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Testimony on “The Endangered Species Act: How Litigation Is Costing Jobs and
Impeding True Recovery Efforts”
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The effectiveness of the Endangered Species Act cannot be measured by the number of delisted species because the vast majority of species have not yet reached their scheduled recovery date.

“Evaluating success as a measure of how many species are delisted is a non-informative metric.”

The Performance of the Endangered Species Act
Schwartz (2008)

“The recovery plans we reviewed indicated that species were not likely to be recovered for up to 50 years. Therefore, simply counting the number of extinct and recovered species periodically or over time, without considering the recovery prospects of listed species, provides limited insight into the overall success of the services’ recovery programs.”

Endangered Species: Time and Costs Required to Recover Species Are Largely Unknown
Government Accountability Office (2006)

Critics of the Endangered Species Act often complain that the law is failing because only 1% of endangered species have recovered and been removed from the list. These critics, however, have never explained *why* they think more species should have recovered by now. They conspicuously fail to provide scientific support for the contention. They fail because the claim is illogical and contrary to scientific expectations. As quoted above, scientists and the U.S. GAO have examined the critique and declared it meaningless.

It is meaningless because the timeline and action blueprint for recovery of endangered species is established in federal recovery plans and those plans stipulate that few species should have been recovered by now. There are currently 1,396 species protected under the Endangered Species Act. On average, they have been on the list 21 years. Their federal recovery plans, however, expect that on average they will take 42 years from listing to be recovered. To complain that a species did not recover 21 years prior to the conservation timeline established in its recovery plan is like declaring an antibiotic to be a failure because it did not cure an infection on the first day of a ten day course.

Hundreds of listed species have strong recovery trends but, as per their federal recovery plans, will not reach full recovery for several decades. Their progress is indicative of the Endangered Species Act's effectiveness despite the fact they are not yet recovered. Here are just a few examples:

Whooping Crane. The whooping crane was listed as an endangered species in 1967. Its recovery plan anticipated downlisting to threatened status in 2035, *68 years from listing*. Full delisting would likely take until at least 2050, *83 years from listing*. The population has grown from 54 birds (48 wild and 6 captive) at the time of listing in 1967 to 599 in 2011.

Shortnose Sturgeon. The shortnose sturgeon was listed as an endangered species in 1967. Its recovery plan anticipates delisting in 2024, *57 years from listing*. Most of the sturgeon's 19 distinct populations have increased. The majority of fish occur in the Hudson River population, which increased from 12,669 fish in 1979 to 56,708 in 1994-1996.

Hawaiian Goose. The Hawaiian goose was listed as endangered in 1967. Its recovery plan anticipates delisting in 2034, *67 years from listing*. The population increased from 300 birds in 1980 to 1,744 in 2006.

Florida Panther. The Florida panther was listed as endangered in 1967. Its recovery plan anticipates delisting in 2083, *116 years from listing*. Panthers increased substantially from about 30-40 individuals in the 1980s to 87 in 2003 and 130 in 2010.

Utah Prairie Dog. The Utah prairie dog was listed as endangered in 1973 and downlisted to threatened in 1984. Its recovery plan anticipates delisting in 2040, *67 years from listing*. The number of prairie dogs increased from 3,300 in 1973 to 11,296 in 2010.

Measured by its three goals, the Endangered Species Act is remarkably effective.

“Critics, on the other hand, counter that it is an indication of the act's failure that only 17 of these species have “recovered,” or improved to the point that they no longer need the act's protection. However, we believe that these numbers, by themselves, are not a good gauge of the act's success or failure; additional information on when, if at all, a species can be expected to fully recover and be removed from the list would provide needed context for a fair evaluation of the act's performance.”

