

ENDANGERED SPECIES LITIGATION REASONABLENESS  
ACT

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JULY 17, 2014.—Committed to the Committee of the Whole House on the State of  
the Union and ordered to be printed

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Mr. HASTINGS of Washington, from the Committee on Natural  
Resources, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 4318]

[Including cost estimate of the Congressional Budget Office]

The Committee on Natural Resources, to whom was referred the bill (H.R. 4318) to amend the Endangered Species Act of 1973 to conform citizen suits under that Act with other existing law, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF THE BILL

The purpose of H.R. 4318 is to amend the Endangered Species Act of 1973 to conform citizen suits under that Act with other existing law.

BACKGROUND AND NEED FOR LEGISLATION

H.R. 4318 is intended to standardize the awarding of attorneys' fees to prevailing parties against the federal government, in effect reducing the excessive amount of taxpayer-financed payouts in Endangered Species Act lawsuits.

Under current law, section 2412 of Title 28 of the U.S. Code (the Equal Access to Justice Act or EAJA) limits awards of attorneys' fees to parties that prevail on the merits in lawsuits against the federal government, and provides that "attorney fees shall not be awarded in excess of \$125 per hour unless the court determines

that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.”

While the \$125 per hour EAJA cap is not an insignificant hourly rate for American taxpayers to reimburse successful litigants against the federal government, no similar hourly cap current exists for attorneys’ fees awarded under the Endangered Species Act (ESA), which are distributed from the federal government’s Judgment Fund. In addition, there is no current requirement that parties suing the federal government under the ESA must “prevail” to be awarded attorneys’ fees. It is reasonable, therefore, for successful ESA litigants to abide by the same rules.

H.R. 4318 applies EAJA’s \$125 per hour cap on attorneys’ fees awarded to individuals and groups suing the federal government under the ESA and requires that the party prevail in the case.

The Committee on Natural Resources has received numerous examples of attorneys under the current ESA’s citizen suit provision arguing for and being awarded by federal courts upwards of \$400, \$500, and even \$700 or more per hour in taxpayer-funded fees.

For example, in 2012, Mr. Daniel J. Rohlf, a Lewis and Clark College law professor who also represented Southwest Center for Biological Diversity in a lawsuit involving the construction of a San Diego elementary school due to the existence of a two-inch fairy shrimp, argued that the “prevailing San Diego market rate” for his attorneys fees were reasonable, including his special expertise in challenging ESA habitat conservation plans, vernal pools, and his efficiency in preparing and reviewing legal documents for the case. In the final six years of the litigation, he charged over \$400 per hour, including \$450 per hour in the years in which the school district was blocked from moving forward with construction of the school. He and two other attorneys were awarded over \$650,000 in federal funds, with his fees totaling over \$150,000.

In another example, in March 2012, the National Marine Fisheries Service and the Bonneville Power Administration were involved in a settlement for the payment of attorneys’ fees associated with litigation on biological opinions for operation of several Northwest federal hydroelectric dams that the plaintiffs claimed jeopardized listed salmon. The settlements included payment of \$940,000 in legal fees to the plaintiffs for litigation between 2000 and 2004 and an agreement to pay an additional \$950,000 in legal fees to the plaintiffs for litigation between 2004 and 2008. The plaintiffs were paid an hourly rate of \$200 to \$350 per hour and interns on the case were paid \$100 per hour. Recently, three of same attorneys representing these groups filed a third application for attorneys’ fees at rates of \$500, \$475, and \$400 per hour for a total of \$535,000 for their time between 2010 and 2012. This would amount to a total of more than \$2.4 million in taxpayer-funded fees at rates that have more than doubled in just a few years’ time.

Also in 2012, EarthJustice, a plaintiff with several other groups in a lawsuit challenging the Department of the Interior’s decision to delist the gray wolf, sought over \$630,000 in attorneys’ fees at the rate of over \$300 per hour for the principal attorney.

This bill would not eliminate the ability of aggrieved parties to sue or recover attorneys’ fees under the citizen suit provision of ESA. However, instead of continuing the law that incentivizes liti-

gious attorneys to argue in court for inflated, “market” rates at the taxpayers’ expense, it would allow federal agencies to better prioritize resources that could go to more productive efforts, such as actual on-the-ground conservation efforts for species.

