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H.R. 2933, A BILL TO AMEND THE ENDANGERED SPECIES ACT OF 1973 TO REFORM THE PROCESS FOR DESIGNATING CRITICAL HABITAT UNDER THAT ACT.

LEGISLATIVE HEARING

BEFORE THE

COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

Wednesday, April 28, 2004

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LEGISLATIVE HEARING ON H.R. 2933, TO AMEND THE ENDANGERED SPECIES ACT OF 1973 TO REFORM THE PROCESS FOR DESIGNATING CRITICAL HABITAT UNDER THAT ACT.

Wednesday, April 28, 2004
U.S. House of Representatives
Committee on Resources
Washington, DC

The Committee met, pursuant to notice, at 10:05 a.m. in Room 1324, Longworth House Office Building, Hon. Richard W. Pombo, [Chairman of the Committee] presiding.

Present: Representatives Pombo, Gilchrest, Calvert, Cubin, Radanovich, Jones, Gibbons, Walden, Tancredo, Osborne, Flake, Rehberg, Renzi, Cole, Pearce, Bishop, Rahall, Kildee, Inslee, Tom Udall, Grijalva, Cardoza, Bordallo, Baca, and McCollum.

STATEMENT OF THE HON. RICHARD W. POMBO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

The CHAIRMAN. Good morning. I would like to call this hearing on H.R. 2933 to order. I look forward to listening and gaining greater insight from the witnesses today and from my congressional colleagues on how the Endangered Species Act is being implemented by Federal agencies and interpreted by the courts specific to critical habitat.

The Endangered Species Act has given wildlife very little to cheer about as it barrels out of control through its 30th anniversary year. Since its inception, more than 1,300 species have been listed as threatened or endangered, yet only seven domestic species listed under the ESA have ever been recovered in those 30 years. Not one of these species was recovered as a result of the ESA alone; their removal from the ESA is to be linked to other vital conservation measures and human intervention.

Sadly, that is the history of the Endangered Species Act. Born of the best intentions, it has failed to live up to its promise and species are more threatened today because of its serious limitations. Thirty years of the same prescription have failed. Moreover, despite the evidence, some maintain that we can only use one treatment, the one prescribed 30 years ago. But for the last 30

years the ESA has remained a law that checks species in, but never checks them out. It has been a failing form of managed care.

Specifically, the diagnosis and treatment aspects of the law are fatally flawed. They are ambiguous, open to arbitrary personal judgment, and do not rely on sound science or peer-reviewed research.

Known as listing and critical habitat respectively, these key elements of the Act are responsible for the misdiagnosis of species as endangered or threatened and the application of a one-size-fits-all solution. When a species is listed for protection, treatment comes in the form of critical habitat designations which forbid the use of lands by or for anything but the species. Critical habitat is one of the most perverse shortcomings of the Act. It has been interpreted to mean that if an animal is determined to be in trouble, there is only one viable option—to designate critical habitat and let nature take its course.

For over a decade Congress has worked to reauthorize the Endangered Species Act so that it both conserves species and the rights and needs of Americans. During the same time, designation of critical habitat under the ESA has evolved into a source of controversy. Due to the rigorous mandates required, specifically critical habitat designations, many think the program is unworkable.

Rampant environmental litigation has undermined the already broken system at the expense of species recovery. In fact, there have been so many lawsuits that the Federal critical habitat program went bankrupt last year. Litigation has left the United States Fish and Wildlife Service with a limited ability to prioritize its species recovery programs and little or no scientific discretion to focus on those species in greatest need of conservation.

The Administration acknowledges that court orders and mandates often result in leaving the Fish and Wildlife Service with almost no ability to confirm scientific data in its administrative record before making decisions on listing of critical habitat proposals. In the wake of this decade-long trend, the current Administration, supported by the previous Clinton Administration, recognizes that critical habitat designations provide the majority of listed species and proposed-to-be-listed species little, if any, additional protection.

Since the last authorization of the Endangered Species Act expired in 1993, there has been great optimism and hope that we would be able to amend the Act and implement a process based on sound science and common-sense approaches to species conservation and recovery, goals similar to those that the 1973 Congress envisioned when they originally adopted the law. Congress intended for this law to be used to recover species and to increase the number of those in need before triggering Federal regulation.

To merely prevent the extinction of the species is not a long-term measurable success. Congress never dreamed that it would turn into a tool used by vocal and well-funded special interest groups seeking to impose court-ordered Federal land and water controls on the majority of Americans.

Celebrating these failures, as many are doing on this 30th anniversary year of the Act, is not how we should mark this occasion. Instead, we must begin to improve it for the immediate and long-

term health of America's wildlife. As we are doing here today by closely examining H.R. 2933, Congress must focus on legislative reforms that foster the science, technology, and innovation that have made America successful in other endeavors.

I realize amendment and reauthorization of the Endangered Species Act has dragged on since it expired in 1993. This is not for lack of trying and Congress has come close to reaching agreement a number of times. But unfortunately, some groups would rather play politics and benefit from the current state of dislocation under the Act than to agree on what is best for the species. It is this selfish attitude that has resulted in the uncertainty that wildlife is facing nationwide with critical habitat and absentee recovery goals.

So now that the candles are blown out on the 30th anniversary celebrations, it is time for the House Committee on Resources to start its work on meaningful reauthorization of the Act. Today we begin the process and, as Chairman, I wish for all Committee members to take note that we will finish this this time.

I would like at this time to recognize the Ranking Member, Mr. Rahall.

STATEMENT OF THE HON. NICK J. RAHALL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WEST VIRGINIA

Mr. RAHALL. Thank you, Mr. Chairman.

Mr. Chairman, when you became Chairman of this committee there were some, and I think it is no secret, who felt deeply that you would take a meat ax to the Endangered Species Act, that you intended to gut the ESA, but I have to tell you when I heard such things I simply could not believe it. Amidst the hand-wringing I told anyone who asked, "Sure, it would be far better if I were chairman of the committee." But in the alternative, I do think Chairman Pombo intends to take a much more deliberative approach to the ESA than the past rhetoric would lead one to believe. And so far to date, my assessment has been correct.

While supporters of H.R. 2933 and myself have fundamental differences on how we view the Endangered Species Act, this bill represents a piecemeal effort to address what some view as problems with the statute and I have said for many years that I do not believe the ESA needs to be amended. Problems do exist with the Act's implementation. This is not a function of the statute itself but rather, a lack of adequate funding and the failure of the Fish and Wildlife Service to issue instructions to its managers outlining how the critical habitat management program should be run. And I would note that the GAO twice recommended this.

And I think some people confuse the situation. Because of real or perceived problems with certain aspects of the Act's implementation due to a lack of funding, they may confuse the issue and believe that the Act itself is in need of reform.

The Bush Administration's Fiscal Year 2005 budget would cut ESA recovery programs by $10 million below current year levels. It would also slash about $2 million from the ESA's consultation and habitat conservation planning program. These shortcomings are going to affect real people in the real world, including private property owners, developers, Federal agencies, and local units of government.

Take, for instance, Snowshoe Ski Resort in the congressional district I have the honor of representing. It is owned by a major corporation, Intrawest. It is an 11,000-acre facility. They are engaged in a habitat conservation plan and lo and behold, things are proceeding too slowly. Yet Intrawest is not joining the chorus that the ESA is broken and must be amended. You know what their main complaint is? The Elkins, West Virginia Fish and Wildlife Service field office is overworked and underfunded, and they are right.

The bottom line is that without critical habitat, species will go extinct and who are we to determine which species shall perish? As people of faith, and I know that we all are, we should acknowledge these words from Ecclesiastes: "Man's fate is like that of animals. The same fate awaits them both. As one dies, so dies the other. All have the same breath."

I will conclude by noting how pleased I am that we have a witness today who will bring the Christian perspective to this debate, Dr. Joseph Sheldon from Messiah College in Pennsylvania. And while I note he has been placed last on the witness list, the word of the faithful will refuse to be heard last in our deliberations on this issue. Thank you, Mr. Chairman.

[The prepared statement of Mr. Rahall follows:]

Statement of The Honorable Nick J. Rahall, II, a Representative in Congress from the State of West Virginia

Mr. Chairman, when you became chairman of this committee there were some, and I think it is no secret, who felt deeply that you would take a meat axe to the Endangered Species Act. That you intended to "gut" the ESA.

I will tell you, I could not believe it when I heard such things. Amidst the hand-wringing I told anyone who asked, sure, it would be far better to have a Democrat as chairman, but in the alternative, I think Chairman Pombo intends to take a much more deliberative approach to the ESA than past rhetoric may lead one to believe.

To date, my assessment has been correct. While supporters of H.R. 2933 and myself have fundamental differences on how we view the Endangered Species Act, this bill represents a piecemeal effort to address what some view as problems with the statute.

I have said for many years that I do not believe the ESA needs to be amended. Problems do exist with the Act's implementation. That is not a function of the statute itself, but rather, lack of adequate funding, and the failure of the Fish and Wildlife Service to issue instructions to its managers outlining how the critical habitat management program should be run. I would note that the GAO twice recommended this.

And I think some people confuse the situation. Because of real or perceived problems with certain aspects of the Act's implementation due to a lack of funding, they may confuse the issue and believe that the Act itself is in need of reform.

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These shortcomings are going to affect real people in the real world, including private property owners, developers, Federal agencies and local units of government.

Take for instance Snowshoe Ski Resort in my Congressional District. Owned by a major corporation, Intrawest, the resort is an 11,000 acre facility. They are engaged in a Habitat Conservation Plan. And Lo and Behold, things are proceeding too slowly. Yet, Intrawest is not joining the chorus that the ESA is broken and must be amended. You know what their complaint is? The Elkins, West Virginia, Fish & Wildlife Service Field Office is overworked and underfunded. And they are right.

The bottom line is that without critical habitat species will go extinct. And who are we to determine which species shall perish. As people of faith, as I am sure we all are, we should acknowledge these words from Ecclesiastes: "Man's fate is like that of the animals; the same fate awaits them both: As one dies, so dies the other. All have the same breath."

I will conclude by noting just how pleased I am to have a witness today who will bring the Christian perspective to this debate, Dr. Joseph Sheldon from Messiah College in Pennsylvania. And while he has been placed last on the witness list, the word of the faithful will refuse to be heard last in our deliberations on these matters.

The CHAIRMAN. Thank you.

I would now like to call up our first panel, which is made up of The Honorable Judge Craig Manson, Assistant Secretary for Fish, Wildlife and Parks.

Thank you, Judge Manson. It is nice to have you back before the Committee. I think it is appropriate to begin the deliberations on this legislation that was introduced by my colleague, Mr. Cardoza, with comments from those that are charged with overseeing the Act. So Judge Manson, when you are ready you can begin.

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

Mr. MANSON. Thank you, Mr. Chairman. I appreciate the opportunity to appear once again before this committee, particularly today on H.R. 2933, the Critical Habitat Reform Act of 2003.

Let me begin by saying that we in this Administration are absolutely committed to achieving the primary purpose of the Endangered Species Act, which is the recovery of threatened and endangered species, and to improve the efficiency and effectiveness of the Act.

We believe that the conservation of habitat is vitally important to successful recovery and delisting of species, but critical habitat is another matter altogether. As you have indicated in your remarks, the Fish and Wildlife Service's efforts to carry out the ESA requirement of designating critical habitat have been a source of controversy for many years. As the Clinton Administration noted several years ago, in more than 30 years of implementing the Act, the Service has found that designation of official critical habitat provides little additional protection to most listed species while consuming significant amounts of scarce conservation resources.

The Department of the Interior, the Service, the Congress and interested parties must work together to determine how to get the most value for species conservation out of available Federal resources. In that regard, we believe that H.R. 2933 is a step in the right direction and we would like to continue to work with the author and the Committee on any proposed amendments concerning the designation of critical habitat.

As you pointed out, for more than a decade the Service has been embroiled in a relentless cycle of litigation over the implementation of the critical habitat and listing provisions of the Act and the Service now faces a program in chaos, due not to agency inertia or neglect but due to a lack of scientific or management discretion to focus available resources on the actions that provide the greatest benefit to those species in greatest need of conservation, and the keystone of that situation is critical habitat.

The Service has for a number of years characterized the designation of critical habitat as required under the Act as the most costly and least effective class of regulatory actions undertaken by the

Service. It is often counterproductive and can result in negative public sentiment toward the designation and toward the Act.

For these reasons and others, for many years the Service often found the designation of critical habitat to be not prudent and did not designate it for most listed species, and this approach was formalized under the previous Administration. However, the legislative history is clear that Congress intended the findings of not prudent to be limited to exceptional circumstances and as a result, we faced the flood of lawsuits that you alluded to earlier.

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

Now with respect to the issue of funding, the Administration's budget request for 2005 provides funding to meet our resource protection goals and address the growing listing program's litigation-driven workload. The requested increase includes a total of $13.7 million for critical habitat for already listed species. That is an increase of $4.8 million over the Fiscal Year 2004 funding level. The increased funding will allow the Service to meet its current and anticipated court orders for the designation of critical habitat. In this regard I would note that as of April 26 there were 76 lawsuits pending or threatened related to critical habitat or other Section 4 actions.

With respect to H.R. 2933, it directs that the timing of critical habitat be concurrent with the approval of recovery plans, a concept which has been supported over the prior Administration, and we recognize that this is one of a number of limited potential solutions to address the problems that we are talking about here today.

The bill also specifies factors for consideration when conducting an economic impact analysis, including the direct, indirect and cumulative impacts associated with the designation. It further modifies the content of required notices for proposed designation to include any municipality having administrative jurisdiction over the area in which the species is believed to occur.

We believe that these steps are in the right direction to address several of our concerns about the current designation process. We are also pleased that the bill codifies some of the reforms that the Administration has carried out over the past 3 years. As I said earlier, we are dedicated to working with the Congress to find the solutions to the problems associated with critical habitat.

I would note that I have directed the Fish and Wildlife Service to strictly construe the provisions of the Endangered Species Act with respect to the timing of critical habitat designations and that is a measure that we have taken in order to staunch the bleeding, if you will, and stem the tide of litigation to the extent that we can.

I have also issued an endangered species guidance letter on critical habitat to the Fish and Wildlife Service outlining several important points concerning designation of critical habitat. Later this week this draft critical habitat guidance will be finalized and the Service will begin applying it.

So although we believe that the current system of designating critical habitat is broken, the combination of administrative measures and legislative action will work to solve that issue and we are prepared again to work with the Committee to identify ways to provide relief and ensure that the legislation clearly and efficiently accomplishes its goals.

Mr. Chairman, that concludes my prepared testimony. I would be pleased to respond to any questions that you or other members of the Committee may have.

[The prepared statement of Mr. Manson follows:]

Statement of Craig Manson, Assistant Secretary for Fish and Wildlife and Parks, U.S. Department of the Interior

Mr. Chairman, I appreciate this opportunity to testify today on H.R. 2933, the "Critical Habitat Reform Act of 2003."

Let me begin by saying that we are committed to achieving the primary purpose of the Endangered Species Act (ESA or Act)—the recovery of threatened and endangered species—and to improving the efficiency and effectiveness of the Act. We believe that conservation of habitat is vitally important to successful recovery and delisting of species.

As discussed in more detail below, the U.S. Fish and Wildlife Service's (Service) efforts to carry out the ESA's requirement of designating critical habitat have been a source of controversy and challenge for many years. As the Clinton Administration noted several years ago, in more than 30 years of implementing the Act, the Service had found that designation of official critical habitat provided little additional protection to most listed species, while consuming significant amounts of scarce conservation resources. The Department of the Interior (Department), Congress, and interested parties must work together to determine how to get the most value for species conservation out of available federal resources. With this in mind, we appreciate the opportunity to comment on H.R. 2933. We believe that the legislation is a step in the right direction, and would like to continue to work with the Committee on any proposed amendments to the ESA concerning the designation of critical habitat.

Background

For well over a decade, the Service has been embroiled in a relentless cycle of litigation over its implementation of the listing and critical habitat provisions of the Act. The Service now faces a Section 4 program in chaos due not to agency inertia or neglect, but to a lack of scientific or management discretion to focus available resources on the listing actions that provide the greatest benefit to those species in greatest need of conservation. The keystone of this situation is critical habitat.

The Service has characterized the designation of critical habitat as required under the Act as the most costly and least effective class of regulatory actions undertaken by the Service. It is often counterproductive and can result in negative public sentiment to the designation. This negative public sentiment is fueled by inaccuracies in the initial area designated when we must act with inadequate information to meet deadlines and because there is often a misconception among the public that, if an area is outside of the designated critical habitat, it is of no value to the species. On the other hand, the designation of critical habitat imposes often burdensome requirements on federal agencies and landowners, or is perceived by them as doing so, and the designation process can create significant economic and social turmoil.

For these reasons, for many years the Service often found designation of critical habitat to be "not prudent," and did not designate it for most listed species; this approach was formalized during the previous Administration. However, the legislative history is clear that Congress intended such findings to be limited to exceptional circumstances. In the late 1990s, some critics began challenging these "not prudent" findings in court; those successes led to a flood of additional suits which continue to this day. These lawsuits have subjected the Service to an ever-increasing series of court orders and court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget. This leaves the Service with little ability to prioritize its activities to direct resources to listing program actions that would provide the greatest conservation benefit to those species in need of attention. The previous Administration recognized this when it said that lawsuits which force the Service to designate critical habitat necessitate the diversion of

scarce Federal resources from imperiled,. but unlisted, species which do not yet benefit from the protections of the ESA.

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

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

In 2001, a federal district judge, in Center for Biological Diversity v. Norton, No. CIV 01-0258 PK/RLP (ACE), observed that "the Secretary is caught in a quandary" in trying to "fulfill the myriad of mandatory [ESA] duties." The judge opined that "[m]ore lawsuits will inevitably follow" unless, among other things, the Service regains its discretion to prioritize its workload. The judge suggested that a legislative solution is necessary; otherwise "tax dollars will be spent not on protecting species, but on fighting losing battle after losing battle in court."

Other courts have agreed with this assessment. Simply put, the listing and critical habitat program is now operated in a "first to the courthouse" mode, with each new court order or settlement taking its place at the end of an ever-lengthening line. We are no longer operating under a rational system that allows us to prioritize resources to address the most significant biological needs. I should note that it is as a direct result of this litigation that we have had to request a critical habitat listing subcap in our appropriations request the last several fiscal years in order to protect the funding for other ESA programs. At this point, compliance with existing court orders and court-approved settlement agreements will likely require funding into Fiscal Year 2007.

In short, litigation over critical habitat has hijacked the program. Former Secretary Bruce Babbitt wrote in an op-ed piece in the April 2001 N.Y. Times that, in its struggle to keep up with court orders, the Service has diverted its best scientists and much of its budget for the ESA away from more important tasks like evaluating candidates for listing and providing other protections for species on the brink of extinction. We also believe that available resources could be better spent focusing on those actions that benefit species by providing the protection of the Act to those species that need it, and then pursuing effective conservation of these species through improving the consultation process, the development and implementation of recovery plans, and voluntary partnerships with states and private landowners.

For example, other more significant, and more efficacious, elements of a modern conservation strategy than critical habitat designations might include habitat conservation plans, conservation banking, voluntary agreements with landowners such as through the Service's Partners for Fish and Wildlife Program, incentive-based actions such as those carried out under the Service's Landowner Incentive Program, partnerships with states, tribes, and nongovernmental organizations, and private stewardship efforts by individuals and businesses. These programs, which consist of combined private and governmental action, improve the health of our lands, forests, rivers, and other ecosystems. Their implementation provides far greater conservation benefits than the designation of critical habitat while avoiding the regulatory, economic, and social disadvantages of critical habitat designations.

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

The Administration's budget request for FY 2005 provides funding to meet resource protection goals and address the growing listing program litigation-driven workload. The requested increase includes a total of $13.7 million for critical habitat for already listed species. This is an increase of $4.8 million over the FY 2004 funding level. The increased funding will allow the Service to meet its current and anticipated court orders for the designation of critical habitat for already listed species. In this regard, I would note that as of April 26, 2004, there were 76 lawsuits pending or expressly threatened related to critical habitat or other section 4 actions.

Within the Department and the Service, we are taking those limited administrative steps available to us to address these issues. For example, I have directed the Fish and Wildlife Service henceforth to comply strictly with the statutory provisions for designation of critical habitat. This measure, reversing prior practices, will staunch the bleeding off of resources in "deadline" litigation. It is, however, an incomplete and less than sufficient step. That is because it may indeed spark a different form of litigation. These drawbacks remain to be seen and at least in the meantime, the Service will regain some degree of control over its program. Nonetheless, this highlights the need for a specific legislative solution.

We have made other modest changes to cut costs in the critical habitat designation process.

H.R. 2933 Provisions

H.R. 2933 directs that the timing of designation of critical habitat be concurrent with approval of recovery plans, a concept which the previous Administration supported. We recognize that this is one of a number of potential solutions by which Congress could address this difficult problem. The bill makes additional changes to the ESA to facilitate the process of designating critical habitat and potentially provide relief from the current litigation cycle that we have been facing.

It amends section 4(a)(3) of the Act by requiring that designation be practicable, economically feasible, and determinable. In addition, the measure prohibits the designation of an area that is subject to a habitat conservation plan or state or federal land conservation if the Secretary determines that these protections are substantially equivalent to the protection provided by critical habitat designation.

H.R. 2933 also specifies the factors for consideration when conducting an economic impact analysis of critical habitat designation, including the direct, indirect, and cumulative impacts associated with such designation. Additional factors in the economic impact analysis would also include consideration of lost revenues to landowners and Local/State/Federal governments, as well as the costs associated with reports, surveys, and analyses required to be undertaken, as a consequence of a proposed designation, by landowners seeking permits and approvals.

The proposed measure further modifies the content of the required notice for proposed designation to include any municipality having administrative jurisdiction over the area in which the species is believed to occur. In addition, the bill requires the Secretary to maintain, on a publicly accessible Internet page of the Department of the Interior, a Geographical Information System map of the proposed designation, including coordinates of the area. Each required notice of the proposed designation shall also include reference to this Internet page.

We believe that these provisions are steps in the right direction to address several of the Department's concerns about the current designation process. We are also pleased that the bill codifies some of the reforms that the Administration has carried out over the past few years. As I have stated before, the Department is committed to working with the Congress to find a solution to the problems associated with critical habitat and other related issues. I want to reiterate that offer here today.

Summary

In sum, the present system for designating critical habitat is broken. The designation process provides little real conservation benefit, consumes enormous agency resources, and imposes social and economic costs. Rational public policy demands serious attention to this issue in order to allow our focus to return to true conservation efforts. We are optimistic that this bill will encourage a meaningful, bipartisan discussion on reforming the designation of critical habitat, and we are prepared to work with the Committee to identify ways to provide necessary legislative relief and ensure that any legislation clearly and efficiently accomplishes its goals.

Mr. Chairman, this concludes my prepared testimony. I would be pleased to respond to any questions you and other members of the Committee might have.

[Mr. Manson's response to questions submitted for the record follows:]

Response to questions submitted for the record by The Honorable Craig Manson,, Assistant Secretary for Fish, Wildlife and Parks, U.S. Department of the Interior

Questions from Chairman Richard Pombo

Question 1: At the Imperial Sand Dunes Recreation Area, located in southern California, the BLM has been working for the last decade to develop a Recreation Area Management Plan (RAMP) to manage the Dunes, and is very close as you know to signing a final ROD that would implement that RAMP. The absence of a Management Plan for the dunes has affected tens of thousands whose access has been restricted by temporary closures put in place as part of a settlement agreement to a lawsuit brought under section 7 of ESA for the endangered Pierson's milkvetch, a plant native to the Imperial Sand Dunes. As we stand today, the final Record Of Decision for the RAMP cannot be signed by the BLM until the U.S. FWS issues a no-jeopardy Biological Opinion (BO) for the 15-year RAMP. Although the FWS has in their possession a study that was funded by the off road recreation industry, and conducted by a well respected independent scientist, Dr. Arthur Phillips, FWS has mandated their own redundant and expensive study that has only delayed the finalization of the RAMP. Mind you, BLM has endorsed the findings of the Phillips study and uses his findings as part of their baseline data in their own biological opinion. So my question is this, with proposed monitoring provisions called for in the RAMP, and recommendations backed by current data made by BLM that FWS issue a no-jeopardy opinion, why is it necessary that FWS conduct their own independent study? And further, with proposed monitoring contained in the RAMP, and current data that backs up the finding of a no jeopardy opinion for the RAMP, can we get your personal commitment to encourage the FWS to evaluate the BLM recommendations and if appropriate, forego a FWS study for its own sake?

Response: The Fish and Wildlife Service (Service) is close to completing its review of the existing April 3, 2003 Biological Opinion for the Bureau of Land Management's (BLM) Recreation Area Management Plan, and the Service expects to respond to the BLM's request for clarification in the near future. In evaluating the Recreation Area Management Plan, the Service is not developing an independent study. The rigorous monitoring and research plan, designed cooperatively by the BLM and the Service, and approved by the Service in the April, 2003 Biological Opinion, is designed to support the plan's proposal to optimize various multiple use opportunities, including off-highway vehicle use and listed species conservation.

Question 2: The BLM's new Northern & Eastern Colorado Management Plan lists 22 unlisted species that are being treated as if they are listed. They call this list "sensitive species", and again these are not listed as endangered or threatened on any federal or state species list. As you might imagine, this management practice is having a drastic negative impact on access to public lands by the public, and it creates pseudo-ESA list of species that have the same land use and economic impacts as listed species. What are your plans to stop the FWS practice of treating non-listed species as though they are listed?

Response: Only those species listed as endangered or threatened receive statutory protection under the Endangered Species Act (ESA). We do encourage voluntary, proactive, and collaborative approaches with our partners, such as BLM's program, to keep species from declining to the point that they warrant listing under the ESA.

Specifically, through the Candidate Conservation program, the Service works to identify species that face threats that make listing a possibility, provide information, planning assistance, and resources to encourage voluntary partnerships for conservation of such species, and prioritize non-listed species, so that those species most needing protection or additional study are addressed first. In our experience, this collaborative, voluntary approach is an essential tool for proactively addressing species at risk. The public also benefits because land use options can be more flexible than would occur if a species were listed, critical habitat does not have to be designated, permits authorizing "take" do not have to be obtained, recovery plans do not have to be prepared and implemented, and section 7 consultations are not required.

Question 3: H.R. 2933 would establish a recovery plan concurrent with the designation of critical habitat; A linkage, so-to-speak. I support what the author is getting at. It is only right to establish recovery plans and goals first. Then from that put on the table what components can be used to successfully meet the recovery goal. If critical habitat is scientifically

shown to have a roll in this recovery plan, then the science will back that up. However, if it is not then it should be able to be taken off the table. This way we get away from 30 years of the cookie cutter approach and one-size fits-all actions that has led us to be here today.

- **However, in some of the testimony today there is concern with the drafting of that provision. Can you comment on this and discuss how we may be able to edit that language to accomplish the author's goal of linking the two while ensuring that recovery is primary and the Act does not continue to lock up lands that are not scientifically proven to provide any benefit to the species in question?**

Response: Given the controversy that has surrounded the issue of designation of critical habitat for more than a decade, I believe that H.R. 2933 is a step in the right direction toward solving many of the current issues involved in this process.

For example, the Administration believes that designating critical habitat concurrent with a recovery plan, as H.R. 2933 proposes, is one alternative to designating critical habitat at the time of listing. Often at the time of listing, insufficient information is available to determine what may be required to conserve a federally listed species. Currently, the Service is statutorily required to designate those areas known to be critical habitat, using the best information available, at the time of listing. This process can result in designations of critical habitat that may, after sufficient information is available to determine what is necessary to conserve a species, prove to be incomplete or erroneous. While we do not have any specific changes to offer at this time, we are reviewing the provisions and are committed to working with the Committee to develop the best possible legislation.

Question 4: FWS has indicated that it will follow the 10th Circuit's decision in New Mexico Cattle Growers.

- **What steps have been taken to ensure compliance?**
- **How has FWS considered the costs of both listing and C.H. to come up with total cost?**

Response: Pursuant to section 4(b)(2) of the ESA, the Service is required to take into consideration the economic impact of specifying a particular area as critical habitat. The court's decision in N.M. Cattle Growers Ass'n v. USFWS, 248 F.3d 1277 (10th Cir. 2001) required the Service to look at all of the costs of critical habitat, whether or not they are coextensive with the costs of listing or with other factors. As a result, we conduct economic analyses to estimate all of the potential economic impacts of designating critical habitat. These analyses include other economic impacts of species listing and conservation to the extent that those impacts are co-extensive with the designation. The analyses quantify these impacts, to the extent determinable, given the nature of the data available.

This information is intended to assist the Secretary in determining whether the benefits of excluding particular areas from the designation outweigh the benefits of including those areas in the designation (see section 4(b)(2)). In addition, this information allows the Service to address the requirements of Executive Orders 12866 and 13211, and the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA).

Specifically, the economic analyses that we now carry out consider both the economic efficiency and distributional effects that may result from designation of critical habitat. Economic efficiency effects generally reflect "opportunity costs" associated with designation of critical habitat. For example, if activities that can take place on a parcel of private land are limited as a result of the designation, and thus the market value of the land is reduced, this reduction in value represents one measure of opportunity cost or change in economic efficiency. Similarly, the costs incurred by a Federal action agency to consult with the Service under section 7 represent opportunity costs of designation.

The economic analyses also address how the impacts of a critical habitat designation are distributed, including an assessment of any local or regional impacts and the potential effects of designation on small entities, the energy industry, or governments. This information can be used by decision-makers to assess whether the effects of a designation might unduly burden a particular group or economic sector.

The economic analyses also consider indirect effects associated with a designation, including the economic impact associated with project delays due to a reinitiation of a section 7 consultation or due to compliance with other regulations. Consideration is also given to costs associated with regulatory uncertainty (e.g., the cost to retain outside experts of legal counsel to better understand a party's responsibilities with regard to critical habitat) and changes to private property values associated with public attitudes about the limits and costs of critical habitat, which are termed as "stigma" impacts.

Question 5: What is the current position of the FWS in response to the 5th Circuit's Sierra Club decision in which it held that Congress intended a lower threshold for triggering the duty to assess adverse modifications of C.H. than for determining jeopardy to species? When will FWS initiate a rule-making to revise the two definitions?

Response: The Service is still evaluating options and consulting with NOAA Fisheries in response to the 5th Circuit's decision so that we may make a joint revision to the regulatory definition of "destruction or adverse modification of critical habitat" in consideration of the Court's opinion.

Question 6: How does FWS justify designating "unoccupied" habitat as "critical"?

Response: Section 3(5)(A)(ii) of the ESA provides that the Secretary may designate critical habitat for a federally listed species outside the geographical area occupied by the species "upon a determination by the Secretary that such areas are essential for the conservation of the species."

The Service's implementing regulation further provides: "The Secretary shall designate as critical habitat areas outside the geographic area presently occupied by the species only when a designation limited to its present range would be inadequate to ensure the conservation of the species" (50 CFR 424.12(e)). Consequently, critical habitat is only designated in unoccupied habitat for a species when it is determined to be prudent, determinable, and essential to the conservation of the subject species, and that the species could not be conserved absent the inclusion of the specific unoccupied habitat into critical habitat.

Question 7: On what basis does FWS justify designating large areas of land as "critical" despite having no knowledge of whether or not the species or "primary constituent elements" are actually present?

Response: Pursuant to section 4 of the ESA, the Service is required to designate critical habitat in occupied areas only where features essential to the conservation are found. In defining critical habitat boundaries, the Service makes an effort to exclude all developed areas, such as housing developments, open areas, and urban and other lands unlikely to contain the primary constituent elements essential for the conservation of the particular species for critical habitat is being designated. However, due to mapping scale, quality of data available, and in cases where courts have established deadlines, time and resource limitations, it is difficult to exclude by mapping out all of the areas that do not contain features essential to the species. The Service excludes by text those areas that do not contain primary constituent elements, such as roads and buildings, parking lots, rail lines and other paved areas. In other words, although included on some maps, such features are not critical habitat.

Question 8: Does FWS feel it is more appropriate to delay C.H. designation until recovery plans have been adopted? To what extent does FWS use adopted recovery plans in designating C.H.?

Response: As mentioned in the response to question 3, The Administration believes that designating critical habitat concurrent with a recovery plan, as H.R. 2933 proposes, is one alternative to designating critical habitat at the time of listing. Often at the time of listing, insufficient information is available to determine what may be required to conserve a federally listed species. Currently, the Service is statutorily required to designate those areas known to be critical habitat, using the best information available, at the time of listing. This process can result in designations of critical habitat that may, after sufficient information is available to determine what is necessary to conserve a species, prove to be incomplete or erroneous.

It is often during the recovery planning process that the information concerning specific features and areas essential to the conservation of a species becomes available. In those cases where current recovery plans or strategies have been in place prior to the development of a critical habitat designation, the recovery plan or strategy has been the foundation from which the critical habitat designation is built and justified. In these instances, the resulting designation has generally been more precise. Furthermore, in those cases where there has been an outdated recovery plan or strategy, there has often been an attempt, with time and resources permitting, to update those plans prior to initiating the development of a critical habitat designation.

Question 9: Is FWS revising any older or outdated recovery plans? How many?

Response: As of September 30, 2003, 1,248 domestic species for which the Service has the lead are listed under the ESA. Of these listed species, 1,016 have final recovery plans. Recovery plans are revised or amended as necessary when new information becomes available that makes the existing plan outdated, such as a change

in the species' status, threats, or recovery needs, or a significant number of recovery actions identified in the implementation schedule have been completed or are no longer considered appropriate. The Service is currently revising and updating recovery plans for 83 species.

Question 10: How does the FWS prioritize recovery efforts and what mechanisms do they have to implement recovery plans?

Response: As directed in the 1982 Amendments to the ESA and described in the Service's Recovery Priority Guidelines (48 FR 43098-43105, September 21, 1983 and 48 FR 51985, November 15, 1983), all listed species are accorded a recovery priority number between 1 and 18C, based on the degree of threats, the potential for recovery; taxonomic distinctness; and whether or not they are, or may be, in conflict with construction, development projects, or other economic activity. The Service applies this priority system to making recovery decisions among listed species. Furthermore, individual recovery actions are identified in recovery plan implementation schedules based on a priority system of 1 to 3. Priority 1 actions are those actions that must be taken to prevent extinction or to prevent the species from declining irreversibly; priority 2 actions are those that must be taken to prevent a significant decline in species population/habitat quality or in some other significant negative impact short of extinction; and priority 3 actions are all other actions necessary to provide for full recovery on the species.

Implementation of these actions is dependent upon the availability of resources and partners. For example, while the Service works with the responsible partner to implement a priority 1 action, an opportunity may arise to complete a different priority 2 action first. If taking advantage of this opportunity would not delay the implementation of the priority 1 action, the Service and its partners would likely implement the priority 2 action first. The Service uses a variety of mechanisms in cooperation with other federal, state, and local governments, non-governmental organizations, and private landowners to implement all of the actions necessary to recover threatened and endangered species including, but not limited to: appropriated funds, grants, in-kind cost matching, memorandums of agreements and understandings, safe harbor agreements, on-the-ground management actions such as habitat restoration or population enhancement, and protective regulations.

Question 11: Would it be beneficial for the FWS to incorporate delisting criteria in recovery plans? If not, how does an affected entity determine compliance with recovery standards?

Response: The ESA requires each recovery plan, to the maximum extent practicable, to provide (i) a description of site specific management actions as may be necessary to achieve the plan's goal for conservation and survival of the species; (ii) objective, measurable criteria which, when met, would result in a determination that the species be removed from the list; and, (iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal. Service strives to incorporate delisting criteria in recovery plans whenever possible. The Service believes delisting, or recovery, criteria are not only essential to determining whether and when a species may be eligible to be removed from the endangered species list, but they also help identify what recovery strategies and actions are necessary to achieve recovery. However, the ESA also recognizes (in section 4(f)(1)), that it is not always practicable to identify definitive recovery criteria when first developing recovery plans for listed species. To the extent that recovery criteria can be approximated, such criteria is developed. For other species, recovery plans may include only downlisting or interim criteria. In all cases, as new information becomes available and it becomes possible to develop, revise, or refine recovery criteria, the Service revises or updates the species recovery plan, subject to availability of resources.

Questions submitted by Representative Barbara Cubin

Judge Manson, as you know, the State of Wyoming and the Department of Interior have been embroiled in a dispute over how and when wolves can be de-listed in the three state area of Wyoming, Idaho and Montana.

In January of this year, when the Department of Interior rejected Wyoming's wolf management plan, it is my understanding it did so based on political considerations, for fear of lawsuits by environmental organizations and speculation regarding future actions by Montana and Idaho to adopt plans similar to the one adopted by Wyoming.

It is also my understanding that this rejection directly contradicts the Endangered Species Act, which requires the Secretary of the Interior and the Fish and Wildlife Service (FWS) Director to base de-listing decisions "solely upon" the best science available. In fact, 10 of the 11 scientists on

the FWS's peer review panel indicated that Wyoming's plan was scientifically sound.

Question 1: Would you please comment on the Department of Interior's stance on this issue and whether the decision was in fact based solely on science as the Endangered Species Act requires, or upon political considerations?

It has been my impression all throughout the process of attempting to delist the wolf that the FWS have continually moved the goal line for the State of Wyoming. It takes two parties to compromise, but over and over again it has seemed to me that it was the State of Wyoming that had to make all the compromises.

Response: Because the Department's evaluation of the State of Wyoming's management plan for the gray wolf is the subject of pending litigation, we are constrained in discussing specific details related to the management of plan. However, I am enclosing letters from the Service's Director to Terry Cleveland, Director of Wyoming Fish and Game Department, and Michael R. Baker, Chairman of the Wyoming State House Committee on Travel, Recreation, Wildlife and Cultural Resources, which explain the Service's position on wolf issues.

Question 2: Could you comment on what the FWS has specifically done in the way of compromise with the State of Wyoming in the wolf delisting effort?

Response: I am enclosing letters from the Service's Director to Terry Cleveland, Director of Wyoming Fish and Game Department, and Michael R. Baker, Chairman of the Wyoming State House Committee on Travel, Recreation, Wildlife and Cultural Resources, which detail the exchange of information between the Service and the State, and explain the Service's position on the issue. I believe these letters contain much of the information you requested.

Questions Submitted by Representative Tom Udall

Question: In your remarks before the Committee you referred to guidance on critical habitat designation that will soon be finalized. Given that this is an extremely significant issue, is it your intention to provide public notice of this draft guidance and seek public comment? If not, why not?

Response: The current document is designed for staff use as non-binding guidance on an interim basis. Once the full guidance is completed it will be made available for public review and comment.

Question: Can you please provide the Committee with the details of how this guidance was developed, including:

1) the exact time period over which it was formulated;

Response: The policy guidance has been worked on at various times since the fall of 2002. We do not have a specific date at which the first elements may have been drafted.

2) any involvement of the Fish and Wildlife Service including the names of individuals who worked on the guidance;

3) the names of individuals involved at the Departmental level;

4) the names of any individuals outside the Department of the Interior that may have been involved; and

Response: Numerous individuals on my staff, within the Service, elsewhere within the Department, at the Department of Commerce, and elsewhere within the Administration have either drafted, reviewed or commented on all or portions of various drafts of the guidance. We did not attempt to maintain a list of those involved. Inasmuch as all drafting, review and comment was predecisional, I see no value in either attempting to collect or in releasing the names of these persons.

5) any other circumstances related to the development of this guidance.

Response: It is not clear what information is being sought here. I would be pleased to respond to a more specific question.

The CHAIRMAN. Well, thank you, Mr. Manson. To begin, I will just start by asking you a fairly simple question. Do you believe that protecting habitat is necessary for the recovery of endangered species in order to recover those that ultimately have ended up on the list?

Mr. MANSON. I do believe that the protection of habitat is essential to the conservation and recovery of species. I happen to believe that critical habitat, as the Act outlines it presently, is not the best

way to do that. I think that frequently there are far superior methods to do that, including voluntary actions on the part of landowners, in partnership with the Service. In that regard, I have announced today revised regulations that will encourage private landowners to undertake these voluntary conservation measures to benefit species that are listed and that are at risk. And this results in the creation of real habitat that one can touch and see and feel and it is done all without a legal and administrative process that is burdensome and imposes great costs.

The CHAIRMAN. Previous Administrations, like you, have been critical of what the critical habitat designation process has become. I have noticed in researching for this hearing that you, this current Administration and previous Administrations, never said protecting habitat was not important, and yet the process that designation of critical habitat has become has become a very real problem for the Fish and Wildlife Service and you have been fairly outspoken about that, as well as the previous Administration was very outspoken about that. And what we are searching for here today and what I believe that Congressman Cardoza was attempting to do with the introduction of this bill was to change that legal process under the Endangered Species Act for the designation of critical habitat so that it was something that would work for the administrative process of implementing the Endangered Species Act.

Mr. MANSON. I think you are exactly right, Mr. Chairman, that this is not about the issue of—there is no debate about the role that habitat plays in conservation biology. There is simply no debate about that and I have never disputed that. No one else in our Administration has ever disputed that.

The issue is, as you put it, a process which is counterproductive and takes resources away from other far superior processes that provide a greater conservation benefit. So that process needs to be fixed.

The CHAIRMAN. I know you are attempting to change administratively how this process works and there are some things you can do; there are other things that will take Congress to take action. But the question that I get repeatedly is that if an area is designated as critical habitat, how does that change the use of that land?

Mr. MANSON. Well, you have to take into account that the designation of critical habitat is part of the listing process as the current law has it set up, and under the listing process a listed species is subject to Section 9 of the Act, which prohibits the take of that species, which is defined specifically in the law and in the regulations.

The designation of critical habitat would still allow the issuance of incidental take permits under that law but it becomes a particular issue when Section 7 of the Act is applied, which requires consultation over actions that may affect a listed species, particularly focused on the adverse modification of habitat. And Section 7 is often said to refer only to those actions which require a Federal nexus but it is very difficult to find actions these days in the ordinary course of business or even life that does not have some Federal nexus, so many things, many activities are tied to the consultation provisions of Section 7 of the Act.

Finally, in your understanding, your reading of Mr. Cardoza's bill, is there anything in there that would lessen the amount of protection that there is for endangered species under the Act? Would people be allowed to go out and destroy habitat or take endangered species under the definition of the Act?

Mr. MANSON. I saw nothing in the bill that would weaken the protections of the Act. I saw this bill as reforming a process that in itself is often counterproductive and the process in and of itself is a weakness in the Act as far as I am concerned. But there is nothing in this bill that lessens the protections afforded to listed species.

The CHAIRMAN. Thank you very much.

I would like at this time to recognize the author of the legislation on which we are holding this hearing, Mr. Cardoza.

Mr. CARDOZA. Thank you, Mr. Chairman. Is this the appropriate time for my opening statement?

The CHAIRMAN. Go ahead.

STATEMENT OF THE HON. DENNIS CARDOZA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. CARDOZA. I would like to thank the Chairman, Ranking Member Rahall, and all the members of the Committee. I appreciate the opportunity to have this hearing today on the legislation, H.R. 2933, the Critical Habitat Reform Act. I look forward to a lively and productive debate on some of the problems involving the critical habitat issues under the Endangered Species Act.

When ESA was adopted in 1973, it was celebrated as groundbreaking environmental legislation. The ultimate goal of ESA was to focus sufficient attention on listed species so that in time, they could be returned to a healthy state and removed from the list. I fully support this goal and believe that recovery and ultimately delisting of species should be the Fish and Wildlife Service's top priority.

Unfortunately, we have been driven off course from a system that should have been directed by biology to a system driven by litigation. The efforts by the Service to recover species have been hampered by litigation, court orders, and unrealistic time lines which are preventing the exercise of discretion and frustrate the original purposes of the Act.

The critical habitat program is a poster child of a broken policy. I know this from personal experience and my folks back home know this from personal experience. A case in point is the Service's recent designation of critical habitat for vernal pool species. The original proposal would have designated over 1.7 million acres in California and Oregon as critical habitat. Over 330,000 acres in Merced County, California located in my congressional district would have been designated as critical habitat. That is over one third of the entire acreage of the county. Another more recent example is the Service's proposal to designate over 4.1 million acres in California as critical habitat for the red-legged frog.

These designations defy logic. If the species can be found all over 1.7 million acres, either the species cannot by definition be considered endangered or the entire zone of habitat cannot by definition

be considered essential to the conservation of the species. It simply makes no sense.

My experience with these designations has convinced me that we can do a better job of achieving the original goal of ESA to recover the species if we do a few simple things. First of all, we need a system that encourages the gathering of better information to enable the Service to make more informed decisions on critical habitat. Before designating critical habitat, it is important that the Service have a plan for recovery of the species. We are putting the cart before the horse in many instances, designating millions of acres of land as critical habitat when we do not have the information as to what truly is needed to recover the species.

The Service should involve local governments and landowners in critical habitat designations. They should consider local resource data, including maps, when considering areas for possible designation, and they should provide GIS maps when providing public notice of the proposed designations so that folks know if their land is actually affected. The Service should consider all economic impacts to a proposed designation, including direct, indirect, and cumulative impacts.

Second, areas that are already protected under Federal or state or local conservation plans, such as habitat conservation plans, should be excluded from critical habitat designations.

And finally and perhaps most importantly, the Fish and Wildlife Service needs to be put back in the driver's seat. We need to let them do their job of prioritizing listings, recovery and critical habitat designations. Biology and sound science, not litigation, should drive the Service's critical habitat program.

Again I wish to reinforce my commitment to ESA and getting us back on track to achieving our goal of recovery of the species and let me state for the record that I have no intention of gutting, dismantling, or eliminating this important legislation. But the system is broken. My constituents are being affected and I was sent here to do something about it.

I understand that there are concerns from both sides of the aisle on some of the provisions I have included within my bill. I look forward to discussions today in the hearing and pledge to work with all those parties who are seriously interested in moving forward on moderate, common-sense changes to the critical habitat designation process.

Again I want to thank you, Mr. Chairman. You have been very helpful in this process and I want to thank Ranking Member Rahall and the members of the Committee.

[The prepared statement of Mr. Cardoza follows:]

Statement of The Honorable Dennis A. Cardoza, a Representative in Congress from the State of California

Thank you Mr. Chairman, Ranking Member Rahall and other members of the committee in attendance this morning. I appreciate the opportunity to have this hearing today on my legislation H.R. 2933, "The Critical Habitat Reform Act." I look forward to a lively and productive debate to the problems facing the implementation of the Endangered Species Act.

