 2015

SUBJECT: SAJ-2015-00706 Save Crystal River

Project Location: Canals connected with Kings Bay, Crystal River, Citrus County, Florida

1. Background:

The Corps received a request by Save Crystal River, Inc. (SCR) on March 13, 2014 regarding activities in man-made residential canals in Kings Bay/Crystal River. The request was for the Corps to provide a written determination regarding whether SCR's *Lyngbya* algae harvesting activities would require a Department of the Army Permit pursuant to Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403) and/or Section 404 of the Clean Waters Act (33 U.S.C. 1344).

On April 24, 2014 the Corps staff accompanied SCR's representatives to a proposed worksite to observe the *Lyngbya* harvesting operations. Corps staff observed the operation of a modified mechanical vegetation harvester utilizing a device known as a bubbler bar to harvest the *Lyngbya* algae from the canal bottom. Corps staff noted that the bubbler bar, which emits compressed air, is attached to the front of the harvester conveyor belt where the harvester's cutting blade is typically located. The harvester operator then lowered the bubbler bar below the surface of the water where the compressed air emitted from the bubbler bar loosened and resuspended the algal material. The conveyor belt on the harvester then removed the algae from the water column to the harvester's hopper. The harvester operator emptied the harvester hopper loads onto a waiting dump truck which would then haul the harvested algae to an upland location. Corps staff further noted that the turbidity associated with the harvesting activity was limited to a small plume in the vicinity of the bubbler bar, and that any disturbance and/or redeposit of bottom sediment associated with the harvesting activity was not visible.

Based on the April 24, 2014 site visit the Corps determined that no permit under Section 404 of the Clean Waters Act would be required as long as the material removed was not discharged into a Water of the United States. The Corps also decided that the *Lyngbya* harvesting techniques would not require a Department of the Army Permit pursuant to Section 10 of the Rivers and Harbors Act, as long as, the specific harvesting techniques and canal conditions viewed on April 24, 2014 were consistent though out the project scope. The Crystal River, Kings Bay and the connected canal systems are subject to the ebb and flow if the tides and are jurisdictional under Section 10 of the Rivers and Harbors Act. On May 1, 2014 the Corps sent a letter to SCR outlining these decisions.

2. Unauthorized activity:

On March 10, 2015 the Corps received a complaint from Mr. Pat Rose of Save the Manatee that Save Crystal River (SCR) was performing dredge operations within the canal systems connected to Kings Bay. Corps staff contacted Mr. Rose to obtain further information about the complaint and received several pictures of waste bins containing material removed by SCR's contractor. Corps staff contacted Citrus County and performed a public records search on March 12, 2015 to gather information on the project and received pictures of material placed in bins that were submitted to Citrus County for payment under a contract between SCR and Citrus County.

On March 31, 2015 the Corps contacted Mr. Bob Mercer with SCR by phone to discuss the project and that a complaint was received. An email was sent to Mr. Mercer on April 1, 2015 requesting information that demonstrated the ongoing work was in accordance with the Corps' May 1, 2014 letter. The email warned SCR that any work not specifically allowed by the May 1, 2014 letter may need a Department of the Army permit, but work being performed under the May 1, 2015 letter could continue. SCR responded to the request by letter dated April 16, 2015, stating that the work being performed the material being removed were the same as seen during the April 24, 2014 site visit. Mr. Mercer also included a copy of a turbidity monitoring report sent to the Florida Department of Environmental Protection.

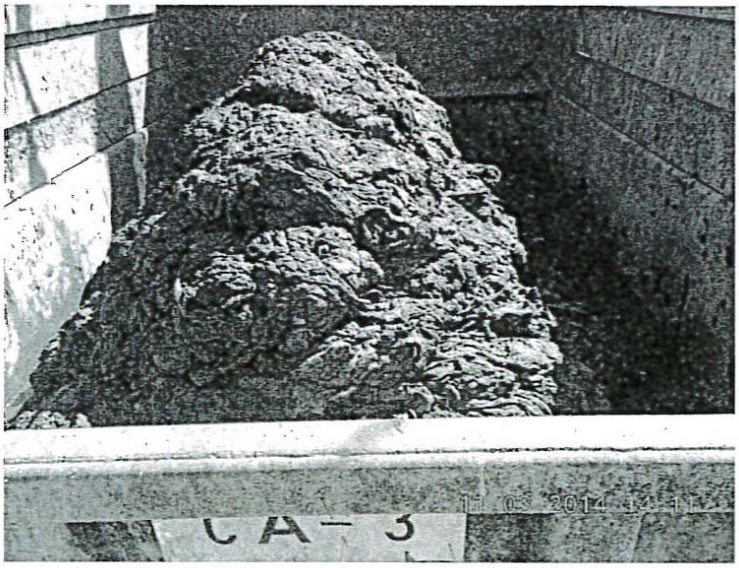
Corps staff reviewed the information provided by Save the Manatee and Citrus County and decided that work requiring a Section 10 permit was performed by SCR. A Cease and Desist Notification letter was sent to SCR on April 30, 2015. The Warning letter informed SCR the ongoing work exceeded the scope of the activity described in the May 1, 2014 letter and if SCR wished to continue dredging or excavating activities a Department of the Army permit would be required. The Warning letter requested SCR to provide, within 15 days of receipt, notification of the Warning letter and any permits received for the project. SCR responded by letter, received on May 13, 2015, requesting: 1) The Corps definition of "muck," 2) The names of individuals and entities that files the complaint, 3) The dates, times, and locations in which this activity was reported, 4) A copy of any other information that is being judged to be in support of these claims, 5) copy of any scientific verification of the nature of the samples provided, 6) The evidence that was provided to the Corps and 7) Any information regarding any actions the claimant may have taken to address the issue with SCR prior to contacting the Corps.

Corps representatives meet with representative of SCR on June 9, 2015 to discuss the Warning letter, SCR's request, educate SCR on the Corps' jurisdiction in regards to Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Waters Act (CWA) and to visit SCR's dewatering site. During the June 9th meeting the Corps also provided SCR with pictures of the bins and material. The Corps informed SCR during the meeting that no evidence was found showing a violation of Section 404 of the CWA occurred. However, the Corps did inform SCR that a Section 10 violation did occur since the level of work that was performed was inconsistent with what Corps representatives witnessed during the April 24, 2014 site visit. SCR felt that, per the Florida Fish and Wildlife Commission aquatic plant removal permit, they could remove up to three feet of material from the canals. Corps representatives noted conditions in the canal showed during the April 24, 2014 meeting did not show up to three feet of material. The decision not to require a Section 10 permit for the *Lyngbya* removal was based on a representative canal with sparse mats of *Lyngbya*. SCR staff agreed that any work not specifically covered by the May 1, 2014 letter had ceased and would not be performed again unless a Department of the Army permit was issued.

