S. HRG. 109–865

THE ENDANGERED SPECIES ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON FISHERIES,
WILDLIFE, AND WATER

OF THE

COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

MAY 19, 2005

Printed for the use of the Committee on Environment and Public Works

Available via the World Wide Web: http://www.access.gpo.gov/congress.senate

U.S. GOVERNMENT PRINTING OFFICE
32–210 PDF WASHINGTON : 2007

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ONE HUNDRED NINTH CONGRESS

FIRST SESSION

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C O N T E N T S

ADDITIONAL MATERIAL

THE ENDANGERED SPECIES ACT

THURSDAY, MAY 19, 2005

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON FISHERIES, WILDLIFE, AND WATER,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:15 a.m. in room 406, Senate Dirksen Building, Hon. Lincoln Chafee (chairman of the subcommittee) presiding.

Present: Senators Chafee, Inhofe, Clinton, Jeffords and Lautenberg.

OPENING STATEMENT OF HON. LINCOLN CHAFEE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator CHAFEE. The hearing of the Subcommittee on Fisheries, Wildlife, and Water will come to order.

Good morning. As the new chairman of the Subcommittee on Fisheries, Wildlife, and Water, I welcome you today to the subcommittee's first hearing on the Endangered Species Act.

Today we begin to look at the law that was crafted over 32 years ago with the goal of protecting and recovering threatened and endangered species. The Endangered Species Act of 1973 was enacted as a response to concern in the United States about the decline of species around the globe. It is considered one of the world's most comprehensive wildlife conservation laws, but also one of the most hotly debated.

We find ourselves in a position to take a hard look at the effectiveness of the Endangered Species Act and how successful it has been at recovering species and bringing them back from near extinction. We will be hearing from witnesses today that will touch on new and innovative ways to not only protect species and prevent their extinction, but also to do a better job at moving ESA into the 21st century.

As this subcommittee pursues its hearing agenda on ESA and begins to explore legislative options, I am also pleased to announce that Senators Inhofe, Jeffords, Clinton, Crapo, and Lincoln have joined me in sending a request to the Keystone Center to initiate a stakeholder dialogue on the issue of critical habitat. As one of the Act's most debated and litigated provisions, the critical habitat provision, my colleagues and I are beginning to explore new ways to address this issue. I look forward to the outcome of the Keystone dialog.

Similar to the efforts of my father, Senator John Chafee, and then Senator Dirk Kempthorne in moving forward S. 1180, the En-

dangered Species Recovery Act of 1997, by a committee vote of 14 to 3, I believe it is possible to pursue bipartisan legislative options for the ESA. The Kempthorne-Chafee bill focused on the timing of recovery plans, a priority system for species protection, and enhanced roles for States, to name a few. These are all areas where I believe we can still find common ground and consensus.

Other witnesses today will be highlighting areas where the Act will be strengthened by focusing on incentives for species recovery at the local and private landholder levels. I welcome these and other recommendations for ways to improve ESA.

Upon signing the Endangered Species Act on December 28, 1973, President Nixon stated: "Nothing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed." As this subcommittee reviews one of the Nation's most important environmental laws, we must keep in mind the importance of species protection today and in the future.

I will turn to Senator Jeffords, but first I want to welcome Senator Mike Crapo who is here this morning. As my predecessor in chairing this subcommittee, Senator Crapo has done a great deal of work in reaching out to both the regulated and the environmental communities to identify new ideas for making ESA a more effective tool for species protection and recovery.

[The prepared statement of Senator Chafee follows:]

STATEMENT OF HON. LINCOLN CHAFEE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

The hearing will come to order. Good morning.

As the new chairman of the Subcommittee on Fisheries, Wildlife, and Water, I welcome you today to the subcommittee's first hearing on the Endangered Species Act.

Today, we begin taking a look at the law that was crafted over 32 years ago with the goal of protecting and recovering threatened and endangered species. The Endangered Species Act of 1973 was enacted as a response to concern in the United States about the decline of species around the globe. It is considered one of the world's most comprehensive wildlife conservation laws, but also one of the most hotly debated.

To proponents of the ESA, the law has provided critical safeguards to species and their habitats and, despite its flaws, has been a success. The reintroduction of wolves in Yellowstone; the current delisting process for the American Bald Eagle; and even the management of the threatened piping plover in Rhode Island are all examples of the power of the ESA to protect and recover species.

If one measures the success of the Endangered Species Act by the number of species that have gone extinct while the law has been in place, only 9 out of more than 1,200 U.S. listed species have gone extinct since 1973.

This is good news. We are slowing species extinction for now. But at the same time, what is happening to successfully recovering species and bringing them back to sustainable populations?

During my tenure in the Senate, I have come to realize that our nation's environmental laws are not perfect. As our understanding and knowledge of the environment and ecosystems have grown, so too must our ability to adapt our nation's laws to this new information. Critics of the ESA declare that we must do a better job at streamlining the Act and recovering species.

We find ourselves in a position to take a hard look at the effectiveness of the Endangered Species Act and how successful it has been at recovering species and bringing them back from near extinction. We will be hearing from witnesses today that will touch on new and innovative ways to not only protect species and prevent their extinction, but also do a better job at moving the ESA into the 21st century.

As this subcommittee pursues its hearing agenda on the ESA and begins to explore legislative options, I am also pleased to announce that Senators Inhofe, Jef-

fords, Clinton, Crapo, and Lincoln have joined me in sending a request to The Keystone Center to initiate a stakeholder dialog on the issue of critical habitat.

As one of the Act's most debated and litigated provisions, my colleagues and I are beginning to explore new ways to address this issue. I look forward to the outcome of the Keystone Dialogue.

Our first witness today is Senator Mike Crapo. As my predecessor in chairing this subcommittee, Senator Crapo has done a great deal of work in reaching out to both the regulated and environmental communities to identify new ideas for making the ESA a more effective tool for species protection and recovery.

Similar to the efforts of my father, Senator John Chafee, and then Senator Dirk Kempthorne in moving forward S. 1180—the Endangered Species Recovery Act of 1997—by a committee vote of 14–3, I believe it is possible to pursue bipartisan legislative options for the ESA.

The Kempthorne-Chafee bill focused on the timing of recovery plans, a priority system for species protection, and enhanced roles for states, to name a few. These are all areas where I believe we can still find common ground and consensus.

Other witnesses today will be highlighting areas where the Act may be strengthened by focusing on incentives for species recovery at the local and private landholder levels. I welcome these and other recommendations for ways to improve the ESA.

Upon signing the Endangered Species Act on December 28, 1973, President Nixon stated "Nothing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed." As this subcommittee reviews one of the nation's most important environmental laws, we must keep in mind the importance of species protection today and in the future.

Thank you.

Senator CHAFEE. Senator Jeffords.

OPENING STATEMENT OF HON. JAMES M. JEFFORDS, U.S. SENATOR FROM THE STATE OF VERMONT

Senator JEFFORDS. Thank you, Chairman Chafee, for holding this first in a series of hearings on the Endangered Species Act. As you chair your first hearing of this subcommittee, I want you to know how pleased I am that you are leading our work on the Endangered Species Act, as well as water infrastructure, water quality, and wetlands protection. Under your thoughtful leadership, I am certain that working together we can find solutions to these problems. You and the ranking member of the subcommittee, Senator Clinton, will make a great team in guiding us as we consider ESA and other issues to come before the subcommittee during this Congress.

I hope that you are not tired of hearing this, but your father was not only a champion when it came to preserving and protecting our environment, he was a person I was privileged to call a friend. I know he is looking down on you today with great pride.

Thirty-two years ago the Endangered Species Act was enacted to prevent extinction, the final doom of a species. For the first time, our Nation listed the species endangered of extinction, took steps to provide the diversity of life for which we have been blessed. One thousand, eight hundred, and twenty-six species have been listed as threatened or endangered. The good news is that only 9 of these species have been since counted extinct. While the permanent loss of 9 species is 9 too many, more than 1,800 species protected makes the Endangered Species Act one of the most successful conservation measures.

By formally recognizing that a species is in trouble and also protecting that species, the Act can be the deciding factor in the fate of these species. In the face of a continued threat of extinction, we need protections to remain in place. One of the success stories of the Endangered Species Act is the peregrine falcon. One of the first

species listed under the Act 30 years ago, the peregrine falcon is a great example of how the protections act at work. The falcon was delisted from the national list in 1999. In my home State of Vermont, after finding 29 pair of peregrine falcons, the State has proposed the delisting of the falcon this year. The Endangered Species Act's protections, along with the banning of DDT, helped to rescue this bird from extinction.

Ninety-nine percent of the listed species have been protected from extinction. Ninety-nine percent is pretty close to perfect. A great percentage.

So if the Act is achieving its goals, why are we here today? We are here because we are responsible for overseeing the programs that this subcommittee has jurisdiction over, and to hear from the witnesses on the status of the programs and recommendations to improve them. I also want to welcome all of our witnesses here today, especially our colleague and former chair of the committee, Senator Crapo. I know he has been interested in the Endangered Species Act for a long time, and I look forward to hearing from him today. Thank you, Mr. Chairman.

[The prepared statement of Senator Jeffords follows:]

STATEMENT OF HON. JAMES M. JEFFORDS, U.S. SENATOR FROM THE STATE OF VERMONT

Thank you, Chairman Chafee, for holding this first in a series of hearings on the Endangered Species Act. As you chair your first hearing of this subcommittee, I want you to know how pleased I am that you are leading our work on the Endangered Species Act, as well as water infrastructure, water quality and wetlands protection.

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Thirty-two years ago, the Endangered Species Act was enacted to prevent extinction, the final doom of a species. For the first time, our nation listed the species in danger of extinction and took steps to protect the diversity of life with which we have been blessed.

1,826 species have been listed as threatened or endangered. The good news is that only nine of these species has since gone extinct. While the permanent loss of nine species is nine too many, more than 1,800 species protected makes the Endangered Species Act one of our most successful conservation measures. By formally recognizing that a species is in trouble, and also protecting that species, the Act can be the deciding factor in the fate of that species. In the face of continued threats of extinction, we need protections to remain in place.

One of the success stories of the Endangered Species Act is the peregrine falcon. One of the first species listed under the Act 30 years ago, the peregrine falcon, is a great example of how the protections of the Act have worked. The falcon was delisted from the national list in 1999. In my home state of Vermont, after finding 29 pair of peregrine falcons, the state has proposed the delisting of the falcon this year. Endangered Species Act protections, along with the banning of DDT, helped rescue this bird from extinction.

Ninety-nine percent of listed species have been protected from extinction. Ninety-nine percent is pretty close to perfect, a great percentage. So, if the Act is achieving its goals, why are we here today? We are here because we are responsible for overseeing the programs that this subcommittee has jurisdiction over, and to hear from the witnesses on the status of these programs and recommendations to improve them.

I also want to welcome all of our witnesses here today, especially our colleague and former chair of this subcommittee, Senator Crapo. I know he has been inter-

ested in the Endangered Species Act for a long time, and I look forward to hearing from him today.

Senator CHAFEE. Thank you, Senator Jeffords.

A couple of weeks ago, as we were debating the budget bill and getting on toward midnight, bleary-eyed, Senator Crapo came up and said they just discovered a bird they thought was extinct down in Arkansas. He had the breaking news on the ivory-billed woodpecker at about midnight as we were debating. The next morning, sure enough, there it was all over the papers.

Welcome, Senator Crapo.

STATEMENT OF HON. MIKE CRAPO, U.S. SENATOR FROM THE STATE OF IDAHO

Senator CRAPO. Thank you very much, Senator Chafee and Senator Jeffords. I appreciate the opportunity to come before you in this hearing. It has been just a little less than half a year since I served on this committee and I already feel nostalgic in terms of coming back.

I appreciate the invitation to be here with you with you today. I especially appreciate, Mr. Chairman, your continuing what has become a decades long examination of the Endangered Species Act. I look forward to a strong partnership with you and the many other members who share your commitment to this issue.

We have been accumulating good ideas for updating and strengthening the Act for more than a decade now since its last update. And everything we know is based on two clear lessons: First, the protection of endangered and threatened species continues to be a national priority; second, the Act must be improved to be more effective. Those are the words of this committee in 1997 and they remain true today.

These words gained new immediacy last month from the rediscovery of the ivory-billed woodpecker in Arkansas, as the chairman has just mentioned. The recovery program now mobilizing for the ivory-billed woodpecker should inspire us to mobilize recovery for more species. Surprisingly, though we have worked hard at protecting species during the 30-plus years since we passed the Act in 1973, we have few active recovery programs compared to the many species listed as threatened or endangered. And this is no criticism of the Act. It is an opportunity for improvement.

We can help more wildlife in new ways if we support more recovery programs. We can help ourselves, too, because this is the key to rebuilding good will and trust over the species conservation issues. If we in Congress seize this opportunity to enhance recovery through partnerships, technology, and hard work, we will be catching up to the people who are already striving to recover species out in the field.

As the people behind success stories like the Black Bear Conservation Committee in Louisiana, and the Whooping Crane Eastern Partnership in Wisconsin have struggled to make the Act work, Congress has remained in a meaningless and destructive argument about whether the Act is broken. This is a demonstration of gridlock.

An environmental group that has been very helpful to me on this issue, the World Wildlife Fund, has observed as well, saying, "the

real problem is gridlock on reauthorization, which can be broken by enhancing conservation and simplifying compliance with the Act." A property rights group has touched on the same point, stating, "We need to reestablish trust so that we can conserve wildlife." A coalition of businesses has called for changing the debate from "a clash over existing terms and programs to new tools that improve the Act."

We do not need to repudiate the Act before we agree to improve it. We must focus on the agreement on improvement in order to work ourselves free from old political positions. We must take up a bill that writes into law what people have made to work on the ground.

We have a good head start on what it takes. The Endangered Species Recovery Act, which is S. 1180 from the 105th Congress, had balanced and strong cosponsorship and solid ideas. Chairman Chafee has already referred to the fact that his father, John Chafee, co-sponsored this bill. My friend and predecessor in the Senate, Dirk Kempthorne, was the chairman of this committee when that bill was written. They joined with Senators Baucus and Reid, mutual friends of yours and mine, and earned a strong vote in this committee. The 109th Congress should honor their work with its own commitment to the motto of those years; "making allies out of adversaries."

The focus now, as it was then, must be an improved and energized recovery program supported by a simple outline of ideas; namely, improving habitat conservation, providing more and better incentives, enhancing the role of States where appropriate, and ensuring reliable science. This outline emerged from the more than one hundred witnesses over the 3 years of testimony in the mid-1990s. Continuing scrutiny and debate has sharpened those ideas since. Conferences, workshops, studies, and forthcoming papers and books have been sponsored by the Universities of California and Idaho, Stanford Law School, the Western Governors Association, the Government Accountability Office, and many others.

In the debate today there are a number of promising ideas for implementing the vision of a stronger ESA:

Ensure direct recovery work for listed species by setting recovery goals and budgeting each year to make progress toward them.

Create and improve incentives by codifying an effective "no surprises" policy, and speed the writing of habitat agreements and use of special rules for threatened species.

Find responsible ways to increase funding. Some of this should come from private sources by turning from litigation to conservation.

Enhance the role of States and expand the option for States to promote landowner involvement in protection and recovery.

I want to emphasize the importance of working respectfully with landowners. Because private land and the support of private landowners is so obviously necessary, we must jump at any chance to work with the landowners who show interest in joining conservation efforts. We are smarter about this today than we ever have been. We are gaining experience in protecting property rights as a part of voluntary agreements to promote species conservation.

For example, in Idaho landowners have stronger property rights today because they have advanced their own conservation ideas for wolves, grizzly bears, sage grouse, ground squirrels, and a desert plant, the slick-spot pepper-grass. Other States have similar accomplishments. Colorado, California, Louisiana, Texas, Wisconsin, and others have advanced recovery and property rights together with lynx, songbirds, bears, and butterflies. There are other examples as well.

In summary, Mr. Chairman, we have good ideas and strong capabilities against the well-rehearsed controversy of gridlock. We can and we must surmount entrenched positions. If we update and strengthen the ESA to become less contentious and more effective, we will have the votes to win passage of a bill. I have suggested, asked, and even provoked interest groups to unite on points of agreement and ignore the carping that destroys the debate. I hope today we will hear evidence of unity, and I urge the committee to join me in promoting it.

Thank you, Mr. Chairman.

[The prepared statement of Senator Crapo follows:]

STATEMENT OF HON. MIKE CRAPO, U.S. SENATOR FROM THE STATE OF IDAHO

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We must focus on the agreement on improvement in order to work ourselves free of old political positions.

We must take up a bill that writes into law what people have made to work on the ground.

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- improving habitat conservation.
- providing more and better incentives.
- enhancing the role of states where appropriate.
- ensuring reliable science.

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- Ensure direct recovery work for listed species by setting recovery goals and budgeting each year to make progress toward them.
- Create and improve incentives by codifying an effective "No Surprises" policy, and speed the writing of habitat agreements, and the use special rules for threatened species.
- Find responsible ways to increase funding—and some of this should come from private sources by turning from litigation to conservation.
- Enhance the role of states and expand options for states to promote landowner involvement in protection and recovery.

I want to emphasize the importance of working respectfully with landowners. Because private land and the support of private landowners is so obviously necessary, we must jump at any chance to work with landowners who show interest in joining conservation efforts.

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If we update and strengthen ESA to become less contentious and more effective, we will have the votes to win passage of a bill.

I have suggested, asked, and even provoked interest groups to unite on points of agreement and ignore the carping that destroys the debate. I hope today we will hear evidence of unity and I urge the committee to join me in promoting it.

Thank you, Mr. Chairman.

Senator CHAFEE. Thank you very much, Senator Crapo. We look forward to your continued leadership even though you are not on the committee. And I would agree with you, building trust is so important here. I am sure working with your former colleagues on the House side, you bring a lot of credibility as we try and move this forward.

I now recognize Chairman Inhofe for an opening statement.

Senator INHOFE. Thank you, Mr. Chairman.

Senator CHAFEE. I think, Senator Crapo, you are free too.

Senator INHOFE. Well, you are not free yet.

[Laughter.]

Senator CRAPO. I would be glad to sit and listen to the chairman.

Senator INHOFE. No, I just want to tell you that I had seen your statement before you made it and I really do agree with your approach, even more so than I did your predecessor. I think now with the team we have put together, I know Senator Chafee and Senator Jeffords, all of us want to get something done. And so I do appreciate all the work that you have done on this.

As you know, Mr. Chairman, as I had mentioned to you, we are getting the defense bill ready to go on the floor. I would like to just get a statement in here.

Senator Crapo, you do not have to wait around. I will say essentially what you just said.

Senator CRAPO. Thank you very much, Mr. Chairman.

OPENING STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator INHOFE. Mr. Chairman, thank you for having this first hearing on the Endangered Species Act. ESA is one of the most popular environmental laws despite the fact that it has not yet reached most of the stated objectives. The U.S. Fish and Wildlife Service has stated "recovery is the cornerstone and the ultimate purpose of the Endangered Species Program."

Yet we have recovered only a tiny fraction of the 1,300-plus species on the list, and half of all of the species that have been taken off the Endangered Species List were removed because the original data was in error and they never should have been added in the first place.

According to the Fish and Wildlife Service's most recent report to Congress, 77 percent of the listed species are classified in the lowest recovery achievement category, and only 2 percent fall into the highest recovery achievement category. The reasons for this less than stellar record are numerous and complicated, but clearly we ought to be able to do better.

I have many concerns regarding the ESA. I believe the Act contains perverse incentives for landowners. I have seen firsthand in Oklahoma how the implementation of the Act actually ends up penalizing landowners for being good stewards of their land instead of being rewarded for trying to create and preserve for an endangered animal or plant. They are hamstrung by rigorous regulations that jeopardize their ability to provide for their families and deliver power to rural communities and develop water resources.

The Act encourages landowners to make their land inhospitable to an endangered species in order to avoid regulation. This is not good for the species. It is not good for the landowner. It does appear, however, that the current state of affairs is good for lawyers.

I am concerned that some groups have contorted and distorted the Act's goals and provisions to turn it into a tool to halt all land development, regardless of its true effect on species. The Fish and Wildlife Service is currently being inundated with lawsuits. In Oklahoma, I hear that it is common for citizens groups to petition the Fish and Wildlife Service to consider a species for listing know-

ing that the Service cannot meet its statutory deadline for evaluating that petition. The group then sues the Service for missing the deadline, forcing it to settle the lawsuit and thus pay for the group's attorney's fees. The use of the system in this manner is detrimental to both the public and endangered species, as it means that the agency's scarce resources are stretched even thinner.

When I began my tenure as chairman of the Environment and Public Works Committee I stated that I believe we should base regulatory and legislative decisions on strong science. Part of the problem with ESA is that the science associated with listing and delisting decisions is often erroneous, incomplete, or agenda-driven, and not readily available to the public. We must ensure that regulatory decisions are made using independent peer-reviewed science in an open and transparent process.

Finally, I am interested in hearing what the witnesses have to say with respect to the need for greater State and local involvement. I have heard numerous stories where State and local officials, private landowners, local environmental citizens groups have worked together in partnership and have agreed to a sensible protective strategy to recovery species while protecting land only to have the Federal Government come in and overrule them. States and localities need to be given specific authorities and responsibilities for recovery and day-to-day on the ground implementation. These are the individuals with the closest knowledge of the species, its habitat, and local conditions.

With the purpose of the ESA being to recover species, I believe we can learn from other existing programs also being administered by the Fish and Wildlife Service. One example of this is the Partners for Fish and Wildlife program. We actually held, Mr. Chairman, a hearing in our State of Oklahoma on this program. We had testimonies from all over, people just working with the Fish and Wildlife, people taking what they have on their land and doing it on their own and reaping the benefits of it. It is a program that has a very small Federal financing, I think it is only 20 percent, participation, and yet we have people lined up to do it. We need to expand programs like that. That is the kinds of things we need to do rather than taking a command and control regulatory approach to recovery.

So, Mr. Chairman, thank you for kicking this off. I look forward to working with you in coming up with something that we can actually get passed.

[The prepared statement of Senator Inhofe follows:]

STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM THE STATE OF OKLAHOMA

Mr. Chairman, thank you for holding this important first hearing on updating the Endangered Species Act. I look forward to hearing from the witnesses, including my good friend and former chairman of this subcommittee Mike Crapo, who is a recognized leader on the issue of ESA. I am particularly interested in the witnesses' thoughts about areas for improvement in the Act so that we may begin our work considering much-needed legislative changes.

The ESA is one of our most popular environmental laws despite the fact that it has not yet reached most of its stated objectives. The U.S. Fish and Wildlife Service has stated, "Recovery is the cornerstone and ultimate purpose of the endangered species program." Yet, we have recovered only a tiny fraction of the 1,300-plus species on the list. And, half of all the species that have been taken off the endangered species list were removed because the original data was in error and they never

should have been added in the first place. According to FWS' most recent report to Congress, 77 percent of listed species are classified in the lowest recovery achievement category and only 2 percent fall into the highest recovery achievement category. The reasons for this less-than-stellar record are numerous and complicated. But clearly we ought to be able to do better.

I have many concerns regarding the ESA. I believe that the Act contains perverse incentives for landowners. I have seen first hand in Oklahoma how the implementation of the Act actually ends up penalizing landowners for being good stewards of their land. Instead of being rewarded for trying to create and preserve habitat for an endangered animal or plant, they are hamstrung by rigorous regulations that jeopardize their ability to provide for their families or deliver power to rural communities or develop water resources. The Act encourages landowners to make their land inhospitable to an endangered species in order to avoid regulation. This is not good for the species or the landowner.

It does appear, however, that the current state of affairs is good for lawyers. I am concerned that some groups have contorted and distorted the Act's goals and provisions to turn it into a tool to halt all land development, regardless of its true effect on species. The Fish and Wildlife Service is currently being inundated with lawsuits. In Oklahoma, I hear that it is common for citizen groups to petition the Fish and Wildlife Service to consider a species for listing knowing that the Service cannot meet its statutory deadline for evaluating that petition. The group then sues the Service for missing the deadline, forcing it to settle the lawsuit and thus pay for the group's attorney's fees. The use of the system in this manner is detrimental to both the public and endangered species as it means that the agency's scarce resources are stretched even thinner.

When I began my tenure as Chair of the Environment and Public Works Committee, I stated that I believe we should base regulatory and legislative decisions on strong science. Part of the problem with the ESA is that the science associated with listing and de-listing decisions is often erroneous, incomplete or agenda-driven and not readily available to the public. We must ensure that regulatory decisions are made using independent, peer-reviewed science in an open and transparent process.

Finally, I am interested in hearing what the witnesses have to say with respect to the need for greater state and local involvement. I have heard numerous stories where state and local officials, private landowners, local environmental and citizen groups have worked together in partnership and have agreed to a sensible, protective strategy to recover species while protecting land, only to have the Federal Government come in and overrule them. States and localities need to be given specific authorities and responsibilities for recovery and day-to-day, on-the-ground implementation. These are the individuals with the closest knowledge of the species, its habitat and local conditions.

With the purpose of the ESA being to recover species, I believe we can learn from other existing programs also being administered by the Fish and Wildlife Service. One example of this is the Partners for Fish and Wildlife program, for which I recently introduced authorizing legislation. This innovative program provides Federal financial and technical assistance to private landowners through voluntary agreements to protect wildlife habitat. Rather than taking a command and control regulatory approach to recovery, this program provides real results for affected wildlife while protecting property rights and giving landowners meaningful and lasting incentives to benefit species on their land. Much can be learned by the success of programs such as these.

Thank you, Mr. Chairman, for kicking off our legislative work with this hearing today and I look forward to hearing the testimony.

Senator CHAFEE. Thank you, Mr. Chairman, very much.

Now we will move to the second panel. We have the Honorable Craig Manson, Assistant Secretary for Fish and Wildlife and Parks, with the Department of the Interior; Mr. James H. Lecky, Senior Advisor for Intergovernmental Programs, with the National Marine Fisheries Service; and Ms. Robin Nazzaro, Director for Federal Land Stewardship Issues, with the General Accounting Office.

Unfortunately, we have a 2-hour time limit on the overall hearing today. And the fact that we have three panels, I request that all of my colleagues and witnesses follow a 4-minute time limit for statements and questions.

Judge Manson, when you are ready, we welcome your testimony.

STATEMENT OF HON. CRAIG MANSON, ASSISTANT SECRETARY FOR FISH AND WILDLIFE AND PARKS, DEPARTMENT OF THE INTERIOR

Judge MANSON. Thank you, Mr. Chairman. As you know, the ESA was passed in 1973 to conserve plant and animal species that, despite other conservation laws, were in danger of extinction. A key purpose of the ESA is to provide a program for the conservation of endangered and threatened species so as to bring them to the point at which measures under the Act are no longer necessary.

Once listed, the species are afforded the full protection available under the ESA, including prohibitions on killing, harming, or otherwise taking listed species. In addition, Federal agencies are to utilize their authorities to carry out programs for the conservation of endangered or threatened species.

Unfortunately, the Fish and Wildlife Service's work related to endangered species is increasingly being driven by lawsuits. As of the middle of March, the Service was involved in 35 active lawsuits on listing issues with respect to 57 species, and was complying with court orders for 42 lawsuits involving some 87 species.

But today I want to talk about cooperative approaches to conservation under the ESA. This Administration believes that conservation of habitat is vitally important to successful recovery and delisting of species. We are committed to implementing a cooperative approach through the development of partnerships with States, tribes, landowners, and other stakeholders.

The Department of the Interior and the Fish and Wildlife Service is focused on identifying new and better means of encouraging voluntary conservation initiatives. Indeed, we currently have many conservation tools available, including Candidate Conservation Agreements, Safe Harbor Agreements, Habitat Conservation Plans, and Conservation Banking, which provide for close cooperation with private landowners, State, tribal, and local governments, and other non-Federal partners which are particularly important in our implementation of the ESA. Most of these, however, are nonstatutory programs.

The Habitat Conservation Planning Program, for example, provides a flexible process for permitting the incidental take of threatened and endangered species during the course of implementing otherwise lawful activities. It encourages applicants to explore different methods to achieve compliance with the ESA and to choose the approach that best meets their needs. It is the one example of a statutorily authorized program and may provide a template for statutory authorization of some of the other programs, such as the Partnership Program that Senator Inhofe just talked about.

There are several challenges to the implementation of the ESA without legislative change. We do need congressional action in order to improve the implementation in several areas. I want to take a few moments to talk about some of those.

Senator Crapo talked about the gridlock and litigation is certainly part of that. As I noted initially, protection of habitat is the key to sustaining and recovering endangered species. But critical habitat designation has been the source of much litigation.

The Service has long characterized the designation of critical habitat, under several Administrations, as the most costly and least effective class of regulatory actions undertaken by the Service. It is often of little additional value or counterproductive and can result in negative public sentiment, and it is the key lightening rod for litigation.

I recently asked a group that frequently sues with respect to litigation to forego the next critical habitat lawsuit and join the Department of the Interior in a joint venture, using the money that they would otherwise spend on litigation, to spend that money in a joint venture with us and put that money into a concrete habitat conservation program on the ground. We have spent hundreds of millions of dollars in the Partners Program and other programs restoring and enhancing and creating hundreds of thousands of acres of habitat, and that would be a more useful example of conservation than litigation.

In closing, we appreciate the subcommittee's interest in how the ESA works. I would like to reiterate the Administration's interest in working with Congress to improve the Endangered Species Act. We must work together to determine how to get the most value for species conservation out of the Federal resources devoted to the Endangered Species Program. I would be happy to answer the committee's questions at the appropriate time.

Senator CHAFEE. Thank you, Judge Manson.

Mr. Lecky.

STATEMENT OF JAMES H. LECKY, SENIOR ADVISOR FOR INTERGOVERNMENTAL PROGRAMS, NATIONAL MARINE FISHERIES SERVICE

Mr. LECKY. Thank you, Mr. Chairman, members of the committee. My name is Jim Lecky. I am Senior Advisor for Intergovernmental Programs with National Marine Fisheries Service.

I am pleased to be here today to discuss the Endangered Species Act. I will focus my remarks on the National Marine Fisheries Service's role in implementing the statute, and a few areas that warrant special attention to ensure continued protection and recovery of these species.

The National Marine Fisheries Service shares jurisdiction with the Fish and Wildlife Service. We are responsible for the marine and anadromous species and currently have jurisdiction over 61 listed species.

We have been working to improve the transparency and scientific integrity of our decisionmaking under the Act. In the area of recovery planning, we have been working with Fish and Wildlife Service to develop guidance for recovery plans. This will ensure plans are focused on high priority management actions and research needs. We want these plans to become useful documents to provide meaningful guidance to our many partners, and we want them to be dynamic and responsive to changing conditions and new information.

Currently, we focus our limited resources on those requirements that have statutory deadlines, such as listing decisions and section 7 consultations. Recovery planning needs to be given a higher priority, and we need to develop collaborative mechanisms with our partners to implement recovery actions.

We are working to improve our decisionmaking process for listing determinations in section 7 consultations in terms of transparency and quality of science used. A team of scientists at Fish and Wildlife Service and National Marine Fisheries Service is developing criteria for determining whether species qualify for listing as threatened or endangered. These criteria will be based on best available science on population ecology and the processes of species extinction. Their application and evaluation of species status should result in more transparent and repeatable decisions.

In section 7, both NMFS and Fish and Wildlife are required to render opinions about the effects of Federal actions on species and their critical habitat. Likewise, these opinions are based on the best scientific and commercial data available. However, rendering these opinions is often difficult and sometimes controversial where information is limited. To address these concerns about quality of science that underlies these consultations, we are revising our process for analyzing effects in preparing Biological Opinions. We are designing an analytical framework for biologists and managers that provides a consistent and transparent structure to our section 7 decisionmaking that gives appropriate consideration to the quality of data available.

Critical habitat designation remains a contentious and controversial part of the statute. Although habitat conservation does contribute to conservation of species, we expend too much of our resources in litigation and redoing designations as a result of that litigation. One key reason these designations are controversial is at the time of listing information on species distribution and habitat requirements is generally not available, and information on land-use patterns and economic activities that may affect that habitat likewise is very limited. Usually these data are developed during recovery planning processes because recovery plans need to address those issues and risks associated with those economic activities.

Finally, we are interested in developing a more collaborative relationship with the States in species recovery. We are working to foster partnerships with the States in implementing the statute. Currently eight Atlantic Coast States and two Caribbean territories have section 6 agreements with NMFS, but they are very limited in scope and we are interested in exploring how to share more resources and responsibilities with the States under section 6. We would like to work with the committee in strengthening partnerships and removing hurdles to expand our partners' involvement.

Mr. Chairman, thank you for inviting me here today. We look forward to working with the committee on reauthorization of the ESA. I would be happy to answer questions at the appropriate time as well. Thank you.

Senator CHAFEE. Thank you, Mr. Lecky.

Ms. Nazzaro. Welcome.

STATEMENT OF ROBIN NAZZARO, DIRECTOR FOR FEDERAL LAND STEWARDSHIP ISSUES, NATURAL RESOURCES AND ENVIRONMENT TEAM, GAO

Ms. NAZZARO. Thank you, Mr. Chairman and members of the subcommittee. I am pleased to be here to discuss the results of our work related to the Endangered Species Act. Specifically, I will

focus on the collaboration among Federal agencies to conserve threatened and endangered species while also fulfilling other agency missions, and second, the utilization of scientific information in key Endangered Species Act decisions.

We found that Federal agencies have taken steps to improve collaboration as a way to reduce conflicts between species protection and other resource uses, but more could be done. In September 2003, we reported on Department of Defense efforts in Arizona where Air Force officials worked with the Fish and Wildlife Service and National Park Service officials to enhance food sources for the endangered Sonoran pronghorn in locations away from military training areas. As a result, the Air Force was able to minimize the impact of restrictions on training missions due to the presence of the pronghorn. However, such cases were few and far between.

In March 2004, we reported on collaboration that takes place pursuant to section 7(a)(2) of the Act, referred to as the consultation process. Again, we found that steps the services and other Federal agencies had taken made the consultation process run smoother and contributed to improved interagency relationships.

However, some agencies disagree with the services about when consultation is necessary and how much analysis is required to determine potential impacts on protected species. In each of these reports, we made recommendations intended to further improve collaboration. DoD and Fish and Wildlife Service have begun to discuss an implementation strategy for improving collaboration regarding species protection on military and other Federal lands, and the development of a training program.

However, regarding the consultation process, while Fish and Wildlife Service and the National Marine Fisheries Service have continued to take steps to expand the collaboration process, the agencies believe that current training and guidance is sufficient.

With regard to the use of science, we have found that generally the Fish and Wildlife Service used best available information in key Endangered Species Act decisions, although the service was not always integrating new research into ongoing species management decisions. In addition, we identified concerns with the adequacy of the information available to make critical habitat decisions.

For example, in December 2002, we found that the decision to list the Mojave Desert tortoise as threatened, its critical habitat designation and the species recovery plan were based on best available information. However, despite spending over $100 million in expenditures on recovery actions and research over the past 25 years, it is still unclear what the status of the tortoise is and what effect, if any, recovery actions are having. Some question whether protective actions such as grazing and off-road vehicle restrictions are necessary for the tortoise's recovery.

Accordingly, we recommended that the Fish and Wildlife Service better link management decisions with research results to ensure that conservation actions and land use restrictions actually benefit the tortoise. In response, the Fish and Wildlife Service recently established a tortoise recovery coordinator and plans to create an advisory committee to ensure that monitoring and recovery actions feed back into management decisions.

In August 2003, we noted concerns about the adequacy of the available information for critical habitat decisions. As a result, we recommended that the Secretary of the Interior clarify how and when critical habitat should be designated and identify if any policy, regulatory, or legislative changes are required to enable the department to make better informed decisions. The Fish and Wildlife Service has not responded to our recommendations.

In conclusion, while there are no simple answers to the conflicts and controversies, we believe that Federal agencies responsible for managing endangered species and their habitats can be more effective in how they manage these conflicts. Mr. Chairman, that concludes my statement. I would be pleased to respond to any questions you or members of the subcommittee may have.

Senator CHAFEE. Thank you, Ms. Nazzaro, and thank all members of the panel.

We are going to go to 4-minute questions and we will go in order of the rank. So I will start off with Judge Manson. You talked about voluntary programs. My question would be, how does the Administration measure how well its shift to voluntary conservation programs are benefiting species? How do you measure it?

Judge MANSON. I think the best measure is how much habitat is being created and whether or not landowners are signing up for these programs. Over the last 3 or 4 years, we have obligated and spent literally hundreds of millions of dollars out of the Partners Program, in the Landowner Incentive Program, in the Private Stewardship Grant Program, and out of the conservation title of the Farm Bill, and we have created, restored, or enhanced hundreds of thousands of acres of habitat for threatened and endangered species, habitat being the key issue, for the most part, in the decline of most species.

Now, in fact, it may be some time before we are able to point to a specific species and say this species is improving or this species decline has been arrested. But we do know in fact that more habitat has been created and more habitat has been restored and enhanced as a result of these programs.

Senator CHAFEE. Thank you, Judge. You also talked in your opening statement about less litigation and more conservation. Can you expand on that. You said you are going to be meeting with some of the litigators and try and channel some of that energy into spending that money on conservation. How is that going?

Judge MANSON. Well, most of the litigation is over procedural issues, quite frankly. It is over deadlines missed or other procedural matters. Frankly, those are slam dunk cases, if I can use that vernacular. The Fish and Wildlife Service misses a deadline, the lawsuit is filed, there is no defense, it is either settled or a judgment is entered, and attorneys fees are paid. That is really to the detriment of the species because the time and effort that goes into that could be spent more productively on conservation.

So my suggestion to some of the litigators is let us take that money and let us put it into on the ground conservation instead of putting it into the somewhat nonproductive exercise of litigation. We can more easily prioritize and control that in a joint venture with groups that are interested in doing that, and we are prepared to do that.

Senator CHAFEE. Thank you, Judge. Boy, these 4 minutes go fast.

Mr. Lecky, you were involved in the Klamath Basin issue. Can you tell us what is the status of that dispute?

Mr. LECKY. The dispute is ongoing. We are working with the Department of the Interior and the States' Department of Agriculture to implement cooperative processes in the Basin. We are continuing to pursue some of the science to better define the requirements of both the endangered fish in the lake, two sucker species, and the threatened coho salmon in the river system.

We expect that information to become available in the next year and we will evaluate that and decide at that time whether it would be appropriate to re-initiate consultation. Meantime, we are working cooperatively to improve operation of the facilities, ensure water supply reliability, implement habitat conservation measures both in the main stream and in some of the tributaries in the downstream.

Senator CHAFEE. And at the conclusion of the dispute, is there concrete recommendations to how we can improve ESA as a result of having been involved in that? Are there concrete areas that you can really pinpoint as to what we can do on ESA?

Mr. LECKY. Well, there certainly have been criticisms over the quality of science and how science was used in that decisionmaking process. I think it points out the fact that the agencies have to make decisions regardless of the quality of science that is available when it comes to evaluating jeopardy. In those situations, we exercise professional judgment.

I think being able to share some of that process more broadly with the public in terms of how biological opinions are developed and getting more and broader input will help us exercise professional judgment, it certainly will make it more visible to the public on how that is done, and it will open up the debate and perhaps refine the solutions.

Senator CHAFEE. Thank you, Mr. Lecky.

I would like to welcome the ranking member of the subcommittee, Senator Clinton. Senator Clinton wants to make an opening statement at the conclusion of this panel. We will continue with our questions for now. Welcome.

Senator CLINTON. Thank you, Mr. Chairman. I appreciate your leadership on this issue and look forward to working with you to determine whether we can reach some consensus that might improve the law, if possible, and protect the underlying purpose that it has stood for over all these years.

Judge Manson, in your testimony, I apologize I was not here, I had a previous engagement, you state that the Fish and Wildlife Service's priorities particularly in the listing of critical habitats are driven by litigation and court orders. Yet is it not the case that the Interior Department could assert some control by developing a science-based priority system for dealing with ESA decisions and the critical habitat backlog? Could you perhaps explain to us whether that is possible. If so, why has the Department not put forward a policy or initiative to ensure that ESA priorities are being set based on science?

Judge MANSON. Well, Senator, that is an excellent question. The problem is that the law requires that critical habitat be designated

at the time of listing. There are 1,200 listed species, something less than 400 have critical habitat designated. So there are 800 that are without critical habitat. So there are 800 that are essentially in default, if you will.

If we were to develop a priority system, that still would not satisfy the courts because we still would be in default on those 800. The courts would not give deference to our priority system because each of those 800 are individual defaults. We have tried to establish priority systems in the past and each individual judge in each individual case tells us, you know, I'm sorry, but you had an obligation to designate critical habitat for this species 8, 10, 12 years ago, you are that far behind, and so you have got to designate it now or within a period of time that is reasonable.

So as a result, we have conflicting court orders and litigation that goes on and on and on, and that is the problem. This is a longstanding problem. It did not start recently and it is not going to end any time soon without some legislative relief.

Senator CLINTON. Judge, one thing that concerns me, and you certainly underscore the difficulty as you perceive it, yet it is my understanding that this Administration has consistently excluded or eliminated areas determined by Fish and Wildlife Service biologists to be essential to a species' conservation from final designated critical habitat. So how do you reconcile these seemingly contradictory positions?

Judge MANSON. Well, Senator, that is a completely different issue. The statute provides that once a piece of habitat is determined to be essential to the conservation of the species, the secretary has the discretion to determine whether or not the benefits of excluding it outweigh the benefits of including it. That is in the statute itself and the secretary exercises that discretion according to the law. That is part of the designation process laid out in the statute.

Senator CLINTON. Well, I think there is some confusion, because the previous Administration and administrators of the service took a slightly different approach. So I think that is one of the areas, Mr. Chairman, we need to sort out and try to understand.

But I would like you to have a chance to explain a quote that appeared in an article in the Los Angeles Times on Friday, November 14, 2003, in which you stated as follows: "If we are saying that the loss of species in and of itself is inherently bad, I don't think we know enough about how the world works to say that." Now, does your statement not reflect a fundamental disagreement with the goals and purposes of the ESA? And second, how do you reconcile that viewpoint with leading scientists who do view the current rate of extinction as an ecological and biological crisis and the majority of the American people who support the ESA by an overwhelming margin?

Judge MANSON. Let me say first, Senator, that I support the ESA as well and I do believe in the fundamental goal of the ESA, I always have and I did at the time that I gave that interview. The statement that I made was this. That the ESA is not designed to save every single species that goes extinct everywhere in the world for any particular reason. It has particular goals and it has particular processes and we have to honor and respect those goals and

processes. The issue of species extinction is a very complex one. We simply do not have the resources to deal with all of the complexities of the science of species extinction. The resources that we do have we must apply in a manner that honors the goals of the ESA as set forth by the Congress.

Senator CLINTON. Thank you, Mr. Chairman.

Senator CHAFEE. Senator Jeffords.