When the Endangered Species Act, or ESA, was adopted by Congress in 1973, it was heralded as a landmark environmental legislation for the protection and conservation of threatened and endangered species. The ultimate goal of the ESA was

to focus sufficient federal attention on listed species so that, in time, they could be returned to a healthy state and removed from the list.

I fully support the goal of species protection and conservation, and believe that recovery, and ultimately delisting of species should be the U.S. Fish & Wildlife Service's top priority in the context of the ESA.

Unfortunately, over the past 30 years since its passage I believe that we have driven off course from a system that should be directed by biology to a system that is driven by litigation, thereby causing us to lose sight of the ESA's original purpose. The efforts by the Service to recover species have been hampered by litigation, court orders and unrealistic time lines which in total prevent the exercise of discretion and frustrate the purpose of the Act.

The critical habitat program is the poster child of broken policy.

Once a species is listed as threatened or endangered the ESA directs that habitat which is "essential to the conservation of the species" is to be designated by the Service. Failure to do so, even when the Service has determined that a designation would not be prudent and limited resources would be better spent on other recovery priorities, almost always results in the filing of a petition by a third party, thereby beginning the cycle of litigation. Currently, compliance with court actions and settlement agreements now consumes nearly the entire listing budget and leaves the Service with little ability to prioritize its actions to protect the most vulnerable species.

The Service has been on record for sometime now raising similar concerns that the critical habitat system is broken:

- In a February 2002 public information memorandum, the Service stated that "...critical habitat designation usually affords little extra protection to most species, and in some cases it can result in harm to the species. This harm may be due to negative public sentiment to the designation, to inaccuracies in the initial area designated, and to the fact that there is often a misconception among other Federal agencies that if an area is outside of the designated critical habitat area, then it is of no value to the species."
- In an August 29, 2003, report, a GAO concluded that "[t]he Service's critical habitat program faces a serious crisis because of extensive litigation that is consuming significant program resources."

A case in point is the Service's recent designation of critical habitat for 15 wetland animals and plants listed as threatened and endangered. The original proposal would have designated over 1.7 million acres as critical habitat in California and Oregon. Almost one-third of the entire acreage in one of the California counties I represent, Merced County, would have been designated as critical habitat. Another more recent example is the Service's announcement just 2 weeks ago in which it proposed to designate over 4.1 million acres as critical habitat for the red-legged frog. These designations defy logic—if the species can be found in this broad of a range, either the species cannot, by definition, be considered "endangered," or the entire zone of habitat cannot, by definition, be considered "essential to the conservation of the species."

My experience with these designations has convinced me that we can do a better job of achieving our original goal of protection, recovery and delisting of species if we do a few simple things provided for in legislation which I have sponsored:

First of all, we need a system that encourages the gathering of information that will help the Service to make better, more informed decisions about critical habitat for threatened and endangered species:

- Before designating critical habitat, it is important the Service have a plan for the recovery of the species. We are putting the cart before the horse in many instances—designating millions of acres of land as critical habitat, when we do not have the information as to what is truly needed for the recovery of the species. Critical habitat designation is not a one-size-fits-all program, some species require very specific and sometimes unique conservation tools that must be fully vetted and scientifically tested before a designation is proposed. Recovery plans, and therefore recovery of the species, should be tantamount in the critical habitat process.
- The Service should be required to consider local resource data, including maps, when considering areas for possible designation. Information from these agencies in many instances is more accurate and can provide crucial information regarding land conservation measures and land use planning.
- The Service should also be required to consider all economic impacts to a proposed designation, including direct, indirect and cumulative impacts. While the Service is directed to consider some economic costs an expansion of this information would provide the Service with a more accurate picture of the costs associated with their proposed designations. Additionally, this information will

provide the Secretary with greater tools in a determination as to whether the proposed designation is economically feasible, as provided in the legislation.

- The Service should be required to provide GIS maps when providing public notice of the proposed designation in order to provide more meaningful information to the public. Often landowners have difficulty deciphering what parts and parcels of their land are included within the proposed designation. Having accurate land use maps would help clear confusion on the ground and allow for informed participation in the recovery.

Secondly, areas that are already protected under other federal, state or local conservation plans such as Habitat Conservation Plans should be excluded from critical habitat designation. HCP's and other similar programs often take years of intense collaborative effort to create and implement. All sectors of the affected community, including agriculture, the business and environmental communities, as well as federal regulators, participate in crafting a conservation plan that is consistent with recovery objectives for listed species. Fostering a continued sense of community involvement and participation is an important and often overlooked component of species protection.

Finally, the Fish and Wildlife Service needs to be put back in the driver's seat. The Service needs to be able to do its job of prioritizing listing, recovery and critical habitat programs. Biology and sound science, not litigation, should drive the Service's determination of areas that are "essential to the conservation of the species."

Again, I wish to reinforce my commitment to the Endangered Species Act and getting us back on track to achieving our goals of recovery of the species. And let me state for the record that I have no intention of gutting, dismantling, or eliminating this important legislation.

I understand that there are concerns from both sides of the aisle on some of the provisions included within my bill. I pledge to work with all of those parties who are seriously interested in moving forward on moderate, commonsense changes to the critical habitat designation process the hope of reaching a compromise we can all be proud of. Again, thank you Mr. Chairman and Ranking Member Rahall for the opportunity to speak today.

The CHAIRMAN. Thank you.

Mr. Gilchrest?

STATEMENT OF THE HON. WAYNE T. GILCHREST, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Mr. GILCHREST. Thank you, Mr. Chairman. Thank you for calling this hearing.

Secretary Manson, welcome. The Secretary, Mr. Chairman, has been in my district many times. We do have some refuges, Federal refuges in Maryland. These are beautiful places and the Secretary has helped us enormously with a number of our situations and problems out there and I hope that the Secretary, as a result of a stringent hiking incident sometime ago, is a little bit under the weather but we look forward to your full recovery and then maybe climbing some of those beautiful mountains around the vast arenas of this country.

Thirty years ago we passed ESA and there is no doubt that we know a lot more about the ecological systems than we did 30 years ago, so it would be only prudent, I think, for us to take a close look at the Act to see where we can improve those provisions in the Act to enhance the wildlife that we are trying to protect, enhance their habitat, improve recovery plans, have a better understanding of what habitat is and a better understanding of what critical habitat is and have a better understanding of how to do that with some management flexibility for the Fish and Wildlife to reduce the problem and the cost, the time of litigation.

I think as we move through this, though, very often when we discuss the Endangered Species Act or when we discuss the Clean Water Act or we discuss wetlands or we discuss a whole range of statutes in various Acts, we do it in isolation. And just a quick comment before a question, Mr. Secretary, about a couple of things.

One, if we can improve this Act by improving communication between the various Federal agencies, especially when they come into conflict with Section 7 and Section 9 and most often both of those sections of the Act, in advance of designating critical habitat or some type of habitat because you are right, Mr. Secretary; habitat loss means species loss. There is no question about it. But improve within the confines of the Act the ability and the flow of information between different Federal agencies and certainly the ability of local communities to have input into this conversation because we need to go broader than just saving a particular type of species in California or Oklahoma or Maryland because when you preserve forests, you preserve nature's ability, free of charge, to clean the water and clean the air. Above the forest there is less carbon dioxide and there is more oxygen. When you have forested wetlands, when you have forests, you have a retention of water, you have a cleansing of that water, and you do not have to develop a very expensive prosthesis to do that. It does it by itself and, by the same token, it also preserves the species. When you look at wetlands, it controls floods, it cleans water, it provides habitat for wildlife.

So as we go through these things, whether or not to designate this area or that area for habitat, there is a whole broader question about preserving nature's infrastructure upon which our infrastructure depends. Whether it is a road, a highway, a school, or whatever it is, a sewage treatment plant, we depend on nature to process our activity to make it clean so that future generations can live here.

I think the question I have is not—and I look forward to looking at this legislation and working with the gentleman from California to pursue a better process for this particular legislation, to preserve habitat, to do it in a way that everybody has a stake in it.

I think at some point in the near future we are probably going to come to a place where we will have to plan that this area is going to be habitat for wildlife, this area will be for our industry, this area is going to be for commercial activity, this area is going to be for residential activity, and this area is going to be for agriculture. That plan will help preserve nature's infrastructure, habitat for species, and allow human beings to be able to sustain their dynamic economy and the quality of their life.

The Chairman of this committee, and I will close with this statement because I think I am probably over my time—I keep looking for the lights and I have a yellow yet—the Chairman, Mr. Pombo, helped develop a pilot project on the Delmarva Peninsula as a statute within the Farm Bill for a conservation corridor program and we have been working on that for the past year and it helps preserve an agricultural corridor, which is fundamentally our economy and it has been that way for 3009 years, along with the fishing economy and tourism, a corridor for agriculture, a corridor of forested wetlands and wetlands that preserve the hydrology and species habitat, and a corridor where people live.

So we are working on this pilot project to try to understand how we as humans can perpetuate our economy, improve the quality of our life, protect the air and water and habitat for species.

So I look forward to working with the author of this bill and certainly, Mr. Secretary, I look forward to continuing to work with you.

And thank you, Mr. Chairman, for the time.

[The prepared statement of Mr. Gilchrest follows:]

Statement of The Honorable Wayne T. Gilchrest, a Representative in Congress from the State of Maryland

Since Congress passed the Endangered Species Act thirty years ago we have experienced increasing land use changes, development, and loss of ecosystem components and habitat connectivity. We have also experienced a multitude of challenges in the listing of species and their recovery under the Endangered Species Act.

Thirty years ago, we collectively acted to boldly stem the extinction of species in the U.S. through this landmark conservation law. Because we knew the pressures on land would increase as the nation's economy and population grew, we put the protection of listed species before many other national priorities. We did this because, as we say, extinction is forever. Although we can restore habitats in many cases, we cannot restore genetic diversity among populations of species when it is lost. It is lost when the number of individuals reaches a point where all progeny are too closely related to give a species competitive advantage in the wild or to protect it against disease or congenital defects. The finality of extinction and that inevitable outcome when the number and distribution of a species becomes so limited should drive us to do all we can to prevent it.

Species become endangered in part because their needs are finely tuned to particular habitat resources. For instance, the Florida snail kite requires a certain species of snail in order to survive. Many listed bird species in Hawaii are uniquely adapted to extract particular kinds of food sources. When the habitat, including food, shelter, water and space, is altered, these species cannot adapt. Habitat changes not only remove critical sources of food and shelter, but also can provide opportunity for native or nonnative invasive species, with more generalist habitat requirements, to outcompete listed species. General preventative conservation measures are often not sufficient to protect such species from listing, making the Endangered Species Act and the recovery of listed species an important piece of the nation's overall fish and wildlife conservation policy.

In 1976, Congress recognized the powerful connection between habitat protection and the recovery of listed species in the House Committee on Merchant Marine and Fisheries Report for the reauthorization of appropriations for the act:

It is the Committee's view that classifying a species as endangered or threatened is only the first step in insuring its survival. Of equal or more importance is the determination of habitat necessary for the species continued existence. Once a habitat is so designated, the act requires that proposed federal actions not adversely affect the habitat. If the protection of endangered and threatened species depends in large measure on the preservation of the species habitat, then the ultimate effectiveness of the endangered species act will depend on the designation of critical habitat.

That being said, I share many of the Chairman's and my colleague's concerns about the process used to protect habitat for listed species through the Endangered Species Act and commend Representative Cardoza for starting the Congressional effort to improve this process. The goal of Endangered Species Act improvement will be, I hope, full and priority protection for listed species and effective recovery, in partnership between federal and state fish and wildlife agencies and private landowners with improved regulatory and flexible programmatic tools.

However, the goal cannot be an end to the struggle to better understand and meet the needs of listed species while fairly burdening public and private landowners with recovery efforts. This struggle will continue and we should not be hesitant to engage in it—while we use our experience during the past 30 years to improve the Endangered Species Act now, this continued struggle will ensure the refinement of habitat protection for listed species over the next 30 years.

The CHAIRMAN. Mr. Inslee.

Mr. INSLEE. Many of us believe that this is not the time to weaken the Endangered Species Act, that this was a fundamental

decision made decades ago by America that we should hue to and strengthen, if not anything, rather than weaken it. And many of us are very concerned that by attacking the fundamental character of critical habitat, that is exactly what will be happening here.

Now I must express, Judge, I think you have a difficult job this morning because you carry a lot of baggage that may not be yours personally but it is due to your Administration. You come to us with some ideas, you have made some suggestions about this issue, but the baggage you carry is working with an Administration that many people believe has the worst environmental record of any American President in American history. The attempts to weaken the clean air laws, the reduction in mercury toxic levels, the roadless area, gutting of the roadless area bill, the extension of resource development in critical habitat areas—not critical habitat areas but in our interior West—a whole slew of things that have simply gone backwards on protecting clean air and clean water. So I think you have kind of a difficult row to hoe not due to your personal difficulties but the Administration's. I just want to make sure you are aware of a concern that we have generally.

But I want to ask you because I understand that you know that this may be the sixth period of global extinction ever in world history, that what we are seeing right now where we have in the United States 985 endangered species, and that is just the United States, and many scientists think that we are in a global occurrence of extinction that really has only happened many five times before in global history. Before, it has happened because of asteroids, climate change. Now it is due to some things that we are responsible for. So many of us think we should not be weakening America's fundamental tool used to fulfill this American value of keeping species around for our grandchildren.

Now I understand you are sort of a point person in the Administration for this process and I want to ask you about your beliefs because I have read some things that cause me some concern. I read in a Grist Magazine article where you had said, "I don't think we know enough about how the world works to say that," referring to extinction of a species. And another place you said that "Critical habitat adds very little additional benefit to the conservation of a listed species."

I want to tell you, that causes me concern because as the person responsible for our government responsible for protecting endangered species who has publicly said that you do not think we know enough to know whether that is vital or not, when it is the policy of America for 30 years and when you are the person responsible for dealing with critical habitat designation and you have said you do not think it adds much value apparently, I just want to give you a chance to explain that, to tell me where you think the sunny side is of extinction.

Mr. MANSON. Well, first of all, I have never said that there was a rosy side to extinction. My point was that we do not know enough about how the world works to know A, all the causes of extinction and B, whether or not in every case that is necessarily something that nature does not have as part of some greater dynamic plan. That was the point there.

As for critical habitat, my view is the same as the Fish and Wildlife Service has held for 25 years, that there is little additional benefit added by critical habitat designations. And again the point here is not that habitat is not essential. Habitat is essential. The question is do we have a process that gets us what we need in terms of conservation benefit? And that is where for many years various Administrations have felt that we do not have such a process.

Mr. INSLEE. I just want to tell you, with all due respect, that those answers really do not wash, and I will tell you why. It is sort of like saying the fellow in charge of protecting Fort Knox saying well, gold is not everything in life. It is when you are in charge of critical habitat designation, which I understand to be your responsibility, and it is when you are in charge of implementing the Endangered Species Act. And I read quotations that you think it has some lesser value and with all due respect, I would think a person would be aware of the science that human activity is causing—our activity, all of us in this room in some sense—is causing massive extinction. And to sort of palm it off as this minimalist issue is very distressing, particularly when you then come and suggest in some form that we weaken the Endangered Species Act by reducing—and we will talk about this in length, but this clearly reduces the level of protection that will be provided species, particularly in giving them corridors for travel, and the like.

So I just want to tell you it is very distressing and if you want to make any comment on that, go ahead.

Mr. MANSON. Well again, I do not see this as a weakening of the Act. There still would be critical habitat designated under this particular bill, there still will be all of the other protections of the Act, and most importantly from my point of view, we have an opportunity to put resources into other programs which have demonstrated a greater ability to protect actual habitat on the ground that you can touch and you can feel and that critters can actually live on, and those programs are proving successful.

Some of those programs are voluntary programs in partnerships with landowners, some of them are habitat conservation plans, some of them involve conservation banking, all of which I believe are superior ways to protect habitat for species which are not only endangered but may be not listed but at risk of becoming endangered.

The CHAIRMAN. Mr. Calvert?

Mr. CALVERT. Thank you, Mr. Chairman. I want to thank you for having this hearing. I want to thank the author of this legislation, Mr. Cardoza, for bringing this up and certainly thank you, Judge Manson, for coming here, Mr. Manson, for having the time to come here.

I have the privilege to represent a district that has the distinction of having one of the most impacted areas by the Endangered Species Act of anywhere in the United States, Riverside, California, and certainly Mr. Baca's district, San Bernardino County, shares that distinction. We certainly live every day with critical habitat and the distinction of having to deal around that.

In Riverside County we have been somewhat proactive. We are attempting to create a multi-species habitat conservation plan, one

of the largest in the United States. Hopefully we are very close to putting this together, which proactively deals with the Endangered Species Act in a way that has not been done before. But we have found through experience that critical habitat, you are absolutely correct, Mr. Manson, in saying that that does not help the situation; it hinders the situation. The complexities of dealing with critical habitat is well known.

And by the way, the concept of saying science, in fact, weakens or law or using science is absolutely, I find, amazing. We have been attempting to make sure that science is part of the law as we deal with the Endangered Species Act. We have one species that in Mr. Baca's district called the Delhi flower-loving sandfly, which is somewhat famous. We cannot find the fly but we have been told it is there. They can hear it. They cannot see it. But the community that Mr. Baca represents, Fontana, is being, in effect, held hostage to this species, which we cannot deal with rationally.

We have the new Santa Ana suckerfish, again an area where this species—we have designated critical habitat where the species does not exist and that is a question I want to ask you, Mr. Manson. How do we deal with or how do we justify designating unoccupied habitat as critical?

Mr. MANSON. Well, the statute itself has a provision for the designation of unoccupied habitat. The statute says that unoccupied habitat may be designated as critical habitat but as I read that provision of the statute, that should be done only where the occupied habitat is not sufficient to provide a conservation benefit to the species.

Mr. CALVERT. Now in your experience have you found that people designated unoccupied habitat based on objective, scientific information or in many cases based upon subjective information between various parties?

Mr. MANSON. Well, that is one of the reasons why we are putting out this guidance, so that the public can be confident that the folks in the field who are doing the work are guided by principles that comport with not only the statute but with good sense and good science, as well.

Mr. CALVERT. I would hope so. In our area, again in the Inland Empire of California, one of the apparent reasons why this critical habitat was put together was not done because of any particular study. As we understand it, it was based upon two personal communications with biologists who stated in e-mails to the Service that designating that area was important.

Now we have a similar situation upriver where the Federal government spent several hundred million dollars putting a dam in based upon scientific information at the time that, for instance, the San Bernardino kangaroo rat habitat would not be harmed and now we are getting reports that the Service may require us to go ahead and just open the floodgates and not allow for the flood protection that this dam provides.

And it seems inconsistent to us in government who are in charge of trying to use taxpayers' money logically, to make sure that what we are attempting to do is not incompatible with species protection and I think science is an important part of that.

Again I want to thank Mr. Cardoza for bringing this legislation forward, for having this conversation, for having this hearing, and I hope that your legislation is successful and anything I can certainly do to assist you, I will do.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Miss Bordallo, did you have questions?

STATEMENT OF THE HON. MADELEINE Z. BORDALLO, A DELEGATE IN CONGRESS FROM THE TERRITORY OF GUAM

Ms. BORDALLO. Thank you very much, Mr. Chairman.

Members of the Committee and Mr. Cardoza, I am very pleased that you have brought this bill up before us and I represent a territory that has impacted by this. I would like to take a few minutes to explain to Assistant Secretary Manson why I at this stage will be supporting the Cardoza bill, or at least support rectifying many of the concerns which it seeks to address.

The Fish and Wildlife Service has been demonstrating everything that is wrong with the current system of critical habitat designation through its management of the Ritidian Point Wildlife Refuge in Guam and its proposed critical habitat overlay for substantial land on the rest of the island.

Mr. Chairman, in 1993 the Fish and Wildlife Service took property that was slated to be returned to the people of Guam after it was declared excess by the Air Force, thereby effectively cutting off those residents who live at the northern end of the island from having visitors to their property at Jinapsan Beach.

For the last decade, the Fish and Wildlife Service has been opposing the right of access through the refuge for these landowners to their property. Efforts to resolve this matter have been ongoing but the Fish and Wildlife Service continues to either point a finger at the Air Force or hide behind their lawyers at the Justice Department, rather than having an open discussion on how to achieve land use management that meets the needs of the local population and the endangered species.

Meanwhile, two endangered species in Guam have recently been declared extinct—the Mariana Mallard and the Guam broadbill. The Fish and Wildlife Service has not adequate managed to control the invasive brown tree snake, which is the prime threat to endangered species on the island, not the lack of habitat. And it seems pretty clear to me that the Fish and Wildlife Service is not demonstrating effective land use management at Ritidian and critical habitat designation would not meet the needs of our community.

So I support the notion in this legislation of tying critical habitat designation to having a recovery plan in place and to considering local concerns, such as access to private property. An alternative beyond the constraints of critical habitat designation is sorely needed and this bill offers the prospect of alternative land management that respects the concerns I have raised and until the Fish and Wildlife Service comes to its senses regarding access to Jinapsan Beach, I must support the bill.

[The prepared statement of Ms. Bordallo follows:]

Statement of The Honorable Madeleine Z. Bordallo, a Delegate in Congress from the Territory of Guam

Mr. Chairman, I would like to take a few minutes to explain to Assistant Secretary Manson, why I at this stage will be supporting the Cardoza bill, or at least support rectifying many of the concerns which it seeks to address. The Fish and Wildlife Service has been demonstrating everything that is wrong with the current system of critical habitat designation, through its management of the Ritidian Point Wildlife Refuge in Guam and its proposed critical habitat overlay for substantial land on the rest of the island. In 1993, the Fish and Wildlife Service took property that was slated to be returned to the people of Guam after it was declared excess by the Air Force, thereby effectively cutting off those residents who live at the northern end of the island from having visitors to their property at Jinapsan Beach.

For the last decade the Fish and Wildlife Service has been opposing the right of access through the refuge for these landowners to their property. Efforts to resolve this matter have been ongoing, but the Fish and Wildlife Service continues to either point the finger at the Air Force or hide behind their lawyers at the Justice Department, rather than having an open discussion on how to achieve land use management that meets the needs of the local population and the endangered species. Meanwhile, two endangered species in Guam have recently been declared extinct, the Mariana Mallard and the Guam Broadbill. The Fish and Wildlife Service has not adequately managed to control the invasive Brown Tree snake, which is the prime threat to engendered species on the island, not the lack of habitat. It seems pretty clear to me that the Fish and Wildlife Service is not demonstrating effective land use management at Ritidian and critical habitat designation would not meet the needs of our community. So, I support the notion in this legislation of tying critical habitat designation to having a recovery plan in place and to considering local concerns such as access to private property.

An alternative beyond the constraints of critical habitat designation is sorely needed. This bill offers the prospect of alternative land management that respects the concerns I have raised, and until the Fish and Wildlife Service comes to its senses regarding access to Jinapsan Beach, I must support the bill. Assistant Secretary Manson, I would welcome your comments on this problem and hope you will convey my message today to those within your organization responsible for dragging this land access issue out for over a decade, so it can be finally resolved.

Ms. BORDALLO. Assistant Secretary Manson, I would welcome your comments on this problem and I hope you will convey my message today to those within your organization responsible for dragging this land access issue out for over a decade, so it can finally be resolved.

Mr. MANSON. Well, thank you, Congresswoman. You may know that I went to Guam a few months ago and I visited the refuge. I had conversations with the Governor and all of the government of Guam who are in the natural resources arena. I also convened a meeting with the Air Force, the Navy, the Fish and Wildlife Service and the government of Guam and began working through this issue.

The matter is in litigation so I'm constrained as to what all I may say about this but I will tell you that about 2 weeks ago we received from the government of Guam a proposal that the Fish and Wildlife Service has found adequate to meet the needs that we discussed in the meetings back several months ago. That plan of the government of Guam is now out for public review and comment and I am hopeful that that is a pathway forward for all the difficult issues on Guam.

Ms. BORDALLO. I am aware of the plan.

Mr. Secretary, just how long is the litigation going to continue?

Mr. MANSON. Well, the court has a schedule and if the plan that is out for public notice and comment passes muster with all of the

parties, then there is a good chance that that litigation can be over with this summer.

Ms. BORDALLO. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Gibbons?

Mr. GIBBONS. Thank you very much.

Judge, welcome to the Committee. We are happy to have you and your testimony certainly has been helpful to us.

I, like my colleagues, am very supportive of this idea about amending the Endangered Species Act and I think it is important to know that we are in the 31st year of the implementation of the Endangered Species Act. I think it is important also to know that some people believe that simply by listing a species in the Endangered Species Act will result in its preservation well into the future. I think they would also be surprised to hear that 1,304 and rising species are on that list but only 12, less than one one-hundredth of a percent, have been recovered and 9 percent are in the recovering phase, or stable.

I think one of the issues that we have is science. One of the problems we have is science versus emotion. There is no doubt that the emotion of a species becoming extinct yields unintended consequences on both sides of the aisle—the debate, I should say—on this issue.

I am a firm believer that before a species is listed it should have, or within a period of time after it is listed, say 60 to 90 days, it should have a recovery plan, and that recovery plan should indicate how we plan to go forward with the recovery and preservation of that species because as I look at it today, with 1,304 species and only 12 recovered, the plan for the Endangered Species Act has been a failure to preserve and protect those species which were listed.

So I would ask what your thoughts are on implementing and requiring a recovery plan as part of the listing of a species and what you think should be included in that recovery plan.

Mr. MANSON. Well, I think it is very important to have a plan or a strategy to recover endangered species. I do not know if at the time of listing we frequently know enough about a species to do it on that short a timeframe, but I do strongly believe that the goal of the Act is recovery, that it is not simply sufficient to put a species on the list. That would be like saying the analogy would be in our health care system that we put people in the hospital and never let them out of the hospital. That would be a failure of a health care system if we were to do that.

Mr. GIBBONS. And you do nothing while they are in the hospital but just let them lie there.

Mr. MANSON. Right. That would be a failure of the health care system. It is likewise a failure of the Endangered Species Act if we do not recover species, because that is the goal, not just to list them.

Mr. GIBBONS. How many of the 1,304 species currently on the Endangered Species Act have a recovery plan?

Mr. MANSON. Only a very small percentage. It could be as many as 25 percent. I can get you that figure.

Mr. GIBBONS. Let me ask a question about science because I too often hear the mantra of people saying we are weakening the Endangered Species Act by requiring science or we are weakening it by requiring a habitat to be protected or listed for the preservation and recovery of the species.

Let me give you an example that occurred in the district I have the great fortune to represent with the bull trout. The bull trout was listed at the request of a Trout Unlimited group, fishing group, at the request to the Fish and Wildlife Service. Yet at the same time, the state of Nevada biologist had for the preceding three decades studied the bull trout in the very location where the issuance of the Endangered Species Act limitation was to take place.

As a result, the state of Nevada provided the Fish and Wildlife Service with the information in their biologic data, which was summarily disregarded. The species was listed as endangered despite what the biologist of the state of Nevada had said, that it was not an endangered species, yet today we are engaged in a very long and expensive process, much of which has gone through litigation, over the status of the bull trout in this area.

I am concerned that we too often let emotion rather than science drive the indication of whether a species should be listed. It is often listed for purposes other than recovery. In other words, oftentimes a species is listed to block, stall or delay any kind of use or development of land in its adjacent areas.

What are your thoughts on science as a criteria for listing an endangered species?

Mr. MANSON. Well, the law makes that a very firm criteria. In the guidance that we are issuing this week, we address the quality of information that is used to find the best available science and the guidance that we issued this week makes clear that there are different qualities of information and that we want to use the highest quality of information that we have on any particular species.

So I think that the issue that you raise is one that we are addressing now.

Mr. GIBBONS. Well, thank you, Judge. I look forward to working with you on this issue. I thank Mr. Cardoza for introducing this bill. I thank the Chairman for giving me the extra time because the light is red, and I look forward to making common sense work in this very important piece of legislation. Thank you.

The CHAIRMAN. Mr. Grijalva?

Mr. GRIJALVA. Thank you, Mr. Chairman. Not any questions for the witness but a couple of comments, if I may.

In my community, the area I represent, Pima County, we had the pygmy owl that was listed as an endangered species. What has resulted from that listing is a multi-government—state, Federal, local—effort and a multi-species habitat recovery plan for the species. And in the process of doing that, all the essential players in that decisionmaking process—development interests, environmental interests—have come together to work on a plan that now has broad-based support and broad-based support from the voters in terms of passing bond elections for land acquisition and habitat protection.

I mention that because I believe to this day that if that listing had not occurred, there would not have been the impetus to bring

all those people together at the table to begin to discuss protection and recovery but also how to balance economic development needs with the needs to protect the environment.

I think the bill that we have before us today will render ESA's critical habitat provision toothless and no longer able to provide help to species, as it was intended to do 34 years ago. I cannot support this legislation because it will do nothing to further the goals of ESA and will instead, make it more difficult and less likely that we will be able to recover species.

The proposed legislation will limit habitat designations to areas where species currently live. This will preserve the smallest possible area. It will make it impossible to recover species to a point where they no longer need listing.

This bill would also prioritize economic impacts over environmental impacts in the designation process, thus robbing us of an opportunity to create balance in those decisionmaking processes.

And I think this bill takes us backwards in our goal of recovery of endangered species. It will result in less protection for species and a reduced likelihood that species will recover.

As the bill stands today, I cannot support it and I believe this bill takes us back to a time that 34 years ago this country in its wisdom and this Congress in its wisdom set aside as the time to begin to protect our critical habitats and in doing that, protect the species.

So with that, Mr. Chairman, I don't have any further comments.

Mr. INSLEE. Mr. Grijalva, would you yield a moment?

Mr. GRIJALVA. Absolutely.

Mr. INSLEE. Thank you. I appreciate it.

I wanted to ask the judge about an issue of guidance on designation of critical habitat. We have already had a little bit of discussion about that.

It is my understanding that one of the concerns is the lack of definition of critical habitat and apparently the definition of "destruction or adverse modification of critical habitat," which I believe is the language out of the statute. The old regulations were thrown out in 2001 by a court. The court ruled that the Federal government was not abiding by the statute.

Now it is 2004. I am told that your agency still has not issued guidance or regulations for that definition, despite the passage of 3 years. Is that correct?

Mr. MANSON. You are talking about the issue of the definition of "adverse modification of habitat" in Section 7 of the Act?

Mr. INSLEE. Correct.

Mr. MANSON. And yes, for the last 3 years the Fish and Wildlife Service and NOAA Fisheries have worked on such a definition. We are coming closer to closure on that but we are not quite there yet. That is true.

Mr. INSLEE. You know, this is just extraordinary. Here we are talking about weakening the fundamental American protection for endangered species but the agency charged with the responsibility both to recover species and to be fair with property owners so property owners will know what the rules of the game are, has spent 3 years—we fought World War II in 4 years—to come up with some guidance to Americans about what the rules were.

Now it is no wonder that people are griping about the Endangered Species Act when the agency responsible for telling Americans how to play the game has not told us what the rules are. I find that totally unacceptable. The only possible explanation for that is that you do not have the budget to get a rule adopted, but that is not much of an excuse, either, when your Administration wants to cut the budget by $10 million to deal with recovery of species.

So can you give me some explanation of what you are going to do to solve this problem without gutting the Endangered Species Act?

Mr. MANSON. Well, as I said, first of all, we are dealing not with the issue of guidance on critical habitat but with a definition that the court found in its view did not comport with the statute. We have taken a very deliberate approach to creating such a rule. It is not a simple process.

Mr. INSLEE. You have been deliberative like a glacier is deliberative. Thank you.

The CHAIRMAN. Mr. Renzi?

Mr. RENZI. Thank you, Mr. Chairman.

Judge, I appreciate your coming today. I want to take advantage of your legal mind here.

I have great respect for the congressman from Southern Arizona; I consider him a friend. There is a lot of debate over the pygmy owl. One of the issues that has come up in Southern Arizona has to do with geographical area. The pygmy owl in its northern migration pattern comes up into what is Southern Arizona. It is said to be a flourishing species in Mexico.

So as you look at geographical area and in particular in the language of this legislation, which I do support, will there be an understanding as to migratory patterns, particularly from foreign soil into those areas like border states?

Mr. MANSON. I am not entirely sure I get the gist of your question.

Mr. RENZI. When we look at geographical area we look at habitat. When we look at the idea of critical habitat and of a species and we have a situation where that species may be rare in Southern Arizona or in Southern California, but it is plentiful in Mexico.

Will there be an ability to weight or will there be an ability to take into consideration the species' primary habitat in foreign soil?

Mr. MANSON. Well, the question that you ask is really one of listing. The critical habitat provisions as they currently exist do not allow us to designate critical habitat outside the United States. So when we look at what is essential for the conservation of the species, we are constrained to look at that which is in the United States itself, as opposed to what may—

Mr. RENZI. Thank you. Here is where I am going with this. As we see data that shows a species may be moving north and has not entered the United States or is just entering the United States and we are looking at the possibility of critical habitat being further north, the idea that oh, we may have heard the bird fly over this area or we may feel that as the bird continues its northern migration it may inhabit this area, under the language here, "occupied

and used," we would not be in a situation where the speculation would occur as to species that would be moving north, would we?

In other words, geographical area is really defined as occupied or used, not so much may occupy or may be projected to use as a species moves north.

Mr. MANSON. Right, that is the definition.

Mr. RENZI. So this language would actually bring a definition as to that speculation that is occurring in our backyard in Arizona.

Mr. MANSON. It definitely puts sideboards on the issue of which habitat ought to be designated as critical habitat.

Mr. RENZI. I appreciate that.

When we look at the issue of economic impact and the balancing and the weighting of that in comparison to the designation, in Arizona we have the Tonto Forest, which used to support 50,000 head of cattle. We have a willow flycatcher bird that we are able to see exactly where the nesting sites are but we have also designated now five miles within that area, even close to that area, because the cowbird may go in and lay its eggs, so we are kicking cattlemen off the ranch. We have gone from 50,000 head of cattle down to less than 1,500 head of cattle in an area where John Wayne used to own his own ranch.

So the Arizona beef industry is essentially almost decimated in the Tonto National Forest, which has millions of acres.

When you look at economic impact, how do you see it balancing and how do you see it being weighted in consideration of the species itself?

Mr. MANSON. Well, there is a provision of the statute know as 4(b)(2), which allows us to weigh the economic impact of designating critical habitat, as we are not allowed to do with respect to listing. In fact, that provision says we can weigh economic impact or any other relevant impact and the limit is the extinction of the species.

Mr. RENZI. So it is an equal weighting, an equal balancing, in comparison to the species itself, economic impact, or is it a three-legged stool or is it equally weighted?

Mr. MANSON. We balance the benefit of including an area in critical habitat versus the benefits of excluding it and that provision has been used only sparingly until this Administration and we have made more robust use of that provision.

For example, in Mr. Cardoza's district and throughout California with respect to vernal pool species, we used that. We looked at the economics of the situations in various counties and based upon the greater economic impact versus the limited conservation benefit, we excluded a number of counties from that designation.

Mr. RENZI. Thank you.

The CHAIRMAN. Mr. Baca.

Mr. BACA. Thank you very much, Mr. Chairman.

First I would like to thank Mr. Cardoza for introducing this legislation, which I believe is very much needed and I am a cosponsor of it, so I am on the opposite side of some of our members out here. And the reason why, as Mr. Calvert also mentioned, the problems that we have had in the Inland Empire, especially as it pertains to the Endangered Species Act and the Delhi Sands Flower-loving

fly and, of course, the Kangaroo Rat that have impacted both of our areas.

Before making additional statements I would like to thank the judge for working with us in trying to solve a particular problem that we had in Fontana and the immediate area. But what has been very controversial in the Inland Empire is the Endangered Species Act and the definitions, especially of the Delhi Sands Flower-loving fly. It has only been in existence for sometime. We do not even know if it even currently exists right now. It may be extinct. We have Santa Ana winds that are blowing. We do not know when the Santa Ana winds are blowing, where it is at, and if it is still there, yet it has cost millions and millions of dollars, especially for the City of Fontana and some of the surrounding areas like Colton with this particular fly in revenue and default bonds that have stalled even commercial development and preserved pockets of lands in connecting the corridor for this fly.

It is hard to imagine a fly. I mean if all of us saw a fly right now we would slap it. I mean if it came right now and I had a fly swatter, I would swat it and I would not know if it had a little yellow on it and if it is distinct and when it even comes up, but yet we have this as part of the Endangered Species Act, in the definition. We do not even know if it is still alive but yet the blight, the surrounding areas, so many things that can be done that has cost millions of dollars.

And because of this designation of both the fly and also the kangaroo rat, we have designated between San Bernardino and Riverside Counties, 33,000 acres of critical habitat just for the kangaroo rat alone and the economic impact—people have to understand the costs. It has cost us up to $130 million over 10 years. That is a heck of a lot of money that you have for a fly that we do not know if it exists, a fly that most of us would slap, a kangaroo rat that exists that is part of Endangered Species Act; it is there. I believe the Congress also has the responsibility not to burden, beyond the financial responsibility, to protect not only our communities but also as we look at this fly and this rat.

That is why one of the questions that I have and I would like to ask as we begin to work in our area, Judge, as you know, there is a difference between habitat conservation plan and critical habitat designation. As the Endangered Species Act stands now, the Fish and Wildlife Service can exclude HCPs from critical habitat. In dealing with the endangered Delhi sandflower-loving fly in my district, an HCP was created but no critical habitat designated, which is most likely a good thing. This was not allowed under the law.

Is there any current law that would prevent HCP from being turned into a critical habitat in the future? Question one. And question two is would H.R. 2933 be effective in making sure that habitat conservation plans are prohibited from becoming a critical habitat?

Mr. MANSON. Well, as to your first question, any party can petition to have critical habitat revised under the current statute. So it is possible that someone could petition to have the HCP areas included in critical habitat under the existing statute.

That is not going to happen during our Administration because the guidance that we have issued, HCPs which conserve the species are to be excluded from critical habitat. That is in our guidance which is coming out. But at some other point someone might well be able to do that.

Mr. BACA. That is why it is important to have the law and the definition be explicit, correct?

Mr. MANSON. Well, that is right. And our guidance is based upon our analysis of the current law and our belief in the strength of HCPs as a superior way to conserve habitat, as compared with critical habitat designations because critical habitat designations are more of a legal exercise, although they have consequences, where as habitat conservation plans provide real conservation benefit to species.

Under this bill in the definition of critical habitat, this bill would revise the definition of critical habitat to explicitly provide that habit conservation plan areas are not part of critical habitat definitionally.

Mr. BACA. Good. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Cole?

Mr. COLE. Thank you very much, Mr. Chairman. And I, too, want to thank Mr. Cardoza for introducing this legislation. It is frankly very important legislation. I appreciate it. I sat in the hearing on it, as well.

Secretary Manson, if I could I want to ask you a series of questions. I am particularly interested by the amount of litigation that the Endangered Species Act seems to generate. Am I correct in my opinion that it seems to be an inordinate amount of litigation particularly for a piece of legislation that is now over 30 years old and ought to be pretty well understood?

Mr. MANSON. Well, lawyers are always finding new aspects of the statute and new areas in which to litigate and it may be that that is part of the process of a statute maturing. I do not know. I do know, though, that the current tide of litigation which is about eight or 9 years old has really hampered the Fish and Wildlife Service's ability to carry out discretionary actions. When you have biologists writing declarations and spending more time with their lawyers than with the critters, then that is not the way to run a conservation agency.

Mr. COLE. Again that would suggest if we are having that degree of litigation that either there is something defective in the law or the Fish and Wildlife Service is not doing their job. I mean one of the two would be the logical surmise. Do you have an opinion on that as to which it is.

Mr. MANSON. Well, the current amount of litigation is generated in the listing and the critical habitat program and it is my belief that the critical habitat process, the provisions designating critical habitat, are defective and need to be fixed.

Mr. COLE. Last year we had testimony before this committee and before the Armed Services Committee about the application of the Endangered Species Act on military reservations and training reservations and during the course of that, in both committees there was testimony that actually the military had done a pretty good job

in its military reservations of enforcing the Endangered Species Act but was constantly running into litigation and a very slow process in terms of getting critical decisions done that it needed. We took action, as I recall, in the DOD bill, with the concurrence of this committee, to try and deal with that problem.

Are you telling us, in effect, that we have this problem across the board, that we really are having a hard time administering the law because we are involved in so much litigation about the law?

Mr. MANSON. Well, I think there are two things. I gave some of that testimony on the DOD bill.

The process itself is defective when it comes to designating critical habitat and one of the defects is the strict time lines which necessarily create a hook for litigation. And the second problem then is the ligation itself because it has caused a diversion of resources from core missions and it has resulted in court orders that stretch out through the year 2007 or so in order to be complied with. That means that other things which might be a higher priority in the view of the biologists do not get done because they do not have discretion to do those things without running afoul of the court orders.

Mr. COLE. I just want to thank you and thank again Mr. Cardoza. I do not think we have a debate, certainly not in this committee, about protecting endangered species. I think we would find agreement. The real question is a process whereby we can achieve that goal that is efficient and that is expeditious, which I think both the species themselves, not to mention the rest of us that are dealing with this could benefit from.

So I appreciate very much your efforts in that regard and again thank my friend Mr. Cardoza for his efforts in focusing on this critical problem.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Udall.

Mr. UDALL. Thank you, Mr. Chairman, and thank you, Judge, for being here today with us.

Clearly, Judge, we must find a better way to implement the Endangered Species Act and I think that is the thrust of many of the questions you are hearing today about implementation, about the failure of your agency to really move forward in an aggressive way and issue regulations and implement where you could resolve some of these issues in terms of litigation.

But let me just start with the proposition that we have a piece of legislation that my colleague Mr. Cardoza has introduced back, I believe, in July of 2003 and you are the political appointee that is over this Fish and Wildlife Service, this whole agency, and we are approaching—if it were this July it would be a year since this legislation is pending and is the Administration taking a position on this piece of legislation? Are you supporting it? Are you opposing it? Are you suggesting changes? What are you doing as far as this piece of legislation that we are hearing today?

Mr. MANSON. We are prepared to work with Mr. Cardoza and the rest of the Committee on the legislation. We think that it solves many of the issues that we have been talking about over the last year in terms of critical habitat designation.

Mr. UDALL. Is this an unqualified support, then, of this piece of legislation?

Mr. MANSON. I am not authorized to state an Administration position.

Mr. UDALL. So you do not have a position, then, on this piece of legislation?

Mr. MANSON. In the terms that we talk about positions, that is correct.

Mr. UDALL. Judge, could you explain to me the period of time we have gone through here where this legislation has been pending? You folks have the scientists to look at this kind of legislation. I mean occasionally on a congressional staff we will have the ability to hire a Ph.D. scientist or have a fellow come in but you have under you, in the Fish and Wildlife Service, all the professionals that understand this and have been working with it for years and yet I do not see any effort on your part to come forward and enlighten us on these kinds of provisions. And now you tell me today that you are not taking a position on this, that the Administration is not taking a position on this piece of legislation. I personally do not understand it.

Could it be that you do not want to take a position on such a controversial piece of legislation in an election year? Is that part of what is going on here?

Mr. MANSON. I think I said last year I am not in charge of developing positions on legislation. I can tell you what I think of the bill, which I have, which is that it addresses most of the issues.

Mr. UDALL. Are you supporting the legislation? You are not taking a position, right, on the legislation?

Mr. MANSON. That is right.

Mr. UDALL. OK. More than a year ago, Judge, you made a statement to the Senate, and this is a quote: "The present system for designating critical habitat is broken." I would like to know what have you done to improve the situation? Have you proposed legislation? Is there any legislation that your scientists and your people—I mean we all want to get the science right here. The career people that are working on this issue in your department, have they suggested changes based on science? Have you come forward with some legislation in this critical habitat area?

Mr. MANSON. We have not proposed any legislation. We have taken administrative steps that are within our ability to take to improve the administration of the critical habitat provisions. Those steps have been somewhat on an ad hoc basis over the last year but this week they are now compiled in a single guidance document that the Fish and Wildlife Service will begin applying.

Mr. UDALL. Now is that the one that it has taken 5 years to get out, that we are talking since 1999? We are talking 5 years to get some guidance out?

Let me ask you; in August of 2003 the GAO issued a report called "The endangered species Fish and Wildlife Service uses best available science to make listing decisions but additional guidance needed for critical habitat designations." It says in the footnote on page 15, "The Service is currently drafting interim peer review guidance that will provide objectives and procedures for implementing the 1994 peer review policy."

When will this guidance be issued on peer review?

Mr. MANSON. We have a peer review policy. In the interim, OMB has developed peer review guidelines to be applied throughout the government, so we are not actively looking presently at peer review. We are concentrating right now on the critical habitat guidance, which is going to be started to be applied this week.

The CHAIRMAN. The gentleman's time has expired.

Mr. UDALL. Thank you, Judge. I will be back on the next round. Thank you very much, Mr. Chairman.

The CHAIRMAN. Mr. Osborne.

Mr. OSBORNE. The very much, Mr. Chairman. And thank you, Judge, for being here. I would like to thank Mr. Cardoza. You have been thanked profusely today.

I represent a district that is almost entirely rural, 85 percent of Nebraska. The Endangered Species Act has been a real problem to landowners in this area, so I appreciate the judge's comments on involving landowners and state groups in this designation more thoroughly.

At the present time I think the feeling that I pick up from so many of my constituents is that there has been an inordinate amount of power accorded sometimes to a relatively few number of biologists in making designations of species and also habitat.

Also, a major concern has been the almost total lack of consideration of economic impact. For example, one process that is now under way would involve taking 150,000 acre-feet of Platt River water each year and designating that as water that should be used in ways that would preserve the whooping crane in the Central Platt and there is also some indication that that might go to 400,000 acre-feet, which comprises almost all of the irrigation water used in the Platt River on an annual basis.

Now if that happened, then we would have an awful lot of farmers completely put out of business. So we think that certainly some consideration of economic impact needs to be done.

And, of course, the last issue and I think it has been addressed by Mr. Cole and you, also, Judge, is just the litigation issue, which I would hope that everyone here could agree on, that so many of the funds that you need to implement the Endangered Species Act in terms of preserving species is now being tied up in court.

With that, let me just ask one question that may be somewhat peripheral to what Mr. Cole asked earlier but can you tell me what best practices exist in other agencies for managing the impact of litigation on programs and work priorities? In addition, what additional administrative or managerial actions could Fish and Wildlife take more effectively to manage the impact of litigation on programs and work priorities? Can you amplify or discuss that particular question?