#### COMMITTEE ACTION

H.R. 4318 was introduced on March 27, 2014, by Congressman Bill Huizenga (R-MI). The bill was referred to the Committee on Natural Resources and in addition to the Committee on the Judiciary. On April 8, 2014, the Committee on Natural Resources held a hearing on the bill and on April 30, 2014, the Committee met to consider the bill. Congressman Jared Huffman (D-CA) offered an amendment designated .001 to the bill; the amendment was ruled out of order. No further amendments were offered, and the bill was then adopted and ordered favorably reported to the House of Representatives by a bipartisan roll call vote of 27 to 15, as follows:

## Committee on Natural Resources

U.S. House of Representatives

113th Congress

Date: April 30, 2014

Recorded Vote #: 5

Meeting on / Amendment on: **H.R. 4318 - TO REPORT**, Adopted and favorably reported to the House of Representatives by a roll call vote of 27 yeas and 15 nays.

MEMBERS	Yes	No	Pres	MEMBERS	Yes	No	Pres
<b>Mr. Hastings, WA, Chairman</b>	X			<b>Mr. Duncan of SC</b>	X		
<i>Mr. DeFazio, OR, Ranking</i>		X		<i>Mr. Cardenas, CA</i>		X	
<b>Mr. Young, AK</b>	X			<b>Mr. Tipton, CO</b>	X		
<i>Mr. Faleomavaega, AS</i>				<i>Mr. Huffman, CA</i>		X	
<b>Mr. Gohmert, TX</b>	X			<b>Mr. Gosar, AZ</b>	X		
<i>Mr. Pallone, NJ</i>		X		<i>Mr. Ruiz, CA</i>		X	
<b>Mr. Bishop, UT</b>	X			<b>Mr. Labrador, ID</b>	X		
<i>Ms. Napolitano, CA</i>		X		<i>Ms. Shea-Porter, NH</i>		X	
<b>Mr. Lamborn, CO</b>	X			<b>Mr. Southerland, FL</b>	X		
<i>Mr. Holt, NJ</i>				<i>Mr. Lowenthal, CA</i>		X	
<b>Mr. Wittman, VA</b>	X			<b>Mr. Flores, TX</b>	X		
<i>Mr. Grijalva, AZ</i>		X		<i>Mr. Garcia, FL</i>			
<b>Mr. Broun, GA</b>	X			<b>Mr. Runyan, NJ</b>	X		
<i>Ms. Bordallo, GU</i>		X		<i>Mr. Cartwright, PA</i>		X	
<b>Mr. Fleming, LA</b>	X			<b>Mr. Mullin, OK</b>	X		
<i>Mr. Costa, CA</i>	X			<i>Ms. Clark, MA</i>		X	
<b>Mr. McClintock, CA</b>	X			<b>Mr. Daines, MT</b>	X		
<i>Mr. Sablan, CNMI</i>		X		<b>Mr. Cramer, ND</b>	X		
<b>Mr. Thompson, PA</b>	X			<b>Mr. LaMalfa, CA</b>	X		
<i>Ms. Tsongas, MA</i>		X		<b>Mr. Smith, MO</b>	X		
<b>Mrs. Lummis, WY</b>	X			<b>Mr. McAllister, LA</b>	X		
<i>Mr. Pierluisi, PR</i>				<b>Mr. Byrne, AL</b>	X		
<b>Mr. Benishek, MI</b>	X			<i>Vacancy</i>			
<i>Ms. Hanabusa, HI</i>		X					
				<b>TOTALS</b>	27	15	

## COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Natural Resources' oversight findings and recommendations are reflected in the body of this report.

## COMPLIANCE WITH HOUSE RULE XIII

1. Cost of Legislation. Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out this bill. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974. Under clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of the Congressional Budget Office:

*H.R. 4318—Endangered Species Litigation Reasonableness Act*

CBO estimates that implementing H.R. 4318 would have no significant effect on the federal budget. Enacting the bill would reduce direct spending on attorneys' fees over the 2015–2024 period; therefore, pay-as-you-go procedures apply. However, we estimate that any such effects would be negligible. Enacting the bill would not affect revenues.

