

ENDANGERED SPECIES LITIGATION REASONABLENESS
ACT

FEBRUARY 15, 2018.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed

Mr. BISHOP of Utah, from the Committee on Natural Resources,
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 3131]

[Including cost estimate of the Congressional Budget Office]

The Committee on Natural Resources, to whom was referred the bill (H.R. 3131) 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. 3131 is to amend the Endangered Species Act of 1973 to conform citizens suits under that Act with other existing law.

BACKGROUND AND NEED FOR LEGISLATION

In the United States, parties to litigation traditionally pay their own court costs and attorneys' fees. However, fee-shifting statutes permit awards of litigation costs to plaintiffs in certain circumstances, and the Equal Access to Justice Act (EAJA) authorizes a "prevailing party" to collect attorneys' fees in litigation against the federal government. (EAJA, 28 U.S.C. 2412). EAJA also 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 liv-

ing or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee”.

Under the citizen suit provision in the Endangered Species Act of 1973 (ESA, 16 U.S.C. 1540(g)(4)), a court can award costs, including attorneys’ and expert witness fees, to private parties. However, ESA’s fee-shifting provision places no cap on hourly attorneys’ fees and does not require a litigant to “prevail” to recover attorneys’ fees.

In setting attorneys’ fee rates, courts apply the “lodestar” method by multiplying the hours reasonably spent on a case by a reasonable hourly rate. The reasonable hourly rate accounts for “the rate prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation,” often in private practice (*Conservation Law Found. of New England, Inc. v. Watt*, 654 F. Supp. 706 (D. Mass 1984)).

Special interest attorneys representing environmental groups argue that their expertise is “specialized” to justify substantial, uncapped fees. Some special interest attorneys have collected fees as high as \$750 taxpayer dollars per hour. A 2014 Natural Resources Committee ESA Congressional Working Group report analyzed records from the Department of Justice and found at least two such attorneys have garnered more than \$2 million in attorneys’ fees by filing ESA suits.¹ The taxpayer-funded Judgment Fund serves as the source for ESA-related attorneys’ fees payments.

H.R. 3131 would require ESA litigants to abide by the same rules as others suing the federal government, requiring plaintiffs to prevail to collect attorneys’ fees, as well as impose the \$125 fee cap set by EAJA. Capable environmental attorneys are no longer rare or specialized to the point where uncapped attorneys’ fees are justified. While this legislation does not restrict aggrieved parties’ ability to seek redress in court, it removes an incentive for litigious plaintiffs to request large fee awards and safeguards taxpayer dollars against abusive litigation.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

This Act may be cited as the Endangered Species Litigation Reasonableness Act.

Section 2. Award of litigation costs to prevailing parties in accordance with existing law

This section amends section 11(g)(4) of the ESA to require awarding of attorneys’ fees in accordance with the EAJA.

COMMITTEE ACTION

H.R. 3131 was introduced on June 29, 2017, 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 July 19, 2017, the Committee held a hearing on the bill. On October 3, 2017, the Natural Resources Committee met to consider the bill. No amendments were offered and the bill was ordered fa-

¹ Endangered Species Act Cong. Working Group, 113th Cong., Reports, Findings and Recommendations (2014), available at https://naturalresources.house.gov/uploadedfiles/esa_working_group_final_report_and_recommendations_02_04_14.pdf.

vorably reported to the House of Representatives on October 4, 2017, by a roll call vote of 22 ayes and 16 noes, as follows:

Committee on Natural Resources
U.S. House of Representatives
115th Congress

Date: 10-04-17

Recorded Vote #: 3

Meeting on / Amendment on: FC Mark Up on Favorably Reporting H.R. 3131 (Rep. Bill Huizenga), To amend the Endangered Species Act of 1973 to conform citizen suits under that Act with other existing law, and for other purposes. "Endangered Species Litigation Reasonableness Act"