Senator JEFFORDS. Mr. Manson, I am troubled by some of the recent administrative actions that have been taken with regard to consultation with the Endangered Species Act. One eliminates consultation between the EPA and the Fish and Wildlife Service on the impact pesticide use would have on the wildlife. Another eliminates the requirement that the Forest Service consult with the Fish and Wildlife Service before logging and road building to determine the impact on wildlife and the habitat.

Consultation with the Fish and Wildlife Service is required under section 7 of the Act and not self-consulting. In addition, you state that resources should be spent focusing on actions that directly benefit species, such as improving the consultation process. Do you consider eliminating consultation a way of improving it?

Judge MANSON. Senator, we have not eliminated consultation. As you state, consultation is required by the law. What you are referring to are two situations where we have adopted what are referred to as counterpart regulations.

What happens in those counterpart regulations is that some decisions, which by regulation and not by statute were given to the Fish and Wildlife Service, are now made by biologists in the particular agencies. These are threshold determinations and not the actual consultative determinations on the issues of jeopardy. The fundamental determination of whether or not jeopardy to a species is caused is still made by the U.S. Fish and Wildlife Service. The consultation process still exists, there is still an obligation on the part of those agencies to consult with the U.S. Fish and Wildlife Service on projects that the statute requires consultation.

Senator JEFFORDS. Another administrative proposal that concerns me is the one that Senator Chafee and I wrote to you about last year, it was the draft policy for enhancement of survival permits for foreign species listed under the Endangered Species Act. Could you please tell me what the status is of this proposal?

Judge MANSON. That proposal is still under consideration.

Senator JEFFORDS. Thank you, Mr. Chairman. Do I go on to Mr. Lecky?

Senator CHAFEE. Sure. Yes.

Senator JEFFORDS. Mr. Lecky, you said that you would like to work with the committee to strengthen partnerships and remove the potential hurdles to the partners' full involvement. Does the National Fisheries Service have any legislative proposals to accomplish this?

Mr. LECKY. No, sir, we have not developed any at this point.

Senator JEFFORDS. Ms. Nazzaro, earlier Senator Chafee talked about our request to the Keystone Center to convene a group of stakeholders to try to reach a consensus on how to deal with the issue of habitat conservation. Are you familiar with the Keystone Center, and what do you think of this approach?

Ms. NAZZARO. I am sorry, sir, I am not familiar with the Keystone Center. But overall, the approach that you are talking about sounds like a valid approach. Our primary concern is with the critical habitat designations and we do have some follow-on work for this committee as well as others that will be looking at the recovery program as well.

Senator JEFFORDS. Thank you. Thank you, Mr. Chairman.

Senator CHAFEE. Senator Lautenberg.

Senator LAUTENBERG. Mr. Chairman, just a couple of seconds of housekeeping before we throw the timer on. I would recommend, obviously by the statements that have been made, that for questions, 4 minutes is slightly too short a time to do it. I have already used 4 minutes.

[Laughter.]

Senator CHAFEE. We do have some kind of a time constraint at the end of the hearing. With three panels, I did not have much choice.

Senator LAUTENBERG. Right. We may in the future have to reduce the panels.

Senator CHAFEE. Another hearing, another day.

Senator LAUTENBERG. I thank you and I thank the witnesses for their statements. Did I understand you to say also, Mr. Chairman, that you were going to accept an opening statement after this panel?

Senator CHAFEE. Yes, sir.

Senator LAUTENBERG. OK. Thank you. Thank you each for your testimonies. Very important. And you are credible witnesses and we appreciate your being here. But Mr. Manson, are you aware of the fact that the Union of Concerned Scientists polled the scientists working for Fish and Wildlife, and that one out of five expressed an opinion or a view or reported that they were asked to change their findings that had been earlier published. Is that true?

Judge MANSON. I am aware of that report. I think it is significant that no one at all pointed to any specific report or example of anything that had been changed. As far as I know, no one was ever directed to change any scientific document.

Senator LAUTENBERG. You dismiss the polling done by the Union of Concerned Scientists?

Judge MANSON. I do. And I have——

Senator LAUTENBERG. I thank you very much for that observation. As you look at the cost-benefit of decisions about critical habitat, how does the Service decide what to count as a benefit? I know that in my State, for instance, tourism is substantially increased (a) because it is good for the soul, (b) because it is good for my kids and grandchildren, and (c) because it is very good for the economy. Do you count tourism as one of the benefits in your cost-benefit analysis?

Judge MANSON. Generally, we are focused on biological benefit as opposed to other benefits.

Senator LAUTENBERG. Then why introduce cost-benefit at all if that plays such an insignificant part? I think it should play a huge part. But if we throw out the criteria by which we measure the success of these programs, then I think that we ought to have a further review of that.

Ms. Nazzaro, you said that the Government had spent $100 million to recover the Mojave Desert tortoise. But did you say you did not know whether it is recovering, or do you know whether it is recovering or not as a result of that expenditure?

Ms. NAZZARO. That is right, at the time we did that work we were not able to determine nor was the Service able to tell us the status of that Mojave Desert tortoise. Part of the problem that we saw was that while they were using best available science in doing their listing, they are not then using best available science when they are making critical habitat designation, and recovery plan, they were not integrating the results of new scientific studies into ongoing management decisions.

Another problem was that, as Judge Manson noted, the time period over which you have to monitor tortoise populations before you could discern a trend in status is very long. Monitoring would need to be done for at least one generation, which is about 25 years. The Service just started this in 2001 to establish a baseline population; prior to that, they had done nothing.

So while they have been spending this money over 25 years, they did not have a baseline to even know what to measure against. Now, in 2001 they have started the baseline, but it will take 25 years to know what is happening. That is why I said the work that we have planned to do at your request and others will be looking at the recovery program and we should be able to be more definitive as to what has been accomplished and what has not.

Senator LAUTENBERG. I think the reverse of what you just said is probably that these investments have to be made at an early point in time because the review has to be one done thoroughly, and it perhaps could take a lot of time. So we should be able to make those expenditures even though we are not down to the last few of those in that species.

Thank you very much. Thanks, Mr. Chairman.

Senator CHAFEE. Thank you, Senator Lautenberg.

Before we dismiss this panel, I would like to give you each a shot if you have any experience or knowledge of the S. 1180 that I mentioned in my opening statement, the Kempthorne-Chafee bill of 1997. Judge Manson, do you have any comments on that bill, which came out of this committee 14 to 3, I think I said, and a lot of work was put into it. I know it is dated, but any comments on that?

Judge MANSON. Yes. I had the pleasure of representing the Governor of California on the Western Governors Task Force that took a look at S. 1180 when it was active at that time. And our role in the Administration today is to assist the Congress as it considers what needs to be done in terms of updating and modernizing the ESA. And we will be pleased to take a look at S. 1180 and evaluate that for your consideration as we go through this process today.

Senator CHAFEE. Thank you. Mr. Lecky, did you work with that in your capacity?

Mr. LECKY. I have reviewed that statute personally, and as Judge Manson indicates, we will be willing to work with the committee to update the legislation and address issues in it.

Senator CHAFEE. No ringing endorsements here.

[Laughter.]

Senator CHAFEE. Ms. Nazzaro?

Ms. NAZZARO. We have not evaluated the provisions, sir.

Senator CHAFEE. Or ringing criticisms either. Thank you very much for your time.

We will now call our third panel.

Senator Clinton would like to make an opening statement, and Senator Lautenberg, following Senator Clinton, as the third panel takes their seats.

Senator Clinton.

Senator CLINTON. Thank you very much, Mr. Chairman. I will ask unanimous consent that my entire statement be submitted for the record and just briefly summarize some of the key points.

Senator CHAFEE. Without objection, so ordered.

OPENING STATEMENT OF HON. HILLARY RODHAM CLINTON, U.S. SENATOR FROM THE STATE OF NEW YORK

Senator CLINTON. I want to begin by explaining why I think it is so important that we start from a presumption that conserving animal and plant species is good for us. I think it is really a significant starting point that this is not an exercise of balancing one set of priorities against another, but that we start from a baseline that conservation is important for a number of reasons, and one is simple pragmatism.

We have long used plants for medicinal purposes. And even in our current age of laboratory-created pharmaceuticals, many important drugs are derived from plants. To give just a few quick examples:

The cancer drug Taxol comes from the bark of the Pacific yew tree and it is used to fight ovarian and breast cancer.

The bacterium thermos aquaticus that lives in the hot springs of the Yellowstone National Park is the source of a compound called taq polymerase, an enzyme required for DNA fingerprinting in forensics and diagnostics.

We know that a protein found in the blood of the horseshoe crab is used to detect bacterial toxins in medical implants and injectable medicines and vaccines.

And just recently, in the last few weeks in our newspapers, we saw that the saliva of the gila monster is going to be useful in the treatment I think of diabetics.

We have no idea what is out there. And so we may have started years ago with the idea of protecting plant and animal species because we understood at some profound soul level that we did not want to destroy the world in which we were a mere inhabitant. We had nothing to do with creating it, we did not want to be responsible for its destruction. And I think that is an incredibly important philosophical basis for what we are doing here today in trying to determine the best ways to protect endangered and threatened species.

But I do not want to lose sight of the practical implications of what we are doing as well. We do not know what discoveries are out there yet to be learned. I hope that maybe our hearings and our work can raise the visibility of the significance of this aspect of our endeavors.

There are also economic reasons. I think Senator Lautenberg was referring to the role that tourism dollars play in many communities

as people travel to see wolves or grizzlies. I have traveled to see wolves and grizzlies myself. I know that it is something that in the wild is so attractive and compelling, and it is an area that I believe has tremendous potential economically.

But, of course, the whole question of extinction is more fundamental. We are really on the brink, according to many scientists throughout the world, in seeing many, forms of life disappearing, and they are disappearing at an alarming rate. Mr. Chairman, I would ask unanimous consent to include a letter from 10 prominent scientists, including Edward O. Wilson, documenting the global rates of extinction.

Senator CHAFEE. Without objection.

Senator CLINTON. As these scientists point out, the rate of extinction in the United States is not as dire as other parts of the globe. I would argue strongly that one of the reasons it is not is because of the Endangered Species Act. That we ought to be very proud of what we have done to maintain and promote the life of our Planet. We have work to do in our own country, but, clearly, when we look at the loss of critical habitat throughout the world, when we look at what happens not only to plant and wildlife species but what erosion does in terms of flood, loss of farmland, if you go to some of the places that we as senators travel and see treeless areas where there once were millions of trees, and we talk to farmers and government officials about how difficult it has been because the erosion has wiped away everything, plant life, animal life, and human sustenance.

Now, one reason that the Endangered Species Act has worked so well is that 99 percent—99 percent—of the species that have been put on the Endangered Species List have avoided extinction. That is a tremendous record of accomplishment that everybody in America ought to be proud of. And many of these species are on the road to recovery. I brought a picture of one, the Canada lynx cub.

In 1999, before the species was listed in Colorado, the State, knowing that it was about to be listed, reintroduced the Canada lynx in southern Colorado. Four years later, in 2003, 16 lynx kittens were born in the wild there. Now, there is still more work to be done, but this is one example of how the States and the Federal Government have worked together under the framework of the ESA.

So I am excited by the progress we have made and the success that we can celebrate. And I really applaud Senator Chafee for his leadership in putting the Keystone Center process in motion. I hope that process will produce ideas on critical habitat that a range of stakeholders will be able to support. About 2 or 3 weeks ago, we were all so excited about the ivory-billed woodpecker.

I remember very well when my husband was governor of Arkansas, one of his goals was to preserve critical habitats in Arkansas. They put State money in, they teamed up with private landowners who donated money, the Nature Conservancy, other groups that came in and said we are going to buy up this critical habitat, and now, all these years later, we know that the ivory-billed woodpecker lives in that critical habitat.

So, I think that there is so much that we can celebrate with this act. I know that there are a lot of people who have questions and

concerns. I think it is clear that Senator Chafee and I and members of the committee are open to ideas about how to provide better incentives for private landowners to conserve species, how to provide adequate funding to the agencies to implement the act, how to do a better job protecting habitat and involve the States.

So our goal is to continue this record of success but make it better, make it work better, make it less cumbersome, make the incentives more attractive. Just yesterday in my office, I met with a group of my constituents who live along the Peconic Bay on Long Island, and there has just been a wonderful gift by a private landowner of some of the shell beds. We have lost a lot of the shellfish. Well, now that a private landowner has turned it over to a conservation group, we are going to see if we can bring shellfish back to Long Island Sound and to the Peconic Bay.

These are the kinds of advances that I think really tell the story of the success of the Endangered Species Act. And we want to hear how we can make it better, more effective, less cumbersome, more flexible, but we want to maintain our commitment to what this act has achieved and to the extraordinary commitment the American people have made to preserving the life of this planet.

[The prepared statement of Senator Clinton follows:]

STATEMENT OF HON. HILLARY RODHAM CLINTON, U.S. SENATOR FROM THE STATE OF NEW YORK

Thank you, Mr. Chairman. I congratulate you on your chairmanship of the Fisheries, Wildlife and Water subcommittee. It's a pleasure to join you here today as the ranking member for our first hearing in this Congress.

I'm sorry that I missed Senator Crapo's testimony, but I want to thank him for that testimony and will review it carefully. In addition, I want to thank all of our witnesses for appearing today.

I want to begin my statement by explaining why I think it is so important for us to conserve our plant and animal resources. One reason is simple pragmatism. Human beings have long used plants for their medicinal properties, and even in our current age of modern pharmaceuticals, many important drugs are derived from plants. To give one well-known example, the cancer drug Taxol, which is used to fight ovarian and breast cancer, is derived from the bark of the Pacific Yew tree. Fortunately, the Yew is not endangered, but the fact is that we don't know which plant the next breakthrough drug might come from. By protecting our plants from extinction, we keep our options open.

There are also economic reasons to conserve wildlife, such as the tourism dollars that flow to communities where people go to see animals such as wolves and grizzlies in the wild.

But to me, the most important reason—prevent extinction is more fundamental. It's because we are custodians of this planet for future generations, and the world we pass on to our children and grandchildren is a richer, more interesting place with animals such as the Canada Lynx, the Grizzly Bear and the Gray Wolf in it.

That's why the Endangered Species Act is so important. It is a lifeline for creatures that are on the brink of disappearing forever.

And there is no question that on a global basis, plants and animals are disappearing at increasing and alarming rates. Mr. Chairman, I ask unanimous consent to include a letter from 10 prominent scientists, including Edward O. Wilson, documenting global rates of extinction. As these scientists point out, although we face the extinction of many plants and animals here in the United States, our situation is not as dire as other parts of the globe.

One reason is certainly the Endangered Species Act. Since its enactment, 99 percent of the species that have been put on the Endangered Species list have avoided extinction. And many of these are on the road to recovery.

I have next to me a picture of a Canada Lynx cub. In 1999, before the species was listed in Colorado, the state reintroduced the Canada Lynx in southern Colorado, and just 4 years later in 2003, 16 Lynx kittens were born in the wild there. There's still more work to be done, but this is one example of how states and the

federal government can work well together under and the framework of the ESA to achieve results.

So as I approach this issue, I do so without preconceptions, except that I start from the premise that the Act is successfully achieving its primary objective preventing extinction. At the same time, I recognize that like any program, like any law, the Endangered Species Act can be amended to increase its effectiveness.

Many stakeholders and some in Congress have put forward ideas about how to provide better incentives for private landowners to conserve species; how to provide adequate funding to the Agencies to implement the Act; how to do a better job protecting habitat; how to better involve states; and how federal agencies can better meet their obligations to conserve listed species.

I am open to ideas on these issues, and I look forward to hearing more today and at future committee meetings. In that regard, I want to thank Senator Chafee for his leadership in putting the Keystone Center process in motion. I hope that process will produce ideas on "critical habitat" that a range of stakeholders can support and that we can look at down the road.

In short, I look forward to working with Senator Chafee and my other Senate colleagues to try to find consensus ideas about how to improve the Endangered Species Act. I hope we are able to do that.

But until we get a bill to the President's desk, the current Endangered Species Act is the law of the land. And I have to say that I have concerns about the way that this Administration is interpreting and implementing that law.

First of all, I am disturbed by evidence that political leadership is subverting science at the Fish and Wildlife Service. A recent survey by the Union of Concerned Scientists and the Public Employees for Environmental Responsibility of 1400 scientists at the Fish and Wildlife Service found that:

• 44 percent of respondents said they had been asked to refrain from making scientific findings that protect species;
• 1 in 5 respondents had been directed to change technical information in scientific documents;
• and 3 out of 4 respondents felt that the USFWS is not acting effectively to maintain or enhance species and their habitats.

These are troubling findings that deserve further inquiry, and I intend to ask the GAO to look into them.

I am also concerned about the Administration's regulatory actions. The Administration has weakened the consultation requirement, one of the pillars of the Act. In addition, the number of species added to the endangered species list has dropped under this Administration.

So, Mr. Chairman, I want to thank you for holding this hearing. I look forward to working with you to find ways that we can improve the Act, while at the same time, conducting oversight to review the way that the current Act is being implemented. Thank you.

Senator CHAFEE. Thank you, Senator Clinton. Since 1973, yes, the Act has done a lot of good. Think back, in 1973 Congress got together and passed a good law and then President Nixon signed it, and now we are here in 2005 seeing if we can make it better. Have you ever been to Cash River where the ivory-billed woodpecker is now?

Senator CLINTON. Yes, I have. I never saw the woodpecker, however.

[Laughter.]

Senator CHAFEE. I am sure, as Senator Lautenberg said, people are probably going to flock from all over the world to come to Cash River in Arkansas to try and see this bird.

Senator CLINTON. It is a good problem to have.

Senator CHAFEE. Yes. Maybe spend some money in the restaurants and——

Senator LAUTENBERG. And also visit the wonderful library that was recently established.

[Laughter.]

Senator CHAFEE. Senator Lautenberg?

OPENING STATEMENT OF HON. FRANK LAUTENBERG, U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator LAUTENBERG. Thanks very much, Mr. Chairman. I will try not to take too long. I come from New Jersey, the most densely populated State in the country. As a consequence, much of what I see and what I think about in terms of my responsibilities here I see through the eyes of my 10 grandchildren, the oldest of whom is 11.

And we just heard from Ms. Nazzaro that an analysis of one particular turtle's recovery, if any, would take many years. I worry about another species—the human species. We are all part of the ecological chain that makes this world go round.

It is short-sighted to have these disputes, in my view. I understand that the landowners, who paid for their land and want to work it to the last degree possible, might feel that they are being driven out by some species, and they will throw out derogatorily a name of a bird or a little thing here or there. I come from the State also that was the home of Joyce Kilmer, who wrote the poem so famous for all of us, Trees, "Poems are made by fools like me, but only God can make a tree." Mr. Chairman, human beings can write poems but we cannot build these species. We cannot recreate some of these species.

I am going to shorten my statement in the interest of time. But I just would say that we have made the Endangered Species Act, which you mentioned Mr. Chairman, signed by a Republican into law, Senator Clinton had an excellent recall of those species that were endangered and may actually be in their last stages. It is never too late to try to keep them going. We talked about treeless plains, we talked about fishless streams. Idaho, where Senator Crapo comes from, used to be filled with salmon up the Snake River. Well, they are not around anymore for all kinds of reasons. They were not protected when we had an opportunity to do so.

So, Mr. Chairman, I commend you for doing this. I wish we had more time. We have a war against disappearing species, and we have another war on the floor of the Senate which we will have to get to. But thank you very much for having the hearing.

[The prepared statement of Senator Lautenberg follows:]

STATEMENT OF HON. FRANK LAUTENBERG, U.S. SENATOR FROM THE STATE OF NEW JERSEY

Mr. Chairman, thank you for giving our committee an opportunity to discuss this landmark piece of legislation—the Endangered Species Act.

The American poet Joyce Kilmer was born in New Jersey, and educated at my alma mater, Columbia University.

Before he died in combat in World War I, Mr. Kilmer wrote many wonderful poems. Perhaps the most famous is "The Trees," which includes the well-known lines,

"Poems are made by fools like me, But only God can make a tree."

Mr. Chairman, human beings can write poems. We can build things. We can pass laws. But we cannot create a new plant or animal. We can either destroy them and drive them to extinction . . .

Or, if we choose, we can protect them. I believe it is our duty as stewards of this planet to protect other forms of life. It is our duty to the future generations who will live on the planet we leave them. The Endangered Species Act has done that.

Since it was enacted in 1973—during a Republican Administration, by the way—many species of American wildlife have been saved from extinction. Some of these, like the majestic bald eagle, have not been officially removed from the endangered

list, but it is widely agreed they have recovered. It's more common to see a bald eagle today than it was a few decades ago.

Others, like the Florida panther, would almost certainly be extinct today if not for the Endangered Species Act. The bald eagle is one—the 17 animals on the endangered species list that are found in my state of New Jersey. Others include the piping plover, the bog turtle and the gray wolf.

Mr. Chairman, I have 10 grandchildren. I can't imagine how I would feel if I knew that they were growing up in a world where the bald eagle had become extinct.

The three purposes of the Endangered Species Act are to identify species at risk of extinction, protect the remaining individuals of these species and their habitats, and aid the recovery of these species. The Act has been successful in all three cases. But that doesn't mean it is perfect.

Since its original passage, Congress has revisited the Endangered Species Act several times. Today, I am collaborating with my friend from Idaho (Sen. Crapo) in requesting a GAO report to determine whether the ESA can operate more efficiently.

We can undoubtedly find ways to implement this Act more efficiently. But the main problem with the ESA today is that the Administration is not following the spirit of the law—or in some cases, the letter.

The Administration is turning its back on science—just as it has done in ignoring global warming and allowing unsafe levels of mercury to be released into the air we breathe.

This is an act that has broad support among the American people. It has been renewed and strengthened through five different Administrations of both parties before the current Administration.

Congress can't make a tree or an eagle—but we can uphold the legacy of protecting those species that share the Earth with us.

Thank you for the time, Mr. Chairman.

Senator CHAFEE. Thank you, Senator Lautenberg.

Welcome to the panel. We have Mr. John Kostyack, from the National Wildlife Federation; Mr. Reed Hopper, from Pacific Legal Foundation; Ms. Jamie Rappaport Clark, with the Defenders of Wildlife; and Ms. Monita Fontaine, with the National Endangered Species Act Reform Coalition. Welcome.

We will start with Mr. John Kostyack.

STATEMENT OF JOHN KOSTYACK, SENIOR COUNSEL, NATIONAL WILDLIFE FEDERATION

Mr. KOSTYACK. Thanks, Senator Chafee. Good morning. I would like to address three issues today in my testimony. First, the Endangered Species Act's overall effectiveness; second, that critical habitat feature that has come up so much this morning; and third, what changes to the Act would be most useful for Congress to consider.

First, the Endangered Species Act has been a remarkably effective law in its 32-year history. For that reason, its core protections must be preserved. The folks who have been arguing for a radical overhaul of the Act rely largely on one statistic: that roughly a dozen or so U.S. species have been fully recovered and delisted, and they say that is a major indicator of failure of the Act. But once this misleading use of the statistic is discredited once and for all, the entire case for overhaul of the Act evaporates.

The bottom line is, the limited number of delistings we have had as of 2005 is not an indicator of failure of the Act. Species currently on the ESA list have been there for roughly 15 years on average. For reasons unrelated to the Endangered Species Act, it will take decades before the conditions are right for most of these species to be delisted: first, restoration and management strategies must be designed; second, funding must be secured to carry out those restoration and management strategies; third, time is needed for the

trees to grow back or other key biological processes to be put in place until the newly restored habitats become suitable and can be reoccupied by the species; and finally, once a species is recovered, delisting still cannot happen until some regulatory mechanism is put in place to prevent the species from sliding back toward extinction after the ESA regulations are removed.

So if the number of delistings after just a couple of decades tells us very little, how can the Act's performance be evaluated? Here are the questions that should be asked: Is the Endangered Species Act rescuing species from extinction? Is it helping stabilize species and moving them in the direction of recovery? By using those measures, the Act has been quite successful. Over 99 percent of species protected by the Act remain with us today, and by the way, there is some dispute whether it is 98 or 99 percent, but we can set that aside.

Of the listed species whose condition is known, 68 percent are stable or improving, and only 32 percent are declining. And a third statistic I will give you is probably the most significant one. The longer a species enjoys the Act's protection, the more likely its condition moves from the declining category to the stable or improving categories.

These successes are playing out on the ground all across the country. Cherished wildlife like the Whooping crane, Florida panther, gray wolf, and bald eagle, and obscure plants like the Robbins' cinquefoil that may someday help devise a treatment for AIDS or cancer, all remain in our midst due, in part, to the Endangered Species Act. As a manatee scientist said just this week in response to the latest attacks on the law, "I just can't imagine what we would do for the species without the Endangered Species Act."

Let me get to my second point about critical habitat. Critical habitat, as you know, is very controversial, especially with those who rely on Federal lands or Federal permits or subsidies for their development activity and do not want that activity restricted to protect habitat needed for recovery. Yet scientists tells us there is no way to recover a species unless we protect its habitat.

Now, there are other provisions of the Act that protect some habitat, but they have been interpreted as not protecting all of the habitat needed for recovery. Only the Act's critical habitat feature makes it absolutely clear that Federal actions cannot destroy habitat needed for recovery.

Now, those who say this protection is redundant or worthless have not done their homework. The only peer-reviewed studies on a critical habitat's effectiveness show that species with designated critical habitat are more likely to be stable or improving than those without.

My final point. I would just like to give you some suggestions on simple steps that you can take to improve the chances of species recovery and reduce the risk of extinction. First, encourage implementation of recovery plans. You can do that by adopting a suggestion that was developed as early as the mid-1990s by the Western Governors Association, it remains a policy of theirs today, is the concept of Recovery Implementation Agreements. We need to step down from sort of the broad generality of recovery plans and get

into the details and make those formally adopted Recovery Implementation Agreements.

Second, encourage proactive conservation. Give recognition to those early cooperative recovery projects that we have been talking about today that are springing up all around the country. Let us give them some Federal recognition in the recovery plan and then let us have Federal funding flow from there. Provide the funding to support those projects that the wildlife agencies have recognized in the recovery plan as being the most successful and the most useful.

Third, provide conservation incentives to private landowners through targeted changes to the tax code. That is the only secure funding we are going to be able to give to those private landowners to enable them to plan their activities.

Fourth, integrate critical habitat designation with recovery planning. Let us get all our science together at roughly the same time in the same process.

And finally, and most important of all, is provide the long overdue funding that is needed to implement this law.

Thank you for the opportunity to testify today. I would be very pleased to answer any of your questions.

Senator CHAFEE. Thank you.

Mr. Reed Hopper. Welcome.

STATEMENT OF M. REED HOPPER, PRINCIPAL ATTORNEY, PACIFIC LEGAL FOUNDATION

Mr. HOPPER. Thank you very much, Mr. Chairman, members of the committee. I appreciate this opportunity to express my views on the efficacy of the Endangered Species Act.

In its 32-year history, the Act has been successful at demonstrating our general lack of understanding of the physical and biological needs of at risk species and the functions of diverse ecosystems. A report issued this week to the House Resources Committee documents that the Act is not achieving its primary goal of recovery of species. I think that one of the primary reasons for this is that the Act really does not contemplate protections of human needs. I think that this breeds distrust in the Government and is ultimately counterproductive.

As a people, we have a moral imperative to secure a meaningful quality of life for present and future generations. Society must both protect the environment and provide for economic growth. It is the obligation of elected officials to ensure that these ends are achieved by fair and orderly means. While protecting the environment and maintaining a robust economy are not mutually exclusive, the Federal Government has, for the most part, failed to provide a proper balance.

As a result, we live in a system that in some cases encourages the destruction or overuse of our natural resources and in other cases nurtures the pursuit of marginal environmental goals at disproportionate social costs. In its implementation, the ESA does not strike a balance between competing economic and ecological values, nor is it protective of human rights.

This approach I believe pits people against species, environmentalists against landowners, and urban communities against

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

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

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

These examples underscore the problems created by an inflexible law that fails to consider human needs and species protection. Unfortunately, the societal costs of species protection under the ESA are hidden, particularly to the public. I believe that any meaningful discussion of the effectiveness of the ESA must include a consideration of these costs.

In a study done recently by the Property and Environment Research Center, PERC, that organization concluded that Federal estimates of ESA spending are grossly understated, probably 4 times the amount estimated, and that the ESA may be wasting taxpayer dollars because only a few species benefit from Government ESA expenditures; that is, 50 percent of reported expenditures are for 7 species, just 0.6 percent of the ESA list.

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

The city of Albuquerque is a city of about 500,000 residents and sits near the Rio Grande River. When a district court and then a circuit court of appeals ruled the ESA required Albuquerque to divert its own limited water supply to increase river flows for protected fish, it caused a huge public outcry. New Mexico officials, including Democrat Governor Bill Richardson and Republican U.S.

Senator Pete Domenici, supporters of the ESA, were calling for intervention by the U.S. Supreme Court.

In the midst of this controversy over how limited water supplies should be used, for people or fish, the Albuquerque Journal commissioned a survey of New Mexican opinions of the ESA. The Journal asked: "Thinking of recent development in New Mexico involving the Endangered Species Act, such as efforts to protect the Rio Grande silvery minnow, do you think the Act goes too far, does not go far enough, or is working as it should?" Sixty-nine percent said the Act goes too far, while 15 percent said it is working as it should, and 6 percent said it does not go far enough.

Senator CHAFEE. Mr. Hopper, you might have to wrap up.

Mr. HOPPER. OK. Thank you very much.

Let me just add that in my written testimony I have outlined 13 areas of concern that, if addressed, could improve the efficacy of the Endangered Species Act, most notably a resolution of the critical habitat controversy, improvement in the best available science, and incentives for landowners.

Thank you.

Senator CHAFEE. Very good testimony. We look forward to your recommendations.

Ms. Jamie Rappaport Clark.

STATEMENT OF JAMIE RAPPAPORT CLARK, EXECUTIVE VICE PRESIDENT, DEFENDERS OF WILDLIFE

Ms. CLARK. Thank you, Chairman Chafee and members of the subcommittee. I would also like to acknowledge and thank Senator Crapo for his commitment to this issue and his leadership on the Endangered Species Act over the years.

Having spent the majority of my professional career in Government and now in the private sector working on these issues, I appreciate the invitation to speak on the importance of this law in ensuring a healthy natural resources legacy for future generations. We are ready and we are eager to join in a bipartisan effort to improve the Act so that it works better for all stakeholders, including species.

There can be no denying that, with the Act's help, hundreds of species—manatees in Florida, sea otters in California, as well as bald eagles, peregrine falcons, Americans alligators, and California condors—have been rescued from the catastrophic permanence of extinction.

In so many ways, Congress was prescient in the original construction of the law. First, it crafted a law that spoke specifically to the value, tangible and intangible, of conserving species for future generations, a key point lost sometimes in today's discussions.

Second, it sought to stem a looming crisis of wildlife extinction that affects us all and by all accounts has been extremely successful in doing that, given, as we have heard a number of times, over 99 percent of the species that are listed today are still with us.

Last, in passing the Act, Congress recognized another key fact that subsequent scientific understanding has only confirmed: the best way to protect a species is to conserve their habitat. Today, loss of habitat is widely considered by scientists to be the primary cause of species extinction and endangerment.

But as important as what the Act does is what is does not do. We must remember that the Act was not written to prevent species from becoming threatened or endangered. It was written to prevent them from going extinct.

Protecting wildlife from becoming endangered is the province of our other conservation laws—those that protect our water, our land, our air. The Endangered Species Act is meant to prevent extinction when we have failed by not passing, not enforcing, not funding, or not implementing all of those other measures. The Act is the alarm, not the cause of the emergency. When the alarm sounds, it is we who are failing to live responsibly and in a manner that prevents species extinction.

Unfortunately, some ignore all the facts and call the Act a failure. They say we should dismantle it because it does not move enough species off the list to full recovery. They ignore the fact that the Act is our Nation's best tool to prevent extinction and they ignore the hundreds of species still around today because of its protections. They ignore the simple truth that unless we prevent extinction first, there can never be any hope of recovery.

Should the Endangered Species Act be improved so that it works better for all stakeholders without sacrificing its purpose and intent? Sure, it should. Although the Act is fundamentally sound, like any law, it should be improved.

Improving the protection and conservation of habitat, looking for opportunities to enhance the role of States where appropriate, expanding incentives, especially for private landowners, are some of the important issues we stand ready to work on with the committee to further develop. But as we move forward down this path of evaluating its effectiveness, we need to consider an important benchmark, a measurement against which all efforts to alter it should be measured—does it truly aid species conservation. If the answer is no, then we have failed.

The bottom line is this, the Endangered Species Act is one of our Nation's most critical and essential environmental laws. Its basic premise and intent remain as sound today as when it was first crafted. And now, more than ever, our Nation needs a strong Endangered Species Act. If we work hard to uphold the Act, we will build that trust and I believe better guide improvement efforts going forward.

When the Nation rejoiced last month at the rediscovery of the ivory-billed woodpecker, and I have canoed Cash River, Secretary Norton said that we rarely have a second chance to save wildlife from extinction. The Endangered Species Act is all about first chances to do that very same thing, about preventing wildlife extinction now, just in case nature is out of miracles. Thank you.

Senator CHAFEE. Thank you.

Ms. Monita Fontaine. Welcome.

STATEMENT OF MONITA FONTAINE, MEMBER, BOARD OF DIRECTORS, NATIONAL ENDANGERED SPECIES ACT REFORM COALITION

Ms. FONTAINE. Good morning. The Endangered Species Act was enacted in 1973 with the promise that we can do a better job of protecting our Nation's species and ecosystems. We have learned a

great deal over the past three decades and it is time to update and improve the ESA to reflect the lessons we have learned.

I am here before you today on behalf of the National Endangered Species Act Reform Coalition, NESARC, an organization of 110 national associations, businesses, and individuals who are working to develop bipartisan legislation to modernize and strengthen ESA. My organization, the National Marine Manufacturers Association joined NESARC in 2003 and I now have the pleasure of serving on the board of NESARC.

NESARC members come from a wide range of backgrounds. We are farmers, we are ranchers, cities and counties, rural irrigators, electric utilities, forest and paper operators, mining, home builders, and other businesses and individuals throughout the United States. What we have in common is that we have been impacted by the operation of the ESA. Without the support and active commitment to the protection of listed species by private landowners, businesses, and communities where the species reside, the chances of success are slim. If we are to do a better job protecting endangered and threatened species, we need an ESA that can fully accommodate the range of efforts that are necessary.

NESARC reviewed its members' experience with ESA and attempted to identify the success stories in protecting species as well as the roadblocks that had to be overcome. What we learned was that, more often than not, our members have succeeded in protection efforts in spite of, rather than because of, the ESA. Attached to my testimony is a white paper NESARC released in November of 2004 outlining a new approach to improve the Act, to provide stakeholders the tools and flexibility to take action, and the certainty that quantifiable success will be rewarded by lifting ESA restrictions.

We urge the following reforms: expand and encourage voluntary conservation efforts; give States the option of being on the front line of species conservation; increase funding of voluntary and State programs for species conservation; encourage prelisting measures; establish recovery objectives; strengthen the critical habitat designation process; improve habitat conservation planning procedures and codify "no surprises"; and last, ensure an open and sound decisionmaking process by providing for better data collection and independent scientific review, we can ensure the necessary data will inform the decisionmaking process.

For more than a decade, Congress has struggled with the question of what, if any, changes to the ESA should be made. In the interim, stakeholders like NESARC members have had to try to make the Act work. It has been time-consuming, expensive, and often frustrating, and the success has been limited. NESARC urges this committee to work toward a bipartisan reform bill that improves the Act so that the law better protects species and does so in a way that fosters cooperation rather than confrontation.

Thank you.

Senator CHAFEE. Thank you very much, Ms. Fontaine, all members of the panel.

Since there are 4 members, let us go to 5 minutes for this round of questions.

Senator LAUTENBERG. I would settle for one quick question and then I will get out of your way altogether.

Senator CHAFEE. Senator Lautenberg.

Senator LAUTENBERG. Thank you very much. Ms. Fontaine or Mr. Hopper, do you include fishermen when you consider commercial enterprise being damaged or hurt? I mean, you have lots of members. Either one of you.

Ms. FONTAINE. Sure.

Senator LAUTENBERG. And you do not think the Act has been that effective? I know Mr. Hopper does not. And here we see disappearing species. When the Federal Government got into the striped bass, and the Senator from Rhode Island knows it only too well, when the Federal Government got into the protection of striped bass, it went from diminishing at such a rapid rate to now some places you can stand and they will swim between your legs. The cod, the billfish, all disappearing.

And to suggest—forgive me, Mr. Chairman. I do feel passionately about this. I spend time in those waters watching these things disappear in front of your face. Senator Clinton said something about clam beds. We are expert on declining shellfish beds in New Jersey. If you do not include that in your consideration, then you really do not see the full picture. Thank you very much.

Senator CHAFEE. Thank you, Senator Lautenberg. Nothing wrong with passion.

I have a question. I will start off with back to S. 1180 and the work that was done in 1997. Any criticisms or advice on starting with that bill as we go forward here in this Congress? Mr. Kostyack?

Mr. KOSTYACK. Yes. I was involved in that process back at the time. The National Wildlife Federation and virtually all of the other conservation groups that were involved ended up not supporting that bill. I would like to explain at least two reasons why. I think we have learned a lot of lessons since that bill passed by this committee that would enable us to make some fixes.

One is, section 7 is the basic safety net of the Act. The bill had a waiver of section 7 responsibilities for anybody who participated in a recovery agreement. Now, we talked earlier in my testimony about how important recovery agreements are. But the problem is people use the word recovery to mean a lot of things and a lot of times it is a cover for bad things. S. 1180 had insulation of any judicial review of these recovery agreements and essentially said, if you get yourself under that umbrella, no further Endangered Species Act review. We essentially said that eliminates a large part of the safety net that we have been relying upon in the Endangered Species Act. That is one.

The other is the "no surprises" issue, which has been alluded to by 2 of the folks on the panel here today. I know it is a major agenda item for development interests to get that codified. We are very supportive of giving developer interests certainty in these planning processes, if they invest in a planning process, at the end, would likely stick to the Government's commitment.

The fundamental problem with "no surprises," and today it is even more apparent than it was 7 or 8 years ago when that bill was passed, is that the Government at the time indicated it was

going to pick up the responsibilities for things that go wrong with these conservation strategies if the developers are not going to pick up the responsibility. The problem is there is a fallacy there; there is no legal mechanism where the Government steps in and picks up the responsibility and there is no funding mechanism.

So we are very happy to give some kind of assurances to developers once you make this conservation commitment, we are not going to keep on coming back to you. The problem is we cannot just leave the species in the lurch. We have a lot of new data now showing a lot of these conservation strategies that have been developed under the HCP process have holes—a lot of habitat destruction being allowed, not a lot of conservation happening under a number of these plans. A significant expose was done in the Seattle Post Intelligence just a week or two ago, that I would recommend to your attention, showing the holes in those processes.

We recognize that all conservation is inherently going to be flawed. It is a political process. There are going to be balls that will be dropped. We live in the real world. That is fine. The Federal Government needs to have a backstop. Five, 10, 15 years later when the species are going down the tubes, we need to have a plan and a strategy, and the "no surprises" provision essentially says we are going to wash our hands of this. If we do not have a strategy in the HCP, then there is going to be no other strategy. That is a problem.

Senator CHAFEE. Good history. Mr. Hopper?

Mr. HOPPER. Yes. I am not sure that I recall all of the particulars of that particular bill; however, I do seem to recall its emphasis on recovery and critical habitat as two major components.

With respect to recovery, I think that any emphasis on recovery as opposed to mere protection is an improvement. It is not enough to simply set aside land. It must be managed, enhanced, improved for the betterment of the species. That is one of the problems with critical habitat, of simply designating an area as essential to the conservation of the species. I would say, however, with respect to recovery, one concern we have is that there is a clear recognition in the law for landowners to mitigate for the impacts of their specific projects. They have a remediation obligation. However, they do not have a general obligation, as does the Government, for recovering the species generally.

Emphasis on recovery, I would encourage, should be sensitive to the obligation of the Government for the general enhancement of habitat and recovery of the species. We all have an interest in the environment. We all have an interest in protecting species. We should, therefore, all share in that burden.

With respect to critical habitat in that bill, as I recall, our concern was that it did not really go far enough in resolving the controversy over critical habitat. As you are aware I am sure, for years now the Fish and Wildlife Service has been screaming for relief with respect to critical habitat. In each of its designations of critical habitat, which generally occurs as a result of litigation, the agency includes in its preamble a statement that goes something like this: in 30 years of implementing the ESA, the designation of statutory critical habitat provides little additional protection to

most listed species while consuming significant amounts of conservation resources.

Senator CHAFEE. Thank you, Mr. Hopper. I am going to have to keep moving. I am the cruel keeper of the time here and I am trying to stay on our allotted time. So I am sorry to interrupt once again.

Ms. Clark, if you could quickly go through S. 1180 again, and then I will turn to Senator Clinton.

Ms. CLARK. Sure. I worked on S. 1180 while I was inside the Administration. At the time, I thought it was a great bipartisan effort, first in a long time, where we worked on what were some of the serious implementation challenges of the Endangered Species Act. It was bipartisan, we worked on achieving common ground, we tried to deal with strengthening some of the transparency needs of the Act, deal with making the Act more user friendly, more efficient, more effective. I would strongly urge it be used today as a great reference point.

The reason I think you cannot just pick it up and go with it is because I think we have learned a lot in the last 4 years about what can happen with administration of the Endangered Species Act and oversight. So I would relook at it today to strengthen some of the provisions of how it is administered. I stand behind a lot of the concepts and a lot of the transparency, and the fact that it reached a lot of common ground in bipartisan fashion.

Senator CHAFEE. How would you respond to Mr. Kostyack's criticism of the section 7 element?

Ms. CLARK. When we dealt with that issue that John is referring to, we were trying to tighten and make more efficient and more effective the relationship between the Federal agencies in dealing with the recovery planning and allowing Federal agencies to step up to the plate, as they should, in commitments to recovering endangered species.

So what we were trying to do is diminish what we felt could potentially be duplicative bureaucracy. In today's world, I might look at it differently. At the time, the relationships were such that with a lot of evaluation and a lot of the administrative processes in place, it should work. But the unraveling of the administration of the Act may have called that into question.

Senator CHAFEE. Thank you very much. Ms. Fontaine?

Ms. FONTAINE. I have only looked at it very superficially. But I do believe that it is a great starting point. I do believe that there was a lot of good in that particular piece of legislation. And I think, and I share with Ms. Clark, I certainly think that you could not go wrong by taking that as your opening review of the ESA.

Senator CHAFEE. Thank you once again.

Senator CLINTON. Thank you, Mr. Chairman, and thanks to the panel members. I also want to just point out that in Ms. Fontaine's written testimony, she includes a letter signed by Ms. Clark, as well as others. So I think that there are some common understandings of how we might proceed.

