



February 12, 2014

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

Dear Mr. Hastings:

We are writing to express concerns about numerous substantive errors in your working group's February 4, 2014 Report, Findings, and Recommendations on the Endangered Species Act. Because the findings of this report underpin your recommendations for proposed changes to the Endangered Species Act, we believe that it is especially important that these recommendations are based on reliable information, which does not appear to be the case. We are also concerned that your self-appointed working group does not appear to fall within Rule X of the Rules of the House of Representatives, which provides the House Committee on Natural Resources with jurisdiction over the Endangered Species Act. Rather than pursuing oversight and legislative changes through the Committee's normal process, a group of 13 Republicans—six of whom are not on the Committee—has declared itself to be sole arbiter of the fate of the most important species protection law ever passed by any nation on Earth. It is thus no surprise that this report is riddled with errors.

The Endangered Species Act remains one of the most successful and important environmental laws ever passed. The Act has been more than 99 percent successful at preventing the extinction of species it protects. Were it not for the Endangered Species Act, scientists estimate that at least 227 species would have likely gone extinct since the law's passage.¹ To date only 10 species protected under the Act have been declared extinct, and of these 10 species, eight were likely extinct before they were protected (such as the Caribbean monk seal, which was protected in 1973 despite the last verified sighting having occurred in 1952). While much can be done to further strengthen the Endangered Species Act, such as fully funding the U.S. Fish and Wildlife Service and National Marine Fisheries Service, because your report's findings are substantively incorrect, the recommended changes to this law would likely weaken nearly every major provision of the Act.

Below are 12 examples of egregious errors in the report. We hope that in correcting your report's mistakes, you can then move in an informed manner and strengthen the Endangered Species Act, rather than weaken it. Thank you for your attention to this important issue.

Report Error #1 (page 13): “Unfortunately, the FWS acknowledges in its most recent review of its own recovery efforts that less than 5 percent of the over 1,500 domestic species on the ESA list are improving. NMFS reports that a little over one-third of its 70 listed species are improving.”

Fact: In the U.S. Fish and Wildlife Service’s *Report to Congress on the Recovery of Threatened and Endangered Species: Fiscal Years 2009-2010*, the Service identifies 158 species as improving (16 percent), 489 species as stable (50 percent), and 339 as declining (34 percent).² The report incorrectly concludes that the only species that are currently ready to be downlisted to endangered from threatened status or delisted due to recovery are “improving.” Many species are improving, but still are not yet ready for downlisting and delisting. Furthermore, the report completely ignores the scientific reality that *stabilizing* listed species—almost all of which were declining rapidly at the time they were protected under the Endangered Species Act—is the first step to recovering them.

Report Error #2 (page 6): “While the FWS claims the settlements don’t require that listing will occur, the overwhelming decisions so far have resulted in the vast majority going toward new listings, which is the goal of these groups. In just the past two years, over 80 percent (210 of the over 250) decisions involving these species were either listings or proposals to list by the FWS.”

Fact: Since 2011 the Fish and Wildlife Service has reviewed approximately 240 species for protection under the Endangered Species Act that were part of the 2011 settlement. Of those species, 105 species have been protected under the Act, and 113 species have been denied protection under the Act.³ Another 31 proposals to list species are currently pending, and the Service will ultimately decide whether these species warrant listing based solely on the best available science.

Report Error #3 (page 16): “The FWS has taken the position that it is not required to act on delisting of a species unless and until an ‘interested party’ petitions for action and then follows up with a lawsuit. Because most citizens do not desire or are not in a position to file petitions or lawsuits against the federal government, many species continue to be listed under ESA even when it may not be necessary.”

Fact: The Fish and Wildlife Service delists species on its own initiative routinely, including most recently the Oregon chub on Feb. 3, 2014⁴ and the Magazine Mountain Shagreen in 2012.⁵ The Oregon chub is an excellent example of how citizen involvement in the Act works best. The species was petitioned for protection by two private citizens in 1993 and, following protection under the Act, populations increased from approximately 1,000 fish in 1993 to more than 160,000 today.