MEMBERS	Yes	No	Pres	MEMBERS	Yes	No	Pres
Mr. Bishop, UT, Chairman	X			Mr. Cook, CA	X		
<i>Mr. Grijalva, AZ, Ranking Member</i>		X		<i>Mr. Soto, FL</i>		X	
Mr. Young, AK, Chairman Emeritus	X			Mr. Westerman, AR	X		
<i>Mrs. Napolitano, CA</i>		X		<i>Mr. McEachin, VA</i>		X	
Mr. Gohmert, TX, Vice Chairman	X			Mr. Graves, LA	X		
<i>Ms. Bordallo, Guam</i>		X		<i>Mr. Brown, MD</i>		X	
Mr. Lamborn, CO	X			Mr. Hice, GA	X		
<i>Mr. Costa, CA</i>		X		<i>Mr. Clay, MO</i>		X	
Mr. Wittman, VA	X			Mrs. Radewagen, AS	X		
<i>Mr. Sablan, CNMI</i>				<i>Mr. Gomez, CA</i>		X	
Mr. McClintock, CA	X			Mr. LaHood, IL	X		
<i>Ms. Tsongas, MA</i>		X		Mr. Webster, FL	X		
Mr. Pearce, NM				Mr. Bergman, MI	X		
<i>Mr. Huffman, CA</i>		X		Ms. Cheney, WY	X		
Mr. Thompson, PA	X			Mr. Johnson, LA	X		
<i>Mr. Lowenthal, CA</i>		X		Ms. González-Colón, PR	X		
Mr. Gosar, AZ	X			Mr. Gianforte, MT	X		
<i>Mr. Beyer, VA</i>		X					
Mr. Labrador, ID							
<i>Mrs. Torres, CA</i>		X					
Mr. Tipton, CO	X						
<i>Mr. Gallego, AZ</i>							
Mr. LaMalfa, CA	X						
<i>Ms. Hanabusa, HI</i>		X					
Mr. Denham, CA							
<i>Ms. Barragán, CA</i>		X		TOTAL:	22	16	

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 AND CONGRESSIONAL BUDGET ACT

1. Cost of Legislation and the Congressional Budget Act. With respect to the requirements of clause 3(c)(2) and (3) of rule XIII of the Rules of the House of Representatives and sections 308(a) and 402 of the Congressional Budget Act of 1974, the Committee has received the following estimate for the bill from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 12, 2018.

Hon. ROB BISHOP,
*Chairman, Committee on Natural Resources,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3131, the Endangered Species Litigation Reasonableness Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Jeff LaFave.

Sincerely,

KEITH HALL,
Director.

Enclosure.

H.R. 3131—Endangered Species Litigation Reasonableness Act

Under current law, courts can require the 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 in such cases using guidelines established under the Equal Access to Justice Act (EAJA). That act caps attorneys' fees at \$125 per hour but allows for adjustments for the cost of living and other 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 the EAJA, CBO expects that amounts awarded to attorneys under the bill would be slightly less than amounts awarded under current law; the total decrease in direct spending for those fees would be insignificant.

Because enacting the bill would affect direct spending, pay-as-you-go procedures apply. Enacting the bill would not affect revenues.

Enacting H.R. 3131 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 3131 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

The CBO staff contact for this estimate is Jeff LaFave. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

2. 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 citizens 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. This bill does not contain any directed rule makings.

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 italics, and existing law in which no change is proposed is shown in roman):

ENDANGERED SPECIES ACT OF 1973

* * * * *

PENALTIES AND ENFORCEMENT

SEC. 11. (a) CIVIL PENALTIES.—(1) Any person who knowingly violates, and any person engaged in business as an importer or exporter of fish, wildlife, or plants who violates, any provision of this Act, or any provision of any permit or certificate issued hereunder, or of any regulation issued in order to implement subsection (a)(1)(A), (B), (C), (D), (E), or (F), (a)(2)(A), (B), (C), or (D), (c), (d),

(other than regulation relating to recordkeeping or filing of reports), (f), or (g) of section 9 of this Act, may be assessed a civil penalty by the Secretary of not more than \$25,000 for each violation. Any person who knowingly violates, and any person engaged in business as an importer or exporter of fish, wildlife, or plants who violates, any provision of any other regulation issued under this Act may be assessed a civil penalty by the Secretary of not more than \$12,000 for each such violation. Any person who otherwise violates any provision of this Act, or any regulation, permit, or certificate issued hereunder, may be assessed a civil penalty by the Secretary of not more than \$500 for each such violation. No penalty may be assessed under this subsection unless such person is given notice and opportunity for a hearing with respect to such violation. Each violation shall be a separate offense. Any such civil penalty may be remitted or mitigated by the Secretary. Upon any failure to pay a penalty assessed under this subsection, the Secretary may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found, resides, or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action. The court shall hear such action on the record made before the Secretary and shall sustain his action if it is supported by substantial evidence on the record considered as a whole.