Endangered Species: Time and Costs Required to Recover Species Are Largely Unknown
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The Endangered Species Act is designed to prevent declining species from going extinct, turn their populations around so they increase toward recovery, and achieve recovery on the timeline set out in their federal recovery plans. As described below in greater detail, the Endangered Species Act has been remarkably effective on these three fronts:

Prevention of extinction: 99.9 percent effective
 Population growth toward recovery goals: 93 percent effective
 Recovery within the time frame established by federal recovery plans: 82 percent effective

Goal 1: Extinction Prevention

Ten species have been delisted because of extinction. Eight of these were extinct *before* being protected under the Endangered Species Act. Two went extinct while listed. Thus the Act has 99.9-percent success rate in preventing the extinction of the 1,445 species placed on the domestic threatened and endangered lists.

Ten Species Delisted Due to Extinction

| Delisting Year | Species | Status |
|----------------|----------------------------|------------------------|
| 2008 | West Indian monk seal | Extinct before listing |
| 2004 | Guam broadbill | Extinct before listing |
| 2004 | Marianna mallard | Extinct after listing |
| 1990 | Dusky seaside sparrow | Extinct after listing |
| 1987 | Amistad gambusia | Extinct before listing |
| 1984 | Wabash riffleshell | Extinct before listing |
| 1983 | Blue pike | Extinct before listing |
| 1983 | Santa Barbara song sparrow | Extinct before listing |
| 1983 | Longjaw cisco | Extinct before listing |
| 1982 | Tecopa pupfish | Extinct before listing |

It should be noted that even without protection, not all 1,445 species would have become extinct by 2011. The polar bear, for example, is projected to be extirpated from the United States by 2050 and become completely extinct by the turn of the century if its habitat is not stabilized. To determine how many species would likely have gone extinct by now, U.S. Geological Survey scientist Michael Scott compared the actual and projected extinction rate of listed species, finding that Endangered Species Act prevented the extinction of 227 species (Scott and Goble 2006).

Goal 2: Moving Species Toward Recovery

On a biennial basis, the U.S. Fish and Wildlife Service scores all listed species as *improving*, *stable*, *declining* or *unknown*. Sixty-eight percent of species listed for at least six years with a known score were stable or improving (U.S. Fish and Wildlife Service 2005). This is impressive, given that most species are declining and at very low population numbers at the time they are listed (Wilcove *et al.* 1993). It must be noted, however, that these trend scores only reflect a brief

two-year period; they don't cover the trend since listing. The data are also limited because they include threat assessments, rather than being limited to population-size trends. This is not to say the data are erroneous or in any way wanting, they are simply not designed to reveal long-term, quantitative species population trends.

The largest study to quantitatively examine changes in population size since species were listed is *Measuring the Success of the Endangered Species Act: Recovery Trends in the Northeastern United States* (Suckling 2007). It examined the population trend and federal recovery plan expectations of all threatened and endangered species in the eight Northeast states: Maine, Vermont, New Hampshire, Massachusetts, Connecticut, Rhode Island, New York and New Jersey. It found that:

- None of the species went extinct after being listed.
- 93 percent increased in population size or remained stable since being listed.

Goal 3: Recovery Within the Time Frame Established by Federal Recovery Plans

The Northeast species were listed for an average of 24 years, while their federal recovery plans established recovery processes averaging 42 years. Thus not surprisingly, the recovery plans only expected 11 of the species to have been delisted. In fact, nine had been delisted, downlisted or proposed for such action. That the actual recovery trend is so close to that expected by recovery plans (=82 percent) is promising, given that the vast majority of the recovery plans were substantially underfunded.

Litigation has aided recovery efforts

Listing under the Endangered Species Act, the length of time listed, and the existence of critical habitat are correlated with positive recovery trends (Suckling *et al.* 2004, Taylor *et al.* 2007). Unlisted species have a much higher extinction rate than listed species. Species are more likely to be improving the longer they are listed. Species are twice as likely to be improving if they have critical habitat than if they do not.