Report Error #4 (page 9): “One outdoors writer and widely known environmentalist commented that the federal government ‘could recover and delist three dozen species with the resources they spend responding to the CBD’s litigation.’ ”

Fact: From 2005 to 2007, the most recent years where data are available,⁶ total litigation-related expenses borne by the Fish and Wildlife Service ranged from \$100,000 to \$300,000 per year, which equals roughly 0.2 percent of the Service’s total endangered species budget. The Service provides data on the costs of recovering listed species where it is able to make an estimate.⁷ Only a few species total recovery costs are below \$300,000 such as the Anastasia Island beach mouse.⁸ Most species will require millions to tens of millions of dollars to be recovered. Recovering Hawaii’s native songbirds, for instance, will cost an estimated \$2.4 billion.⁹

Report Error #5 (page 27): “Publicly available court documents reveal that ESA litigation has risen dramatically over the past few years. In 2012, the Department of Justice (DOJ) provided the House Committee on Natural Resources case information on 613 total cases. Each of these cases was at least partially devoted to litigating some aspect of the ESA. Of these, 573 (93%) were cases where federal agencies were sued under the ESA. That amounts to an average of at least *three cases a week* dealing just with citizen suits under the ESA.”

Fact: Nothing in the data provided by the Department of Justice indicates that “litigation has risen dramatically over the past few years.” Of the 573 cases, the report ignores the fact that 67 were filed by industry groups and at least 19 were filed by state and local governments. The Department of Justice data further shows, when including civil litigation filed by industry and non-profit organizations, 119 lawsuits were filed in 2009, 111 in 2010, 57 in 2012, and only 23 through April 2012. There is simply no factual support for the statement that current ESA caseload equates to “three cases a week.”

Report Error #6 (page 31): “As Figure 2 illustrates, several organizations filing ‘citizen suits’ have received millions of dollars in attorneys’ fees from the federal government. According to DOJ documents, ESA has cost American taxpayers more than \$15 million in attorneys’ fees alone – in just the past four years. These groups – and their lawyers – are making millions of taxpayer dollars by suing the federal government, being deemed the ‘prevailing party’ by federal courts, and being awarded fees either through settlement with DOJ or by courts.”

Fact: The Endangered Species Act has not cost the American taxpayer any attorneys’ fees. Instead, the failure of the Fish and Wildlife Service and National Marine Fisheries Service to follow the legal mandates of the Endangered Species Act has cost the American taxpayer. Hastings’ claim that groups like the Center for Biological Diversity are making millions from suits is simply not supported by the data. From 2008-2012, the Department of Justice data shows that the Center was paid a total of \$594,123. By comparison, industry was paid a similar \$550,324 in fees in ESA cases for the same four year period.

Report Error #7 (page 6): “In addition, though the federal government annually awards attorneys’ fees to plaintiffs who file ESA-related lawsuits, the exact amount spent by American taxpayers on ESA litigation and attorneys’ fees is unattainable. Even the former Interior Secretary acknowledged at a 2012 budget hearing that he could not identify how much money his agency spent on ESA-related litigation.”

Fact: The Department of Justice provided extensive data to the Natural Resources Committee on the attorneys’ fees paid to prevailing parties that file litigation under the Act. Your working group report presents that data on pages 30-31.

Report Error #8 (page 35): “As a result of FWS’ focus on listings, others have complained that opportunities for public comment and engagement, and accessibility to scientific data supporting significant ESA proposals have been short-changed, often with the federal agencies citing deadlines from the mega-settlement as the excuse.”

Fact: The settlement has not altered in any way the legal process for the public—including state and local governments and industry—with the ability to participate in any listing decision. For each

species listed thus far, the Service has provided ample public comment periods, often reopening the comment period to solicit additional information.¹⁰ Where an interested organization or citizen has demonstrated that scientific uncertainty exists, the Service has extended the comment period by six months, as the Act allows, and solicited additional data.¹¹

Report Error #9 (page 23): “Many believe that modern scientific data methods, such as DNA testing, are superior to federal agencies’ reliance on unpublished studies or professional opinions. Federal agencies nevertheless are resistant to using DNA.”