Corps staff and representatives from SCR visited the dewatering site after the meeting and a sample of the material SCR removed was taken by the Corps. The material witnessed at the dewatering site was comprised of *Lyngbya* and mineral deposits.

3. Pictures obtained from Citrus County and Save the Manatee:

REPRESENTATIVE MATERIAL REMOVED BY COUNTY CONTRACTORS



REPRESENTATIVE MATERIAL REMOVED BY SCR CONTRACTOR

4. Resolution:

The Corps concluded its investigation and resolved the Section 10 violation by letter dated June 16, 2015. The letter outlined the Corps' decision and informed SCR that any future proposed work in a Section 10 body of water would require a Department of the Army permit.

SHAUN E. GALLAGHER
Project Manager, Enforcement Section

Mr. BEYER. Thank you, Mr. Chairman. That includes a cease-and-desist order issued to the organization that was conducting the habitat work that clearly showed it was the organization's failure to seek a permit from the Army Corps of Engineers, rather than the ESA, that delayed the project.

Can you give us your perspective on this incident?

Mr. LI. Yes. Thank you for the question. Our Florida office actually worked specifically on this issue. And Save the Crystal Rivers did not have a Clean Water Act permit for the dredging. The original method of dredging also used this aquatic plant harvester, and that was very problematic, because it actually caused a lot of muck to be stirred up in the water column and increased the turbidity, which is not good for the aquatic life.

There are certainly better methods to carry out the restoration, including the use of filtration that reduces the sedimentation.

Mr. BEYER. Mr. Li, I have a long question for you based on Mr. Calkins' very thoughtful testimony. He offered a number of specific policy suggestions that I read as an attempt to balance these concerns about delays in projects with the overall intent of the Endangered Species Act. Let me just throw three of them at you, Mr. Li, for your response.

The first is that there are no consequences to the agency for failure to adhere to the statutory timeline, with a suggestion that there should be consequences. And to my friends on the panel, I suggest there might be consequences for failing to pass a budget on time, or appropriations bills, or other things.

The second piece is that it would require the consultation agency to follow the conclusions derived from the biological assessments. For example, there is a difference between what the Forest Service said and what the Fish and Wildlife Service said. And in cases where the consultation agency may not agree with the biological assessment findings, the consultation agency should be required to defend it through a peer panel.

And then third, that once a project's impacts have been assessed through the issuance of a NEPA document, an EIS, or an EA, or a biological opinion, that future assessments should only look at those specific items that were remanded or otherwise administratively modified, rather than opening up the entire thing again and starting the process all over.

How would you, from Defenders of Wildlife, answer those objections or those specific policy proposals? I mean what is wrong with them?

Mr. LI. Let me start with the second one on peer review. If folks are concerned about the length of consultations right now, you can

only imagine what a peer review process would do to increase that length. So, I am not sure that is going to actually further the objectives of the other witnesses here.

As far as future assessments and opening up those assessments, the bottom line is that, if you look at most reinitiations, it is not true that the entire consultation is opened up. The Fish and Wildlife Service certainly has better things to do than spend its time doing unnecessary analysis. What is actually re-evaluated is the newly-listed species or new critical habitat, as it is affected by whatever portion of the project, which may not be an entire project. And it is only those impacts that are typically evaluated.

As far as the first recommendation on the dates, there are, to some degree, consequences for exceeding the 135-day time frame. According to regulations there needs to be a mutual extension, and the Fish and Wildlife Service does not have in its self-interest dragging on consultations forever. It needs to move on to other things.

Mr. BEYER. OK. Well, thank you. Mr. Calkins, one of the other suggestions you had was reform of the Equal Access to Justice Act. On page 7, you talk specifically about excessive attorneys' fees and totally disconnected from the Act's original purposes.

I basically understand the work of most of the environmental agencies, like Defenders of Wildlife—the purpose of the lawsuits is very much connected to their agency's original purpose, which is to respect, defend, and protect those endangered species. How do you make the argument that their work is disconnected from the Act's original purposes?

Mr. CALKINS. I think it is the extreme. I mean we have had an example where, in order to settle a lawsuit, Ventura had to agree to $55 million to settle a lawsuit that was just dragging the decision on and on and on.

So, I think, even though you have heard that these are very rare examples, they happen over and over again. And the cost is prohibitive, and it really marginally goes to protecting the species, as far as I am concerned.

Mr. BEYER. Thank you. I yield back, Mr. Chair.

Mr. LABRADOR. Thank you. And now the Chair recognizes Miss González-Colón.

Miss GONZÁLEZ-COLÓN. Thank you, Mr. Chairman.

Mr. Li, in your testimony, you state, "From the time a Federal agency provided Fish and Wildlife Services with enough information to initiate a consultation, the medium duration of informal consultations was 13 days and formal consultations was 62 days." Does the relevant Service have the discretion to determine what constitutes as a satisfactory amount of information?

Mr. LI. I am sorry, I didn't hear the last part of your question because the door was opening and closing.

Miss GONZÁLEZ-COLÓN. Does the relevant Service have the discretion to determine what constitutes as a satisfactory amount of information?

Mr. LI. Yes. The Service has in its discretion the ability to determine how much information is presented in order to start a consultation. And that should be the right way things work. Because

every species is different, every project is a little bit different, and it is a case-by-case analysis.

Miss GONZÁLEZ-COLÓN. So, therefore, is it possible also that the Service can delay the triggering of the formal consultation timeline by continually asking for more information related to a project?

Mr. LI. If the initial information is not adequate to start a consultation, that can happen. But, by and large, those are outliers. Those are not representative of most consultations.

Miss GONZÁLEZ-COLÓN. That will be just discretional?

Mr. LI. I am sorry?

Miss GONZÁLEZ-COLÓN. That will be just discretional?

Mr. LI. Discretional to start the formal consultation? There is quite a bit of discretion there, correct.

Miss GONZÁLEZ-COLÓN. I yield back.

Mr. LABRADOR. Thank you. And now the Chair recognizes Ms. Tsongas.

Ms. TSONGAS. Thank you, Mr. Chairman, and thank you for allowing me to join this Subcommittee for this hearing. I appreciate it.

I believe the Endangered Species Act—and this is why I asked to be here today—has served as one of our Nation's bedrock environmental statutes for over 40 years. The bald eagle, the brown pelican, and the grizzly bear are just a few examples of iconic species that have survived, thanks to protections provided by this law, and whose survival is greatly appreciated and deeply valued by Americans across this country.

Instead of working to erode this law, I believe Congress should be doing more to give the Fish and Wildlife Service and the National Marine Fisheries Service more tools in the toolbox to not only complete Section 7 consultations as efficiently as possible, but enable them to work proactively with states and local stakeholders to prevent species from needing to be listed in the first place.

This brings me to my first question for you, Mr. Li. Who is first and foremost in charge of wildlife management, the Federal Government or the states?

Mr. LI. It would be the states.