Ms. Clark, I wanted to ask you to help perhaps clarify some of the issues that have been raised. My understanding of the Act is that ESA does explicitly allow costs and benefits to be considered in the designation of critical habitat. Not in the listing process, but

when we get to the point of trying to figure out how to go about preventing extinction, then costs and benefits have to be taken into account. I would like you to perhaps comment on some of the points made by Mr. Hopper as how we balance the needs of human beings and species. Obviously, that is an essential part of this. I would be curious to hear your response to some of the points he made.

Ms. CLARK. Sure. The Act is quite clear in that when deciding whether or not a species should be afforded the protections of law it is clearly a science question; a species is in trouble or it is not based on the scientific understanding of that species and the biological status. It does evolve a bit when designating critical habitat. And in designation of critical habitat, it obliges the consideration of economics and allows for the weighing of costs and benefits in determining whether or not that habitat should be designated. It does not diminish the importance of habitat for species survival and recovery.

What is really most troubling about the way it is being administered today, never have I seen this in a long career with the Fish and Wildlife Service, but in doing the economic analyses today, the reason you are seeing such obviously under balanced designations of critical habitat is because the economic analyses that are being done in today's administration weigh only the costs. I think most reasonable people would agree that there is terrific economic benefits of having endangered species, a ivory-billed woodpecker. So the notion that you can do economic analysis work and only look at costs defies any kind of natural resources economics that I have ever been exposed to.

Senator CLINTON. Mr. Kostyack, I know that you also share the opinion that there are partnerships between public and private sector entities as well as governments to advance the purposes of the Endangered Species Act. Can you perhaps elaborate on the potential for increased economic opportunities, eco-tourism and some of those benefits?

Mr. KOSTYACK. Yes. We have been working on that quite a lot because of the fact that it is becoming increasingly a concern of ours, particularly when a large part of the Endangered Species Act debate is happening now through the media. The Administration is generating large dollar figures associated with every implementation step, and only on the cost side.

So we have been investigating benefits and trying to quantify them. And the numbers are actually staggering. If you go to different regions of the country, you will find that entire economies depend upon a healthy environment, and the first indicator of a healthy environment is whether or not it can sustain fish and wildlife.

If you look at the Pacific Northwest, for example, with Pacific salmon, you have entire recreational industries that depend on people coming out to healthy rivers and fishing, but also just enjoying that environment. You have all kinds of commercial fishing that depends upon a sustainable fishery. If you go up and down the coast, if you do not have a healthy ecosystem, it has direct dollar impacts.

You can also look at it in terms of the indirect benefits. Oftentimes on the cost side of things we see a lot of indirect steps and the causal cycle about how many jobs or industries might be affected. Well, if you do that on the conservation side, you would look, for example, at drinking water and flood protection. If you are protecting habitats, you are generally also helping protect our drinking water supply, and you are generally helping protect against flood damage, and those numbers need to be factored in if we are going to do an honest analysis.

Senator CLINTON. Thank you.

Senator CHAFEE. Senator Jeffords.

Senator JEFFORDS. Mr. Kostyack, I would like to hear more about your proposals to encourage private landowners to do their part to contribute to the recovery of listed species.

Mr. KOSTYACK. OK. There are two that I would like to focus your attention on. One is, and it really depends on how ambitious you want to be, because I know working with the tax code is sometimes a high hurdle, but this is an item that has been a consensus item since I participated in the Keystone dialog back in 1995 on private landowner incentives.

If you can get a private landowner to sit down, enter a conservation agreement for the benefit of listed species to carry out conservation measures and either defer State taxes or have some kind of credit for their expenses on the income tax, that is a win-win solution. I have been on the Hill lobbying with the farm bill on that very issue. There is no dispute on any part of the regulated community or the conservation community to make those kinds of tax code changes. It is an opportunity that has been waiting for action for 10 years, and I would very much like to work with this committee on that.

Once you get outside the tax code, you obviously depend much more upon the appropriators. Therefore, there is a certain amount of uncertainty about the levels of funding, and therefore it is harder for private landowners to do planning. Nonetheless, there are existing grant programs that are well-established that can be relied upon to provide conservation benefits for wildlife. Yet they do not take the key extra step, that we have not yet seen at least in most of these programs, of explicitly linking those grants to endangered species recovery.

We have a number of wildlife related grant programs. The Interior Department has two they have been touting in recent years, the Landowner Incentive Program and the Stewardship Program, and you have a long array of farm bill programs. If this committee were willing to look at some of those grant programs and just make a few tweaks and say we are going to reward people who are carrying out actions that are specified in an endangered species recovery plan, all of a sudden, we are going to have all kinds of progress.

Again, this is a consensus point. There is no controversy among the development and conservation side that we should be spending more money on private landowners who are willing to carry out beneficial conservation measures.

Senator JEFFORDS. Ms. Clark, I am interested in the reference you made in your testimony to upstream mechanisms that come

into play to stop species declines before the Endangered Species Act is ever triggered. Can you comment further on this point.

Ms. CLARK. Certainly, Senator. There are a couple of issues. Clearly, front-ending the Endangered Species Act, enhancing the role of the States, increasing the capacity and capability and legal authorities of the State where appropriate, makes good sense, as the primary owners of wildlife in this country.

At the end of the last Administration, the initiation of a program called the State Wildlife Grant Conservation Program allowed for an upstream solution to the Endangered Species Act through the development of wildlife conservation strategies, plans, if you will, by the States to encompass the conservation needs of all wildlife within the jurisdiction of the State, focusing on species in greatest conservation need.

By the time a species is on the Endangered Species Act list it is very tough to balance. You are out of flexibility. So providing those resources up front—candidate conservation agreements, there is a watch list that is almost 300 species long already maintained by the Federal Government, engaging in candidate conservation agreements and providing the certainty to those that engage, particularly the private landowners, is a really important way so that you do not tumble into the regulatory framework of the Endangered Species Act. Enhancing the capacity of States, enhancing the funding ability and legal authorities where States are willing and have the political will to step up should be encouraged to stave off the declining species dilemma that we are facing today.

Senator JEFFORDS. Thank you. Thank you, Mr. Chairman.

Senator CHAFEE. I have no further questions of the members of the panel. Thank you very much for your testimony. We look forward to working with you as we go forward. I do not think any of us would disagree, it is a difficult path to get legislation through the entire process. But where there is a will, there is a way, and we have some will.

Thank you once again.

[Whereupon, at 11:05 a.m., the committee was adjourned.]

[Additional statements submitted for the record follow:]

STATEMENT OF CRAIG MANSON, ASSISTANT SECRETARY, FISH AND WILDLIFE AND PARKS, DEPARTMENT OF THE INTERIOR

Mr. Chairman and members of the subcommittee, I appreciate the opportunity to testify today regarding the Endangered Species Act (ESA).

The ESA was passed in 1973 to conserve plant and animal species that, despite other conservation laws, were in danger of extinction. The ESA provides significant policy direction and tools to encourage and accomplish species conservation and protection. The Act states that the policy of the Congress is that the Federal Government will seek to conserve threatened and endangered species. It further states that the purposes of the Act are to provide a means to conserve the ecosystems upon which listed species depend, to develop a program for the conservation of listed species, and to achieve the purposes of treaties and conventions such as the Convention on International Trade in Endangered Species (CITES).

A key purpose of the ESA is to provide a program for the conservation of endangered and threatened species to bring them to the point at which measures under the Act are no longer necessary. At the Department of the Interior, the ESA is administered by the U.S. Fish and Wildlife Service (Service). Under the law, species may be listed as "endangered" or "threatened." All species of plants and animals, except pest insects, are eligible for listing as endangered or threatened if they meet the criteria specified in the ESA. Once listed, the species is afforded a range of protections available under the ESA. These protections include prohibitions on killing,

harming or otherwise taking listed species of animals. In addition, Federal agencies are to utilize their authorities to carry out programs for the conservation of endangered or threatened species, and must insure that any action authorized, funded, or carried out by the Federal agencies is not likely to jeopardize the continued existence or any listed species or result in the destruction or adverse modification of a listed species' critical habitat.

Currently, there are 1,264 listed domestic species (988 endangered and 276 threatened) and 386 species under consideration by the Service for possible inclusion on the list. Of the 386 species, 286 are candidate species being reviewed on an annual basis. The Service has determined that these candidate species warrant listing, but listing proposals are precluded by higher priorities. In addition, the Service currently has published proposed rules to list 24 species as either endangered or threatened, 21 domestically and 3 internationally. Further, the Service has 56 pending petitions to list a total of 76 species as either endangered or threatened. Of these petitions, the Service has published 8 findings that the petitioned action to list the subject species may be warranted, and has initiated a status review for the involved species.

Unfortunately, the Service's work related to endangered species is in large part driven by lawsuits. As of March 18, 2005, the Service is involved in 35 active lawsuits on listing issues with respect to 57 species; including 8 lawsuits on 90-day petition findings for 11 species, 9 lawsuits on 12-month petition findings for 13 species, 13 lawsuits regarding final determinations for 23 species, 13 lawsuits regarding critical habitat for 21 species, and 18 lawsuits regarding merits challenges on 17 species. The Service is also complying with court orders for 42 lawsuits involving 87 species.

COOPERATIVE APPROACHES TO CONSERVATION UNDER THE ESA

The Administration believes that conservation of habitat is vitally important to successful recovery and delisting of species. We are committed to implementing a cooperative approach through the development of partnerships with states, tribes, landowners, and others. The Department is focused on identifying new and better means of encouraging voluntary conservation initiatives. Indeed, the Service currently has many conservation tools available, including Candidate Conservation Agreements, Candidate Conservation Agreements with Assurances, Safe Harbor Agreements, Habitat Conservation Plans and Conservation Banking, which provide for close cooperation with private landowners, state, tribal, and local governments, and other non-Federal partners that are particularly important in our implementation of the ESA.

Through the Candidate Conservation program, the Service can work with Federal agencies, states, landowners, and other non-Federal partners to voluntarily conserve candidate or other declining species. Under this program, the Service works to identify species that face threats that make listing under the ESA a possibility and provides information, planning assistance, and resources to encourage voluntary partnerships and agreements. These resulting conservation agreements or plans may contribute to removing the threats that might otherwise necessitate listing under the ESA.

In 1999, the Service published regulations that provided for Candidate Conservation Agreements with Assurances (CCAA). Conservation of fish and wildlife resources on private lands is critical to maintaining our Nation's biodiversity. However, landowners are often concerned over the potential impact of the listing of a species on their property. CCAAs provide regulatory certainty to landowners who voluntarily promote candidate conservation on their lands.

For example, in 2002, Georgia Power, the Georgia Department of Natural Resources, and the Service signed the Candidate Conservation Agreement with Assurances for the robust redhorse. A key objective is to establish a population of this fish in the Ocmulgee River. In return for conservation activities in the river, the agreement specifies that the hydropower production company will not be required to take additional measures beyond those in the agreement if it is necessary to list the species under the ESA in the future. Initially, Georgia Power implemented a new flow regime for the Sinclair Dam to emulate natural seasonal discharges in the Oconee River and is now funding research to learn the life-history and preferred habitat of the robust redhorse, estimate its population numbers, and determine the best conditions for reintroducing the fish.

Similar to Candidate Conservation Agreements with Assurances, Safe Harbor Agreements also help garner non-Federal property owners' support for species conservation on their lands. Under Safe Harbor Agreements, non-Federal property owners who commit to implement voluntary conservation measures that will result in

a net conservation benefit for listed species receive assurances that at the end of the agreement period, the landowner can return the enrolled property to the baseline conditions that existed at the beginning of the agreement.

For example, under the North Carolina Sandhills Safe Harbor Agreement, 44 non-Federal landowners are enrolled through certificates of inclusion covering 48,000 acres and protecting 50 groups of red-cockaded woodpeckers. In addition, more than 325 private landowners have signed up under 30 additional Safe Harbor Agreements to conserve and protect 35 endangered and threatened species including 13 birds, 7 fish, 4 amphibians, 3 mussels, 3 mammals, 3 butterflies and 2 plants. Over 3.6 million acres of private land and 16 linear miles of stream have been enrolled in the Safe Harbor program.

As successful as the Safe Harbor program is, we are committed to updating and improving the program based on the lessons learned from the private landowners and partners participating in the program. The Service is using more "umbrella" Safe Harbor Agreements to cover species across all or a relatively large segment of its range by partnering with state wildlife agencies and non-governmental organizations (NGO). The state or NGO holds the Safe Harbor permit and individual landowners enroll, and thus receive assurances, by signing up through certificates of inclusion.

The Habitat Conservation Planning Program provides a flexible process for permitting the incidental take of threatened and endangered species during the course of implementing otherwise-lawful activities. The program encourages applicants to explore different methods to achieve compliance with the ESA and to choose the approach that best meets their needs. Perhaps the program's greatest strength is that it encourages locally developed solutions to listed species conservation, while providing certainty to permit holders. Through this process of consultation and cooperation with our partners, the program helps provide for the conservation of listed species on non-Federal land throughout the country.

In April the Service approved an incidental take permit based on a Habitat Conservation Plan for the lower Colorado River. In all, the plan covers 6 listed species, 2 candidate species, and 18 unlisted species that may become listed in the future. The permit covers the present and future activities of non-Federal entities within the states of Arizona, California, and Nevada that involve the consumption of water and power resources. The plan includes the development of 8,132 acres of native riparian, marsh and aquatic habitats, extensive stocking and monitoring of native fishes, a monitoring and research effort on the species, their habitats and how best to restore native habitats, and an adaptive management program to take the results of research and monitoring and adjust the conservation actions to best meet the needs of the covered species for the next 50 years.

On May 8, 2003, the Service announced new conservation banking guidance to help reduce piecemeal approaches to conservation by establishing larger reserves and enhancing habitat connectivity, while saving time and money for landowners. This guidance details how, when, and where the Service will use this collaborative, incentive-based approach to species conservation. Conservation banks are lands acquired by third parties, managed for specific threatened or endangered species and protected permanently by conservation easements. They may also help avoid the need to designate critical habitat. Banks may sell a fixed number of mitigation credits to developers to offset adverse effects on a species elsewhere.

In December 2003 Dove Ridge Conservation Bank, a privately owned, 2,400-acre site located in Butte County, California, was approved to sell vernal pool preservation credits for the vernal pool fairy shrimp, tadpole shrimp, and Butte County meadowfoam. It is currently the single largest conservation bank for vernal pool species in the State of California. Other resources on the bank site include a stream with wetland banking potential. Establishment of the Dove Ridge Conservation Bank has spurred more interest in preserving habitat within the county and it is likely more habitat within this watershed will be acquired for similar conservation purposes.

As Members are aware, we recently announced the rediscovery of the Ivory-billed woodpecker at the Cache River National Wildlife Refuge in Arkansas. The Ivory-billed woodpecker, the largest woodpecker in the United States, is the second largest in the world and was thought to be extinct in the United States for more than 60 years.

On April 28, 2005, Secretary Norton and USDA's Secretary Johanns announced a multi-year, multi-million-dollar partnership effort to aid the rare bird's survival. The Department and USDA have proposed more than $10 million in Federal funds for research and monitoring, recovery planning and public education. In addition, the funds will be used to enhance law enforcement and conserve habitat through conservation easements, safe-harbor agreements and conservation reserves.

After consulting with Governor Mike Huckabee and other officials at the Federal, state and local levels, the Interior Department will appoint members to a Corridor of Hope Cooperative Conservation team. The conservation efforts to be established for the benefit of the Ivory-billed woodpecker will emphasize working with local citizens and private landowners. Local involvement is critical to ensuring successful, effective and long lasting conservation results. This approach, not imposition of the regulatory critical habitat scheme now in the Act, is how the species will be recovered.

PROCEDURAL AND RESOURCE CHALLENGES RELATED TO CRITICAL HABITAT

While the Department has made great strides in improving administration of the ESA without legislative changes, we do need congressional action in order to update and improve implementation in certain areas. I would like to take the opportunity to discuss one area of implementation that continues to be both a challenge and a source of controversy—the designation of critical habitat.

The Service has been embroiled in a relentless cycle of litigation over its implementation of the listing and critical habitat provisions of the ESA for over a decade. This has resulted in a Section 4 program with serious problems due not to agency inertia or neglect, but to a lack of scientific or management discretion to focus available resources on the listing actions that provide the greatest benefit to those species in utmost need of protection. In fiscal year 2004, the Service proposed critical habitat for 12 species and completed critical habitat designations for 25 species. Currently, the Service is working on 31 critical habitat proposals for 51 species. All of the fiscal year 2004 and fiscal year 2005 proposed and final designations were the result of court orders or settlement agreements.

As I noted initially, protection of habitat is the key to sustaining and recovering endangered species. However, the critical habitat process as currently established is not an effective means of conserving habitat.

The Service has characterized the designation of critical habitat as required by the ESA as the most costly and least effective class of regulatory actions undertaken by the Service. It is often of little additional value or counterproductive and can result in negative public sentiment. This negative public sentiment is fueled by inaccuracies in the initial area designated when we must act with inadequate information to meet deadlines and also because there is often a misconception among the public that, if an area is outside of the designated critical habitat, it is of no value to the species. At the same time, the designation of critical habitat imposes burdensome requirements on Federal agencies and landowners and can create significant economic and social turmoil.

As a result, for many years the Service often found designation of critical habitat to be "not prudent," and did not designate it for most listed species; an approach which was formalized by the previous Administration. In the late 1990s, some critics began successfully challenging these "not prudent" findings in court; those successes led to a flood of additional suits which continue to this day. These lawsuits have subjected the Service to an ever-increasing series of court orders and court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget.

Consequently, the Service has little ability to prioritize its activities to direct resources to listing program actions that would provide the greatest conservation benefit to those species in need of attention. The previous Administration recognized this when it said that lawsuits that force the Service to designate critical habitat necessitate the diversion of scarce Federal resources from imperiled but unlisted species that do not yet benefit from the protections of the ESA.

The accelerated schedules of court-ordered designations initially left the Service with limited ability to take additional time for review of comments and information to ensure the rule addresses all the pertinent issues before making decisions on listing and critical habitat proposals. This in turn fostered a second round of litigation in which those who will suffer adverse impacts from these decisions challenged them. This cycle of litigation appears endless, is very expensive, and in the final analysis provides relatively little protection to listed species.

Extensive litigation has shown that the courts cannot be expected to provide either relief or an answer, because they are equally constrained by the strict language of the ESA. The Department of Justice has defended these lawsuits and sought to secure relief from the courts to allow the Service to regain the ability to prioritize the listing program according to biological need. Almost universally, the courts have declined to grant that relief.

In 2001, a Federal district judge, in *Center for Biological Diversity* v. *Norton*, No. CIV 01–0258 PK/RLP (ACE), observed that "the Secretary is caught in a quandary"

in trying to "fulfill the myriad of mandatory [ESA] duties." The judge opined that "[m]ore lawsuits will inevitably follow" unless, among other things, the Service regains its discretion to prioritize its workload. The judge suggested that a legislative solution is necessary; otherwise "tax dollars will be spent not on protecting species, but on fighting losing battle after losing battle in court." Other courts have agreed with this assessment.

In short, litigation over critical habitat has hijacked the program. Simply put, the listing and critical habitat program is now operated in a "first to the courthouse" mode, with each new court order or settlement taking its place at the end of an ever-lengthening line. The Service is no longer operating under a rational system that allows them to prioritize resources to address the most significant biological needs. As a direct result of this litigation, the Service has had to request a critical habitat listing subcap in its appropriations request the last several fiscal years in order to protect the funding for other ESA programs. At this point, compliance with existing court orders and court-approved settlement agreements will likely require funding into fiscal year 2008.

Congress added the strict deadlines to the Act to ensure that listing actions are completed in a timely manner. However, absent some measure to allow for a rational prioritization of the workload based on a consideration of the resources available, those strict deadlines will only worsen the current untenable situation. It cannot be overstated that managing the endangered species program through litigation is ineffective in accomplishing the purposes of the ESA.

Former Secretary Bruce Babbitt wrote in a New York Times op-ed piece in April 2001 (attached) that, in its struggle to keep up with court orders, the Service has diverted its best scientists and much of its budget for the ESA away from more important tasks like evaluating candidates for listing and providing other protections for species on the brink of extinction. We also believe that available resources should be spent focusing on actions that directly benefit species such as improving the consultation process, development and implementation of recovery plans, and voluntary partnerships with states, tribes, and private landowners.

DOI FISCAL YEAR 2006 FUNDING FOR THE ENDANGERED SPECIES PROGRAM

The Administration's budget request for fiscal year 2006 provides funding to meet resource protection goals and address the growing litigation-driven workload. The requested funding includes $18.1 million for listing activities, an increase of $2.2 million over the fiscal year 2005 funding level. Of this, $12.9 million is directed to critical habitat designation. This funding will allow the Service to meet its current and anticipated court orders for the designation of critical habitat for listed species. In this regard, I would note that as of May 2, 2005, there were 64 lawsuits pending or expressly threatened related to critical habitat or other section 4 actions.

We are also requesting $64.2 million for recovery, $8.3 million for Candidate Conservation and $49.5 million for Consultation and Habitat Conservation Planning. In addition, our budget requests significant increases for grants that we provide to states, tribes, and private landowners to conserve and recover endangered species on non-Federal property. We are requesting $40 million for these State and Tribal Landowner Incentive Program, an increase of $18.3 million from fiscal year 2005; $10 million for the Private Stewardship Grants Program, an increase of $3.1 million; $80 million for the Cooperative Endangered Species Conservation Fund; and $74 million for the State and Tribal Wildlife Grants—all grant programs that can aid in endangered species conservation and recovery efforts. These programs are central to helping the agency pivot toward cooperative conservation and voluntary approaches to species conservation and protection.

CONCLUSION

In closing, we appreciate the subcommittee's interest in the ESA process. I would like to reiterate this Department's interest in working with Congress to improve the Endangered Species Act. We must work together on a bipartisan basis to determine how to get the most value for species conservation out of the Federal resources devoted to the endangered species program. I would be happy to answer any questions that Members may have.

RESPONSES BY CRAIG MANSON TO QUESTIONS FROM SENATOR INHOFE

Question 1. In your testimony, you mentioned that the USFWS approached an organization that often sues the USFWS with a plan that would have used the money they would have spent on litigation on ground-level species and habitat protection

efforts, What is the name of this organization and did they accept your offer or sue instead?

Response. I made the offer myself, to the Center for Biological Diversity, in May of this year. To date, I have received no formal response, but they have filed two or three additional lawsuits.

Question 2. Many of the species being protected have a wide geographical range. How does the USFWS ensure uniformity in the protection of species among its various regional and field offices? For example, in OK the protections and restrictions for the American Burying Beetle are different from those in Arkansas?

Response. The U.S. Fish and Wildlife Service (Service) coordinates conservation efforts to address species that may inhabit several regions. Regional and field offices use recovery plans as guidance regarding measures needed to conserve the species. Additional coordination is achieved by assigning each species to a lead region. The lead region will track and coordinate the activities of other regional and field offices involved. Within the non-lead regions, state offices are often assigned responsibilities for a species, including coordination with the lead region. In addition, if other offices have done work on a particular species, the regional and field offices will frequently ask for assistance from those offices. For example, previously completed biological opinions on a species are shared as well as other analyses regarding threats to a species.

With regard to past differences in protection and restrictions for the American burying beetle (ABB), there have been discrepancies in the manner in which the ABB was treated in the consultation process by Arkansas and Oklahoma. While some of the differences were simply a result of interpretation of the "best available science," other differences arose as a result of threats to the species that vary from state to state. For instance, in Oklahoma the Service deals with an overwhelming number of oil and pipeline issues that are not as abundant in Arkansas. However, recognizing that there needs to be more consistency between regions in the treatment of the ABB, the Arkansas and Oklahoma Field Offices have met several times over the last 12 months to align the consultation processes. Any remaining differences in consultation for ABBs (between regions or field offices) should result from differences in threats to the species at a given locality and the cumulative effect of those threats in relation to other ongoing or future projects.

Question 3. How is the Fish and Wildlife Service complying with the Data Quality Act in reference to listings, internal policy decisions for listed species, critical habitat determinations, recovery plans, delisting, etc.?

Response. The Service is committed to using science in its decisionmaking and to providing the American public with information of the highest quality possible.

Federal agencies are required to publish guidelines for ensuring the quality, objectivity, utility, and integrity of information we use and disseminate, and to provide mechanisms for allowing the public to seek correction of that information. The Service's Policy on Information Standards Under the Endangered Species Act (Act), published in the Federal Register on July 1, 1994 (59 FR 34271), and Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (P.L. 106–554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service, provide criteria, establish procedures, and provide guidance to ensure that decisions made by the Service represent the best scientific and commercial data available. They require Service biologists, to the extent consistent with the Act and with the use of the best scientific and commercial data available, to use primary and original sources of information as the basis for listing, reclassification, delisting, critical habitat designations, recovery planning and implementation, and petition findings. All information is used in accordance with the provisions of Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (P.L. 106–554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service.

The Service has a web site, *http://www.fws.gov/informationquality/* that is intended to meet those requirements. In addition to our information quality guidelines and those of the Department of the Interior, we also present on the site Service responses to inquiries concerning the quality of information on specific topics as well as a Year-End Information Quality Report for fiscal year 2004 and fiscal year 2003.

Specifically, in regard to listings, critical habitat determinations, recovery planning and implementation, reclassifications, and delistings, in accordance with our joint peer review policy published in the Federal Register on July 1, 1994 (59 FR 34270), we solicit review, from at least three appropriate and independent specialists/experts regarding the proposed rule. The purpose of such review is to ensure that listing, reclassification, delisting, critical habitat designations, recovery planning, and recovery implementation (as appropriate) are based on scientifically sound data.

Question 4. GAO's testimony stated that the service "was not always integrating new research into ongoing species management decisions." Should the Fish and Wildlife Service employ the best science as it becomes available to ensure that those restrictions on activity imposed actually have the effect of helping species? What steps should be taken to ensure that the best science is continually being used in managing species?

Response. The Service is committed to using the best available science in its decisionmaking and to providing the American public with information of the highest quality possible. The Service's policies and practices, including the Information Quality Act, Interagency Cooperative Policy on Information Standards Under the Endangered Species Act, and the Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities help to ensure that species management decisions are based on the best available science. The Service routinely consults with experts and considers information from Federal and state agencies, academia, other stakeholders, and the general public. Decisions are subject to independent peer review, as appropriate, to help ensure that they are based on the best available science and conform to contemporary scientific principles.

Question 5. As a follow-up there have been allegations of political influence or agenda driven science on both sides of the issues, would it not be prudent to have a statutory standard by which to judge good science to avoid this finger-pointing?

Response. I agree that additional statutory clarification of the science requirements of the Act would be beneficial. Issues which might be addressed include definitions of terms such as "scientific data" and "scientific information;" setting a point at which "best available" scientific or commercial data is or is not sufficient to make an informed decision; and establishing a workable peer review requirement.

Insofar as political influence is concerned, the Department and the Service place great importance on the integrity of science and the role it plays in the decisionmaking process. Over the past 4 years, the Department has taken a number of actions to enhance both the integrity of our science and the role it plays in the decisionmaking process. We take seriously any concerns employees or others might have about scientific integrity. To that end, our Inspector General and other outside parties have investigated recent allegations of interference and have found them to be unsubstantiated.

Notwithstanding these particular findings, upon receipt of the recent survey to which you refer regarding concerns among employees about science integrity, we are evaluating options for improved communication and procedures for ensuring high scientific standards and information flows throughout the Service.

Question 6. How does the USFWS manage the various activities (among region and field offices) being conducted on a species to eliminate duplication and ensure the right projects are being funded for that species? Is there "central" oversight?

Response. The Service has a lead field office and region for each candidate and listed species. When a species occurs in more than one office's or region's area of responsibility, all activities for the species are coordinated through the lead office and region. This ensures consistency and eliminates duplicative activities between and among offices/regions. The Service clearly directs how the regional and field offices should implement the endangered species program by dividing appropriated funds into a separate budget for each program area. Regional and field offices are responsible for developing recovery plans and tracking implementation of actions for those species for which they have lead recovery responsibility, to ensure the appropriate projects are being funded for the species and to avoid duplication of efforts. One way of tracking recovery implementation actions is through the newly developed Recovery On-line Activity Reporting data base that will be accessible to our partners and the general public at the end of 2005. Similarly, regional and field offices with lead responsibility for candidate species are responsible for coordinating conservation efforts to address such species, and to annually update the status of candidates and conservation efforts for them.

Question 7. You mentioned all of the cooperative agreements and partnership programs that the Fish and Wildlife Service has implemented by rule. We'll hear from others later that these practices need to be codified if updates to the Act are made. Do you concur? Are there other types of partnership programs that the Service would like to have the authority to pursue?

Response. We now have a wide variety of cooperative and partnership programs underway, most of which have been initiated administratively under our general conservation authorities rather than by statute. We believe it would be very helpful to have express authority for these programs, particularly those directly related to ESA activities. I am not aware of additional programs that might be added to the existing ones, as they now cover the full spectrum of activities.

Question 8. You testified that "The Service has characterized the designation of critical habitat as required by the ESA as the most costly and least effective class of regulatory actions undertaken by the Service". And "that litigation over critical habitat hijacked the program". The previous administration was disparaging of the critical habitat program. Are there ways to fix this program or do we need a whole new way of doing business?

Response. I believe we need a new way of doing business under the ESA with respect to habitat conservation. The current process, in addition to being costly, is not effective in providing for the habitat needs of the species, and in many cases we believe is counter-productive to those needs.

Protection of critical habitat occurs only where there is Federal agency involvement (through funding, permits or direct action) in the proposed alteration of that habitat. The fact of listing provides in almost all cases the same general protection against adverse modification or destruction of critical habitat, through the requirements of section 7(a)(2); even under the recent court rulings distinguishing between survival and recovery as standards for evaluating impacts to critical habitat, the net result is likely to be measured in degrees of permitted impacts in cases where there is Federal involvement, not protection for additional habitat.

However, what species generally need with respect to habitat is habitat enhancement or restoration, not maintenance of the status quo. This cannot be compelled under the Act, and it is the Service's experience that even the prospect of a critical habitat designation serves to antagonize landowners and governmental land managers, often preventing the actions most beneficial to the species. We believe this is a compelling argument for changing the Act's approach to habitat conservation toward one of cooperative conservation.

The Service firmly supports the philosophy that by working together, the Federal Government and private landowners can achieve tremendous success in habitat conservation. In August 2004, President Bush signed an Executive Order on Cooperative Conservation asking all agencies to strengthen their efforts to work together and with tribes, states, local governments, and landowners to achieve conservation goals. During the years 2002-2004, the Department provided over $1.3 billion in grants to states and private landowners and, with our partners, have restored millions of acres of habitat; removed invasive exotic species and replanted native grasses and shrubs; improved riparian habitat along thousands of miles of streams; conserved limited water resources to benefit fish and other species; and developed conservation plans for endangered species and their habitat.

We need to move more toward basing the ESA's habitat conservation provisions on the many cooperative, voluntary habitat conservation efforts now underway. These programs have solid records of accomplishments over many years.

Question 9. I have recently introduced with Senator Jeffords, S. 260, the Partners for Fish and Wildlife Act authorizing a conservation program that works in cooperation with private landowners. Will you address the need for incentive programs, like the Partners program to be a part of any updating of the ESA?

Response. Yes, voluntary, incentive-based programs should be one of the key parts of updating the ESA. The Partners for Fish and Wildlife program has a long track record of significant accomplishments, and despite considerable funding increases in recent years, has a backlog of landowners waiting to sign up. Other programs which should also be included are those such as the Candidate Conservation Agreement with Assurances and Safe Harbor agreements, which ensure that landowners are not penalized for assisting in the conservation of listed or candidate species, and the Landowner Incentive Program and the Private Stewardship Grants Program, referred to collectively as the "Species Protection Partnership Program," which offer incentives for private landowners to protect imperiled species and restore habitat while engaging in traditional land management practices like farming or ranching.

RESPONSES BY CRAIG MANSON TO QUESTIONS FROM SENATOR CHAFEE

Question 1. Previous Administrations have listed far greater numbers of species to the Endangered Species Act list. For example 58 species per year were listed under the first President Bush and 65 per year under President Clinton in comparison to less than 10 species per year over the past 4 years. What is the cause for this recent decline in listing species?

Response. The decline in listing new species began in the last Administration. On November 22, 2000, former Director Jamie Clark issued a press release that stated, in part:

> The U.S. Fish and Wildlife Service announced today that it will be unable to consider adding any new species to the Endangered Species List, except on an

> emergency basis, for the remainder of the 2001 Fiscal Year because all available funding must be allocated to conduct critical habitat designations required by court orders or settlement agreements.
>
> "We have reached the point where the staff time and funding needed to list species have been consumed by the requirement to do court-ordered critical habitat designations stemming from a flood of lawsuits," said Service Director Jamie Rappaport Clark. "Unfortunately many species that should be listed in the coming year won't be listed."

The consequences of that "flood of lawsuits," many of which were not decided until 2003 and 2004, continue to dominate the listing process. Although funding for the listing element of the endangered species program has increased from $6.3 million in fiscal year 2001, when former Director Clark made her statement, to the $15.9 million enacted last year, with $18.1 million requested for fiscal year 2006, most of the money continues to go to compliance with court orders related to these critical habitat lawsuits.

We do have some funding this year to undertake additional listing actions, which we are devoting to the highest-priority pending species, and to address a backlog of petition actions relating to yet more listings, in an effort to hold off an entirely new flood of lawsuits on that issue. If our budget request is appropriated, we anticipate having additional funds for listing actions next year as well. However, as long as the critical habitat backlog remains, there is no prospect of listing species in the numbers done in the prior two Administrations.

I would also note that approximately 400 of the 520 listings (65 per year times 8 years) in the Clinton Administration were the subject of the settlement of a single lawsuit. It should also be understood that listing does not, in and of itself, result in direct, on-the-ground, recovery of species or enhancement of their habitat. Recent significant investments by the Administration in cooperative conservation grants significantly contribute to enhancement and restoration of habitat, as well as to species protection.

Question 2. There has been a great deal of criticism recently that scientific decisions with regard to threatened and endangered species have been unduly influenced by the political process at the Fish and Wildlife Service. How do you respond to these accusations?

Response. The Department and the Service place great importance on the integrity of science and the role which it plays in the decisionmaking process. Over the past 4 years, the Department has taken a number of actions to enhance both the integrity of our science and the role which it plays in the decisionmaking process. We take seriously any concerns employees or others might have about scientific integrity. To that end, our Inspector General and other outside parties have investigated several allegations of interference and have found them to be unsubstantiated.

Notwithstanding these particular findings, upon receipt of the recent survey to which you refer regarding concerns among employees about science integrity, we are evaluating options for improved communication and procedures for ensuring high scientific standards and information flows throughout the Service.

Question 3. Is it possible to reform Endangered Species Act while at the same time ensuring species and their habitat are protected?

Response. Yes. The type of reforms we are discussing will continue to protect listed species, and will enhance their prospects for recovery by encouraging improvement, not just protection, of their habitat.

Question 4. In your testimony you noted that protection of habitat is key to sustaining and recovering endangered species, but rampant litigation has eroded the Services ability to identify critical habitat for listed species. In your opinion, what types of regulatory or legislative solutions are available for resolving this situation?

Response. The most effective approach to habitat conservation is one that provides incentives—which need not be entirely financial—to land owners and land managers to manage their lands for the benefit of fish and wildlife, including specifically listed species. There are a variety of ways to accomplish this, including using programs already underway such as Partners for Wildlife, Landowner Incentive Program, Private Stewardship Grant Program, and ESA-specific efforts such as Candidate Conservation Agreements and Safe Harbor Agreements. We look forward to working with you on this.

RESPONSES BY CRAIG MANSON TO QUESTIONS FROM SENATOR CLINTON

Question 1. In your testimony at the hearing you remarked that "there are 800 species that are without critical habitat . . . If we were to develop a priority sys-

tem that still would not satisfy the courts because we still would be in default on those 800. The courts would not give deference to our priority system because each of those 800 are individual defaults . . . So as a result, we have conflicting court orders and litigation that goes on and on, and that is a problem. This is a long-standing problem. It did not start recently and it is not going to end any time soon without some legislative relief.

Notwithstanding your answer, I understand that the Fish and Wildlife Service maintains a list of potential critical habitat designations for internal use in estimating its budget needs for each year and that list includes only those species listed in the past 6 years and still without critical habitat. It is true that there are over 850 listed species for which critical habitat has never been designated. However the lack of critical habitat designations can be challenged in court for only about 44 of these species because there is a 6 year statute of limitations to challenging Federal actions. (In this case, the statue of limitations begins from the final listing rule). Given these facts, how do you justify your statements during the hearing that: (1) the courts will not allow FWS to develop a priority system to designate critical habitat because FWS still would be in default on 800 species and (2) "it is going to end any time soon without some legislative relief"? Is it not, in fact the case that you would develop a schedule to designate critical habitat for those hundreds of species listed more than 6 years ago but still without critical habitat and that schedule could not be challenged in court?

Response. While I agree that the application of the statute of limitations should apply to critical habitat designations for species listed more than 6 years ago, that does not ultimately resolve the problem. First, the application of the statute of limitations to ESA Section 4 listing deadlines, including those for designating critical habitat is unsettled. While a recent district court decision has upheld the government's position that the statute of limitations does apply, see *Center for Biological Diversity* v. *Hamilton* (N.D. Ga. June 2, 2005), a previous decision, issued before the hearing, viewed the failure to meet an ESA Section 4 deadline as an ongoing violation and held, consequently that the statute of limitations did not apply. See *Southern Appalachian Biodiversity Project* v. *U.S. Fish and Wildlife Service*, 181 F. Supp. 2d 883 (E.D. Tenn. 2001). Plaintiffs have already filed a motion for reconsideration of the June 2005 decision.

Second, at most, the statute of limitations is a defense to current liability, which is what the Service's internal list addressed. Notwithstanding the statute of limitations argument, the public may always petition the Service to designate critical habitat for any of those 800-plus species, see 50 C.F.R. 424.14(d), and if the Service does not respond in a timely fashion, it may be subject to a new claim, effectively resetting the statute of limitations. The underlying problem remains in either scenario—there is no "warranted but precluded" or similar provision in the Act with respect to critical habitat that would allow the courts to recognize or respect a priority system.

Question 2. Many, including Congress when the Endangered Species Act was enacted, consider Section 7, entitled "Interagency Cooperation", to be the heart of the Act. Sec. 7, as you know, requires each Federal agency to consult with the Fish and Wildlife Service or National Marines Fisheries Service to ensure that no Federal actions jeopardize listed species or adversely modify or destroy their critical habitat. Yet this administration seems to be moving down a dangerous road to undermine this key protection by issuing new regulations allowing two agencies—Forest Service for "National Fire Plan" and EPA for pesticide registration—to circumvent this requirement and make their own determinations. In my view, allowing Federal agencies to bypass review by the Services plainly violates the Act's section 7 requirements. I have several questions about these changes. Can you please explain to me how these new regulations are legal under the Endangered Species Act? Does the administration plan to propose similar changes to the section 7 regulations for other Federal agencies?

Response. The Service's regulations authorize the adoption of joint counterpart regulations by Federal agencies and the Fish and Wildlife Service and NOAA Fisheries (Services). The authorizing regulations are in 50 C.F.R. 402.04 which was finalized as a rule on June 3, 1986. The intent of the counterpart regulations is to allow Federal agencies to "fine tune" the general consultation procedures to fit their specific program responsibilities and obligations. Counterpart regulations must be designed to improve efficiency while still placing the ultimate responsibility for compliance with section 7 on the Federal agency. Furthermore, the counterpart regulations must retain the "overall degree of protection afforded listed species" required by the Endangered Species Act.

In both sets of counterpart regulations that the Services developed (50 CFR Part 402, subparts C for fire management and D for pesticide registration), we have

worked closely with the affected action agencies (Bureau of Indian Affairs, Bureau of Land Management, National Park Service, U.S. Forest Service, and Environmental Protection Agency) to develop regulations that maintain the same standards for making effects determinations; provide training to the action agencies in making these effects determinations; and include a monitoring/oversight role for the Services. As a result of these considerations, the Services are confident that the counterpart regulations are consistent with the provisions of section 7 of the Act.

There are no other counterpart regulations being drafted at this time.

Question 3. In your testimony, you speak about the importance of conserving habitat for species, yet it is my understanding that this administration has consistently excluded or eliminated areas determined by Fish and Wildlife Service biologists to be essential to a species' conservation from final designated critical habitat. How do you reconcile these two seemingly contradictory positions?

Response. Section 4(b)(2) of the Act states that critical habitat shall be designated, and revised, on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. Congress has given the Secretary the discretion to exclude an area from critical habitat if it is determined that the benefits of exclusion outweigh the benefits of specifying a particular area as critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species. The legislative history is explicit that Congress anticipated that in some cases no critical habitat might be designated as a result of this authority, and therefore significant exclusions from areas otherwise eligible for designation were contemplated at the time the authority was enacted. In our critical habitat designations, we use the provisions outlined in section 4(b)(2) of the Act to evaluate those specific areas that we are consider proposing designating as critical habitat as well as for those areas that are formally proposed for designation as critical habitat.

Question 4. The Union of Concerned Scientists and Public Employees for Environmental Responsibility surveyed FWS scientists and found that a majority of the scientists who responded did not trust the agency to make decisions that will protect species and habitats. Could you explain how the Department is working to address the lack of confidence among it own employees in the agency ability to make administrative decisions regarding the ESA that are grounded in science?

Response. The Department and the Service place great importance on the integrity of science and the role which it plays in the decisionmaking process. Over the past 4 years, the Department has taken a number of actions to enhance both the integrity of our science and the role which it plays in the decisionmaking process. We take seriously any concerns employees or others might have about scientific integrity. To that end, our Inspector General and other outside parties have investigated several allegations of interference and found them to be unsubstantiated.

Notwithstanding these particular findings, upon receipt of the recent survey to which you refer, regarding concerns among employees about science integrity, we are evaluating options for improved communication and procedures for ensuring high scientific standards and information flows throughout the Service.

RESPONSES BY CRAIG MANSON TO QUESTIONS FROM SENATOR JEFFORDS

Question 1. In your testimony, you stated Congressional action is necessary in order to update and improve implementation in certain areas of the Endangered Species Act. In addition to designation of critical habitat, what other areas of the Act does the administration consider in need of legislative action?

Response. There are a number of areas in addition to critical habitat that Congress may want to consider as part of ESA reauthorization. Providing a statutory basis for voluntary, incentive-based programs could provide greater assurances to private parties.

Another area that has been the subject of considerable litigation, and so might profitably be looked at, is additional statutory clarification of the science requirements of the Act. Issues that have been contentious include definitions of terms such as "scientific data" and "scientific information;" setting a point at which "best available" scientific or commercial data is or is not sufficient to make an informed decision; and establishing a workable peer review requirement. Yet another subject of extensive litigation is the various deadlines in the Act, which some courts have even indicated Congress should review.