Fact: The Service relies on scientific, peer-reviewed genetic information routinely in its listing and delisting decisions. The Idaho springsnail, for instance, was delisted in 2007 when new genetic studies indicated that the snail was actually part of the much more widespread species, the Jackson Lake springsnail.¹² In addition, the Service expressly considers genetic distinctiveness in its 1996 Distinct Population Segment Policy as a rationale for protecting species.¹³

Report Error #10 (page 39): “In an example where the rush to meet mega-settlement deadlines can lead to errors and poor consequences for local governments and private landowners, the FWS failed to properly notify a local county and private landowners on a proposal to list a plant subspecies [the White Bluffs Bladderpod], including designation of over 400 acres of private irrigated farmland. The FWS was forced to seek permission from the CBD to amend the original settlement deadline to list, and refused to further study DNA data provided to them which completely contradicted the FWS’ science in its ESA listing. The FWS nevertheless proceeded to list the plant within the settlement deadline.”

Fact: The Service extended the deadline to list the White Bluffs bladderpod without receiving permission from the Center. The Service had the industry-funded, unpublished DNA study reviewed by five scientific experts who unanimously concluded it was not credible because the sample size of the study was too small to be scientifically meaningful.¹⁴ The Service listed the plant species beyond the settlement’s deadline, but excluded the 400 acres of private farmland from the final critical habitat designation.

Report Error #11 (page 56): “In an unprecedented move the FWS in September 2011 announced that it was reviewing the status of 374 aquatic species that in its view ‘may warrant’ listing under ESA....The proposal drew an outcry because of the size and scope of the proposal, that it could undermine public involvement and result in a legally deficient administrative record, and would require the FWS to review all 374 listing determinations in twelve months.”

Fact: It is indisputably established in the scientific literature that freshwater animals from the southeastern United States are one of the most endangered categories of animals on Earth,¹⁵ yet little has been done to adequately protect them from extinction.¹⁶ After making its initial 90-day finding on the petition in 2011, the Service has not rushed to list any of these species. In fact, nearly four years have passed since the petition was submitted. The Service is now slowly working through these species following all statutorily required public commenting procedures. To further this review, the Service has provided grants to the states where these species are found to better understand their conservation status. It will take many years to determine which of these species need the protections of the Act to survive.

Report Error #12 (page 10): “Fires are destroying species habitat and ESA itself is creating obstacles that are counter-productive to fighting wildfires, including use of heavily mechanized equipment, use of aerial retardant and restricted use of water due to concerns about potential impacts to other ESA-listed species, such as salmon....Over the past two fiscal years alone, 26 lawsuits, notices of lawsuits, and appeals were filed in the Idaho and Montana region of the U.S. Forest Service to block timber thinning and other vegetation management in areas at high risk of wildfire.”

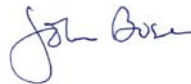
Fact: According to the Forest Service’s Region 1, all environmental litigation filed before FY 2012 affected 3,495 acres of planned treatment areas.¹⁷ However, in FY 2011, more than 787,478 acres of Forest Service lands were treated to restore fire-adapted ecosystems toward desired conditions nationally.¹⁸ Thus acres affected by litigation in this region account for only 0.44 percent of national acreage treated; thus litigation has no significant impact on the Forest Service’s ability to address fire risk.

We hope that our identification of these errors is useful to you and illustrates why this report is fatally flawed and should not provide a basis for changes to the Endangered Species Act. Please do not hesitate to contact us if you have any questions.

Sincerely,



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cc: The Honorable Peter DeFazio
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¹ Scott, J.M, D.D. Goble, L.K. Svancona, and A. Pidgorna. 2006. By the numbers. In D. Goble, M. J. Scott, and F. W. Davis, editors. *The Endangered Species Act 1 at Thirty: Renewing the Conservation Commitment*. Island Press, Washington, DC.