Mr. MANSON. I cannot really say much about the first part of the question because I am just not familiar enough with that. What we have done this year is a couple of things with respect to critical habitat litigation. One is we did increase the budget for critical habitat designations. Second, I have directed the Fish and Wildlife Service to comply with the provision of the law that requires critical habitat designation to be done at the time of listing and the idea there is to prevent further lawsuits over deadlines. And third,

we have new guidance out this week that Fish and Wildlife Service will apply in designating critical habitat. It addresses the various definitions that are in the law. It addresses the issue of economic impact, although there will be further guidance on that issue. And it also addresses the matter of information quality. And all of those things taken as a whole should serve to reduce the amount of litigation that will result in the future.

Mr. OSBORNE. Thank you, Judge. I am glad to hear that you have taken those steps. It seems to make sense to me and hopefully it will bear some fruit.

With that, Mr. Chairman, I yield back.

The CHAIRMAN. Mr. Cardoza.

Mr. CARDOZA. Thank you, Mr. Chairman.

I would like to start by thanking Judge Manson for coming today. While I cannot attest to things that happened—Mr. Udall raised the issue of a 5-year period of time it has taken to get some of these clarifications—I cannot attest to that whole period because it predates my service but I can attest to the fact that I have been assisted a great deal by Judge Manson's input on this bill and I appreciate information that I have gotten from him and his Service.

My question goes to a report. In October 2003 a report on critical habitat was issued by the Center for Biological Diversity. I have it here in my hand. The center states that the populations of endangered species with critical habitat designations are more than twice as likely to improve as species without critical habitat designations. I have reviewed this report and do not see how the center arrived at this conclusion. The center states that it relied upon the data provided by Fish and Wildlife Service.

Sir, could you please comment upon the report and its findings and conclusions and whether you agree with them or not?

Mr. MANSON. Yes. Well, I do not agree with it and my disagreement is based on having asked the career scientists in the Fish and Wildlife Service about the methodology of that particular study. First of all, there was no data provided by the Fish and Wildlife Service for the purposes of that study. My understanding is that what the center did was they took a look at other reports, other data prepared for other purposes, and somehow extrapolated this conclusion out of those other reports and used the Fish and Wildlife Service data and those other reports for a purpose that it was not intended to be used for. The career scientists in the Fish and Wildlife Service that I asked about this said that that methodology was flawed and that they do not believe the conclusion is correct.

Mr. CARDOZA. Thank you, sir.

Some have stated that the problem that we are dealing with is one of implementation and that regulatory and legislative changes are not necessary. I understand, however, that the courts have actually stated that a legislative solution is necessary and can you provide us with any information as to court rulings on the need for a legislative fix?

Mr. MANSON. Several Federal judges have commented in the course of litigation that they believe, as one judge put it, that the Service is in a quandary trying to comply with the existing provisions on critical habitat designation and they have suggested that

a legislative fix is the proper way to go in addressing the issues that create this box that is bounded by strict deadlines on the one hand and the lack of available information at the outset of the listing process on the other hand.

Mr. CARDOZA. I concur. Looking at what has happened in Merced County, we have had wide swaths that were designated that you then went back and corrected in the process. I recall in one case there was a parking lot that had been paved over. In the information that the Fish and Wildlife Service had on its maps it indicated that there was an endangered species there when, in fact, we were parking cars on it.

So certainly it is difficult. We need accurate information and you need that information in order to be able to make the best call possible. Is that not correct?

Mr. MANSON. That is right.

Mr. CARDOZA. Thank you for your help, sir.

The CHAIRMAN. Mr. Pearce.

Mr. PEARCE. Thank you, Mr. Chairman. And I thank Mr. Cardoza for bringing this bill.

We have some questions about it but mostly we will work through those. I am appreciative that we are talking about the common sense of the legislation because sometimes that appears to be lost. As soon as I was elected I visited all 18 counties in a vast rural, sprawling district that every county said one of the most difficult things for them to deal with are the losses of property rights and private property rights, community property rights caused by the Endangered Species Act.

One example is that along the Rio Grande River that cuts right down through the middle of the big square state of New Mexico the silvery minnow is declared endangered and in times of drought we were not able to sustain the flow of water through the river that normally it had and in order to keep the minnow alive, we dumped 50 years worth of storage of water in upstream reservoirs to sustain a flow that nature will not sustain now that we have emptied that.

So my question, Mr. Manson, is why do we not breed that minnow in captivity? Why do we not have hatcheries? You used the word, that we have a failure if we do not recover the species and why do we not use fish hatcheries to do that?

Mr. MANSON. Well, with respect to silvery minnows, there is a program that is going down that road.

There is a lot of controversy about the use of captive breeding and hatchery-produced creatures to count with respect to endangered species. It has been the subject of litigation. There is biological disagreement about it. And those are some of the reasons why it is not a widespread—

Mr. PEARCE. Basically what you are saying is that there is objection to doing that?

Mr. MANSON. There is in some quarters, yes.

Mr. PEARCE. Mr. Manson, also in my district the agency follows the practice of not breeding in captivity minnow pairs but it does follow in my district—the same district, the same economic impact—it follows a practice of breeding wolves in pairs in captivity

and then releasing them. Why do we have one standard for one species and another standard for another species?

Mr. MANSON. Well, the difference has to do with the biology of the species.

Mr. PEARCE. I see. So the wolf is more needed and it is better to breed them in captivity but the minnow is not. That is the common sense that I am talking about, Mr. Manson. We just seem to have lost that.

We have in my district, also, the lesser prairie chicken and we shut down—we are dying for jobs in this country, we are dying for affordable energy, and we shut down drilling rigs so that the lesser prairie chicken can procreate. Is that not true?

Mr. MANSON. I am not aware of—

Mr. PEARCE. Just be aware that there is a moratorium on drilling and activities that create noise in order that the lesser prairie chicken might breed. I wonder if maybe we should not be piping in Bolero or maybe some Vivaldi to help these poor chickens—now keep in mind that the day after the moratorium lapsed, and it lapses at the same time every day, that people on these rigs were watching the thumping and the grinding and the booming of the breeding pairs, still with the noises going on and I suspect that the people in the agency who write up the rules either have not watched breeding pairs of many species, including homo sapiens, that possibly noise does not always interrupt.

That is the lack of common sense that would take away jobs and would take away economic activity, especially the endangered species of the silvery minnow along our Rio Grande River. We have 400 years of cultures. The Hispanics moved in, the Native Americans were there and 400 years of culture on that river that cannot get access to the water because it is being left in the river. They cannot irrigate their small 10- and 12- and 15-acre plots and we have economic destruction occurring in a very poor state. New Mexico ranks about 47th and if you want to put us back to even further, then we will continue to eliminate common sense from this whole idea.

But just the three examples I a citing here—we cannot breed minnows in captivity but we can breed wolves. We cannot have noises because the chickens might not mate. Where is the common sense? Where is the economic reality? When do we get to the realization that nature in drought years—and we have had 2,000 years of recorded moisture history—2,000 years and sometimes the Rio Grande was dry for 10 years at a stretch and the silvery minnow somehow made it through and I suspect that in those years when the river had no flow of water that it did not reach the CFS, cubic feet per second, that your agency is prescribing now.

The common sense is absolutely gone. I would hope that we can get some common sense. None of us would watch any species go extinct but one of my farmers on the Rio Grande said, "Please put in the Rio Grande farmers as an extinct species or endangered species."

So if you would kindly list them in your agency and maybe get some treatment for the endangered farmers of America, I would appreciate it. Thank you very much.

The CHAIRMAN. Mr. Inslee.

Mr. INSLEE. Thank you.

I want to thank Mr. Pearce for working on our ratings here, too.

The question we have here is whether the Act is broken or whether the actors or in this case nonactors are broken, meaning the agencies. You have just told us that your agency has failed now for somewhere between three and 5 years to adopt a needed guidance that your agency recognized in 1989 was needed for a definition of critical habitat.

But there is another one I am concerned about. Twenty Nobel laureates wrote some time ago to the President expressing a concern about a repeated failure to level with the American public and give scientific information. In fact, they pointed out repeated circumstances where the Administration had suppressed information from the American public. I want to ask you about one of those.

Recently Fish and Wildlife released an economic impact analysis of designating critical habitat for the bull trout and suppressed from the final government report issued by your Administration were 55 pages that detailed $215 million in economic benefits primarily from the reestablishment of a sport fishery stemming from critical habitat designation.

The press reported, saying "The removal was a policy decision made at the Washington level, did not come out of Denver or Portland."

Now it seems to me in working with the Endangered Species Act, leveling with the American public and sharing information should be a value rather than its suppression. Could you tell us why the department removed this analysis of economic benefits of designating critical habitat and the economic contribution of sports fishing?

Mr. MANSON. You know, the first I heard about that was when I read it in the newspaper. And subsequently I found out that those 55 pages or so were removed by the Fish and Wildlife Service at a midlevel, a midcareer level. The chief of the branch in Arlington of the Fish and Wildlife Service that does this said that she removed those pages because they did not comply with OMB guidelines for economic analysis.

I signed that critical habitat rule and I signed the notice putting out the economic analysis for public comment but she had not told me that 55 pages had been removed from the economic analysis.

So I do not think this is a case of suppression. I think it is a case of a public servant who looked at something, said this does not comport with the guidelines put out by OMB for economic analysis, so she took the action that she thought she needed to take.

Mr. INSLEE. So did she call the local agency then and say this does not comply with the rules; we need a legitimate analysis of the economic benefits of bull trout sports fishery; let us redo it so that Americans can make sure they know about the benefits of recovering this species? Or did she just put it in the trash can? Which did she do?

Mr. MANSON. I do not know what she did.

Mr. INSLEE. Well, she put it in the trash can, did she not? She did not go back to the agency and say look, you did not comply with the OMB rules, you need to redo this, because I do not want to keep the American public in the dark about the economic benefits

of species recovery; that would not be the right thing to do. She put it in the trash can, did she not?

Mr. MANSON. I have no idea what she did with us. I can tell you this, though. I have looked at those pages subsequently, after I heard about this in the press, and I have looked at the OMB guidelines and she was correct. There are methodologies in those pages, which were done by the contractor, which do not comport with OMB guidelines.

Mr. INSLEE. So do I understand that it is your policy—you think it is good leadership in your agency to encourage people to keep Americans in the dark about the benefits of recovering species when you get economic benefits of a sports fishery? You think that is good public policy to not go back and do an honest appraisal of that benefit and then tell Americans about it? Is that your testimony?

Mr. MANSON. No, my testimony is that it is good work on the part of a public servant who sees something that is not correct and takes action to correct it.

Mr. INSLEE. Well, my point is I want to make sure you understand the nature of my question. If she saw that this was not done according to OMB analysis, she had a choice, did she not? And she had a choice under your leadership to do what she should have done if that was the case, which is to go back and ask them to do it right, to come up with the right number of the economic benefit.

But the economic benefit that you want Americans believe in the recovery of endangered species is zero because that is the economic benefit that your agency told the American public would get from the recovery of bull trout and that is wrong, is it not? There is an economic benefit of the recovery, is there not?

Mr. MANSON. I can honestly tell you that as I sit here today, I do not know. That analysis has not been done.

Mr. INSLEE. You do not know that the recovery of having a sports fishery is a major economic benefit to the western and eastern United States? You have not seen the development of these rural communities coming back from the development of recreational industries? You do not know that?

Mr. MANSON. The question is whether there was an economic benefit from the designation of critical habitat, not from the recovery of the fishery.

The CHAIRMAN. Mr. Walden.

Mr. WALDEN. Thank you, Mr. Chairman.

So Judge, what you are saying is that the analysis that was done did not meet the legal guidelines that your agency was supposed to follow.

Mr. MANSON. That is right.

Mr. WALDEN. And a career public servant followed the law.

Mr. MANSON. That is correct.

Mr. WALDEN. And that the issue here is not about whether you have an economic benefit by the species being recovered to a point where it could be harvested, then. What that analysis was was whether declaring this habitat had an economic benefit. Is that right?

Mr. MANSON. Whether the designation of critical habitat had an economic benefit or not; that is the question.

Mr. WALDEN. Not the recovery of the species to the point where it could be harvested and eaten.

Mr. MANSON. Right.

Mr. WALDEN. Mr. Chairman, it seems to me in 30 years the Endangered Species Act has been on the books we have really had few recoveries. I think something on the order of 12 of 1,304 species have been recovered, according to Fish and Wildlife Service's own data.

Judge, does that sound right?

Mr. MANSON. That sounds about right.

Mr. WALDEN. So the percentage is pretty small, a hundredth of a percent that we are getting. If this were any other law would we not say that there is a problem that in 30 years we are not getting results?

Mr. MANSON. Well, I have said that the results have been good for a handful of species and not so good for many of the rest.

Mr. WALDEN. And I guess I want to make sure the actions this government is taking are based on sound science and peer-reviewed science. It is what we demand out of medical journals and Clean Water Act and elsewhere, that we rely on really peer-reviewed science. Is there that requirement in the law today for the work your agency does, that everything you do has to be peer-reviewed?

Mr. MANSON. There is not an explicit requirement in the statute itself for peer review. There are policies in place for peer review.

Mr. WALDEN. But they change Administration to Administration. They are subject to change.

Mr. MANSON. They are.

Mr. WALDEN. And there is no requirement that your agency do outside independent peer review with, say, the National Academy of Sciences.

Mr. MANSON. No such requirement in the statute, no.

Mr. WALDEN. And it seems to me, as I have looked through this information brought forward as a result of Mr. Cardoza's legislation, that your agency is really driven by whatever species happens to have an attorney that wants to file a suit to protect it, regardless of how threatened that species is with extinction.

Mr. MANSON. Well, that is one of the problems that we have pointed out, that the biologists lack the discretion to make those determinations anymore because they have to follow the orders prescribed by the courts.

Mr. WALDEN. Well, given the emphasis in this legislation by this committee on legitimate science-based and supported evaluations for determinations of species habitat, we are obviously watching the Central California tiger salamander decision with great interest.

How is the Fish and Wildlife Service utilizing and incorporating the scientific information provided to you and your staff in the fall of 2003 demonstrating the stability of the CTS's range and population in the Central Valley, the existence of suitable CTS habitat, and importantly, the aggressive application of mitigation and habitat replacement activities where human activity impacts CTS habitat?

Mr. MANSON. Well, that species is currently the subject of a rulemaking that will be complete in several weeks, so I would be

reluctant to comment specifically about that. I can tell you this, however, that I expect the Fish and Wildlife Service to utilize all of the best available science, as the statute requires, and when it comes to critical habitat, the information quality guidelines that are included in our new guidance that is out this week. So I have every confidence that the Service will apply that in whatever rulemaking they are currently engaged in.

Mr. WALDEN. A few years ago—I think it was May of 1999—your predecessor from the Clinton Administration, Jamie Rappaport Clark, said, and I quote, before a hearing in the Senate. "In 25 years of implementing the ESA we found that designation of official critical habitat provides little additional protection to most listed species while it consumes significant amounts of scarce conservation resources. We believe the critical habitat designation process needs to be recast as the determination of habitat necessary for the recovery of listed species."

Further, in 2001 Jamie said, "Critical habitat has turned our priorities upside down. Species that are in need of predication are having to be ignored. This is a biological disaster."

Mr. MANSON. That is the same situation that exists today.

Mr. WALDEN. And what needs to be done to fix that?

Mr. MANSON. Well, we have taken the limited administrative steps that are available to us but ultimately it is a legislative fix that needs to happen.

Mr. WALDEN. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Bishop.

Mr. BISHOP. In view of the time and the vote that is going on, let me just submit any questions by writing and you can move on.

The CHAIRMAN. Mrs. Cubin, did you have questions?

Mrs. CUBIN. Thank you, Mr. Chairman. I do have some questions about the wolf delisting or not in Wyoming, Idaho and Montana. I will submit those in writing.

But could you just briefly sum up for me what is happening with Idaho and Montana? Obviously Wyoming has filed suit and they are different but what is the status of the other two?

Mr. MANSON. In Idaho and Montana—we have to delist the wolf as a complete population, so we cannot delist Idaho and Montana separately under the law.

Mrs. CUBIN. Will conditions or requirements, restrictions be different in Montana and Idaho than they are in Wyoming?

Mr. MANSON. Yes, we have proposed a rule that would apply in Idaho and Montana that gives those two states more flexibility in terms of managing the wolf populations than those states—

Mrs. CUBIN. Why is that? Why should they be managed differently in Wyoming? We are talking about one population.

Mr. MANSON. Right. The issue is whether or not—ultimately when delisting occurs the states will have management authority over those species, so the issue is how can we give them some flexibility at this point, although we cannot completely delist?

Mrs. CUBIN. That does not answer my question. My question is why should the restrictions or the treatment of the wolves be different in Wyoming than in the other two states? Why?

Mr. MANSON. The difference is the management schemes that those states have proposed, as opposed to the management plan that Wyoming has proposed.

Mrs. CUBIN. But that does not answer the question. We are talking about preserving the species and we are talking about one population of wolves, so why would the management be different in those states? It is not because there is a state plan. Is it not because we are being punitive toward Wyoming?

Mr. MANSON. No, not at all. It has to do with the fact that the law in Wyoming is different than the law—

Mrs. CUBIN. But the ESA is a Federal law.

Mr. MANSON. Well, except in terms of—the issue is how much flexibility do the states get under the rules we have proposed or under a scheme of delisting.

Mrs. CUBIN. But how they are treated, how the states are treated differently, it makes no sense.

I do not want to take any more time but we will be submitting questions and I hope you will answer that question more directly than you have today when we submit it in writing. Thank you.

The CHAIRMAN. Thank you.

I know that Mr. Udall had additional questions and because we have been called to a vote—there are two votes and we are going to recess just very shortly and allow the members to go vote and come back. But I would ask Mr. Udall if he would submit those questions in writing.

Mr. UDALL. I would be happy to, Mr. Chairman.

The CHAIRMAN. Thank you.

I know there were several members of the Committee that had additional questions. We would submit those to you in writing, Judge. If you could answer those in a timely fashion so that they could be included in the hearing record?

Mr. MANSON. We would be pleased to do that.

The CHAIRMAN. Thank you very much. Thank you for your perseverance with all the questions. I am going to release you at this time. When the Committee returns from recess from the votes we will seat the second panel.

Mr. MANSON. Thank you, Mr. Chairman.

The CHAIRMAN. We stand in recess.

[Recess.]

The CHAIRMAN. I call the Committee back to order.

I would like to call up our second panel. David L. Sunding, Lawrence R. Liebesman, Rob Roy Ramey, II, Ph.D., and Jamie Rappaport Clark.

I am going to begin with Mr. Sunding. Before you start I just wanted to, in advance, apologize to the panel for the delay. I know that the first panel, Judge Manson, was a long time and I appreciate all of you sticking with us here and Mr. Sunding, if you are ready you can begin.

STATEMENT OF DAVID L. SUNDING, PROFESSOR, UNIVERSITY OF CALIFORNIA AT BERKELEY

Mr. SUNDING. Thank you, Mr. Chairman.

My name is David Sunding. I am a Professor of Environmental and Natural Resource Economics at Berkeley, where I am also the

Director of the University's Center for Sustainable Resource Development.

As a threshold comment, I would like to point out that I am not here to represent any particular group but simply to represent the results of research that my colleagues and I, working with our fantastic graduate students, have conducted at Berkeley.

I would like to refer in particular to two types of studies, first some studies that deal specifically with the question of the economic impacts of critical habitat designation. These studies include the red-legged frog, vernal pools, and the gnatcatcher. I would also like to refer to the results of some more general studies on the impact of environmental regulation on regional housing markets. In the interest of time I would like to limit my remarks here today to the impacts of designation on housing for a couple of reasons, first recognizing the fact that an enormous amount of the wealth in the United States is held in the form of real estate, upwards of 70 percent, and also realizing that critical habitat designation does have the ability to profoundly impact the development and completion of housing projects.

Having said that, I would also like to point out that critical habitat designation has the potential to touch a variety of economic activities, ranging from agriculture to mining, transportation to utility industries, especially in the provision of water. I would also like to note and I am sure we will hear from the witnesses later today, given their affiliations, that critical habitat designation can also impact the activities of state and especially local governments.

Now with respect to the research, I would like to begin at the project level where critical habitat designation can have three general types of impacts on housing projects. First, critical habitat designation increases the cost of development. It can cause the developer to redesign the project, can create a need to hire outside experts to get through the permitting process, these experts including attorneys and biologists. Critical habitat designation also imposes a requirement in many cases to perform needed mitigation at some expense.

Taken in total, the increase in development costs can easily be in the thousands of dollars per housing unit and can in some cases exceed $10,000.

The second type of impact critical habitat designation has on housing projects is to reduce the output of the project. This is caused by the necessity to avoid onsite impacts, and I will speak in a second about the market or regional implications of a reduction in housing availability.

Third, critical habitat designation delays completion of projects. This is what I tell my students is a very good example of the hidden costs of regulation. It is often overlooked but it is of great practical importance. Delay imposes costs on consumers, developers and landowners alike and these costs can in some cases account for some, if not the majority, of total impacts of designation.

Now having spoken a little bit about the project-level impacts of critical habitat designation, the main role of economic analysis, moving beyond just description, is to take these project-level impacts and convert them into market impacts and in particular, the incidence of impacts to different groups in society. At the market

level, critical habitat designation can decrease housing availability in a region and thereby increase its price. This implies a large wealth transfer and it is something that is worth discussing at some point today.

Second, marginal consumers, those with the lowest ability or willingness to pay for housing at a particular location, can find themselves pushed to a suboptimal location or, in some cases, out of the housing market altogether. In fact, I think it is fair to argue that most impacts of critical habitat designation are borne by consumers of housing, since developers have some capacity, which varies from project to project, to pass along costs to consumers.

In closing and again in the intersect of time, I would simply like to note that where we come to with respect to the economic analysis is that the costs of critical habitat designation can easily run to the millions of dollars per acre actually conserved as a result of the designation process. Whether or not that is a good policy decision is a larger question. What I am trying to do here today is simply point out the magnitude of the wealth transfer that can result from designation of critical habitat. Thank you.

[The prepared statement of Mr. Sunding follows:]

Statement of David L. Sunding, Professor, University of California at Berkeley

Mr. Chairman and Members of the Committee, it is a pleasure to provide you with information on the economic costs of critical habitat designation. In these remarks, I will focus on the housing industry since it is the sector of the economy most impacted by designation of critical habitat. It should be borne in mind, however, that critical habitat designation affects other industries including commercial development, transportation, mining, agriculture and utilities, as well as the activities of state and local governments.

Section 4 of the Endangered Species Act authorizes the Secretary of the Interior to take economic impacts into account when designating critical habitat. I have authored a series of studies describing how the economic impacts of critical habitat designation should be measured and identifying the groups who are most likely to be impacted. I will summarize my findings to date in this written statement.

Regulatory Baseline

A crucial step in any present calculation of the impacts of CHD is a definition of the regulatory baseline. When defining the regulatory baseline, it one must confront the admonition of the Tenth Circuit in its widely cited New Mexico Cattlegrowers decision.[1] Plaintiffs in the case challenged the Fish & Wildlife Service's designation of critical habitat for the southwestern willow flycatcher arguing, inter alia, that the Service's "baseline" approach to measuring the economic impacts of critical habitat designation was an erroneous construction of the ESA. Under this approach, the Service would consider the initial listing of the species to be part of the baseline and thus would not analyze the economic impacts of listing, but only the economic impacts attributable directly to the critical habitat designation. Applying this baseline approach to the critical habitat designation for the flycatcher, the Service relied on its Section 7 regulations to conclude that no economic impacts would have occurred "but for" the critical habitat designation, and that the impacts of critical habitat designation and listing of the flycatcher were co-extensive.

The Tenth Circuit rejected this "baseline" approach, holding that the Service is required to analyze all impacts of critical habitat designation, regardless of whether those impacts are co-extensive with those of listing. The court acknowledged that the ESA "clearly bars economic considerations when the listing determination is being made." However, the court stated, the ESA also plainly requires "some kind of consideration of economic impact" at the critical habitat designation phase. The Service's regulatory "definition of the jeopardy standard as fully encompassing the adverse modification standard renders any purported economic analysis done

[1] New Mexico Cattlegrowers Assn. v. U.S. Fish and Wildlife Service, 248 F.3d 1277 (10th Cir. 2001).

utilizing the baseline approach virtually meaningless." Thus, the court concluded, the baseline approach failed to give effect to the congressional directive that economic impacts be considered at the time of critical habitat designation and was not in accord with the language or intent of the ESA. Accordingly, the costs of CHD are properly defined as all of the costs that flow from the listing of the gnatcatcher as threatened.

Project-Level Impacts of CHD

In the context of housing, the most obvious effects of CHD are to increase the cost of development and to reduce the size of individual projects as a result of land set-asides. However, there are other, more subtle economic effects of CHD. The process of land development is complex and conditioned by numerous factors. If land is set aside or if the scale of projects is reduced by CHD, there may well be market and regional effects from this designation. Other land cannot always be brought into production to make up for losses due to designation, and even if it can, it may be in a suboptimal location. CHD also delays the development process, which imposes additional costs on developers, consumers and others in the affected region.

This process of site selection is often exhaustive since a large number of factors are relevant to the site selection process. In fact, the National Association of Home Builders has developed a list of over 1,000 factors that should be considered before acquiring land for development. Among the factors that make a site suitable for development are the following:

- Location and neighborhood
- Size and shape
- Accessibility and visibility
- Environmental conditions
- Legal constraints
- Utilities
- Zoning and regulation

The cumulative effect of these factors is that while an area may appear to have a large amount of vacant land available for development, in reality there can be little land actually or realistically available for development. Imposing additional regulation through CHD may effectively reduce the amount of land available for development in a region, reduce the regional stock of housing and create unintended consequences on other resources (such as agriculture) and local planning processes.

Other factors constrain the development process. Local governments often impose density restrictions that work to limit the number of housing units that can be constructed in a particular location. "Leapfrog" development is increasingly problematic since local governments often seek to confine development within defined boundaries. Further, nonsequential development requires utilities, roads and other infrastructure to be extended longer distances, thereby increasing project costs. Thus, land away from the urban boundary may be at best an imperfect substitute for land on the boundary that is set aside for habitat protection.

It is also important to note that CHD can significantly delay completion of a project, imposing potentially large costs on the developer, consumers and others affected by project completion. Delay reduces the supply of housing by reducing the present value of the developer's return on investment. In extreme cases, delay can lead to bankruptcy if the developer is highly leveraged. Delay also imposes costs on consumers who must live in a suboptimal location for some period of time.

Market Implications

The economic impacts of CHD depend as well on the nature of the regional housing market. There are two basic theories of housing market equilibrium. The most common approach is to assume that the price of housing reflects the marginal cost of construction and development. Accordingly, in this approach, housing is expensive because, say, land (an input to housing) is expensive. In this view, commonly called the neoclassical approach to housing market equilibrium and taught to every graduate student in urban economics, density will adjust to equate the price of land with its marginal value to consumers. This view also holds that developers do not earn excess profits from their activities.

An alternative approach stresses the importance of regulation such a zoning and density controls that limit the supply of housing. In this approach, the marginal cost of construction and development can be far below the market price of a house since houses are rationed among a number of consumers and their price is bid up accordingly. Thus, in the regulation-focused approach, housing prices reflect scarcity more than costs of production. In this view, the value of land with a house on it can be far above the willingness of consumers to pay for an additional unit of lot size.

This distinction between the neoclassical and regulation-focused explanations of the price of housing is important to the impact of CHD on the housing industry. As discussed earlier, CHD perturbs the housing market in three basic ways: it increases the cost of development, it reduces the output of the project, and it delays completion and delivery of the housing units. In markets where housing prices reflect marginal costs, the impact of CHD on costs of construction and development and on completion time will be of most importance; the marginal welfare costs of output restrictions are negligible since marginal cost equals marginal utility in the pre-regulation equilibrium.

When housing supply is limited and houses are rationed as a result, the supply-reducing effect of environmental regulation takes on major significance. By further restricting supply, environmental regulation imposes costs on consumers and results in losses to landowners and developers undertaking projects on conserved land.

Recently, UC Berkeley graduate student Aaron Swoboda and I implemented a statistical test to identify regulation-constrained housing markets. The approach exploits the fact that in regulation-constrained markets the price of housing is above the costs of construction and development. In such situations, the value of land with a house on it (called the "extensive margin" value) will exceed the marginal willingness of consumers to pay for an additional unit of land (the "intensive margin" value). This line of reasoning suggests a statistical test of price formation: if the intensive and extensive margin values of land are equal, then the neoclassical model best describes the housing market. If, however, the extensive margin value exceeds the intensive margin value, then the market is constrained by prior regulation and these distortions must be accounted for when calculating the cost of additional regulations.

The main difficulty in executing the test to categorize housing markets is how to measure consumers' willingness to pay for land. Mr. Swoboda and I collected information on over 18,000 new home sales in the "Inland Empire" region of Southern California, one of the nation's fastest-growing areas. The study area was divided into 14 subregions along lines used by the regional metropolitan planning agencies. Controlling for other factors, they estimated the contribution of a unit of lot size to the sales price of a home separately for each subregion. In 11 of the 14 areas considered, the extensive margin value of land was above the intensive margin value at a high level of statistical significance. The neoclassical model held only in the most remote, least politically organized areas. Thus, in the study area, housing is rationed by prior regulation and imposition of further regulation can cause large increases in the price of housing.

Nationwide, the work of other economists suggests that housing is rationed by regulation in a number of regions. In a less formal study than my work with Mr. Swoboda, researchers at Harvard University and the University of Pennsylvania have found that around 20 percent of the nation's housing is sold in markets where supply is artificially limited by regulation and other non-market factors. It is in these markets (largely on the West and East Coasts) where setting aside land for habitat is likely to have the largest economic impact

Who Bears the Costs of CHD?

In previous work, I have developed simulation models to measure the total economic effects of CHD, as well as its impact on particular groups. A typical simulation scenario envisions a 1,000-unit housing project that is reduced to 800 units as a result of CHD. The demand for the project's units has an implied elasticity of minus-1.67 evaluated at the initial price and quantity. The pre-regulation cost of development and construction is $200,000 per unit, and CHD adds $10,000 to the price of each unit. The rate of interest is 10 percent, and CHD is assumed to delay completion of the project by 1 year.

Before designation of critical habitat, the equilibrium price of each house in the development is $250,000 and 1,000 units are sold. CHD increases the price of a house to $280,000, and decreases output by 200 units. The increase in price and the reduction in the number of homes built cause a loss to consumers with a present value of $27 million. The effects on producers are subtler. While producers lose from the reduction in quantity and the increase in development and construction costs, they also gain from the increase in selling price.

This surplus loss is a present-value loss from a permanent reduction in consumption and production. The effects of delay are temporary. While social surplus loss stems largely from a reduction in output, delay cost stems from postponing construction of the units that do get built plus regional and indirect costs. Thus, delay costs are equal to post-construction consumer and producer surplus plus external costs multiplied by the interest rate for each period of delay.

Taking short- and long-run effects together, the total economic impact of CHD is $33 million for this hypothetical project. As a group, consumers lose the most from CHD in this scenario. This finding is quite robust to permutations of market conditions.

An important lesson from the simulation analysis is that permitting costs and land price decreases are a poor guide to the total impacts of CHD. These indicators underestimate true costs and give a biased impression with respect to the incidence of CHD costs. In cases where land is scarce and where housing is rationed by prior regulation, it is important to consider the market effects; in all cases it is important to recognize the costs of delay.

[Mr. Sunding's response to questions submitted for the record follows:]

Response to questions submitted for the record by David L. Sunding, Professor, University of California at Berkeley

Questions from the Majority Members:

Question: The current ESA allows for an economic analysis to coincide with a critical habitat designation. Sometimes this hasn't been done or has been done belatedly. Communities deserve a "right to know" how critical habitat will affect them. This bill requires the agency to do a comprehensive economic impact statement.

- **How do you react to those who say that the bill's economic impact provisions undermine the ESA?**

Answer: The economic analysis provisions do not undermine the ESA. Economic analysis can help to shape critical habitat by identifying the areas where designation would cause the greatest economic losses while providing little additional benefit to the species. In this way, economic analysis can help to minimize unnecessary conflicts between species and human activities, and can help to make the ESA less controversial.

Questions from the Minority Members:

Question: Are there any economic benefits, such as enhanced probability of recovery for a species, to critical habitat designation? In some of the economic impact analyses the FWS has prepared prior to critical habitat designation, benefits are discussed. Yet, you do not address this. How come?

Answer: My understanding is that economic analysis plays only a limited role in the designation of critical habitat. Economic analysis can be used to shape the region of critical habitat, but cannot preclude the designation of any critical habitat. Ideally, economic analysis should be used, together with biological analysis, to identify land that is of minimal benefit to the species in question, but of great benefit to the economy. By excluding such land from critical habitat, there would be only a small change in the species' recovery possibilities (perhaps none that are measurable at all), but a great savings to landowners and others.

I see some danger in expanding the benefits analysis beyond biology. The ESA should not be used as a mechanism to second-guess the land use choices of state and local governments. I would be very circumspect about conducting a benefits analysis that looked at factors such as aesthetics, amenity values, recreation possibilities for local residents, or other factors that could have been considered by state and local governments. Again, I see CHD benefits estimation as mainly a biological question, and thus not one that I am qualified to answer.

Additional Questions from Rep. Udall:

Question 1: In the sections of your testimony dealing with Project-Level Impacts of CHD and Market implications, where is the empirical data that demonstrate that CHD, and only CHD, perturbs the housing market in three basic ways: 1) increases in the cost of development; 2) reduced output of housing; and 3) delays in housing completion and delivery. We want information that these impacts are based on real data.

Answer: My characterization of how CHD impacts housing projects is widely accepted. In fact, it is accepted by the FWS's own economists and now used in their analyses of economic impacts of CHD.

With respect to the magnitude of cost changes, output reductions and other effects, it is hard to give an acontextual answer to this question. Recent work, however, suggests that the parameters I use in the hypotheticals are conservative. In their recent economic study on the gnatcatcher CHD, FWS economists reviewed

biological opinion from Southern California and concluded that land set-asides were well over 50 percent of the total project area, and that the cost of off-site mitigation was often over $75,000 per acre impacted. The Service's economists also concluded that the Section 7 consultations triggered by CHD will delay completion of projects by an average of 6 months.

Question 2: How did you separate out the impacts of the CHD from other regulatory impacts?

Answer: Other regulations are treated as part of the baseline, or status quo. For example, local land use controls such as minimum lot size restrictions, zoning or growth controls can constrain new housing supply and create the wedge between the price of housing and the marginal cost of construction and development to which I refer in my testimony. My analysis focused on the incremental impacts of CHD on landowners, developers and consumers, keeping all other regulations constant.

In reality, other regulations may change once CH is designated. The effect of this endogeneity can cut both ways. For example, if a city relaxes density restrictions in response to CHD effectively removing some land from development, then my model overestimates impacts. If, however, CHD triggers additional regulation by state and local governments (as FWS acknowledges is the case), then my model actually underestimates impacts.

Question 3: On the section of "Who Bears the Costs of CHD," you use a simulation model to measure total economic effects of CHD and on its impact on particular groups. This is a hypothetical project, in your own words. What were the assumptions and data used in the simulation model? We already know that this model was rejected by the FWS's own economists in your comments on the Draft Economic Impact Analysis for the Vernal Pool CHD.

Answer: Actually, my approach was not rejected by FWS's economists. To the contrary, in their final report released after they had read my study, they accepted all of my major criticisms, and modified their analysis along the lines I suggested.

Interestingly, the modifications changed the FWS's final calculations of economic impacts just as I had predicted. In my report I made rough calculations suggesting that if housing market and consumer impacts were considered, then FWS's estimate of economic impacts would underestimate true costs by a factor of anywhere from 7 to 14 times. In their final report, the FWS concluded that their earlier calculations underestimated actual impacts by 11 times.

The CHAIRMAN. Thank you.

Mr. Liebesman.

STATEMENT OF LAWRENCE R. LIEBESMAN, ESQ., HOLLAND & KNIGHT, LLP

Mr. LIEBESMAN. Good afternoon, Chairman Pombo and members of the Committee. My name is Lawrence Liebesman. I am a partner in the Washington, D.C. office of Holland & Knight. I am here and it is a privilege to be here to testify in support of House bill 2933.

By way of background, I have been practicing environmental law for over 30 years, including 13 years from the Federal government, with the Department of Justice, where I was a senior trial attorney handling many different cases under various environmental statutes. Over the last 15 years I have been very involved in the Endangered Species Act through litigation and policy matters, particularly critical habitat. Recently I co-authored the Endangered Species Desk Book published by the Environmental Law Institute with Rafe Peterson from our firm, and I am also planning co-chair for the American Bar Association's ESA course next year.

H.R. 2933 will address many of the very serious problems we have heard about today in critical habitat. It will provide clear direction by more precisely defining how critical habitat is designated, by setting forth clear criteria for considering and balancing economic impacts. Most significantly, the bill will especially

advance the basic goal of the Act, and that is to get species delisted through sound science and a fair process.

When you look at the various provisions of the bill, I think they help achieve that result. Section 2 of the bill, designation of critical habitat, will mesh the timing of critical habitat designation with the development of recovery plans. Recovery has got to be fundamental to getting species off the list and unfortunately we have seen a terrible disconnect between critical habitat designation and the approval and development of recovery plans.

As a matter of fact, the Alameda whipsnake case in California is a prime example where the Service's designation of over 400,000 acres in four California Central Valley counties for critical habitat was struck down, where that occurred 2 years before the adoption of a recovery plan for the snake. It was overturned on several grounds and particularly the court stated, and I quote, "If the Service has not determined at what point the protections of the ESA will no longer be necessary, how can it possibly determine and identify the features of habitat that are indispensable in getting the species off the list?" The bill's linkage will help alleviate that kind of disconnect and problem.

It is also consistent with sound science and I point the Committee to the 1995 National Academy of Sciences report on science and the ESA that specifically recommended the critical habitat designation be meshed procedurally with the approval of recovery plans.

The bill will also recognize what I think is a very important commonsense objective, and that is if there is an existing plan that achieves substantially the same results as critical habitat, that the Service does not need to go through the designation process; that is, if there is a habitat conservation plan or some other kind of plan in place. And what this does, in my judgment, is that it elevates—what we have now is form over substance, as opposed to focusing on what protections are being provided by a management plan and the flexibility in place is really essential.

We have seen problems in litigation with this that has not been recognized. The Mexican spotted owl case, for example, is a prime example where the judge said you still have to designate critical habitat despite extensive and very well defined management plans for both public and private land in Arizona.

The clarification, Section 5, the clarification of the definition of critical habitat will also go a long way toward promoting sound science and fair gathering of data and information. What we have seen unfortunately is that unoccupied areas are often swept into the critical habitat definition, the idea of a blurring of a distinction between ordinary habitat and critical habitat, and it is important that we get it right, that science be sound and carefully defined because critical habitat should not encompass all possible habitat. It is only the habitat that is essential to bring the species to the point of recovery.

In that regard, I think the language of the bill, while it is good, needs to be thought through because the language defining essential as absolutely necessary and indispensable may be subject to some confusion and potentially some abuse by regulators, albeit well meaning, in the field. So I would recommend looking more

precisely toward kind of biological criteria that would allow that kind of sound science approach to be applied to that definition.

Now the basis for the determination, Section 3, again some very important points I think in this bill that the Committee should seriously consider. Getting information from local governments is essential. Oftentimes local agencies are the best repository of information on habitat. But I would go a step further. You need to look at state agencies. I do a lot of work in Maryland. Very good Department of Natural Resources, great repository of information. That can help ease the information-gathering and provide a sounder scientific basis to gather information.

Economics, and we have heard a lot of talk about economics. The New Mexico Cattle Growers case is a very, very significant case and what it says is you have to consider the full range of economic effects. Unfortunately, the Service for years has not done that and with all due respect, I think they are trying to do it right now but they still have not gotten it right in that they have to look at the total effects of both listing and critical habitat because for years they said there is no distinction, so essentially the increment above listing is nil and therefore there is no adverse economic consequences.

Court after court has rejected that principle. The Service has taken remands on that regard. So I think looking at both direct and indirect effects is very important. Working with clients and landowners—by putting critical habitat essentially in many ways use redline property; you affect property values, as Professor Sunding pointed out. You cannot look at economics strictly on the number of Section 7 consultations that may occur. So the bill's broader approach is very important in the whole balancing process of making sound judgments.

But that has got to be also coupled, in my view, with the Service revising the definition of adverse modification and jeopardy out of the Sierra Club opinion that Congressman Inslee mentioned and asked in a question to Judge Manson. It is very important to recognize, in my view, that there is a lower threshold for critical habitat. It will trigger more of an impact and the Service has got to go back, in my view, and go through a rulemaking to recognize that and formalize that. And I think hopefully the bill will encourage that.

Final point. Information to the public. Section 4 is very important in providing clear guidance, requiring designations to be posted on the Internet. The public right now is confused. I work with landowners. A lot of them have no real commonsense understanding of what is critical habitat and what is not so people can make rational decisions.

Property owners are not out there to kill species. They want to manage species in many ways, deal with government agencies in a fair and sound approach, and they cannot do that right now. It is very, very frustrating.

So in conclusion, I would say that H.R. 2933 provides an excellent vehicle to address this most contentious issue today and get to the fundamental purpose of the Endangered Species Act. Let us get these species delisted through sound science, fairness to the

public, to everybody out there, and let us follow through in a concerted effort and a bipartisan effort to make this happen.

I will be very happy to take questions from the Committee. Thank you.

[The prepared statement of Mr. Liebesman follows:]

Statement of Lawrence R. Liebesman, Esq., Partner, Holland & Knight, LLP, Washington, D.C.

INTRODUCTION

Good morning—my name is Lawrence R. Liebesman, and I am a partner in the Washington, D.C., office of Holland & Knight LLP, a national law firm with offices in 24 cities, and 7 foreign countries. It is a pleasure to be here today to testify in support of H.R. 2933, the "Critical Habitat Reform Act of 2003." I have practiced environmental law for over 30 years including 13 years with the Federal Government at EPA and the Justice Department's Environment Division. I was also detailed to the President's Council on Environmental Quality in the Carter Administration, helping to develop CEQ's NEPA regulations. Over the past 15 years, I have been heavily involved in issues under the Federal Endangered Species Act, including Critical Habitat Designation. I recently co-authored the "Endangered Species Deskbook" with Rafe Petersen of our firm, published by the Environmental Law Institute. (See The Endangered Species Deskbook, written by Lawrence R. Liebesman, Rafe Petersen and other Holland & Knight attorneys, and published by the Environmental Law Institute, Washington, D.C. (2003)) I am also a planning co-chair for the first ALI-ABA Course of Study on the ESA, scheduled for April 2005.

The thirty-year history of the Endangered Species Act (ESA) is mottled with a give-and-take between the United States Fish & Wildlife Service (FWS), the National Marine Fisheries Service (NMFS), and the federal courts. Disagreements over the substance of the ESA's requirements traditionally has focused on the listing of threatened and endangered species. Unfortunately, increased contention over the species listing process occurred to the detriment of the ESA's critical habitat (CH) designation requirements. Disregard for Critical Habitat designation reached its apex in the mid-1990's, when the Clinton Administration determined that most potential CH designations were "not prudent" and thus exempt from the ESA's designation requirement.[1] Consequently, the FWS had designated Critical Habitat only about one-third of the 1200 listed domestic species.[2]

In the past few years, however, litigants and courts alike have recognized the past neglect over Critical Habitat designation and the issue has come center stage in the world of environmental litigation. This recognition has produced a steady stream of litigation in which parties bring claims against the FWS alleging its failure to designate Critical Habitat violates the Act, the agency scrambles to throw together a general designation before the statutory deadline expires, and then subsequent claims are brought by other parties because the hastily-created designations fail to satisfy the ESA's CH requirements. Indeed, last year Assistant Secretary of the Interior, Craig Manson, testified in Senate Committee hearings that "the listing and Critical Habitat program is now operated in a 'first to the courthouse' mode and, as a result, [CH] budgets into Fiscal Year 2008 are being dedicated to compliance with existing court orders and court-approved settlement agreements."[3]

H.R. 2933, "The Critical Habitat Reform Act of 2003" will address many of the problems arising over Critical Habitat. While it may not stop the recent "flood" of litigation, it will provide clear direction by more precisely defining how Critical Habitat is designated and by setting forth clearer criteria for considering and balancing economic impacts. Most significantly, the bill would especially advance the basic goal of the ESA—the conservation and eventual delisting of imperiled species—by linking the designation of Critical Habitat to the approval of recovery plans.

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[1] United States Fish & Wildlife Service, Critical Habitat—Questions and Answers 1 (May 2003).

[2] Id. See also CRS Issue Brief for Congress "Endangered Species: Difficult Choices," September 1, 2003, at CRS-13.

[3] The Designation of Critical Habitat Under the Endangered Species Act: Hearing Before the Subcommittee on Fisheries, Wildlife and Water of the Senate Committee On Environment and Public Works, 108th Cong. (Apr. 10, 2003) (testimony of Craig Manson, Assistant Secretary of Fish and Wildlife and Parks, Department of Interior).

SUMMARY OF COMMENTS ON H.R. 2933

Section 2—(Designation of Critical Habitat Concurrent with Approval of Recovery Plan Standard)

This section would amend ESA Section 4(a) to require the establishment of critical habitat concurrent with the approval of recovery plans under Section 4(f). Present law, has often resulted in hastily prepared CH maps without adequately considering overall economic impacts as courts have recognized. Under H.R. 2933, CH designation will fit into its logical place in the Act—at the time that the Services approve a recovery plan to eventually remove a species from the list. There is little evidence that CH designations have aided in species recovery efforts. The only way to reverse this trend is to ensure that CH is integral to the development of a plan which provides "concise and measurable recovery criteria." Further, the bill would provide more discretion to designate critical habitat "to the maximum extent practicable, economically feasible and determinable" as compared to the current law ("maximum extent prudent or determinable"). H.R. 2933 would allow consideration of factors such as whether it is practicable or feasible to even designate critical habitat as part of the overall recovery planning effort. Section 2(a)(3)(B) also grants discretion not to designate CH if the Secretary determines that either a "substantially equivalent" Habitat Conservation Plan under section 10(a)(2) or a State or federal land conservation program is in place. This recognizes a commonsense principle—it is the substance of the management protections in place, not the formality of a CH designation, that should control a decision whether to designate CH.