While the Administration has not proposed a bill, we remain committed to working with the committee to develop a reauthorization proposal we can all support.

Question 2. Under the current Administration, the Department of the Interior has listed far fewer species than recent Administrations, a rate of about 10 per year for this Administration, as compared to 58 per year under the first President Bush and 65 per year under President Clinton. Approximately 286 candidate species are currently awaiting protection under the Act. Please explain why this Administration has not made greater process in listing species?

Response. The reduction in listing new species began in the last Administration. On November 22, 2000, former Director Jamie Clark issued a press release that stated, in part:

> The U.S. Fish and Wildlife Service announced today that it will be unable to consider adding any new species to the Endangered Species List, except on an emergency basis, for the remainder of the 2001 Fiscal Year because all available funding must be allocated to conduct critical habitat designations required by court orders or settlement agreements.
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> "We have reached the point where the staff time and funding needed to list species have been consumed by the requirement to do court-ordered critical habitat designations stemming from a flood of lawsuits," said Service Director Jamie Rappaport Clark. "Unfortunately many species that should be listed in the coming year won't be listed."

The consequences of that "flood of lawsuits," many of which were not decided until 2003 and 2004, continues and has resulted in numerous court-ordered and settlement deadlines extending 2 to 3 years out, thus making it continually difficult for the Service to set priorities by any factor other than court-ordered or settlement deadlines. Although funding for the listing element of the endangered species program has increased from $6.3 million in fiscal year 2001, when former Director Clark made her statement, to the $15.9 million enacted last year, with $18.1 million requested for fiscal year 2006, most of the money continues to go to compliance with court orders related to these critical habitat lawsuits.

We do have some funding this year to undertake additional listing actions, which we are devoting to the highest-priority pending species, and to address a backlog of petition actions relating to yet more listings, in an effort to hold off an entirely new flood of lawsuits on that issue. If our budget request is appropriated, we anticipate having additional funds for listing actions next year as well. However, as long as the critical habitat backlog remains, there is no prospect of listing species in the numbers done in the prior two Administrations.

I would also note that approximately 400 of the 520 listings (65 per year times 8 years) in the Clinton Administration came from the settlement of a single lawsuit. It should also be understood that listing does not, in and of itself, result in direct, on-the-ground, recovery of species or enhancement of their habitat. Recent significant investments by the Administration in cooperative conservation grants significantly contribute to enhancement and restoration of habitat, as well as to species protection.

Question 3. In your testimony, you state and have repeatedly complained that the Fish and Wildlife Services priorities, particularly in the listing and critical habitat contexts, are being driven by litigation and court orders rather than by scientists. However, the Interior Department could attempt to assert some control by developing a science based priority system for dealing with Endangered Species Act decisions and the critical habitat backlog. Please explain why the Department has failed to put forth a single administrative policy or initiative to ensure that Endangered Species Act priorities are being set based on science.

Response. We do have a science-based priority system for making listing decisions and prioritizing recovery actions under the ESA. This ranks entities according to whether they are a species, subspecies, or population, and the degree of threat they face. It was developed pursuant to section 4(h)(3) and (4), after public review and comment, and has been in effect for many years.

The problem we face is not from lack of listing priority system, but rather that the flood of litigation related to critical habitat designation has forced us to use virtually all of our available listing resources to comply with court orders for critical habitat designations, even though science tells us that we get far more for our money from a listing. We have not attempted to develop a priority system for critical habitat because there is no basis for it. The Act requires that critical habitat be designated at the time of listing, and contains no "warranted but precluded" or similar provisions allowing us to utilize available funds for higher priority actions. The courts have accordingly held that each failure to designate critical habitat is an individual violation of the Act, required to be addressed notwithstanding other demands on resources (including those arising from other failures to designate). There is no point to developing a critical habitat priority system in these circumstances,

unless the Act were amended to authorize one, as the courts by these rulings have said neither they nor we can undertake such prioritizing of critical habitat designations.

Question 4. Some scientists say the rapid rise in global temperatures could be top cause of an unprecedented wave of species extinction. "Climate change will simply accelerate habitat loss which already is the leading threat to species" said Jeff McNeely, the chief scientist for the World Conservation Union. The current rate of species loss is 1,000 times faster than at any time in history, and up 30 percent of all mammal, bird and amphibian species could be lost by 2050, according to the latest Millennium Ecosystem Assessment released March 2005. Do you agree with this assessment? If so what is this administration doing to address the problem? If you do not agree, please explain why you disagree with the worlds leading scientists.

Response. In examining the report, it actually states:

> "The number of species on the planet is declining. Over the past few hundred years, humans have increased the species extinction rate by as much as 1,000 times over background rates typical over the planet's history (medium certainty). [referenced chart not copied here] Some 10-30 percent of mammal, bird, and amphibian species are currently threatened with extinction (medium to high certainty)."

The phrases in italics are "judgmental estimates of certainty, based on the collective judgment of the authors." (Readers Guide, Ecosystem and Human Well-being Synthesis)

We have no basis on which to agree or disagree with these estimates, which are aimed at the situation globally and in which the report's authors have varying degrees of confidence, since we do not collect information on species status worldwide.

The percentage of species in the United States currently threatened with extinction is far lower than these worldwide estimates, as there are approximately 50,000 species within the United States, while only 1,264 are listed as either threatened or endangered, and less than 300 are on the candidate list. Some of those listed are close to or have achieved recovery, and will be taken off the list in the near future.

To the extent that threats to species from climate change or other factors may be increasing, we believe this provides an additional reason why funding should be available for other conservation actions rather than tied up in the marginally valuable, if not counter-productive, critical habitat designation process.

STATEMENT OF JAMES H. LECKY, SENIOR ADVISOR, INTERGOVERNMENTAL PROGRAMS, NATIONAL MARINE FISHERIES SERVICE

Mr. Chairman and members of the committee, I am James H. Lecky, Senior Advisor for Intergovernmental Programs for the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration (NMFS). I am pleased to be here today to discuss the Endangered Species Act (ESA). I will focus my remarks on NMFS' role in implementing the ESA, and a few areas of the ESA that warrant special attention to ensure species protection and recovery in the future.

NMFS' ROLE IN IMPLEMENTING THE ESA

The ESA (16 U.S.C. 1531–1543; P.L. 93–205, as amended) requires NMFS and the U.S. Fish and Wildlife Service (FWS) to list species that are determined to be endangered or threatened, and to subsequently protect those species and their habitat. Pursuant to a 1974 Memorandum of Understanding between the two agencies, FWS has management authority for terrestrial and freshwater species, while NMFS manages marine species, including anadromous species that spend most of their life cycle in the ocean. NMFS currently manages 61 listed species.

The NMFS programs are coordinated by our Office of Protected Resources at NOAA's Silver Spring, Maryland, headquarters. These ESA activities are implemented through our Regional Offices and Fisheries Science Centers in cooperation with other Federal agencies, states, tribes, conservation groups, private property owners, and other members of the public. NMFS' management of many ESA-listed species also requires coordination with foreign nations. When necessary, our Office for Law Enforcement works with the U.S. Coast Guard and other partners to enforce provisions of the ESA.

Section 4(a) requires NMFS to determine whether a species should be placed on—or removed from—the Federal list of endangered or threatened species. This determination is based on a rigorous status review. These status reviews involve the public, States, Tribes, and local government in a process to collect and consider the best

available scientific information. At the end of the status review, NMFS determines whether the species meets the threshold for listing.

If a species does not warrant listing but we have concerns that it may be in decline, we may designate it as a "species of concern." Species of concern are those species about which "NMFS has some concerns regarding status and threats, but for which insufficient information is available to indicate a need to list under the ESA." They may also include species "for which NMFS has determined, following a biological status review, that listing under ESA is 'not warranted' but for which significant concerns or uncertainties remain" (64 FR 19975–April 15, 2004). We have initiated pilot proactive conservation efforts aimed at these species of concern to minimize their risk of decline. Proactive conservation can be more cost-effective than recovering a species once it is listed. We work with interested partners using other authorities besides the ESA to rebuild these at-risk stocks. For example, our Northwest and Southwest Regions are relying on the authority provided in the Magnuson-Stevens Fishery Conservation and Management Act to work with the states and commercial and recreational fishing interests to rebuild bocaccio and other depleted groundfish stocks.

The listing of an endangered species generally protects the species from "take" by making it illegal to harass, harm, or kill a listed species. NMFS is required to address all activities that may impact an endangered species. However for threatened species, section 4(d) of the ESA provides some flexibility to permit activities that may not contribute to the decline of a species.

Section 7 of the ESA requires Federal agencies proposing actions that may affect listed species to consult with NMFS or FWS to ensure that their proposed actions are not likely to jeopardize the continued existence of the species or adversely modify its critical habitat. The section 7 consultation process often concludes when NMFS issues a Biological Opinion, which presents NMFS' assessment of how the proposed actions would affect listed species. It offers measures to minimize take or reasonable alternatives that will not jeopardize the continued existence of the species or result in adverse modification to critical habitat.

Finally, the ESA requires development of recovery plans that identify conservation measures to recover listed species. NMFS works with other Federal agencies, state and local governments, tribes, and private entities to develop and implement measures in these plans. These plans allow NMFS to prepare better informed analyses, inform other Federal agencies on how to use their authorities, and guide cooperation with states and other interested parties.

Over the past few years, we have heard from our constituents and other parties affected by our implementation of the ESA that several aspects of our process need to be more transparent and scientifically sound. We are developing processes to improve transparency and consistency in listing decisions, consultations, and recovery planning that I would like to share with you today.

IMPROVING THE PROSPECTS FOR RECOVERY OF SPECIES

NMFS is required under section 4(f) to prepare recovery plans for all ESA-listed species. The recovery plan provides a road map for actions and funding priorities needed to remove the species from the list and ESA protections. We have been working with FWS to improve how we prepare recovery plans. For example, we are standardizing the process of identifying threats to listed species, communicating the threats to the public, and engaging the public in developing responses to the threats. In the future, we want our recovery plans to become living documents that provide meaningful guidance to our many partners.

Additional improvements can be made to aid recovery, including making the recovery planning process more timely. Currently we focus our limited resources on those areas of ESA that have strict statutory deadlines, such as listing and section 7 consultations. The President's fiscal year 2006 Budget Request includes an increase of $8.5 million for Pacific Salmon ESA recovery and research activities, including section 7 consultations and recovery planning. We would like to put more emphasis on our recovery efforts in the future. To speed recovery, we need to focus our efforts beyond recovery planning into collaborative recovery actions.

USING THE BEST AVAILABLE INFORMATION IN AN OPEN AND TRANSPARENT MANNER

NMFS understands the importance of improving the quality of conclusions drawn from data used to implement the ESA and ensuring that decisions are based on the best data available. This has proved difficult in situations where policy decisions must be made when the information is limited.

NMFS biologists evaluate all information to ensure that it is the best available science. We incorporate independent peer review in listing and recovery activities.

We devote a significant portion of our budget to allow our scientists to stay up-to-date in their respective fields, and to incorporate state-of-the-art analytical techniques and methods to assess and understand species and their ecosystems.

Over the past few years, we have dedicated substantial time and energy to systematically change how we implement the ESA in response to concerns about the quality of the science used in decisionmaking. We focused these efforts on improving the processes regarding species listing as well as section 7 consultations.

Efforts to Improve Species Listing Determinations. A team of scientists (including NMFS and FWS) has been assembled to develop specific criteria for determining whether species qualify for listing as threatened or endangered. The scientists involved in this effort represent a cross section of the best scientific minds working on population ecology in the Federal Government. They are developing criteria that are transparent, repeatable, and based on the best scientific knowledge of population ecology and the process of species extinction. When this effort develops a working set of criteria, we will collaborate further with our Federal and state partners. We also plan to engage the larger scientific community and the public through workshops, presentations at scientific meetings, and papers published in peer-reviewed scientific journals.

Efforts to Improve the Section 7 Consultation Process. As I mentioned earlier, section 7 consultations require NMFS and FWS to render an opinion based on the best available data, which has proven difficult and sometimes controversial in situations where information is limited. To address concerns raised about the quality of the science that underlies these consultations, we have revised our process for consultations and preparing Biological Opinions. NMFS is designing an analytical framework for biologists and managers that provides a more consistent and transparent structure to our section 7 decisions regardless of whether information is limited.

NMFS and FWS personnel have worked for more than 2 years to develop this analytical framework, which makes the process of reaching conclusions transparent, objective, and reproducible, while continuing to protect threatened and endangered species from further declines. We have tested this framework in actual consultations, and in each case the framework provided the expected guidance and made the conclusions of our consultation more legally defensible. Soon, we will start preparing policy and guidance on the use of an application of the framework, which we will finalize in a process that actively engages the larger scientific community, the public, and our Federal and state partners.

For consultations on actions our agency takes under the Magnuson-Stevens Fishery Conservation and Management Act and related fisheries authorities, we are developing operational guidelines that weave section 7 consultations into our procedures for interacting with the Regional Fishery Management Councils. These operational guidelines are designed to address endangered species issues early in the process of developing fishery management actions, and to ensure that the Regional Fishery Management Councils have the information they need to integrate our obligation to protect and recover threatened and endangered species with our interest in the production of sustainable fisheries.

These changes seek to make the process more transparent to all parties involved in a consultation—action agencies, applicants, and other interested parties—and will engage them as active participants in the process of assessing the effects of Federal actions on threatened and endangered species and designated critical habitat. Active and open discussions and exchanges of information between action agency, applicant, and our consulting biologists will now be at the center of the consultation process.

DESIGNATING CRITICAL HABITAT

The designation of critical habitat continues to be both a challenge and a source of controversy. Critical habitat is defined as those areas "on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." The designation of critical habitat is one of the few areas of the statute where economics is taken into account—the Secretary may exclude habitat from a designation if the economic benefit of exclusion outweighs the benefit of inclusion and the exclusion will not result in extinction of the species.

Habitat conservation contributes to a comprehensive effort to recover species. However, much of our critical habitat resources are focused on litigation. One key reason these designations are controversial and litigious is a lack of understanding about exactly what habitat the species needs at the time of listing. At the time of listing, data about the distribution and habitat needs of species and land-use patterns is often not readily available.

Usually such data becomes available during the recovery planning process. Development of recovery plans requires collecting information on distribution, habitat needs, and activities affecting habitat. It also requires an analysis of how activities adversely affecting habitat need to be changed to conserve and restore habitat needed for recovery.

INCREASING THE CONSERVATION PARTNERSHIP ROLE OF STATES

Section 6 of the ESA identifies the states' key role in conserving wildlife. NMFS and FWS recognize the important role of states in species recovery, and have worked to foster partnerships with them in this regard. We acknowledge that states possess broad trustee responsibilities over species and their habitats, compile valuable scientific data and expertise on the status and distribution of species. States often have a more constant working relationship with property owners and local governments.

Currently, eight Atlantic Coast states and two U.S. Caribbean territories have section 6 cooperative agreements with NMFS. These agreements encompass a total of 15 federally listed species and 23 species of concern under NOAA's jurisdiction. In 2003, Congress provided funding to NMFS to implement the section 6 program. Through a competitive grants program, NMFS awarded this funding to states and territories. Last year, section 6 funding supported research on sea turtles, shortnose sturgeon, Atlantic sturgeon, and smalltooth sawfish. NMFS has continued this competitive grants program with similar levels of funding in fiscal year 2004 and 2005. NMFS has requested approximately $1 million in the fiscal year 2006 President's budget to be available as grants.

We are interested in exploring how to share more resources and responsibilities with our partners. We would like to work with the committee on strengthening partnerships and removing potential hurdles to the partners' full involvement.

CONCLUSION

I want to thank you, Mr. Chairman and members of this committee, for inviting me here to speak today. We look forward to working with you to improve ESA and to ensure available resources are spent on actions that benefit threatened and endangered species.

RESPONSES BY JAMES H. LECKY TO QUESTIONS FROM SENATOR INHOFE

Question 1. In your testimony, it appears that NMFS will be working on developing listing "criteria that are transparent, repeatable, and based on the best scientific knowledge of population ecology and the process of species extinction." What should the role of economic and social factors be in making a listing decision?

Response. Listing determinations under the Endangered Species Act (ESA) are made "solely on the basis of the best scientific and commercial data available after conducting a review of the status of the species and after taking into account those efforts, if any, being made . . . to protect such species . . . ." Therefore, listing determinations are made independent of economic and social factors. However, social and economic factors are important in other ESA actions and are considered in designation of critical habitat, recovery planning, and development of conservation regulations. Listing a species does not mean that landowners or fishers, for example, cannot continue their activities. Section 10(a)(1)(A) research and enhancement permits, section 10(a)(1)(B) incidental take permits (i.e., habitat conservation plans), and section 6 cooperative agreements provide for exceptions to the section 9 "take" prohibitions, while still ensuring that the listed species can recover.

Question 2. You mention that you believe information should be used in an "open and transparent manner." At what point is the public notified officially of a NMFS activity? Does the public get notified when a request for listing is made or are they notified only after a listing decision is made?

Response. Within 90 days of receiving a petition, the National Marine Fisheries Service (NMFS) publishes a finding on the petitioned action in the Federal Register. If NMFS finds the petitioned action is warranted (a "positive 90-day finding"), NMFS solicits relevant information (e.g., status, threats, and critical habitat) and initiates a review of the status of the species. The species under consideration in the positive 90-day finding is also added to the NMFS Candidate Species list. Within 12 months of receiving the petition, NMFS determines whether listing the species as either threatened or endangered is warranted; if listing is warranted, NMFS publishes a proposed rule and simultaneously solicits additional comments from the public and other interested parties. If anyone submits a request, NMFS also holds

a public hearing(s) on the proposed action. Dates and locations of hearings are published in the Federal Register and press releases are issued at various stages in the process. We value input from the public, and the public has many opportunities to get involved in the listing determination process.

Question 3. I have recently introduced with Senator Jeffords S. 260, the Partners for Fish and Wildlife Act, authorizing a conservation program that works in cooperation with private landowners. Will you address the need for incentive programs, like the Partners Program, to be a part of any updating of the ESA?

Response. NMFS recognizes the importance of incentive programs for private landowners. One incentive program under development at NMFS is the ESA section 6 program on Cooperation with States. This program provides grants to states to conserve listed and candidate species and species of concern. Since our first line-item appropriation of $1 million in 2003, we have increased from 6 to 11 the number of Cooperative Agreements with states and territories, and we have funded dozens of on-the-ground research and management projects to help various species reach recovery. We are examining the feasibility of expanding this program in the future.

Question 4. In your testimony, you suggest that more time needs to be spent on recovery, specifically on recovery actions, not just recovery planning. Can you elaborate on what you see as the difference between the two?

Response. When a recovery plan is written, specific actions are identified that must be taken to achieve species recovery. The development of recovery plans is required by policy to be completed within 2.5 years of listing. Because NMFS is emphasizing stakeholder involvement in recovery planning to ensure the "buy-in" of affected parties and to encourage early implementation of these actions, often we do not meet the goal of 2.5 years. However, the completion of recovery plans is a tangible accomplishment, and is sought and achieved for most species.

Although we minimize impacts to species via section 7 interagency consultations and Habitat Conservation Plans and help some species recover through regulation, most listed species need additional measures, such as habitat protection and restoration, propagation, protection from predators and introduced species, and research to help us understand the cause of decline. Unfortunately, there is no set deadline for any of these recovery actions and, because they are not urgent on a day-to-day basis, other more pressing needs often take priority over implementation of these actions. This limits species' recovery and thus the success of the ESA. One way we can implement recovery actions is through section 6, mentioned in the previous question. For this reason, we are examining ways to expand this program within the current budget constraints.

RESPONSES BY JAMES H. LECKY TO QUESTIONS FROM SENATOR VITTER

Question 1. Mr. Lecky, are you aware that the National Marine Fisheries Service office in Santa Rosa, California has advised the State of California, in writing, that no timber operations should occur in the flood plain of a river with listed salmon?

Response. The January 21, 2005, letter and recommendation refer exclusively to the 148-acre proposed timber harvest plan submitted by Gualala Redwoods and timberlands manager Henry Alden. The plan area is located entirely on 4.8 miles of the highly meandering and frequently inundated floodplains of the Little North Fork and North Fork of the Gualala River; it is not a recommendation to the State that no timber operations should occur in the floodplain of any river with listed salmon. The Little North Fork River supports one of the two known remaining runs of ESA-listed Central California Coast coho salmon in the Gualala watershed.

Question 2. Do you know how many acres in the United States are designated as floodplains? Based upon your California application, are you saying it would be appropriate to regulate all floodplains for the protection of fish?

Response. We have not estimated how many acres are contained within floodplains. Application of the recommendation "no timber operations should occur in the floodplain of a river with listed salmon" across all floodplains in the United States would not be appropriate.

Question 3. Could you describe the relationship between floodplains and the protection of fish?

Response. Floodplains serve as "safety valves" for rivers (Goodwin 1999). Floodplains (1) slow the velocity of flood flows down rivers; (2) reduce extreme shifts in stream channel structure and function, limiting physical damages that floods can cause; (3) provide settling areas for sediment, and organic material such as wood and debris; (4) absorb floodwater and release it slowly, nourishing the stream during dry seasons; and (5) act as a natural reservoir to reduce the height of the flood

downstream. All definitions of floodplain agree on one point: "the river channel and its floodplain inseparably comprise a stream" (Ligon 1999).

Floodplains support higher biotic diversity (Junk et al. 1989) and increased production of fish (Bayley 1991; Halyk and Balon 1983 in Sommer et al. 2001). Floodplains of a river channel (1) provide low-velocity refugia habitat to salmonids during high-flow events; (2) support salmonid habitat by absorbing floodwaters and slowly releasing floodwaters to the active channel during dry seasons; and (3) support channel and riparian processes that develop off-channel habitats and provide cover, structure, and nutrients to salmonids. In fact, many salmonids seek out these low-velocity areas during flood events to optimize foraging and maximize net energy gain (Fausch 1984).

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Ligon, F., A. Rich, et al. (1999). Report of the scientific review panel on California Forest Practice Rules and salmonid habitat. Sacramento, The Resources Agency of California and the National Marine Fisheries Service: 21.

National Marine Fisheries Service letter to California Department of Forestry and Fire protection for Timber Harvest Plan 1–04–032 MEN. January 21, 2005.

Respondent's Trial Brief in Opposition to Petition for Writ of Mandate, Gualala Redwoods, Inc. v. California State Board of Forestry, Sacramento Superior Court Case No. 02CS00356

Committee References:

(a) In a letter to the California Department of Forestry dated January 21, 2005, NMFS comments on page 10: "The classification of the Class I watercourse should extend laterally to include both the river and the floodplain."

(b) Under the California Forest Practice rules, no harvesting is allowed in Class I watercourses.

RESPONSES BY JAMES H. LECKY TO QUESTIONS FROM SENATOR CHAFEE

Question 1. For ESA decisions at the National Marine Fisheries Service where science comes into play, how often does your agency utilize independent peer reviews and how exactly does it work? Is there a protocol for sending items out to be peer reviewed?

Response. On July 1, 1994, NMFS and the U.S. Fish and Wildlife Service (FWS) promulgated an interagency policy on information standards that requires biologists from NMFS and FWS to gather and impartially evaluate all scientific and other information that will be used to support listing actions, recovery planning and recovery actions, interagency consultations, and permitting actions the Services take under the ESA.

Our Northwest and Southwest Regions have established protocols for biological review teams and technical recovery teams conducting formal reviews of the science on the biology, ecology, status, and trends of threatened or endangered Pacific salmon. When these teams meet, they gather the available evidence from published and unpublished sources and form topical teams to critically evaluate that evidence for quality. These teams then use this evidence to make conclusions about the state of scientific knowledge on the status and trends of salmon and to evaluate the reliability of those conclusions.

Regarding recovery planning, per NMFS policy outlined in our Recovery Planning Guidance, all recovery plans are sent to at least three independent peer reviewers

(in addition to public review of draft plans, during which any member of the public, including experts on the species or some portion of the plan, may comment on the plan). Comments from peer reviewers are given great weight and are usually incorporated into the final draft of the plan. If not incorporated, a response to the comments is made, either in an appendix to the plan or in the administrative record for the planning process.

NMFS has not established formal peer-review procedures for section 7 consultations; the limited time available to complete a consultation generally precludes formal, independent peer review. However, over the past 7 years, NMFS has worked with independent panels to conduct peer reviews on six controversial biological opinions. For example, the 2001 and 2002 biological opinions on the Klamath Water Project operations were reviewed by the National Academy of Sciences.

Question 2. The designation of critical habitat for terrestrial species seems more clearly defined by geography than designating critical habitat for marine and fish species. How does the National Marine Fisheries Service go about designating critical habitat for species such as salmon or whales?

Response. The ESA defines critical habitat as "the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and specific areas outside the geographical area occupied by the species at the time it is listed that are determined by the Secretary to be essential for the conservation of the species." For species under NMFS' jurisdiction, such as salmon and whales, an evaluation is conducted to determine the habitat meeting this definition-i.e., what habitat contains the physical and biological features essential to the species' conservation, and are those features present in areas occupied by the species? A biological report is available on the NMFS Northwest Regional Office website (*http://www.nwr.noaa.gov/*) listing the features (also known as primary constituent elements, or PCEs) and sites essential to support one or more salmon life stages (spawning, rearing, migration, and foraging). These sites in turn contain physical or biological features essential to the conservation of an Evolutionarily Significant Unit (e.g., spawning gravels, water quality and quantity, side channels, and forage species).

NMFS uses the best available data and considers economic impacts when designating critical habitat.

RESPONSES BY JAMES H. LECKY TO QUESTIONS FROM SENATOR LAUTENBERG

Question 1. The Endangered Species Act is primarily an alarm system, indicating that all other management strategies for a species have failed. For species that your office deals with, what actions could be taken before we get to the situation in which a species is on the brink of extinction? Do you routinely work with other offices at NOAA to solve these problems before they become such problems? Is there anything more that offices at NOAA can do to work synergistically to prevent a species from being listed?

Response. In April 2004, NMFS initiated a Species of Concern List. This nonregulatory list is used to identify species potentially at risk, increase public awareness about those species, stimulate cooperative research efforts to obtain the information necessary to evaluate species status and threats, and foster proactive efforts to conserve the species before listing becomes warranted. NMFS Regional Offices and Science Centers assist in identifying species for inclusion on this list. NOAA and NMFS Regional Offices also work with state partners through ESA section 6, which provides Federal assistance to states to implement recovery actions.

Question 2. We learned just yesterday that the eastern oyster, a species with such rich tradition and an important role in the history of this nation, might be considered for listing. Can you speak about the status of the eastern oyster? Will this have any affect on the introduction of non-native oysters into areas that traditionally contained our native eastern oyster?

Response. NMFS initiated a status review of the eastern oyster on May 18, 2005. Results of the full status review are expected in January 2006. Until the status review is completed and NMFS makes a determination on whether and how to list the species, we cannot predict what effect the introduction of non-native oysters would have on native oysters.

The eastern oyster is distributed from the Gulf of St. Lawrence to the Gulf of Mexico and south through the Caribbean to the Yucatan Peninsula. Declines of eastern oysters off the Atlantic Coast and in the Chesapeake Bay are well-documented; these declines are the combined result of overharvesting (reflected by dramatically

decreased landings), habitat degradation (sediment load and nutrient loading), and disease (MSX and Dermo). The petitioner presented substantial information on the status of and threats to the Atlantic Coast populations of eastern oyster, but little information regarding the status or threats in other areas such as the Gulf Coast and Caribbean. In its status review, NMFS will determine whether there is a separate Atlantic coast subspecies of eastern oysters that is threatened or endangered or whether the entire species of eastern oyster is threatened or endangered throughout a significant portion of its range.

The U.S. Army Corps of Engineers is working with other Federal agencies, including NMFS, to prepare an Environmental Impact Statement (EIS) under which permits would be issued allowing the introduction of non-native oysters. If the eastern oyster were to be listed under the ESA, then an ESA section 7 consultation would be conducted on the issuance of any permit for the introduction of non-native oysters. Through the consultation process, NMFS would consider the impacts of introducing non-native oysters to the listed species and to any designated critical habitat. Those who are considering introducing non-native oysters into the Chesapeake Bay would also need to consider the impacts on the native eastern oyster under other laws such as the National Environmental Policy Act (NEPA) or the Clean Water Act, regardless of whether the eastern oyster is listed as threatened or endangered under the ESA.

Question 3. What is the current status of the right whale in U.S. waters? Is there any possibility that shipping lanes might be closed under the Endangered Species Act to prevent more deaths of these animals from ship strikes?

Response. The North Atlantic right whale is listed as endangered. The population has shown little sign of recovery after being severely depleted by commercial whaling, hovering at about 300 individuals for at least the past several decades. Although calf production has increased somewhat in recent years, recovery is seriously affected by fatalities and serious injury resulting from human activities, primarily from entanglement in fishing gear and collisions with ships. Since 1972, 6 right whale deaths have been attributed to fishing gear entanglements and 27 to ship strikes. The actual number of deaths is almost certainly higher, as not all carcasses are detected or reported. In the past 18 months (January 2004 through June 2005), 8 right whale deaths have been confirmed—1 due to ship strike, 3 possibly due to ship strikes, and 1 possibly due to entanglement (it was not possible to determine the cause of the remaining 3 deaths). Of these eight deaths, six were females, three of which carried fetuses. In addition, at least eight right whales are believed or confirmed to be currently entangled alive.

NMFS has taken several steps to address these threats. Regarding ship strikes, NMFS has developed a multi-year, range-wide Ship Strike Reduction Strategy. The Strategy was issued as an Advance Notice of Proposed Rulemaking (ANPR) (69 FR 30857, 1 June 2004) and a series of public meetings were held on the ANPR. On June 22, 2005, NMFS published a Notice of Intent to prepare an Environmental Impact Statement under the National Environmental Policy Act on the Strategy and its alternatives. The Strategy does not contain, and at no time was consideration given to, shipping lane closures. Instead, the Strategy and its alternatives identify a network of relatively minor routing changes (none of which is expected to affect navigational or human safety nor seriously impact East Coast commerce) and a set of ship speed restrictions along the eastern seaboard. The U.S. Coast Guard (USCG) is currently conducting Port Access Route Studies (70 FR 8312, 18 February 2005) on two routing changes recommended in the Strategy—one in Cape Cod Bay and the other in right whale critical habitat in waters off Florida and Georgia. The USCG analysis will assess potential navigational and environmental problems should the routes be imposed. The USCG is required to provide its recommendations on the proposed routes in a report to Congress by the end of 2005.

As to fishing gear entanglement, NMFS has worked through the Take Reduction Team process to develop the Atlantic Large Whale Take Reduction Plan as required by the Marine Mammal Protection Act. This rule was published on June 21, 2005.

On a related matter, NMFS recently completed an updated Recovery Plan for the North Atlantic right whale. Copies are available from the Office of Protected Resources, and the Plan can be downloaded from *www.nmfs.noaa.gov/pr/pr3/recovery*.

STATEMENT OF ROBIN M. NAZZARO, DIRECTOR FOR FEDERAL LAND STEWARDSHIP ISSUES, NATURAL RESOURCES AND ENVIRONMENT TEAM, GAO

ENDANGERED SPECIES ACT: SUCCESSES AND CHALLENGES IN AGENCY COLLABORATION AND THE USE OF SCIENTIFIC INFORMATION IN THE DECISION MAKING PROCESS

Why GAO Did This Study

The purpose of the Endangered Species Act is to conserve endangered and threatened species and the ecosystems upon which they depend. This law currently protects more than 1,260 animal and plant species. Within the Department of the Interior, the Fish and Wildlife Service implements and enforces the act. In addition, all Federal agencies, such as the Department of Defense and the Bureau of Land Management, must ensure that their activities do not jeopardize a protected species' continued existence or adversely modify or destroy habitat that has been designated as critical to its survival.

The Endangered Species Act and its implementation can be controversial when there are conflicting uses for a natural resource as, for example, when timber on Federal lands is both habitat for endangered and threatened species and a valuable commodity to be harvested. Conflicts also occur over the adequacy or interpretation of scientific information in making species protection decisions.

GAO has issued numerous reports on the implementation of the Endangered Species Act. This testimony is based primarily on four of these reports and addresses (1) collaboration among Federal agencies to conserve threatened and endangered species and (2) utilization of scientific information by the Fish and Wildlife Service. *www.gao.gov/cgi-bin/getrpt?GAO–05–732T.*

To view the full product, including the scope and methodology, click on the link above. For more information, contact Robin Nazzaro at (202) 512–3841 or nazzaror@gao.gov.

What GAO Found

We have found that effective agency collaboration can reduce conflict over competing uses of natural resources and improve agencies' abilities to protect species while carrying out other mission-related activities. While we have noted several instances of effective interagency cooperation, we have also discovered that agencies could be doing more to work together to find effective species protections. For example, at one military facility, Air Force officials worked with the Fish and Wildlife Service and others to entice the endangered Sonoran pronghorn—a species similar in appearance to antelope—away from military training areas. As a result, the agencies were able to minimize the impact of species protections on training exercises. Previously, Air Force officials had reported that 32 percent of their live-fire missions were either canceled or moved due to the presence of the pronghorn. However, we have found that there are obstacles to further agency collaboration that need to be addressed.

We have found that the Fish and Wildlife Service generally used the best available information in key endangered species decisions, although the agency was not always integrating new research into ongoing species management decisions. For example, since the Bureau of Land Management eliminated sheep grazing on more than 800,000 acres in tortoise habitat in California, neither the Bureau or the Fish and Wildlife Service had ensured that necessary research was conducted to assess whether this action had benefited the tortoise. Unless managers link research findings to recovery actions, they cannot develop a scientific basis to make decisions about whether land use restrictions—such as limiting grazing or other activities in tortoise habitat—should remain unchanged, be strengthened, or whether alternative actions are more appropriate. Developing such information is important as some of the restrictions imposed to protect the tortoise have been controversial because of their broad impact and some affected by the restrictions have questioned whether they are necessary for the tortoise's recovery.

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss our work related to the Endangered Species Act. As you know, the purpose of the act is to conserve endangered and threatened species and the ecosystems upon which they depend. This law currently protects more than 1,260 animal and plant species. Under the act, no one may "take" a protected species, which is defined as harming, harassing, pursuing, shooting, wounding, killing, trapping, hunting, capturing, or collecting, or attempting any such conduct. In addition, Federal agencies and federally authorized activities may not jeopardize a species' continued existence or adversely modify habitat deemed critical for a species' survival. The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS)—collectively referred to as the Serv-

ices—are responsible for working with other Federal agencies, tribal, state, and local governments, private companies, and citizens to ensure that species are appropriately protected. In addition, all Federal agencies are directed by the act to utilize their authorities to conserve threatened and endangered species.

The act requires FWS and NMFS to list as endangered any species facing extinction and to list as threatened any species likely to become endangered in the foreseeable future. When a species is listed, the act also generally requires the agencies to designate critical habitat—habitat essential to a species' conservation—because the loss of habitat is often the principal cause of species decline. FWS and NMFS are also required to develop a plan to recover the listed species to the point that they are no longer endangered or threatened, an achievement marked by their removal, or delisting, from the list of endangered or threatened species.

The act's success in protecting species depends on one's point of view. Some believe it has been successful because in the face of chronic underfunding only 9 species have gone extinct since the act's inception, others say it has been a failure because only 9 species have been recovered. Advocates on both sides of the argument would likely agree, however, that the Endangered Species Act and its implementation have served as lightning rods in the ongoing national debate concerning the tradeoffs that must often be made between economic, social, and environmental values. The tradeoffs required to implement the act were vividly apparent in 1978, when the Supreme Court ruled that construction of the Tellico Dam could not be completed because doing so would jeopardize the continued existence of the endangered snail darter—a species of fish.[1] The dam, which has since been completed,[2] is located on the Little Tennessee River and provides flood control, hydropower, and water supply. In this case, the Court ruled that the Endangered Species Act explicitly prohibits activities that would jeopardize the continued existence of an endangered species or result in the destruction or modification of its habitat, and stated that the act represents a congressional decision to require agencies to give greater priority to the protection of endangered species than to their other missions. Under the Court's decision, Federal agencies generally are prohibited from authorizing, funding, or carrying out actions, such as dam construction, permitting timber harvesting and livestock grazing, and wetland dredging, if doing so would jeopardize the continued existence of arty endangered or threatened species or destroy or adversely modify their critical habitats.

The legacy of this decision continues to this day as Federal agencies struggle to balance their obligation to protect species and carry out other mission-related activities that often involve ensuring industries, ranchers, farmers, recreational enthusiasts, tourists, and others, appropriate access to and use of the very natural resources on which those species depend. One prominent recent example is the federally-operated Klamath Project—dams, reservoirs, and associated facilities that sits on the California-Oregon border. Here, under extreme drought conditions, several Federal agencies—including the Services and the Bureau of Reclamation—are trying to balance the water needs of irrigators and others who receive water from the project, and threatened and endangered fish, which must have sufficient water to survive. In 2002, thousands of fish died while water was delivered for agricultural irrigation; the prior year, farmers experienced crop losses while water was used to maintain stream flows for fish.[3] Another prominent example involved the threatened Northern spotted owl. In the early 1990s, timber sales on Federal lands that are habitat for the Northern spotted owl were brought to a virtual halt by Federal court injunctions. In various rulings, the Federal courts enjoined the Forest Service and Bureau of Land Management from selling timber until they addressed issues related to protecting the habitat of the owl.[4]

More recently, controversies surrounding the act have centered on the adequacy of the scientific information used to make decisions about whether and how to list species. Just in the past few months sparks have flown in response to scientific decisions concerning the Florida panther, the Preble's meadow jumping mouse, and the greater sage grouse. In the first case, FWS conceded weaknesses in the data used to craft some of its plans to protect the endangered panther. While critics of FWS

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[1] Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978).

[2] Legislation, passed in 1979, allowed for completion of the Tellico Dam.

[3] For a more comprehensive assessment of the status of the nation's freshwater supply see U.S. General Accounting Office, Freshwater Supply: States' Views of How Federal Agencies Could Help Them Meet the Challenges of Expected Shortages, GAO–03–514 (Washington, D.C.: July 9, 2003).

[4] For a fuller account of this controversy and efforts to resolve it, see U.S. General Accounting Office, Ecosystem Planning: Northwest Forest and Interior Columbia River Basin Plans Demonstrate Improvements in Land-Use Planning, GAO/RCED–99–64 (Washington, D.C.: May 26, 1999).

claim the agency's use of faulty information was politically motivated, FWS officials defend it as an honest mistake made in the context of an ever-evolving body of knowledge. In the case of the Preble's mouse, FWS announced in January 2005 that it will propose removing the mouse from the endangered species list because new research indicates that it is genetically not a separate subspecies of meadow jumping mouse as previously thought. Critics of the act cite this as evidence that the act does not require sufficient scientific evidence before a species is listed. Finally, FWS also recently announced that it will not place the sage grouse on the endangered species list. Critics of the decision are concerned that politics interfered with a scientifically justified decision to list the species. FWS claims that the decision was the result of an extensive review of scientific data and analysis.

While there are no simple answers to the conflicts and controversies surrounding the act, we believe that the Federal agencies responsible for managing endangered species and their habitats can be more effective in how they manage these conflicts or potentially avoid conflicts altogether. We have issued more than 15 reports in the past 10 years addressing how the Endangered Species Act is being implemented. (These reports are listed in Appendix I along with other GAO reports that discuss the effect of the act on other programs). Today, I am going to discuss our work on two of the major issues currently being debated concerning the Endangered Species Act—the difficulty of balancing species needs with other resource uses and the use of science in implementing the act. Specifically, this testimony addresses (1) collaboration among Federal agencies to conserve threatened and endangered species and (2) utilization of scientific information by FWS in key Endangered Species Act decisions.

This testimony is based primarily on four previously issued reports. In general, we did not perform additional audit work in preparing this testimony. We made recommendations in these four reports and have updated the status of agencies' efforts to implement our recommendations. Our work was conducted in accordance with generally accepted government auditing standards.

SUMMARY

In summary, we found that Federal agencies have taken steps to improve collaboration as a way to reduce conflicts that often occur between species protections and other resource uses, but that more could be done to promote routine use of collaboration and clarify agencies' responsibilities under the Endangered Species Act. In September 2003, we reported on efforts taken by the Department of Defense (DOD) to coordinate with other Federal land managers in order to reduce the impact of species protections on military activities. We found several cases where such efforts were successful. For example, at the Barry M. Goldwater range in Arizona, Air Force officials worked with officials at FWS and the National Park Service to enhance food sources for the endangered Sonoran pronghorn in locations away from military training areas. As a result, the Air Force was able to minimize the impact of restrictions on training missions due to the presence of the pronghorn. However, such cases were few and far between because, among other things, there were no procedures or centralized information sources for facilitating such collaboration. In March 2004, we reported on collaboration that takes place pursuant to section 7(a)(2) of the act—referred to as the consultation process—in the Pacific Northwest. In this area, large numbers of protected species and vast amounts of Federal land conspire to make balancing species protection and resource use a contentious endeavor. We found that steps the Services and other Federal agencies had taken made the consultation process run smoother and contributed to improved interagency relationships. However, some problems have persisted. For example, some agencies disagree with the Services about when consultation is necessary and how much analysis is required to determine potential impacts on protected species. In each of these reports, we made recommendations intended to further improve collaboration among Federal agencies with regard to balancing species protections and other resource uses, and—in the March 2004 report—to resolve disagreements about the consultations process. DOD and FWS have begun discussing an implementation strategy to improve collaboration regarding species protection on military and other Federal lands and development of a training program. With regard to the consultation process, while FWS and NMFS have continued to take steps to expand their collaboration processes, the agencies did not believe that disagreements about the consultation process require additional steps. They believe that current training and guidance is sufficient to address questions about the process.

With regard to the use of science, we have found that FWS generally used the best available information in key Endangered Species Act decisions, although the agency was not always integrating new research into ongoing species management

decisions. In addition, we identified concerns with the adequacy of the information available to make critical habitat decisions. In December 2002, we reported on many aspects of the decisionmaking for species protections regarding the Mojave Desert tortoise. We found that the decision to list the tortoise as threatened, its critical habitat designation, and the recommended steps in the species' recovery plan, were based on the best available information. However, despite over $100 million in expenditures on recovery actions and research over the past 25 years, it is still unclear what the status of the tortoise is and what effect, if any, recovery actions are having on the species because research has not been coordinated in a way to provide essential management information. Such information is critically important as some of the protective actions, such as restrictions on grazing and off road vehicle use, are vigorously opposed by interest groups who question whether they are necessary for the tortoise's recovery. Accordingly, we recommended that FWS better link land management decisions with research results to ensure that conservation actions and land use restrictions actually benefit the tortoise. In response, FWS recently established a new office with a tortoise recovery coordinator and plans to create an advisory committee to ensure that monitoring and recovery actions are fed back into management decisions. In August 2003, we found that, similar to the decisionmaking regarding the tortoise, FWS decisions about listing species for protection under the act were generally based on the best available information. However, while most critical habitat designations also appeared to be based on the best available information, there were concerns about the adequacy of the information available at the time these decisions are made. Specifically, critical habitat decisions require detailed information of a species' life history and habitat needs and the economic impacts of such decisions—information that is often not available and that FWS is unable to gather before it is obligated under the act to make the decision. As a result, we recommended that the Secretary of the Interior clarify how and when critical habitat should be designated and identify if any policy, regulatory, or legislative changes are required to enable the department to make better informed designations. FWS has not responded to our recommendation.