Ms. TSONGAS. So, the states have the flexibility to manage wildlife populations as they see fit, according to their own goals and priorities. What species are typically given top priority by state wildlife agencies?

Mr. LI. Typically, what we see across the board are game species.

Ms. TSONGAS. Why would that be?

Mr. LI. It is oftentimes because funding for those state agencies comes from revenues for fishing and hunting.

Ms. TSONGAS. So, they encourage the revenue, the hunting for revenue.

So, as states are taking a lead role on wildlife management and choosing where to allocate their resources, what circumstances would trigger protections provided by the Endangered Species Act—in other words, invoking Federal legislation?

Mr. LI. The ESA only needs to step in when control of a species under state management is to the point where the species is at risk of going extinct, right? When the species meets the definition of a threatened or endangered species.

Ms. TSONGAS. And what are the factors you would consider?

Mr. LI. Factors include pollution, habitat loss and fragmentation, invasive species, a whole series of human and natural activities.

Ms. TSONGAS. So, would you categorize the Endangered Species Act as a law that is only used in emergency situations, as you describe? A last resort to protect species from going extinct, as opposed to one that is routinely invoked to just create problems?

Mr. LI. Absolutely. It is the last safety net for species that are going to blink out.

And there is also quite a bit of effort under the Endangered Species Act to incentivize states to do more to conserve at-risk species, so that those species do not need to be listed under the ESA. Defenders of Wildlife emphatically supports that approach.

Ms. TSONGAS. Well, I thank you for those responses, because it seems clear to me that, instead of eroding the Endangered Species Act and increasing the likelihood of species going extinct—and we all know, once gone, we don't know what we have lost if we can't see them—we should be doing all we can to prevent species from needing emergency protections in the first place.

And we have examples of this approach successfully working. The most well-known example is a collaboration between 11 western states and local stakeholders to protect the greater sage-grouse. And in New England, where I come from, we saw a similar successful conservation effort for another iconic species, the New England Cottontail, especially relevant as we come close to Easter.

The Fish and Wildlife Service worked together with the states, local communities, foresters, conservationists, private landowners, and other key stakeholders to prevent the New England cottontail from being listed under the ESA. Those on-the-ground partnerships created a strategy that responsibly balances conservation of the species and its habitat with the needs of people whose economic livelihoods depend on healthy New England forests. So, we know we have models that have really been win-wins, all around.

Then, Mr. Li, I would like to ask another question. As we know, Section 7 reviews ensure that the Federal Government fully understands the impacts of a specific project on a threatened or endangered species, a "look-before-you-leap requirement." How could landscape-level conservation planning and early stakeholder engagement improve the Section 7 review process in the event that a species is put on the endangered species list?

Mr. LI. Well, landscape-scale conservation allows conservation to be carried out more efficiently, which is something I think is of great interest to everyone in this room today, by looking at the impacts across the entire landscape, and strategically placing mitigation in areas that further recovery.

As far as additional collaboration with stakeholders, stakeholders could actually adopt better conservation measures at the start of a consultation, so that the consultation is easier and more streamlined.

Ms. TSONGAS. Thank you and I appreciate your testimony. I yield back.

Mr. LABRADOR. Thank you, and I recognize Mr. Clay for 5 minutes.

Mr. CLAY. Thank you, Mr. Chair. Let me start with a statement and say to the general public and those viewers who are watching us on CSPAN, we are headed down a slippery slope here. If the intent is to tinker around the edges of the Endangered Species Act or to try to attempt to destroy it, to attempt to destroy a law that has worked for years is dangerous, and you need to be exposed for what you are trying to do to our country and the environment, and should be ashamed of yourself.

Let me share. In some of the testimony I have heard, you at the table should be ashamed of yourselves, too. Let me share with you what the Ranking Member has written about the Endangered Species Act. By any reasonable measure, the ESA has been a remarkable success. The law has prevented the extinction of more than 99 percent of the plants and animals that have received this protection. Few laws in American history have so thoroughly achieved their goals.

Nor has the law stifled economic growth, as its detractors claim. Since it was enacted in 1973, the U.S. economy has more than tripled in size, from just over $5 trillion to more than $16 trillion in GDP.

He also goes on to say—and this kind of blows your theories out of the water—that, rather than drawing obvious conclusions, that species recovery takes time, especially when unsustainable development has wiped out wildlife habitats like old-growth forests, wetlands, and native prairie.

And he said weakening the ESA would allow for sensitive wildlife habitats to be open to mining, oil, and gas drilling, and commercial logging, activities that Republican orthodoxy supports, regardless of the cost to the environment and the millions of Americans who enjoy wildlife-watching and outdoor activities in our public lands.

Mr. Li, in reading through today's testimony I am having trouble identifying whether opponents of the ESA want new information that comes to light during a consultation to be included or excluded from an active consultation and permitting process. In your opinion, is there value in incorporating new information regarding a species' critical habitat or anything else into an active consultation process?

Mr. LI. Absolutely. First off, the Endangered Species Act requires the best available science be used. And if best available science is new science, then that should be used.

More importantly, species—threats change over time. Species' biology change over time. Their status changes over time. And why would we not want to use the best science available to conserve species in the most efficient manner possible?

Mr. CLAY. So, those who want to erode the effectiveness of the ESA are really—I guess we would call them science deniers?

Mr. LI. That is one way to put it.

Mr. CLAY. OK. And dealing with an alternative reality or alternative fact. Is that it?

Mr. LI. That is right.

Mr. CLAY. OK. Do the impacts of climate change increase or decrease the value of examining new information during the consultation process?

Mr. LI. They increase it overall. That is because more and more species are being imperiled by climate change. Climate change is a bigger impediment to species recovery, so it absolutely is a vital consideration in permitting.

Mr. CLAY. Thank you. And Mr. Wood's written testimony states that the Cottonwood decision requires the Forest Service to redo all of its comprehensive programmatic consultation, complicating all timber projects related to it. Could you please elaborate? Is it as complicating as the witness would lead us to believe?

[No response.]

Mr. CLAY. It is to Mr. Li.

Mr. LABRADOR. Your time has expired.

Mr. CLAY. Oh.

Mr. LABRADOR. Yes. Thank you very much. I turn the time over to Mr. Bishop now.

The CHAIRMAN. But it was fun while it lasted. I want to thank you all for having the courage to be here and to say that there is a problem that we need to address in some way.

Let me try and go through these questions as quickly as I possibly can.

Mr. Stiles, let me do this very quickly. In your opinion, do organizations that are philosophically opposed to energy development use litigation as an offensive weapon sometimes to prolong the process for projects?

Mr. STILES. Absolutely.

The CHAIRMAN. So, do you think, in your situation, has the agency reinitiated consultation due to either litigation or fear of litigation?

Mr. STILES. Absolutely.