(2) Hearings held during proceedings for the assessment of civil penalties by paragraph (1) of this subsection shall be conducted in accordance with section 554 of title 5, United States Code. The Secretary may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and administer oaths. Witnesses summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpoena served upon any person pursuant to this paragraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Secretary or to appear and produce documents before the Secretary, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(3) Notwithstanding any other provision of this Act, no civil penalty shall be imposed if it can be shown by a preponderance of the evidence that the defendant committed an act based on a good faith belief that he was acting to protect himself or herself, a member of his or her family, or any other individual from bodily harm, from any endangered or threatened species.

(b) CRIMINAL VIOLATIONS.—(1) Any person who knowingly violates any provision of this Act, of any permit or certificate issued hereunder, or of any regulation issued in order to implement subsection (a)(1)(A), (B), (C), (D), (E), or (F); (a)(2)(A), (B), (C), or (D), (c), (d) (other than a regulation relating to recordkeeping, or filing of reports), (f), or (g) of section 9 of this Act shall, upon conviction, be fined not more than \$50,000 or imprisoned for not more than one year, or both. Any person who knowingly violates any provision of any other regulation issued under this Act shall, upon conviction,

tion, be fined not more than \$25,000 or imprisoned for not more than six months, or both.

(2) The head of any Federal agency which has issued a lease, license, permit, or other agreement authorizing a person to import or export fish, wildlife, or plants, or to operate a quarantine station for imported wildlife, or authorizing the use of Federal lands, including grazing of domestic livestock, to any person who is convicted of a criminal violation of this Act or any regulation, permit, or certificate issued hereunder may immediately modify, suspend, or revoke each lease, license, permit, or other agreement. The Secretary shall also suspend for a period of up to one year, or cancel, any Federal hunting or fishing permits or stamps issued to any person who is convicted of a criminal violation of any provision of this Act or any regulation, permit, or certificate issued hereunder. The United States shall not be liable for the payments of any compensation, reimbursement, or damages in connection with the modification, suspension, or revocation of any leases, licenses, permits, stamps, or other agreements pursuant to this section.

(3) Notwithstanding any other provision of this Act, it shall be a defense to prosecution under this subsection if the defendant committed the offense based on a good faith belief that he was acting to protect himself or herself, a member of his or her family, or any other individual, from bodily harm from any endangered or threatened species.

(c) DISTRICT COURT JURISDICTION.—The several district courts of the United States; including the courts enumerated in section 460 of title 28, United States Code, shall have jurisdiction over any actions arising under this Act. For the purpose of this Act, American Samoa shall be included within the judicial district of the District Court of the United States for the District of Hawaii.

(d) REWARDS AND CERTAIN INCIDENTAL EXPENSES.—The Secretary or the Secretary of the Treasury shall pay, from sums received as penalties, fines, or forfeitures of property for any violations of this chapter or any regulation issued hereunder (1) a reward to any person who furnishes information which leads to an arrest, a criminal conviction, civil penalty assessment, or forfeiture of property for any violation of this chapter or any regulation issued hereunder, and (2) the reasonable and necessary costs incurred by any person in providing temporary care for any fish, wildlife, or plant pending the disposition of any civil or criminal proceeding alleging a violation of this chapter with respect to that fish, wildlife, or plant. The amount of the reward, if any, is to be designated by the Secretary or the Secretary of the Treasury, as appropriate. Any officer or employee of the United States or any State or local government who furnishes information or renders service in the performance of his official duties is ineligible for payment under this subsection. Whenever the balance of sums received under this section and section 6(d) of the Act of November 16, 1981 (16 U.S.C. 3375(d)) as penalties or fines, or from forfeitures of property, exceed \$500,000, the Secretary of the Treasury shall deposit an amount equal to such excess balance in the cooperative endangered species conservation fund established under section 6(i) of this Act.

(e) ENFORCEMENT.—(1) The provisions of this Act and any regulations or permits issued pursuant thereto shall be enforced by the

Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating, or all such Secretaries. Each such Secretary may utilize by agreement, with or without reimbursement, the personnel, services, and facilities of any other Federal agency or any State agency for purposes of enforcing this Act.

(2) The judges of the district courts of the United States and the United States magistrates may within their respective jurisdictions, upon proper oath or affirmation showing probable cause, issue such warrants or other process as may be required for enforcement of this Act and any regulation issued thereunder.