COLLABORATING TO PROTECT ENDANGERED SPECIES

At the heart of many of the controversies surrounding the Endangered Species Act is the competition for natural resources—competition between the needs of threatened and endangered species and resource extraction industries, land owners, and other users of the natural resources on which those species depend. Our work has largely focused on the challenges that agencies face in protecting species while carrying out their other mission-related related responsibilities, some of which could have a negative impact on protected species. While our work has highlighted positive examples where collaboration between Federal agencies has reduced conflict, there is still room for improvement.

COLLABORATION CAN HELP THE MILITARY SUSTAIN CRITICAL FUNCTIONS WHILE PROTECTING ENDANGERED SPECIES

We saw the importance of collaboration among Federal agencies in our work evaluating the protection of threatened and endangered species and habitat on military installations in the United States. Many DOD and other Federal agency officials have recognized that military lands often provide some of the finest remaining examples of rare wildlife habitat for protected species. In fact, more than 300 threatened or endangered species inhabit military lands. However, DOD officials are concerned that the presence of protected species may constrain essential military training. DOD officials have identified the Endangered Species Act, along with other factors such as competition for air space and urban growth around military installations, as issues affecting or having the potential to affect military training and readiness.[5]

In September 2003,[6] we issued a report on the extent to which DOD and other Federal land management agencies are cooperatively managing the protection of endangered species affecting military training ranges, and the factors that can limit

[5] U.S. General Accounting Office, Military Training: DOD Lacks a Comprehensive Plan to Manage Encroachment on Training Ranges, GAO–02–614 (Washington, D.C.: June 11, 2002). See also U.S. General Accounting Office, Military Training DOD Approach to Managing Encroachment on Training Ranges Still Evolving, GAO–03–621T (Washington, D.C.: April 2, 2003); and U.S. General Accounting Office, Military Training: DOD Needs a Comprehensive Plan to Manage Encroachment on Training Ranges, GAO–02–727T (Washington, D.C.: May 16, 2002).

[6] U.S. General Accounting Office, Military Training: Implementation Strategy Needed to Increase Interagency Management for Endangered Species Affecting Training Ranges, GAO–03–976 (Washington D.C.: September 29, 2003).

such collaboration. We found several cases where DOD and other Federal land managers have entered into cooperative agreements that have benefited both the species and the military. For example, collaboration among Federal agencies around the Air Force's Barry M. Goldwater Range in Arizona, minimized the impact of restrictions on training exercises that were necessary to protect the endangered Sonoran pronghorn (a species similar in appearance to an antelope). Previously, Air Force officials reported that 32 percent of their live-fire missions were either canceled or moved due to the presence of the pronghorn. Air Force officials worked with FWS and National Park Service officials to jointly fund forage enhancement plots, which provided food sources for the Sonoran pronghorn. The plots enticed the pronghorn to an adjacent national wildlife refuge and away from military training areas and, as a result, minimized the impact of restrictions on training missions.

However, the instances of collaboration between DOD and the Departments of the Interior and Agriculture were limited. Although the departments have entered into memorandums of understanding that contain specific actions to be taken to implement cooperative management—such as forming interagency working groups, identifying geographic regions for species management, and identifying reporting requirements—many of the specific actions in these agreements were never fully implemented and most agreements had expired. When there were examples of cooperative management efforts between DOD and other Federal land managers, they were often initiated in response to a crisis, such as a marked decline in a species' population or land-use restrictions that significantly impacted Federal land managers' abilities to carry out their missions. The Departments of Defense, the Interior, and Agriculture identified a number of factors that can limit interagency cooperative management for endangered species affecting military training ranges. In addition to the absence of a shared sense of crisis among Federal land managers, other obstacles to agency collaboration included limited agency interaction, resource constraints, lack of land manager training and experience, and the lack of centralized or otherwise easily accessible sources of information.

In our September 2003 report, we recommended that the Secretaries of Defense, the Interior, and Agriculture develop and implement an interagency strategy, a comprehensive training program, and a centralized data source for cooperative management efforts. The departments concurred on the need to improve interagency cooperation. The Department of Defense, FWS, and others have initiated plans for an interagency strategy, training program, and information sharing mechanisms.

Collaboration Can Help Reduce the Contentiousness of the Consultation Process

Collaboration is central to the consultation process required under section 7(a)(2) of the Endangered Species Act, where Federal agency officials must jointly assess the potential impacts of agency activities on protected species. The process can get contentious, however, because it sometimes pits officials at the Services against officials from other agencies who are attempting to carry out typical agency activities. For example, the process can become difficult when an agency such as the Corps of Engineers is planning an activity in accordance with its mission to support navigation in the nation's waterways, such as issuing permits for dock construction, and the Services recommend project changes in order to meet the requirements of the Endangered Species Act. Such changes can impact the nature of the original project, and add to the time and cost necessary to complete what some agency officials described as seemingly benign or insignificant activities.

We issued a report in March 2004 that evaluated the consultation process in the northwestern United States.[7] We were asked to evaluate the consultation process in this region because of persistent concerns about the time and cost that consultation added to Federal activities and activities that are federally permitted or funded. In the northwest United States, the consultation process is a prominent feature of Federal land management because of the region's combination of large areas of Federal land and significant numbers of listed species. Endangered or threatened species in this region include the Northern spotted owl, grizzly bear, Canada lynx, bull trout, and various species of salmon.

Between 1997 and 2000, 25 species in the northwest were identified for protection under the Endangered Species Act. This prompted concerns about the consultation process because many projects in the region were delayed, sometimes for years, because of the services' inability to address the associated workload increases. For ex-

[7] U.S. General Accounting Office, Endangered Species: More Federal Management Attention Is Needed to Improve the Consultation Process, GAO–04–93 (Washington, D.C.: Mar. 19, 2004). See also U.S. General Accounting Office, Endangered Species: Despite Consultation Improvements Efforts in the Pacific Northwest, Concerns Persist about the Process, GAO–03–949T (Washington, D.C.: June 25, 2003).

ample, according to a local community representative, before salmon were listed for protection in the late 1990s, the Corps of Engineers' permitting process for activities such as constructing or modifying private docks on Lake Washington generally took only 2 or 3 months and averaged about 5 percent of construction costs. Since salmon were listed, the Corps must consult with NMFS when issuing these permits. This representative said that, as a result, the timeframes for permits have increased to about 24 months and permitting costs have increased to about 33 percent of construction costs.

We found that, in response to concerns about the consultation process, the Services and other Federal agencies had taken steps in three general categories to make the consultation process more collaborative and efficient.

- The Services and other Federal agencies took steps to facilitate collaboration among their staffs so that disagreements about species protections and project modifications could be resolved before they slowed down the consultation process. Officials at the agencies cited several benefits of these steps such as increased trust between the Services and other agencies, better communication, and earlier involvement in projects, which many officials emphasized as important for consultations to run efficiently.
- The Services and other Federal agencies also developed approaches to reduce the consultation workload, such as including multiple related activities in a single consultation. According to officials, this has increased the efficiency of the consultation process and enabled the agencies to deal more quickly with activities for which the effects on species are known.
- The Services and other Federal agencies took steps to increase the consistency and transparency of the consultation process, such as providing interagency training courses and posting guidance and information on agency Web sites. For example, to address disagreements between the Services and other Federal agencies, the Services issued guidance on how to assess the effects of right-of-way permits on protected species.

Despite efforts to improve the consultation process, officials with the Services and other Federal agencies still have concerns about two key issues. First, officials at the agencies are still concerned about workload. While staff levels have increased in recent years, increases in personnel have been outpaced by the increasing number and complexity of consultations. Officials told us that more activities are going through the consultation process than before and that projects are becoming more complex, requiring greater analysis and staff time to identify potential impacts on species and any necessary protections. Second, officials at the Services and other Federal agencies sometimes disagree about the extent to which consultation is necessary. Some agency officials said they feel pressured by the Services—and by the fear of litigation—to seek consultation, regardless of the likely effects of an activity on protected species, including in situations where they feel consultation is unnecessary. Officials at the Services also cited the fear of litigation, and said they believed that they were simply fulfilling their responsibilities under the act to consult on projects that may affect protected species regardless of the level of the potential impact. The result is a continued sense of frustration among agency officials regarding what protections are necessary under the Endangered Species Act and the time it takes to reach agreements in agency consultations.

Because many concerns about the consultation process center on its timeliness, we recommended in our March 2004 report that FWS and NMFS work with other agencies to determine how best to capture data on the level of effort devoted to the consultation process and use this information to manage the process. We further recommended that the Secretaries of the Interior and Defense, the Under Secretary of Commerce for Oceans and Atmosphere, and the Chief of the Forest Service work together to resolve disagreements about when consultation is required and how detailed an analysis is necessary. Both FWS and NMFS have taken steps to improve information management of the consultation process, although it is unclear whether they have determined how to capture the level of effort devoted to the process—admittedly, a difficult task. While FWS and NMFS have continued to take steps to expand collaborative processes, in an update on their actions, the agencies stated that they did not believe that disagreements about the consultation process require the adoption of additional measures. They believe that the current training and guidance on consultation is sufficient to address questions about the process.

Using Scientific Information to Make Decisions

Scientific information is a key component of most decisions regarding the implementation of the Endangered Species Act. Our work has largely focused on how FWS has used information in key decisions about endangered species, such as listing threatened and endangered species, designating critical habitat, and developing

species recovery plans. While we found that FWS has generally done a good job using available information to make decisions, there is still room for improvement.

While Many Key Protection Decisions for the Mojave Desert Tortoise Were Based on the Best Available Information, FWS Has Not Always Integrated Research Into Ongoing Recovery Decisions

In a December 2002 report,[8] we found that key FWS decisions were supported by the best available information. We relied on experts identified for us by the National Academy of Sciences to review FWS listing, critical habitat, and recovery plan decisions for the Mojave Desert tortoise. Based on their review of the information available at the time the respective decisions were made, the scientists we consulted agreed that the listing of the desert tortoise in 1990, the critical habitat designation, and the recommendations in the recovery plan were reasonable. These scientists recognized that, as is often the case with such decisions, little published data on the species were available. However, they agreed that FWS's decisions were appropriate and consistent with their understanding of the agency's responsibilities under the act.

Our report, however, was less positive with regard to what FWS had learned about the tortoise since their decisions were made. We found that while over $100 million (in constant 2001 dollars) had been spent on research and recovery efforts over the past 25 years, there was still little known about the species' status, the key threats to its survival, or the effectiveness of management actions implemented to help the tortoise. While many actions intended to protect the tortoise have been taken, necessary research had not been conducted to determine whether these actions were effective. For example, the Bureau of Land Management prohibited sheep grazing on more than 800,000 acres of tortoise habitat in California and implemented restrictions on off-road vehicles in tortoise habitat. While individual studies had been conducted on these issues, the research had not been coordinated in a way to answer questions about the impact of such actions on tortoise populations or habitat. Determining the effectiveness of such protective actions is important because they affect large areas of land, were recommended on the basis of limited published data, and in some cases, are vigorously opposed by certain interest groups. Unless managers link research findings to assessments of recovery actions that have been implemented, they cannot make determinations based on scientific information as to whether land use restrictions should remain unchanged, be strengthened, or whether alternative actions are more appropriate.

To ensure that the most effective actions are taken to protect the tortoise, we recommended in our December 2002 report that the Secretary of the Interior develop and implement a coordinated research strategy for linking land management decisions with research results and periodically reassess the recovery plan for the tortoise. In response, FWS recently established a new office with a tortoise recovery coordinator and three field coordinators who will help coordinate research and management. In addition, the agency plans to create an advisory committee to ensure that monitoring and recovery actions are fed back into management decisions. FWS previously utilized an expert committee to review the recovery plan for the tortoise. Although the committee found that the plan was fundamentally sound, it similarly recommended that ties between research and management be strengthened.

Species Listing and Critical Habitat Decisions Are Based on Best Available Information, But Concerns Remain About the Adequacy of That Information

Recent concerns about FWS listing and critical habitat decisions have focused on the role that "sound science" plays in the decisionmaking process and whether FWS properly interprets scientific data and bases its decisions on adequate scientific information. Critics of FWS decisions warn that improper listing and critical habitat decisions may disrupt social and economic activities and divert funding and attention away from species truly facing extinction. The Endangered Species Act requires FWS to use the best available information when making decisions to list species or designate critical habitat. It is important to note that the "best available" standard does not obligate FWS to conduct studies to obtain new data, but prohibits the agency from ignoring available information. FWS goes through an extensive series of procedural steps that involve public participation and review by outside experts (i.e., peer reviewers) to help ensure that it collects relevant data and uses it appropriately.

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[8] U.S. General Accounting Office, Endangered Species: Research Strategy and Long-Term Monitoring Needed for the Mojave Desert Tortoise Recovery Program, GAO–03–23 (Washington, D.C.: Dec. 9, 2002).

In August 2003, we reported on FWS's use of available scientific information in making listing and critical habitat decisions.[9] Because of the number of species decisions to analyze and the inherent difficulties in independently assessing available scientific information and determining what constitutes a scientific sound decision, we identified several proxies for assessing the reliability of FWS listing and critical habitat decisions. These proxies entailed reviews of:

- The procedures FWS follows for gathering information and internally reviewing decision documents;
- Comments from peer reviewers on listing and critical habitat decisions;
- The outcomes of legal challenges to these decisions; and
- Subsequent changes to FWS listing and critical habitat decisions, such as after additional scientific information had been gathered.

In each case, we determined that, overall, FWS species listing and critical habitat decisions were based on the best available information. However, experts and others knowledgeable about the Endangered Species Act have expressed concerns about FWS's ability to designate critical habitat for some listed species given the amount of information available on the species' habitat needs at the time decisions must be made—at the time of listing or shortly thereafter. Unlike listing decisions that are more straightforward—requiring FWS to answer only a "yes or no" question as to whether a species warrants listing—critical habitat decisions often require more detailed knowledge of a species' life history and habitat needs and call for FWS to factor in the species' special management needs as well as the economic impacts of the designation. FWS officials, experts, and others with whom we spoke agreed that the amount of scientific information available when they are required to designate critical habitat is limited and often affects FWS's ability to adequately define the habitat essential to the species' conservation. While some interested parties stated that FWS designated areas too broadly and included lands unsuitable for several species, others said that FWS did not designate enough habitat for some listed species. According to FWS officials, the resource and time constraints under which its scientists work often preclude them from collecting new information and, as a result, their ability to produce adequate critical habitat designations may be limited by the information available for some species. We found that most scientific disagreements surrounding recent critical habitat designations concerned whether the area chosen as critical habitat is sufficiently defined or whether the overall information used to support the designation is adequate. In order to increase the amount of information available on which to base critical habitat designations, FWS and others, including the National Research Council, have recommended delaying designations until recovery plans are developed.[10]

We also reported that FWS's critical habitat program faced a serious crisis that extended well beyond the use of science in making decisions. Key court decisions have invalidated certain practices adopted by the agency, causing its critical habitat program to become overburdened by litigation. Specifically, a key court case in 1997 invalidated FWS's policy regarding when it was prudent to designate critical habitat for listed species.[11] Prior to the decision, FWS had designated critical habitat for only about 10 percent of listed species. Since then, court orders and settlement agreements have compelled FWS to designate critical habitat in cases that the agency had previously determined doing so was not prudent. In 2001, FWS lost another key lawsuit, challenging the adequacy of the economic analyses the agency used to support its critical habitat designations.[12] Since this decision was issued, court orders and settlement agreements have prompted FWS to re-issue some critical habitat decisions. The Department of the Interior believes that the flood of litigation over critical habitat designation is preventing FWS from taking what it deems to be higher priority activities, such as addressing the approximately 250 "candidate" species waiting to go through the listing process (listing and critical habitat activities are funded under the same line item in the department's budget).

Because FWS's critical habitat program faces serious challenges, including questions regarding the role of critical habitat in species conservation, we recommended in our August 2003 report that the Secretary of the Interior provide clear strategic

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[9] U.S. General Accounting Office, Endangered Species: Fish and Wildlife Service Uses Best Available Science to Make Listing Decisions, but Additional Guidance Needed for Critical Habitat Designations, GAO–03–803 (Washington, D.C.: Aug. 29, 2003).

[10] National Research Council, Science and the Endangered Species Act (Washington D.C.: National Academy Press, 1995) pp. 71–93.

[11] Natural Resources Defense Council v. United States Department of the Interior, 113 F.3d 1121 (9th Cir. 1997).

[12] New Mexico Cattle Growers v. United States Fish and Wildlife Service, 248 F.3d 1277 (10th Cir. 2001).

direction for the critical habitat program by clarifying the role of critical habitat and how and when it should be designated and recommending policy, regulatory, and/or legislative changes necessary to address these issues. The Department did not respond to our request to comment on a draft of this report and has not formally indicated whether or not it intends to implement the recommendation.

CONCLUSION

We recognize that passions run high when issues concern the Endangered Species Act. The act, with its broad powers to restrict the use of natural resources and impinge upon individual property rights, coupled with its noble purpose to conserve the ecosystems upon which threatened and endangered species depend, provides a crucible for an ongoing national debate concerning the tradeoffs between economic, social, and environmental values. As members of the subcommittee are well aware, there are no easy answers. However, there is common ground among everyone concerned about the act and its impact on the Nation and its resources. All can agree that reducing the negative impacts of implementing the act—whether it be the loss of credibility for the Services over debates about "sound science" or the perceived injustice of limited resource use due to needed species protections—while improving the status of threatened and endangered species is a worthy goal. In our testimony today, we have highlighted just a few examples where Federal agencies, working cooperatively and diligently, have achieved just that. Unfortunately, we found too few examples of this in our work. We believe more can be done. The task before us is to identify how all concerned parties—Federal, tribal, state, local, and private—can work together to improve the status of threatened and endangered species while further reducing the negative impacts of implementing the act. As we begin a new review of how species recovery plans are being implemented—work that was requested by a bipartisan group of Senators and Congressmen including the chairman of this subcommittee—we hope that the successful examples on collaboration and the use of science we noted here are harbingers for future cooperation and success.

RESPONSES BY MS. NAZZARO TO QUESTIONS FROM SENATOR INHOFE

Question 1. Under the Endangered Species Act (ESA), landowners may be required not only to refrain from economic activity in order to avoid environmental damage, but also to expend funds to actively manage their property to benefit the environment. In your testimony you mentioned the need for increased collaboration among Federal agencies. Do you believe that increased collaboration and cooperative agreements with private landowners are equally beneficial and what are some ways to get landowners to voluntarily perform species-beneficial activities? If you can comment, what assurances do landowners need to engage in these voluntary-efforts?

Response. GAO has not specifically evaluated the benefits of increased collaboration and cooperative agreements with private landowners to protect threatened and endangered species. However, it is likely that such cooperation and collaboration would be beneficial to some threatened and endangered species because many species live or depend on privately owned land. For example, in 1994, we reported that some or all of the habitat for over 600 of the nearly 800 species then under the jurisdiction of the Fish and Wildlife Service (FWS) was on private lands.[1] Additionally, we have repeatedly heard from Federal and nonFederal officials during the course of our reviews that such cooperation and collaboration is needed. We have not evaluated what assurances may be needed to encourage landowners to take voluntary actions to benefit species.

Question 2. In your testimony, you note that it has been recommended that critical habitat designations be delayed until recovery plans are developed. What is a reasonable timeframe for this delay?

Response. We have not determined what a reasonable timeframe is for issuing critical habitat designations. Currently, the ESA generally requires that critical habitat be designated at the time of listing or shortly thereafter. As we reported in August 2003,[2] there are concerns about FWS's ability to designate critical habitat for some listed species given the amount of information available on species' habitat needs at the time decisions must be made. For this reason, we recommended that the Secretary of the Interior require that FWS clarify, among other things, when

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[1] U.S. General Accounting Office, Endangered Species: Information on Species Protection on NonFederal Lands, GAO/RCED–95–16 (Washington, D.C.: Dec. 20, 1994).

[2] U.S. General Accounting Office, Endangered Species: Fish and Wildlife Service Uses Best Available Science to Make Listing Decisions, but Additional Guidance Needed for Critical Habitat Designations, GAO–03–803 (Washington, D.C.: Aug. 29, 2003).

critical habitat should be designated. In its 1995 report, the National Research Council recommended delaying critical habitat designations until recovery plans are developed in order to increase the amount of information available on which to base the designations.[3] The FWS's policy is to issue a recovery plan within 2 years of a species being listed as a threatened or endangered species. However, the Council also recommended that temporary critical habitat be designated at the time of listing. A temporary designation would automatically expire with the adoption of a recovery plan and the formal designation of critical habitat.

Question 3. A December 2002 GAO report noted that FWS failed to integrate new research into ongoing species management decisions on a consistent basis. The agency is attempting to address this issue by establishing an advisory committee to ensure that monitoring and recovery actions feed back into management decisions. In light of the results of a survey by the Union of Concerned Scientists, in which one in five agency scientists responding had been 'directed to inappropriately exclude or alter technical information from a USFWS scientific document,' what recommendations would you make to the FWS to ensure that sound science is the basis for ongoing species management decisions?

Response. In conducting the review for our December 2002 report as well as a report we issued in 2003,[4] we did not encounter allegations that FWS inappropriately excluded or altered technical information in ESA decisionmaking. In the latter report, we specifically reviewed the processes FWS follows when making listing and critical habitat decisions (we evaluated the 64 listing decisions and 37 critical habitat decisions made during fiscal years 1999 through 2002). We concluded that the processes-internal reviews, peer reviews, and public comment-generally ensure that FWS decisions are based on the best available science. In addition, we also spoke with experts spanning the political spectrum in academic, government, nonprofit, and private sectors to identify recent listing and critical habitat decisions that were particularly controversial due to scientific disagreements and asked them to briefly explain the nature of the controversy. Although these experts identified a number of controversial decisions, no one raised concerns about FWS altering the data or science used in listing or critical habitat decisions.

Question 4. Many past GAO studies seem to advocate for adaptive management in species protection, which is incorporating learned lessons throughout the process of protecting a species. Why does this not seem to be taking place in most situations when it comes to endangered and threatened species management?

Response. GAO has not specifically evaluated the extent to which adaptive management is being used in recovering threatened and endangered species. However, we are beginning a review of recovery plan implementation during which we will identify recovery actions taken for species and the role recovery plans play in these actions-including whether FWS and the National Marine Fisheries Service are incorporating new information about a species. Fish and Wildlife Service officials have told us that recovery plans are considered "blueprints" for species' recovery and that the Service may deviate from it as new information about the species becomes available. Our recently initiated review should shed light into this process.

Question 5. The important role that states play in species management is a common theme among both proponents and critics of the act. What opportunities exist for exploring the resources that states are investing in species management as part of a future GAO study?

Response. There are many possibilities for a GAO review evaluating the states' role in implementing the ESA. While much has been written on other sections of the act, little has been done on section 6, which authorizes cooperative agreements with and funding to states. One source of information about state resources for species management is an annual report published by FWS that includes state expenditures on threatened and endangered species.[5]

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[3] National Research Council, Science and the Endangered Species Act (Washington D.C.: National Academy Press, 1995) pp. 71–93.

[4] U.S. General Accounting Office, Endangered Species: Research Strategy and Long-Term Monitoring Needed for the Mojave Desert Tortoise Recovery Program, GAO–03–23 (Washington, D.C.: Dec. 9, 2002). U.S. General Accounting Office, Endangered Species: Fish and Wildlife Service Uses Best Available Science to Make Listing Decisions, but Additional Guidance Needed for Critical Habitat Designations, GAO–03–803 (Washington, D.C.: Aug. 29, 2003).

[5] See Federal and State Endangered and Threatened Species Expenditures, Fiscal Year 2003. This is the most recent report available.

STATEMENT OF JOHN KOSTYACK, SENIOR COUNSEL, NATIONAL WILDLIFE FEDERATION

Good morning, Senator Chafee and members of the subcommittee. My name is John Kostyack, and I am Senior Counsel and Director of Wildlife Conservation Campaigns with the National Wildlife Federation. I appreciate your invitation for me to testify here today on the Endangered Species Act. I have been working on Endangered Species Act law and policy, both here in Washington, DC, and in various regions around the country, for the past 12 years. Over this time my appreciation for the value and wisdom of this law has grown continuously.

I'd like to talk today about how Congress could update the law to deal with the wildlife conservation challenges of the coming decades. The challenges are many. Consider, for example, the following threats, each of which is accelerating over time:

Invasive Species. According to the USDA, 133 million acres of land in the U.S. are already covered by invasive plants, and each year another 1.7 million acres are invaded. Invasive species threaten the survival of nearly half of all listed species.

Sprawling Development Patterns. The amount of land covered by urban and suburban development in the U.S. has quadrupled since 1950, with the rate of land consumption greatly outpacing population growth and increasing every decade. According to Endangered by Sprawl (2005), a study recently completed by National Wildlife Federation, Smart Growth America, and Nature Serve, over 1,200 plant and animal species will be threatened with extinction by sprawl in just the next two decades.

Global Warming. According to the U.S. State Department's recent Climate Action Report (2002), global warming poses serious risks to species and habitat types throughout the United States, threatening, among other things, alpine meadows across the West, prairie potholes in the Great Plains, and salmon spawning habitats in the Pacific Northwest.

If we truly want to pass on this nation's wildlife heritage to our children and grandchildren, we are going to need a strong Endangered Species Act to address these threats.

Before moving to some suggested updates to the Endangered Species Act, I would first like to talk about what kind of law we already have. It is crucial that Congress understands the benefits the law is already providing, and the law's many on-the-ground success stories, before it proceeds to reauthorization. The positive accomplishments of the past 32 years are the foundation that future changes to the Act must be built upon.

THE BENEFITS OF THE ENDANGERED SPECIES ACT

The Endangered Species Act represents the only effort by this nation to grapple in a comprehensive way with the problem of human-caused extinctions. For the many animal and plant species at risk of extinction, it is the only safety net that our nation provides.

Fortunately, the Endangered Species Act has been quite successful in rescuing plants and animals from extinction.

- Over 98 percent of species ever protected by the Act remain on the planet today.
- Of the listed species whose condition is known, 68 percent are stable or improving and 32 percent are declining.
- The longer a species enjoys the ESA's protection, the more likely its condition will stabilize or improve.

This is the most important thing for Congress to understand about the Endangered Species Act. It has worked to keep species from disappearing forever into extinction and, over time, it has generally stabilized and improved the condition of species. As a result, we have a fighting chance of achieving recovery, and more importantly, we are passing on to future generations the practical and aesthetic benefits of wildlife diversity that we have enjoyed.

The other key benefit provided by the Endangered Species Act, besides stopping extinction, is that it protects the habitats that species depend upon for their survival. The habitats protected by the Act are not only essential for wildlife, they are oftentimes the very natural areas that people count on to filter drinking water, prevent flooding, provide healthy conditions for hunting, fishing and other outdoor recreation, and provide a quiet and peaceful respite from our noisy and frenetic everyday lives.

To this date, no one has come up with a better way to protect our wildlife and wild places for future generations. So, when our children peer into the eyes of a manatee swimming by their canoe in a clear cool Florida river, or listen to a wolf howl in Yellowstone, or watch a condor soar majestically over the Grand Canyon, our generation and the one before ours should take pride in what we have done for

them in the past 32 years. As a result of the commitment Congress made in enacting the Endangered Species Act in 1973, and as a result of the efforts of many people working with the law ever since, we still have a rich and wonderful wildlife legacy to pass along.

MEASURING SUCCESS: A LESSON FROM THE IVORY-BILLED WOODPECKER

In the past few years, opponents of the Endangered Species Act have repeatedly tried to persuade the American people that despite the law's success in stopping extinction, the law is broken and needs a radical overhaul. Their argument boils down to a single statistic: only 13 or so species have been removed from the endangered species list due to recovery.

Recovery and delisting are certainly goals that the National Wildlife Federation shares, and I will speak in a moment about how to improve the odds of achieving them. However, I must first challenge the premise of the ESA's opponents that recovery and delisting should be the only measure of the success of the Endangered Species Act. Because it is not the only measure of success—it is not even the best measure—the entire case for a radical overhaul of the Act evaporates.

The story of the ivory-billed woodpecker highlights three reasons why the Endangered Species Act cannot be evaluated based upon the number of species fully recovered and delisted. Although the ESA has not yet been applied to the ivory bill, this species symbolizes the challenges facing wildlife agencies today. It shows that some of the biggest obstacles to recovery and delisting are largely beyond the influence of the Endangered Species Act.

First, restoring species and habitats requires funding.

Although the ivory-billed woodpecker has been listed as endangered under the ESA and predecessor laws since 1967, it has been presumed extinct since the 1940s. In perhaps one of the most exciting wildlife stories in our nation's history, a single bird was recently sighted in the Cache River National Wildlife Refuge in eastern Arkansas. We hope and expect that there are more birds in that area, but in any case, the bird's numbers are extremely low.

The ivory bill historically inhabited swampy bottomland hardwood forests. It prefers older trees, where it finds its primary food source, beetle larvae, living under the bark. In the southeastern U.S. where the bird once ranged, the vast majority of these old-growth forests are now gone, cleared for farms and pine plantations, and it will take decades to grow them back.

Restoring the habitats that the ivory bill needs to recover is going to take a lot more than the Endangered Species Act. Although safe harbor agreements under the ESA can remove disincentives, substantial public and private dollars will be needed to create positive incentives for private landowners to plant bottomland hardwood trees and protect them until they reach the stage where they are suitable habitat for the ivory bill. The fact that the ivory bill is listed as endangered under the Endangered Species Act will help concentrate everyone's attention on this task. However, if sufficient restoration dollars are not raised, it will not be a failure of the Endangered Species Act. Congress and other key actors need to provide funding to make this large-scale restoration project happen.

Second, as a matter of biology, achieving full recovery often takes a long time.

The average period of time in which species have been listed under the ESA is 15.5 years. In that amount of time, our best-case scenario is that we will have discovered and begun protecting a few more ivory bills and developed a strategy for accommodating range expansion. As a matter of simple biology—there aren't currently enough old trees around that could sustain a viable meta-population—full recovery of the ivory bill will take many decades.

Although the condition of most other listed species is not as dire as the ivory bill, many have severely depleted population numbers and habitats. As with the ivory bill, bringing their population numbers back and restoring their habitats often takes a long time for reasons of biology alone. Add in economic and political obstacles—such as the fact that many areas that need to be restored as habitat have potentially competing uses—and you can reasonably expect that recovery will not be completed for many species for a long while.

Third, delisting requires putting in place non-ESA regulatory measures.

Once a species' numbers and habitats are restored to the point of long-term viability, delisting still may not be feasible. Under the ESA, the Fish and Wildlife Service or NOAA Fisheries must first ensure that adequate regulatory measures are in place to prevent immediate backsliding after delisting.

For the ivory bill and many other listed species, there are no protections in place to prevent immediate habitat losses after the Endangered Species Act's protections are removed. In addition, many species require continuing management even after their population sizes and habitats have been restored to targeted levels. Conservation agreements with funding, monitoring and enforcement mechanisms must be negotiated with land managers to ensure that this management is carried out over the long run.

In summary, those who claim the ESA is broken due to the absence of a sizable number of delistings are ignoring the facts. The realities that impede quick recovery and delisting—inadequate funding, slow biological processes, and the absence of any alternative safety net—are not the fault of the Endangered Species Act.

The Endangered Species Act is making an essential contribution to recovery by stabilizing and improving the condition of species over time. Thanks to the Act, the ivory bill has a real chance of making it into the next century. But Congress needs to look outside the four corners of the Act to fully understand and address the reasons why so few species are removed from the threatened and endangered list due to recovery each year.

In addition, members of Congress should stop relying a single statistic about delistings as the measure of the Act's success, and instead encourage the wildlife agencies to develop new and better mechanisms for tracking progress. As authors Michael Scott and Dale Goble point out in the April 2005 issue of BioScience, the wildlife agencies currently do not maintain a database enabling policymakers and the public to track Endangered Species Act actions. A database that identifies, among other things, how much habitat is being conserved and how much is being authorized for destruction as a result of ESA consultation processes, would greatly inform the debate over the effectiveness of the law.

ON-THE-GROUND SUCCESS STORIES TO BUILD UPON

The Endangered Species Act has produced numerous on-the-ground successes. The small list of examples below is designed simply to highlight the variety and creativity of the conservation actions that the law has fostered. These examples show that the Endangered Species Act is empowering people to find a place for wildlife in a country that is increasingly crowded with extractive industries, real estate developments, and other human uses of natural resources. Because of the Act's safety net features and its recovery programs, native wildlife still has a place on the American landscape.

1. Whooping Crane.

The whooping crane is a dynamic and charismatic bird that, if it were not for the Endangered Species Act and its predecessors, would probably no longer exist in the wild today. As a result of a recovery program developed under the Act, birds have been bred in captivity, released into the wild, and trained with the help of an aircraft to fly and migrate. Endangered Species Act enforcement action to protect the bird's designated critical habitat led to the creation of the Platte River Critical Habitat Maintenance Trust, which has acquired over 10,000 acres of riparian habitat along the crane's migratory route. Prior to the Endangered Species Act, a mere 16 birds existed in the wild. Today, nearly 200 birds thrive in the wild, attracting birdwatchers from around the world.

2. Florida Panther

The Florida panther is one of the most endangered large mammals in the world. As recently as 15 years ago, its numbers had been reduced to somewhere between 30 and 50. Due to the Endangered Species Act, a number of innovative conservation measures have been taken to bring the animal back from the brink. The U.S. Fish and Wildlife Service successfully addressed the panther's inbreeding problem by bringing Texas cougars (a closely related subspecies) into south Florida. Vehicle mortality, one of the leading causes of panther deaths, has been greatly reduced with the construction of highway underpasses. The underpasses created for the Florida panther now serve as a world model for facilitating movement of wildlife in an urbanizing landscape. Today, the number of cats living in the wild approaches 100. The Florida panther is still a long way from full recovery, but it has a fighting chance.

3. Gray Wolf

Although the gray wolf once ranged across much of the continental United States, several centuries of hunting and predator control programs, reduction of prey, and habitat loss greatly reduced the species' numbers. By the mid-1960s, the only gray wolves in the lower 48 states were the 200 to 500 animals in Minnesota and roughly

20 on Isle Royale, Michigan. Today, thanks to the Endangered Species Act, there are thriving gray wolf populations in the Western Great Lakes and Northern Rockies, a small population in the Southwest, and occasional wolf sightings in the Northeast and Pacific Northwest. The dramatic recovery of the gray wolf in the Northern Rockies was jump-started by an historic reintroduction of wolves to Yellowstone National Park and the central Idaho wilderness one of the most successful wildlife reintroductions in the nation's history.

4. Bald Eagle

In the 1960s, the bald eagle, our Nation's symbol, had fewer than 500 breeding pairs remaining in the continental U.S. Widespread use of the pesticide DDT in the post-World War II period had contaminated the majestic bird's food supply, causing its populations across the country to plummet. Although the Federal ban on DDT in 1972 was a major factor in turning around the bald eagle's decline, the Endangered Species Act also played an essential role in its recovery. The Act protected the bird's key habitat and facilitated translocations of eaglets from areas where the bird was numerous to states where it had been eliminated or severely depleted. Today, the number of bald eagles in the lower 48 states exceeds 7,600 breeding pairs.

5. Puget Sound Chinook Salmon

Chinook salmon have long been a symbol of the Pacific Northwest, providing important cultural values for Native American tribes and sustenance and recreation for all residents. The Puget Sound population of the Chinook was listed in 1999 after declining steadily due to logging, mining, dam-building and suburban development in its habitat, and interbreeding of hatchery fish. Recently, in response to the Endangered Species Act, Seattle City Light improved prospects for the fish by modifying its dam operations on the Skagit, the Puget Sound's largest river. Prospects for the fish and habitats also have improved due to the emergence of Shared Strategy, a groundbreaking collaborative effort by a diverse array of citizens and organizations to build an ESA recovery plan for the Puget Sound chinook from the ground up, watershed by watershed. This effort will ensure broad public support for the array of recovery actions that will ultimately be needed to bring the chinook back to full recovery.

6. Robbins' Cinquefoil

The Robbins' cinquefoil is a species of the rose family, found at just two locations on the slopes of the White Mountains in New Hampshire. In the 1970s, its numbers were reduced to roughly 1,800 plants due to trampling by horses and hikers and harvesting by commercial plant collectors. After listing and critical habitat designation pursuant to the Endangered Species Act, the Appalachian Mountain Club and New England Wild Flower Society teamed up with Federal agencies to relocate a hiking trail, educate the public and reestablish healthy populations. By 2002, the species' numbers had rebounded to over 14,000 plants in two populations, and the species was removed from the endangered list. A cooperative agreement with the U.S. Forest Service helps ensure the continuation of the Robbins' cinquefoil's success story through management and monitoring.

OPPORTUNITIES FOR UPDATING AND IMPROVING THE ACT

Many lessons can be learned from the successes described above and from the numerous other positive experiences implementing the Endangered Species Act. The following are some ideas for updating and improving the Act that are drawn from these experiences.

• *Implement Recovery Plans and Encourage Proactive Conservation.* Any effort to update the Endangered Species Act must begin with steps to promote greater and earlier progress toward recovery. As discussed above, due to Act's flexibility the Nation has benefited in recent years from numerous collaborative initiatives to restore species and habitats. Wildlife agencies should build recovery plans around these proactive recovery initiatives, and Congress should support them with funding so long as they are consistent with recovery plans. If such an approach were taken, ESA conflicts would be reduced because there would be greater buy-in to the Act's implementation. Because greater amounts of habitats would be restored, wildlife agencies would have greater management flexibility.

The Endangered Species Act already provides a solid foundation for this approach. Section 4(f) calls for one of the two wildlife agencies to develop a recovery plan with objective measurable criteria for success and to implement it. However, recovery plans oftentimes are not completed for many years after listing, and thus there is no early blueprint to guide management and restoration actions. A simple solution

to this problem would be to require that recovery plans be finalized within a specified time after listing (e.g., 3 years).

A related problem is that the two wildlife agencies are typically not in the position to carry out many of the actions that are needed to bring about recovery. Section 7(a)(1) of the Act requires all Federal agencies to utilize their authorities in furtherance of species recovery, but it does not link this duty to the recovery plan. As a result, agencies have often chosen recovery actions in an arbitrary manner.

A solution to this problem would be for Federal agencies to be required to develop and implement Recovery Implementation Plans to set forth the specific actions, timetables, and funding needed for that agency to help achieve the recovery goals set forth in the Recovery Plan. The Western Governors Association developed a variation of this idea when it adopted its ESA legislative proposal in the 1990s. "Implementation agreements" for Federal and state agencies to help carry out recovery plans remains part of WGA policy to this day.

Another problem related to implementation of recovery plans is that Federal agencies oftentimes carry out actions that are at odds with those plans. For example, the Corps of Engineers has issued dredge-and-fill permits for development in Florida panther habitat despite the fact that the habitat is deemed essential for the species in the recovery plan. Congress could easily fix this problem by clarifying that Federal agencies must ensure that their actions do not undermine the recovery needs of listed species. The recovery needs of the species would be identified in the recovery plan, and updated by the latest scientific data. If Congress were to adopt this approach, agency decisions would more likely to contribute to the Act's recovery goal. They would also be easier to defend in court, and less likely to attract litigation, because they would be tied to a larger strategic framework, the recovery plan.

• *Provide incentives for private landowners to contribute to recovery.* According to the GAO, roughly 80 percent of all listed species have at least some of their habitat on non-Federal land; about 50 percent have the majority of their habitat on non-Federal land. Much of this non-Federal land is private land, and yet the current Endangered Species Act does not provide many incentives for private landowners to carry out the management measures that are often needed for listed species to thrive. Although ESA regulatory programs such as Safe Harbor remove disincentives, they do not provide incentives. Technical assistance programs can help, but by far the most meaningful incentive that Congress can provide is financial assistance. To ensure a reliable source of funding, this assistance should be provided through the tax code. In return for conservation agreements in which private landowners commit to actively manage habitats for the benefit of listed species, Congress should defer indefinitely Federal estate taxes or provide immediate income tax credits for expenses incurred.

• *Protect critical habitat.* The Administration has attempted to justify its efforts to weaken the Act's critical habitat protections by claiming that these protections are redundant with other ESA protections and therefore without value to listed species. At the same time, the Administration contradicts itself by generating cost-benefit analyses claiming that critical habitat protections are imposing enormous costs on the private sector. None of this rhetoric is supported by any meaningful analysis of data. The only quantitative studies on critical habitat have shown that critical habitat indeed provides benefits to many listed species. Species with critical habitat designations tend to do better than species without such designations.

Critical habitat is particularly important when it comes to protecting unoccupied habitat, because the other protections in the Endangered Species Act generally do not adequately protect such habitat. Most species will never recover unless they can return to some part of their historic range that is currently unoccupied.

Because of the hostility shown by the current Administration toward critical habitat, it will be essential for Congress, when it reauthorizes the ESA, to strongly reaffirm the importance of critical habitat protection. Congress should push back the deadlines to 3 years after listing, thereby giving the wildlife agencies the time they need to get the science right. It also should encourage the wildlife agencies to integrate recovery plan and critical habitat designation decisions. Congress also should develop a schedule, and authorize the funding, for cleaning up the backlog of species awaiting critical habitat designations. When the late Senator Chafee took these steps in S. 1100 back in 1999, they attracted broad public support.

• *Provide adequate funding.* Finally, there perhaps can be no more important step that Congress can take to improve implementation of the Endangered Species Act than to increase funding to reasonable levels. At a bare minimum, Congress must provide the funding that the wildlife agencies need to carry out their mandatory duties. For example, the U.S. Fish and Wildlife Service has estimated that it would take approximately $153 million over 10 years to eliminate the current backlog of listings and critical habitat designations. Congress could immediately eliminate doz-

ens of lawsuits simply by providing these funds and other funds needed for the basic implementation steps of the Act. In addition, many of the concerns about the Act's impact on states, local governments and private landowners could be alleviated if Congress were to expand its Section 6 and other grant funding for recovery actions.

Thank you again for the opportunity to testify today. I would be pleased to answer any questions.

RESPONSES BY JOHN KOSTYACK TO QUESTIONS FROM SENATOR INHOFE

Question 1. In your testimony you state that the Act "over time, has generally stabilized and improved the condition of species." In the FWS most recent report to Congress, the recovery status of 60 percent of listed species is either "uncertain" or "declining", while 30 percent are classified as stable, and 6 percent are classified as improving. Only 6 percent are classified as improving. Don't you think we can do better than 6 percent? And as a follow-up, do you know exactly how many species were endangered but stable at the time of listing versus the number the ESA itself has stabilized?