The CHAIRMAN. All right. Let me hit on something Mr. Johnson came up with very quickly. Defenders of Wildlife have done 300 lawsuits since ESA was reauthorized. You did 18 in 2015.

So, Mr. Wood, in the Equal Access to Justice Act, attorneys' fees are capped at $125 an hour. However, attorneys' fees and lawsuits initiated by organizations such as Defenders of Wildlife are not subject to those caps. Is that correct?

Mr. WOOD. That is my understanding.

The CHAIRMAN. And Mr. Johnson also said that costs the government $21 million in fees that have been paid, which also may be inaccurate, since the Department of the Interior does not have the mechanisms to track that kind of information of what is actually paid. That $21 million goes to attorneys, rather than going to the goal of conservation.

So, Mr. Wood, in your opinion, is the profit that is gained through attorneys' fees a driving mechanism behind environmental organizations that initiate lawsuits?

Mr. WOOD. Yes, the profit motive is an unfortunate incentive for more and more litigation.

The CHAIRMAN. All right. Well, let's go to this. Mr. Li's paper—when he came up with 13 days and 62 days, that was the median, the mean. It was not an average. You said medium, correct? All right.

So, here is the problem in the paper of Mr. Li's. Even though that may be the medium, we found that there were 606 formal

consultations that lasted twice the statutory 135 days, 110 formal consultations that lasted more than 2 years, 58 formal consultations that lasted between 1,000 and 4,000 days, 213 informal consultations that lasted longer than 2 years. And that figure is magnified by project postponements that go through the informal consultation and then formal consultation, not to mention the pre-consultation.

In fact, that is one of the things that is so maddening, sitting up here, is to realize you have pre-consultation, and then informal consultation, and then formal consultation, and then litigation that will drag things out for years after years after years.

Mr. Wood, do you find those statistics in the study surprising, that the consultation process takes this long?

Mr. WOOD. Not at all, and it is unfortunate that the study omits the pre-consultation period.

The CHAIRMAN. Which drastically skews the results of those.

Mr. Wood, I have one other question I can ask you. Can you just clarify the burdens that consultation places upon emergency actions such as those at the Oroville Dam?

Mr. WOOD. I think it makes it more likely that you will see emergencies like that, because someone who wants to repair or upgrade a dam might put that off because they realize the process is going to be more expensive and take longer than it should.

The CHAIRMAN. I just want to—I have like a minute left here—just give one concept here. There were some things about state management of species which I felt were unfortunate. Because if I go back to the most recent species that was initiated in my state, each state was told they were supposed to come up with a management plan that was then rejected by the Department of the Interior after those management plans were invented.

Those state plans solved the problem, and yet were denied the ability of going into place, except for one state. And that is a sad situation, which the Federal Government seems to pre-empt and think that only somebody here in Washington has the intellectual ability to come up with a management plan, and states cannot do it, and states do not care. That is wrong, that is inaccurate, that is simply an unfair statement to go on there, especially when we are talking about this bedrock Act.

Not even the Flintstones like this bedrock Act, but it is still there, nonetheless.

I appreciate the witnesses being here. This is a significant issue. One of the issues I want to address this year is really talking about what consultation is. It is in the law, it has to be done, but no one has really defined it. And, therefore, the agencies are all over the board on how they define it, how they work with it, what is the result of that. This is something that needs a clear definition so we can actually find out when that clock needs to start ticking, and who actually gets to consult, and in what manner those consultations need to be addressed and considered by the Federal agencies going in there. And with that, I appreciate you all being here.

I don't think we probably have enough time for a second round of questions, but I thank you for holding this hearing. I think it is a significant one, and I will yield back.

Mr. LABRADOR. Thank you, Mr. Chairman. And I thank the witnesses for their testimony today and the Members for their questions.

Development of our infrastructure and resources is critical to the health, safety, economic growth, and stability of our Nation. As we turn our attention in the coming months to examining our infrastructure and resource needs, we must address the unnecessary regulatory burdens and delays that will impact any projects we choose to undertake.

I have found interesting some of the comments from some of the Members today. Apparently the GDP grew over the last 25 years because of the ESA, not in spite of the ESA.

[Laughter.]

Mr. CLAY. That is not what I said.

Mr. LABRADOR. But that is the conclusion that one can lead to.

The examples we heard today are representative of thousands more critical projects that are mired in years of bureaucratic delays and litigation. We know that between 2008 and 2016 almost 600 formal consultations with the Fish and Wildlife Service lasted twice the statutory 135 days, over 100 formal consultations lasted more than 2 years, and over 50 lasted more than 1,000 days. We also know that 70 percent of National Marine Fisheries Service consultations are not completed in a timely fashion. And none of these egregious statistics include the years and years of informal consultation that these projects have to undergo, nor do they represent the years of litigation that can serve to further delay a project.

Delay and uncertainty in the case of the Endangered Species Act consultations can jeopardize human health and safety, harm our economy, and prevent good stewardship of the very species we are trying to conserve. The Services must strive to increase consistency between regions, adhere to timelines, and hold their employees accountable for completing consultations in an efficient, timely, and effective manner.

I now ask unanimous consent that the following document be entered into the hearing record: a letter to Chairman Bishop from the Williamson County Conservation Foundation in Texas.

[The information follows:]

WILLIAMSON COUNTY CONSERVATION FOUNDATION,
LEANDER, TEXAS

March 27, 2017

Hon. ROB BISHOP, *Chairman*,
House Committee on Natural Resources,
Subcommittee on Oversight and Investigations,
1324 Longworth House Office Building,
Washington, DC 20515.

Dear Chairman Bishop:

Thank you for this opportunity to provide comments to the Natural Resources Subcommittee on Oversight and Investigations. We hope to provide some locally based insights on how critical infrastructure projects often face delay, uncertainty, and significant cost increases due to the inefficiencies of complying with the Endangered Species Act (ESA). We also have included some suggestions for program improvements for the ESA and implementation by the U.S. Fish and Wildlife Service (USFWS).

Williamson County in central Texas has for over a decade been one of the top 10 fastest growing counties in the nation. Because of its location in an ecologically rich part of the state, as well as its close proximity to the city of Austin, the County must often deal with the important task of balancing environmental quality—including preservation of species listed under the ESA—with the needs of a rapidly growing population and accompanying economic development. Approximately two decades ago, the County began negotiations with USFWS that culminated in USFWS' issuance of a County-wide incidental take permit (Permit) and approval of the County's Habitat Conservation Plan (HCP) under the ESA. The Permit was issued in 2008, and for some projects, use of the permit and HCP has been successful. The HCP has, in many circumstances, allowed the County and its citizens to move forward in providing infrastructure and other necessities to the community, while also protecting over 900 acres of habitat for five listed species. Moreover, pursuant to its obligations under the Permit and HCP, the County is contributing to the scientific community's understanding of an elusive and newly listed salamander species. However, even with the permit and HCP in place, the County has encountered significant inefficiencies, delays, and inconsistent direction from USFWS in obtaining clearance for critical infrastructure projects.