(3) Any person authorized by the Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating, to enforce this Act may detain for inspection and inspect any package, crate, or other container, including its contents, and all accompanying documents, upon importation or exportation. Such persons may make arrests without a warrant for any violation of this Act if he has reasonable grounds to believe that the person to be arrested is committing the violation in his presence or view and may execute and serve any arrest warrant, search warrant, or other warrant or civil or criminal process issued by any officer or court of competent jurisdiction for enforcement of this Act. Such person so authorized may search and seize, with or without a warrant, as authorized by law. Any fish, wildlife, property, or item so seized shall be held by any person authorized by the Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating pending disposition of civil or criminal proceedings, or the institution of an action in rem for forfeiture of such fish, wildlife, property, or item pursuant to paragraph (4) of the subsection; except that the Secretary may, in lieu of holding such fish, wildlife, property, or item, permit the owner or consignee to post a bond or other surety satisfactory to the Secretary, but upon forfeiture of any such property to the United States, or the abandonment or waiver of any claim to any such property, it shall be disposed of (other than by sale to the general public) by the Secretary in such a manner, consistent with the purposes of this Act, as the Secretary shall by regulation prescribe.

(4)(A) All fish or wildlife or plants taken, possessed, sold, purchased, offered for sale or purchase, transported, delivered, received, carried, shipped, exported, or imported contrary to the provisions of this Act, any regulation made pursuant thereto, or any permit or certificate issued hereunder shall be subject to forfeiture to the United States.

(B) All guns, traps, nets, and other equipment, vessels, vehicles, aircraft, and other means of transportation used to aid the taking, possessing, selling, purchasing, offering for sale or purchase, transporting, delivering, receiving, carrying, shipping, exporting, or importing of any fish or wildlife or plants in violation of this Act, any regulation made pursuant thereto, or any permit or certificate issued thereunder shall be subject to forfeiture to the United States upon conviction of a criminal violation pursuant to section 11(b)(1) of this Act.

(5) All provisions of law relating to the seizure, forfeiture, and condemnation of a vessel for violation of the customs laws, the dis-

position of such vessel or the proceeds from the sale thereof, and the remission or mitigation of such forfeiture, shall apply to the seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this Act, insofar as such provisions of law are applicable and not inconsistent with the provisions of this Act; except that all powers, rights, and duties conferred or imposed by the customs laws upon any officer or employee of the Treasury Department shall, for the purposes of this Act, be exercised or performed by the Secretary or by such persons as he may designate.

(6) The Attorney General of the United States may seek to enjoin any person who is alleged to be in violation of any provision of this Act or regulation issued under authority thereof.

(f) REGULATIONS.—The Secretary, the Secretary of the Treasury, and the Secretary of the Department in which the Coast Guard is operating, are authorized to promulgate such regulations as may be appropriate to enforce this Act, and charge reasonable fees for expenses to the Government connected with permits or certificates authorized by this Act including processing applications and reasonable inspections, and with the transfer, board, handling, or storage of fish or wildlife or plants and evidentiary items seized and forfeited under this Act. All such fees collected pursuant to this subsection shall be deposited in the Treasury to the credit of the appropriation which is current and chargeable for the cost of furnishing the services. Appropriated funds may be expended pending reimbursement from parties in interest.

(g) CITIZEN SUITS.—(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this Act or regulation issued under the authority thereof; or

(B) to compel the Secretary to apply, pursuant to section 6(g)(2)(B)(ii) of this Act, the prohibitions set forth in or authorized pursuant to section 4(d) or section 9(a)(1)(B) of this Act with respect to the taking of any resident endangered species or threatened species within any State; or

(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 4 which is not discretionary with the Secretary.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation or to order the Secretary to perform such act or duty, as the case may be. In any civil suit commenced under subparagraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.

(2)(A) No action may be commenced under subparagraph (1)(A) of this section—

(i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation;

(ii) if the Secretary has commenced action to impose a penalty pursuant to subsection (a) of this section; or

(iii) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of any such provision or regulation.

(B) No action may be commenced under subparagraph (1)(B) of this section—

(i) prior to sixty days after written notice has been given to the Secretary setting forth the reasons why an emergency is thought to exist with respect to an endangered species or a threatened species in the State concerned; or

(ii) if the Secretary has commenced and is diligently prosecuting action under section 6(g)(2)(B)(ii) of this Act to determine whether any such emergency exists.

(C) No action may be commenced under subparagraph (1)(C) of this section prior to sixty days after written notice has been given to the Secretary; except that such action may be brought immediately after such notification in the case of an action under this section respecting an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants.

(3)(A) Any suit under this subsection may be brought in the judicial district in which the violation occurs.

(B) In any such suit under this subsection in which the United States is not a party, the Attorney General, at the request of the Secretary, may intervene on behalf of the United States as a matter of right.

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

(5) The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Secretary or a State agency).