Response. Although we can do better, this summary of FWS statistics does not accurately portray the ESA's performance. FWS's statistics show that the ESA indeed has been successful in stabilizing and improving the condition of listed species.

First, by suggesting in its most recent recovery report that only 30 percent of listed species are stable and only 6 percent are improving, FWS distorts its own data. See U.S. Fish and Wildlife Service, Recovery Report to Congress, Fiscal Years 2001-2002, Figure 1. FWS's report inaccurately states that the trends of listed species fall within six distinct categories: uncertain, declining, improving, stable, presumed extinct, and found only in captivity. In fact, species with an uncertain trend also fall within the stable, improving and declining categories. The only accurate way to characterize the data is to provide separate statistics for species with "known" trends and those with an "uncertain" trend. For those species whose trend is "known," 49 percent are stable, 10 percent are improving and 34 percent are declining.

Second, FWS's report contains two sets of statistics concerning the trends of listed species: one covering all listed species, and one covering those that have been listed for six or more years. See U.S. Fish and Wildlife Service, Recovery Report to Congress, Fiscal Years 2001-2002, Figure 1 and Table 4. The question posed above uses only the former data set. However, to meaningfully assess the performance of the ESA, it is more appropriate to use the latter data set. This is because it is unrealistic to expect that the ESA or any law could have a measurable impact on the overall trend of a species during the first few years after the law has gone into effect.

According to FWS's breakdown of the "known" trends of species under ESA protection for 6 or more years, 55 percent are stable, 13 percent are improving, and 32 percent are declining. See Table 4. Moreover, FWS's report shows that over time, the trends of listed species shift from declining to stable or improving. Ibid. This is an impressive record, especially considering that most species are not listed until their populations have been reduced to very low numbers. See Wilcove, D.S., M. McMillan, K.C. Winston. 1993. What exactly is an endangered species? An analysis of the U.S. endangered species list: 1985-1991. Conservation Biology, V. 7(1): 87–93. To make the ESA work even better, Congress should encourage conservation action to be taken before species have declined drastically and management options have become limited and costly.

Regarding the follow up question, I am unaware of any study suggesting that threatened and endangered species are stable at the time of listing. Considering that most imperiled species do not receive focused management efforts until after they are listed under the ESA, I would presume that the species deemed to be "stable" in FWS's recovery reports became stable only after receiving ESA protection.

Question 2. As you mention in your testimony, there have been allegations of political influence or agenda-driven science on both sides of the issue, would it not be prudent to have a statutory standard by which to judge good science to avoid this finger-pointing?

Response. Enforcing the current statutory standard, which requires use of the best scientific and commercial data available, would achieve the goal of ensuring that "good" science drives management decisions. Because science is constantly evolving, Congress is in no position to dictate what kinds of scientific data is the best data available.

The Union of Concerned Scientists survey of FWS biologists is not about finger pointing; it is a necessary first step toward fixing a serious breakdown in ESA implementation. The essay responses, in particular, provide Congress and the public

with a rare window into the political manipulation of science in which the current administration has been engaged. It would be helpful for Congress to investigate whether the abuses exposed by FWS biologists in this survey are being addressed and, if not, to provide the administration with direction on removing the abuses.

Question 3. What is your view as to the need for requiring the completion or amendment of recovery plans for a given species before designating critical habitats for that species?

Response. As my oral and written testimony make clear, the National Wildlife Federation supports setting a 3-year deadline for both recovery plans and critical habitat designations, so that the agencies have the time they need to do the necessary scientific work and to ensure that this science is integrated into all ESA decisionmaking. However, the failure to complete a recovery plan by the 3-year deadline should not provide an excuse for failure to designate critical habitat. Congress should provide funding and direction needed to end the lengthy delays that have plagued both recovery plans and critical habitat designations.

Question 4. Most species do require management even if from overpopulation. If the targeted level for recovery has been met, is the ESA a better management tool than state and local wildlife agencies and why?

Response. It is true that many species will require management even after recovery targets are met. Whether state, local, tribal and Federal managers of land or water will be willing and able to put in place effective management tools in the absence of the ESA is not yet known. It would be worthwhile for Congress to provide these managers with the funding they need for species conservation so that they can begin management prior to the date on which recovery targets are met. This would provide FWS and NMFS with a track record to evaluate whether the tools these resource managers have put in place are adequate to prevent a reversal in the trend of the species. If FWS and NMFS can reasonably conclude that these tools are adequate to enable the species to continue thriving in the wild, then it is appropriate for the species to be delisted and for ESA management tools to be removed once recovery targets are met.

RESPONSES BY JOHN KOSTYACK TO QUESTIONS FROM SENATOR JEFFORDS

Question 1. In your testimony, you mention three major threats to wildlife: invasive species, urban sprawl, and global warming. How can we minimize or eliminate these threats?

Response. Most of the actions that Congress can take to address these threats are outside the scope of the Endangered Species Act. Regarding global warming, the McCain-Lieberman Climate Stewardship Act is a bipartisan plan of action in Congress that sets achievable goals for reducing global warming pollution in the United States. The bill requires power plants, oil companies, and other major sources to collectively reduce emissions of carbon dioxide and other greenhouse gases to what they emitted in the year 2000. The bill also allows businesses to implement their own solutions, using a flexible emissions trading system that has successfully reduced air pollution under the Clean Air Act at a fraction of the anticipated costs. The Act will:

- Create more than 800,000 new energy technology jobs in the U.S.
- Provide new income to farmers by rewarding environmentally friendly farming and forestry practices that help remove global warming pollution from the atmosphere
- Take an important step toward protecting Americans and wildlife from the impacts of global warming.

The National Wildlife Federation has additional policy recommendations for Congress on global warming and invasive species on its website, *http://www.nwf.org/ourprograms/*

Policy recommendations for urban sprawl are set forth in our report co-authored with NatureServe and Smart Growth America, entitled, Endangered by Sprawl: How Runaway Development Threatens America's Wildlife, which can be found at *http://www.nwf.org/nwfwebadmin/binaryVault/EndangeredBySprawlFinal.pdf*

These threats are already implicitly addressed in the Endangered Species Act, which calls for Federal agencies to take whatever action is necessary to conserve listed species and their habitats. However, wildlife agencies and agencies charged with managing land and water resources are often focused heavily on responding to immediate threats of piecemeal habitat loss and frequently lack the programs and resources needed to grapple with the underlying causes of species decline. Congress should consider giving wildlife agencies and resource managers additional direction and funding to address these looming threats more proactively.

Question 2. You state in your testimony that there are no protections in place to prevent immediate habitat losses after the Endangered Species Act protections are removed for the ivory-billed woodpecker and other listed species. What do you think can be done to protect species habitat immediately upon delisting?

Response. As indicated in my answer to Senator Inhofe's fourth question, Congress should provide state, local, tribal and Federal managers of land and water resources with funding and other support for managing and restoring listed species. If recovery targets are later met, these managers will already have a track record of successfully conserving the species and could be expected to continue doing so in a post-delisting environment. Congress should continue to insist (as is currently required by the ESA) that regulatory mechanisms be put in place prior to any delisting so that wildlife agencies can ensure that species will be adequately protected after delisting.

Question 3. Please explain what your concerns are when you say that "two wildlife agencies are typically not in the position to carry out many of the actions that are needed to bring about recovery." What are your recommendations to address these concerns?

Response. To achieve recovery of listed species, Congress must devise strategies to encourage greater involvement by the numerous public and private entities that make decisions affecting natural resources. The two Federal wildlife agencies lack the resources to participate in the many public processes where decisions are made affecting the fate of threatened and endangered species.

For example, local governments routinely enact comprehensive plans outlining where development will take place; local transportation officials routinely enact plans outlining where roads will be built; and state technical committees routinely set policies allocating Farm Bill dollars. Congress should consider ways to encourage these and other non-Federal resource managers to (1) provide input into recovery planning for listed species and specify their own contributions to recovery, (2) make themselves aware of the contents of final recovery plans, and (3) ensure that their decisions do not undermine agreed-upon recovery strategies.

With respect to Federal resource managers, Congress should elaborate on the Federal agencies' mandatory duty to affirmatively promote species recovery. As explained in my oral and written testimony, Federal agencies with activities affecting listed species should be required adopt Recovery Implementation Plans setting forth the agencies' contribution to implementation of the Federal recovery plan.

RESPONSES BY JOHN KOSTYACK TO QUESTIONS FROM SENATOR CLINTON

Question 1. I was pleased to hear you mention the ivory-billed woodpecker in your testimony. When my husband was Governor of Arkansas, he supported a combination of Federal, state and privately financed conservation efforts. How does the Endangered Species Act encourage public-private partnerships to save threatened species? What is the economic impact of such partnerships?

Response. The Endangered Species Act encourages such public-private partnerships in countless ways. For example, after listing, a recovery team consisting of Federal, state, university, and other experts is typically formed and a research agenda is decided upon and implemented. State and local agencies and private landowners qualify for ESA §6 and a host of other grants that are used for public-private partnerships. ESA §7 stimulates negotiations and partnerships among Federal agencies and many others who are involved in Federal actions affecting listed species. Habitat conservation planning efforts and safe harbor agreements are partnerships stimulated by ESA §§9 and10.

The economic benefits of these partnerships are difficult to measure, but are undoubtedly substantial. By stimulating a discussion among key players about how natural resources can be managed sustainably, the ESA ensures that decisions are made and action is taken before damage to natural systems is impossible or extremely costly to reverse. The partnerships formed as a result of these collaborative decisionmaking processes can be long-lasting and help raise substantial public and private dollars for local communities. For example, enforcement of ESA §7 to protect the endangered whooping crane led to the formation of the Platte River Whooping Crane Maintenance Trust, which has acquired nearly 10,000 acres of habitat, providing enormous economic, aesthetic and ecosystem benefits to Nebraska communities. Thanks in part to the ESA, the whooping crane, once teetering at the brink of extinction, is now on the rebound and attracting tourists from around the world. Success stories like this one can be found all across the country.

Question 2. In your testimony, you mention that the current Administration is attempting to weaken the Act's critical habitat protections. Could you please elaborate

on the ways in which the Administration has failed to act in accordance with these provisions of the Endangered Species Act?

Response. The Administration has been claiming for the past 5 years that the critical habitat feature of the Endangered Species Act is broken, and yet it has failed to offer any improvements. Instead, it has engaged in a relentless campaign to undermine critical habitat protection at every turn. Last year, the National Wildlife Federation issued a report, entitled Unsound Economics: The Bush Administration's New Strategy for Undermining the Endangered Species Act, documenting some of the worst of these abuses. See *http://www.nwf.org/nwfwebadmin/binaryVault/Unsound%20Economics.pdf*

The report shows how the Bush administration has used flawed economic data to cut in half the critical habitat designations for imperiled wildlife recommended by Interior Department wildlife experts. It also shows that the administration has consistently overestimated the costs and suppressed and ignored the benefits of proposed critical habitat designations, thereby reducing the amount of habitat protected under the Act.

The Bush administration is the first administration to justify reducing the amount of proposed critical habitat primarily on the grounds that it costs too much. Between 2001 and 2003, the share of total critical habitat reductions justified using cost-benefit analysis had risen from less than 1 percent to 69 percent. By 2003, the Bush administration had used economic analysis to deny over one million acres of critical habitat protection.

The report documents how the administration has gone so far as to delete portions of economic analyses that discuss the benefits of critical habitat designation.

The report also illustrates how the administration has systematically inflated the costs of critical habitat. When calculating costs of a designation, the administration has tallied the entire expense of implementing the Endangered Species Act for a given species instead of just the added cost of the proposed critical habitat protection. In one case involving 15 threatened crustaceans and plant species in California, this approach, together with other flaws, led the administration to overestimate the cost of critical habitat tenfold.

The report cites several specific examples where improper cost-benefit analyses led to skewed outcomes that favored reductions in critical habitat. For example:

• In March 2004, the U.S. Fish and Wildlife Service issued an economic analysis of proposed critical habitat for threatened bull trout in the Columbia, Klamath and Snake River Basins. Before issuing the analysis, which had been written for the agency by a private contractor, FWS deleted the entire 57-page section on the benefits of this habitat protection.

• Also unveiled in March 2004, a critical habitat proposal for the Topeka shiner, a Midwestern fish, was based in part on an economic analysis that had its entire benefits section deleted. The White House's Office of Management and Budget called for the deletion, asserting that "the benefits accruing from designating the critical habitat are not relevant to the policy decision at hand."

• The March 2004 economic analysis of critical habitat for the Mexican spotted owl lacked a benefits section, in sharp contrast with the extensive discussion of benefits of conservation of the same species found in a November 2002 analysis. Whereas the earlier report discussed both qualitative and quantitative benefits, the later one discussed neither.

Additional information about how the Bush administration has undermined critical habitat protection can be found in the article, "Critical Habitat at the Crossroads," which I published with co-authors Michael Senatore and Andrew Wetzler in the Spring 2003 edition of Golden Gate Law Review.

Question 3. During Mr. Hopper's testimony, he offered several examples of conflicts between the ESA and people. Can you offer your perspective on these specific examples?

Response. Mr. Hopper makes numerous outrageous claims about how the ESA has supposedly caused death and financial ruin, but he fails to offer any authoritative sources. Rather than accepting these allegations on their face, Congress should obtain articles and reports prepared by reputable journalists at the time they were first made. During the past decade, numerous allegations made by ESA opponents have been shown to be false after an objective review of the facts has been performed.

Although I have not been invited to provide a point-by-point rebuttal of Mr. Hopper's testimony, I would like to offer some perspective on his claims. First, it is true that developers are sometimes inconvenienced by the delays associated with ESA permitting. However, many of these delays are an inevitable part of the ESA's crucial "look before you leap" function. Congress should reaffirm the importance of this

feature—it is the safety net that has enabled wildlife agencies to develop "win-win" solutions and prevent wildlife from disappearing into extinction.

Some delays are due to the fact that the wildlife agencies are chronically underfunded and short-staffed. Congress can go a long way toward addressing developers' concerns about the ESA by addressing this funding shortfall.

Finally, in discussing the Klamath Basin controversy, Mr. Hopper pretends that the farmers are the only group affected by the Federal Government's water management policies. In fact, Native American tribes, commercial fishermen, the recreational fishing industry and many others have suffered mightily as a result of the Federal Government's failure to protect the habitats of listed fish in the Klamath Basin. A balanced solution to the Klamath controversy must address their interests as well as those of the farmers. In evaluating any proposed solution, and in evaluating the economic impacts of the ESA more broadly, Congress should ensure that both the costs and benefits of species conservation are considered.

RESPONSES BY JOHN KOSTYACK TO QUESTIONS FROM SENATOR CHAFEE

Question 1. Ms. Fontaine's statement mentioned National Wildlife Federation testimony before Congress in 1973 that advocated for states to have primary authority for endangered species, including managing recovery plans for these species. What is NWF's position on this issue today?

Response. NWF believes that the involvement of states in the conservation of listed species can and should be greatly expanded. Section 6 of the ESA already provides broad authority for the Secretary of the Interior or Commerce to empower the states under the ESA with cooperative agreements and funding. This existing authority could be used more effectively. Moreover, as has been proposed by the Western Governors Association, Congress could authorize states to prepare Recovery Implementation Agreements in which they commit to carry out various elements of the Federal recovery plan. Concurrence in such agreements by the Secretary of the Interior or Commerce could qualify the states for expanded funding support.

NWF does not support giving the states primary authority over threatened and endangered species. To our knowledge, states are not requesting such authority.

Question 2. One of the issues we hear a great deal about is the large amount of litigation associated with the ESA. In your opinion, does litigation harm efforts to move toward more collaborative approaches for species protection, particularly innovative approaches where private landowners are involved?

Response. Many if not most of the collaborative approaches for protection of listed species on private lands have produced meaningful results only because of actual or threatened ESA enforcement. For example:

- As noted in my answer to Senator Clinton's first question, a major collaborative effort to save the whooping crane's private land habitat along the Platte River was stimulated by ESA enforcement.
- Multi-species conservation planning for private land habitats in southern California was stalled until ESA enforcement led to the listing of the California gnatcatcher. As a result of this listing and threatened enforcement of the ESA's take prohibition, southern California is now often cited as a model of collaborative conservation in a rapidly developing landscape.
- Safe harbor agreements and mitigation banks are viewed by many as cutting-edge approaches to habitat conservation on private land. Both of these incentives programs depend for their success on enforcement of the ESA's take prohibition.

Litigation has indeed been heavy in two areas of ESA law: listings and critical habitat designations. Much of this litigation could have been avoided if the administration was motivated to comply with the law and to request adequate funding from Congress. Instead, as noted above, the current administration is extremely hostile to critical habitat protection and will comply with the law only if forced to do so by a court. The situation has been similar with regard to listings. The current administration is the first one in history to list species only when forced to do so by litigation. Its pace of listing, roughly 8 per year, is far below all prior administrations. Congress could substantially reduce ESA litigation by reaffirming the importance of the listing and critical habitat programs, providing adequate funding for these programs, and holding the administration accountable when it undermines them.

RESPONSES BY JOHN KOSTYACK TO QUESTIONS FROM SENATOR LAUTENBERG

Question 1. As we heard at the hearing, the Endangered Species Act is really an alarm system, suggesting that all other management strategies for a species have failed. What other actions could be taken before we get to the situation in which a species is on the brink of extinction?

Response. The health of this nation's species and ecosystems is affected by a vast array of decisions made every day by both public agencies and private entities. Congress influences many of these decisions with its policymaking and funding. When Congress considers renewing a law or enacting a new one, it should consider whether adjustments could be made to enhance the health of species and ecosystems. This approach should be taken with respect to environmental laws such as the Clean Water Act, conservation grant programs such as Forest Legacy, and laws not primarily focused on the environment such as the Farm Bill and the surface transportation bill. Congress should also consider creating a dedicated source of funding for the states to conserve wildlife, such as was proposed in the Conservation and Reinvestment Act (CARA) of 2001.

STATEMENT OF M. REED HOPPER, PRINCIPAL ATTORNEY, PACIFIC LEGAL FOUNDATION

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

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

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

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

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

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

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

This approach pits people against species, environmentalists against landowners, and urban communities against rural communities. Further, strict application of the ESA has resulted in some unfortunate, even frightening outcomes. For example, homeowners in Texas have been threatened by the Fish and Wildlife Service with criminal charges if they erect fences on their property in the habitat areas of the

Golden-cheeked warbler, a small bird. Likewise, homeowners in California have been warned that clearing brush away from their houses for fire protection in gnatcatcher habitat will subject them to substantial fines or imprisonment.

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

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

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

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

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

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

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

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

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

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

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

See Accounting for Species, at i-ii.

Examples of these "other costs" not reported include costs for implementing species recovery (e.g., $650 million for a Habitat Conservation Plan (HCP) in San Diego County, California); costs from ESA-related interference with building schools, hospitals, roads, and other infrastructure (e.g., delay of $55 million high school in Vista Murrieta, California, at a cost of over $1 million); economic impacts from Federal regulation of 38 million acres of private land (e.g., costs of critical habitat for the California gnatcatcher alone estimated at an average $300 million a year); enormous private costs such as development project denials, delays or changes (e.g. up to $120 million in project modifications for California vernal pool critical habitat designation); social costs from regulatory burdens placed on agriculture, water use, forest management, mineral extraction, and recreation (e.g., crop losses in the Klamath Basin of Oregon in 2001 exceeding $50 million); loss of jobs (e.g., at least 130,000 jobs and more than 900 forest product facilities closed since mid-1990 to protect the northern spotted owl); and, reduction of business activities, tax revenues, property valuation (e.g., ESA-mandated water reductions in the Westlands Water

District cost the California economy more than $218 million and 4,500 jobs statewide and a loss of Federal revenue of $2.3 million). Id. at 1–11. See also, The Economic Costs of Critical Habitat Designation: Framework and Application to the Case of California Vernal Pools, by David Sunding, Aaron Swoboda and David Zilberman, February 20, 2003, at 25–35 (over 90 percent of total costs of critical habitat designation for California vernal pool species are due to project modifications, $118-$120M), *http://www.calresources.org/admin/files/crmichreport.pdf*

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

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

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

In the midst of this controversy over how limited water supplies should be used, for people or fish, the Albuquerque Journal commissioned a survey of New Mexicans' opinions of the ESA. The Journal asked: "Thinking of recent developments in New Mexico involving the Endangered Species Act, such as efforts to protect the Rio Grande silvery minnow, do you think the Act goes too far, does not go far enough, or is working as it should?" Sixty-nine percent said the Act goes too far while 15 percent said it is working as it should, and only 6 percent said it does not go far enough. This was an abrupt change from previous surveys.

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

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

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

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

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

68 Fed. Reg. 46684–01 (Aug. 6, 2003).

Because Congress has not responded to the Agency's repeated calls for greater discretion in the use of critical habitat as a conservation tool, continued litigation is likely to drive the Agency's critical habitat program. The ESA requires the designa-

tion of critical habitat for all listed species, with few exceptions, but this has been done for only 25 percent of the 1,264 threatened and endangered species listed nationwide. Activists have sued to compel the Fish and Wildlife Service to designate critical habitat for literally hundreds of species. The Agency complains, however, that these court actions leave the Service with inadequate time and resources to properly identify critical habitat, resulting in overly broad designations. This was the case with the Alameda whipsnake.

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

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

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

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

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

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

Thus, the ESA critical habitat requirement is, at best, inefficient, and, at worst, wasteful, on two fronts. First, according to the very agency tasked with the responsibility for protecting listed species, the designation of critical habitat provides no meaningful protection to the species beyond the protections already provided by other provisions of the Act, such as the Section 9 take provision which prohibits anyone from harming a listed species. This was also the conclusion of the district court in Home Builders. While the environmental intervenors argued that the invalid critical habitat designation should be left in place for the protection of the Alameda whipsnake, the court found no evidence that setting aside the critical habitat would have any harmful effect on the species.

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

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

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

Under the ESA, landowners can be "prosecuted, fined, jailed, and ordered to pay restitution" if they harm a listed species without Federal approval. Id. "Harm" is widely defined and may include modification of species habitat. Id. In effect, the Federal Government exercises a veto power over land use activities in species habitat. The impact on landowners is severe. See Sunding, Swoboda & Zilberman. As United States Supreme Court Justices Antonin Scalia and Clarence Thomas argued in dissent in *Babbitt* v. *Sweet Home Chapter of Communities for Great Oregon*, 515

U.S. 687,714 (1995), such restrictions "impose unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use."

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

Besides encouraging landowner cooperation and satisfying fundamental notions of fairness, compensating landowners serves another important societal purpose; it acts as a restriction on Federal power by limiting the incentive of the government to take more land than it needs for wildlife conservation. Under the ESA, the Federal Government essentially "acquires" land at no cost. With the stroke of a pen private property becomes protected habitat, with all its attendant restrictions. The natural result of a government that regulates without cost is a government that regulates without end.

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

1. "Best Available" Scientific Evidence

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

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

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

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

2. Proof of Harm

Section 9 of the Endangered Species Act prohibits the "taking" of any endangered or threatened species. 16 U.S.C. §1538(a)(l)(B). However, the Act allows a "taking," when authorized, if the "taking" is incidental to, and not the purpose of, carrying out an otherwise lawful activity. See 16 U.S.C. §1539(a)(l)(B). The term "take"

means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. §1532(19). The term "harm" was interpreted by regulation to mean:

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

50 C.F.R. §17.3 (emphasis added).

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

3. Private Lands v. Public Lands

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

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

4. Existing Federal Contracts

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

5. "Reasonable and Prudent Alternatives"

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

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

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

6. Economic Impacts Analysis

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

> Whether a species has declined sufficiently to justify listing is a biological, not an economic, question. For this reason, the committee eliminated all economic considerations from the species listing process. Desirous to restrict the Secretary's decision on species listing to biology alone, the committee nonetheless recognized that the critical habitat designation, with its attendant economic analysis, offers some counter-point to the listing of species without due consideration for the effects on land use and other development interests. For this reason, the committee elected to leave critical habitat as an integral part of the listing process . . .

H.R. Rep. No. 567, 97th Cong., 2d Sess., reprinted in 1982 U.S.C.C.A.N. 2812 (emphasis added).

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

7. Essential Habitat

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

8. Mitigation v. Recovery

Section 10 of the Act requires a permit applicant to provide a "conservation plan" that includes the steps that will be taken to "minimize and mitigate" the impacts of any incidental "taking" that may result from the proposed project. 16 U.S.C. §1539(2)(A)(ii). This conservation plan must also include "such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan." Id. Although the "purposes of the plan" clearly relate back to the requirement to "minimize and mitigate" the impacts of the incidental "taking," the United States Fish and Wildlife Service and NOAA Fisheries have taken this provision as carte blanche to impose any and all measures these agencies desire. In addition to the required mitigation, these agencies typically mandate through the conservation plan that the applicant also pay fees or provide land for habitat enhancements that go way beyond the remedial needs of the project. In effect, these agencies distort the Act to push the cost of conservation and recovery onto the private citizen. Under the Act and other laws, the government itself, and not the applicant, has the responsibility to provide for the general conservation and recovery of threatened and endangered species. "Mitigation" measures that exceed the impact of a project in

type or extent violate the applicant's constitutional protections. See *Nollan* v. *California Coastal Commissio*, 483 U.S. 825 (1987), and *Dolan* v. *city of Tigard*, 512 U.S. 374 (1994). Although private applicants are required to "minimize and mitigate" the effects of their conduct on listed species, they do not have a duty, like the government, to provide resources for the general conservation or recovery of the species.

9. "Adverse Modification"

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

Under section 7 of the ESA, Federal agencies must ensure that any activities they authorize, fund, or carry out are not likely to "result in the destruction or adverse modification" of "critical habitat." 16 U.S.C. §1536(a)(2). The term "adverse modification" is not defined by the Act and is subject to varying interpretations. And although Federal regulations require such modification to be "substantial," even small changes have been challenged by environmental litigants. As a result, the use of land, public or private, that is designated "critical habitat" can be severely limited, or prohibited altogether without affording significant protections to listed species. Congress tried to avoid the onerous impacts of "critical habitat"—when it amended the ESA in 1978—by limiting the scope of the designation to "essential" habitat areas. However, Federal regulators continue to designate overbroad "critical habitat" areas while environmental litigants argue that "adverse modification" should preclude even minor changes to the land.

10. "Distinct Population Segments"

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

11. State and Local Enforcement

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

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

12. Permit Streamlining

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

13. Section 10 v. Section 7

The Act authorizes two separate means of obtaining Federal authorization to "take" a protected species incidental to a lawful activity—sections 10 and 7. Section 10 allows private citizens to obtain "take" approval (Incidental Take Permit or ITP) by means of a costly and lengthy application, review, and permit process. 16 U.S.C. §1539. Section 7 allows private citizens to obtain "take" approval (Incidental Take Statement or ITS) by means of a less formal, but often burdensome, consultation process. 16 U.S.C. §1536. By their terms, section 10 only applies to projects that do not involve a Federal agency whereas section 7 only applies to projects that do involve a Federal agency. Both the Incidental Take Permit under section 10 and the Incidental Take Statement under section 7 protect the applicant from liability for the incidental "take" of a threatened or endangered species and each may require substantial mitigation of project impacts. But although these two sections are directed at different types of project applicants, the United States Fish and Wildlife Service and the NOAA Fisheries claim that private project applicants who seek an Incidental Take Permit under section 10 are also subject to the requirements of section 7. See *Environmental Protection Information Center* v. *Pacific Lumber Co.*, 67 F. Supp. 2d. 1090 (N. D. Cal. 1999) (overruled on appeal at 257 F.3d 1071 (9th Cir. 2001)). Subjecting applicants to redundant permitting requirements is unnecessary and wasteful.

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

RESPONSES BY M. REED HOPPER TO QUESTIONS FROM SENATOR INHOFE

Question 1. We heard from many witnesses today that there should be increased landowner incentives and/or voluntary conservations programs for protecting species on private land. What are you thoughts on this idea and do you have any suggestions for the types of incentives that would work for the individuals that you represent?

Response. Almost all listed species have all or a portion of their habitat on private land. Therefore, landowner cooperation is essential to species conservation. Positive incentives elicit landowner cooperation and should be encouraged. One of the most important incentives for the regulated community is regulatory certainty. Landowners are often willing to commit resources to species conservation beyond what is required by the law. But their incentive to do so disappears if they cannot be certain that they will not be required, time after time in the future, to provide additional resources for species conservation. For this reason, the "no surprises" rule should be codified in the Act.

Likewise, voluntary conservation efforts on private land should be factored into the listing and critical habitat determinations. If such efforts are sufficient to protect or recover a species, the agency should be able to avoid listing the species or exclude the conservation lands from critical habitat designation. Whether the agencies have the authority to do this under the Act as currently written is the subject of litigation. A clarification in the Act itself would provide positive incentives for voluntary conservation efforts.

Compensation for landowners who have lost the productive use of their land is also an important incentive for landowner cooperation. No single landowner has driven a species to the brink of extinction by himself, although the last remaining population of that species may be present on his land. The plight of listed species is the result of societal decisions made long ago and the natural result of a burgeoning population. Therefore, we all have an obligation to shoulder the economic burden of species conservation.

Some jurisdictions are experimenting with tax breaks and transfer development rights for affected landowners. These types of incentives should be assessed to determine their effectiveness in encouraging landowner cooperation and participation in conservation planning.

More obvious incentives include permit streamlining with strict time limits for responding to permit applications, limitations on mitigation requirements (these should not exceed project impacts), encouraging the use of safe harbor agreements, and express statutory language that private parties do not have responsibility for species recovery—that is a government obligation. In addition, the committee should consider resolution of the 13 issues raised in my written testimony.

Question 2. It is often stated that the Section 7 consultation process and the designation of critical habitat has "no effect" or "doesn't apply to" private landowners except when Federal permits are required. Is this nexus something that happens rarely or frequently? Are there other ways in which Section 7 affects private landowners?

Response. The idea that critical habitat has no effect on private landowners, except when a Federal permit is required, is a misnomer. The Fish and Wildlife Service routinely warns landowners that any unauthorized modification of critical habitat may cause harm to protected species and subject the landowner to fine or imprisonment for violation of the section 9 "take" prohibition. For example, the Service sent warning letters to landowners in Texas that erecting fences in the critical habitat area of the golden-cheeked warbler may result in civil or criminal prosecution. Homeowners in California gnatcatcher territory have been similarly warned if they try to clear the brush from around their homes as a fire break without obtaining a Federal permit.

The practical result of critical habitat designation is that affected landowners are required to obtain Federal approval (e.g., an Incidental Take Permit or Statement) to avoid prosecution before modifying the habitat, either under section 10 or, if there is a Federal nexus, under section 7. In effect, the designation of critical habitat creates a presumption that anyone modifying the habitat has harmed the species. This subjects landowners to risk of either a government suit or a citizen suit. This threat imposes severe burdens on landowners who must either attempt to prove a negative—that their use of the land will not harm protected species—or they must go through the lengthy and costly process of obtaining a Federal permit. When critical habitat is designated, the Federal Government gains a virtual veto power over local land use.

In addition to these impacts, once private land is designated as critical habitat its value drops precipitously because it is uncertain what, if any, uses will be allowed on the property. Such lands are difficult, sometimes impossible, to sell on the open market. Loans are also hard to acquire because of these uncertainties and local agencies often refuse to approve a land use project unless the landowner can show the project has Federal approval. Landowners know that critical habitat designation will invariably cause increased burdens including, but not limited to, project delays or denials, study costs, mitigation fees, design changes, permit fees, and consulting costs.

Question 3. In your testimony, we have heard several references to the lack of statutory definition of several key terms in the Act. In your opinion, would clearer definitions from Congress alleviate some of the litigation?

Response. Absolutely! Clearer definitions of any key terms may alleviate some litigation. For example: Does "critical habitat" include only those areas actually necessary to protect the species or does it include potential habitat and areas necessary for recovery? Does "adverse modification" include any change to the land whatsoever, no matter how small, or just significant change? Does the term "reasonable and prudent" mean feasible for the project applicant or simply theoretically possible? Does "conservation" include recovery efforts and do private parties have an obligation to recover species or just mitigate for their own impacts? Does "best available data" mean any data at all or should it require substantial information? Does "take" require actual harm to a species or is the possibility of harm enough?

Question 4. What is your view about the role that compensation should play when ESA regulations and listings diminish the value of private property? What mechanisms would you suggest in assessing how compensation be determined and paid?

Response. It should first be understood that a particular landowner is not responsible for pushing the species to the brink of extinction. That has occurred either because of natural ecological conditions or because of larger societal pressures which have limited species habitat. It is fundamentally unfair, therefore, to impose the entire burden of species protection on the individual landowner. We all have an interest in protecting species; therefore, we should all share in the cost. One way to do this is to provide compensation to affected landowners. How that should be done is a difficult question to answer. Some states have considered or adopted laws (like Measure 37 in Oregon) which require compensation for diminution in property values as a result of land use regulation. Such laws are indicative of a growing unrest with onerous regulatory provisions. And, presumably, government officials are working out practical means of determining diminution and compensation which could provide guidance for others.

Under the ESA, I believe it would be equitable to compensate landowners when their property is required to be left essentially in its natural state for species protection. The amount of compensation can be determined using standard market indicators. The level of deprivation may not be apparent when land is designated as critical habitat. However, it should be clear when a habitat conservation plan or recovery plan is prepared whether the property is so essential to the conservation of the species that no practical use of the land will be allowed. Some multi-species habitat conservation plans (such as the Riverside Multi-Species HCP) call for purchasing lands necessary for species conservation using mitigation fees or other contributions collected from Federal, state, and local governments and other affected landowners.

Question 5. Should the definition of critical habitat by the FWS require that the area itself be essential to the conservation of the species? Further, in the event that "special management measures" are imposed, should such measures be required to be based on actual verifiable field data rather than simply because FWS has found that the species' "Primary Constituent Elements" (PCE's) are present?

Response. Yes, to both. It seems clear from the history and language of the Act that Congress intended the area itself to be essential to the conservation of the species. Some courts have recently so held. See *Home Builders Association of Northern California* v. *U.S. Fish and Wildlife Service*, 268 F.Supp. 2d 1197 (E.D. Cal. 2003) and *Cape Hatteras Access Preservation Alliance* v. *U.S. Department of Interior*, 344 F.Supp. 2d 108 (D.D.C. 2004). This limitation is important to prevent the Service from designating areas larger than are necessary to protect the species and to minimize undue impacts on the regulated community. However, ambiguity in the term "essential to the conservation of the species" has led the Service to include "potential habitat" which may include only a single PCE or none at all. Also, because the Act authorizes the Service to rely on "best available data" the agency is not required to collect actual verifiable field data that the species or its PCE's are present or that certain management measures are required or even helpful in conserving the species.

Question 6. In how much detail should the ESA legislate so that there is a level of distinction between the sizes of projects to allow for more small landowners to attain incidental take permits?

Response. The cost for incidental take permits is prohibitive for small landowners. Even a modest habitat conservation plan with field surveys and biological assessments can cost $30,000 to $50,000 (in addition to any mitigation) and require months of processing. Unfortunately, the ESA does not distinguish between the impacts of a large subdivision and a backyard BBQ. And although Fish and Wildlife and NOAA Fisheries have their own regulations for small impact projects, they are rarely and inconsistently applied. Clearly, this needs to be addressed in the Act. At

a minimum, the Act should define small projects, set out streamlined information criteria, and establish absolute deadlines for permit approvals.

RESPONSES BY M. REED HOPPER TO QUESTIONS FROM SENATOR VITTER

Question 1. What reforms are necessary to strengthen and improve the ESA to improve the recovery of endangered species?

Response. According to the Fish and Wildlife Service, litigation over critical habitat has co-opted department resources that could be used for species recovery. I have discussed the problem at some length in my written testimony. It is essential that this issue of critical habitat is resolved. The Service has determined that critical habitat provides little or no added protection to species beyond other provisions of the Act, such as the section 9 ″take" prohibition, but litigation to compel the designation of critical habitat consumes enormous resources. As a solution, the Service has suggested it should be given the discretion to designate critical habitat when it is in the interest of the species to do so.

To date, the most successful recovery efforts have been private and voluntary as illustrated by the recovery of the American peregrine falcon. It stands to reason that changes to the Act which encourage voluntary conservation efforts are most likely to advance the Act's goals. The landowner incentives discussed above address this issue more fully.

Improving the science on which species decisions are made would also improve recovery. More species have been delisted (16) due to original data errors than have been deemed recovered (15). This diverts resources from where they are needed most and limits recovery options for other species.

Funding needs to be more widely distributed. Fifty percent of reported Federal expenditures for species conservation are applied to 7 species, just 0.6 percent of the entire ESA list of species.

The establishment of recovery objectives for each species would enhance species recovery by providing stakeholders with measurable goals to which voluntary conservation measures could be tailored. If delisting were mandated when the objectives are met, even if management measures continued, it would likely accelerate species recovery be encouraging more robust conservation efforts.

Question 2. Recovery plans are not required as part of the listing process. They are required after a species is listed. Do you see any barriers to requiring recovery as part of the original listing process? If there are barriers identified, are the barriers a result of the ESA law or part of problems identified in the implementing regulations? How would you eliminate those barriers?

Response. The only barrier I see to creating a recovery plan at the time of listing is that under current law listing determinations may be made based on the "best scientific data available." This standard falls far short of providing the information that is needed to establish meaningful recovery objectives and management measures. In some cases, the agency has relied on data more than 20 years old, such as when the Buena Vista Lake shrew was listed. At the time of listing, the agency is not required to conduct actual field surveys to determine historic and current habitat areas, migration paths, population counts, species disbursement, and many other factors that should be considered in developing a recovery plan. In effect, the Act authorizes the agency to act on knowing ignorance. The solution would be to raise the level of science on which biological determinations are made, including the listing.

Question 3. Local input especially conservation efforts are not considered in the listing decision. Voluntary conservations efforts have been greatly expanded since the ESA was passed over 30 years ago. Do you believe that local conservation efforts should be part of recovery plans and considered as part of the listing decision? If not why should they not be considered?

Response. Local conservation efforts, both private and public, should definitely be considered in the listing decision and included in recovery plans for the simple reason that such efforts are effective and economical and should be encouraged. The recovery of the American peregrine falcon is credited almost entirely with local conservation efforts. As noted in my written testimony, experts dispute whether the ESA had any impact on the recovery of this, and other, species whatsoever. It would be tragic to discount the most effective conservation efforts we know.

Moreover, local voluntary conservation efforts include local stakeholders and reduce conflicts. The Act should be changed to specifically allow the listing agencies to rely on voluntary conservation efforts in their assessment of the risks to species survival. The Act should also be changed to ensure that voluntary conservation efforts are encouraged in recovery plans by codifying the "no surprises" rule.

Question 4. The term "recovery" under the Act to mean the same thing as "conservation." Recovery exists when the species no longer needs to be listed. Even after "recovery" is achieved, conservation measures should be in place to keep the species from regressing and developing a new need for listing consideration. Should ESA and or the regulations be revised to reflect conservation measure for listed species rather than the concept of recovery?

Response. Equating "recovery" with "conservation" imposes unfair burdens on landowners. It is one thing to ask landowners to mitigate for their own impacts, but it is quite another to ask the same landowners to assume the financial responsibility to recover species that are at risk because of decisions we have made as society as a whole. Both the ESA and its implementing regulations should be revised to clearly define who is responsible for species recovery. This has become a matter of urgency because some courts have interpreted the term "conservation" to include "recovery" thereby expanding the definition of critical habitat. Areas "essential to the conservation of the species" may be read to mean areas "essential to the [recovery] of the species." See Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service, 378 F.3d 1059 (9th Cir. 2004)

Question 5. One of the key steps in recovery could be re-introduction of the species on public and private land. Do you favor reforms to include re-introduction considerations before a species is listed and if not why? What assurances and assurance procedures are appropriate for property owners so they can work cooperatively with Federal, state and local entities to reintroduce candidate species? Are these assurances in place today and can you provide specific examples of such agreements?

Response. I do not favor re-introductions for three reasons: (1) historic range (on which these re-introductions are typically based) is not a good measure of suitable habitat for the species today; (2) re-introductions can cause increased conflicts with humans, such as the wolf and panther re-introductions that have resulted in mounting livestock depredations; and, (3) reintroductions may cause adverse and unexpected changes in the ecosystem such as gray wolves pushing out coyotes in Yellowstone and upsetting the established food chain. The fact is we don't know enough about biological systems to predict how re-introduced species will affect other species in the same habitat.

Question 6. What reforms are necessary for effective use of the critical habitat consideration in the ESA and regulations? Are the economic considerations relevant for critical habitat considerations? If not, what would you do to make them relevant?

Response. As discussed at length in my written testimony, and as determined by the Fish and Wildlife Service itself, critical habitat places enormous burdens on private citizens while providing little or no additional benefit to species. This is the very definition of waste. Additionally, critical habitat is virtually never limited to the actual areas "essential to the conservation" of the species as required by the Act, but almost always includes larger areas such as "potential habitat." The designation of overly broad critical habitat areas is the result of litigation forcing designations in shortened timeframes and expansive interpretation of the critical habitat standard. This leads to further litigation. Two changes should occur to address these problems: (1) the Act should more clearly define the limits of critical habitat with an emphasis on designating public lands rather than private lands and (2) the designation of critical habitat should be discretionary rather than mandatory.

Congress included the economic analysis requirement specifically as a counterpoint to the listing. This requirement is the only place in the Act that provides a balance between species impacts and social impacts. That balance is essential to protect individuals from the onerous demands of the Act. However, the economic analysis has become meaningless because the agencies have taken the position they need only consider the incremental impacts of the critical habitat designation and not the cumulative impacts of the listing and the designation. This results in a customary finding that the designation will have no significant economic impacts. Some courts have determined that this approach nullifies the economic analysis requirement and is invalid. See *New Mexico Cattle Growers Association* v. *U.S. Fish and Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001) and *Home Builders Association of Northern California* v. *U.S. Fish and Wildlife Service*, 268 F.Supp. 2d 1197 (E.D. Cal. 2003). To make the economic analysis relevant, therefore, the Act should clarify that it must include all related impacts, both from listing and critical habitat designation.

Question 7. What are the biological factors for critical habitat that should be considered before a species is listed and should those factors be clearly identified as part of the listing decision?

Response. Before a species is listed, the agency should identify all of the Primary Constituent Elements (PCEs) necessary for the survival of the species and determine, based on actual field surveys, where the PCEs are found. The agency should

also identify actual occupied habitat, not just look at the historic range, and determine actual species population and distribution. These determinations should be identified as part of the listing decision.