Our proactive and hands on approach to dealing with the endangered species in the area has given us unique insight into some of the challenges and obstacles presented by the current application of the ESA by the USFWS. These comments focus specifically on administrative and legislative improvements we believe could save money and time for both USFWS as well as the regulated entities.

STUMBLING BLOCKS

Most of the inefficiencies, delays, and cost escalations Williamson County has faced in complying with the ESA fall into one (or more) of the following categories: (1) uncoordinated and unlimited project review by multiple federal agencies; (2) failure of federal agency(ies) to follow existing statutory deadlines or lack of deadlines for review; (3) USFWS policies, guidance, and protocols can change while project is under review; (4) projects with a federal nexus are not permitted to receive coverage under the Permit and HCP, which creates long delays and increases costs for all parties.

(1) Uncoordinated project review by federal agencies

One common roadblock experienced by the County is the lack of coordinated, concurrent federal agency review for roads and other projects. Under Section 7 of the ESA, any project authorized, carried out or funded by a federal agency that "may affect" listed species or habitat designated by USFWS as critical must undergo consultation between USFWS and the relevant "action agency" [e.g., U.S. Army Corps of Engineers (Corps) or Federal Highway Administration (FHWA)]. Consultation generally means a back-and-forth between, for example, the Corps and the USFWS, requiring submission of a biological assessment by the action agency, the Corps, which then receives comments by USFWS, and then additional revisions by the Corps, in a seemingly never-ending cycle until the issues ultimately are resolved and USFWS issues a biological opinion. While the ESA prescribes deadlines for some aspects of consultation, often, these deadlines are missed or the action agency and USFWS delay initiation of the formal process that begins the clock. This process is complicated further when multiple federal agencies are involved in a project (e.g., a road project is funded fully or partially with federal funds, and also requires a Clean Water Act section 404 authorization). All the while, the County must wait until this consultation process is complete.

The problem can be simply stated in the following way: uncoordinated Federal agency reviews with no or unenforced deadlines create unnecessary consultation delays and indeterminate time frames for decisions. These delays create extra costs, not just for the regulated entity or project, but unnecessarily cause inefficiencies of both personnel and budget for the Federal agencies.

(2) Lack of deadlines or adherence to deadlines

While section 7 of the ESA contains mandatory deadlines for completion of various aspects of the consultation process, these timeframes are often not met and consultations frequently drag on long past the expiration of the deadline prescribed by ESA section 7. Some statutory and regulatory frameworks do not have deadlines at all.

(3) USFWS changes the rules during the game

While the ESA, its regulations, and relevant case law are relatively clear, USFWS operates largely on its own guidance and policies, which may be changed without public notice or comment and which can have a significant impact on communities. For example, several of the species listed in Williamson County are karst invertebrate species. At the beginning of a transportation improvement project on IH 35 in our County, USFWS karst survey protocol required three inspections of the cave to check for species. After construction on the project had begun, this policy was revised to 14 inspections without input by the affected public and despite the existence of its HCP. Williamson County must nevertheless comply with this burdensome new policy in order to remain in compliance. The County had construction crews on site when this change occurred, resulting in the County having to pay hundreds of thousands of dollars in delay damages to the construction company and costs for the additional biological surveys.

(4) Projects with a federal nexus are not permitted to utilize the permit and HCP

When Williamson County was in negotiations with USFWS regarding the details of its Permit and HCP, there was an understanding among the parties that projects with a federal nexus would be able to use the County's HCP so that the consultation process would be streamlined significantly. This made sense, because the County's HCP is based on USFWS' own recovery standards for the certain species covered. Moreover, other USFWS offices in both southern and northern California have embraced this model. Nevertheless, the USFWS office that oversees the Williamson County's Permit and HCP has been unwilling to allow projects subject to ESA section 7 to use the HCP, even though participation in the HCP would, in most cases, benefit the relevant species to a greater degree than not participating. Neither the species nor the County's citizens benefit from this position. The species receives less conservation than it would if the "federal" project could participate in the HCP, while the project is subjected to months or years of delay, increased costs, or abandonment. This result is absurd.

Two road projects in Williamson County were particularly affected by one or more of the stumbling blocks described above. US Highway 195 is a major transportation corridor providing a logistical link for the U.S. Army's Fort Hood to coastal port facilities, and is a major regional link for private and commercial ground transportation. Despite the existence of the County-wide HCP that would have made compliance with the ESA a simple process encompassing a matter of weeks, interagency consultation on improvements to this road was complex. This resulted in the need to set aside two additional cave preserve areas at a direct cost of $1.8 million and caused the County to incur many millions of dollars in costs due to delays, redesign, reevaluation and consultation. Increased construction costs were incurred over the approximate ten-year period while obtaining environmental clearance and during this time there were numerous car crashes, many involving soldiers from nearby Ft. Hood, including several fatalities.

Likewise, US Highway 183 is a multi-state, regional and local transportation artery that was being widened. The project involved no environmentally sensitive areas and replaced an existing bridge over a river. The time to complete the consultations should have taken no more than six months. The Federal Agency "ping pong" and associated delays with multiple ESA section 7 consultations on various portions of this highway drug this project on for three and one half years, resulting in increased of right-of-way costs, rising from $10 million to $37 million. A cost borne completely by the local tax payers.

Clearly this brief commentary cannot provide all the details and travails of these two projects, but are a few examples of the inefficiencies caused by the administration of the ESA.

POTENTIAL SOLUTIONS

In short form here is our local perspective on solutions and remedies:

- Require review deadlines and concurrent reviews by Federal Agencies. For instance a "scoping" meeting provision for all agencies and stakeholders which would determine the level of environmental review and establish deadlines.
- Projects should be "entitled" upon Federal notification and submission, subject to rules and policies in place at the time negotiations begin unless jointly agreed for cost and efficiency.
- Allow regional incidental take permits and HCP's to be utilized for projects regardless of the source of funding or the agencies involved.

- Allow portions of the incidental take permits and HCPs to be amended without opening the entire HCP and Permit for review and revision, particularly when the level of species conservation and level of impacts authorized do not change significantly. This would prevent the need for additional NEPA process and the risk of opening up existing permits and HCP's to a new round of third party litigation.

Again, thank you for this opportunity to provide you and the subcommittee brief examples of our experiences with the ESA and our suggestions for improvement. We have enclosed additional suggestions which were provided by Williamson County to Members of Congress, and their staff persons, as well as to and committee staff in meetings we held with them last week while we were in Washington D.C. We stand ready to provide additional information, data, and suggestions pertinent to your deliberations and decision making.

Respectfully,

COMMISSIONER VALERIE COVEY,
President.

COMMISSIONER CYNTHIA LONG,
Vice President.