A large percent (possibly the majority) of environmental lawsuits have sought to place species on the endangered species list and designate critical habitat for those already on the list. Environmental litigation has thus consciously sought to maximize actions known to improve species recovery status. The vast majority of these lawsuits have succeeded, causing the rate of species listings, the length of species listings and the designation of critical habitat designation to increase (Taylor *et al.* 2007, Greenwald *et al.* 2006, Parenteau 2005).

The third most common type of environmental litigation has been to ensure that federal agencies consult with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service when they conduct actions which may jeopardize the existence of endangered species. These consultations rarely stop projects from occurring, but often result in their negative impacts being reduced and/or mitigation measures being increase.

An example of this type of litigation is a suit by the Center for Biological Diversity forcing the Bureau of Reclamation to consult with the U.S. Fish and Wildlife Service over its plan to increase the height of Roosevelt Dam on the Salt and Tonto Rivers in central Arizona. The consultation allowed the project to occur, but required the Bureau to expend \$4 million purchasing and managing riparian habitat for the Southwestern willow flycatcher on the San Pedro River. The riparian habitat on that area has been restored, its flycatcher population has increased in size, and the species is closer to meeting its recovery goal.

Another example is litigation by the Center for Biological Diversity forcing the Bureau of Land Management to consult with the U.S. Fish and Wildlife over the impact its grazing, mining, and road building programs were having on 24 threatened and endangered species within the 24 million acre California Desert Conservation Area. Most of the activities were allowed to continue with mitigation measures and safeguards, some grazing allotments were purchased to eliminate sheep grazing, and some portions of some roads were closed. These actions have greatly benefited endangered species there, contributing to the population growth of the desert bighorn sheep and other listed plants and animals.

Expenses associated with Endangered Species Act litigation are a very small portion of the U.S. Fish and Wildlife Service's budget

In a September 11, 2011 letter to the Association of Fish and Wildlife Agencies (see Attachment A), the U.S. Fish and Wildlife Service disclosed that in 2010 it spent \$1.24 million to “manage, coordinate, track, and support ESA litigation” brought by environmental and industry groups. This amounts to one half of one percent of the endangered species budget, which was over \$275 million in 2010. According to the letter, the amount the Service spent on litigation has remained relatively constant over the last ten years, meaning 2010 was a typical year in terms of the very small percentage of the endangered species budget that is spent managing litigation.

A large percent of Endangered Species Act litigation is brought by industry groups

Industry groups, lobbyists and lawyers—and many in Congress closely associated with them—have complained that environmental groups file too many Endangered Species Act lawsuits. These groups, however, have never complained about lawsuits filed by industry groups. Nor have they provided evidence that environmentalists file more lawsuits—or more expensive lawsuits—than industry interests.

In fact, 80% of all active critical habitat litigation in 2005 was filed by industry groups (Parenteau 2006).

Similarly, the U.S. Government Accountability Office (USGAO 2011) recently found that industry groups filed 48% of lawsuits against the Environmental Protection Agency while environmental groups filed 30%.

The Center for Biological Diversity receives little income from federal litigation fee and cost recovery

Despite wildly erroneous and highly exaggerated claims by Karen Budd-Falen and other industry funded “researchers”, the Center for Biological Diversity receives little money from recovery of fees and costs in federal litigation, and even less under the Equal Access to Justice Act:

| | Federal Litigation Fees & Costs Retained | Federal Litigation Fees & Costs Retained as % of Organizational Income | EAJA Fees & Costs Retained | EAJA Fees & Costs Retained as % of Organizational Income |
|------|--|--|----------------------------|--|
| 2001 | 2,295 | n/a | 0 | n/a |
| 2002 | 49,125 | 3.1% | 0 | 0.0% |
| 2003 | 93,096 | 3.1% | 0 | 0.0% |
| 2004 | 111,768 | 5.0% | 0 | 0.0% |
| 2005 | 307,537 | 8.6% | 45,000 | 1.3% |
| 2006 | 43,512 | 1.1% | 0 | 0.0% |
| 2007 | 460,004 | 7.6% | 10,143 | 0.2% |
| 2008 | 365,477 | 4.0% | 145,444 | 1.6% |
| 2009 | 341,676 | 4.4% | 7,570 | 0.1% |
| 2010 | 249,475 | 3.1% | 7,505 | 0.1% |