Section 5—Clarification of Definition of Critical Habitat

This Section would define key terms in the CH definition ("geographic area occupied by the species" as meaning "the specific area currently used by the species for essential behavioral patterns" and "essential to the conservation of the species" as "areas absolutely necessary and indispensable to conservation.") This language will help cure one of the problems in the CH process—despite the ESA's direction that CH should not encompass all actual or potential habitat for a species unless the Secretary specifically finds that such designation of unoccupied habitat is essential to the conservation of the species, the Services often appears to "sweep in" unoccupied habitat on the theory that species may have frequented the area at some point in the past and may do so in the future. Often such a conclusion is based on questionable or incomplete data. However, H.R. 2933's use of "absolutely necessary and indispensable to conservation" language in defining "essential" could be problematic. In the absence of biological criteria, officials at the Services could easily apply value judgments and sweep in larger areas than justified by objective field data—even including unoccupied areas that might some day acquire the Primary Constituent Elements (PCEs) for creation of suitable habitat. While the language directs agency officials to restrict CH only to very limited "essential" areas, any legislation should provide objective criteria for both the decisionmakers and the public.

Section 3—Bases For Determination

This section would provide the Secretary with more complete and accurate information for determining under section 4(b) if the benefits of exclusion of an area would outweigh the benefits of designation. It would require consideration of information from local governments as well as direct and indirect economic impacts and costs. This language will greatly advance the goal of ensuring that CH decisions are based on the most accurate and up-to-date technical and economic information. The duty to "seek and consider, if available, information from local governments in the vicinity of the area, including local resource data and maps" should help since there is no consistent approach to seeking and utilizing local information in CH decisions. Many state natural resource agencies have excellent habitat inventory data that could greatly assist in CH decisions and help fill the data gaps. The bill's articulation of the range of scope of economic and cost data that should be considered in CH decisions highlights perhaps the most contentious CH issue and will be consistent with the Supreme Court's interpretation of the ESA in Bennett v. Spear that economic considerations are "mandatory" in the CH process. In my judgment, the bill will lead to a more accurate assessment of the true economic impact of CH designations by looking beyond the mere costs of section 7 consultations and assessing all direct, indirect and cumulative costs including those costs associated with reports, surveys and analyses. However, in my view, the economic factors in the bill must also be accompanied by FWS addressing the holding of the Fifth Circuit in Sierra Club v. Norton—namely, that the "adverse modification" standard under section 7 creates a much lower threshold of potential impacts than the section 7 "jeopardy" standard given that Critical Habitat is defined as areas "essential to the

conservation of a listed species" whereas the focus of the jeopardy standard is the "survival" of the species.

Section 4—Contents of Notices Of Proposed Designation of Critical Habitat

This section would provide a key tool for the public to access CH areas maps and data through requiring GIS maps and coordinates to be posted on the Department's Internet page. Internet data is often the primary source for the public to obtain information from the federal government. Under the current system, the public often cannot easily access CH data. Further, this change will also help facilitate meaningful public comment on proposed CH designation by providing the specific Internet page with the proposed designation. In this manner, landowners, local governments and the public will not only be able to better participate in the CH process but will also be able to make better land use decisions based on accurate and easily accessible GIS maps of the CH area.

DETAILED COMMENTS ON H.R. 2933

Section 2—(Designation of Critical Habitat Concurrent with Approval of Recovery Plan Standard)

This section would amend section 4(a) to require the establishment of Critical Habitat concurrent with the approval of recovery plans under section 4 (f). Present law, requires Critical Habitat designation "concurrent with the listing of a species as endangered or threatened" to the maximum extent prudent or determinable." The Services' failure to designate Critical Habitat concurrent with the listing decisions has triggered numerous lawsuits imposing court-ordered schedules for Critical Habitat actions. This has often resulted in hastily prepared and poorly drawn CH maps without adequately considering overall economic impacts, as the New Mexico Cattle Growers [4] and other courts have recognized.

Under H.R. 2933, the CH designation will fit into its logical place in the Act—at the time that the Services approve a recovery plan to eventually remove a species from the list. Indeed, the ESA has not worked to recover very many species. A recent GAO report indicates that, as of March 2003, "The Service had delisted 25 threatened and endangered domestic species of the more than 1,200 listed and only 7 delistings resulted from recovery efforts." [5] However, Critical Habitat has been designated for approximately one-third of listed domestic species. [6] Clearly, there is a disconnect between Critical Habitat designation and recovery of imperiled species. The only way to reverse this trend is to ensure that CH is integral to the development of recovery plans. In fact, as the GAO Report notes, "the Service and others, including the National Research Council, have recommended delaying designations until recovery plans are developed." [7]

Of course, it could be argued that, given the slow pace and extensive resources involved in recovery plans, such delay would leave important habitat unprotected for a much longer period than present law allows. Yet, it could also be argued that poor CH designations to meet court-imposed deadlines and that are later struck down actually do more harm than good for recovery because they often are done without the benefit of the detailed biological analysis and clear goals of an up-to-date plan, as seen in the court's decision in Home Builders Assn. of Northern California v. FWS (HBANC), overturning the critical habitat designation for the Whipsnake in Central California [8] where the draft recovery plan was released in November 2002 [9] more than two years after the final CH designation on October 3, 2000. [10] There, the court faulted the FWS for designating large areas of Alameda, San Joaquin, Santa Clara and Contra Costa Counties in central California as CH for the snake on several grounds including (1) failure to identify specific areas within the geographic area occupied by the snake with physical or biological features essential to species conservation; (2) failure to articulate a reasonable basis for

[4] New Mexico Cattle Growers Assn. v. USFWS, Civ. No. 02-0461 LH/RHS, slip op. (D.N.M. 2003)

[5] U.S. General Accounting Office. (Aug. 2003). Endangered Species: Fish and Wildlife Service Uses Best Available Science to Make Listing Decision, but Additional Guidance Needed for Critical Habitat Designation (Pub. No. GAO-03-803) at 25.

[6] CRS Issue Brief for Congress,"Endangered Species : Difficult choices," Sept. 12, 2003 at CRS—13

[7] GAO Report at p. 28 and National Research Council' Science and the Endangered Species Act, Washington DC National Academy Press, 1995 at 71-73

[8] Home Builders Assn. of Northern California v. U.S. Fish & Wildlife Service, 268 F.Supp.2d. 1197 (E.D.Cal. 2003).

[9] Draft Recovery Plan for Chaparral and Scrub Community Specific East of San Francisco Bay, California (Reg. 1, USFWS, Portland, Ore.) (Nov. 2002)

[10] Vol. 65 Fed. Reg. 58933 (Oct. 3, 2000)

including disputed areas despite information indicating that some of those lands were not, in fact, occupied by the snake; (3) including areas where available biological information indicated that essential physical or biological features did not exist; (4) failure to examine the economic effects of CH designation that were co-extensive with those of the listing of the snake as threatened; and, (5) failure to make a finding prior to designation that the area in question might require special management considerations and protections at some time in the future. In particular, the court held that "if the Service has not determined at what point the protections of the ESA will no longer be necessary for the whipsnake, it cannot possibly identify the physical and biological features that are an indispensable part of bringing the snake to that point." [11]

H.R. 2033 will help prevent the kind of "disconnect" cited by the HBANC court. Assuming sufficient funding in the budget, the linkage in H.R. 2933 will create incentives for more rapid development and revisions of recovery plans. The bill should also help facilitate more meaningful public comment by providing clear context for channeling public comment to address how critical habitat will advance specific recovery goals.

Further, the bill would provide more discretion to the Services to designate critical habitat "to the maximum extent practicable, economically feasible and determinable" as compared to the current law ("maximum extent prudent or determinable"). Under current law, courts have largely rejected FWS "prudent or determinable" arguments and imposed unworkable deadlines for designation. H.R. 2933 would allow the Secretary to consider a host of factors such as whether it is practicable or feasible to even designate critical habitat as part of the overall recovery planning effort. For example, in certain cases, the recovery goals could be achieved through other methods such as seen on coastal Long Island (Westhampton, NY) which has seen record piping plover numbers in due largely to local property owner stewardship. [12] In other cases, insufficient biological data may not even be available for such designation. H.R. 2933 would defer to the informed expertise of the Secretary in making these judgments.

Section 2(a)(3)(B) would also grant discretion not to designate CH if the Secretary determines that either a "substantially equivalent" Habitat Conservation Plan under section 10(a)(2) or a State or federal land conservation program is in place. This language recognizes a commonsense principle—it is the substance of the protections in place, not the formality of a CH designation, that should control a decision whether to designate CH. The recent Mexican Spotted Owl decision is an example of one court elevating form over substance in mandating CH for large land areas in Arizona despite the existence of a comprehensive management plan. [13] Congress has also recognized this principle under section 4(a)(3) of the Defense Authorizations Act of 2004 prohibiting the inclusion of military lands within CH if there is an Integrated Natural Resources Management Plan in place that provides substantial benefits to the species. Just as Congress included certain criteria for such a plan to be "substantially equivalent" so too should Congress consider similar criteria here for sanctioning a decision not to designate. [14]

Section 5—Clarification of Definition of Critical Habitat

This section would define certain key terms in the critical habitat definition ("geographic area occupied by the species" as meaning "the specific area currently used by the species for essential behavioral patterns" and "essential to the conservation of the species" as "areas absolutely necessary and indispensable to conservation.") This language will help cure one of the real problems in the CH process—despite the ESA's direction that CH should not encompass all actual or potential habitat for a species unless the Secretary specifically finds that such designation of unoccupied habitat is essential to the conservation of the species. The Services often appear to "sweep in" unoccupied habitat on the theory that species may have frequented the area at some point in the past and may do so in the future. Often such

[11] 268 F. Supp 2d. at 1212.

[12] U.S. Fish & Wildlife Service, Piping Plover: Charadrius Melodus, available at http://endangered.fws.gov/i/B69.html (site visited on April 13, 2004). Following 1992 storms, a beach nourishment project was constructed with the approval of the FWS requiring the Village to implement predator control and other measures. The plover population then flourished to a level of 26 pairs along just two miles of the beach. In 1997, these plovers made up 14.4% of the breeding pairs located in the State of New York. See American Coastal Coalition "Beach Nourishment and the Coastal Environment".

[13] Center for Biological Diversity v. Norton, 240 F.Supp 2d. 1090 (D.Az. 2003)

[14] National Defense Authorization Act for Fiscal Year 2004, H.R. 1588' 108th Cong. § 318 (P.L. 108-136) (2003).

a conclusion is based on questionable data.[15] This "blurs" the distinction between ordinary and critical habitat and diverts resources away from protecting those areas that are truly necessary for species recovery. Indeed, courts have held that the ESA envisions a narrow application of CH, reasoning that "even though more extensive habitat may be essential to maintain the species over the long term, critical habitat only includes the minimum amount of habitat needed to avoid short-term jeopardy or habitat in need of immediate intervention." Northern Spotted Owl v. Lujon.[16] H.R. 2933 would force the Services to ensure that FWS has the most accurate and current data for CH designation because it must demonstrate that an area is "currently used" for "essential behavioral patterns." It would also force the Secretary to better justify including unoccupied habitat by requiring her to provide a detailed and specific biologically-based rationale for why inclusion is necessary for species recovery—all tied to the development of recovery plans.

However, H.R. 2933's use of "absolutely necessary and indispensable to conservation" language in defining "essential" could be problematic. Those terms are vague.[17] In the absence of biological criteria, officials at the Services could very easily apply their own value judgments and sweep in larger areas than might be justified by objective field data—even including unoccupied areas that might some day acquire characteristics for creation of suitable habitat (known as Primary Constituent Elements (PCEs)). While the language certainly directs agency officials to focus on limited areas, it should be further modified to provide objective criteria for both the decision-makers and the public.

Section 3—Bases For Determination

This section would provide the Secretary with more complete and accurate information for determining under section 4(b) if the benefits of exclusion of an area would outweigh the benefits of designation. It would do so by requiring consideration of information from local governments as well as direct and indirect economic impacts and costs as a consequence of the designation. This language will greatly advance the goal of ensuring that the CH decisions are based on the most accurate and up to date technical and economic information.

The duty to "seek and consider" if available, information from local governments in the vicinity of the area, including local resource data and maps should help cure a significant problem because currently there is no consistent approach to seeking and utilizing local information in CH decisions. As the recent GAO report on ESA listing and CH decisions stated, "Experts and others we spoke to explained that the amount of scientific information available on a species habitat needs often may be limited, affecting the Service's ability to adequately define the habitat area required."[18] Local land use agencies often assemble good area-wide and site-specific natural resource data that could be of great use to the Services in defining habitat limits. Such data often is included in the development of County area-wide plans. Without question, use of such data will advance the scientific accuracy of CH designations, given the expert opinion reflected in the GAO Report about the general scarcity of habitat data. Moreover, the agencies should also seek out relevant state data as well. Many state natural resource agencies have excellent habitat inventory data that could greatly assist in CH decisions and help fill the data gaps that exist at the federal level.

The bill's articulation of the scope of economic and cost data that should be considered in CH decisions highlights perhaps the most contentious CH issue—a question that has been heavily litigated over the past few years. The Supreme Court in the Bennett v. Spear decision recognized that, in adopting the ESA, Congress not only declared an overall goal of species conservation, but also a mandate to pursue that goal without creating unnecessary economic impacts. As the Court stated, "we think it readily apparent that another objective (if not, indeed, the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives."[19] The Bennett court also stressed that under the ESA there is a "categorical requirement" to "take into consideration the economic impact and any other relevant impact" in designating

[15] See court's analysis in the Whipsnake case, Home builders Association of Northern California v. FWS' 268 F. Supp. 2d. 1197 (E.D. Cal. 2003)

[16] 758 F. Supp. 621, 623 (W.D. Wash. 1991).

[17] For example, "indispensable" is defined as "that cannot be dispensed with or neglected." (Webster's New World Dictionary).

[18] U.S. General Accounting Office. (Aug. 2003). Endangered Species: Fish and Wildlife Service Uses Best Available Science to Make Listing Decisions, but Additional Guidance Needed for Critical Habitat Designation (Pub. No. GAO-03-803) at 27.

[19] 520 U.S. 154, 176-177 (1997)

CH.[20] Yet, historically the Service has essentially ignored this mandate by relying on the "incremental baseline" theory to minimize the economic impact of CH designation over listings. This approach has been strongly rejected by New Mexico Cattle Growers[21] (NMCG) and other courts. The Service has attempted to comply with that decision in taking voluntary remands in several cases but has not issued any regulations or guidance addressing the true economic costs of CH designations. Indeed, a recent study of economic analyses since NMCG by Prof. Amy Sinden of Temple Law School[22] found "in the vast majority of the thirty five or so critical habitat designations completed since the Cattle Growers opinion was issued, FWS has answered this question (that the costs of inclusion outweigh the benefits for any particular area of critical habitat) in the negative. In most instances, the basis for this conclusion has been FWS's finding that the 'critical habitat impacts'—or the cost figure derived form the original baseline—are 'not significant'." She further states that "in the final analysis, FWS's economic analysis continues to turn on the same critical habitat baseline that the Tenth Circuit held invalid in Cattle Growers."[23] These findings give greater force to the GAO report's conclusion that, "it is imperative that (the FWS) clarify the role of Critical Habitat and develop guidance for how and when it should be designated and seek regulatory and/or legislative changes that may be necessary."[24]

In my judgment, the factors identified in the bill will lead to a more accurate assessment of the costs and economic impact of CH designations by looking beyond the mere costs of section 7 consultations and assessing all direct, indirect and cumulative costs including those costs associated with reports, surveys and analyses required to be undertaken as a consequence of the designation. As the recent study by Prof. David Sunding entitled "The Economic Impacts of Critical Habitat Designation" states "The economic effects of CHD go well beyond these costs (of development by making it more difficult to obtain necessary permits and to reduce the size of individual projects)".If land is set aside or if the scale of projects is reduced by the CHD there may well be market and regional effects from this designation."[25] Significantly, he notes that the Service "emphasizes only the most obvious costs, namely the direct out-of-pocket expenditures needed to complete the section 7 process, and ignores the potential for regional market impacts". Thus, the Service seriously underestimates the impacts of critical habitat designation (in some cases by more than 90 percent) and also mischaracterizes their incidence."[26]

However, in my view, the economic factors in the bill must also be accompanied by FWS addressing the holding of the Fifth Circuit in Sierra Club v. Norton—namely, that the "adverse modification" standard under section 7 creates a much lower threshold of potential impacts than the Section 7 "jeopardy" standard since critical habitat is defined as areas "essential to the conservation of a listed species" whereas the jeopardy standard focuses on the "survival" of the species. As the Sierra Club court stated, "Conservation is a much broader concept than mere survival."[27] Indeed, as Prof. Sinden suggests, "FWS should revise its definitions so as to give independent meaning to the concept of adverse modification." She notes that such a change would reflect the "real world" consequences of CH designations—that the direct and indirect costs for "adverse modification" exceeds the costs of avoiding "jeopardy." She even cites the example of where, after the court vacated the 731,000 acre CH designation for the endangered ferruginous pygmy-owl in the Tucson area but kept the listing in place, the "Corps and the EPA promptly responded by terminating Section 7 consultations with FWS on several major development projects within the former critical habitat area.... Thus in this instance, critical habitat designation seems to have made a significant difference for the pygmy-owl, imposing added restrictions on development and, therefore, economic costs over and above those imposed by the listing."[28] This is but one example of the greater direct economic impacts flowing from CH designations, not to mention the indirect impacts.

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[20] Id.

[21] New Mexico Cattle Growers Assn. v. FWS' 248 F.3d 1277' 1280 (10th Cir. 2001).

[22] Amy Sinden, The Economics of Endangered Species: Why Less is More In the Economic Analysis of Critical Habitat Designations, 28 Harv. Envtl. L. Rev. 129 (2004).

[23] Id. at 163.

[24] U.S. General Accounting Office. (Aug. 2003). Endangered Species: Fish and Wildlife Service Uses Best Available Science to Make Listing Decisions, but Additional Guidance Needed for Critical Habitat Designation (Pub. No. GAO-03-803) at 36.

[25] David Sunding, The Economic Impacts of Critical Habitat Designation, Univ. of Cal. Giannini Foundation of Agricultural Economics, vol. 6 n. 6 at 7 (2003).

[26] Id. at 10.

[27] Sierra Club v. U.S. Fish & Wildlife Service, 245 F.3d 434, 441 (5th Cir. 2001).

[28] Amy Sinden, The Economics of Endangered Species: Why Less is More In the Economic Analysis of Critical Habitat Designation, 28 Harv. Envtl. L. Rev. 129, 164 (2004).

Section 4—Contents of Notices Of Proposed Designation of Critical Habitat

This section will provide a key tool for the public to access CH areas maps and data through requiring GIS maps and coordinates to be posted on the Department's Internet page. Internet data is often the primary source for the public to obtain information from the federal government. Under the current system, the public often cannot easily access CH data. Under this amendment, it will be easier to access specific CH mapping data by simply accessing the Department's world wide web home page. Further, this change will also help facilitate meaningful public comment on proposed CH designation by providing the specific Internet page with the proposed designation. In this manner, landowners, local governments and the public will not only be able to better participate in the CH process but will also be able to make better land use decisions based on accurate and easily accessible GIS maps of the CH area.

CONCLUSION

H.R. 2933 provides an excellent vehicle to address perhaps the most contentious issue under the ESA today. The Critical Habitat debate has spurned extensive litigation and technical and policy scrutiny without any clear guidance from the executive branch. In my judgment, Congressional action is absolutely necessary to clarify the role of critical habitat in achieving the ultimate goal of the Act—the conservation and eventual recovery of imperiled species.

NOTE: An attachment (Exhibit A) to Mr. Liebesman's statement has been retained in the Committee's official files.

[Mr. Liebesman's response to questions submitted for the record follows:]

Response to questions submitted for the record by Lawrence R. Liebesman, Esq., Holland & Knight, LLP

Questions from Chairman Pombo

I am writing to respond to the follow-up questions for the hearing on H.R. 2933. Due to other pressing deadlines, I am first responding to the Chairman's questions and will follow up with responses to the minority's questions next week.

1. Most everyone can agree that there are too many ambiguities and gray areas in the ESA. That is why we have all these lawsuits that suck money away from species protection. In fact, the last two Administrations, including one of our witnesses here today talked about the impacts of these lawsuits during her tenure as Director of FWS. The Cardoza legislation seeks to reduce these lawsuits and tighten up vague definitions.

Question: Do you believe that linking a recovery plan to critical habitat will improve scientific gathering?

Response: Yes. The current disconnect between critical habitat (CH) designations and recovery plans often results in CH designations that lack a strong scientific foundation. Often, CH designations are made under the pressure of court imposed deadlines without the benefit of the rigorous scientific analysis from recovery plans as recognized by the court in the Alameda Whipsnake case, Home Builders Ass'n of Northern California v. FWS (HBANC), where the court held, in part, that "if the Service has not determined at what point the protections of the ESA will no longer be necessary for the whipsnake, it cannot possibly identify the physical and biological features that are an indispensable part of bringing the snake to that point." 240 F. Supp 2d. 1090, 1098-99 (D. Ariz. 2003). Indeed, because recovery plans must (1) Describe any site specific management actions to conserve species; (2) identify objective and measurable criteria necessary to result in delisting of the species; and (3) set time and cost estimates for carrying out the plan, 16 U.S.C.1533(f) (1)(B)(i)- (iii), any critical habitat designation would, of necessity, have to be justified on the basis of whether it furthered then de-listing criteria. This will promote the gathering of rigorous objective data and avoid the chance that CH will be based on subjective opinion. Further, the linkage concept in H.R. 2399 must recognize that recovery planning is not a static effort. According to the recent GAO Report, "the Service has a goal of developing recovery plans within 1 year and having approves plans within 2 and 1/2 years of species listing" and "the Service periodically reviews approved recovery plans to determine of updates or revisions are needed. As of June 2003, the Service has approved recovery plans for 1000 species" (GAO Report at page 45). However, while some of these plans have been revised within the past decade (e.g., Breeding population of Wood Stork, Jan 27, 1997) others are

older (e.g., Delmarva Fox Squirrel Plan last revised in 1993). Thus, in order for the linkage concept in H.R. 2399 to be meaningful, Congress should consider language that directs the Service to determine if current plans need revisions and to revise plans, where appropriate, by specified dates unless not practicable and to provide FWS with sufficient budget to do so.

Question: If this linkage allows better science, will this improved science help insulate the Service from some of the more frivolous lawsuits?

Response: Yes. Court decisions overturning CH designations have particularly focused on lack of factual scientific support in the administrative record on such issues as identifying Primary Constituent Elements for CH, including unoccupied areas and failure to identify specific management measures. See Home Builders Ass'n of Northern California (Whipsnake); Middle Rio Grande Conservancy District v. Babbitt (Silvery Minnow) 206 F.Supp 2d. 1156 (D.N.M. 2000). Even the Supreme Court in Bennett v. Spear held that one of the objectives of the ESA " is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives."520 U.S.154, 176- 177(1997) Under H.R. 2399 linkage, the FWS CH record support will presumably be based on sound peer reviewed science since recovery plans are issued after the submission of comments from state and federal agencies, experts and the public. Potential plaintiffs would then have to "think twice" about challenging such decisions knowing that courts would likely defer to the sound expert judgment of the Service.

2. Many scientists have complained that the broad definitions under the ESA lead to open interpretations. Some have equated ESA science to skewed polls: You ask the question and you get the answer you want. The Cardoza bill tries to improve the underlying ESA science. It tightens the critical habitat criteria and better defines critical habitat. However, some have said that the Cardoza bill creates more vague definitions.

Question: Do you think the Cardoza bill brings better and tighter science and less discretion to the process?

Response: The bill does bring better and tighter science, provided that certain terms in the critical habitat definition are clarified, either through this bill or by regulation. Certainly, by requiring data on "current use by species " for the specific area, the Services will have to rely on the most up to date sampling data and cannot simply assume presence based on past historic data. Further, the requirement to consider information from local governments will also advance the quality of the data. This mandate should also extend to consideration of state and regional agency data since many state wildlife agencies have excellent data bases. Further, H.R. 2933's use of "absolutely necessary and indispensable" to define "essential" should require a more rigorous, objective data gathering exercise and further the original intent of congress under the ESA that "even though more extensive habitat may be essential to maintain the species over the long term, critical habitat only includes the minimum amount of habitat needed to avoid short term jeopardy or habitat in need of immediate intervention." Northern Spotted Owl v. Lujon, 758 F. Supp. 621, 623 (W.D. Wash. 1991). Service biologists will be forced to carefully evaluate data to separate ordinary habitat from habitat that meets such a rigorous test. However, this terminology could also be subject to abuse if biologists subjectively assume that no habitat can be eliminated. Therefore, the Services should be directed to conduct a rulemaking on the kinds of scientific criteria and the importance of peer review needed to make these judgments in evaluating often extensive and conflicting data.

Question: Will this improved science lead to better recovery chances?

Response: Subject to the suggestions outlined above, the improved science from this "linkage" approach will most certainly lead to better recovery chances. The designation of CH is a basic cornerstone in the recovery process. Therefore, the stronger the scientific basis for the designation as linked to the recovery plan, the better the agencies can evaluate whether a plan's "objective and measurable" criteria can be met.

3. Congress expressly directed (in the Committee report for the bill that created the current critical habitat process, H. Rept. 95-1625, page 18) that the Secretary should be "exceeding circumspect" in designation of unoccupied habitat as critical habitat.

Question: How could unoccupied habitat provide significant benefits if it was not intended to be extensively designated?

Response: Unoccupied habitat should only be designated as "critical" in exceptional circumstances where the Service has made very scientifically rigorous, peer reviewed findings that such an area is so essential that must be included. See Northern Spotted Owl v. Lujon. Linking CH designation to recovery plans, should facilitate such a scientific determination. Otherwise, the distinction between CH and

ordinary habitat becomes blurred and subject to abuse by field biologists who are unwilling to make the necessary scientific judgments required to truly further recovery.

4. One of the ways to make the ESA work is to provide landowners with incentives to protecting the species. HCP's can provide incentives through some amount of certainty. Yet, current law allows bureaucratic discretion to overlap HCP's with more critical habitat designations.

Question: Does this overlapping reduce the HCP incentives for landowners? Will this bill fix this problem?

Response: Yes. The Service has been pursuing a policy of encouraging HCP's for the past ten years. The concept is that such a private party conservation agreement negotiated with the Service will allow a landowner a certain "take " of the species in return for private party commitment to implement the HCP. The landowner when receives "no surprises" protection against any future land use restrictions. Indeed, the FWS has noted that the benefits of including HCP lands within Critical Habitat are normally small." As the Service stated in its final CH designation for the wintering population of piping plover:

> The principal benefit of any designated critical habitat is that Federal activities in such habitat that may affect it require consultation under section 7 of the Act. Such consultation would ensure that adequate protection is provided to avoid adverse modification of critical habitat. Where HCPs are in place, our experience indicates that this benefit is small or non-existent. Currently approved and permitted HCPs are already designed to ensure the long-term survival of covered species within the plan area. Where we have an approved HCP, lands that we ordinarily would define as critical habitat for the covered species will normally be protected in reserves and other conservation lands by the terms of the HCP and its implementation agreements. The HCP and implementation agreements include management measures and protections for conservation lands that are crafted to protect, restore, and enhance their value as habitat for covered species.
> *(Fed. Reg. 36081, Vol. 66, 7/10/2001)*

However, despite this analysis, the courts have not necessarily agreed with FWS interpretation, as especially noted in Judge Bury's ruling regarding the Mexican Spotted Owl case. See Center for Biological Diversity v. Norton 240 F. Supp 2d. 1090 (D. Az. 2003). H.R. 2399 should help fix this problem and avoid the disincentive by allowing an HCP or State plan to substitute for CH if the Secretary finds that it provides protection for habitat that is "substantially equivalent" to protection provided by the designation." However, defining "substantial equivalence" could be problematic since, under the bill, CH must further specific conservation goals in a recovery plan. While this distinction may seem semantic, property owners may object to FWS demands that HCPs must go far beyond merely sanctioning a limited "take" of species and also impose an affirmative duty to further the conservation goals of the Act which include meeting recovery plan goals—duties which are now only imposed on Federal Agencies under section 7 (a) (1) of the ESA. Thus, Congress should consider directing the Secretary through rulemaking to reconcile these concerns in defining "substantial equivalence."

Questions from Minority Members

I am writing to respond to the follow-up questions from minority members on H.R. 2933. These responses supplement those I provided on May 18 to Chairman Pombo's questions.

Question 1: Do you agree with what the GAO said in August 2003 that courts have overturned few of the Service's critical habitat decisions because they were not supported by the best available science? Instead, most of the challenges have dealt with non science issues, such as the Service's failure to designate habitat for a listed species. [Page 4, GAO report August 2003]

Response: While I agree that the vast majority of court decisions overturning critical habitat (CH) designations have been based on procedural missteps (e.g., refusal to designate based on a "not prudent" finding) as opposed to faulty science, a number of recent significant court decisions have focused on the science behind the Service's decisions. For example, in 2002 the 10th Circuit upheld the lower court's decision to set aside the designation of 163 miles of the Rio Grande River as CH for the Silvery Minnow in part, on scientific grounds, including failure to specifically define the Primary Constituent Elements (PCEs) for the species and to identify where they actually were found along the River. Middle Rio Grande Conservancy Dist. v. Norton, 294 F.3d 1220 (10th Cir. 2002). In turn, the designation of CH for the Alameda Whipsnake was set aside after an in depth probing of the scientific

support for the designation. See Home Builders Ass'n of Northern California v. USFWS, 268 F.Supp.2d 1197 (E.D. Calif. 2003). The court cited such improprieties as failure to identify PCEs and improper inclusion of areas where available biological information indicated that the essential physical or biological features did not exist. In particular, the HBANC court noted the agency's failure to complete the Whipsnake recovery plan prior to the CH designation as a major scientific failing.

Question 2: In your statement you express support for the change that would direct the Secretary of the Interior to designate critical habitat as practicable, economically feasible and determinable. How would the Secretary define practicable? Couldn't it mean that if the Fish and Wildlife did not have the budget, it would not be practicable to designate critical habitat?

Response: Unlike other environmental regulatory regimes, the ESA does not define "practicable." Currently, section 4 requires CH designation only to the extent that it is "prudent and determinable" but does not define those terms. Thus, the Services are already working with somewhat broad terms that are undefined. The concept of "practicability" does appear in the section 10 Incidental Take permitting provisions. Section 10 requires that before the Service may issue an incidental take permit, it must find that the applicant will minimize the impacts of the "take" of the species "to the maximum extent practicable." Recently the DC Circuit found that the Service improperly deferred to the applicant's definition of "practicable" and faulted the Service for not conducting its own independent analysis. Gerber v. Norton, 294 F. 3d 173, 184-86 (D.C. Cir. 2002). Thus, this term is not completely foreign to the ESA. In addition, current CH designations are based on a "prudence" analysis that, in many ways, is no more clear.

I believe that the Committee may take comfort in the fact that there are other similar environmental statutes that are also based on an underlying "practicability" analysis. For example, the Clean Water Act section 404 permitting program (known by practitioners as the Environmental Protection Agency's section 404(b)(1) guidelines) creates a presumption against impacting wetlands and other "Waters of the United States" if the project is not "water dependent" unless the applicant can clearly demonstrate that there are no practicable alternatives to such impacts. The guidelines define practicability as an alternative that is "available" and "capable of being done after taking into consideration cost, existing technology and logistics in light of overall project purposes." 40 C.F.R. § 230.10(a)(3). The goal of this provision is to avoid unnecessary destruction of wetlands and other aquatic resources while nonetheless preserving the applicant's overall project purpose.

Thus, the approach to "practicability" in the above examples focuses on balancing an over-riding statutory or regulatory goal—e.g., minimizing the "take" of listed species (in section 10 permitting and minimizing wetlands impacts 404 program)—with the reality that meeting such goal is not always possible and that the Service must be given some level of flexibility when the science or other factors do not favor designation. Indeed, most of the litigation concerning CH designations could probably have been avoided if the Service was not forced to designate simply for the sake of meeting an inflexible mandate.

I do not believe that this bill would allow the Service to avoid designating CH if it lacked the budget for the necessary work. The existing cases to deal with this issue have made clear that the Service may not raise such a defense. See e.g., Forest Guardians v. Babbitt, 164 F.3d 1261 (10th Cir 1998) (ordering U.S. Fish and Wildlife Service to designate critical habitat for species under Endangered Species Act despite claims that Congress had not appropriated sufficient funds for such action). Ensuring that Congress appropriates sufficient funding for CH designations will remain essential in light of the current fiscal climate. However, given that the central goal of H.R. 2399 is to ensure that CH designations are linked to recovery plans (so that the best available science is used towards de-listing), I do not believe that, absent strong compelling evidence that CH designation would prevent FWS from carrying out other vital ESA priorities such as failing to take action on pending listing petitions that are overdue under ESA time frames, budget priorities could be used to avoid designation. However, my understanding of this bill is that it would still allow the Secretary to determine, based in part on economic factors, that CH should not be designated under the criteria in section 4(b)(2) based on a finding that the benefits of denial outweigh the benefits of designation. This language would clarify that if the designation would have a significant economic impact within the area to be designated, then the Secretary should exercise her discretion not to designate such an area.

Question 3: Also, what does economically feasible mean? Here again, does it mean that if Fish and Wildlife Service is not well funded it will not be economically feasible for the Secretary to designate critical habitat? Or

does it mean it is not economically feasible for the State or some other entity to have land designated as critical habitat?

Response: The term "economically feasible" is a rather vague term and should be clarified so that it cannot be used to avoid CH designation based on a range of economic factors even where CH may otherwise be justified. I do not believe that the Secretary should be able to invoke FWS funding constraints in finding that CH designation is not "economically feasible." Given the Service's historic antipathy towards CH designations, such an interpretation should not be allowed to provide a convenient excuse for the Secretary to not designate even where scientifically justified. Rather, the focus of "economic feasibility" should be the direct and indirect costs on both land owner, the affected local government and the public as a whole. Professor Sunding's study, finding that CH designation's impacts go far beyond the immediate land owner, provides a good model for FWS to apply in considering economic feasibility. FWS should be able to weigh and balance those kinds of economic impacts with the benefits CH will provide in furthering recovery goals in making an "economic feasibility" determinations.

Question 4: Many FWS announcements on critical habitat say "In most cases, protection of a species from critical habitat designation duplicates the protection provided by Section 7 of the ESA." Yet court cases have begun to disagree with this thinking. In the Endangered Species Deskbook which you authored you state that "...the FWS has begun to recognize that its prior policy is not correct and that critical habitat designation could have an incremental effect above that of the "baseline" of listing. Can you explain what benefits critical habitat provides above and beyond the jeopardy prohibition?

Response: As noted in my testimony, the Fifth Circuit's Sierra Club v. USFWS, 245 F.3d 434 (5th Cir. 2001),decision provides an excellent analysis of why Congress intended the section 7 "adverse modification" standard for CH to create a lower threshold of potential impacts than the section 7 jeopardy standard. This is because CH was intended to focus on protecting areas "essential to the conservation of a listed species" whereas the jeopardy standard focuses on the "survival" of the species. That is, once CH is designated, any activity with a federal nexus would arguably impact the conservation of the species (i.e., adversely modify habitat) whereas in the absence of CH it would be necessary to demonstrate that the proposed federally-authorized activity would "take" the species to such an extent as to lead to its potential extinction. Mere habitat modification would not be sufficient to make that showing. Arizona Cattle Grower's Ass'n v. USFWS, 273 F.3d 1229, 1244 (9th Cir. 2001). H.R. 2399's linkage between CH designation and recovery plan approval would be consistent with this distinction and the greater protections for the species within the CH area. However, it would do so using better science than is now used in the CH process because recovery plan goals would become the "driving scientific force" in the process.

I appreciate the opportunity to work with the Committee on these important issues. Please feel free to contact me with any questions on my responses.

The CHAIRMAN. Thank you.

Dr. Ramey?

STATEMENT OF ROB ROY RAMEY, II, PH.D., DEPARTMENT OF ZOOLOGY CHAIR AND CURATOR OF VERTEBRATE ZOOLOGY, DENVER MUSEUM OF NATURE AND SCIENCE

Dr. RAMEY. I am Rob Roy Ramey from the Denver Museum of Nature and Science and the Chair of Zoology and Curator of Vertebrate Zoology. I am not speaking on behalf of any group but I have 23 years of experience in endangered species research and management. That includes research and management on Peninsula Ranges bighorn sheep, Sierra Nevada bighorn sheep, California condors, peregrine falcons, African elephants, and argali sheep in Mongolia.

We need to update the Endangered Species Act to meet today's scientific standards and to make use of today's technologies. Genetic analyses, computer-aided modeling, statistical analyses have provided us with powerful analytical and predictive tools. These

are some of the same technologies that have aided advancements in medicine, criminal justice, space exploration, and national defense. But more importantly, we need to update the standards for what constitutes best available science used in day-to-day ESA decisions. It appears there is a substantial disconnect between accepted scientific standards in mainstream science and how science is used in decisions regarding endangered species.

The Preble's meadow jumping mouse and bighorn sheep in the Peninsula Ranges, both projects I have worked on, provide examples of fundamental ESA science issues—listings made without adequate questioning of evidence, hypothetical threats treated as if they are real threats. Anecdotes and unsubstantiated opinion are created with equal seriousness to conclusions that are reached through empirical data and hypothesis-testing. Objective and independent peer review are often lacking. We would never approve new drugs or go to the moon or cure cancer and AIDS on the kind of evidence which can pass for scientific evidence in the administration of ESA.

Endangered species management can produce passionate empathy or disdain for some listed species. When passion and the lack of critical thinking are coupled with the decisionmaking power under the ESA, decisions can easily deviate from having a sound scientific basis. The consequences of this can be far-reaching.

What can we do about this problem? The solution is to raise the bar on scientific standards used in support of ESA decisions and more clearly defined disputable terms. I urge the Committee to support bills like H.R. 2933. This bill raises the bar on the definition of critical habitat and therefore represents a significant step along the path of ESA reform. It also allows us to calculate the real cost of critical habitat designations or the benefits.

By delaying the designation of critical habitat until there is a recovery plan, H.R. 2933 provides the Fish and Wildlife Service with more time to gather evidence on species occurrence, and also it provides time for communities to develop alternative strategies for habitat conservation, including those with incentives.

In addition to the proposed changes in H.R. 2933, I urge the Committee to consider requirements for scientifically defensible tests of genetic uniqueness for candidate species on this and other ESA bills. This question should be asked before listing petitions are considered or critical habitat is designated.

Furthermore, protection of species should deal with real observable threats and not hypothetical threats. Recovery goals should be realistic and achievable. Empirical evidence and predictive models should be utilized to define critical habitat. Objective and independent peer review should be sought for listings, recovery plans, critical habitat, biological opinions and delistings.

And finally, it is presently difficult for the Service to admit and revise some errors on critical ESA decisions. In the field of science, however, all hypotheses are potentially falsifiable with new evidence or new analyses. A good scientist is a good skeptic, especially their own hypothesis. As an example, I provide for the record correspondence and manuscript review that I solicited from Dr. Phillip Krutzsch, the scientist who originally described the Preble's meadow jumping mouse as a new subspecies in 1954. I did a research

project where we tested that utilizing genetic data and morphologic data. Krutzsch is 84 years old, underwent open heart surgery in January, and is still an active scientist. Regarding the taxonomic reevaluation of this subspecies he wrote, "The study clearly invalidates Z.h. preblei and demonstrates its relationship to Z.h. campestris. Perhaps most significant is the model you provide to unequivocally establish the uniqueness of an organism and its relationships before declaring it in danger of extinction. Such an analytical approach would prevent the implementation of a process to support an agenda or a point of view. I can think of other listed species that could have benefited from a prior, detailed, scientific appraisal."

In conclusion, Congress and the people expect much from science in protecting and preserving existing species. Many of the choices contained in the ESA use vague and broad words to convey a desire but not a path to achieve that desire. Litigation has been the chosen method to describe that path and has led to the misallocation of resources and unnecessary limitation on many benign activities. Congress needs to define the path more precisely, place better and more limited definitions on disputable terms, and ensure that decisions are based on scientific evidence. Thank you.

[The prepared statement of Dr. Ramey follows:]

Statement of Rob Roy Ramey II, Ph.D., Department of Zoology Chair and Curator of Vertebrate Zoology, Denver Museum of Nature & Science

My current position is Chair of Zoology and Curator of Vertebrate Zoology at the Denver Museum of Nature & Science. I earned a master's degree from Yale University in Wildlife Ecology and a Ph.D. from Cornell University in Ecology and Evolutionary Biology. As a field biologist and conservation geneticist, I have 23 year of experience in conservation, research and management of threatened and endangered wildlife. I have worked on peregrine falcons, California condors, bighorn sheep in the Peninsular Ranges of California, Sierra Nevada bighorn sheep, African elephants in Zimbabwe, and argali sheep in Mongolia. It was my doctoral dissertation research (Ramey 1993, 1995) and subsequent research (Wehausen and Ramey 1993, 2000) that refuted much of the old taxonomy on mountain sheep (Cowan 1940) and prevented the U.S. Fish and Wildlife Service (USFWS) from listing bighorn sheep from the Peninsular Ranges as an invalid subspecies. My most recent project has been to test the taxonomic validity of the Preble's meadow jumping mouse, a currently listed threatened subspecies in Colorado and Wyoming. These experiences have given me a unique perspective on the Endangered Species Act (ESA), and led to my concern with the standards of evidence and strength of scientific inference that are often used in management decisions for threatened and endangered species.

Why the Endangered Species Act is outside the scientific mainstream

When the ESA was drafted thirty years ago, many of the scientific tools and concepts that are now basic to the field of conservation biology did not exist. We need to update the ESA to meet today's scientific standards and to make use of today's technologies. For example, genetic analyses are now routine, and can be easily used to test hypotheses about the genetic uniqueness of populations and subspecies. Also, the Internet now provides unprecedented opportunities for public access to information that was not available thirty years ago.

While the ESA is in need of updating to keep pace with the tools of science, I see a more fundamental problem with the application of the ESA, one that has become a major source of controversy and litigation. That is the wide latitude for interpretation of what constitutes best available science in making ESA decisions. There can be a substantial disconnect between accepted scientific standards and how science is used in decisions regarding endangered species management.

The scientific method requires that when there are clear-cut criteria laid out in advance of data collection, and as a result there is less room for bias through the selective interpretation of the information. In other words, the more precisely we draw the line of demarcation for testing a hypothesis, the more objective the decision. This is the basic scientific method (Platt 1964).

Yet, when it comes to ESA decisions, opinions, interpretations of limited anecdotal observations, and hypothetical threats are sometimes given equal or greater weight than conclusions reached through hypothesis testing. Much discretion is left in the hands of the USFWS biologist(s) making the decisions. These biologists are given the difficult task of assimilating large amounts of information from disparate sources in a limited amount of time. Although there are many competent and dedicated biologists at the USFWS, their effectiveness may be compromised by being overworked and unfamiliar with the specialized fields from which they are evaluating evidence (General Accounting Office 2001).

In my experience, when USFWS biologists issue decisions on listings or biological opinions, they rarely have the benefit of a truly independent peer review. In fact, until the Office of Management and Budget recently proposed federal standards for peer review (Office of Management and Budget 2003), this process itself was undefined and open to interpretation. In the mainstream of scientific investigation, independent peer review is the standard by which the quality of science is evaluated. This process involves evaluating claims on the basis of their falsifiability, logic, comprehensiveness, honesty, repeatability, and sufficiency (Lett 1990, Lipps 1999).

Independent peer reviewers are technically competent and have no real or perceived conflict of interest. The comments and questions they generate are used by an equally independent editor, who acts in the role of a judge, to request the author to make changes suggested by the peer reviewers, and then ultimately decides whether to accept or reject the paper. In the current ESA decisionmaking process, this task of editor can also fall on the shoulders of the USFWS biologists. It has been my experience with the USFWS peer review process that a document may carry the claim of being peer reviewed but the peer reviews were less than ideal. In one case, the peer reviewer comments were ignored and in another case, the peer reviewers did not appear to be independent. As a result, critical ESA decisions do not always benefit from a truly objective and independent review.

The reasons outlined above could help explain why many ESA decisions end up being challenged in the courts. These may also be some of the same reasons that critics of the ESA perceive that recovery plans and goals are not realistic or achievable. If science is not guiding the direction of conservation efforts under the ESA, then what is? In a recent paper by Restani and Marzuluff (2002), the authors show that lawsuits or the threat of lawsuits drive the allocation of resources to listing and recovery effort.

The progress that H.R. 2933 represents for the ESA

What does the above scientific discourse have to do with H.R. 2933? This bill is a solid step in the right direction towards meaningful ESA reform. Public support for the ESA, and long term effectiveness of species recovery under the ESA can be strengthened if we raise the bar on scientific standards used in support of decisions. More rigorous scientific standards must be applied at each level of the endangered species recovery process, including: listings, critical habitat designations, recovery plans, biological opinions, habitat conservation plans, and delistings. We can save billions of dollars and needless lawsuits by being more specific about the scientific criteria used in the ESA. Our goal should be to prevent decisions from going to the courts in the first place.

H.R. 2933 proposes specific changes that would more precisely define critical habitat, and therefore can do more for species preservation by focusing effort where it will make the greatest difference. This is an important departure from the wide latitude currently found in the ESA for declaring critical habitat.

H.R. 2933 delays the designation of critical habitat until there is a recovery plan, and therefore provides the USFWS with more time to gather evidence on species occurrence. This time can allow the USFWS to make critical habitat designations that will provide long term benefit to species and be scientifically defensible.

H.R. 2933 excludes areas with Habitat Conservation Plans (HCPs) or alternative conservation plans from critical habitat designations, therefore providing an incentive for communities to be proactive in habitat conservation efforts. The potential for new, innovative habitat conservation strategies to be developed under this provision is one of the most positive aspects to this bill. One such strategy could be incentive-based habitat conservation programs at a state or county level.

H.R. 2933 proposes important changes to the process of designating critical habitat and involving the public in this process.

While I agree with the proposed changes, I offer the following as examples of some fundamental ESA science issues that need to be addressed for H.R. 2933 to have a full measure of effectiveness.