Enclosure

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Regulatory Reform Relating to Federal Agency Environmental Review and Approval Process

And comprising

Legislative and Administrative Topics

for

Department of Interior and US Fish and Wildlife Service

Williamson County, Texas and the Williamson County Conservation Foundation

March, 2017

Administrative

1. ENDANGERED SPECIES ACT SECTION 7

The ESA section 7 process should be simplified. First, where a U.S. Fish and Wildlife Service-approved (the "Service") Habitat Conservation Plan ("HCP") covers the project (or project area) nominally subject to a section 7 consultation, the consultation should be truly and significantly streamlined. The Service would already have conducted a jeopardy analysis when it considered whether to issue the Incidental Take Permit (ITP) in the first place. [Scope of review issue: *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31 (D.C. Cir. 2015)]

Secondly, there currently exists a disconnect between the scope of review the Service undertakes for linear projects and that undertaken by the U.S. Army Corps of Engineers. At present, even where the Corps takes narrow jurisdiction over a linear project (e.g., a single and discrete crossing of a wetland or stream). the Service

often assumes a much broader jurisdiction (e.g., the entire roadway or pipeline). The result is often that the Service's consultation involves analyzing the effects of the entire linear project on the relevant species, but the incidental take statement (i.e., the ITP) issued by the Service only covers the discrete crossing over which the Corps has taken jurisdiction. This causes situations where a project proponent cannot move forward because take authorization is needed for the areas outside Corps jurisdiction and the ITP application and approval process is moving at a snail's pace. In summary, there should be no overreach by the Service, and the Service and Corps should be required to conduct congruent reviews so that issues may be identified early in the review process and to ensure that statutory deadlines prescribed by the ESA are met. (Similar situations for section 7 are encountered with other federal agencies.)

2. CONCURRENT REVIEW

Require concurrent review process among all relevant agencies. Like the problem in number 1, above, projects are often delayed because there are multiple agencies—federal and state—that must review the project under various statutory schemes. These agencies are not required to conduct their reviews concurrently and, frequently, do not have any hard deadlines to complete such a review. Requiring all federal reviewing agencies to coordinate and establish a concurrent review process and schedule during the planning stage of the project, with hard, time limited deliverables, would increase efficiency among all agencies and provide the regulated community much-needed certainty. Further, reviewing agencies should be provided one opportunity for review and comment; rather than a never-ending loop of multiple reviews, drafts, and deliverables.

3. CRITICAL HABITAT RULES

Reconsider the critical habitat rules and policy adopted in the last administration and revert rules consistent with existing caselaw. The use of critical habitat designations, particularly where HCPs are in effect doing little or nothing to affect conservation of a species, only further complicate the considerations regarding federalized projects. (See also the sections on simplifying the Section 7 process and on implementing a concurrent review process.) Much of this could be accomplished as part of a settlement of the 20-state lawsuit pending in Alabama. The current rules work to increase the likelihood that the Service will designate as critical habitat areas currently unoccupied by the species, as well as areas that are only infrequently or sporadically used. The newest policy also establishes various requirements an existing habitat conservation plan must satisfy for the plan area to qualify for an exclusion from critical habitat designation, as well as factors that the Service will consider when making the threshold determination of whether to engage in an impact analysis at all. Finally, recent guidelines for inclusion of climate change considerations introduce specious and unquantifiable discussions. Climate change models are in themselves subject to continuing scientific debate, conjecture and adjustments and should not be the basis for additionally compounding critical habitat or mitigation and conservation guidelines. [Rules: 50 C.F.R. 424 (available at 81 Fed. Reg. 7413–40 (Feb. 11, 2016)); and 50 C.F.R. 402.02 (81 Fed. Reg. 7214–26 (Feb. 11, 2016)). Policy: Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, 81 Fed. Reg. 7226 (Feb. 11, 2016). Lawsuit: *State of Alabama, et al. v. National Marine Fisheries Service*, Civ. Action No. 16–593, Case 1: 16–cv–00593–N (S.D. Ala. Nov. 29, 2016)]

4. NO SURPRISES RULE

Clarify "No Surprises" rule in administrative guidelines. Provide Guidance and amend "No Surprises" rule to provide that amendments to one aspect of an HCP (e.g., addition of one species to the list of "covered species") do not re-open the entire HCP for review by the Service or to challenge by a third party. The rule should further be amended to make clear that when an HCP is amended such that the amendment provides additional benefit to a species or no changes to the plan goals (e.g., set-asides, preserve acquisition), the HCP will not be re-opened. [50 C.F.R. 17.22(b).] As it is, fully active and effective HCPs are reticent to suggest even species positive actions due to uncertainty of Service proposals to modify the existing plan. See also this topic under the Legislative section.

5. FEDERAL HIGHWAY ADMINISTRATION POLICY

Repeal or Amend Federal Highway Administration (FHWA) policy requiring that NEPA documents comply with Metropolitan Transportation Plan and Transportation Improvement Program or State Transportation Improvement Program, as applicable. The effect of this policy is that the final NEPA decision cannot occur unless the project scope, limits, and cost correspond with the Metropolitan Transportation Plan and Transportation Improvement Program or, as applicable, the Statewide Transportation Improvement Program. If the NEPA document is not consistent with these plans, then the plans must be amended—a process that can take months to complete. Throughout the development of any given project, it is common that the scope, limits and estimated cost change. This confines deliberations on projects to and unwarranted extent. For example, an engineering and traffic needs assessment might warrant additional lanes or modified interchanges. While these changes sometimes are captured in regular updates of the plans, where a change is late in the process, the final NEPA decision must be postponed until the requisite plans are updated. No statute or regulation ties compliance with transportation requirements to the environmental review process established by NEPA. This policy is contrary to the agency's own rules and needlessly delays environmental approvals. FHWA should rescind the January 28, 2008 policy memo and decouple the NEPA review process from the requirements in the transportation process. [FHWA's NEPA regulations: 23 C.F.R. pt. 771; Council on Environmental Quality's NEPA regulations: 40 C.F.R. pts. 1500–1508; FHWA Policy regarding transportation planning and NEPA review: https://www.fhwa.dot.gov/planning/tpr_and_nepa/]

6. DELISTING PROCESS AND LISTING IN ERROR

Streamline and prioritize delisting petition process and adopt a reasonable definition of "listing in error." At present, the Service is operating under deadlines to list and delist species established by settlement agreements in various cases brought by environmental groups well-versed in "sue and settle" tactics. Going forward, the Service should develop and put forward for public review and comment a policy that would prioritize certain species for delisting, particularly those that may have been listed in error. For example, the Service could establish a formula whereby a species whose known locations increase by a certain percentage over the number of locations known at the time of listing would automatically be placed in the front of the line for delisting actions.