Under current law, courts can require the U.S. Treasury to pay reasonable attorneys' fees to plaintiffs who prevail against the federal government in cases brought under the Endangered Species Act (ESA). Under the bill, courts would determine the amount of fees to award using guidelines established under the Equal Access to Justice Act (EAJA), which cap attorneys' fees at \$125 per hour but allow for adjustments for cost of living and special factors, such as the limited availability of qualified attorneys for certain cases. Based on historical information regarding the amounts of attorneys' fees paid to plaintiffs under the ESA and EAJA, CBO expects that amounts awarded to attorneys under the bill would be similar to amounts awarded under current law, and we estimate that enacting the bill would have no significant effect on the federal budget.

H.R. 4318 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contacts for this estimate are Jeff LaFave and Daniel Austin. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

2. Section 308(a) of Congressional Budget Act. As required by clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, this bill does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures. CBO estimates that implementing H.R. 4318 would have no significant effect on the federal budget.

3. General Performance Goals and Objectives. As required by clause 3(c)(4) of rule XIII, the general performance goal or objective of this bill is to amend the Endangered Species Act of 1973 to conform citizen suits under that Act with other existing law.

#### EARMARK STATEMENT

This bill does not contain any Congressional earmarks, limited tax benefits, or limited tariff benefits as defined under clause 9(e), 9(f), and 9(g) of rule XXI of the Rules of the House of Representatives.

#### COMPLIANCE WITH PUBLIC LAW 104-4

This bill contains no unfunded mandates.

#### COMPLIANCE WITH H. RES. 5

Directed Rule Making. The Chairman does not believe that this bill directs any executive branch official to conduct any specific rule-making proceedings.

Duplication of Existing Programs. This bill does not establish or reauthorize a program of the federal government known to be duplicative of another program. Such program was not included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111-139 or identified in the most recent Catalog of Federal Domestic Assistance published pursuant to the Federal Program Information Act (Public Law 95-220, as amended by Public Law 98-169) as relating to other programs.

#### PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

This bill is not intended to preempt any State, local or tribal law.

#### CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

#### **ENDANGERED SPECIES ACT OF 1973**

\* \* \* \* \*

#### PENALTIES AND ENFORCEMENT

SEC. 11. (a) \* \* \*

\* \* \* \* \*

(g) CITIZEN SUITS.—(1) \* \* \*

\* \* \* \* \*

(4) The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) [to any party, whenever the court determines such award is appro-

private.] *to any prevailing party in accordance with section 2412 of title 28, United States Code.*

\* \* \* \* \*

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EXCHANGE OF LETTERS

ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States  
House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6216

(202) 225-3951  
<http://www.house.gov/judiciary>

June 10, 2014

The Honorable Doc Hastings  
Chairman  
Committee on Natural Resources  
1324 Longworth House Office Building  
Washington, DC 20515

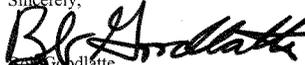
Dear Chairman Hastings,

I am writing with respect to H.R. 4318, the "Endangered Species Litigation Reasonableness Act", which the Committee on Natural Resources reported favorably on April 30, 2014. As a result of your having consulted with us on provisions in H.R. 4318 that fall within the Rule X jurisdiction of the Committee on the Judiciary, I agree to discharge our Committee from further consideration of this bill so that it may proceed expeditiously to the House floor for consideration.

The Judiciary Committee takes this action with our mutual understanding that by foregoing consideration of H.R. 4318 at this time, we do not waive any jurisdiction over the subject matter contained in this or similar legislation, and that our Committee will be appropriately consulted and involved as the bill or similar legislation moves forward so that we may address any remaining issues in our jurisdiction. Our Committee also reserves the right to seek appointment of an appropriate number of conferees to any House-Senate conference involving this or similar legislation, and asks that you support any such request.

I would appreciate a response to this letter confirming this understanding with respect to H.R. 4318, and would ask that a copy of our exchange of letters on this matter be included in the *Congressional Record* during Floor consideration of H.R. 4318.

Sincerely,



Bob Goodlatte  
Chairman

cc: The Honorable John Conyers, Jr.  
The Honorable Peter DeFazio  
The Honorable John Boehner, Speaker  
Mr. Thomas J. Wickham, Jr., Parliamentarian

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**U.S. House of Representatives**  
**Committee on Natural Resources**  
 Washington, DC 20515  
 June 10, 2014

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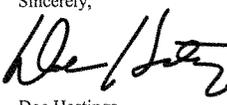
The Honorable Bob Goodlatte  
 Chairman  
 Committee on the Judiciary  
 2138 Rayburn HOB  
 Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your letter regarding H.R. 4318, the Endangered Species Litigation Reasonableness Act. As you know, the Committee on Natural Resources ordered favorably reported the bill without amendment on April 30, 2014. I appreciate your support in bringing this legislation before the House of Representatives, and accordingly, understand that the Committee on the Judiciary will forego action on the bill.