Test for genetic uniqueness before listing

What happens to critical habitat if new information comes along that suggests part of the original listing was in error? In the case of the Preble's meadow jumping mouse, our scientific team determined that the mouse was not genetically distinct for the DNA sequences examined, or morphologically unique relative to a nearby subspecies. In simple words, the threatened subspecies was not really a valid subspecies and when combined with the populations of the genetically and morphologically indistinguishable nearby subspecies, the Preble's meadow jumping mouse is not a threatened subspecies (Ramey et al. 2004). This discovery came about six years after Preble's meadow jumping mouse was listed as threatened (U.S. Fish and Wildlife Service 1998), and one year after critical habitat was declared. Therefore, H.R. 2933 does not address the larger issue of: "Is this population of organisms genetically unique in the first place?" This question should be asked before listing petitions are considered.

There is good reason to view as suspect the taxonomic work on species and subspecies prior to the late-twentieth century. Species and subspecies descriptions relied on small sample sizes, had little or no quantitative basis, and were based largely on opinion. Essentially, a species or subspecies was what a good taxonomist said it was. For example, the only quantitative measures to support the designation of Preble's meadow jumping mouse as a new subspecies in 1954 were skull measurements from three adult specimens (Krutzsch 1954). No statistical tests were done to compare it to a nearby subspecies. In contrast, our study utilized substantially larger sample sizes for skulls and DNA sequences. Both data sets were subject to multivariate statistical analyses and these results were used to test the hypothesis of genetic uniqueness.

A great deal of conservation effort and resources can be put to better use if species, subspecies and distinct population segments are tested for genetic uniqueness prior to listing. Similar proof should be provided in consideration of delisting petitions. We now have the conceptual and analytical tools to more cleanly distinguish species, subspecies, and distinct population segments (DPS). I hope future drafts of this or other bills will require scientifically defensible tests of genetic uniqueness.

Why the designation of critical habitat should be based on quantitative evidence

I agree with H.R. 2933's clarification of Critical Habitat and I hope that this definition can be made even more specific. In some cases, critical habitat has been based on unverifiable opinion and not quantitative evidence, such as physical evidence or documented observations of species presence. Critical habitat designations that are not based on quantitative evidence can potentially result in misdirected conservation effort. For example, the recovery plan for bighorn sheep in the Peninsular Ranges (listed as a Distinct Population Segment) specifically called for a quantitative habitat analysis, and an extensive database of 21,055 observations was compiled. However, critical habitat was based upon the opinions of recovery team members (U.S. Fish and Wildlife Service 2000) and not on a quantitative analysis of the available data. There was no incentive or requirement that critical habitat should be based on anything more substantial. I know this situation well because I was a peer reviewer on the recovery plan, and I am a co-author on a soon to be published paper that used that USFWS database to develop a quantitative model of bighorn habitat use (Turner et al., in press). In that paper, we describe how approximately 66% of the critical habitat in the North Santa Rosa Mountains has a near zero probability of bighorn sheep occupancy.

Much of the area with a near zero probability of bighorn sheep use is subject to extensive recreational trail use restrictions. This begs the question: Should we be denying public access to public lands, or subject private landowners to restrictions on the basis of unverifiable opinion and a remote possibility that an endangered species may pass through an area? This example illustrates the impact that an erroneous critical habitat designation can have on the public. It also demonstrates how a quantitative analysis of available data can increase the probability of protecting the highest value habitat to an endangered population while reducing the scale of unneeded restrictions on nearby public and private land.

Why Habitat Conservation Plans (HCPs) do not always result in the reduction of threats to listed species

I agree with H.R. 2933 in excluding areas covered by HCPs from critical habitat. This change to the ESA could be a powerful incentive for communities to be proactive in conservation planning and to involve the public in this process. However, HCPs do not automatically guarantee that demonstrated causes of species decline will be addressed or that decisions will be made based upon the best available

scientific information. Thus, communities may view HCP's with suspicion unless the HCPs prioritize the mitigation of threats, with the highest priority going to those based on verifiable scientific evidence.

For example, the current draft of the Coachella Valley Multiple Species Habitat Conservation Plan in Southern California substantially overlaps the critical habitat for bighorn sheep from the Peninsular Ranges. This HCP includes an interagency plan that imposes restrictions on backcountry trail use by hikers and horseback riders, based on the hypothetical threat of human disturbance. This presumed obstacle to bighorn sheep recovery is supported by nothing more than speculation in the literature. Like some other purported threats to endangered species, it lacks a plausible cause and effect mechanism. Some areas cited for closure or restrictions have no credible evidence of bighorn sheep use at all.

Demographic data collected on the bighorn sheep population show that it has increased well in recent years with the trail use that is now proposed to be curtailed.

In contrast, the primary demonstrated causes of bighorn sheep decline in this DPS, that are supported by empirical evidence, disease (DeForge et al. 1982, Turner and Payson 1982a, b, Elliot et al 1994) and predation by mountain lions (Hayes et al. 2000), were not given the same priority in the Recovery Plan or the HCP. For example, not a single mountain lion had been removed from this area since the listing and three potential sources of exotic respiratory disease have not been double fenced.

This is an example of the lack of action on known causes of mortality and a focus of effort on hypothetical causes, such as human disturbance. It illustrates the extent to which opinion, and selective citation and interpretation of the literature can influence HCP actions and potentially violate the public's confidence in the ability of the ESA to assure recovery of a species.

Endangered species management can produce passionate empathy for some listed species. When passion and a lack of critical thinking are coupled with decision making power under the ESA, decisions easily deviate from having a sound scientific basis. Firmly held beliefs about the hypothetical threats to or genetic uniqueness of listed species are similar to those found in believers of paranormal phenomena. While additional evidence is always called for, critical tests that could potentially falsify the belief are typically lacking. Like-minded authorities are called in and their opinions are used in support of those beliefs. Time and money are wasted, because courses of action are followed on the basis of belief instead of science. This lack of critical thinking jeopardizes the recovery of endangered species and undermines public support for the ESA.

Conclusions

The solution to each one of the examples above is to raise the bar on the scientific standards used in support of ESA decisions.

H.R. 2933 raises the bar on the definition of critical habitat. This more precise definition allows science to better inform the policy choices which the ESA requires.

I offer the following specific suggestions that could further improve the science used in support ESA decisions:

Require that candidate species, subspecies, and distinct population segments be tested for genetic uniqueness before listing. In some cases that will not mean gathering new data but analyzing existing data in order to test the hypothesis of uniqueness.

Require that critical habitat, specifically the "geographical area occupied by the species" and "essential to the conservation of the species," be based on a quantitative analysis of reliable data, and the data used for such determination be publicly available.

Protection of species should deal with real, observable threats and not hypothetical threats. In recovery plans and HCPs, the presumed threats to endangered species need to be cast in terms of questions and the questions ranked in order of importance. Each question should then receive a problem analysis and be broken down into component parts that can be treated as testable hypotheses. In this manner, hypothetical threats can be properly prioritized and investigated as testable hypotheses.

Require that recovery goals be realistic and achievable.

Require objective and independent peer review of proposed listings, recovery plans, critical habitat, biological opinions, and delistings. Require reviewers to disclose potential conflicts of interest. These same requirements should be applied to key evidence used in support of these proposed ESA decisions.

Congress and the people expect much from science in protecting and preserving existing species. Many of the choices contained in the ESA use vague and broad words to convey a desire but not a path to achieve that desire. Litigation has been

the chosen method to describe that path and has led to misallocation of resources and unnecessary limitation on many benign activities. Congress needs to define the path more precisely, place better and more limited definitions on disputable terms, and insure that decisions are based on scientific evidence.

Thank you very much.

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[Dr. Ramey's response to questions submitted for the record follows:]

Response to questions submitted for the record by Rob Roy Ramey II, Ph.D., Department of Zoology Chair and Curator of Vertebrate Zoology, Denver Museum of Nature & Science

Questions from Chairman Richard Pombo

(1) Dr. Ramey, you mentioned that you hope future drafts of this bill will address the need for scientifically defensible tests of genetic uniqueness.

- **Can you explain why this is so important?**
- **Do you have any specific examples?**

RESPONSE:

Look Before You Leap -- Genetic Testing and Objective Peer Review

The Application of "Best Available Science" to Determine Uniqueness of Species, Subspecies or Distinct Population Segment as a Prerequisite to Listing as a "Threatened" or "Endangered" Species.

The Problem:

The public has a finite amount of resources for protection of species that are threatened with extinction. Listings under the ESA currently occur without a critical review of genetic uniqueness of the species, subspecies or distinct population segment prior to being listed. This can lead to a misallocation of recovery effort, unneeded economic costs, and erosion of public confidence in the administration of the ESA if, at a later date, a listed species is discovered not to be genetically unique.

Potential Solutions:

(1) Genetic Testing—A Prerequisite of Listing

Require outside petitioners and internal listing proposals to provide reliable evidence that the proposed entity to be listed is genetically unique. In some cases that will not mean gathering new data but analyzing existing data in order to test the hypothesis of uniqueness. Evidence would have to meet modern scientific standards in the fields of evolutionary genetics and systematics. This is especially needed where original taxonomic inference was weak and based primarily on opinion rather than reliable data. This requirement would winnow out substandard science and opinion in the initial phase of listing a species.

(2) Independent Peer Review to Assure Objectivity and Scientific Integrity

In considering a proposed listing, the USFWS should either (a) be required to organize an independent peer review of the information by qualified scientists who conduct research in appropriate fields, or (b) convene a permanent panel of appropriate scientists that reviews all proposed listings relative to evidence of genetic uniqueness. This latter panel might be made up entirely of qualified scientists from various governmental agencies, or a mixture of government and academic scientists. Where appropriate, this panel might solicit input from outside experts. A mandated written review of the evidence for each proposed listing would force serious scrutiny. This could be similar to a Supreme Court decision. In some ways it carries similar weight in that the future of a potentially unique population of organisms lies in the balance. That written review might serve importantly in some cases as impetus for the development of further data.

Examples of Listings Based on Weak Evidence of Genetic Uniqueness:

(1) The Preble's meadow jumping mouse (Zapus hudsonius preblei) was described by Krutzsch (1954) as a new subspecies that he split from Z.h. campestris to the north. The weakness of the original subspecies description included: limited numbers of specimens used to describe the subspecies (3 adult skulls measured, 4 adult skins examined), qualitative descriptions that would not meet modern standards, and overlap in physical appearance to other Zapus species and subspecies.

That subspecies was petitioned for listing in 1994, listed in 1998, and critical habitat was designated in 2003. Although various genetic and morphometric studies were conducted, none rigorously tested the uniqueness of the Preble's meadow jumping mouse until the Denver Museum of Nature & Science did so beginning in 2002. The results strongly refuted the genetic and morphological uniqueness of the Preble's meadow jumping mouse and were released in December 2003. Delisting petitions that cite this and other new information were filed and a decision by the USFWS about this is now pending.

The most fundamental failure in this process was the lack of a critical independent review that would have revealed the weakness of the original subspecies description on which the listing was based. Such an independent review would have requested a more rigorous test of the genetic uniqueness prior to listing.

(2) Bighorn sheep in the Peninsular Ranges were proposed to be listed as a subspecies (O. c. cremnobates) in 1991, but mitochondrial DNA and morphological testing revealed that they were not a unique (Wehausen and Ramey 1993, Ramey 1995) and this subspecies was synonymized with (Ovis canadensis nelsoni). A subsequent paper (Boyce et al. 1997) using data from two different nuclear DNA markers produced apparently conflicting results for one set of genetic markers and that equivocal result and interpretation became the support for the genetic distinctiveness cited in the listing as a distinct population segment in 1999. I know that data set well because I was a coauthor on the paper.

I detailed my concerns about the lack of specific genetic tests for the presumed distinctiveness of this population in the listing in a letter dated 19 January 1999 and hand delivered to Secretary Babbitt. I never received a reply to that letter. In 2000, a recovery plan was completed for bighorn sheep in the Peninsular Ranges, as was critical habitat designation. Lawsuits, subsequent settlement agreements, a General Accounting Office investigation, and a draft multispecies habitat conservation plan are all actions that have occurred consequent to that listing.

The failure in this case was that selective citation of the literature was used as the basis of listing, whereas apparently conflicting data sets would have caught the attention of independent peer reviewers. The unsupported notion that this population is genetically distinct from others in the desert is a firmly-held belief that limits affects future conservation options.

(3) Other Recent Examples:

Other, more recent examples of new genetic data sets refuting genetic uniqueness of listed subspecies or distinct population segments can be found with the California gnatcatcher and Western snowy plover. An example of genetic and morphological data confirming the genetic uniqueness of an subspecies prior to listing can be found with Sierra Nevada bighorn sheep.

The CHAIRMAN. Thank you.

Ms. Clark?

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

Ms. CLARK. Mr. Chairman and members of the Resource Committee, thank you for the opportunity to testify today on H.R. 2933, the Critical Habitat Reform Act of 2003. I am Jamie Rappaport Clark, Executive Vice President of Defenders of Wildlife, a 501(c)(3) nonprofit organization with more than 475,000 members and supporters. Our mission is the protection of all fish, wildlife and plants and the habitat that sustains them.

Today loss of habitat is widely considered by scientists to be the primary cause of species extinction and endangerment. And while the Act has successfully prevented hundreds of species from going extinct, loss of habitat continues to threaten scores of plants and animals, including many species that are already protected under it.

Despite its billing as a critical habitat reform act, there is, in reality nothing reforming about H.R. 2933. It would effectively eliminate one of the Endangered Species Act's central tenets—the designation and protection of critical habitat, and replace it with absolutely nothing. H.R. 2933 would fundamentally weaken the protection of habitat by effectively making the designation of habitat discretionary, by requiring critical habitat only "to the maximum extent practicable, economically feasible, and determinable." This would have the practical effect of making the designation of critical habitat the exception, rather than the rule.

H.R. 2933 would also move the designation of critical habitat from the time of listing to the time a recovery plan is approved by

the Secretary, a shift that Defenders does not oppose. But by requiring the designation of critical habitat concurrently with the approval of the recovery plan without imposing a deadline for such plans, H.R. 2933 would not only greatly diminish if not eliminate meaningful enforcement of the provision; it would further delay development of any blueprint for species recovery.

And finally, H.R. 2933 also fails in that it neglects to address at all the grave problems regarding this Administration's implementation of the act's critical habitat provisions, problems that are severely undermining and exacerbating the challenges associated with the conservation of endangered and threatened species habitat.

But let us take a step back for a minute and look at the broader issue. What we are ultimately talking about today is the kind of world we will be leaving to our children. Unfortunately, our nation has not always succeeded in protecting a conservation legacy as rich and diverse as the one we inherited. Often we sacrifice tomorrow's bounty for today's gains. Some of these failings are reversible but others are not and the most permanent of them is extinction.

In 1973 our nation's government passed the Endangered Species Act with wide bipartisan support. Our leaders realized then what the years since have only confirmed—that we owe it to future generations to be good stewards of the environment and that good stewardship includes the prevention of species extinction.

Congress also realized how vital habitat was to species recovery, so much so that they highlighted in the original construction of the Endangered Species Act the protection of habitat as one of its key purposes. Since then, the ideals behind the Endangered Species Act and the Act itself have continued to enjoy broad bipartisan support.

A recent poll done by a coalition of conservation groups, including Defenders, revealed some astonishing numbers. Ninety percent of voters subscribe to the view that they owe it to their children and grandchildren both to be good stewards in the environment and to avoid causing species to go extinct. The Endangered Species Act itself enjoys the support of 86 percent of voters and a full 95 percent agree and understand that one of the most effective ways to protect species is to protect the places in which they live.

Clearly any suggestion that there is a groundswell of support for weakening the Endangered Species Act is unfounded. Voters are strongly supportive of species protection in general and the Act specifically, especially with regard to protecting habitat essential to species recovery.

In summary, the Endangered Species Act with its central tenet of habitat protection continues to stand as one of our nation's most important and effective instruments for preserving and restoring the conservation legacy we pass on to our children. We must never forget the central purpose of the Act and the extraordinary foresight of the act's original authors, who saw the wisdom in both species conservation and habitat protection. After all, it hard matters what you do for a species on the brink of extinction if you do not protect their habitat. It is clear that if we are to recover species on the brink and prevent additional species from suffering a similar fate, we simply must do a better job of protecting the habitat they depend on.

I challenge all of us as we discuss any proposed changes to the Endangered Species Act or its implementation to answer the question: Will it improve and ensure the conservation of habitat? It is only when affirmed with a positive answer that we have meaningful reform that will guarantee a rich legacy for future generations. Thank you.

[The prepared statement of Ms. Clark follows:]

Statement of Jamie Rappaport Clark, Executive Vice President, Defenders of Wildlife

Mr. Chairman, Mr. Ranking Member and members of the Resources Committee, thank you for the opportunity to testify today on H.R. 2933, the "Critical Habitat Reform Act of 2003." I am Jamie Rappaport Clark, Executive Vice President of Defenders of Wildlife. Defenders of Wildlife is a 501(c)(3) nonprofit organization with more than 475,000 members and supporters; our mission is the protection of all native wildlife, fish and plants and the habitat that sustains them.

Before I address the specifics of H.R. 2933, I would like to say two things.

First, as a rule, Defenders of Wildlife generally does not support piecemeal reauthorization of the Endangered Species Act. Reauthorization is best considered in the context of the Act's entire framework in order to ensure all aspects of threatened and endangered species conservation are adequately addressed.

Second, let's take a step back and put the issue at hand today in context. What we are really talking about today is the kind of world that we will be leaving to our children. The greatest gift one generation leaves another is a better world. And it is the hope of all parents that the world they leave their children is as rich and diverse as the one they inhabit today. This is the lasting legacy that bonds one generation to the next. And in America, that legacy has always included a deep and abiding appreciation for the natural world.

Whether one is a hiker or a hunter, a fisherman or environmentalist, liberal or conservative, we have all benefitted from our nation's rich and abundant environment and the conservation legacy passed on to us by those who came before. And we bear a responsibility—a duty—to ensure that some measure of what we have received is there to be enjoyed by tomorrow's children.

Unfortunately, we have not always succeeded in protecting that legacy. Often we have sacrificed tomorrow's bounty for today's gains. Some of these failings are reversible, others are not. The most permanent of them is extinction.

In 1973, our nation's government embraced this truth and passed the Endangered Species Act. The bill sailed through both the House and Senate by wide bipartisan majorities. And it was a Republican President, Richard Nixon, whose signature made the Act law.

Our leaders then realized what the years since have only confirmed: that we owe it to future generations to be good stewards of the environment—and that good stewardship entails the prevention of species extinction. This is a weighty responsibility—once species are gone, we cannot bring them back.

The Endangered Species Act is the safety net for wildlife, plants, and fish on the brink of extinction. In so many ways, Congress was prescient in the original construction of the Endangered Species Act when it included the protection of habitat as one of its key components. After all, the very best way to protect species is to conserve their habitat. Indeed, today, loss of habitat is widely considered by scientists to be the primary cause of species extinction and endangerment.

More than 30 years ago Congress recognized the impact habitat loss was having on wildlife and plants when it enacted the Endangered Species Act with the express purpose of "provid[ing] a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." And while the Act has successfully prevented hundreds of species from going extinct, the fact is that loss of habitat continues to threaten scores of plants and animals, including many that are already protected under it. It is clear that if we are to recover currently listed species and prevent additional species from becoming endangered or threatened, we simply must do a more effective job of conserving the ecosystems (i.e., habitats) wildlife and plants depend on for their survival.

Any proposed changes to the Endangered Species Act or its implementation, whether legislative or administrative, must ultimately be judged against that standard: Will it improve and ensure the conservation of habitat? When measured against this standard, H.R. 2933, the "Critical Habitat Reform Act of 2003," fails miserably. Despite its title, there is in reality nothing reforming about H.R. 2933 and certainly

not if one considers meaningful reform of the Endangered Species Act to be that which further improves the conservation of endangered and threatened species and provides a sure pathway to species recovery. Rather, H.R. 2933 would effectively eliminate one of the Act's central habitat protections—the designation and protection of "critical habitat"—and replace it with absolutely nothing. In other words, H.R. 2933 not only fails to improve the conservation of habitat under the Endangered Species Act, it actually would make the situation worse by effectively eliminating any protection for much if not most of the habitat endangered and threatened species need to recover.

As currently required under the Endangered Species Act, the designation of critical habitat could provide several potential benefits for endangered and threatened species. I emphasize "could" and say "potential" because for most currently listed species, critical habitat has never even been designated, much less protected, and because, as discussed in greater detail below, the current Administration is now perversely using critical habitat as a tool to undermine, rather than advance, species conservation.

But let us start by examining some basic truths about critical habitat designation as envisioned in the Endangered Species Act.

- First, defined as that habitat which is "essential to the conservation" of endangered and threatened species, the designation of critical habitat should be important because it identifies, both geographically and in terms of physical and ecological features, that habitat an endangered or threatened species needs to recover. Thus, critical habitat should serve as an important recovery planning tool.
- Second, the designation of critical habitat is the only provision under the Endangered Species Act that expressly requires the protection of unoccupied habitat, which is particularly important for migratory species. Since the single greatest cause of species endangerment is loss of habitat, most listed species will not recover to the point where the Act's protections are no longer necessary unless the loss of habitat is not only stopped, but is actually reversed and sufficient areas are conserved to enable the species' current population to expand.
- Third, by encompassing unoccupied habitat, critical habitat also benefits species by often ensuring that federal actions with the potential to impact listed species habitat are reviewed by the U.S. Fish and Wildlife Service and/or National Marine Fisheries Service pursuant to the Act's section 7 consultation provision. The section 7 consultation requirement is absolutely essential to ensuring that federal agencies do not undermine the conservation of listed species and, instead, actively utilize their existing authorities to promote species' recovery and survival.
- Finally, the designation of critical habitat is important because it triggers a substantive regulatory protection for species' habitat—the prohibition on federal actions which are likely to result in the "destruction or adverse modification" of critical habitat.

Defenders of Wildlife opposes H.R. 2933 as much for what it does not do as for what it does. H.R. 2933 would fundamentally and significantly weaken the protection of habitat under the Endangered Species Act by effectively making the designation and protection of habitat discretionary. With only two exceptions, current law requires the designation of critical habitat at the time an endangered or threatened species is listed. More importantly, the designation of critical habitat can be excused entirely only in the rare situation where it would actually harm the species. H.R. 2933, on the other hand, by requiring critical habitat only "to the maximum extent practicable, economically feasible, and determinable," would effectively make the designation of critical habitat the exception, rather than the rule, and turn what is now a mandatory requirement into one that is almost entirely discretionary with the Secretary. Because it is the current Administration's position that the designation of critical habitat is never "practicable" or "economically feasible," H.R. 2933 would effectively write the designation and protection of critical habitat out of the Act, thereby condemning species already in a precarious state to further decline and possible extinction.

H.R. 2933 would also move the designation of critical habitat from the time of listing to the time a recovery plan is approved by the Secretary and eliminate any enforceable deadline regarding critical habitat. Making the designation of "recovery" habitat part of or at least concurrent with the development of a recovery plan makes sense and is something Defenders supports, but only if the Endangered Species Act is amended to provide for an enforceable recovery planning deadline. Currently, the Act does not impose a deadline for the development of recovery plans. Accordingly, by requiring the designation of critical habitat "concurrently with the approval of a recovery plan" but without imposing a deadline for such plans, H.R. 2933 would

not only greatly diminish if not eliminate meaningful enforcement of this provision, it would further delay development of any "blueprint" for species recovery.

H.R. 2933 also fails in that it neglects to address at all the grave problems regarding this Administration's implementation of the Endangered Species Act's critical habitat provisions which are severely undermining the conservation of endangered and threatened species habitat. Congress plainly intended the designation of critical habitat to be a central tool in achieving the Endangered Species Act's goal of conserving endangered and threatened species. At the same time, Congress also provided that the Secretary take "into consideration the economic impact, and any other relevant impact" of designating critical habitat. This Administration, however, has turned the critical habitat provision entirely on its head; instead of a tool for conserving endangered and threatened species, the designation of critical habitat has become a mechanism for actually eliminating any meaningful protection for habitat deemed essential to species conservation.

We have seen, for example, areas determined by Fish and Wildlife Service biologists to be essential to a species conservation excluded from or eliminated as officially designated critical habitat, only to then have other federal agencies, including the U.S. Army Corps Engineers, refuse to even consult with the Fish and Wildlife Service under section 7 of the Endangered Species Act regarding actions that will destroy and fragment such habitat. In a case involving the endangered cactus ferruginous pygmy-owl, this Administration has taken the extreme position that a federal agency has no obligation to even consult with the Service under section 7 of the Act unless its actions will directly impact habitat that is either occupied by an endangered species or formally designated as critical habitat, even though the agency's action will result in the destruction of habitat determined by the Fish and Wildlife Service to be important to the species' survival and recovery.

This pattern is becoming increasingly worrisome as this Administration continues to exclude vast areas of essential habitat using flawed, one-sided economic analyses and other arbitrary reasons. For example, this Administration has steadfastly refused to consider the economic benefits associated with the designation of critical habitat, and even has gone so far as to delete from its published analysis a section on the economic benefits of designating bull trout critical habitat included in the original analysis by the Fish and Wildlife Service's own economic consultant. This is not only bad economics, but it highlights in stark terms this Administration's real agenda regarding critical habitat and species conservation under the Endangered Species Act.

Under this Administration, the designation of critical habitat is no longer about protecting species and guiding species recovery, but instead has become simply a political opportunity to assault the Endangered Species Act, to make a mockery of the importance of habitat to species recovery and to make baseless assertions that "the Endangered Species Act is broken." For example, despite continually complaining in press releases that its priorities are being dictated by court-ordered critical habitat designations rather than science, in reality, this Administration has failed to develop its own priorities at all regarding the backlog of overdue critical habitat designations.

As the General Accounting Office recently found, "[t]he Service has been aware of problems with its critical habitat program for a number of years," and has previously "announced its intention to streamline the process for designating critical habitat to be more cost-effective," and to develop a much less labor-intensive process for describing the areas proposed for designation as critical habitat." GAO, Endangered Species: Fish and Wildlife Service Uses Best Available Science to Make Listing Decisions, but Additional Guidance Needed for Critical Habitat Designations 35, 36 (August 2003). Yet, according to GAO, "no additional guidance or revisions were issued, and the Service continues to follow the same unworkable system" for designating critical habitat. Id. (emphasis added). Thus, this Administration's repeated claim that critical habitat is broken is spurious given that it has done absolutely nothing to administratively address the critical habitat backlog or reform the process. Plainly, this Administration seems much more interested in publicly criticizing the ESA and fomenting controversy than it is in meaningful reform.

This Administration's implementation of critical habitat designation and H.R. 2933 have moved the focus of the debate from where it rightfully belongs, and it is time to take the discussion to a different level: how can we move forward to keep the conservation of endangered and threatened species and their habitats the central focus of the Endangered Species Act so we can meet our responsibility to leave a rich and abundant natural legacy to future generations?

In keeping with this view, any meaningful reauthorization of the Endangered Species Act's critical habitat provision should encompass the following elements.

1. First and foremost, critical habitat's original intent and purpose of identifying and protecting habitat needed for species' conservation (i.e., recovery) must be maintained. There must be a transparent and scientifically rigorous process for identifying, both geographically and ecologically, a species' recovery habitat. For example, the current distinction between occupied and unoccupied habitat makes no sense from a scientific or species conservation standpoint and should be eliminated. In addition, once identified, there must be regulatory protection for such habitat. The Act's current prohibition on federal actions that are likely to result in the "destruction or adverse modification" of critical habitat, is, on its face, a reasonable standard, but one that must be defined to reflect the ultimate goal of recovery.
2. The designation of critical habitat should become part of, or at least occur concurrent with, the development of a recovery plan, provided that the recovery planning process becomes subject to an enforceable deadline.
3. Species recovery must be the primary focus and goal of identifying and protecting critical habitat. The current Administration's fixation on speculative analyses of the potential economic costs of designating critical habitat as a means to effectively eliminate protections for habitat species need to recover is incompatible with this goal. Economic considerations should play a role in determining how best to protect habitat and achieve species recovery, rather than as a means to effectively foreclose even the chance of recovery, as is the case now.
4. Incentives must be provided to encourage private landowners to conserve habitat determined to be important to species' recovery.
5. Finally, a scientifically based and rational system or set of criteria for addressing the current backlog of species without critical habitat or any other meaningful habitat protections, together with adequate funding to administer the program, must be developed.

In closing, let me say that the Endangered Species Act, with its central tenet of habitat protection, continues to stand as one of our nation's most important and effective instruments for preserving and restoring the conservation legacy we pass on to our children. We must never forget the central purpose of the Act and the extraordinary foresight of the Act's original authors, foresight that saw the wisdom in both species conservation AND habitat protection. Thank you.

[Ms. Clark's response to questions submitted for the record follows:]

Response to questions submitted for the record by Jamie Rappaport Clark, Executive Vice President, Defenders of Wildlife

Questions from Chairman Richard Pombo

1) Congress expressly directed (in the committee report for the bill that created the current critical habitat process, H. Rept. 95-1625, page 18) that the Secretary should be "exceeding circumspect" in designation of unoccupied habitat as critical habitat.

- **How could unoccupied habitat provide significant benefits if it was not intended to be extensively designated?**

So-called "unoccupied" habitat provides essential benefits for many species and is, in fact, from a biological and ecological standpoint, indistinguishable from "occupied" habitat. This fact is perhaps most evident with respect to migratory species which may only utilize a specific habitat to meet an essential life function (e.g., breeding) for a short period of time each year. The fact that such habitat is unoccupied for much if not most of the year, nonetheless, in no way diminishes its critical importance to the species' sustainability. Moreover, because loss of habitat is the single greatest cause of imperilment for most threatened and endangered species, for these species to ever recover, which of course is the fundamental goal of the Endangered Species Act (ESA), sufficient habitat must be protected to enable their existing populations to expand and to ensure their long-term viability in the wild. On the other hand, simply protecting habitat where individual members of these endangered and threatened species are currently found will only condemn a species to the status quo at best and potential extinction at worst, in direct violation of the spirit and intent of the ESA.

It should come as no surprise, therefore, that Congress explicitly affirmed the central importance of protecting "unoccupied" habitat in meeting the ESA's central goal of recovering threatened and endangered species when it drafted the critical habitat provisions. Thus, the plain language of the ESA provides that "unoccupied" habitat

is "critical habitat" if it is "essential to the conservation [i.e., recovery] of the species," which is the same standard that governs the designation of "occupied" habitat. Accordingly, when considered in light of the ESA's unambiguous language that critical habitat is that habitat, whether occupied or unoccupied, which is "essential to the conservation of the species," the language in the legislative history referenced above stating that the Secretary should be "exceedingly circumspect" in the designation of unoccupied habitat, at most means that the Secretary should generally not designate more habitat than is essential to the species' recovery.

As Chief Justice Rehnquist has said, "reference to legislative history is inappropriate when the text of the statute is unambiguous." Dept. of Housing and Urban Development v. Rucker, 535 U.S. 125, 132 (2002).

2) In your testimony you allege that Congress plainly intended for the designation of critical habitat in achieving the ESA's goals?

- **If this is what Congress intended, why did you not designate it while you were Director?**
- **Why did you find it "not prudent" in almost all cases?**

When I became Director of the U.S. Fish and Wildlife Service in 1997, the agency was still trying to emerge from the impossible situation in which it had been placed when a year-long moratorium was placed on new listings and designation of critical habitat. In April 1995, Senator Kay Bailey Hutchison (R-TX) added the moratorium to P.L. 104-6, the Emergency Supplemental Appropriations and Rescissions Act. That moratorium remained in place through the budget battles of the FY 1996 appropriations process, extended by the numerous continuing budget resolutions necessary until the final FY 1996 Omnibus appropriations bill was enacted as P.L. 104-134. While the FY 1996 Omnibus appropriations bill retained the moratorium, final negotiations on the bill had resulted in the inclusion of provisions giving President Clinton the authority to suspend through waivers some of the most egregious anti-environmental riders in the bill, including the moratorium. The President exercised this authority and waived the moratorium when he signed the final bill into law in April 1996.

During the year that the moratorium was in place, the listing program was effectively shut down, Fish and Wildlife employees were reassigned to other program work and more than 500 species slid closer to extinction, denied the legitimate protections of the Endangered Species Act. Final listing determinations for more than 250 species formally proposed for listing by the Fish and Wildlife Service were precluded. An additional 270 species that had been determined by the Fish and Wildlife Service to possibly warrant protection could not be proposed for listing under the moratorium. The situation for many species in significant decline was truly desperate. An internal agency memo at the time stated, "Elimination of the listing program will mean that species which would have been listed as threatened will continue to decline, and may become endangered and are more likely to become extinct. Species which would have been listed as endangered will continue to decline and many will likely disappear altogether."

Once the moratorium was finally lifted, the agency was therefore in a true "emergency room" situation get these species under the Act's protection before their status deteriorated even further. As the Fish and Wildlife Service realigned employees back into the listing program and we completed an evaluation of the situation, we decided it was of greater importance and more beneficial biologically to address the biological status of as many species as possible with the meager funding at our disposal—giving them at least the bare bones protection of the Act—rather than list fewer species so that we could designate critical habitat for those few. If the agency had had more funding at its disposal we could have done both. But it would have been irresponsible to ignore the serious backlog that existed as a result of the moratorium under the circumstances.

The ripple effects of the moratorium are still being felt today. I believe the moratorium put the agency into a hole from which it is still trying to emerge, with a serious backlog of candidate species that still await consideration of Endangered Species Act protections. I hope Members of Congress will look to the impacts of the moratorium and consider its consequences when contemplating any such ill-advised anti-environmental riders in the future.

The CHAIRMAN. Thank you. I want to thank the entire panel for your testimony.

Miss Clark, in your testimony you talked about the results of a poll and where 80 plus percent of the American people are in terms of the Endangered Species Act and protecting habitat. And in lis-

tening to the questions, I have not seen the poll but in listening to the questions the way that you testified, I would have been personally with the 80 percent plus if those questions were asked of me in the way that you presented them to the Committee.

One of the problems that we have in trying to reform the Act and make changes is that is not what we are talking about. I do not think that Mr. Cardoza is trying to introduce a bill or is trying to amend the Endangered Species Act in a way that would remove protecting habitat.

Now we may have a difference of opinion in terms of how do we do that, how do we have a system that works better than what we currently do, and you have testified before this committee many times, I have always had a great working relationship with you and I have always felt that in your time of service as part of the previous Administration, even though we may have disagreed, I always felt that you were doing what you felt was right and within the boundaries of the law, regardless of what the issue was. I always appreciated that and I think that is why we always got along when we were trying to work together on this.

But what Mr. Cardoza is attempting to do is, I think, in line with what you said when you were the Director of Fish and Wildlife Service and that is to make the system work better than what it currently does, and there are ways to do that. And I would make an open invitation to you to work with you. If there are specific parts of this bill that you think go too far or are wrong in the way that they try to approach it, I would be more than happy to work with you to try to find that. But I do believe that this is the right direction to go in terms of trying to reform the critical habitat provisions that are in the bill.

Ms. CLARK. Well, we would welcome working with the Committee to assure that any reforms, including critical habitat but since we are discussing critical habitat today, that it meet that test of sustainability of habitat protections for the long haul. I do not think anybody would disagree with that.

The CHAIRMAN. I do not believe they do and I think that is what brought us to where we are today. I do not think it is helpful to the debate or the discussion. I have read some of the stuff in the paper over the last few days saying that this bill guts the Act and all this other stuff, which is blatantly untrue and everybody knows that it is untrue, but that is the level of debate that we have devolved into when it comes to the Endangered Species Act.

I believe this is an honest attempt to try to make the Act work within the boundaries that we all have. You, as the former Director of Fish and Wildlife, repeatedly pointed out the shortcomings in the critical habitat process and that we needed to change that and reform that. Quotes from you have been put out there and we can spend all day doing that but at least point I do not think it is helpful. I just am trying to move forward in a bipartisan way of trying to come up with a way to fix this better and I appreciate you being here today and your testimony.

I did want to ask Mr. Sunding a couple of questions in terms of his testimony and this is something that I think there is a lack of education or a lack of understanding when it comes to the Endangered Species Act and what some of the impacts are.

I am assuming that you live near the university in what is probably one of the most expensive housing markets in the country, if not in the world.

Mr. SUNDING. Yes, that is right.

The CHAIRMAN. And my district, which is very close to the university, I have cities in my district where the average house is $650,000 plus. And most of the people that are your typical middle class working family could not afford to buy the house that they are living in because of those costs and the result of that.

As a result, we are getting more and more people that are moving out into the Central Valley and into my home town of Tracy. We have just exploded in terms of population in my home town and now our average housing price is $350,000 plus and we are pricing people out of that market.

In the context of all of that, the Endangered Species Act has played a major role in that and I would like to ask you if you could share with the Committee what role the Endangered Species Act has played in terms of those housing costs and the impact on your average middle class family that happens to live in that area.

Mr. SUNDING. Yes, I would be happy to talk about that. Let me say first I had the very good fortune to attend a conference here last week sponsored by the Department of Housing and Urban Development on regulatory barriers to housing affordability and one of the main areas of focus of that gathering was the role of environmental regulations in decreasing housing affordability for some particularly vulnerable groups.

So I will just say to begin, in general, that this is an area where researchers are beginning to connect the dots. There does appear to be a very strong connection. Having said that, I will also say that the connection is going to vary a lot from place to place. In particular, the role of environmental regulation in driving up housing prices and, by inference, the role of the ESA in driving up housing prices is going to vary a lot from place to place. The Bay Area, the Inland Empire area of Southern California, coastal areas of Southern California, those are three cases where I think you can make a very strong general argument that environmental regulations are both driving up housing prices and also, as you point out, pushing consumers to more and more distant locations, forcing them to commute longer and longer distances to their jobs, which causes all kinds of other regional economic and environmental problems.

So I think the connection is quite strong even if, in fairness, it is just beginning to be understood by people at the university.

The CHAIRMAN. Thank you. I appreciate your testimony and I would like the opportunity to continue to discuss that with you.

Mr. Inslee.

Mr. INSLEE. Thank you.

There was a suggestion earlier during our discussion that because only a relatively small number of species have actually been recovered—I think someone used the number 12; I do not know if that is accurate or not—that somehow the Act is a failure; it has not provided Americans with substantial benefits. But it would appear to me that, at a minimum, it had given an opportunity for

many, many species that probably or at least a significant chance would have been extinct by now had this Act not been in place.

And just to give people a flavor of what we are talking about, if you look at the Act now, the woodland caribou, gone; the Columbian whitetail deer, gone; the jaguar, gone; the mountain beaver, the Point Arena Mountain beaver, gone; the ocelot, gone; the Sonoran pronghorn, gone; pygmy rabbit, gone; Hawaiian monk seal, gone; the bighorn sheep, gone; the Hawaiian duck, gone; the northern Apple Meadow falcon, gone. That is just the beginning of the list.

It appears to me that the Act has had, at a minimum, a benefit of assisting the preservation of these species while we work on their recovery and at least has given a significantly better chance of at least keeping the genetic stock available while we work on these recovery plans.

Would the panel pretty much agree with that? Would you all agree with that assessment? If anyone disagrees with that, feel free to—I am seeing mostly yesses and one quizzical look. So if you think of some other idea, let me know.

I wanted to ask about this new guideline. I am told today after three plus years without guidance, after a court struck down what the Administration or the agency was doing, that the agency finally got around to doing something here and that is really troublesome to me because we really are trying to figure out whether the Act is broken or the actors are broken; namely, the agencies that implement the law.

There was a GAO report—I do not know if you folks have seen it; it was requested by Mr. Pombo and others. It came out last year on the Endangered Species Act and what its conclusion was, I will just cite the title because it kind of says it in a nutshell. "Fish and Wildlife Service uses best available science to make listing decisions but additional guidance needed for critical habitat designations."

Basically the GAO study said the agency needs to get off the dime and issue some guidance. That is the problem here. The agency under this Administration has not acted.

Now the question I have is some of you supported this bill, have you been on the agency's case, in a polite way of saying it, since the Bush Administration came into office to get off the dime to issue some guidance here?

Mr. LIEBESMAN. I will be the first to respond, Congressman. I, too, have been very troubled by the lack of guidance over the last couple of years. I think it is very unfortunate when courts are running the program and the Administration does not respond effectively to address some of those issues. I mean a case in point deals with the consideration of economics. The Cattle Growers case out of the Tenth Circuit basically took the Service historically to task for not adequately considering the broad-based economic effects of listing critical habitats. The message quite clearly out of that case is you really have to come up with clear-based guidance about how economics enters into the analysis, and now we are just beginning to see something.

The other issue that I mentioned in my testimony that you picked up on in your questioning earlier is the Sierra Club case out

of the Fifth Circuit, which basically struck down the uniform standard that is applied by the Service historically for jeopardy, as well as adverse modification, saying that Congress intended a lower threshold when you are dealing with adverse modification of critical habitat, as opposed to jeopardy. You know, adverse modification goes toward the idea of recovery of the species, as opposed to jeopardy going to the issue of survival. And clearly the message from that decision is to go through a rulemaking.

So indeed I have been on that case. I think it is very important that the Service move forward. It is good to see the guidance. But I do want to say one other thing. I do not think guidance is the only way. I feel very strongly that we need some clear legislative mandate to make this happen.

Mr. INSLEE. I want to ask you about that mandate. Basically the thrust of the bill in a variety of ways—this is my characteristic and you may challenge it—I think weakens in a significant way the method of adopting critical habitat. For instance, it makes concurrent designation for recovery plan that does not have any deadline for that occurring. It restricts the critical habitat to the range of currently occupied area of the species but if you conclude scientifically that that is going to result in the extinction of the species, you have not solved the problem.

On economic benefit, it does not define economic conditions. It could mean that just if the Administration does not appropriate enough money economically for the administration to do this, this problem does not get solved.

Does anyone want to comment on those concerns that I have about this proposal?

Ms. CLARK. If I could, and while I do not support the current form of the bill, I still have an opinion on the guidance that Judge Manson referred to.

What I find most troublesome about his announcement about the guidance that nobody has seen and that I think is interestingly timed to today's hearing is that for an issue that seems to have been as controversial, dating back to my time even with the Fish and Wildlife Service, I find it a bit curious and troubling that it is a guidance of such magnitude to provide guidance or policy for how the Service will move forward in critical habitat determination that it is not subject to public notice and comment? I had never heard of that before. Or that indeed, from what I understand, the Fish and Wildlife Service was not even involved in the development of the guidance.

So I would just bring that to your attention. I am very interested in looking at how this Administration has determined that they would move forward with critical habitat determination.

The concerns that you raised with the current bill are very real because at the end of the day it becomes a question not only of priorities but available resources. The notion of shifting the determination, science-based determination of habitat that is essential for recovery to the recovery planning stage, which would suggest an open, collaborative fashion for figuring out what is necessary to ensure safe passage to recovery, makes clear sense. But I can tell you after many years of implementing the Act in my former life that absent some kind of affirmative deadline and a hammer if you

will to getting a recovery plan completed and over the finish line, not only will you not have recovery plans completed because of whipsawing of priorities but neither will you have habitat articulated and it becomes a double jeopardy problem.

Mr. INSLEE. Just one very brief comment. I just think that is really an important point. Given the budgetary pressures that the agency is under, we have to have something to make sure these decisions get made in a timely fashion. Thank you.

Dr. RAMEY. I wanted to disagree with your comment, the first blanket comment that all these species would be gone if it were not for the ESA. Let me speak specifically—

Mr. INSLEE. I want to make sure you understand my premise. I did not say they would all be gone. I wanted to say there would be a significantly increased opportunity for them to survive. I just want to make sure you understand. I did not say that they would all be gone.

Dr. RAMEY. OK, but let me point out that in the case of Sierra Nevada bighorn sheep, they were specifically listed to gain Federal supremacy over state law to control mountain lion perdition, which was causing the significant decline in the population. The mountain lion population has crashed in the Eastern Sierra Nevada and the bighorn sheep population has increased dramatically in recent years and they have only removed two or three mountain lions from this area under the Act, but the mountain lions did it on their own.

In the Peninsula Ranges, the primary causes for decline of that population initially from empirical evidence is mountain lion perdition, respiratory disease, and yet the effort is actually going to other areas for hypothetical threats, such as human disturbance. So in that particular case the real causes that are demonstrated are not being dealt with.

Mr. LIEBESMAN. Can I comment very briefly? One of the things that I think is going to have to be thought through is that the Service has adopted a lot of recovery plans already. I do not have the numbers, but a lot of them have been in place and I understand that a lot of them are out of date and need to be updated.

So I would agree in many ways with the premise that you raise, that you need to have some action-forcing mechanism to adopt these plans, but you have to put that in sort of a realistic context; that is, if plans have actually been adopted, do they need to be updated, when would they be updated, how would critical habitat tie into an updating of a plan, what plans have not been updated and need to move forward? So it is not so simple as saying well, let us just put a deadline for recovery plans.

Resources are important. I could not agree with you more. If you are going to really achieve the goal of the Act you have to ensure that there are sufficient resources to develop recovery plans and to mesh all this together in a commonsense way, and we cannot do it in bits and pieces.

So it is not an easy issue to say let us just have a deadline. There is a lot involved in this process.

The CHAIRMAN. Mr. Walden.

Mr. WALDEN. Thank you, Mr. Chairman.

I think my colleague from Washington sort of made the case for why we need to fix what is wrong with the Endangered Species Act. We are losing species. We are not recovering them as fast as a lot of us would like to see. But it seems to me in this debate that designating critical habitat up and down a system, whatever it is, without having a recovery plan first is like trying to build a house without a plan. You can go to Home Depot and lock up everything that is there in the building but you only may need half of it and we do not know what we are going to end up with if we do not ever have a plan.

And it seems like in the recovery planning process you could both develop a plan that would better for recovery of the species and produce more public support because then the public would know what it is we are trying to do and how we get there and how there is an end point.

I face this problem in the Klamath Basin. When the scientists declared we had to keep a high lake level in Upper Klamath Lake to protect the suckerfish when, in fact, the biggest die-offs occurred during the highest lake level years and they cannot tell us how many fish were ever in the lake, how many are there now, or how many they want there when the plan is done. That, to me, forget deadlines; there is not even a plan and that is nuts.

What we have to do is update this law so that we have a recovery plan, gather the information, and then decide what is necessary to achieve that plan. I mean it is a pretty simple planning process. I mean is it just me or does it look like all this is driven by whoever has a lawyer or wants to do fund-raising somewhere out there to support and featherbed their own nest oftentimes, rather than dealing with what is at the top of the threatened list? Is this not litigation-driven? Does anybody want to tackle that?