Further, the Service should propose and adopt, through the required public notice and comment procedures, a clear, reasonable, and concise definition of what it means for a species to be "listed in error." Current regulations explain that delisting may be appropriate where "[s]ubsequent investigations may show that the best scientific or commercial data available when the species was listed, or the interpretation of such data, were in error." 50 C.F.R. 424.11(d)(3). Where a party has petitioned the Service to delist a species, the ESA requires that the petition presents "substantial scientific or commercial information indicating that the petitioned action may be warranted" in order for the Service to reach positive 90-day and 12-month findings on the petition. Service regulations finalized in 2016 revised the definition of the "substantial information" standard and, significantly, now require that the "substantial information" standard be applied "in light of any prior reviews or findings" the Service has made regarding a species' status (e.g., 5-year status reviews and species' recovery plans). The same regulations indicate:

> [w]here the prior review resulted in a final agency action, a petitioned action generally would not be considered to present substantial scientific and commercial information indicating that the action may be warranted unless the petition provides new information not previously considered.

50 C.F.R. §§ 424.14(h)(1)(i),(ii).

The Service should revise the delisting petition regulations to require delisting of a species on any "substantial scientific and commercial information" regardless of whether the Service previously has reviewed that information in a different context (e.g., 5-year status review or species' recovery plan). [ESA provisions regarding petitions: 16 U.S.C. § 1533(b)(3); General delisting regulation found at 50 C.F.R. 424.11(d)(3); Delisting petition regulations found at 50 C.F.R. §§ 424.14(h)(1)(i),(ii).]

7. CONSISTENCY

Consistent application of law, regulation, and policy among Service offices. Currently, the Service operates in eight relatively disjunctive regions with each region having numerous field offices. Within the field offices, there is often little oversight given to individual staff persons responsible for reviewing applications for ITPs, draft HCPs, and consultation-related documents. Thus, ESA permitting and approval processes often vary widely among the various Service offices. Because of this, the regulated community operates with significant uncertainty as to how a given project might be treated by the Service. Providing more direction from Service headquarters—provided such direction is submitted for public review and comment—could give both Service staff and the regulated community much-needed stability, predictability, and accountability.

8. MITIGATION POLICY

Withdraw and reconsider the various recently adopted mitigation policies, including particularly the compensatory mitigation policy focused on Endangered Species Act. The prior policies focused on mitigation to the maximum extent possible. Recently adopted rules greatly complicated the process by trying to follow wetlands-style minimization of impacts and mitigation based on the remaining, possible habitat areas. In general, these rules were overbroad and would likely increase the burden on those required to provide mitigation under the Endangered Species Act ("ESA"). Additionally, the rules could be interpreted to require mitigation under the Migratory Bird Treaty Act and other statutes which do not, themselves, require mitigation for impacts to relevant resources. [Final Endangered Species Act Compensatory Mitigation Act Policy, 81 Fed. Reg. 95316 (Dec. 27, 2016). Overarching mitigation policy, U.S. Fish and Wildlife Service Mitigation Policy, 81 Fed. Reg. 83440 (Nov. 21, 2016)]

9. USE OF SOLICITORS

Solicitors should be involved early in project planning and as part of the concurrent review process. The Service should make clear to its field office and regional staff persons that solicitors are there to advise the Service on legal matters—including whether a habitat conservation plan satisfies the criteria established by ESA section 10 or whether an action is "likely to adversely affect" a species that is the subject of ESA section 7 consultation. If a concurrent review process is established among relevant agencies (see number 2, above), involving Service solicitors at that stage would be extremely beneficial.

10. MITIGATION GUIDANCE

Provide guidance and training on the Constitutional limits on mitigation asks. Service requests for mitigation under the ESA and other statutes are subject to the Constitutional limits on takings of private property and the limitation on "exactions"—preconditions to an agency's approval—as explained in a series of rulings by the Supreme Court. The Service should, in consultation with its attorneys, develop and put forth for public review and comment, guidance for its staff that explains the Constitutional limitations on requests or demands for mitigation, as elucidated by the Supreme Court. [U.S. Constitution, Amendment V; *Koontz v. St. John's River Management District*, 133 S. Ct. 2586 (2014); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).]

11. HABITAT CONSERVATION PLANNING HANDBOOK

Initiate a rewrite of the new Habitat Conservation Planning Handbook ("HCP Handbook"). Among the many points to be made is that it should be clear that amendment of one aspect of an HCP does not open the entire HCP to reconsideration under whatever are deemed to be current standards. Additionally, and much like the mitigation policies referenced in number 10, above, the revised HCP Handbook makes an incidental take permit ("ITP") application and approval process exceedingly complex and potentially costly, particularly with respect to the mitigation requirements set forth therein (and coupled with those laid out in the Service's mitigation policies). [Joint U.S. Fish and Wildlife Service and National Marine Fisheries Service Habitat Conservation Planning Handbook, 81 Fed. Reg. 93702 (Dec. 21, 2016)]

Legislative

1. SECTION 7 CONSULTATION

Revise ESA section 7 to streamline the consultation process for activities already covered by a Service-approved HCP. Section 7 should be amended to require that where a Service-approved HCP covers the project subject to section 7 consultation, the Service must consider and adhere to the consultation that has already taken place pursuant to the Service's intra-agency section 7 consultation associated with issuance of the existing incidental take permit (ITP). This is appropriate because, absent listing of a new species or designation of new critical habitat since the time of the ITP issuance, the Service would already have considered the project's potential effects on listed species and critical habitat. [ESA consultation provisions: 16 U.S.C. 1536; ESA ITP provisions: 16 U.S.C. 1539.]

2. CONCURRENT REVIEW

Codify a concurrent review process requirement for agencies dealing with environmental clearance. Projects are often delayed because there are multiple agencies—federal and state—that must review the project under various statutory schemes. These agencies are not required to conduct their reviews concurrently and, frequently, do not have any hard deadlines to complete such a review. Requiring all federal reviewing agencies to coordinate and establish early on for the project a review process and schedule, with hard, time limited deliverables, would increase efficiency among all agencies and provide the regulated community much-needed certainty. Further, reviewing agencies should be provided one opportunity for review and comment; rather than a never-ending loop of multiple reviews, drafts, and deliverables.

3. CRITICAL HABITAT

Codify a more reasoned interpretation of critical habitat or repeal the concept of critical habitat. Provisions concerning exclusions from critical habitat should be strengthened. For example, the Service currently has discretion to include areas in a critical habitat designation even where the Service's required cost-benefit analysis indicates the cost of inclusion is greater than the benefit derived. Requiring the Service to exclude such areas would remove unnecessary discretion in making the decision. The need for revision to the critical habitat provisions of the ESA is particularly relevant given the recent Fifth Circuit decision to deny a rehearing of the dusky gopher frog critical habitat case. There, the Service designated as critical habitat areas currently unoccupied by the frog that also were not shown as likely to be habitable in the foreseeable future. [16 U.S.C. 1533(b)(2); *Markle Interests, L.L.C. v. U.S. Fish and Wildlife Service*, No. 14–31008 (5th Cir. June 30, 2016).]