RESPONSES BY M. REED HOPPER TO QUESTIONS FROM SENATOR CHAFEE

Question 1. You advocate for more incentives for private landowners to protect species on their lands. How effective have the existing voluntary conservation programs administered by the Federal agencies been in reducing conflict between landowners, the government and non-profit organizations.

Response. Based on anecdotal information, almost all efforts to establish cooperative agreements for conservation programs have reduced conflicts. However, such agreements are not a panacea. Landowners complain that their interests are often not heard and small landowners are often unable to make the same concessions as large land owners.

As noted above, one of the most important factors in reducing conflicts relates to certainty in the process. If agreements are not binding or stakeholders are not protected from future "surprises," conflicts are inevitable. Unless stakeholders know what their long-term commitment of resources will entail, they can't determine their short-term commitment of resources.

Initial response from landowners to the Riverside Multi-Species HCP in California has been favorable. Although that plan is administered by the County, it involves Federal, state and private stakeholders. Among other things, that plan sets forth a matrix, accessable online, that shows at a glance the type of proposed uses that will be allowed on a particular parcel and any associated mitigation fees. Also, money is being provided by numerous stakeholders to purchase high value habitat and landowner incentives are proposed in the way of tax breaks, transfer development rights, and the like.

Question 2. In the Klamath River Basin, a great deal of focus has been placed on endangered species being the indicator species that the overall ecosystem in the area is unsustainable. What are your thoughts on this?

Response. I am unaware of any scientific support for the position that the Klamath ecosystem is unsustainable. The basin is rich with wildlife and has been for more than a hundred years. Farmers and wildlife not only live side-by-side, but they have a symbiotic relationship. Ag crops provide foraging for fowl and irrigation runoff supports a huge population of species, including the rapidly recovering bald eagle.

Question 3. In your testimony, you supported a number of significant changes to the Endangered Species Act that many would consider a rollback. In light of this, do you believe the protection of threatened and endangered species in this country is important?

Response. Absolutely! I think everyone believes that species protection is important. The only questions is how to do it. Some people will say that any change to the ESA is a "rollback" and necessarily weakens species protection. This is a diversion. We should all agree that if we are going to protect species we should do so in a way that is both efficient and effective. We should not impose needless burdens on the regulated public and any burdens that are imposed should be successful in achieving their objective. We have heard testimony that the Act is working, but it can be strengthened and improved. We have also heard testimony that the Act is not working, and it should be strengthened and improved. The goal is the same. It remains to bee seen whether there can be a meeting of the minds. The issues raised in my testimony all relate to improving the efficiency and effectiveness of the Act and should be addressed.

STATEMENT OF JAMIE RAPPAPORT CLARK, EXECUTIVE VICE PRESIDENT, DEFENDERS OF WILDLIFE

THE VITAL IMPORTANCE OF THE ENDANGERED SPECIES ACT

For more than 30 years, the Endangered Species Act has sounded the alarm whenever wildlife faces extinction. Today, we have wolves in Yellowstone, manatees in Florida, and sea otters in California, largely because of the Act. We can still see bald eagles in the lower 48 states and other magnificent creatures like the peregrine falcon, the American alligator, and California condors, largely because of the Act.

Indeed, there can be no denying that, with the Endangered Species Act's help, hundreds of species have been rescued from the catastrophic permanence of extinction. Many have seen their populations stabilized; some have actually seen their

populations grow. Some have even benefited from comprehensive recovery and habitat conservation efforts to the point where they no longer need the protections of the Act.

In so many ways, Congress was prescient in the original construction of the Endangered Species Act. First, it crafted an Act that spoke specifically to the value—tangible and intangible—of conserving species for future generations, a key point sometimes lost in today's discussions.

Second, it addressed a problem that, at the time, was only just beginning to be understood: our looming extinction crisis. Currently there is little doubt left in the minds of professional biologists that Earth is faced with a mounting loss of species that threatens to rival the great mass extinctions of the geological record. Human activities have brought the Earth to the brink of this crisis. Many biologists today say that coming decades will see the loss of large numbers of species. These extinctions will alter not only biological diversity but also the evolutionary processes by which diversity is generated and maintained. Extinction is now proceeding one thousand times faster than the planet's historic rate.

Lastly, in passing the Act, Congress recognized another key fact that subsequent scientific understanding has only confirmed: the best way to protect species is to conserve their habitat. Today, loss of habitat is widely considered by scientists to be the primary cause of species endangerment and extinction.

Reduced to its core, the Act simply says the Federal Government must identify species threatened with extinction, identify habitat they need to survive, and help protect both accordingly. And it has worked. Of the more than 1,800 species currently protected by the Act, only 9 have been declared extinct. That's an astonishing more than 99 percent success rate.

But as important as what the Act does is what it does not do.

We must remember the Endangered Species Act was not written to prevent species from becoming threatened or endangered—it was written to prevent species from going extinct. And that is an important difference.

Protecting wildlife from becoming endangered is the province of our other conservation laws—those that protect our water, air, and land. The Endangered Species Act is meant to prevent extinction when we have failed at-risk species by not passing, not enforcing, not implementing, or not funding those other measures.

To thrive, a species needs habitat. Species need to be free from pollution, sprawl, and other pressures that affect food sources, migration routes, and breeding patterns. If those pressures mount and a species does become endangered, how is that the fault of the Endangered Species Act? What about state and local land use laws and decisions? Or farming and agriculture legislation? Or transportation bills? Or laws governing public lands, forests, or rivers? These all have far more impact on the habitat available to wildlife than the Endangered Species Act ever will.

If a species becomes threatened or endangered and needs protection, invariably we have only ourselves to blame. When a species goes on the list, it is we who have failed.

These developments are no fault of the Endangered Species Act. The Endangered Species Act is the alarm, not the cause of the emergency. When the alarm sounds, it is we who are failing to live responsibly and in a manner that prevents species extinction. Indeed, the same pressures that cause a species to become endangered can keep a species endangered. If a species continues to need the protections of the Act, it is because we have acted insufficiently to remove the pressures that put it on the list.

It is also way too convenient for some to blame the Act itself when they run afoul of its provisions. It is akin to drivers blaming traffic laws or law enforcement officials for that stack of speeding tickets in their glove compartment, as if their behavior has nothing to do with their predicament. Most collisions with the Act can be seen long before they occur; it's not too much to ask that we all exercise a little foresight and head off these incidents before they happen.

Unfortunately, opponents of the Act ignore these facts and call it a failure. They say we should dismantle the Act because it does not move enough species off the list to full recovery. They ignore the fact that the Act is our nation's best tool to prevent extinction and they ignore the hundreds of species still around today because of the Act's protections. And they ignore the simple truth that unless we prevent extinction first, there can never be any hope of recovery.

ENDANGERED SPECIES ACT LEGISLATION IN THE HOUSE

Efforts currently underway in the House of Representatives to alter the Act should definitely undergo some serious scrutiny. Amid claims that the Act is not adequately protecting wildlife, we have only seen legislation that would weaken

those protections. So far, we have seen three bills. The first, introduced by Rep. Dennis Cardoza of California this year, dramatically changes the way we protect habitat for species. We are essentially hemorrhaging habitat in this country. Unfortunately, the Congressman's solution totally misses the mark, ultimately eliminating any effective habitat protection measure from the Endangered Species Act. The bill does this primarily in two ways: by making designation of critical habitat discretionary and by changing the focus of critical habitat from recovery of species to accommodating their mere survival. Even under the most optimistic interpretation of this bill, there is no chance that its passage would lead to more protected habitat, greater species conservation and more timely species recovery and delisting.

Another bill, introduced last year by Rep. Greg Walden of Oregon, undermines the Endangered Species Act from the science angle by hamstringing agency decision-making with needless additional bureaucracy. Currently, the Act requires the Fish and Wildlife Service to use the best available science when making listing and habitat designation decisions. There is also a strong peer review policy in place for all scientific decisions made. But the Walden bill turns this system on its head. Again, more discretion is given to political appointees, in this case about what science—and indeed what scientists—to use for species listing and habitat protection decisions. In addition, the bill requires that greater weight be given to certain types of scientific evidence, taking the decision on what constitutes "best available" science in any given situation out of the hands of the science professionals. Decisions to list species or protect habitat would be required to receive special review while decisions not to list species or not protect habitat—the very decisions often sought by industry—need not be peer reviewed at all.

The third, introduced by Rep. Jeff Flake of Arizona, would prohibit the designation of critical habitat along any rivers, streams, and lakes affected by dams or waterways, a sweeping exemption in some of the most vital habitat to endangered species, as well as allowing destruction or degradation of critical habitat on other lands. The bill also undermines other Endangered Species Act protections by lowering the standards that must be met for Habitat Conservation Plans to minimize and mitigate damage to species and habitat and by exempting water projects from requirements to mitigate damage caused by invasive species.

If any of the bills under consideration in the House were to pass they would seriously cripple the Act's ability to fulfill its purpose and only intensify an effort already underway by the current administration to undermine the protections of the Endangered Species Act.

CURRENT ADMINISTRATION POLICY

Effective implementation of the Endangered Species Act has suffered greatly in recent years.

Under this administration, the number of species being added to the Endangered Species Act list has plummeted. Over the past 4 years, less than 10 species per year have been added to the list, despite the fact that approximately 286 candidates await protection under the Act. This is in marked contrast to recent previous administrations: 32 species per year under President Reagan, 58 per year under the first President Bush, and 65 per year under President Clinton.

Recent policy reforms have resulted in a broad and damaging effort to cut scientists out of the loop on key wildlife decisions. Contrary to the advice of agency wildlife professionals, the Forest Service can now implement logging, road building, and other harmful projects in endangered species habitat without assessing their impact on endangered species, a key requirement of the Endangered Species Act. And, in one of the most significant rollbacks of Endangered Species Act protections ever, the administration asked, and Congress agreed, to exempt the Department of Defense from some Endangered Species Act requirements for military training exercises, despite Government Accountability Office studies showing that there is no documented evidence the Endangered Species Act hampers military readiness or national security.

In recent years, the administration has also worked systematically to undermine the Endangered Species Act in the Courts, employing a wide variety of legal tactics to circumvent the clear language of the law and to skew its function. Defenders of Wildlife research of more than 100 Endangered Species Act-related cases revealed an alarming pattern of illegal acts, rigged science, settlement deals favoring industry, and flagrant disregard of court orders that require one simple thing of the Federal Government: obey the law. Interestingly, the administration has been sternly rebuked by Federal court judges on more than one occasion for their questionable legal approach to the Endangered Species Act.

But most concerning has been the unbalanced intrusion of politics into decisions that should remain the purview of scientists. I was a long time career wildlife biologist with the U.S. Fish and Wildlife Service and had the privilege of serving as the agency Director from 1997-2001. Never have I seen so many decisions overturned, so much scientific advice ignored, and so much intrusion into the daily work of rank and file Fish and Wildlife Service employees as I do today—all by political appointees. The Union of Concerned Scientists surveyed Fish and Wildlife Service employees about this very problem and an astonishing 73 percent of respondents said they know of cases where U.S. Department of Interior political appointees have injected themselves into ecological services determinations. Interestingly, Fish and Wildlife Service employees were ordered, again by political appointees, not to participate in the survey. Thankfully many did anyway, providing us with a startling and disconcerting look into a scientific agency turned on its head and stymied from implementing its mission by political meddling.

But I don't need a survey to shed light on this problem. I know these people. I worked side-by-side with them for many years. I know how dedicated they are and how professional and committed they are to the mission of conserving our nation's natural resources legacy. I know how strongly they feel about conserving wildlife in this country. And I know how much they are struggling, how frustrated they are because they can't do their jobs. I know because they tell me.

I get the frustrated, fear-filled phone calls. I get the dire hushed accounts of bad politics trumping good science, of phone calls from political appointees bypassing Service leadership and ordering changes to documents to support outcomes they want to see. I talk with these folks and a picture emerges of an agency under siege from within, an agency, created and designed to protect our nation's national wildlife heritage, now seemingly more concerned with protecting the interests of those for whom wildlife and habitat are obstacles to be overcome on the way to a bigger bottom line.

MAKING THE ENDANGERED SPECIES ACT WORK BETTER

As we move forward, we should be mindful that we do have one important and undeniable benchmark, a measurement against which all efforts to alter the Act should be evaluated: Does it truly aid species conservation? If the answer is no, then we have failed. If all "reform" does is make it easier to pave over or through the Act, then we have failed. If all "reform" does is decrease habitat available to wildlife, then we have failed.

So is it possible to strengthen the Endangered Species Act so that is works better for all stakeholders, including species, without sacrificing its purpose and intent? Yes. Although the Act is fundamentally sound, like any law, it can be improved. The more difficult question is whether the political process can accomplish that without succumbing to "false reforms" that actually weaken and undermine the law.

How can the Act be improved? Start by improving the protection and conservation of habitat. That means both more effective regulatory protection and more and better incentives to encourage voluntary habitat management and restoration, with species recovery as the overarching, governing standard. Incentives are especially important for private landowners, many of whom have demonstrated a keen eagerness to be true partners in species conservation. Let's also take the common sense step of linking the protection and conservation of habitat to the development and implementation of recovery plans. And yes, economic consideration should play a role in determining how best to protect habitat, but they should never be allowed to trump science or be used to effectively block recovery.

We should also look for opportunities to enhance the role of the states in helping to recover listed species where appropriate. States that have the legal and financial capabilities and the political commitment should be encouraged to help tackle species conservation challenges within their borders in a much more engaged, transparent and collaborative fashion.

The Endangered Species Act has been highly successful in preventing extinction of species. But we need to do a better job of recovering species too. Clearer standards for recovery and stronger, more deliberate implementation of recovery plans will go a long way to achieving this end.

We need to make sure the Federal Government does its job too. We forget that it is not just the expert wildlife agencies that have a role in protecting and recovering listed species. All departments and agencies of the Federal Government have an affirmative obligation, expressed in the Act, to conserve endangered and threatened species, but this obligation is mostly ignored. If Federal agencies did their job of helping to conserve imperiled and listed species, we would be much farther down the road to recovery for many of these species and their habitats.

Everyone knows the U.S. Fish and Wildlife Service and NOAA Fisheries are chronically under funded to carry out their responsibilities under the Endangered Species Act. Interestingly, it wouldn't take much to change that. We're talking about a mere fraction of the money the government spends on roads, mines, timber hauls and other "habitat-busting" projects. Adequate funding would help address the listing backlog and backlog of species awaiting habitat designation, saving money in the long run by addressing situations before they're on the border of being too late.

And the extent to which we can make the Endangered Species Act less contentious and more effective will only help all parties concerned, including species. We need to ensure that the Endangered Species Act is not politicized through the abuse of discretion, especially by political appointees; it just invites rancor and ultimately litigation. Same thing with lackadaisical enforcement of listing and habitat decisions. The vigorousness with which the government enforces the Endangered Species Act can't wax and wane with each new administration.

Finally, we must remember that the Endangered Species Act has been given too much of a burden to bear when so many other mechanisms should have come into play far sooner to stop species declines. We need to do a better job of using available upstream mechanisms for species conservation and be more creative in developing new ones so that we never even get to the point where the Act must be triggered.

Bottom line: The Endangered Species Act is one of our nation's most critical and essential environmental laws. Its basic premise and intent remain as sound today as when it was first crafted. And now, more than ever, our nation needs a strong Endangered Species Act.

The Endangered Species Act was passed to address a looming crisis of wildlife extinction that affects us all. It is simply naive to think we wouldn't revert to crisis mode absent a strong Federal species protection law. And it is the height of ignorance to think, even for a minute, that weakening the Endangered Species Act wouldn't have dramatic and tangible consequences that would affect our entire ecosystem, and ultimately us.

When the Nation rejoiced last month at the return of the Ivory-billed woodpecker, Secretary Norton said that we rarely have a second chance to save wildlife from extinction. But the Endangered Species Act is all about first chances to do the same thing, about preventing wildlife extinction now, just in case nature is out of miracles.

RESPONSES BY JAMIE RAPPAPORT CLARK TO QUESTIONS FROM SENATOR INHOFE

Question 1. There have been allegations of political influence or agenda-driven science on both sides of the issue. Does this problem of science suggest that we need specific scientific criteria and review to make the science more credible, easier to defend and harder to ignore?

Response. The Endangered Species Act's governing standard that decisions are to be based on the "best scientific data available" is sound and has worked extremely well and should not be weakened. The problem we have seen in recent years is, in fact, not one of science at all but instead one of political officials often ignoring available scientific data and information and in some cases actually overruling scientific conclusions. I would strongly advise against imposing overly burdensome peer review requirements beyond what is currently done as some have suggested. Instead, the focus should be on increasing the Services' capacity to gather and apply scientific information in a timely fashion and to increase the transparency and consistency of the decisionmaking process. One specific idea that has been suggested is to establish a science advisory board somewhat like the Environmental Protection Agency for the U.S. Fish and Wildlife Service. Increased funding is also absolutely essential.

Question 2. You put a lot of emphasis on the notion that the number of listed species has been greatly declining. Could this be we are doing a better job of conserving species before the act is needed and are we to be using the number of species listed as the gauge for success or the number of species recovered? What is the right metric for measuring success of the Act?

Response. I believe the reference is to the portion of my testimony where I note that the current administration has added far fewer species to the list (less than 10 species per year) than other previous administrations (32 species per year under President Reagan, 58 per year under the first President Bush and 65 per year under President Clinton.) Unfortunately, this is not because we are doing a better job of conserving species before the Act is needed, as evidenced by the fact that there are currently 286 candidates awaiting protection under the Act—nearly 30 more than the 257 candidates that made up the backlog in 2003. Moreover, even the number

of current candidates is deceptively small in indicating the number of species that likely deserve protection under the Endangered Species Act. The Nature Conservancy and NatureServe have reported that 6,700 U.S. species are vulnerable to extinction—one third of the 20,897 plants and animals reviewed. Only a little more than 1,300 of these species are currently listed.[1] What the numbers seem to show is that the current administration seems to be reluctant to give vulnerable species the Endangered Species Act protection they need.

A good metric for measuring the Endangered Species Act's success is, as I stated in my testimony, its effectiveness in preventing extinction. Of more than 1,800 species currently protected by the Act, only 9 have been declared extinct—a 99 percent success rate. Remembering that the Endangered Species Act was written to prevent species from becoming extinct, not to prevent species from becoming threatened or endangered, a grade of 99 percent is excellent no matter whose class it is.

It is important to note also that unless we first prevent extinction there can never be any hope of recovery. Many of the species on the list were declining for decades before they came under the Act's protections. Absent a significant funding and staffing increase for Federal species protection, it is naive to expect these species to quickly recover. This fact only lends more weight, to and increases the importance of, the Act as an extinction prevention mechanism.

Question 3. In 1999, you testified before this subcommittee when you were Director of the Fish and Wildlife Service in the previous Administration. You stated that that "designation of "official" critical habitat provides little additional protection to most listed species, while it consumes significant amounts of scarce conservation resources. We believe that the critical habitat designation process needs to be recast as the determination of habitat necessary for the recovery of listed species." How would you go about defining what habitat is "necessary" so that we can avoid more litigation on this important topic.

Response. At that time, the Fish and Wildlife Service's listing program was still recovering from the damage done by a 1995 moratorium that had been imposed by Congress on all Endangered Species Act listing activities in a rider to a defense supplemental appropriations bill. That moratorium was in place for an entire year. No funding could be spent on any activities funded through the listing account, which included both actual species listings as well as critical habitat designation, with the result that an extensive backlog developed of more than 400 species in need of listing. Once the moratorium was lifted and the FWS could again spend funding on activities under the listing account, the Service found that it was "not prudent" to use limited listing account dollars on critical habitat designation before more of the backlogged species could be given at least the basic protections of the Act. Thus, the overriding priority was getting species onto the list, getting them under the Act's protection rather than designating critical habitat which, while important, was overshadowed by the need to provide the Act's protection to species in great need.

As to the issue of defining what habitat is necessary for the recovery of listed species, the basic guideline must always be the amount and extent of habitat scientists believe is biologically needed for the recovery of the species, i.e. improving the species status such that it no longer requires the Act's protection and must be delineated on a species by species basis. At this time, a more pertinent issue is not really the means for defining what habitat is necessary for the recovery of listed species, but rather the legal framework in place under the Endangered Species Act to ensure that that habitat is effectively conserved so that species can recover and be delisted. This is why we applaud the leadership of Senators Chafee, Clinton, Inhofe, Jeffords, Crapo, and Lincoln in requesting The Keystone Center to convene and facilitate a cross-sector working group on the Act's habitat provisions. The key questions are those that were highlighted in the request to Keystone:

1. As currently written and implemented, is the ESA adequately protecting and conserving the habitat listed species need to recover?
2. If not, how can the ESA be improved to better conserve habitat and help species recover?
3. What specific changes and recommendations can the regulated and NGO communities jointly recommend, advocate for, and help implement?

We look forward with great eagerness and hopeful support for to the outcome and recommendations of the Keystone Dialogue.

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[1] B.A. Stein, L.S. Kutner, J.S. Adams (eds.) 2000. Precious Heritage: The Status of Biodiversity in the United States. Oxford University Press, New York.

STATEMENT OF MONITA FONTAINE, MEMBER, BOARD OF DIRECTORS, NATIONAL ENDANGERED SPECIES ACT REFORM COALITION

The Endangered Species Act (ESA) was enacted in 1973 with the promise that we can do better in the job of protecting and conserving our nation's resident species and the ecosystems that support them. Today, over 30 years later, I bring that same message back to this committee—we can, and must, do better. We have learned many lessons over the past three decades about how and what can be done to protect endangered and threatened species, and it is time to update and improve the ESA to reflect those lessons.

I am here before you today on behalf of the National Endangered Species Act Reform Coalition (NESARC), an organization of 110 national associations, businesses and individuals that are working to develop bipartisan legislation that updates and improves the ESA. Personally, my organization, the National Marine Manufacturers Association (NMMA), joined NESARC in 2003 largely due to our members' experiences with listed marine species such as the manatee population in Florida, as well for as the opportunity to join a diverse group of interests working on this matter. I have the pleasure of sitting on the NESARC Board of Directors. On behalf of the NESARC Board of Directors and, all of the NESARC members, I want to commend the efforts being undertaken by members of this committee, other members of the Senate and in the House of Representatives to develop a bipartisan bill that updates and improves the ESA. We look forward to working with the committee, its able staff, and other members of the Senate to find common ground.

NESARC members come from a wide range of backgrounds. Among our ranks are farmers, ranchers, cities and counties, rural irrigators, electric utilities, forest and paper operators, mining, homebuilders and other businesses and individuals throughout the United States. What our members have in common is that they have been impacted by the operation of the ESA. Frankly speaking, the burdens and rewards of protecting listed species are borne, in a very large part, by the members of NESARC. NESARC members are actively involved in a broad range of species conservation efforts including:

- The development of State management plans for wolf populations in the Rocky Mountains and in Minnesota, Michigan and Wisconsin.
- Recovery implementation programs such as the Upper Colorado and San Juan Rivers Endangered Fish Recovery Implementation Program and Platte River Endangered Species Recovery Program;
- Numerous habitat conservation plans ranging from county-wide HCPs in Southern California to single parcel plans for covering agricultural operations; and
- Observation, research and monitoring programs for listed and candidate species.

Many environmental groups (including some of those who are testifying today) have recognized the need for on-the-ground partnerships. The reality is that, without the support and active commitment to the protection of listed species by the private landowners, businesses and communities where the species reside, the chances of success are slim. We need to learn from the experiences of those who are faced with the real-world decisions on how to make a living and still protect species if we are to make the Act work better.

If we are to do a better job protecting endangered and threatened species, we need an ESA that can fully accommodate the range of efforts that are necessary. As detailed later in my testimony, NESARC has developed a number of recommendations for ways to improve the ESA. These recommendations are the product of an extensive reassessment by NESARC members as to what improvements to the ESA would be useful for the future implementation of the Act.

At the end of 2003, NESARC decided to look inward, to reassess the state of the ESA's implementation on the ground and to identify the success stories of its members in protecting endangered and threatened species as well as those roadblocks that had to be overcome. What we learned was that, more often than not, our members have succeeded in protecting endangered and threatened species in spite of, rather than because of, the ESA.

When we asked our members to share their success stories and positive experiences, what we received were very personal observations from the ground reporting that success is occurring—but not easily.

> "Our HCP process has had some very beneficial elements, but it's been painfully slow and costly to get there. Given the experience, [it is] hard to endorse it for others to pursue. Yet an HCP embodies concepts for species protection which are very good and could be more effective. [We] advocate moving to a system with more incentives and much greater penalties for abuses." Carol Rische, Humboldt Bay Metropolitan Water District.

"Some of the regulators that we deal with are very results-oriented. Their practical approach has been beneficial to our operations and beneficial to species recovery. Working together with practical regulators to the benefit of the species has been a positive experience." Tom Squeri, Granite Rock Company.

The experience of my own members within NMMA is similar—with the hope of cooperative efforts between Federal and state agencies limited by the realities of working within an Act that was enacted more than 30 years ago and does not provide the necessary flexibility and tools to effectively and efficiently develop workable solutions. As many of you know, Florida has a long history of protecting its endangered manatee population—in which NMMA members have actively participated. As a result of efforts led by the State of Florida and stakeholders, the manatee population has grown from an estimated 1,465 manatees in 1991 to at least 3,142 (as documented by a 2005 aerial survey)—more than a doubling of the population in approximately 14 years. Further, the U.S. Fish & Wildlife Service has joined with the Florida Fish & Wildlife Conservation Commission to begin a "manatee forum" which is aimed at developing a consensus, science-based approach to continuing to protect and enhance manatee populations in balance with marine activities. However, such cooperative efforts remain the exception, not the norm.

As I am here today representing NESARC, I do not wish to dwell on the particular problems facing boaters, marina operators and other marine services; however, to the extent that the committee wishes to hear more about the personal experiences of any of our individual NESARC members, including NMMA, we are happy to provide that information and brief you or your staff on particular issues of interest.

Drawing from our members' experiences and observations, NESARC identified a series of guideposts from which to consider future improvements to the ESA, which include the following:

- Encourage Sound Decisionmaking
- Promote Innovation
- Promote Certainty
- Increase Funding
- Reduce Economic Impacts
- Increase Roles for State, Local Governments
- Provide Greater Public Participation
- Limit Litigation

After developing these initial guideposts, over the latter half of 2004, NESARC worked to draft a white paper which was publicly released in November 2004. This white paper is attached to my testimony and provides an outline of a new approach to ESA legislation that we hope the Members of this committee will take into consideration.

In sum, a new approach is needed to change the focus of the debate from a clash over existing terms and programs to the development of new tools that improve the Act. We need new provisions of the Act that encourage recovery of listed species through voluntary species conservation efforts and the active involvement of States. This new approach can and should maintain the goal of species conservation. Simultaneously, we must recognize that species conservation and recovery will only be accomplished if we can find ways to provide stakeholders the tools and flexibility to take action and, most importantly, certainty that quantifiable success will be rewarded by the lifting of the ESA restrictions.

As this committee reviews ways to improve the ESA, we would ask that you take into consideration the following proposals:

• Expand and Encourage Voluntary Conservation Efforts—A universal concern with the Act is that it does not fully promote and accommodate voluntary conservation efforts. Many landowners want to help listed species, but the ESA doesn't let them. A critical element of updating and improving the Act must be the development of additional voluntary conservation programs. These efforts should include: (1) creating a habitat reserve program, (2) tax incentives, (3) loan or grant programs and (4) other initiatives that encourage landowners to voluntarily participate in species conservation efforts. Further, existing programs like the Safe Harbor Agreements should be codified.

• Give the States the Option of Being On the Front Line of Species Conservation—In 1973, the National Wildlife Federation testified before Congress that "[s]tates should continue to exercise the prime responsibility for endangered species" and "should be given the opportunity to prepare and manage recovery plans and retain jurisdiction over resident species." Thirty-plus years later, the Western Governors' Association, in a February 25, 2005 letter (attached) noted that "[t]he [ESA] can be effectively implemented only through a full partnership between the states

and the Federal Government" and asked Congress to "give us the tools and authority to make state and local conservation efforts meaningful."

NESARC agrees that States should have a wider role in facilitating landowner/operator compliance with the Act and, ultimately, the recovery of species. States have significant resources, research capabilities and coordination abilities that can allow for better planning of species management activities. Further, States know their lands and are often better situated to work with stakeholders to protect and manage the local resources and species.

• Increase Funding of Voluntary and State Programs for Species Conservation—A significant amount of Federal funding for ESA activities is presently tied up in addressing multiple lawsuits and the review of existing and new listing and critical habitat proposals. In contrast, actual funding for on-the ground projects that will recover species is limited.

Federal funding priorities need to be re-focused to active conservation measures that ultimately serve to achieve the objectives of the Act. Further, we need to financially support the voluntary, community-based programs that are critical to ensuring species recovery.

• Encourage Prelisting Measures.—Recently, a nationwide coalition of state and local governments, stakeholders and conservation organizations worked together to develop a comprehensive sage grouse conservation program that has been able to stand in the place of a listing of that species under the ESA. Those efforts were supported by many members of this committee including Senator Harry Reid of Nevada who stated that, ". . . I have advocated using the Farm Security and Rural Investment Act of 2002 (Farm Bill) conservation programs to help local communities like Elko, Nevada, engage in voluntary conservation efforts for species like sage grouse. In fact, the Farm Bill's Wildlife Habitat Incentives Program (WHIP) encourages private and public agencies to develop wildlife habitat on their properties, and specifically has directed funds to enhance habitats for sage grouse. I know more can be done, and I am committed to improving local conservation efforts." Statement of Senator Harry Reid, September 24, 2004.

Private landowners, State and local governmental agencies should be encouraged to develop and implement programs for species that are being considered for listing. The protections afforded by all such programs (including existing activities) should be considered in determining whether a listing is warranted or whether such voluntary programs, other Federal agency programs and State/local conservation efforts already provide sufficient protections and enhance species populations so that application of the ESA is not necessary.

• Establish Recovery Objectives—We need to be able to identify and establish recovery objectives. Knowing what ultimately must be achieved is a critical first step in understanding what must be done. Since the goal of the ESA is to assure recovery of endangered and threatened species, implementation of the ESA should reward progress when it is made toward recovery. There must be a determination of specific recovery goals necessary to reach the point where a species can and will be downlisted or delisted—and there must be certainty in such a goal so that the goal is not continually shifted to perpetuate a listing.

• Strengthen the Critical Habitat Designation Process—We need to strengthen the critical habitat designation process by ensuring that these designations are supported by sound decisionmaking procedures, do not overlap with existing habitat protection measures (such as habitat conservation plans, safe harbor agreements or candidate conservation agreements, and other state and Federal land conservation or species management programs) and rely on timely field survey data.

• Improve Habitat Conservation Planning Procedures and Codify "No Surprises"—The HCP process has the potential to be a success story, but too often private property owners are stymied by the delays and costs of getting HCP approval. HCP approval should be streamlined, and the HCP process must be adapted so that it is practical for the smaller landowner. Further, landowners involved in conservation efforts need to be certain that a "deal is a deal." The "No Surprises" policy must be codified under the Act and cover all commitments by private parties to voluntary protection and enhancement of species and habitat not just HCPs.

• Ensure an Open and Sound Decision-Making Process—The ESA must be open to new ideas and data. A good example of this principle is the emerging data regarding the effect of boat speeds on manatees and their avoidance mechanisms. Because the principal threat to manatees is impact from boat propellers, Federal and state manatee-protection policies historically have focused on slowing boats passing through manatee habitats. However, research by Dr. Edmund Gerstein of Florida Atlantic University and Joseph E. Blue, retired director of the Naval Undersea War-

fare Center and the Naval Research Laboratory's Underwater Sound Reference Detachment challenges some of the existing protection measures. This new research shows that while manatees have good hearing abilities at high frequencies, they have relatively poor sensitivity in the low frequency ranges associated with boat noise, which means that manatees may be least able to hear the propellers of boats that have slowed down in compliance with boat speed regulations designed to reduce collisions. My point is not to suggest that there should not be speed limits in areas occupied by manatees, but rather that we need to make sure that our policy decisions (like setting boat speed limits) are informed by up-to-date research. By providing for better data collection and independent scientific review, we can ensure that the necessary and appropriate data is available.

In addition to making sure we have better information upon which to act, we need a decisionmaking process that allows for full public participation in the listing, critical habitat and recovery decisions. It has been my experience that providing full and open access to the decisionmaking processes beyond simply the submission of letter comments through mechanisms like stakeholder representatives and data collection programs provides a much more diverse and ultimately stronger record from which to act.

For more than a decade, Congress has struggled with the question of what, if any, changes to the ESA should be made. In the interim, stakeholders like NESARC members, have had to take the existing Act and make it work. It has been time-consuming, expensive and often frustrating—and the successes have been limited. Today, less than 1 percent of all listed species in the United States have been recovered.

The congressional history on ESA legislation has had its ebbs and flows over the past 13 years with at least two distinct sets of legislative efforts both of which ultimately failed. NESARC is not interested in going down that same path again where stakeholders (on both sides) re-open old battles and try to right perceived wrongs from past court decisions. NESARC urges this committee to take stock of the lessons we have learned and successes that have been achieved in order to identify the improvements that are necessary to make this Act work better in the future.

RESPONSES BY MONITA FONTAINE TO QUESTIONS FROM SENATOR INHOFE

Question 1. You testified that we need a "decisionmaking process that allows for full public participation in the listing, critical habitat and recovery decisions." Currently, at what point and how can the public play a role in each of these decisionmaking processes? What is generally the reason that, unlike every other environmental law, there is not a standard, Federal public access process?

Response 1a. The public should play a more significant and active role throughout the ESA decisionmaking process-from the receipt of a petition for action, to the conduct of a species status review and any final promulgation of a Secretarial decision. Presently, the public is primarily consigned to a role of a "commenter" in public hearings and/or within an announced notice and comment proceeding initiated by the Secretary. For example, the public input process for listing and critical habitat decisions is primarily laid out in ESA Sections 4(a)(5) and (6). Under these procedures, the Secretary must publish a notice of the proposed regulation in the Federal Register, provide notice and invite comment from affected State agencies and counties or equivalent jurisdictions where the species resides, publish a summary in a newspaper of general circulation and hold one public hearing if requested by a person within 45 days of the general notice. The flaw in this process is that it only brings the public into the process after the Secretary has undertaken a review and prepared a proposed decision.

With respect to recovery plans under Section 4(f), while the Secretary "may" procure the services of appropriate public and private agencies and institutions and other qualified persons for purpose of developing a recovery plan, there is no absolute requirement that the public have the opportunity to participate in the development of a recovery plan. Rather, again, the public is consigned to the public notice and comment period after a proposed plan is developed.

In its present form, the ESA does not actively seek out the valuable data and insight that can be provided by the public. The Act must ensure that there are clear mechanisms by which the public can actively participate and contribute to the decisionmaking process-rather than being limited to commenters on proposed decisions. Further, especially with respect to the designation of critical habitat, there must be a more structured process for involving potentially affected localities and property owners.

Response 1b. The primary reason that ESA implementation does not presently provide for a robust public interest process is that the Act does not specifically encourage public input in all stages of the decisionmaking process. The ESA's silence regarding public involvement is in stark contrast to provisions of the Clean Water Act, for example, which specifically provide for "consultation with appropriate Federal and State agencies and other interested persons" as part of the establishment of water quality criteria under Section 304 (See e.g. 33 U.S.C. Sec. 1314), requires nonpoint source reports and management agreements under Section 319 to be developed in "cooperation with local, substate regional and interstate entities" which are involved in regional planning for water quality management of water bodies (See 33 U.S.C. Sec. 1329) and requires periodic public hearings to review applicable water quality standards (See 33 U.S.C. Sec. 1313).

NESARC supports increasing the public role in the ESA decisionmaking process. Moreover, we do not believe that role should be limited to additional public notice or hearing requirements. Rather, the Secretary should specifically establish programs to seek out and incorporate public input into the data gathering process for ESA decisions. In particular, the submission of data and field observations from the public regarding the presence or absence of species must be encouraged and accommodated under the Act. Further, there must be full and adequate consultation between the Secretary and affected States and local parties to ensure that all parties have the ability to fully participate in the decisionmaking process.

Question 2. You talk about setting objectives for the recovery of species. Where in the process would you put this requirement? At listing? At critical habitat designation?

Response. The Secretary should be required to determine objective and quantifiable recovery objectives that can serve as guideposts for voluntary conservation efforts concurrent with the listing decision. This recovery objective should then be reviewed no later than 5 years after listing (or earlier upon completion of a recovery plan). Finally, we believe any significant changes to the recovery objective (once established) should be subject to notice and comment.

Question 3. You mentioned in your testimony that you believe the states should be on the "front lines." What do you think the specific role of State, local and regional wildlife agencies should be in making Critical Habitat and listing decisions? What value should be placed on data that these agencies contribute to the decisionmaking process?

Response. We believe State, local and regional agencies should play a more prominent role in both the ESA decisionmaking process and in efforts to recover and protect species.

Roles in the Decisionmaking process: The Secretary must consult, and receive input from, State, regional and local entities that are affected by a particular listing or critical habitat designation. Further, data from public agencies with expertise on wildlife matters—i.e., State, regional or local wildlife management agencies-should be fully considered as part of the listing or critical habitat designation. We would note that the "value" of such data is in its collection and synthesis by an entity that is often actively engaged in monitoring and managing the species and/or its habitat. However, we would caution that the source of the data should not grant a particular set of data any presumption-rather, the methodology , level of rigor, extent of data (scope and period of years) and whether it has been peer reviewed provide the appropriate measures by which the Secretary can weigh the sufficiency of such data. For example, NESARC believes that field observations and data are critical to establishing a complete administrative record for listing and critical habitat designations. The fact that field observations are compiled by a group such as a local Farm Bureau should not color the legitimacy of the data provided. Rather the data must be judged on the merits and sufficiency of the underlying work undertaken in development of the report or study.

State and Local Involvement in Implementation Efforts: NESARC strongly believes that State, local and regional agencies have a key ability to provide resources and programs that will further voluntary conservation efforts for listed and candidate species. From the establishment of research programs, technical assistance and development of standard practices (such as the Safe Harbor Programs in North Carolina and South Carolina for Red-Cockaded Woodpeckers) that can be voluntarily adopted by private parties, the State and local agencies can bring their unique management expertise and resources to bear to help private property owners conserve and protect species. It is important that we have an ESA that takes advantage of the unique resources that State, local and regional agencies offer. Unfortunately, the ESA, today, does not provide a meaningful mechanism by which State and local agencies can step into the role.

Question 4. How important is it that critical habitat designations be based on actual verified field data demonstrating the presence of the species? Why is it insufficient to base such designations on scientific "hypotheses" that the species may 1 day be present?

Response. NESARC believes that the critical habitat designation process must incorporate, wherever possible, the consideration of actual verified field observations and data. In this regard, NESARC supports establishment of decisionmaking criteria that requires the Secretary to specifically seek out field observations and data as part of the critical habitat review and, if such information is not included in the administrative record for the critical habitat decision, then the Secretary must explain the reasons that such field data was not developed or otherwise considered.

Computer analysis and modeling have an inherent limitation-they remain the products of the assumptions, data and algorithms used to produce the analytical results. A set of biased or incorrect assumptions can significantly affect any such analyses. By developing actual verified field data, the Secretary has an initial touchstone of fact and data from which to base his or her decision. This data should not only serve as a primary data source, but also can serve as a checkpoint with respect to assessing the validity of hypothetical species presence and range estimates. Using field data and observations in the decisionmaking process will ultimately produce a better defined and thought-out critical habitat designation. Merely relying upon computer models or hypothetical analyses could tend to either over-estimate or under-estimate the necessary critical habitat designation. Field data on species behavior, population dispersal, population trends and habitat needs fundamentally provides a better base from which to determine what habitat can benefit from being designated as critical habitat.

RESPONSES BY MONITA FONTAINE TO QUESTONS FROM SENATOR CHAFEE

Question 1. In your opinion, how do we move away from litigation and toward consensus driven approaches such as the one you mentioned for the manatee population in Florida?

Response. The most effective way of promoting consensus-driven approaches is the passage of legislation to update and improve the ESA. The "culture of litigation" that pervades the ESA today is a direct result of the lack of Congressional action on ESA improvements. At present, environmental groups and stakeholders see the courts as the only means to redress flaws they see in the Act's implementation. Further, special interests use the complicated set of ESA deadlines and mandates to push their own specific agendas.

For consensus-driven approaches to win out over litigation, the programs and procedures must be in place. Today, the ESA does not have a single section that authorizes or encourages voluntary conservation programs. Further, the role of State and local agencies-which have traditionally been a key participant in finding consensus-driven solutions-has been limited. Developing and funding voluntary conservation programs such as a habitat reserve program and increasing the role of State and local governments will help remove the impetus to litigate.

Question 2. The Kempthorne-Chafee ESA bill from the 105th Congress contained several of the proposals listed in your testimony, yet it was objected to by many for not being comprehensive enough. What do you believe was the ultimate downfall of that bill?

Response. It is hard to pinpoint a single reason for why the Kempthorne-Chafee bill was not able to win final passage in the 105th Congress. However, a key component was the lack of bicameral, bipartisan cooperation on the final legislative package. That is one reason that NESARC was excited about the February 2005 joint announcement by Senators Lincoln Chafee and Michael Crapo, Chairman Richard Pombo and Representative Greg Walden regarding bicameral effort to update and improve the ESA. Likewise, NESARC has noted the bipartisan coordination within the Senate EPW Committee on ESA matters such as the recent request for establishment of a Keystone dialog on the role of critical habitat under the ESA. NESARC strongly supports these bicameral, bipartisan efforts to coordinate on ESA improvements and believe that communication between the House and Senate as well as bipartisan development of legislation is a key element of ensuring that a legislative package can move forward.

Question 3. We have heard from several witnesses today that incentives for private landowners is the key to ensuring the ESA continues as a viable Federal law. From NESARC's perspective, how well do Federal agencies work with private landowners to provide incentives for species conservation today?

Response. As a general matter, we believe that most Federal agencies want to work with private landowners. The problem is not with respect to the willingness of Federal agencies to work with private landowners, but rather the lack of authorization under the ESA to do so. Without specific programs and funding, it is difficult to focus Federal agency efforts and energies on voluntary conservation programs. Moreover, the establishment of such programs will not only provide a mechanism by which to encourage landowner conservation efforts, but also it will send a clear message to other Federal agencies as to the priority that should be placed on these efforts.

APPENDIX I: GAO REPORTS CONCERNING THE ENDANGERED SPECIES ACT

REPORTS ADDRESSING IMPLEMENTATION OF THE ENDANGERED SPECIES ACT

Endangered Species: Fish and Wildlife Service Generally Focuses Recovery Funding on High-Priority Species, but Needs to Periodically Assess Its Funding Decisions. GAO–05–211. Washington, D.C.: April, 6, 2005.

Protected Species: International Convention and U.S. Laws Protect Wildlife Differently. GAO–04–964. Washington, D.C.: September 15, 2004.