Mr. LIEBESMAN. Since I am the only lawyer on the panel, I guess by default I have to respond to your comment.

I think there has been a tremendous amount of litigation that unfortunately has driven the process and I think a lot of it is because you have deadlines in the bill, in the original Act, that were unrealistic. Critical habitat has deadlines about within a year of listing and the Service historically, in my view, did not think critical habitat was that important. They said let us put our resources elsewhere. They said that basically the standard for adverse modification, same as jeopardy, Section 7, no difference.

So what happened is that smart plaintiffs in the environmental community and elsewhere said well, here are deadlines; we can force that by going in and filing a citizen suit and working out settlements and that, of course, starts the cycle of a schedule. Then, of course, the plan comes out oftentimes not tied to a recovery plan, inadequate, and then folks unhappy with that sue to challenge the substance of that.

So it creates an endless cycle where there are entre points for litigation to drive the process and there are not enough resources on the part of the Service to respond effectively and judges are forced to grapple with a statute that is very clear with deadlines and a process that is broken. So I think that is where we have come unfortunately, where this has all evolved over these many years and why this kind of legislation, in my view, is essential to

try to put a halt to that process and create some rationality so that judges and courts are not running the program.

Mr. WALDEN. And you are not alone. The Tulane University Environmental Law Journal says, and I quote, "The entire ESA budget runs the risk of being consumed by the bottomless pit of litigation driven by listings and designations. And which habitat is most vulnerable and should be designated as critical, litigation-driven actions prioritize only those species that have a plaintiff behind them and often a larger political objective, rather than those species that are most endangered."

It seems to me that the professional biologists and scientists should be looking at what is most threatened and endangered and trying to save it first and the resources that we have ought to be applied to those species in a constructive way that has a recovery program in mind, you get the data, it is peer-reviewed, it is scientifically sound, we put parameters, we involve local communities and the state.

One of you mentioned how states and localities often have some of the best data. Why would we not try to seek out the best data when we are talking about whether or not a species is going to go out of existence or not? We should open this process, make it transparent, and then come up with the best peer-reviewed recovery plan we can, taking into account all the other parameters, as outlined in this bill.

I appreciate your testimony and thank you, Mr. Chairman. With that, I yield back.

The CHAIRMAN. Mr. Cardoza.

Mr. CARDOZA. Thank you, Mr. Chairman. I would like to submit this question to Ms. Rappaport Clark.

Ms. Clark, you have made some broad, in my mind unfair statements regarding the bill, that my bill devastates ESA. You claim that critical habitat will not be declared by the Secretary. I would like to have you look at page 2 of the bill, Section 3, which states, "The Secretary shall, in accordance with subsection B, to the maximum extent practicable, economically feasible, and determinable, shall concurrent with approval of the recovery plan for the species under subsection F, designate any habitat of such species that is then considered critical habitat."

My question to you is if you are Secretary and you feel that there is critical habitat needing to be designated, you do not think you can designate it under that regulation?

Ms. CLARK. If I am Secretary it might be different.

Mr. CARDOZA. So it is a question of who is Secretary?

Ms. CLARK. And because what is laid out in this construct is when you have words like practicable, economically feasible, and the economic analysis debates that are ongoing now are pretty serious, so—

Mr. CARDOZA. That is exactly my second question that I wanted to ask you because the point of that terminology being in this bill is by your logic, conversely, if we determine it is unpracticable, uneconomically feasible and undeterminable, we would still have to declare that critical habitat. We would have to turn logic on its head and we would have to determine critical habitat even though it is undeterminable.

Ms. CLARK. No, that is not correct.

Mr. CARDOZA. Well, that is the way I understand it.

Ms. CLARK. What I was linking here is the factors of practicable, economically feasible and determinable concurrent with the development of a recovery plan. Now I absolutely agree with all of the comments that have been made prior to this conversation about shifting the designation of habitat essential to recovery to the recovery planning stage, but having worked as a biologist all the way up to the Director in the Fish and Wildlife Service, my frustration, their frustration will continue to be and I suggest it is probably this current Administration's frustration that if there is not a deadline with commensurate appropriate resources to fill that by which to compel the recovery planning process to be completed, the debate on habitat, whether it is practical, economically feasible, determinable, will not occur.

Mr. CARDOZA. I am perfectly willing to engage in a dialog with regard to deadlines because I think that there may be some issue that we have to deal with there, but it is my feeling that if you do not have a plan, how can you designate critical habitat if you do not have a plan? That is one of my concerns.

Ms. CLARK. I do not disagree.

Mr. CARDOZA. Also, I am concerned that the discussion is more political than biological and that is one of the problems I have with some of your testimony because it is who is Secretary is your concern. When we are dealing with the law, that is part of democracy. We cannot write the law for when you are Secretary versus when Mr. Manson is Secretary. We have to write a law that is fair all the time.

Ms. CLARK. And I do not disagree with that, so let me if I could just clarify what I meant. I think there has been a lot of discussion and debate over the years, regardless of whether it was Secretary Babbitt or Secretary Norton sitting in the chair of the Interior Department. Regardless of who sits in the chair, what is troubling to me is how the discussion of "critical habitat" is shifted away from being the notion of habitat essential to recovery of listed species to try to counter this ongoing rhetoric and attack about how the Act has been a failure and has not recovered any species to one of costs and economics. So there has to be a balancing there.

What I have seen in the last few years is a serious shift to economics and economic analysis and I find interesting that when the economic analysis work that is being done today only addresses economic costs and per OMB I sat in a meeting with a Fish and Wildlife Service economist within the last 3 months where they told me they were forbidden from evaluating economic benefits, I think that is half an evaluation.

Mr. CARDOZA. Mr. Chairman, I have a number of questions that I would like to submit, including some to Mr. Liebesman, that I would like to do in writing after the hearing.

The CHAIRMAN. We will hold the record open to allow members to prepare further questions to be submitted to the panel in writing because I know there are a lot of questions of this panel.

Mr. CARDOZA. Thank you.

The CHAIRMAN. Mr. Tancredo.

Mr. TANCREDO. Thank you, Mr. Chairman.

I would like to ask the members of the panel, and I know some of you have addressed this at some point in time, but in the 30 years, over 30 years, since this last has been on the books, has nothing changed in terms of our ability to make better assessments as to exactly what is critical habitat, what is the nature of the process that would bring something to the point of being listed as endangered? Has nothing changed in the science in that period of time?

Dr. RAMEY. Let me speak to that. Yes, quite a bit has changed and we have new standards in the judicial system for evidence and we have computer-aided modeling for making predictions about where species are occurring. So we can take evidence from where they presently occur and make predictions where they could occur or could have occurred in the past that are far more certain than just simply based upon opinion.

So yes, we do have the tools but it is not a requirement to apply those tools presently. We have a paper coming out in about 2 months in the Wildlife Society Bulletin where we utilize a large data set from the Fish and Wildlife Service on observations that they did not use and we used it to develop a model for asking how much of this critical habitat area has a low probability of sheep use and 66 percent had a near zero probability. So it is really a question of picking your battles and putting your resources where they count most.

Mr. TANCREDO. Go ahead, sir.

Mr. LIEBESMAN. I just wanted to follow up, not being a scientist but being a lawyer and having seen the process go on. I think that policy has evolved to be hopefully a little more rigorous in how you make these decisions but still because there is no clear guidance and no way to pull together the best science in a rational, clear way, we are seeing sort of a crazy quilt of decisions going on all over the place.

For example, I talked about the Alameda whipsnake case, which is a very interesting example. A recent decision came out within the past year where the critical habitat designation of over 400,000 acres in Central Valley, California was overturned in many ways on bad science, basically saying that the Service had presumed that habitat was critical based upon a theory that the snake might be there and were trying to make some connection based upon data that may not be scientifically supportable and the judge basically said the record was not sufficient to make that judgment.

What was very important about that case is the court jumped on the fact that a recovery plan had not been adopted, basically saying it is like shooting in the dark; it is like shooting darts against a wall. Without a recovery plan with clear goals, with science laid out, how can you make a judgment about what part of that habitat is essential to the survivability of the species?

You need to have some clear guidance and that is where I think the linkage issue is so critical to this bill. And maybe we need to think through about deadlines and timing and how you deal with past recovery plans that may be out of date; I think that is an important part of the debate and we cannot just leave it hanging. But, at the same time, the recovery plan has got to be the driving force. And I think that is the way to pull science together and, from

what I have seen and the way courts are looking at this, judges are having to jump in and make decisions in many ways beyond their capability because they are being thrust a statute that is so hard to interpret.

These court decisions are the biggest I have seen in many ways in 30 years of litigating environmental cases. They go on 50, 60 pages because judges are just trying to understand the process and they should not be administering a statute that way through litigation.

So that is sort of my assessment about where we are and why recovery plans are so essential.

Dr. RAMEY. May I give you one more specific example? In the Preble's meadow jumping mouse case private landowners will often be asked to have a survey done for the mouse on their property. In one case a consulting group with Haligen Reservoir in Northern Colorado sent us five ear punches from a mouse and asked if we would run DNA testing on those. Two of those specimens the DNA sequences came out wildly divergent from the rest of our data set and I realized that there was a problem. So I called the consultants up and said, "Can you tell me about these two samples?" It turns out once they had examined the photographs they had taken of the mouse that it was a hispid pocket mouse and that they actually caught three Prebles and not five.

Well, everybody laughs about this example except it is very serious. These individuals used the best practices for physical evidence for a species' occurrence. A lot of what is occurring out there is consultants with a certain level of training and experience saying yes, I caught it, but when they are asked to produce the physical evidence, they cannot produce it. So a species' occurrence is being based upon opinion instead of experimental evidence.

The Service at one time required ear punches and photographs to be taken. They dropped that requirement several years back. I do hope they consider it again and that it be considered in other cases.

Mr. TANCREDO. Thank you all. My time has expired but I also would have questions, Mr. Chairman, that I would like to submit for the record since there are plenty of issues here to develop that time just does not allow us to do so.

The CHAIRMAN. Mr. Bishop.

Mr. BISHOP. Thank you. Let me ask a couple of quick ones if I could.

Dr. Sunding to begin with, your testimony was interesting. You talked about how some of this Act can shape urban areas. I think you used the phrase leapfrog development. Are you telling us that this critical habitat designation can lead then to urban sprawl situations?

Mr. SUNDING. Essentially, yes. It can push development further out as land is set aside for habitat protection closer to the center of the urban area.

Mr. BISHOP. Thank you.

Dr. Ramey, I recognize how sometimes vague definitions create some problems. I realize the gentleman from California is attempting to try to tie those definitions down as best as possible so that

it is not the old if you ask the right question you get the right kind of answer syndrome that may be coming up here.

In your opinion, having looked at this bill, do you think the Cardoza bill brings better and tighter science and less discretion to the process?

Dr. RAMEY. Yes, it tightens up definitions. And by also giving more time to make a decision and specifying that critical habitat has to be that area that is occupied with the species or found to be absolutely essential to their existence, it does help. I do think it could go farther, however.

Mr. BISHOP. As far as the definitions?

Dr. RAMEY. As far as the definitions and also requiring some more specific standards for what constitutes evidence of species occurrence. Is it a vague recollection from the 1970's that you wrote down 30 years later or is it actual physical evidence of them being there or a vouchered museum specimen, which would obviously be of great value?

Mr. BISHOP. So if we go down that road is it your opinion then that you actually improve the science?

Dr. RAMEY. Yes. Any time you are able to define the question more clearly, the terms more precisely, I think that you reduce the amount of dispute and unnecessary controversy on the subject. Scientists will often argue a lot about terms and definitions but that is a part of the process that you can get a cleaner result later.

Mr. BISHOP. So the assumption is that once you can do that, you move past the point which could bring litigation in, which sucks up the resources necessary to the program and therefore you would actually, by being able to tighten those definitions, you would actually be able to have a better recovery opportunity in the future.

Dr. RAMEY. Correct. It is all about an allocation of resources. We are in a situation of triage on species, so it is better that the money go to the species instead of to legal fees.

Mr. BISHOP. And Miss Clark, if I could also ask you a question. The gentleman from California actually went to the crux of it. I will give you a couple of softballs here. They will be easy.

One dealt with the phrase of his bill which talked about the maximum extent practicable, economically feasible, determinable as the standards we use. It just seems difficult to understand why that becomes a portion of the bill to be criticized because, as I think he said, the opposite of that means something that is impracticable, that is economically infeasible and vague. I thought those would be the pluses of his particular bill in some particular way.

So if you want to have another crack at that, answering that question, I would appreciate it.

The second one, and maybe I can lump all these together and then just let you run wild with them, I am assuming you were here earlier when the representative from Oregon was quoting some statements you have made in the past about the ESA and I am assuming that you still stand by those statements you made earlier, that that was nothing that was inaccurate.

I guess the other quote, to go along with his defense of that language, which I kind of like, was during your service in this particular agency both you and Secretary Babbitt seemed to be sup-

porting critical habitat reform. As I am listening to the testimony now, I guess the question becomes what happened?

Ms. CLARK. Can I run wild now?

Mr. BISHOP. Go for it.

Ms. CLARK. A couple of things. On the terminology practicable, economically feasible, and determinable, in my mind it sets up a presumption that there could be cases where there is no linkage or no importance of habitat necessary for recovery of species. What this bill does do that is very positive is it links the articulation of critical habitat if you will to the recovery planning stage.

So again, as I mentioned to Mr. Cardoza, it is the connection of these two issues because I would be concerned that when you have a term to the maximum extent practicable, economically feasible and determinable, it could make, would make the designation of critical habitat an exception, rather than a rule. And because you link it to recovery which then becomes not mandatory, it turns what is now a mandatory requirement for the Secretary to evaluate and determine or to decide whether or not critical habitat is prudent into one that is totally discretionary. So it becomes a snowball effect.

Now regarding what I said before, the gentleman from Oregon quoting me, yes, I stand behind I think what I heard him say in my quotes in that any time that you take an agency full of, I think, highly competent and highly trained biologists like the Fish and Wildlife Service and you totally upset the apple cart and rearrange their biological priorities, that is a recipe for problem. And it was very frustrating during my time and I am sure it is very frustrating now, the amount of litigation that surrounds the Endangered Species Act and we worked very hard to try to assert biological priorities for addressing the listing program, which includes critical habitat. I cannot speak to what this Administration has done to try to assert those priorities.

I have been on record agreeing that reform of critical habitat is important and could be positive and, in fact, worked with the late Senator John Chafee and Senator Domenici in the last Administration, the last Congress, which gave rise to Senate 1100 that addressed a lot of what Mr. Cardoza is trying to address, I believe, with his bill.

So any kind of reform that will guarantee safe passage for species recovery, that will highlight the importance of habitat and anchor the importance of habitat conservation for species recovery can only lead to a positive outcome.

Mr. BISHOP. I appreciate your saying especially that last part because as I am listening to what I am hearing going on here with the judicial intervention basically supplementing their decision for others that are professionals, the failure of sound science, the collateral issues that are coming on here, any step to try and define this, narrow the definitions, to move it forward, to make it more obvious the direction should be a step forward in the process. I am actually very much dismayed about the lack of what the status quo has been doing and dismayed about any kind of efforts not to try to make something to change that status quo so we are moving forward.

Mr. Chairman, the bell rang on me. I am done, right? I knew all those years in school would pay off.

The CHAIRMAN. Thank you.

Before I dismiss this panel there were a couple of things that came up in the questioning and I asked to clarify on a couple of issues. In terms of the new regulations that are being issued, Fish and Wildlife Service was included and consulted in the matter of drafting those new regulations.

And in terms of an economic analysis, economic benefit, Fish and Wildlife Service or the Administration is not banned from including the economic benefit in their analysis. I do not believe that any economic analysis that does not include the benefits, as well as the costs, is complete and that is something that I wanted to follow up on and got an answer to.

In terms of previous quotes, former Interior Secretary Bruce Babbitt said, "The best alternative is to amend the Endangered Species Act, giving biologists the unequivocal discretion to prepare maps when the scientific surveys are complete. Only then can we make meaningful judgments about what habitat should receive protection." And I believe that that is the spirit, if not the essence, of what Congressman Cardoza is attempting to do in the legislation that sits before us.

Also, in terms of the written testimony, Mr. Liebesman in his prepared testimony, in talking about the Alameda whipsnake, quoted the court that held that "If the Service has not determined at what point the protections of the ESA will no longer be necessary for the whipsnake, it cannot possibly identify the physical and biological features that are an indispensable part of bringing the snake to that point."

I think that was an extremely important point that was made earlier in that I think a lot of the struggles that the members have talked about, a lot of the anecdotal evidence that they bring forth from their districts, the problems that they have had, that their constituents are having to face, are rooted in that one quote right there. I cannot expect the Administration, whether it is the current Administration or the previous Administration, to come up with critical habitat, court-ordered critical habitat, unless they have the scientific evidence in front of them. You cannot expect them to do that.

In my district, as well as Congressman Cardoza's, we have had the whipsnake, we have had the kit fox, we have had the red-legged frog. We have had all of these different things that have come out and when the red-legged frog came out there were places in my district that were listed as on the critical habitat map where it is physically impossible for the frog to live, yet it was included as critical habitat.

I do not blame the Service for that. They have a court-ordered critical habitat map that they have to release, so they do things without all of the evidence in front of them. And I think what Congressman Cardoza is attempting to do with this legislation is give them the tools that they need to make the right choices. That does not mean they are always going to make the right choices. That does not mean we are still not going to complain, but at least

we can make things better. We can at least give them the tools that they need to do their job.

So I appreciate the testimony of this panel. It was very informative, very educational, and I look forward to working with all of you in the future as this legislation moves forward. Thank you very much.

I would like to call up our third panel—Steven E. Webster, Steven L. McKeel, Kathleen M. Crookham, Paul L. Kelley and Donald B. Walters, Jr.

I want to thank this panel for sticking around with us. We are trying to get through this as quickly as we can but obviously it is an important issue to a lot of members.

Mr. Webster, we are going to begin with you. I will remind the panel that your entire written testimony will be included in the record. If you could contain your oral statements to the 5 minutes allotted. Mr. Webster?

STATEMENT OF STEVEN E. WEBSTER, EXECUTIVE DIRECTOR, FLORIDA MARINE CONTRACTORS ASSOCIATES

Mr. WEBSTER. Chairman Pombo and members of the Committee, I welcome this chance to speak in support of H.R. 2933 and I am very grateful to Representative Cardoza for his sponsorship of this very good bill.

In Florida where what we call manatee madness has so afflicted the state that this book, "The Florida Manatee Conspiracy of Ignorance," is becoming a political bestseller, the Endangered Species Act is the enemy. Yes, we all agree that the Act is well intentioned but for over 30 years some very well heeled Washington lawyers have subverted and corrupted the Act to the point where it does not protect endangered species but it does harass, injure and sometimes even kill innocent Americans.

In Florida the manatee is the poster child for regulatory excess. The farther you get from Florida the more endangered the manatee becomes and since none of you are from Florida, you probably believe that the manatee is highly endangered and that small, fast powerboats are literally slicing and dicing the poor things into extinction. Wrong. I cannot tell you how many visitors think manatees are either extinct already or that the rivers and estuaries are full of their floating carcasses. The truth is they are all over the place.

I am the Executive Director of Florida Marine Contractors Association and Vice President of Citizens for Florida's Waterways and we know there have never been more manatees than there are today, both in terms of range and density. And I am not talking about one every square mile. I am talking about sardines. Near our home 2 months ago a tiny block-long drainage ditch was filled with more than 120 manatees and since they weigh a ton or more each, well, there was more manatee than water.

Now speaking of our home, back in 1996 when manatee slow speed zones were first proposed for our area, they were planned for the western shore, but when the zones were ordered, after a court settlement, the zones were built along the eastern shore, my family's shore, and to this day I wonder what happened between 1996 and 2001 that completely flip-flopped the plan. And the only an-

swer I have found is that instead of science-based rules, a Washington lawyer and a Washington Federal judge are now in charge of manatee protection in Florida. The lawyer has made bagfuls of money suing the Fish and Wildlife Service and the judge—well, he is wrong. He is terribly wrong.

They have used the ESA to close down factories, shut down permitting, wreck boating, endanger our kids, and sacrifice jobs. They have not reduced the rate of manatee mortality. They have not found a way to count manatees accurately. They have not helped reduce increasingly frequent manatee dust from disease. They have blocked important scientific research and they do hamstring state programs. They would not know science if it kissed them on the lips and if it did, they would accuse science of being a whore.

Thanks for the laugh. I was worried about that line.

They have not allowed responsible program managers to do what should be done. They have ham-handedly demanded what the law says can be done.

I represent an industry that contributes $4 billion a year to Florida's economy, $1 in sales and another 3 in multiplier effects. Dock-building is big industry. It is huge, even, a substantial part of Florida's economy. But while it is a big industry, it is all small business. Every single member of the association is a small business and the Endangered Species Act is endangering us. Even in the midst of a real estate boom we already have members who have been forced out of business and more are ready to go.

Last year in my home county of Brevard not a single dock-building permit was issued until December. Why? Because the Fish and Wildlife Service and lawsuit plaintiffs, including the Defenders of Justice who were here earlier, were having a fight with state agencies over how many slow speed zone signs are required before Brevard manatees can be deemed adequately protected. Because of the settlement agreement, if there is not adequate predication then Army Corps permits will not be issued. How many small businesses do we know that can survive a year without work?

This sort of nonsense happens day in and out in Florida. Similar events are being played out in counties across the state. And truthfully I could keep you here all day and still not adequately discuss everything that is wrong with the implementation of the ESA in Florida because literally everything about the implementation is wrong. And let us face it; government is big. It is a lot of ground to cover.

But I will leave you with one specific request. In the packet of information we provided we have seven additional recommendations and suggestions for reform and clarification. If I could pick just one, it would be that this committee help clarify the relationship between the Endangered Species Act and the Marine Mammal Protection Act so that the requirements of the ESA are satisfied, then so, too, the requirements of the MMPA will be satisfied. I swear there would be a street celebration in Tallahassee if we could get that passed.

I greatly appreciate this opportunity to speak in support of Representative Cardoza's bill. Thank you and later I will be happy to answer any questions.

[The prepared statement of Mr. Webster follows:]

Statement of Steven E. Webster, Executive Director, Florida Marine Contractors Association

Introduction

My name is Steven Webster and I am Executive Director of Florida Marine Contractors Association, a not-for-profit association of dock-builders, and businesses that provide goods and services to dock-builders. I am also the Vice President of Citizens For Florida's Waterways, a not-for-profit association of conservation-minded Florida family boaters. I am pleased to be here to speak in support of the Critical Habitat Reform Act of 2003.

Because of Federal interference in the State of Florida's manatee protection program, brought about by a lawsuit in 2000 that effectively put control in the hands of a Federal judge here in Washington[1], you could say that I represent the people of Florida who can no longer enjoy a boat ride, and people who can no longer earn a living by building a dock.

Don't for a second think this is hyperbole. Manatee madness has so afflicted Florida that a book entitled "The Florida Manatee Conspiracy of Ignorance"[2] is on its way to becoming a best seller, in the hands of government staff, office holders and "radical go-fast boaters"[3] across the State.

Marine construction is a billion dollar a year industry in Florida, employing more than 10,000 people and generating three billion dollars in additional economic activity each year from the goods and services dock-builders purchase[4]. It's a significant piece of Florida's economy, entirely composed of small businesses, yet the Federal government, enforcing the Endangered Species Act, is killing this industry and its member small businesses in the name of manatee protection.

In Florida, "mitigation" to "protect" manatees has three steps:

1) Speed zones—restricting pleasure boats to slow or idle speed
2) Signage—double-piling, fixed signs roughly outlining the zones
3) Enforcement—state and local officers charged with manatee zone ticket writing. Very little Federal enforcement takes place and for that we are grateful, as the Federal agents are ill-trained and often ill-mannered.

If the Service—or the Judge—says that any one of these three steps is inadequate, then the Service will not concur and Army Corps will deny permits. In some parts of Florida, no permits have been issued for years. In most cases, permit moratoriums have nothing to do with actual "take" of manatees by boats, but rather with arguments between various government units over how much is enough and who pays for it all. Last year, permits statewide were held up for five months because the Service was unable to process a new type of form that its own Washington headquarters had begun requiring. In Brevard County, permits were held for a year when the Service demanded 50 new signs to mark State—not Federal—zones.

The plain truth is: docks don't kill manatees[5]. But Federal policies are killing dock builders. Over the next two months, I sadly suspect three of our contractor members will go out of business because U.S. Fish & Wildlife Service and the Army Corps won't allow them to do business. Several members have already given up since I took over as Executive Director in 2003.

I grew up in a mechanical contracting family. My father would never bid on Army Corps projects. I asked him why, and it wasn't just the piles of paperwork. "They are so antiquated that some of the materials they require aren't even made today," he said. "Their specs are usually wrong and even violate local building codes. I won't build anything that'll break the first day it's used," he said.

Today, it's even worse. The manatee program in Florida is at best broken, and at worst is responsible for more manatee deaths, more danger to people, more job loss, and it even causes air and water pollution.

Reform is needed before more damage is done. We enthusiastically endorse H.R. 2933 and the amendments proposed by Representative Cardoza.

Sustainable Population

In my position, I work closely with many biologists and wildlife managers and have asked for their opinion and recommendations. In section 5 of H.R. 2933's proposed changes, we recommend including the phrase "sustainable population" in the clarified definitions of critical habitat. For example:

> (II) the term "essential to the conservation of the species" means, with respect to a specific area, that the area has those physical or biological features that are absolutely necessary and indispensable to conservation of the sustainable population of the species concerned.
>
> "(ii) For purposes of subparagraph (A)(ii), the term "essential for the conservation of the species" means, with respect to a specific area, that the

area is absolutely necessary and indispensable to conservation of the sustainable population of the species concerned."

Such a change will help wildlife managers better define the purpose of identifying critical habitat.

I would briefly like to discuss other critical areas where we believe the true intent of the Endangered Species Act has been perverted and abused, and suggested resolutions for each. I would welcome questions on any of these issues and proposals, particularly those regarding the horrific misuse of science by Federal agencies charged with manatee protection.

Critical Natural Habitat

Since 2001, the Fish & Wildlife Service has declared that hundreds, if not thousands, of man-made canals, channels, dredge areas, warm water discharges from power plants and factories, and even sewage treatment facilities are now critical habitat for the Florida manatee [6].

If you're unfortunate enough to have bought your dream home on a deep water canal, odds are your boat today sits on a trailer in your driveway, because your canal has become a Federal manatee "refuge."

Unbelievably, old, inefficient power plants—some listed as the worst polluters in Florida—are required to heat water inhabited by manatees during the winter. Power plants must generate electricity that's not needed, waste expensive fuel and pollute the air, if the water grows too cold for manatees to survive.

Is this what Congress intended?

The fact is, manatees wouldn't be in any of these man-made places if we hadn't built them. Lands and waters that were created by, or substantially altered by, human activity should not be considered "critical habitat."

This change, virtually a "technical correction," may be added to (II) above:

> (II) the term "essential to the conservation of the species" means, with respect to a specific area, that the area has those natural physical or biological features that are absolutely necessary and indispensable to conservation of the sustainable population of the species concerned.

ESA-MMPA Relationship

If there is one reform to the Endangered Species Act we consider of greatest value, it is to clarify the relationship between the ESA and the MMPA. Today, the Service contends that the manatee could be fully recovered under the ESA, but "take" would still be prohibited under MMPA, which would mean no boating and no dock-building, despite recovery. The Service admits this relationship is illogical [7]. No kidding!

An amendment stating that compliance with the ESA will be considered compliance with MMPA can resolve this illogical and damaging dilemma.

Pursuant to such a proposed amendment, applicants would not have to conduct an independent MMPA analysis to obtain an incidental take permit if the ESA's Section 7 consultation is triggered. Specific language for such an amendment in included in our presentation package. For Florida, or indeed for any coastal state, this is without doubt our highest priority.

Exemptions for Economic Hardship

Incredibly, the ESA contains no allowance for economic hardship. The Small Business Administration's Office of Advocacy has repeatedly challenged the accuracy of Service economic impact statements, and the Service has ignored every single challenge [8]. Factories have been shuttered. Marinas closed. Downtown redevelopment ruined. Jobs lost.

In several areas of Florida, there are overlapping State and Federal manatee zones. In one such zone, the Brevard County Barge Canal, Sea Ray boats asked for an exemption to planned slow speeds in a small area of the Canal so they could continue to test newly built boats. The State agreed, but the Service refused, stating it had no authority to give an exemption for economic hardship [9]! Incredibly, the Service now refuses to rescind its duplicate zone, on the grounds that the State exemption to Sea Ray would unacceptably reduce protection.

By the way, more manatee carcasses have been recovered in Brevard in the years since the Federal zones went in than occurred before. You would be correct to question how an ineffective program provides "protection."

Year [10]	Boat-Strike Mortalities
2001	7
2002	17
2003	8

Challenging the Service's lamentably bad economic impact statements is nearly impossible. While the Office of Advocacy is a valued friend of small business, when the Service rejects its findings, small businesses' only recourse is to sue under the RFA. That's a lengthy and costly process. The litigant will succumb long before the case is decided.

To remedy, it should be the Service's obligation to disprove Office of Advocacy findings.

Measurable Rules & Goals

Since none of you are from Florida, you are probably wondering just what do we do to protect this highly endangered animal, brought to the brink of extinction by the slicing propellers of small, fast boats? The three-part answer is:

One—They aren't endangered

Two—Small fast boats have not and are not pushing manatees toward extinction, and

Three—Federal programs and lawsuits in Federal courts have done nothing to protect manatees, but they do harass, injure and sometimes even kill innocent Florida family boaters.

Seriously, the manatee becomes more endangered the farther you get from Florida. In truth, there are more manatees than ever, and their population over the past 25 years has been growing about 5 percent a year, which is several times faster than the human population of Florida is growing [11].

Just last year, the State of Florida's marine research institute concluded the manatee barely qualifies as "threatened," and that status has nothing to do with the consequences of deaths caused by boats. Rather, the manatee is possibly threatened by the long-term risks from those power plants that are literally keeping manatees in hot water. When those older, polluting, plants are inevitably shut down, how will manatees stay warm through the winter? Because of the power plants, the manatee's range has quadrupled or more in the past 30 years—and not surprisingly, the increase in population matches the increase in range. Many manatees now winter far north of their historic range, and many no longer migrate, as they all once did, when northern Florida waters cool. Without the power plants, half of manatees could die because of starvation and cold. By requiring power plants to warm these waters, Federal agencies are priming manatees for the biggest die-off in history.

Clearly, the future risk to manatees has nothing to do with boats, but in planning for this inevitability, the Service remains focused on preventing boat deaths. An increasing worry is the rising number of manatees killed by red tide events. In 2003, more manatees died from red tide than from boat strikes and the frequency of red tide episodes may be increasing.

Yet, the Federal response is not to focus efforts on power plant dependency and red tide deaths. It is to slow boats down. Chairman Pombo's excellent analogy about health care and the ESA fits perfectly with Florida's manatee madness. It's as if we decided to respond to the obesity epidemic by slowing down cars. Rather than invest in education and research, let's lower the speed limit and raise the fines! After all, if we reduced vehicular deaths, that would mitigate the deaths caused by obesity, wouldn't it?

The Service, in those lengthy biological opinions it just learned to prepare last year, and in its inches-thick Manatee Recovery Plan [12], claims that slow boat speed can "drastically reduce" take by boats and cites a small study as proof. But, they are making that up, and seriously misrepresenting the only quantitative study that even suggests slow speed is productive mitigation. More startling, the best scientific evidence says that slow speed can exacerbate risk, because manatees can't hear large vessels traveling at slow speed. So why does the Service insist on slow speed? Because a Federal judge told them to.

This past year in Florida, our Association and other organizations concerned about the lack of sound science, proposed a bill that would seek answers to many unknowns—such as how many manatees are there, how effective are speed zones, and how can we make speed zones safer for boaters and for manatees? The Florida Wildlife Commission and the Florida Marine Research Institute support the bill. But the Save the Manatee Club—one of the batch of regulatory extremist organizations whose lawsuits have caused this mess—opposed it. They actually opposed a science bill! They actually opposed using the very measurable biological goals they helped write to determine whether more "protection" is needed in a specific area.

What does sound science say is causing manatee/boat collision deaths? According to a peer-reviewed study that the Service itself cites as evidence, almost all propeller deaths—which account for at least 35 percent of total watercraft deaths—are caused by vessels over 25 feet in length. Smaller boats have propellers too small to inflict fatal wounds[13]. Meanwhile, these same experts say they cannot tell the size of vessels that caused death by impact, which occurs about half the timex[14]. (The other 15 percent of deaths are combination impact and propeller.)

Less than 10 percent of Florida boats are less than 25 feet in length[15]. If we were serious about reducing boat strike mortality, why not focus on the 10% that we know cause at least one-third of deaths, rather than the 90% that cause an unknown and immeasurable portion of deaths?

Given limited resources, and a desire to do the greatest good, which option would you pick? Today, without a shred of evidence to prove their position, the Service continues to maintain that boat strike deaths are caused by small, fast boats[17]. It is a tragic waste compounded by what everyone in this room realizes. The second toughest job in the world is to get government to do the right thing. The toughest job is to get government to undo the wrong thing.

If the science and logic behind slowing down boats is lacking, there is even less evidence (none!) to connect dock-building to manatee mortality. Supposedly, if a dock is built, a boat will be moored to it and a boat might someday strike a manatee. But in almost every case, a family seeking a dock already owns a boat. And when a permit is denied to an honest contractor, odds are the frustrated homeowner will find someone else willing to build without it. In truth, the only reason the Service is denying dock permits is because they can do it, not because the should do it.

I believe that most docks in Florida are built without Army Corps permits, and because of increasing cost, complexity, delay and uncertainty, that number is trending up. Regulating docks to protect manatees has been a mitigated disaster.

The ESA says the Service must "show the relationship of [the best available science] to such regulation," but courts grant such incredible leeway that the requirement is toothless. In particular, the Service is under no obligation whatsoever to demonstrate that what it does works. Our recommendation is that except in emergencies, a Service mitigation strategy must be reviewed and approved by a balanced panel of experts and stakeholders before public hearings are held, and effectiveness evaluations of all regulations must be conducted at least once every five years.

I would welcome any questions about specific instances where the Service has misrepresented science, and how we found ourselves in this awful mess.

Presumption of Adequacy

Another related problem is that the ESA places no limit on regulatory actions. More rules are always better, and no rule is ever undone. This is bad practice.

There are supposedly four separate manatee "stocks" in Florida, and in three of them, the Service's own Biological Goals are being met or exceeded. Why then do we need more restrictions where the goals are being met? Why is the Service allowed to promulgate more restrictions in areas where rules are being met?

There should be a presumption that, if goals are being met for a species in a given area, then no further restrictions are needed in that area. Florida is enacting exactly that language as I speak. Sample language is included in your packet.

Citizen Suit Provision

Finally, our Association last year was forced to sue the Service because of its permit delays, and because of its illogical application of MMPA rules to sovereign state waters. The Service objects to our suit, claiming we don't have standing to sue outside an APA claim.

Currently, the courts have created a barrier forcing citizens to sue pursuant to the APA, which prevents such citizens from being made whole by recouping their litigation expenses.

The practical result of this is that citizens must "pay their own way" to compel the Secretary to perform his nondiscretionary duties under the ESA. This is an absurd result. Environmentalists who wish to have a species listed or critical habitat designated can sue and receive attorney fees, but a citizen wishing to have the clear and unambiguous mandate of Congress concerning interagency cooperation followed must pay the bill. Simply put, if you wish to expand the ESA, the government will foot the bill; however, if you wish to protect your private rights under the ESA, you better have deep pockets.

The practical solution to this judicially created barrier is to complete the efforts initiated by Congress in the Citizens Fair Hearing Act of 1997.

Your information packet also includes recommended language to effect such an amendment.

Summary

What's my summation? It's that the manatee population in Florida is growing in spite of, not because of, the ESA. The Federal manatee program squanders millions of dollars a year on ineffective, even counter-productive, programs that are directed not by sound science, but by a Federal judge led by a Washington attorney.

I realize I'm preaching to the choir about the critical need for ESA reforms. On behalf of Citizens For Florida's Waterways and Florida Marine Contractors Association, thank you again for this opportunity to support your hard work.

ESA/MMPA Relationship Amendment

Section 17 of the ESA states, "except as otherwise provided in this chapter, no provision of this chapter shall take precedence over any more restrictive conflicting provision of the Marine Mammal Protection Act of 1972." Therefore, even though the MMPA may be more restrictive and broader in scope than the ESA, the propose amendment would make the ESA paramount to the MMPA once section 7 ESA consultation is triggered. This would be true even if the provisions of the two statutes are in direct conflict or would produce different results. The MMPA could only be applied independently when the ESA's section 7 consultation has not been triggered; for example, the Service's creation of speed zones and manatee sanctuaries and refuges.

TITLE 16—CONSERVATION

CHAPTER 35—ENDANGERED SPECIES

Sec. 1536. Interagency cooperation

(a) Federal agency actions and consultations

(b) Opinion of Secretary

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection; and

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

~~(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;~~

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

~~(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and~~

(iii) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clause (ii).

Compliance with the requirements set forth in this subsection and in subsection (a)(2) of this section and any incidental take authorized thereunder will be considered compliance with the Marine Mammal Protection Act of 1972 [16 U.S.C. 1361 et seq.]; including but not limited to, sections 1361, 1371, and 1374 of this section and constitute a finding of negligible impact under that Act.

Presumption of Adequacy ESA Amendment

Added language is in italics.

(f)(1) RECOVERY PLANS-.The Secretary shall develop and implement plans (hereinafter in this subsection referred to as "recovery plans") for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species. The Secretary, in development and implementing recovery plans, shall, to the maximum extent practicable-

(A) give priority to those endangered species or threatened species, without regard to taxonomic classification, that are most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity;

(B) incorporate in each plan-

(i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;

(ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list. Wherever these objective, measurable criteria are being met, additional rules and actions will be presumed to be unnecessary. However, such presumption does not prevent the Secretary from addressing unique issues concerning a listed species within such an area;

(iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.

(iv) provision for an objective, qualitative annual assessment of the effectiveness of promulgated regulations. This assessment must include a quantitative effectiveness evaluation of the listed species' mortality rate in each regulated area before and after promulgation of the rule.

Citizen Suit Provision

16 U.S.C. 1540(g)

1. (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 chapter or regulation issued under the authority thereof; or

(B) to compel the Secretary to apply, pursuant to section 1535(g)(2)(B)(ii) of this title, the prohibitions set forth in or authorized pursuant to section 1533(d) or 1538(a)(1)(B) of this title 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 1533 of this title which is not discretionary with the Secretary;

(D) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1536 of this title which is not discretionary with the Secretary;

2. (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 chapter or regulation issued under the authority thereof; or and

(B) to compel the Secretary to apply, pursuant to section 1535(g)(2)(B)(ii) of this title, the prohibitions set forth in or authorized pursuant to section 1533(d) or 1538(a)(1)(B) of this title 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 1533 of this title which is not discretionary with the Secretary

(B) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under this title which is not discretionary with the Secretary;

FMCA Information Quality Complaint

This Complaint against U.S. Fish & Wildlife Service was addressed to Congressman Dave Weldon on March 8, 2004.

This Request for Correction of Information is Submitted Under DOI/FWS Information Quality Guidelines. Federal law prohibits agencies from "cherry-picking" information to support a pre-determined conclusion (Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 [Public Law 106-554]).

Unfortunately, distorted Service science claims are being used to withhold building permits from Florida marine contractors. Additionally, biased Service claims are being used to deny Floridians constitutionally guaranteed rights to access and use waters held in trust for all the people.

At the root is the Service's belief that "manatees are especially vulnerable to fast moving power boats." (Benjamin, 2003, FWS/R4/ES-JAFL)

This is a commonly held belief:

> The simple rationale is that at reduced speeds, the force of impact will be less deadly, and manatees will be more able to avoid slower boats. (Florida Manatees: Perspectives on Populations, Pain And Protection; Thomas O'Shea, Lynn Lefebvre, Cathy Beck)

It is the foundation of the Service's 2001 Manatee Recovery Plan, 3rd Edition:

> Because watercraft operators cannot reliably detect and avoid hitting manatees, federal and state managers have sought to limit watercraft speed in areas where manatees are most likely to occur to afford both manatees and boaters time to avoid collisions.

But while this hypothesis has been repeated ad nauseam (there are 90 references to watercraft in the 3rd Edition), there is virtually no supporting science. We have been able to identify three studies that tested manatee/boat avoidance in the field. Two of these studies were included on the disks sent to [Rep. Weldon] by the Service—their compilation of the science they say they considered when drafting their Plans and Opinions. A third watercraft/manatee study by Dr. Edmund Gerstein was not included on the disks, but FWS staff personally communicate they are aware of this major study. (Manatees, Bioacoustics and Boats, American Scientist, Vol. 90, No. 2, March-April, 2002, Edmund Gerstein)

In sum, FWS science is based on just two small studies. Not only is the available science scant; FWS misrepresents what little there is. Formal ESA Section 7 Consultations written by FWS to permit or deny marine construction projects routinely exaggerate the scientific findings. Here is an example from a Sept. 12, 2003, Biological Opinion written by the Jacksonville Field Office for the Tampa Army Corps of Engineers (a continuation of the Benjamin citation above):

> Manatees are especially vulnerable to fast moving powerboats. The slower a boat is traveling, the more time a manatee has to avoid the vessel and the more time the boat operator has to detect and avoid the manatee. Nowacek et al. (2000) documented manatee avoidance of approaching boats. Wells et al. (1999) confirmed that at a response distance of 20 meters, a manatee's time to respond to an oncoming vessel increased by at least five seconds if the vessel was required to travel at slow speed. Therefore, the potential for take of manatees can be greatly reduced if boats are required to travel at slow speed in areas where manatees are expected to occur." (my italics)

The two sources cited by the Biological Opinion refer to one study—"Manatee Behavioral Responses to Vessel Approaches: Final Report," conducted near City Island in Sarasota, Florida in May, 1999, by Nowacek, Wells and Flamm, researchers with Mote Marine Laboratory and Florida Marine Research Institute. It was released in 1999.

FWS bases its entire manatee recovery strategy on a single paragraph:

> The timing of responses to vessel approaches is of concern. At an average initial response distance of 20 m, the animal has less than 2 sec to respond to a planing vessel, and about 7 sec to respond to a vessel moving at slow speed. Clearly, boat speed plays a major role in manatee exposure to collision risk. High-speed vessel operations, especially in shallow water or along channel edges where the manatee cannot dive safely below the approaching vessel create a high-risk scenario (Wells, Nowacek, 1999).

On the surface, this may seem to be definitive, but FWS, in relying on this snippet of comment, has omitted important details about the quality and quantity of the study data, which the authors themselves say was insufficient.

According to the researchers:

> Too few high-speed trials were conducted to provide the basis for statistical comparisons to slow speed trials. Of the 12 usable (high speed) trials, six (50%) resulted in a response. However, all the high-speed trials that did not result in a response involved repeated passes 43 m to 77 m from a single individual located in a seagrass meadow.

In other words, out of 135 trials, just 12 were at high speed and six of those involved the fellow described above. Yet, this tiny sample is the scientific foundation for a Federal program that costs untold millions annually and jeopardizes the existence of more than 10,000 Florida marine construction jobs.

The FWS Biological Opinion flatly stated that slow speed would "greatly reduce take where manatees are expected to occur."

But the authors cited by FWS focused their concern about speed specifically on shallow waters:

> ...We know that the animals [in channels] were diving to depths greater than .69 m to 1.15 m. Such depths would place the manatees safely below the propellers and keels of most of the vessels operating in these waters.

The researchers concluded manatees in channels were reasonably safe from boat impacts, but FWS chose to omit this important exception from its Biological Opinion and from the Recovery Plan 3rd Edition.

Sadly, contrary to the research it cites, FWS regularly includes channels in its slow speed zones (Barge Canal, 100, 200 and 400 Cocoa Beach channels, the "emergency" Lee County zones, 60-foot deep waters of the St. John's, etc.).

The best available science—a decade-long study reported in 2002—opposes such a practice.

> A key management strategy used in Florida for protecting manatees over the past 20 years has been to slow boats in waters frequented by manatees by creating idling and slow-speed zones. This strategy can actually exacerbate the problem when it is implemented in turbid water conditions (which, along with tannin staining, are prevalent in Florida). (Manatees, Bioacoustics and Boats, American Scientist, Vol. 90, No. 2, March-April, 2002, Edmund Gerstein)

Somehow, despite its clear obligation to consider all relevant scientific information, FWS is silent on Gerstein's well-known study.

Perhaps most egregious, FWS' Biological Opinion misrepresents its cited research by inflating the conclusions of the authors. The authors did not conclude their research "confirmed" mortality could be "greatly reduced" by slowing down boats. Rather, their key conclusions were:

> The effects of vessel speed, type and approach should be examined in greater (sic) detail relative to response distance and timing.
>
> In light of the high degree of variability in the occurrence of responses to approaching vessels, further studies of how manatees detect vessels would appear to be warranted. Of particular interest would be studies in manatee habitats of transmission loss of sounds produced by vessels.

The researchers cited by FWS clearly recommended more studies, particularly of acoustics.

Other Evidence Also Contradicts FWS

In the list of files provided to you by Service Regional Director Sam Hamilton was a 1994 test that viewed manatees and boats near a St. Pete power plant from aboard the airship Shamu.

This report, "Responses of Manatees to an Approaching Boat: A Pilot Study,—was drafted by three FMRI researchers (Weigel, Wright, and Huff).

The study analyzed 16 boat passes: eight at slow speed, two at 32KPH and six at 48KPH. Despite the small sample, the researchers concluded that manatees became aware of the approaching vessel nearly three times as far away as the "initial response distance" of 20 meters (65 feet) cited in the FWS Biological Opinion:

> At slow speed, the average distance to the boat when movement began was 52 meters ... At 32kph, the average distance was 50 meters ... and at 48kph, movements were initiated when the boat was an average of 58 meters away.

Clearly, a manatee may have much more time to evade than FWS states in its Biological Opinion. (Manatees can produce bursts of speed up to 15 MPH. A manatee that hears a boat from 58 meters away could move 60 feet at 10MPH before the boat reached the manatee start point. Even with two seconds' warning, a manatee moving only 10MPH can travel 20 feet in any direction. Obviously, there is no such thing as a recreational powerboat with a 40-foot beam!)