4. SCIENTIFIC STUDIES, PEER REVIEW AND STATISTICAL TRANSPARENCY

ESA should be amended to include a definition of "best available science." 16 U.S.C. 1532. This definition should require use of reliable, peer-reviewed data and models and should account for known or potential sources of error. The accumulation and evaluation of any such information should be achieved through means that are transparent, replicable, using data sets that are publicly available, (to the extent required by law, especially for publicly funded research) and should not contain a requirement that it err on the side of the species. This point is especially important with respect to considerations of climate change in listing, delisting or down-listing, and critical habitat decisions, as well as in the Service's review of incidental take permits under ESA section 10, biological assessments under ESA section 7, and proposals for mitigation actions.

5. LITIGATION REFORM, MAINTAINING STATUTORY PRINCIPLES

Address "sue and settle" litigation under ESA section 11. ESA section 11 should be amended to eliminate the potential for recovery of legal fees, which would vastly reduce the number of organizations who make a lucrative practice of suing the Service and collecting legal fees when the Service is unable to meet its statutorily-imposed deadlines. Section 11 should also be amended to make the Service's lack of funding a defense to litigation brought because the Service failed to meet its statutory deadline. [16 U.S.C. 1540.]

6. NO SURPRISES RULE

Codify no surprises rule. [50 C.F.R. 17.22(b)]. Codifying the "no surprises" rule would make it much harder for any given administration to dispense with the no surprises requirement. At present, the Service may modify the rule by going through the public rulemaking process. If the "no surprises" rule were codified, changing or dispensing with the rule would take an act of Congress. This is directly related to the Administrative item #4. At present the Service maintains a discretionary role which was likely not a part of the original (1973) ESA considerations.

7. LISTING CHANGES BY RULE OR GUIDANCE

No technical listings or listing changes on taxonomic revisions. The Service should always be required to conduct a full-scale determination as to whether a species should be listed, even where a species is being taxonomically split from one species into two (or more). With respect to taxonomic revisions, the Service often accepts a taxonomic split for a given species and then indicates which of the species will be recognized as a listed entity. There appears to be no basis in law allowing the Service to treat species listings in this manner. For example, in 2012, the Service published in the Federal Register a proposed rule to accept a taxonomic split of the western snowy plover into three distinct species and to recognize as the listed entity one of the three species. The Service also proposed in that Federal Register notice to revise critical habitat for the species. While there was significant space dedicated to examining the proposed critical habitat designation, there was almost no discussion of the taxonomic revision. Likewise, in 1993, the Service made a taxonomic revision to a listed karst invertebrate species, *Texella reddell*; (also known as the Bee Creek Cave harvestman). Pursuant to the taxonomic revisions, the Bee Creek Cave harvestman became two listed species—the Bee Creek Cave harvestman and the Bone Cave harvestman (*Texella reyesi*)—and the Service conducted no additional analysis as to whether the "new" species met the standards for listing in the first place. [Western snowy plover proposed rule: 77 Fed. Reg. 2243 (Feb. 16, 2012); Bee Creek Cave harvestman final rule: 56 Fed. Reg. 43818 (Aug. 18, 1993).]

8. SUNSET PROVISIONS

Include sunset provision for listings. Many species have been listed without sufficient science indicating that they meet the requirements set forth in ESA section 4. Perhaps the best example of this circumstance is the Bone Cave harvestman in central Texas—a species that was known from only a handful of caves at the time it was listed, but is now found in nearly 200. The Service is currently reviewing a petition to delist this species based on the claim that it was listed in error, and a 90-day finding is due at the end of March 2017. A sunset provision in section 4 could require that species are automatically removed from the list of threatened and endangered species after a time certain (e.g., 20 years), but could go back through the relisting process if the best available science at that time supported relisting. [16 U.S.C. 1533; List of threatened and endangered species: 50 C.F.R. 17.11 and 17.12.)

9. STATE AND LOCAL GOVERNMENT ROLE

Strengthen role of state and local governments under section 6. Although the ESA already contains provisions aimed at encouraging states to take actions to conserve listed species, states' efforts to conserve species (such as the multi-state conservation effort aimed at the lesser prairie chicken) are often derailed because of third parties (or even the Service itself). ESA section 6 could be amended so that these kinds of efforts are encouraged to a greater degree (e.g., requiring that the Service place significant weight on such efforts when determining whether to list or delist a species) and so that these kinds of efforts are less likely to face challenge by third party groups whose interests are often misaligned both with the Service and the states. [ESA section 6: 16 U.S.C. 1535; Lesser Prairie Chicken Range-wide Plan: http://www.wafwa.org/initiatives/grasslands/lesser_prairie_chicken/range-wide_conservation_plan/]

The Williamson County Conservation Foundation (WCCF) was established in December 2002 to provide for conservation of endangered species in Williamson County while helping to promote responsible development.

Williamson County is one of the fastest growing counties in the country. Rapid growth necessitates a regional approach to balancing development needs with the needs for conservation.

Mr. CLAY. Mr. Chairman, in response to your comments, I am from Missouri. If you want to be in denial about the effectiveness of the ESA, that is on you; but in Missouri, you can put lipstick on a pig if you want, but it is still called a pig.

Mr. LABRADOR. Yes, but in Idaho we actually look at the reality of what is happening and how it is affecting the economy.

I thank the witnesses for their valuable testimony and the Members for their questions. The members of the Committee may have some additional questions for the witnesses, and we will ask you to respond to these in writing.

Under Committee Rule 3(o), members of the Committee must submit witness questions within 3 business days following the hearing, and the hearing record will be held open for 10 business days for these responses. If there is no further business, without objection, the Committee stands adjourned.

[Whereupon, at 11:31 a.m., the Subcommittee was adjourned.]

[LIST OF DOCUMENTS SUBMITTED FOR THE RECORD RETAINED IN THE COMMITTEE'S OFFICIAL FILES]

Submitted by Rep. Grijalva

- EARTHJUSTICE, September 28, 2015 Letter to DEQ Permitting & Compliance Division regarding Proposed MPDES Permit for the Montanore Mine Project Permit No. MT0030279
- U.S. Fish and Wildlife Service, June 20, 2013, Memo from Noreen Walsh, Regional Director, Region 6 to Dan Ashe, Director regarding Montanore Mine Project
- Submission for the Record which includes excerpts from the following documents:
  - —Montana Department of Environmental Quality, February 12, 2016 Letter
  - —Record of Decision, Montanore Project, February 2016 by the Montana Department of Environmental Quality
  - —Court Case: *Rock Creek Alliance v. U.S. Forest Service*, 703 F.Supp.2d 1152 (2010)
  - —Online article: *Bonner County Daily Bee*, January 22, 2017, Rock Creek Mine Fight 'Not a Done Deal'

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