Endangered Species: Federal Agencies Have Worked to Improve the Consultation Process, but More Management Attention Is Needed. GAO–04–93. Washington, D.C.: March 19, 2004.

Military Training: Implementation Strategy Needed to Increase Interagency Management for Endangered Species Affecting Training Ranges. GAO–03–976. Washington, D.C.: September 29, 2003.

Endangered Species: Fish and Wildlife Service Uses Best Available Science to Make Listing Decisions, but Additional Guidance Needed for Critical Habitat Designations. GAO–03–803. Washington, D.C.: August 29, 2003.

Endangered Species: Despite Consultation Improvement Efforts in the Pacific Northwest, Concerns Persist about the Process. GAO–03–949T. Washington, D.C.: June 25, 2003.

International Environment: U.S. Actions to Fulfill Commitments Under Five Key Agreements. GAO–03–249. Washington, D.C.: January 29, 2003.

Endangered Species: Research Strategy and Long-Term Monitoring Needed for the Mojave Desert Tortoise Recovery Program. GAO–03–23. Washington, D.C.: December 9, 2002.

Columbia River Basin Salmon and Steelhead: Federal Agencies' Recovery Responsibilities, Expenditures and Actions. GAO–02–612. Washington, D.C.: July 26, 2002.

International Environment-U.S. Actions to Fulfill Commitments Under Five Key Agreements. GAO–02–960T. Washington, D.C.: July 24, 2002.

Endangered Species Program: Information on How Funds Are Allocated and What Activities Are Emphasized GAO–02–581. Washington, D.C.: June 25, 2002.

Canada Lynx Survey: Unauthorized Hair Samples Submitted for Analysis. GAO–02–496T. Washington, D.C.: March 6, 2002.

Unauthorized Hair Samples Submitted for Analysis GAO–02–488R. Washington, D.C.: March 6, 2002.

Accidental Contamination of Samples Used in Canadian Lynx Study Rendered the Study's Preliminary Conclusion Invalid. GAO–01–1018R. Washington, D.C.: August 14, 2001.

Endangered Species Act: Fee-Based Mitigation Arrangements. GAO–01–287R. Washington, D.C.: February 15, 2001.

Fish and Wildlife Service: Challenges to Managing the Carlsbad, California, Field Office's Endangered Species Workload. GAO–01–203. Washington, D.C.: January 31, 2001.

Fish and Wildlife Service: Weaknesses in the Management of the Endangered Species Program Workload at the Carlsbad, California Field Office. T-RCED–00–293. Washington, D.C.: September 14, 2000.

Endangered Species: Caribou Recovery Program Has Achieved Modest Gains. RCED–99–102. Washington, D.C.: May 13, 1999.

Department of Commerce, National Oceanic and Atmospheric Administration: Endangered and Threatened Species; Threatened Status for Two Chinook Salmon Evolutionarily Significant Units (ESUs) in California OGC–00–5. Washington, D.C.: October 15, 1999.

Department of Commerce, National Oceanic and Atmospheric Administration: Endangered and Threatened Species of Salmonids. OGC–99–38. Washington, D.C.: April 7, 1999.

Estimated Costs to Recover Protected Species. RCED–96–34R. Washington, D.C.: December 21, 1995.

Reports Related to the Endangered Species Act

Military Training: DOD Approach to Managing Encroachment on Training Ranges Still Evolving. GAO–03–621T. Washington, D.C.: April 2, 2003.

Transboundary Species: Potential Impact to Species. GAO–03–211R. Washington, D.C.: October 31, 2002.

Military Training: DOD Lacks a Comprehensive Plan to Manage Encroachment on Training Ranges. GAO–02–614. Washington, D.C.: June 11, 2002.

Military Training: DOD Needs a Comprehensive Plan to Manage Encroachment on Training Ranges. GAO–02–727T. Washington, D.C.: May 16, 2002.

Consequences of the Ruling by the 11th Circuit Court of Appeals on Forest Management Projects. GAO–01–51R. Washington, D.C.: November 30, 2000.

Timber Management: Forest Service Has Considerable Liability for Suspended or Canceled Timber Sales Contracts, GAO–01–184R. Washington, D.C.: November 29, 2000.

Army Corps of Engineers: An Assessment of the Draft Environmental Impact Statement of the Lower Snake River Dams. RCED–00–186. Washington, D.C.: July 24, 2000.

National Fish Hatcheries: Authority Needed to Better Align Operations With Priorities. RCED–00–151. Washington, D.C.: June 14, 2000.

Fish and Wildlife Service: Agency Needs to Inform Congress of Future Costs Associated With Land Acquisitions. RCED–00–52. Washington, D.C.: February 15, 2000.

Fish and Wildlife Service: Management and Oversight of the Federal Aid Program Needs Attention. T-RCED–99–259. Washington, D.C.: July 20, 1999.

International Environment: Literature on the Effectiveness of International Environmental Agreements. RCED–99–148. Washington, D.C.: May 1, 1999.

Ecosystem Planning: Northwest Forest and Interior Columbia River Basin Plans Demonstrate Improvements in Land-Use Planning. RCED–99–64. Washington, D.C.: May 26, 1999.

Forest Service: Distribution of Timber Sales Receipts, Fiscal Years 1995 Through 1997. RCED–99–24. Washington, D.C.: November 12, 1998.

Water Resources: Corps of Engineers' Actions to Assist Salmon in the Columbia River Basin. RCED–98–100. Washington, D.C.: April 27, 1998.

Federal Land Management: Estimates of Value and Economic Effects of Canceled and Suspended Timber Sale Contracts in the Pacific Northwest. RCED–98–18R. Washington, D.C.: October 6, 1997.

Forest Service: Unauthorized Use of the National Forest Fund. RCED–97–216. Washington, D.C.: August 29, 1997.

Tongass National Forest: Lack of Accountability for Time and Costs Has Delayed Forest Plan Revision. T-RCED–97–153. Washington, D.C.: April 29, 1997.

Federal Power: Issues Related to the Divestiture of Federal Hydropower Resources. RCED–97–48. Washington, D.C.: March 31, 1997.

Timber Management: Opportunities to Limit Future Liability for Suspended or Canceled Timber Sale Contracts. RCED–97–14. Washington, D.C.: October 31, 1996.

Bureau of Reclamation: An Assessment of the Environmental Impact Statement on the Operations of the Glen Canyon Dam. RCED–97–12. Washington, D.C.: October 2, 1996.

Northwest Power Planning Council: Greater Public Oversight of Business Operations Would Enhance Accountability. RCED–96–226. Washington, D.C.: August 30, 1996.

Animas-La Plata Project: Status and Legislative Framework. RCED–96–1. Washington, D.C.: November 17, 1995.

[From the New York Times, April 15, 2001]

BUSH ISN'T ALL WRONG ABOUT THE ENDANGERED SPECIES ACT

(By Bruce Babbitt)

WASHINGTON, DC.—The Bush administration has again outraged environmentalists, this time by proposing that Congress modify the budget for the Endangered Species Act. The administration wants to place financial restrictions on a process called "designation of critical habitat," which maps areas occupied by endangered species.

Environmentalists resist any change, fearful of giving opponents of the Endangered Species Act any openings. But on this matter, they are overreacting. Critical

habitat is a problem that ought to be fixed, if not in the manner proposed by the administration.

When a species is listed as endangered, the underlying cause is usually destruction of its habitat by activities like road building, land development or clear cutting. To ensure the survival of the species, the Fish and Wildlife Service must at some point in the process designate, with detailed maps, those areas of habitat that require special protection.

The controversy now flaring up turns on a seemingly simple question—when to prepare the maps. Should it be at the beginning of the process, when there is often not much information available, or at the end, when the biologists have had an opportunity to prepare a comprehensive plan for the protection of the species? Since mapping and the scientific surveys are time-consuming and expensive, biologists have generally preferred to prepare habitat maps later, as part of the comprehensive plan.

Then in the 1990's, environmentalists brought lawsuits arguing that the Endangered Species Act requires mapping immediately upon listing of a species, whether or not the biologists have enough information.

Because the statute is ambiguous, courts have by and large agreed with environmentalists, and are now ordering the Fish and Wildlife Service to undertake these mapping projects all over the country on strict deadlines. Struggling to keep up with these court orders, the Fish and Wildlife Service has diverted its best scientists and much of its budget for the Endangered Species Act away from more important tasks like evaluating candidates for listing and providing other protections for species on the brink of extinction.

In one recent case in California, the Fish and Wildlife Service was ordered by a federal court to produce, on a short deadline, a habitat map for the endangered red-legged frog. The frog has been identified in streams and wetlands scattered throughout southern California, but the Fish and Wildlife Service had limited biological surveys to identify its critical habitats. So the service quite understandably painted with a broad brush—in this case four million acres, an area the size of Connecticut. Unsurprisingly, this map enraged landowners and developers, who feared the regulatory consequences of such a designation.

These uncertainties undermine public confidence in one of our most important and successful environmental laws. That is why during my tenure as interior secretary I repeatedly asked Congressional leaders to write budget restrictions that would prevent money for important endangered-species programs from being siphoned off into premature "critical habitat" map-making. This request was denied every year. The Bush administration now proposes something similar.

That said, putting restrictive language in the budget is not the best way to fix the problem. The better alternative is to amend the Endangered Species Act, giving biologists the unequivocal discretion to prepare maps when the scientific surveys are complete. Only then can we make meaningful judgments about what habitat should receive special protection.

Back in 1997 we tried to do just that through a comprehensive overhaul of the Endangered Species Act. At that time, John Chafee, the late Republican senator from Rhode Island, called all the usual antagonists into his office and expressed his desire to update the act. He wanted to address the mapping of critical habitats, to codify the voluntary participation of landowners in conservation planning, to require scientific peer review of listing decisions and to encourage state participation. Senator Chafee then patiently worked out a consensus. This legislation sailed through the normally gridlocked Senate Environment and Public Works Committee before it was killed by the Senate leadership.

If the Bush administration is sincere about improving the Endangered Species Act, rather than stirring controversy, it should revive the Chafee reform measures.

Bruce Babbitt served as secretary of the interior in the Clinton administration.

MAY 13, 2005.

Hon. LINCOLN CHAFEE,
Chairman, Subcommittee on Fisheries, Wildlife and Water,
Dirksen Senate Office Building, Washington, DC.

ATTN: Endangered Species Act Hearing—May 19, 2005

DEAR CHAIRMAN CHAFEE: Associated Oregon Loggers, Inc. (AOL) urges you to support extensive update & strengthening of the Endangered Species Act. AOL supports legislative updates of the now-ineffective ESA in the 109th Congress, which would add balance to species protection and the Oregon economy.

I am writing on behalf of AOL, which represents more than 1,000 logging and allied forest member companies. These companies play a major role in management of 28 million acres of private & public forests throughout Oregon, as contractors, purchasers and vendors of forest management services (operators). These Oregon forest professionals employ approximately 10,000 workers in the continuous improvement of operation technology for the sound management of Oregon's abundant and renewable forest resources.

In supporting ESA updates, we emphasize that the ESA has failed because it needlessly disrupts local communities and attacks the roots of forest stewardship vital to Oregon's rural economy. Species listings create a legal uncertainty about the future that is difficult to mitigate or rebuild the economic harm to business, government and society. Over the past two decades, species listings resulted in significant & harmful costs to society due to legal gridlock, loss of business & jobs, displaced communities, government waste, and unintended degradation to species and their habitat.

We agree with ESA goals, but we can do better than its 99 percent failure rate in recovering species:

- It's time to recover endangered species without endangering American jobs & livelihoods
- Independent scientific review is needed in listings and developing recovery plans
- Recovery plans must be flexible and allow local input from landowners & communities
- Allow state and local authorities more flexibility in recovery efforts—e.g. The Oregon Plan
- We can and must protect endangered species, regional economies, and livelihoods
- ESA should require a plan to help a species recover before it is listed
- We want to help improve & measure species recovery, so they can come off the list
- Our goal is to strengthen the Act in ways which will help recover more private habitat

Thank you for the opportunity to comment. Please don't hesitate to contact me to further discuss this matter, at: 800–452–6023, or email: rexstorm@oregonloggers.org

Sincerely,

REX STORM, CF
Forest Policy Manager, Associated Oregon Loggers, Inc.

Defenders of Wildlife
1130 17th Street, NW
Washington, DC 20036

Environmental Defense
1875 Connecticut Ave NW, #600
Washington, DC 20009

World Wildlife Fund
1250 24th Street, NW
Washington, DC 20037

March 11, 2005

The Honorable Bill Owens
Governor of Colorado
136 State Capital
Denver, CO 80203-1792

The Honorable Dave Freudenthal
Governor of Wyoming
State Capital, Room 124
Cheyenne, WY 82002

Dear Governors Owens and Freudenthal:

We noted with interest your letter dated February 25, 2005, on behalf of the Western Governors' Association, transmitting to Senators Inhofe and Jeffords the recommendations of the WGA concerning the Endangered Species Act. We write in response to commend the WGA's efforts and to identify both some shared perspectives and some additional thoughts that may be helpful to you.

First, we are pleased to be able to say that we are in general agreement with the broadly stated objectives set forth in your letter, and would be pleased to discuss with your representatives some more specific ideas as to how best to achieve them. For example, we agree with the desirability of having clearly stated recovery goals for listed species as early as possible. The lack of resources with which to promptly develop (and implement) recovery plans is a longstanding problem, and one that potentially delays and undercuts recovery efforts. For many species, the fact of endangerment is readily apparent well before the knowledge of what to do about their endangerment is apparent. An example with which you are likely familiar is the whooping crane, whose critical endangerment was well established by the 1930s. Because its nesting grounds in Canada were undiscovered until the 1950s, however, both realistic recovery goals and comprehensive recovery strategies could not be developed until long after the bird's endangerment was recognized. That example and others like it suggest that it may often be appropriate to set interim recovery goals that can be adjusted as new learning sheds additional light on the natural history of the species and the feasibility of recovery measures.

We also are in general agreement with the goal of enhancing the role of state governments in recovering species. When the Endangered Species Act was passed in 1973, it held out the promise of significant federal financial assistance in Section 6 to assist the states in developing and implementing conservation programs that would further the Act's recovery goals. For virtually the entire history of the Act, that has been a promise unfilled. Federal financial

assistance has been both too limited and too unpredictable for many of the states to step up to the role that Congress originally envisioned for them.

Thirdly, we share the goal of ensuring that decisions under the Endangered Species Act be based on good quality science. We would be very pleased to explore with your representatives a number of ideas as to how to improve the scientific capacity of the U.S. Fish and Wildlife Service and NOAA-Fisheries. Improving those agencies' scientific capacities and insulating the decisions that are supposed to be based on science from political interference would go a long way to restore confidence in the decisions that the agencies make. We believe that is ultimately a much better approach than having Congress – with little or no scientific expertise of its own – tell the agencies how to do science.

Finally, we agree very strongly with the need for greater economic incentives for landowners to become partners in conservation efforts. For a great many species, recovery will absolutely depend upon active management measures to restore, enhance, or maintain habitats that occur, or can be made to occur, on private land. Our organizations have considerable experience in designing, testing, and applying incentive-based conservation strategies, and we would be pleased to explore them with you.

As your letter notes, there are many other ideas that you considered before identifying the four areas outlined above as the most critical. We very much agree that these four areas represent opportunities that offer considerable promise if thoughtfully and carefully examined. We would be pleased to explore these ideas further with you if you wish.

Sincerely,

Michael J. Bean
Chairman, Wildlife Program
Environmental Defense

Jamie Rappaport Clark
Executive Vice President
Defenders of Wildlife

Wm. Robert Irvin
Director, U.S. Ecoregional Conservation
World Wildlife Fund

Cc: Senator Inhofe
Senator Jeffords
Senator Chafee
Senator Clinton
Senator Crapo
Representative Pombo
Representative Rahall

MAY 17, 2005.

Hon. LINCOLN CHAFEE, *Chair,*
Hon. HILLARY RODHAM CLINTON, *Ranking Member,*
Environment and Public Works,
Subcommittee on Fisheries, Wildlife and Water

DEAR SENATORS: As scientists from across the United States with many years of experience in ecology, wildlife, conservation biology, evolutionary biology, we would like to share with you our views on the current extinction crisis.

We write out of deep and growing concern for biological diversity; the full array of life on Earth, including the vast number of species of plants, animals, fungi, and microorganisms and the natural communities that these species form. Biological diversity at all levels is tremendously important to humankind. For example, hundreds of medicines and other compounds vital to human health are derived from the natural world. Some of them come from unlikely sources, exemplifying the need to protect as many species as possible:

• A bacterium (Thermus aquaticus) that lives in hot springs in Yellowstone National Park is the source of a compound called "Taq polymerase," an enzyme required for DNA fingerprinting in forensics and diagnostics.
• The important cancer treatment drug taxol is derived from the bark of the Pacific yew tree (Taxus brevifolia).
• A protein found in the blood of horseshoe crabs (Limulus polyphemus) is used to detect bacterial toxins in all medical implants and injectable medicines and vaccines.

Wild plant and animal species are the source of virtually all domesticated foods and fibers. Even today breeders turn to wild specimens for genes that help crops resist pests, survive drought, and adapt to different growing conditions. Hence, the value of genetic diversity, or variety within species, speaks to the need to preserve more than just a few examples of each species. Perhaps even more important, however, is the value of full, intact ecosystems, which provide ecological services such as erosion control, water filtration, climate regulation, flood control and pollination.

Despite the incredible importance of biological diversity, a grim scientific consensus is emerging: we are in the throes of an extinction crisis. Extinction is the irrevocable disappearance of a species everywhere on planet Earth. Unlike 'extirpation', which refers to a species disappearing from a particular jurisdiction (such as one state or country), extinction cannot be undone. Extinction is the killing off of all individuals, forever extinguishing the life of an entire species.

Currently there is little doubt left in the minds of professional biologists that Earth is faced with a mounting loss of species that equals or exceeds any mass extinction in the geological record. Human activities have brought the Earth to the brink of this crisis. Many biologists consider that coming decades will see the loss of large numbers of species; these extinctions will alter not only biological diversity but also the evolutionary processes by which diversity is generated and maintained. Extinction is now proceeding one thousand times faster than the planet's historic rate.

As of 2000, a total of 539 species out of roughly 200,000 in the United States have been recorded by NatureServe as extinct or missing. Of these, 100 meet the stricter criteria of presumed extinct, with the remaining 439 falling into the possibly extinct category. These extinctions span the gamut of organisms, including vertebrates such as the great auk and West Indian monk seal, plants like the Santa Catalina monkey flower and falls-of-the-Ohio scurf-pea, and invertebrates such as the Wabash riffleshell and the Colorado burrowing mayfly.

In the United States, there have been more extinctions of birds than of any other group of vertebrates—2.3 percent of our endemic bird species are gone forever. The most current NatureServe data shows 30 bird species in all that are either presumed extinct or missing and possibly extinct. The majority of these birds (23 species) were native only to Hawaii. Four species native to the continental United States are presumed extinct: the passenger pigeon, Carolina parakeet, the great Auk, and Labrador duck. Furthermore, in the past 100 years the United States has lost 2.2 percent of its endemic amphibians, 1.2 percent of the freshwater fishes, 1.1 percent of the plant species, and a staggering 8.6 percent of the freshwater mussels forever.

Worldwide, the situation is even worse. Because of the incredible density of species in tropical regions that are facing rapid deforestation, we may be losing species at a rate of 30,000 per year, or an overwhelming 3 per hour. Many biologists predict that coming decades will see the loss of large numbers of species. One-quarter of all mammals, including lions, tigers, rhinos, and most primates, could be declared

extinct by the end of this century, along with one in eight bird species, and thousands of plant species.

Habitat destruction is widely recognized as the primary cause of species loss. In the United States, habitat loss threatens about 85 percent of imperiled species. Worldwide, the figure may be higher. Agriculture, logging, urban development, dredging, damming, mining and drilling are just a few of the activities that eliminate or significantly degrade habitats. Invasive species released intentionally or imported accidentally take over habitats and crowd out native species. Similarly, diseases imported to areas where the local flora and fauna have no resistance also wreak havoc on biological diversity. Pollution, over-exploitation, and global warming are also responsible for sending numerous species toward extinction.

The future of humanity is inextricably tied to the fate of the natural world. In perpetuating this, the Earth's sixth mass extinction, we may ultimately compromise our own ability to survive. We need to steer this nation and lead the world toward a more sustainable path.

As a result of the Endangered Species Act, passed in 1973 by an overwhelming Congressional majority, the United States maintains a Federal list of Endangered and Threatened Wildlife and Plants. The Endangered Species Act represents our nation's most determined effort to take responsibility for preserving its precious biological diversity. By offering strict Federal protections to the species that are included on the list, the government has drawn a line which it will not allow human pressures to cross over. That line is extinction.

In both its scope and its irreversibility, extinction is the most frightening, most conclusive word in our language. When a species has been declared extinct, not only have all its individuals died, but the possibility of any such individuals ever existing again has been foreclosed. The variety of life with which we share the earth is sadly in rapid decline. Life is grounded in biological diversity, and the fate of this diversity, which created and sustains us, is now in our hands.

Fortunately, we have the wherewithal and the tools we need to address this crisis. The most important of them is the Endangered Species Act. It is the alarm system our nation crafted to warn us when species are facing extinction. It is the measure by which we halt species' decline and give species a fighting chance at recovery. Viewing our looming extinction crisis as a crisis for humans as well as wildlife, the importance of the Endangered Species Act takes on even greater significance. In the face of this crisis, we must strengthen the Act and broaden its protections, not weaken them.

Thank you for considering our concerns and recommendations.

Sincerely,

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Cc Senators John Warner, Lisa Murkowski, Jim DeMint, David Vitter, Joseph Lieberman, Frank Lautenberg, and Barack Obama

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February 25, 2005

The Honorable Richard W. Pombo
House Committee on Resources
1324 LHOB
Washington, DC 20515

The Honorable Nick Rahall
House Committee on Resources
1324 LHOB
Washington, DC 20515

Dear Chairman Pombo and Ranking Member Rahall:

As you begin work on the Resource Committee's legislative agenda for the 109th Congress we ask you to consider making common-sense changes to the Endangered Species Act a priority. We realize that there are many pressing issues competing for your attention. However, as you know, the Western Governors applaud the principles of the ESA and have maintained a longstanding interest in improving species recovery efforts by making the process more efficient and providing more effective incentives for state and private conservation activities.

We recently held an Endangered Species Act summit in which we brought together a very diverse set of stakeholders to discuss ways in which the Act could be improved. The consensus coming out of the summit was that there are many steps we can take together to update and modernize this thirty-year old law. We share the desire of summit participants to increase the effectiveness of the Act and enhance its success in recovering and protecting endangered species. To that end, we ask that you consider the following proposals in any reform legislation:

- **Require recovery goals for listed species.** Western Governors' believe that recovery and, ultimately, delisting of species covered by the ESA should be the highest priority of the Act. Federal funding for ESA activities should be prioritized to reflect this priority. We believe that the best way to accomplish this goal is to require the Fish and Wildlife Service and NOAA-Fisheries to publish quantifiable recovery goals, in consultation with the affected state(s), for threatened or endangered species at the time of the listing decision to provide for objective recovery criteria that both state and federal agencies may work toward in the recovery process. In cases where quantification of recovery goals is not initially feasible, the services should be required to publish a plan, including a timeline, describing the steps the federal agencies will take in identifying measurable goals.

- **Enhance the role of state governments in recovering species.** The Endangered Species Act can effectively be implemented only through a full partnership between the states and the federal government. One way to accomplish this partnership would be to authorize the delegation of authority for the development of conservation and recovery plans on a voluntary basis to states that choose to accept such delegation, and agree with the appropriate Secretary(s) to perform them in accordance with specified standards. Authority should also be given to the appropriate Secretary to provide grants for the additional administrative costs to the state.

  Our states have already demonstrated leadership in the successful effort to conserve the Greater Sage Grouse. We stand ready to continue these efforts, and we ask Congress to give us the tools and authority to make state and local conservation efforts meaningful.

- **Ensure the use of good science in ESA decisions**. Given the broad implications that may arise when ESA actions are taken, significant decisions must be made using objective, peer-reviewed science. Peer review of listing, recovery and de-listing decisions by acknowledged independent experts is important to assure the public that decisions are well-reasoned and scientifically based. Peer review committees should be agreed upon by the Fish and Wildlife Service, NOAA-Fisheries and the state. State agencies also have expertise and other institutional resources such as mapping capabilities, biological inventories and other important data that should be employed in developing endangered species listing and recovery decisions.

- **Incentives for conservation are essential.** Western Governors believe that providing economic incentives for landowners to participate in conservation efforts is likely to achieve more efficient and cost-effective results and may lead to more rapid conservation.

While there are many other improvements that could be made to the Endangered Species Act, we believe that those we have outlined above are the most critical. As you develop your legislative agenda for the 109th Congress we ask you to consider making these changes a priority.

Thank you for your leadership on endangered species issues. We look forward to working with you on this, as well as other issues of importance to the West.

Sincerely,

Bill Owens
Governor of Colorado
Chair and Lead Governor on ESA

Dave Freudenthal
Governor of Wyoming
Lead Governor on ESA

NATIONAL ENDANGERED SPECIES ACT REFORM COALITION MEMBERSHIP LIST

American Agri-Women, Mission, Texas
American Farm Bureau Federation, Washington, D.C.
American Forest and Paper Association, Washington, D.C.
American Forest Resource Council, Portland, Oregon
American Public Power Association, Washington, D.C.
Animas-La Plata Water Conservancy District, La Plata, New Mexico
Anza Electric Cooperative, Inc., Anza, California
Apache County, St. Johns, Arizona
Arizona Municipal Power Users' Association, Phoenix, Arizona
Art Homes, San Antonio, Texas
Association of California Water Agencies, Sacramento, California
Bar Eight Cattle Co., Inc., Lyman, Nebraska
Basin Electric Power Cooperative, Bismark, North Dakota
Boise-Kuna Irrigation, Kuna, Idaho
Bridger Valley Electric, Mountain View, Wyoming
Buckeye Industrial Mining Company, Lisbon, Ohio
Carlsbad Irrigation District, Carlsbad, New Mexico
Central Arizona Water Conservation District, Phoenix, Arizona
Central Electric Cooperative, Mitchell, South Dakota
Central Nebraska Public Power & Irrigation District, Holdrege, Nebraska
Central Platte Natural Resources District, Grand Island, Nebraska
Charles Mix Electric Association, Lake Andes, South Dakota
Clay-Union Electric Cooperative, Inc., Watertown, South Dakota
Codington-Clark Electric Cooperative, Inc., Watertown, South Dakota
Colorado River Energy Distributors Association, Tempe, Arizona
Colorado River Water Conservation District, Glenwood Springs, Colorado
Colorado Rural Electric Association, Denver, Colorado
County of Boise, Idaho City, Idaho
County of Catron, Reserve, New Mexico
County of Eddy, Carlsbad, New Mexico
County of Sierra, Truth or Consequences, New Mexico
CropLife America, Washington, D.C.
Dakota Energy Cooperative, Inc., Huron, South Dakota
Dixie Escalante Rural Electric Association, Beryl, Utah
Dugan Production Corporation, Farmington, New Mexico
East River Electric Power Cooperative, Madison, South Dakota
Eastern Municipal Water District, San Jacinto, California
Edison Electric Institute, Washington, D.C.
Empire Electric Association, Inc., Cortez, Colorado
Exeter Irrigation District, Exeter, California
Flathead Electric Cooperative, Kalispell, Montana
Frank Raspo and Sons, Banta, California
Garkane Power Association, Inc., Richfield, Utah
Garrison Diversion Conservancy District, Carrington, North Dakota
Helix Water District, La Mesa, California
High Plains Power, Inc., Thermopolis, Wyoming
Holy Cross Electric Association, Inc., Glenwood Springs, Colorado
Idaho County Light and Power, Grangeville, Idaho
Idaho Mining Association, Boise, Idaho
Industrial Minerals Association-North America, Calverton, Maryland
Intercounty Electric Association, Mitchell, South Dakota
International Council of Shopping Centers, Alexandria, Virginia
Kern County Water Agency, Bakersfield, California
Lyon-Lincoln Electric Cooperative, Inc., Tyler, Minnesota
Marine Industries Association of South Florida, Fort Lauderdale, Florida
Merced Irrigation District, Merced, California
Mid-West Electric Consumers Association, Denver, Colorado
Morgan County Rural Electric Association, Ft. Morgan, Colorado
National Association of Counties, Washington, D.C.
National Association of Home Builders, Washington, D.C.
National Association of Industrial & Office Properties, Herndon, Virginia
National Association of Realtors, Washington, D.C.
National Grange, Washington, D.C.
National Marine Manufacturers Assn., Chicago, Illinois
National Mining Association, Washington, D.C.
National Rural Electric Cooperative Association, Washington, D.C.

National Rural Water Association Washington, D.C.
National Stone, Sand and Gravel Association, Washington, D.C.
National Water Resources Association, Arlington, Virginia
Nebraska Farm Bureau Federation, Lincoln, Nebraska
Niobara Electric Association, Lusk, Wyoming
Northern Electric Cooperative, Inc., Bath, South Dakota
Northwest Horticultural Council, Yakima, Washington
Northwest Marine Trade Association, Seattle, Washington
Otero Electric Cooperative, Inc., Cloudcroft, New Mexico
Panoche Water District, Firebaugh, California
Rancho California Water District, Temecula, California
Raspo Farms, Banta, California
Rawhide Outfitters, Salmon, Idaho
Renville-Sibley Cooperative Power Association, Danube, Minnesota
Rushmore Electric Power Cooperative, Inc., Rapid City, South Dakota
San Isabel Electric Association, Pueblo, Colorado
San Joaquin County Citizens Land Alliance, Tracy, California
San Joaquin River Exchange Contractors Water Authority, Los Banos, California
San Luis Valley Rural Electric Cooperative, Inc., Monte Vista, Colorado
San Luis Water District, Los Banos, California
Sangre De Cristo Electric Association, Inc., Buena Vista, Colorado
Southwestern Power Resources Association, Edmond, Oklahoma
Southwestern Water Conservation District of Colorado, Durango, Colorado
Sulphur Springs Valley Electric Cooperative, Willcox, Arizona
Teel Irrigation District, Echo, Oregon
Texas Aggregates and Concrete Association, Austin, Texas
Texas Crushed Stone Company, Georgetown, Texas
Toll Brothers, Inc., Huntingdon Valley, Pennsylvania
TRICO Electric Cooperative, Tucson, Arizona
Tri-State Generation & Transmission Association, Inc., Denver, Colorado
Tulelake Irrigation District, Tulelake, California
Upper Yampa Water Conservancy District, Steamboat Springs, Colorado
Washington State Potato Commission, Moses Lake, Washington
Washington State Water Resources Association, Yakima, Washington
Weber River Water Users Association, Sunset, Utah
Wells Rural Electric Company, Wells, Nevada
Western Energy Supply and Transmission, Denver, Colorado
Western Montana Electric Generation and Transmission Cooperative, Inc., Missoula, Montana
West Side Irrigation District, Tracy, California
Wheat Belt Public Power District, Sidney, Nebraska
Whetstone Valley Electric Cooperative, Inc., Milbank, South Dakota
Wilder Irrigation District, Caldwell, Idaho
Williamson County, Georgetown, Texas
Wyoming Water Development Association, Inc., Laramie, Wyoming
Wyrulec Company, Lingle, Wyoming
Y-W Electric Association, Inc., Akron, Colorado

IMPROVING THE ESA: A POTENTIAL NEW APPROACH

BACKGROUND

A growing number of Federal, state and local government policy-makers and private citizens recognize shortcomings in the current version of the Endangered Species Act and are calling for Congress to improve the Act. For example, the Washington Post editorialized that improvements to the Act are needed stating that:

> The key to the act's future is flexibility and a more cooperative attitude. Rather than declaring the act "broken," opponents would do better to heed the example of the Texas ranchers who have agreed to encourage the growth of endangered species' habitat in exchange for more control over their property, or the regulators who have tried to introduce greater clarity and certainty to the rules. Clearly, the act would benefit from constructive congressional attention: The law could be made simpler, the costs more predictable. Unconstructive attention, however, will just lead to more antagonism and lawsuits. (Washington Post Editorial, December 29, 2003).

Despite such calls for improving the Act, a legislative stalemate exists. On one hand, the actual authorization for the Act expired in October 1992 with Congress

(for the past 10 years) carrying forward the implementation of the Act solely through annual appropriations. On the other, legislative reform efforts that also would reauthorize the Act have failed to gain the necessary political support in both the House and Senate to be enacted into law.

Over the years, those in the public and private sector that are subject to the restrictions of the Act have pursued reform by calling for a series of specific changes to the existing provisions of the Act arguing that some standards and requirements are vague or overly restrictive and inflexible. At the same time, those that support the current Act argue that no changes are necessary other than an increase in Federal funding of species recovery efforts and more aggressive implementation and interpretation of the Act by the Federal agencies. For over a decade, these two factions have clashed, finding little, if any, common ground and resulting in the adoption of no improvements to the Act. It is not likely that a continued clash over specific changes to the current sections of the Act will result in an improved Endangered Species Act in the foreseeable future.

A POTENTIAL NEW APPROACH

A new approach is needed to change the focus of the debate from a clash over existing terms and programs to developing new tools that improve the Act. One solution is to enact new provisions of the Act that encourage recovery of listed species through voluntary species conservation efforts and the active involvement of States. This new approach would maintain and further the goal of species conservation. Species conservation and recovery justifies the need for additional flexibility to ensure that recovery and delisting of species can and does occur.

Below is a description of a new proposal to update and improve the Act that would focus on the goal of saving and enhancing species, engaging private landowners, state departments of fish and wildlife and local governmental agencies on the front lines of species conservation, and ensuring that Federal funding for species conservation focuses on these incentive-based programs. The potential new approach consists of the following major elements:

(1) Giving the States the Option of Being On the Front Line of Species Conservation

Issue: States should have a wider role in facilitating landowner/operator compliance with the Act and, ultimately, the recovery of species in order to remove the restrictions of the ESA. States have significant financial resources, research capabilities, and coordination abilities that can allow for better planning of species management activities. Further, States are often better situated than Federal agencies to develop and maintain cooperative efforts between stakeholders to protect and manage the local resources and species.

Proposal: Create an alternative path for species and habitat conservation efforts in lieu of the restrictive, and limited, provisions of ESA Sections 7, 9 and 10. Allow state (or local) governments to facilitate voluntary landowner/operator efforts to protect and enhance species. Participants in an approved State program would be granted incidental take authorization and activities consistent with the State program would not be subject to any additional reviews under Section 7. Several critical elements must be considered:

(1) Voluntary participation by landowner/operators

(2) Eliminate duplicative reviews—A single Section 7 consultation review should occur regarding the overall State program. Once that is complete, no additional Section 7 consultations should be required for participants as long as activities are consistent with approved State program.

(3) Ensure certainty—Participants in the State programs must receive incidental take authorization so that they are not exposed to "take" enforcement under Section 9 for activities consistent with the State program.

(4) Encourage use of non-regulatory mechanisms—If restrictions are placed on a participant's activities, the Secretary must demonstrate that no non-regulatory alternatives existed to achieve the same effect for the species.

(5) Emphasize collaboration between the landowners/operators and the State—Affected stakeholders must be afforded the right to fully participate in the development of the State program.

(6) Appropriate Standards for Program Approval—Establish specific standards for Secretarial review and approval of program with review focused on the ability of the State's program to contribute to achieving the established recovery objectives for the listed species within that State's borders.

(7) Flexibility—Allow State programs to cover both listed and candidate species and involve multi-State efforts.

(8) No Surprises—Provide "No Surprises" type assurance that participation in the program will be sufficient for compliance with ESA Sections 7 and 9.
(9) Recognize Common Interests and Avoid Conflicts—Programs that minimize the social and economically adverse impacts on communities are more likely to garner the public support necessary to be effective.

The State program could take a range of forms—each with their own unique characteristics and benefits. In each case, the elements noted above should guide the development of the legislative proposal. Among the options that exist are:

Options	Scope
Modified Cooperative Agreement/Management Agreements	Modify existing provisions of Section 6 to facilitate development of State cooperative agreements and management agreements. Allow for Federal grants or other funding of state efforts under the cooperative agreements and/or management agreements.
Authorize Programmatic Activities	Allow Secretary to conduct Section 7 consultation on a set of state-wide programmatic activities (e.g. best practices for timber management) that would result in incidental take authorization for participants employing such practices.
Voluntary Species and Habitat Enhancement Program	Alternative path for voluntary species recovery efforts within State borders. Voluntary participants not subject to Section 7 consultation requirement and receive incidental take authorization for efforts consistent with program.
Statewide HCP	Modify Section 10 to specifically allow State to develop and implement multi-jurisdictional habitat conservation plan.

(2) Expanding and Encouraging Voluntary Conservation Efforts

Issue: A universal concern with the Act is that it does not fully promote and accommodate voluntary conservation efforts. A critical element of updating and improving the Act must be the development of additional voluntary conservation programs.

Proposal: Voluntary conservation efforts should be promoted by: (i) codifying the Administration's programs for Safe Harbor Agreements and ESA Mitigation Banks; (ii) establishing a Critical Habitat Reserve Program (similar to the Conservation Reserve Program established under the Farm Bill); and (iii) enacting separate legislation providing tax incentives to promote species conservation efforts on private property.

(3) Focused Funding of Voluntary and State Programs.

Issue: A significant amount of Federal funding for ESA activities is presently tied up in addressing multiple lawsuits and the review of existing and new listing and critical habitat proposals. In contrast, actual funding for on-the ground projects that will recover species is limited. Federal funding priorities need to be re-focused away from bureaucratic decisions and to active conservation measures that ultimately serve to achieve the objectives of the Act.

Proposal: Re-focus species conservation funding to support the voluntary programs and State-led initiatives described above including the establishment of dedicated funding streams supporting voluntary conservation efforts and State/local initiatives. Other potential improvements could include the development of a tax "check off" to support species conservation efforts in the taxpayers' particular State or the authorization of an "ESA Stamp" that is dedicated to supporting local conservation efforts.

(4) Encouraging Prelisting Measures

Issue: Too often the ESA is hurriedly invoked without consideration of other state, local and private efforts that can and will do a better job of protecting and improving species populations. In determining whether listing of a species is necessary, the existing Act only provides for a limited consideration of State programs that protect species and does not allow the Secretary to consider voluntary programs implemented by private landowners that also protect and enhance species and their habitat.

Proposal: State and local governmental agencies as well as private landowners should be encouraged to develop and implement species and habitat programs for

species that are being considered for listing. The protections afforded by all such programs (including existing activities) should be considered in determining whether the listing is warranted or whether such voluntary programs, other Federal agency programs and State/local conservation efforts already provide sufficient protections and enhancement species populations that application of the ESA is not necessary. As part of such determination, the Secretary also must consider whether the designation of a species as threatened or endangered will hinder or damage existing voluntary conservation efforts and/or State/local programs that protect such species.

(5) Establishing Recovery Objectives

Issue: If a listing of a species is necessary, then we need to identify what is actually required. The present Act does not require the establishment of recovery objectives. Knowing what ultimately must be achieved is a critical first step in understanding what must be done. If the Act is to be successful, there must be a determination of specific recovery goals necessary to reach the point where a species can be downlisted or delisted.

Proposal: In order to enhance and improve efforts for species conservation, the Secretary would be required to determine objective and quantifiable recovery objectives that can serve as guideposts for voluntary conservation efforts. Once the recovery objective is met, the Secretary shall delist or downlist that species. The determination of a recovery objective for a listed species should be based on the best scientific and commercial data available. Further, the Secretary must review and revise the recovery objective 5 years after listing. Any significant changes to the recovery objective should be subject to notice and comment.

(6) Improving Habitat Conservation Planning Procedures and Codifying "No Surprises"

Issue: Habitat conservation plans (HCPs) have been one of the few mechanisms of the Act that have allowed for private conservation efforts. However, the authorization for HCPs is limited to a single sentence in the Act that provides no guidelines, timelines or standards. Further, the Administration's efforts to ensure a level of regulatory certainty in the commitments required under HCPs has been the subject of repeated lawsuits that disrupt and undermine the HCP program.

Proposal: The Act should separately and more comprehensively address HCPs to ensure that the program allows for timely and more certain implementation of these voluntary programs. In addition to streamlining the approval of HCPs (including any required interagency consultations or communications), more consistency must be provided in the development of mitigation standards and necessary elements of HCPs. The mitigation standard for HCPs should be set at a level that meets the HCP goals while providing for minimal interference with planned or existing activities covered by the HCP. Moreover, the "No Surprises" policy must be codified under the Act and procedures established which ensure that other Federal and state agencies do not inappropriately preempt or interfere with the administration or implementation of an approved HCP.

(7) Ensuring an Open and Sound Decisionmaking Process

Issue: A frequent criticism of the Act is that its implementation is hindered by poor decisionmaking procedures that rely upon inadequate scientific data. Further, affected stakeholders are often excluded from key elements of the decisionmaking process, which creates a level of distrust and uncertainty.

Proposal: Listing and critical habitat designations must be based upon the best scientific and commercial data available, with an open and deliberate process of collecting and analyzing such data. The proposal would require that the compilation of scientific and commercial data (including field surveys) on species and its habitat be performed by a panel of qualified individuals including Federal and state agency personnel as well as public volunteers. Further, such data should meet the requirements of the Information Quality Act and its guidelines. Public comment should be received on the data sources to be used, collection methodology, criteria for determining data accuracy and the ultimate data compilation. Where there has been little or no public comment or participation in the data compilation efforts, then peer review should be required to ensure the sufficiency of the data developed for the listing determination.

(8) Removing the Litigation Bottleneck

Issue: The Act is hampered by a multiplicity of lawsuits challenging agency decisions as well as allegations of inaction by the Federal Government. Rather than spending Federal funds on recovering species, Interior and Commerce ESA budgets are dominated by costs related to litigation. Moreover, the Act is increasingly being "run" by the priorities established through litigation rather than a measured estab-

lishment of priorities determined by the Secretary as most effectively protecting and enhancing listed species.

Proposal: The programs established under this proposal would be subject to a single "challenge" period in a United States District Court located in the State where the subject species is located. These review procedures would be similar to the provisions recently adopted under the Healthy Forest Initiative (a new Federal law streamlining forest thinning practices). In order to have standing to challenge an agency action, the party would have had to (1) participated in all necessary public proceedings and comment periods on the particular decision; and (2) provided specific written comments raising its concerns/objections to the Secretary during the decisionmaking process. The courts would be directed to expedite consideration and review of any such challenges.

APPLICABILITY OF CORE PRINCIPLES

The program discussed above envisions the enactment of new provisions of the Act. However, a number of the elements embodied in this proposal such as increasing stakeholder participation, establishing sound decisionmaking procedures and removing litigation bottlenecks can be applied on a broader basis as well. Expanding such reforms to all actions under the Act would allow for comparable treatment between the existing Act and the new programs envisioned under this proposal.