FWS is aware of the existence of this Pilot Study, yet this second study is never mentioned in the Biological Opinion.

Clearly, the difference between a 20 m and 58 m response time is hugely significant, even critical. How could FWS not consider and comment on this study? By what objective measure did they dismiss this report, and by what transparent process did they make their determination known?

Indeed, this critical issue looms even larger when Gerstein's study results are considered:

> Prior to our studies, wildlife officials relied on anecdotal assumptions that manatees could readily hear as well as locate the sounds of slow-moving boats....
>
> Consider the results from our boat-measurement studies simulating an encounter between an 8.2-meter boat and a manatee. When the boat approaches at high speed, the noise level crosses the manatees' critical ratio approximately 16 seconds before the propellers reach the hydrophone—

> about 198 meters away from impact. The noise of the same boat approaching slowly remains undetectable and does not cross critical ratios until the propellers are only 0 to 2 seconds away, less than 3.7 meters from impact. Under moderately noisy ambient conditions, the sounds associated with slow-moving boats can become acoustically transparent. (Manatees, Bioacoustics and Boats, American Scientist, Vol. 90, No. 2, March-April, 2002, Edmund Gerstein)

Gerstein's field tests in typically murky Florida water yield a result diametrically different from the "confirmed" 20 meters cited by FWS.

A similarly embarrassing lapse is the omission of any commentary on the seminal 1983 report by Margaret Kinnaird, "Evaluation of Potential Management Strategies for the Reduction of Boat-Related Mortality of Manatees," Cooperative Fish & Wildlife Research Unit, University of Florida, 1983. Her report (one of two she wrote that year), is also part of the documentation you received from Sam Hamilton:

> Slow speed zones may be the most effective short-term strategy for reducing—manatee/boat collisions. The establishment of slow and idle speed zones throughout all bodies of water important to manatees is an unrealistic endeavor. (my italics)

At what point did this short-term, ultimately unrealistic strategy, become the focal point of FWS mitigation? Even in 1983, the evidence did not demonstrate that speed zones were effective:

> An initial evaluation of the first 13 sanctuary zones showed boat/barge collision deaths were infrequent in and around the regulated zones (within 0.5 km) both before and after sanctuary designation (Kinnaird).

What studies or evidence contradict Kinnaird? If such studies exist, why are they not a part of any FWS documentation? Where is the required transparent, objective, analysis of scientific information?

Identifying Causes of Watercraft Mortalities

What, then, accounts for all the manatee watercraft mortalities? This is a question FWS is able to answer just 35% of the time.

Their own experts—ironically, the only watercraft mortality-related study cited in the Service's current Recovery Plan—state that only large vessels (over 25ft) cause propeller-caused mortalities. Propellers account for 35% of total manatee watercraft mortalities.

Propeller deaths comprise a significant portion of an "Analysis of Watercraft-related Mortality of Manatees in Florida 1979-1991 by Scott D. Wright and Bruce Ackerman, FMRI; Robert Bonde and Cathy Beck, Sirenia Project; Donna Banowetz, FMRI. Here is a key excerpt:

> An important point by Beck et al. (1982) was that differences in propeller diameters were distinct between boats powered by inboard engines and boats powered by outboard or stern-drive engines. Therefore, they suggested that scar patterns measured on manatees could be used to determine the size of the watercraft. *The propellers of smaller boats (shorter than 7.3 m) with outboard and stern-drive engines were too small (average 16.4 cm) to inflict fatal wounds,* although they probably caused most of the nonfatal wounds from propellers. (my italics)

According to the Florida Office of Boating and Waterways, less than 10 percent of the vessels registered in Florida are more than 25 feet (7.6 meters) in length.

Therefore, more than one third of manatee vessel deaths (>35%) are caused by just 10% of boats.

When asked why FWS "mitigation" doesn't focus on this 10% of boats responsible for at least one third of all watercraft deaths, the typical response is that such a focus doesn't address deaths caused by impact.

Aside from missing the critical point—wouldn't a reduction in propeller deaths in and of itself be beneficial—the Service's own experts report they do not know what types of vessels are causing impact deaths.

The same study by Wright, et al. states:

> Because few collisions are witnessed, the only available source of information on the size and type of the boats is the appearances of carcasses at necropsies.
>
> However, there were no measurable features and therefore almost no indication of the size of the boat that caused the [impact] mortality.

FWS' own experts conclude smaller boats cannot cause propeller mortality. FWS' own experts state they cannot tell the size of vessels causing impact deaths. What, then, is the objective, transparent, scientific reasoning that leads FWS to seek to slow small boats wherever manatees are found?

FWS' own researchers are in disagreement over the causes of impact-only deaths. Pat Rose, now the Manatee Club's Tallahassee lobbyist, proposed in 1980 that slow-moving barges and tugs are responsible for many impact deaths. Kinnaird (1983) cites him along with others:

> A large percentage of manatee boat/barge deaths result from internal damage without propeller wounds. It is likely that these deaths are caused by deep-draft boats operating in shallow water (Beck et al 1982). Rose and McCutcheon (1980) suggested that water depth should be maintained such that fully loaded barges pass safely over bottom-resting manatees in power plant intakes.

This suggestion neatly ties with the observations from the Wells/Nowacek study, which found that manatees in channels are relatively safe from all but the largest vessels.

All these errors and omissions of fact raise a significant question. What percentage of the 10% of vessels that cause propeller deaths and a "large percentage" of impact deaths operate at slow speed normally?

How can a mitigation strategy based on slow speed zones reduce deaths caused by vessels that are already traveling slowly?

These very pregnant questions are ignored. But, as the saying goes, you can't be just a "little bit" pregnant.

> Our test results contradict several long-held beliefs that form the basis of current protection strategies. Manatees have good hearing abilities at high frequencies, however, they have relatively poor sensitivity in the low frequency ranges associated with boat noise. Ironically, manatees may be least able to hear the propellers of boats that have slowed down in compliance with boat speed regulations intended to reduce collisions. Such noise often fails to rise above the noisy background in manatee habitats until the boat is literally on top of the manatee. In addition, near-surface boundary effects can cancel or severely attenuate the dominant low-frequency sound produced by propellers. In many situations, ship noise is not projected in directional paths where hearing these sounds could help the animals avoid collisions. Our basic and applied research results suggest that there may be a technological solution to address the underlying root causes of the collision problem and resolve the clash between human and animal interests. (Gerstein, 2002)

Once again, the best available science—which FWS did not include in its evidentiary submission to you—flatly contradicts FWS policy.

The amazing conclusion is that FWS has absolutely no evidence to offer, much less any proof, that manatees are especially vulnerable to small, fast moving power boats. The Service has no proof that slow speed is an effective "protection" and its own experts, from data the Service relied upon to formulate its mitigation strategy, contradict the Service's claims, as does research FWS has improperly ignored.

FWS has violated its Information Quality requirements. It has cherry-picked data to support a pre-determined conclusion. That pre-determined conclusion has dire consequences.

Compounding the Error

FWS compounds its error by extending its errant conclusions into yet another realm—its insistence that the absence of speed zones means an area is "inadequately protected." The result of this inadequacy is the denial of dock-building permits, because FWS argues that more boats equals greater threats.

But is this necessarily true? From Wright, et al:

> [Boat registration] numbers indicate a potential increase in threats to manatees but do not necessarily prove cause-and-effect relations in increased numbers of deaths. One can only speculate about the effect of the increase in boating traffic on manatee movement, communication, and other key factors in manatee biology. (my italics)

Actually, we can do better than speculate. Using FWS' analogy, if more boats equal more manatee deaths, then more boats should also equal more human deaths and accidents.

Just the opposite has occurred. According to FWC's Office of Boating and Waterways, the number of accidents per 100,000 registered recreational vessels has declined from 172.1 in 1996 to 125.6 in 2002 (the most recent data available). The fatality rate dropped from 10.6 in 1994 to 5.6 in 2002.

No doubt, there are those who will contend that boat injuries are down because boats are traveling slower in the 1/4 of Florida inland waters that are now slow speed manatee zones. This conveniently ignores the statistical fact that the zones have not decreased either the number, or the likelihood, of manatee/vessel mortali-

ties. Moreover, if slower speeds truly accounted for a reduction in boating fatalities, then automobile deaths, by analogy, should be increasing, as highway speed and vehicle numbers have risen. But here, too, accident and fatality rates have declined even as speeds and numbers increased:

> Highway accident statistics indicate that the annual number and rate of traffic accident deaths have declined to the lowest levels since the early 1960's. (US Department of Transportation website)

In the real world, there's not much support for a "more boats: more take" analogy.

Perhaps the ultimate irony is that the "confidence level" for a registration: take ratio is noticeably below the "confidence level" the Service seeks for the manatee recovery goals it has decreed. (The registration confidence level is below .90. The Service seeks a .95 confidence level for its goals measurements.)

In other words, the Service sets a higher standard to prove that its goals are being met than it does for the goals themselves. This is not merely a matter of "erring on the side of caution." As Gerstein points out, current Service policy, based on this flimsy scientific premise, likely exacerbates danger.

Requested Corrections

1) FWS' justification for speed zones is insufficient and must be readdressed in light of all the best available scientific information.
2) FWS must withdraw its claim that small, fast powerboats are a substantial threat to the manatee.
3) FWS' own data require that it focus mitigation efforts on the 10% of vessels known to cause at least 1/3 of all watercraft mortalities. It has no data to justify mitigation of any other type of vessel by slow speed restrictions.
4) FWS' own experts disagree with its contention that registration: mortality is a viable measure. This premise, too, must be addressed or withdrawn.
5) FWS must address the fundamental issue that its mitigation strategy of slow speed restrictions is based on anecdote and not science. Why, for example, does the release of a boat dock permit require restrictions, and not, for example, research into improved hull or motor designs, acoustic warning, or other technology?

Summary

In sum, neither the Service's own experts, nor a review of accident statistics, nor the Service's own standards for confidence levels supports a conclusion that more boats equals more deaths.

This shaky thread is the only link the Service has to its presumption that docks equals deaths.

Neither a review of all the experts FWS cites, nor a review of experts FWS ignores, supports the Service's belief that slow speeds provide better protection.

Nonetheless, the Service flatly maintains:

> Based on the absence of protection measures (e.g., speed zones, signage, enforcement) for manatees, the Service believes that an increase in watercraft associated with the proposed actions [new docks] are reasonably certain to result in the take of manatees in the form of addition deaths and injuries. (Benjamin op cit)

The Service has failed to comply with the requirements of Federal Information Quality standards, and it has failed to comply with its own obligations to utilize the best available science.

FWS has failed to meet its own standards, and it has failed its duty to the people it represents. As you are aware, this failure has wrought terrible consequences in your district, where Brevard marine construction permits were denied for more than a year, and lately in Lee County, where a State court's removal of unconstitutional manatee zones has resulted in a new "area of inadequate protection" where permits are being denied.

While FMCA appreciates that a poorly articulated and unscientific legal settlement (Save the Manatee Club v Ballard) is the sole grounds for stopping dock construction, we find it distasteful that FWS is attempting to hide its legal troubles beneath a blanket of science fiction.

Bibliography & Footnotes

[1] Save the Manatee Club vs. Ballard. This case is before Judge Emmett Sullivan in the DC District. It was not filed in the Florida district(s) where the alleged harm took place.

[2] Capt. Tom McGill, The Florida Manatee Conspiracy of Ignorance, RALCO Press, 2004

[3] "radical go-fast boater" is a term coined by the Manatee Club to describe anyone opposed to its "go slow/no growth" demands. See http://www.savethemanatee.org/newslmmpa.htm

[4] The Size and Economic Impact of Florida's Marine Construction Industry, FMCA, Oct. 2003

[5] see Federal Register / Vol. 67, No. 4 / Monday, January 7, 2002 / Rules and Regulations: "...watercraft-related 'take' of manatees is a distant indirect effect of the authorization of a boat access facility. While we agree that construction of boat access facilities is a potential contributing factor to watercraft-related take of manatees, in the vast majority of cases a direct cause and effect relationship does not exist between the construction of a marina, dock, or boat ramp, and watercraft-related take of manatees."

[6] see Federal Register / Vol. 67, No. 4 / Monday, January 7, 2002 / Rules and Regulations for a description of Brevard County Federal zones, which includes key industrial and commercial waterways and dredged water sports areas.

[7] FWS Spokesman Chuck Underwood email to Dale Weatherstone, reported in FMCA Newsletter, Vol. 4, June, 2003

[8] see as example www.sba.gov/advo/laws/comments/fws03—0603.html: "Advocacy believes the Service has incorrectly certified the proposed rule under the RFA as not having a significant economic impact on a substantial number of small entities. Advocacy recommends the Service publish an Initial Regulatory Flexibility Analysis ('IRFA') for public comment prior to publishing a final rule."

[9] in Federal Register / Vol. 67, No. 4 / Monday, January 7, 2002: "Federal regulations provide exceptions to manatee protection area regulations only in limited circumstances (50 CFR 17.105(c)). We do not have the authority under our existing regulations to grant an exception based on economic hardship."

[10] Florida Marine Research Institute mortality database

[11] Fraser, Thomas H. 2001. Manatees in Florida: 2001. A report to CCA Florida—March 29, 2001; see also http://ccaflorida.org/updates/Jan02-why—manatee.htm

[12] Florida Manatee Recovery Plan, 3rd Edition, 2001

[13] Analysis of Watercraft-related Mortality of Manatees in Florida 1979-1991 by Scott D. Wright and Bruce Ackerman, FMRI; Robert Bonde and Cathy Beck, Sirenia Project; Donna Banowetz, FMRI. Here is a key excerpt: "An important point by Beck et al. (1982) was that differences in propeller diameters were distinct between boats powered by inboard engines and boats powered by outboard or stern-drive engines. Therefore, they suggested that scar patterns measured on manatees could be used to determine the size of the watercraft. The propellers of smaller boats (shorter than 7.3 m) with outboard and stern-drive engines were too small (average 16.4 cm) to inflict fatal wounds, although they probably caused most of the nonfatal wounds from propellers."

[14] Ibid.

[15] Office of Boating & Waterways, 2004

[16] Conspiracy of Ignorance, page 128, citing the Recovery Plan, 3rd Edition, page 684

[Mr. Webster's response to questions submitted for the record follows:]

Response to questions submitted for the record by Steven E., Webster, Executive Director, Florida Marine Contractors Association

Questions from Chairman Richard Pombo

(1) Mr. Webster, you outlined six additional changes. The most important, you said, would be to establish the primacy of the ESA over the MMPA. Why is this so critical?

The ESA and MMPA contradict each other. On the one hand, ESA strives to "recover" a species by increasing species population. The MMPA, on the other hand, places a general moratorium on the take of any listed species. Thus, as manatee population grows (recovers), the likelihood of illegal MMPA "take" increases. The MMPA punishes success, complicated by the manatee's never-demonstrated standing as "endangered." Because "endangered" species are ipso facto "depleted stocks," it is literally impossible for the Service to develop "incidental take authorization" for manatees.

Chuck Underwood, spokesman for the Jacksonville Field Office, says the outcome is "illogical, but that's the way the laws relate to one another."

For example, in Manatee County (along Florida's West Coast), dozens of dock permits that would have been allowed under ESA have been denied based on MMPA assertions.

Additionally, we believe MMPA jurisdiction is being improperly applied to the inland waters of the State. However, this has been done for so long that a legal resolution is unlikely. Hence our proposed ESA amendment.

I would be happy to refer to Committee attorneys Frank Mathews and Ted Guy, who developed this idea about a year ago.

(2) You said businesses have closed. Like what?

Whitley Marine in Cocoa, Florida. This marina served intracoastal waterway boaters for 37 years, but was forced out of business by litigation brought by Save the Manatee Club, using ESA and MMPA claims as their ammo. The Whitley's finally sold and the site is now filled by condos. Across Florida, ESA and MMPA hurdles are helping cause the conversion of working waterfront—boat repair, boat storage, etc.—into condos, usually either eliminating or greatly reducing public access to public waters. There are three other boat-yard-to-condo conversions underway within three miles of Whitley Marine.

In Fort Myers, a multi-million dollar downtown redevelopment centered around a new high-speed ferry service to and from Key West was canceled after U.S. Fish imposed extensive and unnecessary slow speed zones in the region. "Fast Cats" instead built in Ft. Lauderdale.

In Jacksonville, a downtown redevelopment project tied to the Super Bowl has been tied up in regulatory knots because of ESA and MMPA manatee issues.

Also in Brevard, a brand new multi-million dollar boat manufacturing plant was opened for one day, then shuttered in part because the firm could not gain a Federal exemption that would allow it to test its vessels in adjacent waters. Again, MMPA and ESA.

Statewide, lengthy delays and unpredictable demands have resulted in literally thousands of docks being built outside the permitting regime, usually with the tacit approval of local authorities. It's to the absurd point where some builders actually advertise that they will build without permits!

Over the past 16 months, five FMCA contractor members have closed shop, all stating that the burdens imposed by ESA and MMPA were at least in part responsible. There are three more members I prefer not to name—hopefully they will survive—who are expected to give up in the next few months. As the building boom cools (and it will), the pressure will really begin to mount unless realistic reforms are made.

I would be happy to introduce the Committee to Joe and Diane Whitley, past owners of Whitley Marine.

The CHAIRMAN. Thank you.

Mr. McKeel?

STATEMENT OF STEVEN L. McKEEL, EXECUTIVE DIRECTOR, MARTIN MARIETTA MATERIALS, INC., TESTIFYING ON BEHALF OF THE NATIONAL STONE, SAND AND GRAVEL ASSOCIATION

Mr. MCKEEL. Thank you, sir. Good afternoon. I am Steve McKeel, manager of natural resources for there Southeast Division of Martin Marietta Materials. We are the second largest producer of crushed stone, sand and gravel in the United States. I have a degree in geology from the University of North Carolina and I have worked in the mining industry since 1982. I expect you will hear testimony today on listed animal species but my testimony involves two federally listed plant species.

In 1989 Martin Marietta Materials leased 700 acres in Augusta, Georgia containing a 40-acre exposure of granite that was ideally suited for crushed stone production. Exposed rock is rare in the Southeast but a few granite outcrops resembling a paved parking lot do exist. The best known is Stone Mountain, which is dome-shaped and rises a few hundred feet above the surrounding Atlanta area.

These outcrops also represent an unusual habitat for plant species where shallow pools have formed over time. We became aware that some endangered plant species found only in these pools might be present on our 40-acre granite outcrop.

My company needed a permit for wetlands crossing to access the property. We informed the Corps of the possible endangered plants and my written testimony that you have chronicles the permitting events that trigger the consultation provisions of the ESA.

During our informal consultation with the Fish and Wildlife Service we conducted at our expense a habitat evaluation survey for threatened and endangered plant species. We identified two pools containing the threatened Amphianthus pusillus or snorklewort and the endangered Isoetes tegetiformans or mat-forming quillwort. The quillwort is known to exist in only eight localities in Georgia.

We could not avoid these plants during mining. We tried negotiating their possible transplant but the Fish and Wildlife Service wanted them to remain intact. Several months of informal consultation transpired without results, so we sought legal guidance. We found one, the takings provision of the ESA is more limited regarding listed plant species and does not prohibit the landowner from relocating or even destroying the listed plant species; and two, the listed plants did not occur on lands under Federal jurisdiction or even jurisdictional wetlands.

The finding triggered formal Section 7 consultation, postponing our wetlands permit. Throughout the consultation process we stressed our desire and our landowner's desire to work with agencies and organizations alike to preserve and relocate these plants and even proposed both avoiding the plants for 2 years and funding a relocation program.

The Service finally issued a jeopardy opinion for the quillwort, drawing heavily from a recovery plan that was still in the agency draft stage. The opinion went on to state that the endangered quillwort was historically known to occur in both pools, so therefore both species should be protected under this Act.

The jeopardy opinion also recommended reasonable and prudent alternatives, which seemed to be neither reasonable nor prudent. We were to maintain a permanent fenced buffer for a 100-foot radius around the plants. We were to mount an industrial fan above the pools that was to run at all times during quarry operation to blow the dust away. And, since we would be mining essentially all the way around these pools, we would presumably be leaving a several hundred-foot-tall column of rock rising from the middle of our pit and I guess they envisioned something like a butte in Montana, so we needed to provide for stairs or some other way to climb up and monitor the plants and, of course, maintain the fan.

These reasonable and prudent alternatives would have been laughable if they did not represent so much time and expense to us, such a travesty to the private property rights of the landowners, and a continued drawn on taxpayer dollars.

We withdrew our wetlands permit application, negotiated a separate easement into the site that did not require wetlands crossing. I continued to seek to relocate the plants to various agencies and botanical gardens. Our landowners then decided it was in their

best interest to relocate their plants themselves. Their explanation to me by letter, I quote: "We feel the delays have cost us a considerable amount of monetary consideration and mental anguish." I simply must question a Federal agency process that so stridently attempts to regulate plant species that are the sole property of the landowner.

If I can briefly quote Senate Report 100-240's reference to my report, "The basis for this differential treatment of plants and animals under the Act was apparently the recognition that landowners traditionally have been accorded greater rights with respect to plants growing on their lands than with respect to animals. The amendment made to the Act does not interfere with the rights traditionally accorded landowners but instead reinforces them in a way that also benefits the conservation of endangered plant species." If this was the intent of Congress, then the ESA failed miserably in our case.

The aggregate industry produced crushed stone in all 50 states and virtually every congressional district and is significantly impacted by the Endangered Species Act. I strongly support H.R. 2933, the Critical Habitat Reform Act of 2003 introduced by Congressman Dennis Cardoza, especially those provisions found in Section 3, which requires an economic impact analysis be conducted prior to designating a species' critical habitat. Thank you.

[The prepared statement of Mr. McKeel follows:]

Statement of Steven L. McKeel, Manager, Natural Resources, Southeast Division, Martin Marietta Materials Inc., Atlanta, Georgia, on behalf of the National Stone, Sand & Gravel Association

Introduction

Good morning. I am Steven L. McKeel, Manager of Natural Resources for the Southeast Division of Martin Marietta Materials, Inc. Thank you for the opportunity to testify before you today in support of H.R. 2933, the "Critical Habitat Reform Act of 2003."

Martin Marietta Materials, Inc. is the second largest producer of crushed stone, sand and gravel in the United States. Our Aggregates Division operates more than 300 quarries and distribution facilities in 28 states, the Bahamas and Nova Scotia. Our products are used extensively in concrete for road and other construction, asphalt, railroad ballast and numerous other basic products that form the literal foundation of our infrastructure and economy.

I graduated from the University of North Carolina, Chapel Hill, with a bachelor's degree in Geology in 1982. I worked in the precious metals mining industry for a few years before joining Martin Marietta Materials, Inc. as a geologist in 1985. I became Manager of Natural Resources of the Southeast District in 1990, and with the growth of our company I moved to Atlanta, Georgia, in 1996 into my current role of Manager of Natural Resources for the Southeast Division. The Southeast Division currently oversees some 40 quarry and 20 distribution operations.

In early 1990, I became closely involved with a company project that involved two federally listed plant species. Through this experience I was invited to serve on the National Stone Association's Environmental Committee as their Wetlands and Endangered Species Task Force Chairman, which I did for about seven years. I was also fortunate to later serve as Vice Chair and also Chairman of the Environmental Committee. The National Stone Association subsequently merged with the National Aggregate Association in 2001 to become the National Stone, Sand, and Gravel Association, and it is on their behalf that I relate to you this morning the experiences I had with the ESA in the early '90's.

The National Stone, Sand & Gravel Association is the world's largest mining association by product volume, representing companies who produce over 90 percent of the crushed stone and 70 percent of the sand and gravel produced annually in the U.S. at over 10,000 operations by approximately 120,000 working men and women in the aggregates industry. During 2002, a total of about 2.73 billion metric tons of crushed stone, sand, and gravel, valued at $14.6 billion, were produced and sold

in the United States. The aggregates industry directly and indirectly contributes a total of $37.5 billion annually to the nation's Gross Domestic Product (GDP). NSSGA's Environmental Guiding Principles encourage members to meet all established environmental regulatory requirements, and where possible to do more than the law requires.

Having operations in all 50 states, in virtually every Congressional District, the aggregates industry is significantly impacted by the Endangered Species Act (ESA). NSSGA supports improving the ESA by incorporating scientifically-based programs that implement a balanced approach to protect endangered species while recognizing private property rights and the need for continued economic growth and responsible utilization of natural resources.

I would like to commend you on your efforts to reform and clarify a law that has become a hazy quagmire for many industries and private landowners alike. During my stint with the Environmental Committee of what is now NSSGA, there were a number of attempts by Members of Congress to reform a law that, by promulgation and interpretation by federal agencies, often treads heavily on the basic private property rights of private landowners. This was true for my experience in the early 1990's, and it remains true to this day.

Leasing Private Property

In 1988, I began negotiations with a family of landowners for Martin Marietta Materials, Inc. to lease for the purpose of quarrying a 700-acre parcel of property located near Augusta, Georgia. The 700-acre lease property lay adjacent to a property owned by the Nature Conservancy. I learned late in the lease negotiation process that the Nature Conservancy had also entered into negotiations with the family in an attempt to buy a portion of this land and have the remaining property donated to them for favorable tax considerations. Our lease proposal to the landowners provided for both an annual payment for the leasehold of their property, plus a sum for every ton of material mined and sold from their property. This lease arrangement made the most economic sense to the landowners, and we executed a mining option and lease in September of 1989. The landowners retained about 300 acres of land outside of the 700-acre lease premises.

The Nature Conservancy's as well as our own interests lay in the fact that the property contained a 40-acre continuous exposure, or "pavement outcrop," of granite rock. The Nature Conservancy also owned the adjacent parcel of land that contained a larger, perhaps 100-acre outcrop known as "Heggie's Rock," which lay some three-fourths of a mile from the 40-acre outcrop under lease. A portion of the 700-acre lease premises bounded part of this large granite exposure. Martin Marietta Materials, Inc. owned the 100-acre outcrop, "Heggie's Rock", in the 1970's. Company files I have from that time indicate that we were instrumental in having this property become a nature preserve.

The Nature Conservancy had also indicated to the landowners during our lease negotiations that there were endangered plant species located on the 700-acre lease premises. Martin Marietta Materials, Inc. initiated contact and a site visit with the Nature Conservancy in July of 1989 to assure them our mining activity would have no detrimental impact to their property. It was through this site meeting with their consulting biologist that we learned of two federally listed plant species that existed on the lease premises, and indeed existed on the 40-acre granite outcrop itself.

Our initial findings at this planning stage of the process were informative and generally cordial. There were discussions involving relocating the listed species versus mining around them, and other possible alternatives. I later contacted state agencies that assured me plants were treated differently than animals under the ESA, and that these two plant species had been successfully transplanted in the past.

Granite Outcrops in the Southeast

Exposed bedrock of any kind in the southeastern United States is quite rare. There are, however, a number of exposed granite bodies, or "pavements," that occur in South Carolina, Georgia, and Alabama. A number of these are concentrated in the Atlanta, Georgia, area. These exposed rock bodies are generally semicircular in appearance and can range in size from a few square feet to many square acres. The most famous of these is perhaps the tourist attraction of Stone Mountain near Atlanta, Georgia, which is a several hundred-acre exposed, dome-shaped granite outcrop rising a few hundred feet above the surrounding landscape.

Granite is generally a well-suited source material for crushed stone. The physical characteristics of granite generally exceed all state specifications for road and other construction projects. Only about 15 percent of the total crushed stone output in the

U.S. is derived from granite, but about 70 percent of this output is mined in just five southeastern states.

In many quarry locations, rock suitable for crushed stone production lies under many feet of soil that requires costly removal before processing can commence. This 40-acre exposure of granite on the lease premises was readily available, quality stone, representing a viable resource to our company and a valuable commodity to our landowner. Conversely for our landowner, this 40-acres of exposed granite had no potential developmental value other than for crushed stone mining purposes. Mining was unequivocally the "highest and best use" for this property.

However, in addition to being a source of crushed stone, these outcrops also represent an isolated and unusual habitat, particularly for plant species. Shallow, saucer-shaped depressions or "pools" have formed over time on the level portions of these granite outcrops. These pools are generally no more than five square meters in size, and alternately fill with water during rainy periods or completely desiccate during dry periods. A number of unique plant species are endemic to these pools, including the federally listed endangered Isoetes tegetiformans, or "mat-forming quillwort", and the federally listed threatened Amphianthus pusillus, or "snorklewort". The quillwort is known to exist in some eight localities in Georgia, and the snorklewort—some 55 localities in Georgia, South Carolina, and Alabama.

Wetlands and the ESA Process

I rezoned the entire 700-acre lease property to an M-1 (Mining) designation through provisions of Columbia County, Georgia zoning ordinance in the fourth quarter of 1989 and 1st quarter of 1990. The Columbia County Land Use Plan, developed a few years prior to this rezoning, had already, in anticipation, designated the general location of this property as crushed stone mining because of its suitability for mining, as demonstrated by one of our competitors located nearby. In other words, the county recognized that crushed stone mining on this property was both the highest and best use for the property as well as a conforming use.

The 700-acre lease parcel was completely transected by two significant drainage basins. The area between the two drainages, where the 40-acre granite outcrop occurred, was to be the focus of our mining operation. The first of these two drainages had to be crossed in order to access the granite outcrop from a public road.

In July of 1990, I submitted a pre-discharge notification to the U.S. Army Corps of Engineers (Corps) for wetlands permitting for separate impacts on the two drainages transecting our 700 acre parcel—one 0.48-acre impact for access into the site across the first drainage, and a second 0.92-acre impact for a freshwater pond and erosion control measures on the second major drainage. I requested that the two areas be treated separately under what was, at that time, separate permits under Section 14 and Nationwide 26 of the regulation. Included in that application was a wetlands delineation by our consultant for both drainage basins. A Corps of Engineers biologist had verified the wetlands delineation in May of 1990 prior to the July notification. We made the Corps biologist aware of the possible presence of listed species on the property. Since each impact was less than one acre, I requested that the Corps authorize by letter the use of these permits.

In response, and in light of the possible presence of endangered plants, the Corps recommended by phone that we conduct a biological inventory of the site and begin informal consultation with the U.S. Fish and Wildlife Service (FWS). I began to undertake both of these recommendations in late August of 1990. The Corps also indicated they considered the two wetlands impacts to be one impact under Nationwide 26.

In November of 1990 I informed both the Corps and the FWS that our outside consultant had completed the "Habitat Evaluation Survey for Threatened and Endangered Plant Species" for our 700-acre lease premises. I scheduled a site visit with the FWS for early December of 1990. The FWS requested that an outside biologist with expertise also attend the site meeting, and I agreed. I was surprised to learn that the consulting biologist in attendance was the same individual employed earlier by the Nature Conservancy.

Two pools within a few feet of each other were identified on the granite outcrop by our consultant, one containing Amphianthus pusillus and the other containing Isoetes tegetiformans. The FWS consulting biologist also verified these occurrences. The pools were located in a portion of the granite outcrop that could not be set aside as possible buffer zone. It became painfully transparent from this meeting that I had a vastly different view of mitigating impact to these species than the FWS and this consulting biologist. The FWS wanted the species to remain intact rather than be relocated.

The informal consultation process with the FWS began to drag on into the first quarter of 1991 with no written response or recommendation. It became increasingly

clear to me that our corporation needed to establish our legal rights with regard to this process. As a larger aggregate producer, we were fortunate to have the financial ability to seek excellent legal council on this matter where so many other landowners might not.

In March of 1991 I informed both the Corps and FWS by letter of our legal findings, i.e., that 1) the takings provision of the ESA are more limited regarding listed plants species and do not prohibit the landowner or Lessor from relocating or even destroying the plants, 2) the wetland crossing of the first drainage and impoundment on the second drainage should be treated separately by the Corps under Nationwide 14 and 26, respectively, and that for the Corps to call the wetland crossing a "crossing/impoundment" in order to place it under Nationwide 26 was inaccurate, and 3) the listed plants did not occur in wetlands or lands under federal authority, and that the plants were considered the property of the landowners and could be essentially removed or destroyed by mining independent of a Corps permit, which essentially negated the relevance of FWS consultation. I requested that the Corps reply within 20 days as specified under 33 CFR 330.7(3), otherwise we would assume that in light of our legal opinion all conditions of 33 CFR 330.5 (b) (3) regarding listed species had been met, and we would be free to proceed under Nationwide 14 and 26. I further reiterated our desire and our landowners desire to work with agencies to preserve and relocate these species, and went on to outline a plan where we would avoid mining the pools for two years as well as fund the relocation of the listed species.

The Corps responded by treating the pre-discharge notification as official, and through the agency coordination process the FWS made formal comment to the Corps dated March 21, 1990, that, by our own consultant's findings and the FWS site visit, two listed species had been verified on the proposed quarry property. The FWS thereby requested that the formal Section 7 consultation process be triggered, with a 90-day consultation process and a Biological Opinion to follow within 45 days. Apparently, none of the progress made during the several months of informal process applied in any way towards reducing this time frame. The Corps informed us on March 29, 1990, that as per FWS request, the Corps would postpone determination of this application until the consultation process was completed.

On May 19, 1991, in response to the formal consultation process, I mailed a very detailed letter to the FWS outlining crushed stone mining practices and procedures. I also illustrated by cross-section and mine reserve calculations the very significant economic impact the plants would have on our operation if we were forced to leave them in place. A few of the more significant impacts were: 1) the reduction of our overall minimal reserves by 15 or more million tons, which represented a market value of some $60-70 million; 2) the reduction of the life of our mine by 15 to 20 years, forcing us to seek another mine location prematurely; and 3) the cost to our landowners of several million dollars in royalties on the sales of rock measuring 15 million tons less than anticipated.

I also learned in May of 1991, quite by circumstance, that the FWS and State of Georgia had entered into a cooperative agreement in April of 1990 for the purpose of preparing a Recovery Plan for three granite outcrop plant species—including the mat-forming quillwort and the snorklewort. The cooperative agreement was signed by the FWS on January 3, 1990, coincidentally just a few short months after I began informal consultation with the FWS on these plant species. I requested and received a copy of the Technical Draft, which was a thinly veiled attack on the crushed stone industry as one of the main factors in the continued demise of outcrop plant species. The report was written, coincidentally, by the same consulting biologist who had visited our site with the Nature Conservancy and the FWS the prior year.

On July 17, 1991, the FWS issued a jeopardy opinion for the Isoetes tegetiformans, or mat-forming quillwort, for our wetlands crossing permit application to reach the 40-acre granite outcrop on our lease premises. The opinion drew heavily from the Draft version of the Recovery Plan—a plan that had not been subjected to either the Agency Draft review process or the 60-day written public comment period during the Final Draft review process. Due to the less perilous "threatened" status of the Amphianthus pusillus, a non-jeopardy opinion was rendered in regard to it. However, the opinion went on to state that the endangered Isoetes tegetiformans was historically known to occur in both pools, so therefore both should be protected under this action.

As per the process, the opinion recommended Reasonable and Prudent Alternatives, which were, in brief:

1. No mining activity could be conducted within a 100-foot perimeter or buffer of the two pools, and the buffer area in question to be placed in a permanent conservation easement;

2. A six-foot chain-length fence composed of noncorrosive materials with silt fence to be placed around the perimeter of the buffer area;
3. And, by personal communication with the biologist authoring the Recovery Plan, it was determined that even a small amount of quarry dust build-up in the pools could affect the plant species, therefore an industrial fan should be mounted above the fence to blow across the pools during all times of quarrying activities;
4. Since the avoidance of quarrying of the pools will result in a isolated column of granite in the pit [I suppose the FWS envisioned we would leave a butte in the middle of the pit like you might see naturally in Utah or Montana], there needed to be some type of stairway or access up to the pools for monitoring and fan maintenance;
5. And lastly, the plants were to be monitored and logged on a weekly basis with results submitted to the FWS for the life of the quarry.

The Jeopardy Opinion went on to recommend, under "Conservation Recommendations," that since the survivability of both species at this site was not predictable, a separate site containing both species should be acquired and protected by transference into conservation hands, such as the Nature Conservancy.

These Reasonable and Prudent Alternatives would be laughable if they did not represent so much time and expense to the applicant, a travesty to the private property rights of the landowner, and the continued drain of taxpayer dollars for such endeavors by government agencies.

Resolution

In the fall of 1991, I began negotiations with our landowners on the 300 acres originally omitted from our lease premises. We were able to reach an agreement on a right-of-way to the public road that essentially skirted around the first drainage basin and all wetlands. This added nearly a mile of additional road construction for us, some additional annual rental payments, and also consumed a number of acres of land that the landowners might have used for other purposes.

On January 24, 1992, we formally withdrew our pre-discharge notification to the Corps and likewise notified the FWS. I notified our landowners of our decision, and of our continued interest in seeking avenues for the possible relocation of these species through various agencies and botanical gardens. Groups that had once demonstrated a strong interest now began closing doors on our negotiations; even given the fact we had withdrawn the wetlands permit application.

On March 1, 1992, I received a letter from the property owners, which I will read in part:

> "I appreciate your efforts to working out a solution to our problems with the endangered or threatened plants with the various organizations that should have had an interest in their relocation. After personally discussing the problem with several people that have expertise in this area, we concluded we would receive no help from these individuals or their organizations.
>
> "...it was decided it would be in our best interest to transplant the plants to [our] outcrop located adjacent to Heggie's Rock. The plants seem to be surviving quite well in the new habitat.
>
> "...It is our hope that Martin Marietta can move forward with the necessary permitting to put this property in a state of production. We feel the delays have cost us a considerable amount of monetary consideration and mental anguish."

We then began a two year, strongly contested mining permit process with the State of Georgia. A number of opponents to our mining permit were from the ranks of individuals that originally not want to see the plant species relocated. Included were several negative newspaper articles from the original biologist who was also the author of the Recovery Plan.

In January of 1994, Martin Marietta Materials, Inc. received all mining permits from the State of Georgia for this site. We are in continuous operation at this location today. It should be noted that once the species were documented as removed from the subject mining area, we were granted in 1995 a Corps permits (i.e., Nationwide 26 under one acre) for an impoundment along the second of the two drainages.

Conclusion

After all this effort on the part of landowner and government agency alike, I simply must question a process that encourages federal government agencies to attempt to rigidly regulate plant species that are obviously the property of the private landowner. The interests of the wetlands permit applicant were not served, and the interests of the landowner certainly were not served, and, because this delicate species

was relocated by a private landowner with a shovel and bucket rather than by a professional botanist, ultimately the interests of the plant species were not served.

In my research during this project I came across Senate Report No. 100-240 (1988 U.S.C.C.A.N. 2700 at pages 2711-12) describing the purpose of additional language added in 1988 to Subsection B of the ESA, regarding animals and plants under federal jurisdiction. It reads, it part,

> Currently anyone who captures, kills or otherwise harms an endangered animal commits a violation of the Act for which substantial criminal and civil penalties may be imposed. By contrast, it is not unlawful to pick, dig up, cut or destroy an endangered plant unless the act is committed on Federal land; and even on Federal land there is no violation of the Act unless the plant is removed from Federal jurisdiction. The basis for this differential treatment of plants and animals under the Act was apparently the recognition that landowners traditionally have been accorded greater rights with respect to plants growing on their lands than with respect to animals. The amendment made to the Act...does not interfere with the rights traditionally accorded landowners but instead reinforces them in a way that also benefits the conservation of endangered plant species...Endangered plants have been vandalized or taken from private land against the wishes of landowners. Most private landowners take pride in the presence on their lands of unique or rare species and are eager in their protection.

If indeed this was the intent of Congress, then the ESA failed miserably in our case. I seriously doubt if our landowner has much "pride" left in the fact that these species occur on his property.

With almost fifteen years of hindsight, I can look back on this episode and see the naivety of my actions. I mistakenly believed for nearly two years that the ESA actually worked to protect listed species. I was naíve to believe that, when confronted with the legal rights of ownership afforded the private property owner, governmental agencies and environmental groups alike would be willing to work towards a "Win-Win" solution to transplant and protect the plant species. I came away from this episode believing that the ESA has placed an adversarial tool in the hands of environmentalists who are bent upon curtailing growth by impinging on private property rights.

I strongly support H.R. 2933, the Critical Habitat Reform Act of 2003, introduced by Congressman Dennis Cardoza, especially those provisions found at Section 3, which require that an economic impact analysis be conducted prior to designating species critical habitat. In the above-mentioned case, economic feasibility should have been drawn into question long before the numerous steps taken to issue biological opinions were conducted. The jeopardy opinion rendered in our case should have never been allowed to consult a Draft Recovery Plan when making a determination.

[Mr. McKeel's response to questions submitted for the record follows:]

Response to questions submitted for the record by Steven L. McKeel, Executive Director, Martin Marietta Materials, Inc.

Questions from Chairman Richard Pombo

(1) Mr. McKeel, could you outline the economic impact on your company and the landholder of the Jeopardy Opinion issued by the FWS?

The more tangible impacts to our company were the costs for redesigning our overall site plan, the acquisition (annual lease of r/w) of another route into the site that did not involve wetlands permitting, the engineering design work for this new route, and the construction of an additional approximate 2 mile of roadway beyond our original plan. These costs can be calculated in the half-million dollar range. More intangible are the costs associated with the lost revenue potential during the three-plus year delay in bringing this site into production, the continued maintenance on the extra 2 mile of road footage, the annual lease costs of land for the secondary route, the delays and extra effort necessary to obtain a state mining permit because the plant issue was not resolved (i.e., we had to overcome opposition to our permit from individuals and special interest groups using the unsupervised relocation of the species as a reason to deny our permit), and the negative impact to our well-earned company image by attacks from opponents in the print media. These costs are largely undefined but can be estimated in millions of dollars.

The more tangible costs to our family of landowners involve largely the delay in bringing the quarry into production. As stated in my written testimony, the property

contained a 40-acre expanse of granite not suitable for any other type of development. Our lease arrangement allows for landowner participation in our sale of rock products from the site, so that the landowner literally profits greatest from a high-volume sale of rock products. The delay in opening this operation cost this family of landowners potentially several hundred thousand dollars annually in lost royalties from sale of rock products. This was significant to many family members, especially those associated with family members who passed away at about that time. The more intangible costs to the landowners are derived from the fact that the original access route across wetlands on original quarry lease property remains unused, while a new route across the landowners adjacent un-leased property was necessary. This previously un-leased property did not contain granite outcrops, but remains unsold and undeveloped to this day largely because the family had to give up a r/w swath through it in order to make the quarry operation viable. Our customer trucks now travel this route in and out of the site, rather than over the less conspicuous route originally contemplated with a minor wetlands crossing. This cost is largely undefined but represents several million dollars to our landowners.

The most destructive impacts to both our company and our landowners fall into the "what if" category, but are very real even so. In my written testimony, I described a May, 1991 letter to the FWS during the formal consultation process that indicated by illustration and calculations that if we are forced to leave the plants in situ, we would have to sacrifice some 15 million tons of product reserves on site worth some $60-70 million, reducing our mine life by some 15 to 20 years, and reducing the total royalties to our landowners by several million dollars. The FWS did not acknowledge that the quarry would have to be mined in this manner, but recommended in their "Reasonable and Prudent Alternatives" that the quarry could be developed in a manner that in my opinion would be technically unattainable, violate industry safety standards and best engineering practices, and unquestionably be prohibited by the Mined Safety Health Administration and the Georgia Department of Natural Resources alike.

If we as a company had failed to gain a separate access into the site that did not require wetlands permitting, we may have been forced to abandon the project due to insufficient reserves (described above) to justify operation start-up. I had spent several years locating and leasing a suitable site in this area of Georgia, and there were none other in the county even close to the potential of this property. If we had been forced to abandon this project, we would have sacrificed untold millions of dollars in potential from jobs, tax revenues, and of potential revenue for both our company and the landowners. It is doubtful we would be in operation in Columbia County today. Our landowners would have had no option for the 40-acre outcrop other than to sell it as a conservation area.

(2) You mentioned in your written testimony that the Draft Recovery Plan was a "thinly veiled attack on the crushed stone industry as one of the main factors in the continued demise of outcrop plant species."

- **Can you elaborate as to how the Draft Recovery Plan singled out your industry?**

My written testimony chronicles a series of events, but one common thread remains constant throughout them. The consulting biologist who originally represented the Nature Conservancy at our first site meeting, was the same consultant who advised the FWS during our informal site visit, who was the same consultant hired by the FWS to write the Recovery Plan, who was the same consultant who was quoted in the newspapers as opposing our mine permit efforts even after the consultation process had been dropped. In my professional opinion, this relationship is far too intertwined to foster objective opinions in our consultation process, which was apparently never a consideration for the FWS.

50 CFR Part 17 of the Federal Register found in Volume 53, No. 24, pg. 3560 (Friday, February 5, 1988) contains the final rule by the FWS for listing three granite outcrop plant species, including the federally listed endangered Isoetes tegetiformans and the federally listed threatened Amphiantus pusillus. Section 4(a)(1) of the listing identifies five factors of adverse impact to the species B only one of which is quarrying. The Draft (and Final) Recovery Plan for these species lists "Quarrying" as statistically the greatest of eight "Threats" (Section 1.F.1) to these outcrop species, while also engaging in conjecture about the number of additional unknown populations of the plants that may have been "destroyed" throughout the history of quarrying in Georgia and also speculating on the possible detrimental impact of dust on populations that lie near quarry operations. One of the most significant detrimental impacts recognized by the Plan for these species is the failure of state and federal agencies to protect these species from recreational overrun even on public lands. Protecting existing publicly owned populations of the plants is the number one "Recovery Objective" which identifies six locations in the

public domain. Even so, most of the "Conservation Measures" and other recommendations in the Plan repeatedly single out the need for protection from "destruction from quarrying" while conversely stressing the need for seeking landowner cooperation on private lands. The Plan goes on to try to link the expenditure of Federal Highway trust monies used for state projects, and the resulting supply of crushed stone from quarries that may harbor the listed species, with Section 7 consultation of the ESA. The Plan also calls upon the State of Georgia specifically to consider these plant populations while reviewing mining permits of granite outcrops, even though neither federal nor state law support such consideration. None of the other "Threats" sited for these plants are dealt with in such a specific manner. Also, "Literature Sited" for the Recovery Plan sites three unpublished papers written earlier by the author of the Recovery Plan for the Nature Conservancy, as well as a number of other unpublished papers, which seems contrived for a federal document that is suppose to incorporate "Public Review" into its formulation.