Budd-Falen’s complaints and calls for disclosure of environmental group fee awards are extraordinarily hypocritical in that her law firm receives substantial income from fee returns, yet she has never disclose the amount. Indeed in 2001, Budd-Falen received \$100,000 from a *single* lawsuit fee return, dwarfing retained federal fees from *all* Center for Biological Diversity suits in that year (\$2,295).

Another example this hypocrisy is the Pacific Legal Foundation. While railing against environmental groups for recovering litigation fees and costs, it often recovers much greater sums than the Center for Biological Diversity. In 2008, for example, the Pacific Legal Foundation recovered \$1,400,577 in fees, dwarfing the Center’s retention of just \$365,477 in federal fees and costs. In 2009, the Pacific Legal Foundation recovered \$793,358, while the Center retained just \$341,676.

Note the Center is not complaining about Budd-Falen or the Pacific Legal Foundation recovering legal fees and costs. Such awards are a proper and integral part of our legal system. They level the playing field so that all Americans have equal access to justice.

Our complaint is that such groups and their Congressional allies hypocritically ignore all industry suits and fee recoveries, while complaining bitterly about environmental suits. It is clear

that their interest is not all about litigation or fee recovery in general, it is only about litigation they believe hinders the access of their industry allies to public resources.

References

Greenwald, D.N., K.F. Suckling and M.F.J. Taylor, M.F.J., 2006. Factors Affecting the Rate and Taxonomy of Species Listings under the US Endangered Species Act. In Goble, D, Scott, M.J. & Davis, F.W. (eds.), *The Endangered Species Act at Thirty: Renewing the Conservation Commitment*. Island Press.

Miller, J.K., M.S. Scott, C.R. Miller and L.P. Waits. 2002. The endangered species act: dollars and sense? *BioScience* 52:163-168.

Parenteau, P. 2005. An empirical assessment of the impact of critical habitat litigation on the administration of the Endangered Species Act. *Vermont Law School Faculty Papers*. Paper 1. http://lsr.nellco.org/vermontlaw_fp/1

Schwartz, M.W. 2008. The Performance of the Endangered Species Act. *Annu. Rev. Ecol. Evol. Syst.* 2008. 39:279–99

Scott, J.M., D.D. Goble, L.K. Svancara and A. Pidgorna. 2006. *By the Numbers* in The Endangered Species Act at Thirty: Renewing the Conservation Promise (Dale D. Goble *et al.* eds. 2006).

Suckling, K.F., R. Slack and B. Nowicki. 2004. *Extinction and the Endangered Species Act*. Center for Biological Diversity, Tucson, AZ.

Suckling, K.F. 2007. *Measuring the Success of the Endangered Species Act: Recovery Trends in the Northeastern United States*. Center for Biological Diversity, Tucson, AZ. www.esasuccess.org/reports/northeast

Taylor, M.F.J., K.S. Suckling and J.J. Rachlinski JJ. 2005. The effectiveness of the Endangered Species Act: A quantitative analysis. *BioScience* 55:360–67

U.S. Fish and Wildlife Service. 2005. *Report to Congress on the Recovery of Threatened and Endangered Species, Fiscal Years 2003-2004*. U.S. Department of Interior, Washington, D.C.

U.S. Government Accountability Office. 2006. *Endangered Species: Time and Costs Required to Recover Species are Largely Unknown*. Washington, D.C.

U.S. Government Accountability Office. 2011. *Environmental Litigation: Cases against EPA and Associated Costs over Time*. Washington, D.C.

Wilcove, D., M. McMillan, and K. Winston. 1993. What exactly is an endangered species? An analysis of the U.S. endangered species list: 1985-1991. *Conservation Biology* 7:87-93.