(h) COORDINATION WITH OTHER LAWS.—The Secretary of Agriculture and the Secretary shall provide for appropriate coordination of the administration of this Act with the administration of the animal quarantine laws (as defined in section 2509(f) of the Food, Agriculture, Conservation, and Trade Act of 1990 (21 U.S.C. 136a(f)) and section 306 of the Tariff Act of 1930 (19 U.S.C. 1306). Nothing in this Act or any amendment made by this Act shall be construed as superseding or limiting in any manner the functions of the Secretary of Agriculture under any other law relating to prohibited or restricted importations or possession of animals and other articles and no proceeding or determination under this Act shall preclude any proceeding or be considered determinative of any issue of fact or law in any proceeding under any Act administered by the Secretary of Agriculture. Nothing in this Act shall be construed as superseding or limiting in any manner the functions and responsibilities of the Secretary of the Treasury under the Tariff Act of 1930, including, without limitation, section 527 of that Act

(19 U.S.C. 1527), relating to the importation of wildlife taken, killed, possessed, or exported to the United States in violation of the laws or regulations of a foreign country.

* * * * *

ROB BISHOP OF UTAH
CHAIRMAN

CODY STEWART
STAFF DIRECTOR

RAUL GRIJALVA OF ARIZONA
RANKING MEMBER

DAVID WATKINS
DEMOCRATIC STAFF DIRECTOR

COMMITTEE CORRESPONDENCE
U.S. House of Representatives
Committee on Natural Resources
Washington, DC 20515

November 15, 2017

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
2138 Rayburn HOB
Washington, DC 20515

Dear Mr. Chairman:

On October 4, 2017, the Committee on Natural Resources ordered favorably reported H.R. 3131, the Endangered Species Litigation Reasonableness Act. This bill was additionally referred to the Committee on the Judiciary.

I ask that the Committee on the Judiciary not insist on its referral of the bill so that H.R. 3131 may be scheduled for consideration by the Majority Leader. This concession in no way affects your jurisdiction over the subject matter of the bill, and it will not serve as precedent for future referrals. 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 this letter and your response in the bill report and in the Congressional Record.

Thank you for your consideration of my request and for the extraordinary cooperation shown by you and your staff on matters of shared jurisdiction. I look forward to further opportunities to work with you over the remainder of the Congress.

Sincerely,



Rob Bishop
Chairman
Committee on Natural Resources

cc: The Honorable Paul D. Ryan, Speaker
The Honorable Kevin McCarthy, Majority Leader
The Honorable Raul Grijalva, Ranking Member, Committee on Natural Resources
The Honorable Thomas J. Wickham, Jr., Parliamentarian

BOB GOODLATTE, Virginia
CHAIRMAN

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KAREN HANDEL, Georgia

ONE HUNDRED FIFTEENTH CONGRESS
Congress of the United States
House of Representatives

COMMITTEE ON THE JUDICIARY

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November 15, 2017

JOHN CONYERS, JR., Michigan
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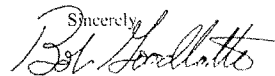
The Honorable Rob Bishop
Chairman
Committee on Natural Resources
1324 Longworth House Office Building
Washington, D.C. 20515

Dear Chairman Bishop,

I write with respect to H.R. 3131, the "Endangered Species Litigation Reasonableness Act." As a result of your having consulted with us on provisions within H.R. 3131 that fall within the Rule X jurisdiction of the Committee on the Judiciary, I forego any 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. 3131 at this time, we do not waive any jurisdiction over subject matter contained in this or similar legislation and that our committee will be appropriately consulted and involved as this 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. 3131 and would ask that a copy of our exchange of letters on this matter be included in your committee report on this bill and in the *Congressional Record* during floor consideration of H.R. 3131.

Sincerely,


Bob Goodlatte
Chairman

cc: The Honorable John Conyers, Jr.
The Honorable Raúl Grijalva
The Honorable Paul Ryan, Speaker
The Honorable Thomas Wickham, Jr., Parliamentarian

DISSENTING VIEWS

H.R. 3131 would undermine the citizen suit provision 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. 3131 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; Surface Mining Control and Reclamation Act; Clean Water Act; Safe Drinking Water Act; CERCLA, and others. 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.

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 do not stand to win anything personally. That is why Congress has determined that, the courts, with respect to the ESA and other similar laws, should have the flexibility to make a case-by-case determination regarding a fee award that will make a plaintiff whole.

But H.R. 3131 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 Judgment Fund. Under current law, fees are paid from either appropriated funds or the Judgment Fund depending on the circumstances of the case. However, if agencies were required to pay all fees from their appropriated funds as the supporters of the bill seem to imply, this would 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.

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