² *Report to Congress on the Recovery of Threatened and Endangered Species: Fiscal Years 2009-2010* pages 2-47.

³ Review of Native Species That Are Candidates for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions; 77 Fed. Reg. 69994, 69996 (Nov. 21, 2012)

⁴ *Removing the Oregon Chub From the List of Endangered and Threatened Wildlife*, 79 Fed. Reg. 7136 (Feb. 6, 2014).

⁵ *Removing the Magazine Mountain Shagreen From the Federal List of Endangered and Threatened Wildlife*, 77 Fed. Reg. 36460 (Jun. 19, 2012).

⁶ *Review of Native Species That Are Candidates for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions*, 72 Fed. Reg. 69034 at 69051 (Dec. 6, 2007).

⁷ *Report to Congress on the Recovery of Threatened and Endangered Species: Fiscal Years 2009-2010* pages 2-47

⁸ USFWS 1993. RECOVERY PLAN: ANASTASIA ISLAND BEACH MOUSE AND SOUTHERN BEACH MOUSE BEACH at 4 (Sept. 23, 1993).

⁹ Hawaiian birds recovery plan

¹⁰ After proposing to list the lesser prairie chicken on December 11, 2012 (78 Fed. Reg. 26302), the Service extended the decision period by six months and reopened the comment period three times (78 Fed. Reg. 41022; 78 Fed. Reg. 75306; 79 Fed. Reg. 4652).

¹¹ *6-Month Extension of Final Determination for the Proposed Listing of the Distinct Population Segment of the North American Wolverine Occurring in the Contiguous United States as a Threatened Species*, 79 Fed. Reg. 6874 (“We also reopen the comment period on the proposed rule to list that distinct population segment. We are taking this action based on substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the proposed listing.”)

¹² *Final Rule to Remove the Idaho Springsnail from (Pyrgulopsis (=Fontelicella) idahoensis) From the List of Endangered and Threatened Wildlife*, 72 Fed. Reg. 43560 (Aug 6, 2007).

¹³ *Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act*, 61 Fed. Reg. 4722 (Feb. 7, 1996)

¹⁴ *Threatened Status for Eriogonum codium (Umtanum Desert Buckwheat) and Physaria douglasii subsp. tuplashensis (White Bluffs Bladderpod) and Designation of Critical Habitat Bladderpod*, 78 Fed. Reg. 76995 (Dec. 20, 2013) (“We requested peer review from five subject and related field experts and received comments from all five reviewers. Their unanimous, independent conclusion was that this analysis was insufficient to warrant a change to the current taxonomic status of White Bluffs bladderpod. All five peer reviewers indicated that this study was inconclusive as to the taxonomic status of *tuplashensis*. Peer reviewers stated that the genetic markers selected for this study were insufficient for determining differences between closely related taxa in the genus *Physaria*. In addition, all peer reviewers stated that too few samples were collected to adequately characterize genetic diversity.”)

¹⁵ <http://www.fws.gov/midwest/endangered/clams/mussels.html>

¹⁶ Neves, R.J., A.E. Bogan, J.D. Williams, S.A. Ahlstedt, and P.W. Hartfield. 1997. *Status of aquatic mollusks in the southeastern United States: a downward spiral of diversity*. Pp. 43-85 in: G.W. Benz and D.E. Collins, eds. *Aquatic fauna in peril: the southeastern perspective*, March-April 1994, Chattanooga, Tennessee. Special Publication No. 1, Southeast Aquatic Research Institute, Chattanooga.

¹⁷ U.S. DEPT. OF AGRIC. FOREST SERV., *VEGETATION MANAGEMENT LITIGATION TRENDS IN REGION 1 3* (JUNE 25, 2013).

¹⁸ U.S. DEPT. OF AGRIC., *FISCAL YEAR 2013 PRESIDENT’S BUDGET: BUDGET JUSTIFICATION 1-10* (FEB. 2012).