The Committee on Natural Resources concurs with the mutual understanding that by foregoing consideration of H.R. 4318 at this time, the Committee on the Judiciary does not waive any jurisdiction over the subject matter contained in this or similar legislation. In addition, should a conference on the bill be necessary, I would support your request to have the Committee on the Judiciary represented on the conference committee. Finally, I would be pleased to include your letter and this response in the bill report filed by the Committee on Natural Resources, as well as in the *Congressional Record* during floor consideration, to memorialize our understanding.

Thank you for your cooperation.

Sincerely,  
  
 Doc Hastings  
 Chairman

cc: The Honorable John A. Boehner, Speaker  
 The Honorable Peter A. DeFazio  
 The Honorable John Conyers, Jr.  
 The Honorable Bill Huizenga  
 The Honorable Thomas J. Wickham, Parliamentarian

## DISSENTING VIEWS

### H.R. 4318: ENDANGERED SPECIES LITIGATION REASONABLENESS ACT

H.R. 4318 would undermine the citizen suit provisions of the Endangered Species Act (ESA) and, similar to the other ESA bills passed through this Committee by the Majority, would compromise recovery of endangered or threatened species. H.R. 4318 would render the ESA citizen suit provision, currently used to ensure enforcement of the law, ineffective by restricting citizens' ability to recover their true litigation costs if they prevail in court.

There is a presumption in the United States that each party bears its own attorneys' fees. For policy reasons, Congress has reversed this presumption by enacting fee-shifting provisions that authorize the award of attorneys' fees and costs "whenever . . . appropriate" in numerous federal statutes including the: Toxic Substances Control Act; Surfacing Mining Control and Reclamation Act; Clean Water Act; Marine Protection, Research, and Sanctuaries Act; Deepwater Ports Act; Safe Drinking Water Act; Noise Control Act of 1972; Energy Reorganization Act of 1974; Energy Policy and Conservation Act; Solid Waste Disposal Act; CERCLA, and the Outer Continental Shelf Lands Act. Similarly, Congress has done this under the ESA citizen suit provision to allow a prevailing party, including industry plaintiffs, to recover reasonable attorney's fees and costs. In addition, the Republican-led Congress has passed legislation this year that would allow for the recovery of "reasonable attorney's fees and costs" for litigants challenging the federal government under H.R. 1944, the "Private Property Rights Protection Act of 2014."

It is appropriate to expect each party to pay their own attorney's fees in cases where successful; plaintiffs stand to recover damages or win their share of a monetary settlement. However, ESA plaintiffs stand to win nothing personally. That is why Congress has determined that for the ESA and other similar laws, the courts should have the flexibility to make a case-by-case determination regarding a fee award that will make a plaintiff whole. Clearly the Majority agrees with this based on their support of H.R. 1944. Unfortunately, H.R. 4318 would change this common-sense, market-based, recovery fee provision, but only for the ESA.

Instead, H.R. 4318 would require an Equal Access to Justice Act fee-shifting regime, a more restrictive attorney's fee recovery law that is typically considered a safety-net for fee recovery when the primary statute does not have a citizen suit provision like the one found in the ESA.

The bill further complicates matters by making it unclear whether it would require the agencies to pay fee awards to prevailing parties from their own agency appropriations, as opposed to the Equal Access to Judgment Fund. Under current law, fees are paid

from either appropriated funds or the Judgment fund, depending on the circumstances of the case. If, however, agencies would now be required to pay all fees from their appropriated funds as the supporters of the bill seem to imply, this would certainly divert agency resources and detract from the agencies' core mission of recovering species. For all of these reasons, we strongly oppose the bill as reported.

PETER DEFAZIO,  
Ranking Member, Com-  
mittee on Natural Re-  
sources.

RAÚL M. GRIJALVA.

GRACE F. NAPOLITANO.

GREGORIO KILILI CAMACHO

SABLAN.

ENI F.H. FALEOMAVAEGA.

RUSH HOLT.

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