As per my written testimony, the confluence of timing between our consultation process and the initiation by the FWS of the Draft Recovery Plan, together with the negative tone of the Draft Recovery Plan towards quarrying, specifically in the State of Georgia, as written by the same consultant who had previously implied during our consultation process that he did not want our population of plants disturbed, together with the federal listing objective implying that the FWS would regulate these species through the section 7 process (see the "Critical Habitat" section of the listing) leads me to the personal opinion that our industry in general and our project specifically was unfairly censured for listed plants which are recognized by the ESA as being the property of the landowner.

Our company, Martin Marietta Materials, Inc., seeks to protect the environment and exceed regulations wherever possible. However, in this instance, the interests of neither the endangered plant species, nor our company, nor our landowner was well served. The ESA, written for a noble purpose, has been historically administered by federal agencies in a glad-handed manner that violates the most fundamental private property rights of our citizens. The process is in bad need of overhauling. I applaud Congressman Cardoza and those legislators who will take the actions necessary to restore balance and fairness to the ESA. Thank you for allowing me to address these questions.

Questions from Congressman Tom Udall

In your testimony, you extensively discuss the impacts that two federally listed plants, Isoetes tegetiformans and Amphiantus pusillus, had on your mining operations. Are you aware that both plants do not have designated critical habitat?

50 CFR Part 17 of the Federal Register found in Volume 53, No. 24, pg. 3560 (Friday, February 5, 1988) contains the final rule by the FWS for listing three granite outcrop plant species, including the federally listed endangered Isoetes tegetiformans and the federally listed threatened Amphiantus pusillus. The "Critical Habitat" portion on pg. 3563 is quoted below in its entirety:

> **Critical Habitat**
>
> **"Section 4(a)(3) of the Act, as amended, requires that to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time the species is determined to be endangered or threatened. The Service finds that designation of critical habitat is not prudent for these species at this time. Publication of critical habitat descriptions and maps would increase public interest and possibly lead to additional threats for these species from collecting and vandalism (see threat factor 'B' above). Distinctiveness of the outcrops increases their vulnerability since they tower above the surrounding vegetation and most are easily accessible. No benefit can be identified through critical habitat designation that would outweigh these potential threats. All State agencies and counties will be notified of the general location of the sites and of the importance of protecting these species' habitat. Protection of these species' habitat will be addressed through the recovery process and through the section 7 jeopardy standard. Therefore, it would not be prudent to determine critical habitat for these species at this time."**

Yes, Mr. Udall, it is correct that neither of these two species have critical habitat designations. Why? It is clear from the quoted Federal Register that when these plants were listed—when Section 4(a)(3) of the ESA mandates that the Secretary is to designate critical habitat "to the maximum extent prudent and determinable—

the FWS exorcized its discretion to decide that these plants would be better served if their locations remained a mystery to all but a select few individuals who knew of their existence. Given that our landowner had never been contacted by any state or federal agency regarding the welfare of the listed plants on his private property, and given that the state Inventory Program and even a private consultant not associated with the FWS knew their exact location, one must presume that the "notification" courtesy described in the "Critical Habitat" portion of the listing was never extended to the landowner, the owner of the plants. My written testimony quotes Senate Report No. 100-240 describing that intent the 1988 amendment to the ESA was to reinforce the traditional rights accorded landowners with respect to plants, and that landowners often participate by taking "pride in the presence ... [of] rare species...". It is apparent from the listing and the actions of the FWS that our landowner was intentionally never afforded that opportunity.

The FWS carries this rationale further by stating that protection of these species would be addressed "through the Section 7 jeopardy standard". It is clear from this that the FWS intended to use Section 7 as a weapon to restrict any activity that might impact these plants, irrespective of right of ownership, and clearly did so in our case.

My testimony documents how our wetlands discharge notification on our leased property triggered the Section 7 consultation process of the ESA regarding the federally listed endangered Isoetes tegetiformans and the federally listed threatened Amphiantus pusillus, and particularly how the FWS initiated the drafting of a Recovery Plan for these species seemingly as a result of this notification. My testimony also documents how the Habitat Survey we conducted at our expense and the Draft version of the Recovery Plan B a Plan that had not even passed the public comment phase—were both used by the FWS to attempt to regulate these two plant species on our landowner's property in spite of unquestionable legal evidence that plants are the property of private landowners.

Even knowing our landowner's ownership rights, Martin Marietta voluntarily entered into negotiations to relocate these plant species at our expense. This quickly turned into a non-voluntary process where we spent considerable time and resources to comply with regulatory agencies. The sad fact remains that, as per my written testimony, the FWS "Reasonable and Prudent Alternatives" were so unreasonable that, after we negotiated a separate route into the site and dropped our pre-discharge notification, the owner of the plants had little incentive and no longer any desire to seek the best solution for the plants.

The ESA, written for a noble purpose, has been administered by federal agencies in a glad-handed manner that violates the most fundamental private property rights of our citizens. Federal agencies take an uncompromising "government knows best" approach—something that needs to be changed if America is serious about working together to help save endangered species.

The legislation introduced by Congressman Cardoza to reform Critical Habitat designation would take the necessary first step by the government to actually start working in a collaborative way with landowners. While it is true that the two listed plant species in our case did not have critical habitat designation, the fact that our landowner and our company voluntarily attempted to save the landowner's plants and were met by a regulatory stonewall that began at the point of listing the species, one in which the interests of the FWS and special interests groups were so intertwined that the welfare of both plant and owner were ignored, in my opinion, is highly relevant to the committee and is the reason why I wanted to tell our story. Our company, Martin Marietta Materials, Inc., seeks to protect the environment and exceed regulations wherever possible. However, in this instance, the interests of neither the endangered plant species, nor our company, nor our landowner was well served. I applaud Congressman Cardoza and those legislators who will take the actions necessary to restore balance and fairness to the ESA. FOLLOWUP

The CHAIRMAN. Thank you.

Miss Crookham?

STATEMENT OF KATHLEEN M. CROOKHAM, DISTRICT 2 COUNTY SUPERVISOR, MERCED COUNTY BOARD OF SUPERVISORS, SONOMA, CALIFORNIA

Ms. CROOKHAM. Thank you, Chairman Pombo and members of the Committee. My name is Kathleen Crookham and I am a County Supervisor in the County of Merced in California. I appre-

ciate the opportunity today to testify in support of H.R. 2933, Critical Habitat Reform Act of 2003. As a County Supervisor and a private landowner, I have first-hand experience of how important it is to reform the current process in designating critical habitat. I would like to briefly summarize for you what happened in Merced.

The Board of Supervisors and the community members were surprised and quite frankly, disappointed to read in the local newspaper on September 25, 2002, that the U.S. Fish and Wildlife Service proposed to designate 1.7 million acres of critical habitat for threatened and endangered vernal pool species. A total of 337,514 acres of this particular proposal were the critical habitat located in Merced County, more than twice the amount of any other county in California or Oregon. The proposed designation covered 26 percent of our entire county, which in addition to 307,280 acres that are already protected as government lands, wetlands, and easements, this would be a total of 50 percent of our county under protected lands, quite a devastating blow to a county whose primary industry is agriculture.

Despite the fact that Merced County had the largest acreage in this proposed habitat within the jurisdiction, the Service refused to hold a hearing in our county because of time constraints. As a result, many of the landowners in eastern Merced County who had been sensitized to the issues surrounding the Endangered Species Act were stunned by the proposed designation. They felt the Service was trying to set the critical habitat designation flying in under the radar screen hoping that no one would notice.

The Board finally convinced staff members from the Service to make an informal presentation regarding the proposed habitat for Merced County. While the presentation was helpful, it was not an official public hearing and the information presented stirred up more questions than answers. The maps presented were outdated and did not provide enough detail for property owners to be able to determine if their land was in or out of the proposed habitat. The two-month comment period was hardly enough time for landowners to attend a public hearing, gather materials, and then provide thoughtful feedback concerning the impact of the proposed designation.

Clearly the proposed habitat was poorly designed. The proposed acreage in Merced County was not scientifically or thoroughly selected and included an already-developed shopping area, parking lot, and even Castle Airport. It is evident that the proposed habitat would only escalate our economic problems. The community recognized that habitat would devalue their land and increase regulations on land use because individuals would lose their own property rights and the government would lose control over local planning and growth.

Granted, Merced County is a rural community, but the residents really rallied together. Local residents took it upon themselves to quickly raise awareness. They compiled a list of affected property owners in the county and paid for the mailing of the information to hundreds of individuals. Actually it was about 1,200 people. They shouldered the burden of the expense, knowing that someone needed to fill the void that the Service had left empty.

While the County of Merced was excluded from the final ruling on this particular proposed critical habitat designation, we anticipate finding ourselves along a similar path once again.

Based on my own personal experience, I would like to reiterate two key issues that I have with the current process for critical habitat designations. Landowners must be notified and given ample time to provide feedback. The Service should consult local agencies in order to obtain resource information that is detailed and accurate. The Service must sincerely make efforts to communicate with landowners and I support providing a user-friendly website mechanism to help landowners determine if they are affected by the proposed designation.

And second, the economic analysis must include consideration of lost revenues to the landowners, as well as to the Federal, state and local governments, so that the designation does not protect the species at the expense of the people.

Chairman Pombo and members of the Committee, I appreciate this opportunity to share my personal story with you today and I am optimistic that this committee will find a positive resolution to this issue.

And I would also like to openly express my appreciation to Congressman Cardoza for his steadfastness in championing this issue. He has been a strong support and a guide for our local board. And thank you for allowing me to speak to you today.

[The prepared statement of Ms. Crookham follows:]

Statement of Kathleen M. Crookham, Supervisor, District Two, Merced County Board of Supervisors, Merced, California

Chairman Pombo, Ranking Member Rahall and Members of the Committee, my name is Kathleen Crookham. I am a County Supervisor for the County of Merced in California. I appreciate the opportunity to testify today in support of H.R. 2933, Critical Habitat Reform Act of 2003. As a County Supervisor for the County of Merced, and a private landowner, I have first-hand experience on how important it is to reform current processes for designating critical habitat.

I would like to briefly summarize for you what transpired in Merced County, California. The Board of Supervisors and our community members were surprised and, quite frankly, disappointed to read in the local newspaper on September 25, 2002, that the U.S. Fish and Wildlife Service proposed to designate 1.7 million acres as critical habitat for threatened and endangered vernal pool species. A total of 337,514 acres of this particular proposed critical habitat was located in Merced County, more than twice the amount as any other County in California or Oregon. The proposed designation covered 26% of our entire County; which is in addition to 307,280 acres that are already protected as government lands, wetlands and easements. This would have resulted in 50% of Merced County being under protected lands—quite a devastating blow for a county whose primary industry is agriculture.

The Service arbitrarily set five public workshops about the proposed habitat, none of which were located in the County of Merced. In fact, the Service refused to hold a public hearing in our County because of "time constraints," despite the fact that Merced County had the largest acreage of proposed critical habitat within its jurisdiction.

To understand how insulting this was to us as the local government entity and to our community at large, I need to explain that the Service, the California Department of Fish and Game, University of California, Merced and Merced County jointly signed a Planning Agreement in preparation of a Natural Community Conservation Plan/Habitat Conservation Plan (NCCP/HCP) in eastern Merced County. This agreement stressed close cooperation among the principal agencies in the preparation of this plan, and also stressed the importance of public outreach and involvement of private landowners.

Merced County, as the lead agency in the preparation of this NCCP/HCP plan, commenced a series of stakeholder meetings engaging various landowners, agricultural interests, business interests, and environmental interests in the beginning

stages of the preparation of this plan. Not only did the U.S. Fish and Wildlife Service fail to actively participate in the stakeholder meetings on a regular basis, it also failed to use this process to inform the public about the proposed critical habitat designation.

As a result of the Service's disregard for adequate public outreach, many landowners in eastern Merced County, who had been sensitized to the issues surrounding the Endangered Species Act, were stunned by the proposed designation because it had never been mentioned in previous stakeholder meetings. They felt the Service was trying to set the habitat designation by flying in under a radar screen, hoping that no one would notice.

Despite numerous requests on our part, the Service did not hold a public hearing in our area. Our Board of Supervisors persisted and finally committed staff representatives from the U.S. Fish and Wildlife Service to make an informal presentation on the proposed habitat in Merced County. While the presentation was helpful, it was not an official public hearing and the information presented stirred up more questions than answers. The maps presented were outdated and did not provide enough details for property owners to be able to determine if their land was included or excluded in the proposed habitat.

It soon became apparent that the main reason the Service proposed the critical habitat designation was in response to a lawsuit. The Service's self-imposed "time constraints" included a two-month comment period, hardly enough time for landowners to attend a public hearing, gather materials and then provide thoughtful feedback concerning the impact of the proposed designation. I still firmly believe that proposals of this nature are too important to be rushed at the expense of adequate public participation.

It also became apparent that the proposed designation was poorly designed. The proposed acreage in Merced County was not scientifically or thoughtfully selected, as the proposed land included already developed shopping areas, parking lots and even the Castle Airport Aviation and Development Center. After reviewing the economic analysis, it was evident that the proposed habitat would escalate our economic problems. The main industry of our County is agriculture and our County has a consistently high unemployment rate between 16-18%. The proposed designation would have taken valuable acreage out of agricultural production and also forced many of our farmers and their workers into unemployment, further devastating our local economy. The community recognized that the critical habitat would devalue their land and increase regulation on land use because individuals would lose their own property rights and local governments would lose control over local growth and planning.

Granted, Merced County is a rural community, but the residents rallied together to ensure that everyone was informed about the proposed critical habitat. As the Service did not make any attempts to inform landowners who would be affected by the designation, local residents took it upon themselves to quickly raise awareness. When the Board of Supervisors finally succeeded in scheduling a presentation by Service representatives, it was local residents who compiled a list of all affected property owners in the County and paid for the mailing of information to hundreds of individuals. They shouldered the burden of this expense knowing that someone needed to fill the void that the Service left empty. They also believed that the expense would be worthwhile in comparison to the potential cost if the proposed habitat had been adopted.

While the County of Merced was excluded from the final ruling for this particular proposed critical habitat designation, we have not had time to rest, as the California Tiger Salamander is now under consideration to be listed as threatened. If it does become listed, we anticipate finding ourselves along a similar path once again.

Based on my personal experience, I would like to reiterate two key issues that I have with the current processes for critical habitat designation. Landowners must be notified and given ample access to information as well as ample time to provide feedback. The U.S. Fish and Wildlife Service should consult local County agencies in order to obtain local resource information that is detailed and accurate. The Service must sincerely make efforts to communicate with landowners and I support providing a user-friendly website mechanism to help landowners determine if they are affected by a proposed designation. Secondly, the economic analysis must include consideration of lost revenues to the landowners as well as the federal, state and local governments so that the designation does not protect the species at the expense of the people.

Chairman Pombo, Ranking Member Rahall, and Members of the Committee, I appreciate the opportunity to share my personal story with you and am optimistic that this Committee will find a positive solution on this issue. I also want to openly express my appreciation to Congressman Cardoza for his steadfastness in cham-

pioning this issue. He has been a strong support and guide for our local County Board. Thank you for allowing me to speak before you today. 621

[Ms. Crookham's response to questions submitted for the record follows:]

Response to questions submitted for the record by Kathleen M. Crookham, District 2 County Supervisor, Merced County Board of Supervisors, Merced, California

Questions from Chairman Richard Pombo

1) We have heard that federal agencies could do a better job when it comes to informing communities of critical habitat designations. Communities deserve to be partners in this process. There are also instances where it is unclear how the federal agency determined critical habitat.

Example: The Final Rule for Santa Ana sucker critical habitat is based on two "personal communications" between with biologists and that nearby communities were not informed of these communications.

- **Will the bill improve cooperation and coordination with local governments?**

I am optimistic that H.R. 2933 will improve cooperation and coordination with local governments because the Service would need to consider information such as local resource data and maps from local governments in the vicinity of the area. In my experience in Merced County, the proposed critical habitat included land that was already developed into shopping areas, parking lots and even the Castle Airport Aviation and Development Center. Had the Service gathered basic data about our communities, they would have instantly seen the errors in their mapping techniques. Requiring the Service to consult local governments will result in more thoughtful and accurate designations, rather than hastily drawn habitats.

Local officials and governments possess a wealth of information about their communities. Consulting local governments will increase communication with the local officials. We want to be a partner in the process and collaborate with the Service. Involving local governments can also help to minimize the distrust felt by local landowners. Landowners must be notified and given ample access to information as well as ample time to provide feedback. I also support providing a user-friendly website mechanism to help landowners determine if they are affected by a proposed designation.

The CHAIRMAN. Thank you.

Mr. Kelley?

STATEMENT OF PAUL L. KELLEY, DISTRICT 4 COUNTY SUPERVISOR, SONOMA COUNTY BOARD OF SUPERVISORS, SONOMA, CALIFORNIA

Mr. KELLEY. Thank you, Mr. Chairman and thank you to the Committee for allowing me the opportunity to come before you and testify in favor of Congressman Cardoza's bill, H.R. 2933.

My name is Paul Kelley. I am a County Supervisor in Sonoma County where I was elected nine-and-a-half years ago and have had the honor to serve my constituents and friends in a premium wine grape-growing region of California. I am here before you today to discuss the challenges that the residents of Sonoma County have faced subsequent to the listing of the California tiger salamander and also to speak in favor of Congressman Cardoza's bill.

On July 22, 2002, the Sonoma County distinct population of the California tiger salamander was listed as endangered on an emergency basis. The final rule was later published and our inability to find a balanced solution to this listing is particularly disappointing to the residents of Sonoma County, where we have been willing and very willingly shouldered all the responsibilities in the past to

protect our environment, regardless of the mandate recognizing it is the right thing to do.

Sonoma County is the home of 450,000 people. In addition to that, we are the home of other endangered species, specifically steelhead, coho and chinook salmon, and local governments, including the county, have had a long history of reviewing policies and procedures to ensure their protection.

Our communities have diligently worked hard to protect our environment. We even have a local sales tax initiative that was passed that provides the opportunity to protect different lands and land conservation programs that brings in over $13 million a year.

As a result of our historical success at preserving the environment, our community felt confident that we could address the challenge of the salamander. Although paralysis in terms of construction and project approvals, infrastructure maintenance and construction has been incredibly costly and potentially millions of dollars, we do feel confident that we have begun a process that will meet with success.

Through the efforts of Wayne White of the Sacramento office of the Fish and Wildlife Service, we have embarked upon a conservation strategy for the CTS in Sonoma County. He has offered us an opportunity to work together so that the economic impact to the community is minimized and the opportunity to protect, recover and conserve the salamander is maximized. If we are successful we hope that this can be duplicated elsewhere.

This strategy team has two tasks over the next 60 days—first, to identify lands that need to be set aside for conservation, and second, to craft solutions that are economically palatable to our community. The members of the strategy team include representatives from appropriate regulatory agencies, local governments, private landowners, and the environmental community.

The Endangered Species Act should be about a conservation strategy and recovery. This bill is the right step to recovery. We in local governments and communities need the tools or the path for recovery.

Beyond the first 60 days of formulating strategy, improvements will be made to certain parts of the landscape. This will undoubtedly include the creation of perpetual conservation easements on both public and private properties. If the team is not successful, we are very concerned that the Service does not have the resources or the personnel that would allow them to respond in a timely manner to requests for assistance and permits from public and private stakeholders. This could be a moratorium on construction, both public and private, including infrastructure critical to all of our constituents.

In summary, my testimony today is meant to emphasize the many components of our local team's efforts that support the congressman's legislation. They include critical habitat designation would be made concurrent with the recovery plan, by developing a conservation plan first, as is currently under way in Sonoma County, and we hope that the designation of critical habitat will more accurately reflect what is actually needed to recover the species.

Properties that are already part of a conservation plan would be excluded from critical habitat designation. In Sonoma County we are looking at properties that now support or could sustain the salamander that are already subject to conservation measures.

At the time the critical habitat is designated, economic impacts of the designation would have already been considered. And finally, the proposed legislation's word change from "essential to the conservation of the species" to "essential to the conservation of the species as areas which are absolutely necessary and indispensable to conservation" would undoubtedly support efforts at crafting a workable conservation plan.

In conclusion, we need the tools to recovery of species that are listed and Congressman Cardoza's bill will, in the long run, offer a better protection for threatened and endangered species, it will go a long way in ensuring recovery of the listed species and will strike a balance that also addresses the needs of the people that we all serve.

I appreciate and thank you for the opportunity to speak and testify before you and look forward to any questions at the end.

[The prepared statement of Mr. Kelley follows:]

Statement of Paul L. Kelley, 4th District Supervisor, Sonoma County, California

I would like to begin by thanking Congressman Richard Pombo for allowing me to testify on Congressman Dennis Cardoza's bill, H.R. 2933, that would amend the Endangered Species Act relative to the designation of Critical Habitat. My name is Paul Kelley, and I represent the 4th Supervisorial District of Sonoma County. I was born and raised in the district that I now represent. I attended local public schools and received my B.S. in Computer Science from San Francisco State University. Experiences from my youth forward have made me intimately familiar with the concerns of the people that I now represent. I've worked in the beautiful vineyards of Alexander Valley, in one of our largest manufacturing plants in the County, for a small computer company and, eventually, in the classroom where I taught Math and History.

In 1994, I was elected as Sonoma County's Fourth District Supervisor. I have served in that capacity since that time. I feel honored to serve the people who are my friends and neighbors. Representing the people that I have known my entire life makes my testimony of special personal significance. I am before you today to discuss the challenges that the residents of Sonoma County faced subsequent to the listing of the California Tiger Salamander.

On July 22, 2002, the Sonoma County Distinct Population of the California Tiger Salamander was listed as endangered species on an emergency basis. The final rule listing of the Sonoma County Distinct Population Segment as endangered was published in the Federal Register on March 19, 2003. Our inability, in the last year, to find a balanced solution to this listing was particularly disappointing to the residents of Sonoma County: people who have willingly shouldered responsibility to protect their environment, not because it was mandated, but because it is the right thing to do. To understand their dismay, it is important to understand the community.

Sonoma County is a wonderfully balanced mix of urban and rural development. We are home to 450,000 people and, for those of you not fortunate enough to be familiar with our locale, about 40 miles north of the Golden Gate Bridge. We live in an area that is varied in scenery: giant redwoods, ocean beaches, rolling hills and, of course, the beautiful wine country. In addition to our human population, Sonoma County is also home to a number of endangered and threatened species such as the Central Coast Steelhead, the Central Coast Coho Salmon and the California Coastal Chinook Salmon. Local governments have a long history of reviewing policies and procedures to ensure protection of all threatened and endangered species. As just one example: The Sonoma County Water Agency, at the direction of the Board of Supervisors, has spent millions of dollars in an effort to protect and restore fish habitat.

Our communities have diligently worked to protect their environment. All of the cities within the range of the Tiger Salamander have passed Urban Growth Boundaries. Community Separators are in place between the communities for maintenance of open space and community identity. Additionally, in 1990, the taxpayers of Sonoma County voted to tax themselves a 1/4 percent sales tax for a 20-year period. These monies fund the Sonoma County Agricultural Preservation and Open Space District. The sales tax provides an annual allocation of approximately $13 million to the District's land conservation program. This District is one of the top ten farmland and open space preservation programs in the Nation. It is one of the few jurisdictions in the Nation to use a sales tax for the purchase of conservation easements to protect agricultural lands and preserve open space. Thousands of acres of lands paid for by Sonoma County taxpayers have been set aside.

As a result of our historical success at preserving the environment, our community felt confident that we could address the challenge of the salamander. Although paralysis in terms of construction and project approvals has been incredibly costly—potentially millions of dollars—we feel confident that we have begun a process that will lead to ultimate delisting of the salamander and certainty for those most economically impacted.

Through the efforts of Wayne White, Field Supervisor for the Sacramento Office of the Fish & Wildlife Service, we have embarked upon a conservation strategy for the California Tiger Salamander in Sonoma County. He has offered us an opportunity to work together so that the economic impact to the community is minimized and the opportunity to protect the salamander is maximized. This strategy has the backing of public and private entities alike. If we are successful, this process could, and should, be duplicated in other areas of the country.

This strategy team has two tasks over the next 90 days: first, to identify lands that need to be set aside for conservation; and second, to craft solutions that are economically palatable to our community. The members of the strategy team include representatives from:

1) United States Fish & Wildlife Service;
2) Environmental Protection Agency;
3) California Department of Fish & Game;
4) Regional Water Quality Control Board;
5) Army Corps of Engineers;
6) City of Santa Rosa, Rohnert Park and the County of Sonoma (1 person);
7) Environmental Community (1 person);
8) Private Property; (1 person);
9) NGO Representative; and, finally a
10) Facilitator.

Beyond the first ninety (90) days, improvements will be made to certain parts of the landscape. This will undoubtedly include the creation of perpetual conservation easements on both public and private properties. Additionally, we are exploring ways in which we can eliminate the expenditure of millions of dollars now spent on surveys that indicate the presence or absence of salamanders, and on Environmental Impact Reports that merely delineate the need for mitigation. Monies spent on these studies can be better used for conservation and ultimate delisting of the species.

If the team is not successful, we are concerned that the Service does not have the resources or personnel that would allow them to respond, in a timely manner, to requests for assistance and permits from public and private stakeholders conducting activities in the salamander habitat area. In practical terms, this could mean a moratorium on construction, both public and private, on the Santa Rosa Plain. Our greatest fear is that anything short of success will result in the designation of Critical Habitat for the salamander. This recently occurred in Santa Barbara County, and the proposal was for 13,920 acres.

In summary, my testimony today is meant to emphasize the many components of this team's efforts that support Congressman Cardoza's legislation. They include:

- Critical Habitat designation would be made concurrent with a recovery plan. By developing a plan first, as is currently underway in Sonoma County, we hope that thoughtful preparation of the plan will allow the time, and will incorporate the expertise necessary, to ensure that the Critical Habitat which is designated meets the stringent requirements in the Endangered Species Act's existing definition of Critical Habitat and as it may be amended by this legislation.
- Properties that are already a part of a "conservation plan" or under protection by other state or federal conservation programs would be excluded from Critical Habitat designation. In Sonoma County we are looking at properties that now support, or could sustain or currently support, the salamander, and that are already subject to conservation measures by local agencies. This would allow land

to be used for multiple purposes, including, preservation of open space, wetlands restoration, plant conservation as well as habitat for the endangered salamander.

- At the time that Critical Habitat is designated, economic impacts of the designation would have already been considered. This approach is key if we want to ensure long-term continuation of the Act itself. We have yet to evaluate how economically devastating a Critical Habitat designation would be in Sonoma County. Given our current process, we hope to avoid the challenges that the people of Santa Barbara County now face.
- Affected jurisdictions, with few resources available to deal with the listing would receive additional notification of critical habitat proposals. The information would have to be shared—precluding the employment of firms to aid in gathering information pertinent to the listing. This would give local jurisdictions access to information that would allow them to make decisions that would best serve their communities' needs.
- Finally, the legislation's proposed word change from "essential to the conservation of the species" to "essential to the conservation of the species as areas which are absolutely necessary and indispensable to conservation," would undoubtedly support our efforts at crafting a "workable" conservation plan. Any conservation requirements should be delineated in detail, clearly stating what is needed in terms of acreage, and the life patterns of the species that support that determination; and "the best available" science that is consistently applied.

Congressman Cardoza's bill will, in the long run, offer better protection for threatened and endangered species. It will go a long way in ensuring recovery of all listed species, and will strike a balance that also addresses the needs of the people we all serve.

Again, thank you for allowing me to testify before your committee.

[Mr. Kelley's response to questions submitted for the record follows:]

Response to questions submitted for the record by Paul L. Kelley, 4th District Supervisor, Sonoma County, California

(1) Supervisor Kelley, we have heard that federal agencies could do a better job when it comes to informing communities of critical habitat designations. Communities deserve to be partners in this process. There are also instances where it is unclear how the federal agency determined critical habitat.

Example: The Final Rule for Santa Ana sucker critical habitat is based on two "personal communications" between with biologists and that nearby communities were not informed of these communications.

- **Will the bill improve cooperation and coordination with local governments?**

Response: Communications between all government agencies, and in this case the USFWS and local jurisdictions, should be of the highest priority. Open lines of communication would allow for elected officials as well as regulators to share knowledge and make better and informed decisions.

Frequently, people we represent in our communities have been ignored in the process. Requiring the USFWS to notify every impacted jurisdiction is of utmost importance. Affected jurisdictions with few resources available to deal with listings would be helped if they were to receive additional notification of proposals. Sharing of information would help reduce concerns involving the expenditure of human and financial resources.

Few federal agencies have an understanding of the needs of a particular area. Locally-elected officials, however, have a very good idea of what these needs are. By working together, we can create solutions that would allow for recovery of the species—often through voluntary action—thus promoting co-existence between human populations and the protected species.

The present communication process largely ignores public input. Few people have the time or energy to read the Federal Register on a daily basis. Even fewer people have a concept of the impact a listing may have on their lives. The time has come for individuals to be given the opportunity to participate in these decisions. If, indeed, it is appropriate that a species be offered federal protection, then a system of communication and cooperation should be devised that allows for maximum opportunity for species recovery with minimal economic impact to the human population.

Thank you for allowing me to give additional testimony.

The CHAIRMAN. Thank you.
Mr. Walters?

STATEMENT OF DONALD B. WALTERS, JR., PRESIDENT, PRIMARY SYSTEMS SERVICES GROUP, LLC., TESTIFYING ON BEHALF OF NATIONAL ASSOCIATION OF HOMEBUILDERS

Mr. WALTERS. Chairman Pombo, members of the House Resources Committee, I am pleased to share with you today the views of the 215,000 members of the National Association of Homebuilders on H.R. 2933, the Critical Habitat Reform Act of 2003 introduced by Congressman Dennis Cardoza. I thank you for the opportunity to appear before you today.

My name is Donald B. Walters, Jr., and I am a homebuilder and developer from Flagstaff, Arizona. As founder and President of Primary Systems Services Group, I oversee a full-service general contracting corporation involved in homebuilding, development and commercial construction.

My family has lived in Arizona's Verde Valley since the 1860s and my company and I have a deep appreciation and respect for the land on which we live and build.

As a result of the failure to either (A) designate critical habitat or (B) properly conduct the analysis required under the ESA, critical habitat designations have become increasingly driven by litigation and inaccurate or incomplete science and data. The problems and difficulties experienced by private landowners with respect to critical habitat are well documented and numerous. In seeking a legislative solution to the current crisis regarding critical habitat, H.R. 2933 proposes several important reforms to the process by which the Service designates critical habitat.

NAHB supports the majority of the reforms H.R. 2933 proposes. However, we do reserve concerns over provisions in the bill linking critical habitat designations to the recovery planning process. The following comments to the Committee address, in turn, four broad provisions of H.R. 2933. Section 2 of the bill proposes to link the designation of critical habitat to the approval of a recovery plan. Although well intentioned, NAHB believes that this may unintentionally create a new litigation threat and place a higher regulatory burden on the regulated community.

First, NAHB is concerned that by linking critical habitat designation to recovery planning, the inherently discretionary nature of the recovery planning process will be supplanted by the mandatory nature of critical habitat designations.

Second, recovery plans are guidance documents that do not have the force and effect of law. If critical habitat, the designation of which does have regulatory impact, is morphed as part of the recovery planning, the unintended consequence would be likely that the elements of the recovery plan would be transposed as having a binding legal effect on private parties.

Finally, if critical habitat were tied to a recovery plan, NAHB is concerned that the boundaries of critical habitat, traditionally interpreted as a smaller area than that which may lead to a species

recovery, would likely coincide with the larger area of recovery habitat.

Mr. Chairman, NAHB stands ready to work with bill sponsors and the Committee to address these concerns with H.R. 2933.

Next, H.R. 2933 would exempt habitat conservation plans, HCPs, and other management plans from critical habitat designations. NAHB supports the exclusion of HCPs and other species management plans from critical habitat designations and therefore supports these provisions of H.R. 2933. NAHB believes that nationwide, private landowners represent a vital component to species conservation and preservation actions.

While the Fish and Wildlife Service has exempted approved HCPs from critical habitat designations, these exemptions are more a matter of administrative policy and interpretation and therefore subject to change. Accordingly, NAHB supports the provisions of H.R. 2933 that would codify these important practices.

Section 3 of the bill would require the consideration of direct, indirect and cumulative economic impacts on designating critical habitat. For years NAHB has questioned and challenged the assumption by the Fish and Wildlife Service that all costs are borne at the time of a species's listing and as a result, there are only incremental economic impacts attributed to the designation of critical habitat. The economic analyses conducted for critical habitat routinely and significantly underestimate the true costs imposed by the designation. As such, NAHB supports provisions of H.R. 2933 that at long last would provide this important direction to the Service.

Mr. Chairman, Section 5 of the bill would establish statutory definitions for key terms relating to critical habitat under the ESA and NAHB also supports these provisions as they would restate and reemphasize the definitions of geographical area occupied by the species and essential to the conservation of the species. These are two terms that have been traditionally misread and misinterpreted and NAHB supports provisions in H.R. 2933 that seek to correct these past failures.

Mr. Chairman, in closing I would like to express NAHB's appreciation for your long-standing leadership on the issues surrounding ESA reform and for holding this important hearing today.

On behalf of NAHB, I would also like to thank Congressman Dennis Cardoza for his leadership in introducing H.R. 2933.

Chairman Pombo and members of the Committee, I thank you for your consideration of NAHB's views on this matter and hope that endangered species conservation in this country becomes less about litigation and gridlock and more about commonsense conservation policies and programs. With the notable exception of linking critical habitat and recovery planning, NAHB believes that H.R. 2933 makes great strides in this direction. Thank you.

[The prepared statement of Mr. Walters follows:]

Statement of Donald B. Walters, Jr., President, Primary Systems Services Group LLC., President, Northern Arizona Building Association, on behalf of the National Association of Home Builders

Chairman Pombo, Ranking Member Rahall, and members of the House Resources Committee, I am pleased to share with you today the views of the National Association of Home Builders (NAHB) on H.R. 2933, "the Critical Habitat Reform Act of

2003", introduced by Congressman Dennis Cardoza (D-CA), and on the process of critical habitat designation under the Endangered Species Act (ESA). I appreciate the opportunity to appear before the committee today to share the building industry's views on this important legislation.

My name is Donald B. Walters, Jr., and I am a homebuilder and developer from Flagstaff, Arizona, and the current President of the Northern Arizona Building Association. As founder and President of Primary Systems Services Group, I oversee a full service general contracting corporation involved in home building, development, and commercial construction. My family has lived in Arizona's Verde Valley since the 1860s, and my company and I have a deep appreciation and respect for the land in which we live and build. This appreciation and philosophy guide my company and the work that we do.

Mr. Chairman, NAHB represents over 215,000 member firms involved in home building, remodeling, multifamily construction, property management, housing finance, building product manufacturing and other aspects of residential and light commercial construction. Our members are committed to environmental protection and species conservation, however, oftentimes well-intentioned policies and actions by regulatory agencies result in plans and programs that fail to strike a proper balance between conservation goals and needed economic growth. In these instances, our members are faced with significantly increased costs attributed to project mitigation, delay, modification, or even termination.

NAHB's members are citizens of the communities in which they build. They seek to support the economy while providing shelter and jobs; partner to preserve important historical, cultural and natural resources; and protect the environment, all while creating and developing our nation's communities. As such, NAHB supports the Services efforts to protect and conserve species that are truly in need of protection. NAHB believes, however, that a vital component of any conservation effort is to ensure the proper balance of each species' needs with the needs of the states and communities in which it is located.

Because the ESA requires the Services to consider this balance, NAHB supports the designation of critical habitat when it is completed within the confines of the ESA. Unfortunately, as a result of the failure to either: a) designate critical habitat or b) properly conduct the analyses required under the ESA, critical habitat designations have become increasingly driven by litigation and inaccurate or incomplete science and data.

The problems and difficulties experienced by private landowners with respect to critical habitat are well documented and numerous. The General Accounting Office (GAO) has repeatedly visited the critical habitat issue, and has twice raised concerns with the U.S. Fish and Wildlife Service for its failure to issue guidance on critical habitat designations (U.S. General Accounting Office. Fish and Wildlife Service uses best available science to make listing decisions, but additional guidance needed for critical habitat designations. GAO-03-803. Washington, D.C., August 29, 2003.) Although FWS has repeatedly examined the issue, and has at times solicited comments on the critical habitat designation process, there has been no definitive guidance on critical habitat in recent years. Without such guidance the building industry has been faced with uncertainty and delay in moving forward with many projects.

In seeking a legislative solution to the current crisis regarding critical habitat, H.R. 2933 proposes several important reforms to the process by which the Services designate critical habitat under the ESA. NAHB supports the majority of reforms H.R. 2933 proposes. However, we do reserve concerns over provisions in the bill linking critical habitat designations to the recovery planning process.

The following comments to the committee address, in turn, four sections of H.R. 2933, including the aforementioned concurrent designation of critical habitat with the approval of a recovery plan; the exemption of Habitat Conservation Plans (HCPs) and other management plans from critical habitat designations; the mandated consideration of direct, indirect, and cumulative economic impacts when designating critical habitat; and the establishment of statutory definitions for two key terms relating to critical habitat under the ESA.

I. Concurrent Designation of Critical Habitat with the Approval of a Recovery Plan

H.R. 2933 proposes to link the designation of critical habitat to the approval of a recovery plan. Some advocates of this position believe that, if critical habitat is pushed back to the recovery planning stage, the Services will have more time to compile the scientific and economic data they need to make fully informed and fair designations. Although well intentioned, NAHB does not believe that this will solve the current litigation crisis that ensnarls the designation of critical habitat, and

may unintentionally create a new litigation threat for the Services while placing a higher regulatory burden on the regulated community.

First, NAHB is concerned that by linking critical habitat designation to recovery planning, the inherently discretionary nature of the recovery planning process could be supplanted by the mandatory nature of critical habitat designation. The Services could effectively be exposed to greater legal liability, and possibly faced with a new breed of lawsuits focusing on compelling the issuance of recovery plans. As the ESA does not currently mandate any set timelines for the completion of a recovery plan, it would be up to the eventual judge to set one. The litigation cycle that currently entraps the ESA would only shift from compelling the issuance of critical habitat under set timelines to the completion of recovery plans under set timelines.

A second concern with coupling the recovery planning process with critical habitat designation is a blurring of the important distinctions between the guidance of recovery plans and the regulations of critical habitat. Indeed, while U.S. Fish and Wildlife Service staff have relied upon recovery plans as the basis for their regulatory actions in some cases, numerous courts have determined that recovery plans are non-binding guidance—documents that impose requirements on federal agencies only. *See, e.g., Fund for Animals v. Rice, 85 F.3d 535 (11th Cir. 1996); Oregon Natural Resources Council v. Turner, 863 F.Supp. 1277 (D Or. 1994); Defenders of Wildlife v. Lujan, 792 F.Supp. 834 (D.D.C. 1992); National Wildlife. Fed'n v. National Park Serv.,* 669 F.Supp. 384 (D. Wyo. 1987)

By way of example, Fish and Wildlife field staff in Arizona have used recommendations from working drafts of the recovery plan for the Cactus Ferruginous Pygmy-Owl as justification for density requirements in proposed critical habitat areas. See, e.g., Biological Opinion on the Effects of the Countryside Vista (Blocks 5 and 6) Development in Marana, Arizona (July 11, 2000). Accordingly, the potential for further abuse of regulatory authority is of significant concern to NAHB.

The third and final concern with tying critical habitat designations to the recovery planning stage is that such a change may raise the standard for the designation and sweep broader areas into the regulatory net than Congress intended. While economic and other "real world" considerations are mandated under the critical habitat designation process, there are no such requirements for the drafting of recovery plans. Further, the ESA currently defines critical habitat as "specific" areas that are found to be "essential" for conservation. This has traditionally been interpreted as a smaller area than that which may lead to a species' "recovery." Quite simply, if critical habitat were tied to a recovery plan, the boundaries of critical habitat would likely coincide with the larger area of "recovery habitat."

Mr. Chairman, NAHB stands ready to work with bill sponsors and the committee to address these concerns with H.R. 2933 in an effort to ensure that the potential for future problems with critical habitat designations are lessened not expanded.

II. Exemption of Habitat Conservation Plans (HCPs) and Other Management Plans From Critical Habitat Designations

NAHB supports the exclusion of HCPs and other species management and conservation plans from critical habitat designations and believes that, in doing so, the Services provide powerful incentives to private landowners to continue entering into such agreements. Accordingly, NAHB supports provisions of H.R. 2933 that automatically exempt HCPs and other management plans from critical habitat designations.

Nationwide, private landowners represent a vital component to ensuring species conservation and preservation. True progress in species conservation and recovery can only be accomplished with the active and creative cooperation of this integral constituency. One way to gain their support is through the creation and implementation of incentive-based policies and programs such as HCPs, Safe Harbor Agreements, Conservation Banking, and the No Surprises Rule. These programs, however, can only be effective if they provide certainty and predictability to the landowners who choose to participate.

Under the ESA, the Services are obligated to consider whether "special management considerations" in the form of critical habitat are warranted for these specific areas. To demonstrate compliance with this mandate and determine whether any such additional management considerations are needed, NAHB believes that the Services are obligated to consider and review all private, local, state, regional, and federal protections, including all applicable management plans and conservation agreements to assess the conservation benefits they provide. If a specific area is already managed for the conservation of a particular species, that area is clearly not in need of additional protections or management considerations, and therefore fails to meet the very definition of critical habitat and must be excluded from the designation.

Unfortunately, recent litigation surrounding the Mexican Spotted Owl has challenged this logical progression (See Center for Biological Diversity v. Norton, Civ. No. 01-409 TUC DCB), and threatens to undercut the attractiveness and usefulness of the full range of conservation tools and management options available to land managers, private landowners, and developers, resulting in a far-more onerous and far-less effective ESA.

Ultimately, in areas covered by HCPs, Safe Harbor Agreements, and other management plans and conservation programs, the designation of critical habitat only serves to add another layer of review and bureaucracy while failing to afford any additional protections for listed species. It also serves as a disincentive in those instances where voluntary measures are underway. Needless red tape is not a substitute for commonsense conservation policy, and may even result in detrimental impacts to threatened and endangered species.

Accordingly, NAHB appreciates the Services recognition of landowner contributions in this regard, and notes as a matter of reference that the Fish and Wildlife Service for one has exempted approved HCPs from critical habitat designations (FWS has exempted HCPs from several recent critical habitat designations including; the La Graciosa thistle on March 17, 2004 (69 FR 12560) and the Santa Anna Sucker February 26, 2004 (69 FR 8847). In conjunction with § 4(b)(2) of the Act, the Fish and Wildlife Service has cited this very logic in its exclusion of HCPs and other properly managed lands in, amongst others, the proposed designation of critical habitat in Arizona for the Cactus Ferruginous Pygmy-Owl. In that proposal, the Service even went so far as to "encourage landowners to develop and submit management plans and actions that are consistent with pygmy-owl conservation that [the Fish and Wildlife Service] can evaluate and that may remove the necessity of critical habitat regulation." (67 FR 71042)

As these exemptions are more a matter of Administration policy and interpretation, and therefore subject to change, NAHB supports the provisions of H.R. 2933 that will codify these practices.

III. Consideration of Direct, Indirect, and Cumulative Economic Impacts when Designating Critical Habitat

For years, NAHB has questioned and challenged the assumption by the Services that all costs are borne at the time of species listing and as a result there is only an incremental economic impact attributed to the designation of critical habitat. Indeed, the 10th Circuit Court has itself rejected this so-called baseline approach, reemphasizing "the congressional directive that economic impacts be considered at the time of critical habitat designation" *(New Mexico Cattle Growers Assn. v. U.S. Fish and Wildlife Service,* 248 F.3d 1277 (10th Cir. 2001)).

The Services should base their decision on whether to exclude areas under § 4(b)(2) of the ESA on economic analyses that are sound and complete, fully addressing the direct, indirect, and cumulative impacts of critical habitat designation. As such, NAHB supports provisions of H.R. 2933 that would provide this direction to the Services.

By merely examining the administrative costs of Section 7 consultations and the costs associated with project modifications as a result of those consultations, economic analyses conducted for critical habitat routinely and significantly underestimate the true costs imposed by the designation.

As pointed out in a report entitled, "The Economic Costs of Critical Habitat Designation: Framework and Application to the Case of California Vernal Pools Report" prepared for California Resource Management Institute by D. Sunding, the Fish and Wildlife Service's attempt at quantifying the impact of critical habitat for four vernal pool species of crustaceans and eleven vernal pool species of plants in California and Southern Oregon underestimated true costs by 7 to 14 times.

By way of further example, the Fish and Wildlife Service's study for the economic impact of critical habitat for the Cactus Ferruginous Pygmy-Owl in my state of Arizona was not so much a study of the economic impact of the proposed designation, but a study of the costs of designation on certain concerned industries. No attention was paid to any effect on the local economy, local governments, or tribes; and regional economic impacts, tax revenues, secondary impacts, and increased housing prices were all excluded because they were assumed to be minimal.

It is obvious that the Services have repeatedly failed to accurately and fully account for the economic impact of critical habitat designations. NAHB believes that H.R. 2933 recognizes and reaffirms the statutory requirement of the Services under § 4(b)(2) of the ESA to examine the economic impacts of critical habitat and to exclude any specific geographical area from a designation if the benefits of exclusion outweigh the benefits of inclusion, and supports these provisions.

IV. Establishment of Statutory Definitions for Key Terms Relating to Critical Habitat under the ESA

Although critical habitat is clearly defined in § 3(5)(a) of the ESA, NAHB believes the Services have traditionally misread and misinterpreted the Act's requirements. Accordingly, NAHB supports provisions of H.R. 2933 that restate and reemphasize the definitions of "geographical area occupied by the species" and "essential to the conservation of the species," two key, interrelated terms relating to the critical habitat process.

The ESA dictates two distinct classes of habitat that may be designated as critical habitat: (1) those areas "within the geographic area occupied by the species" and, (2) those areas "outside the geographic area occupied by the species." Congress intended that, as a benchmark, critical habitat could encompass areas "occupied" by the species. Under § 3(5)(A) of the ESA, "unoccupied" areas may also be designated—but only where the Secretary specifically determines that the unoccupied area is "essential to conservation."

NAHB believes that the Services have only limited and exceptional authority to designate "unoccupied" areas as critical habitat. The current implementing regulations also evince a clear priority for designating occupied areas as critical habitat in the first instance. The Services' regulations state that areas outside of a species' occupied habitat may be included in the critical habitat designation but "only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e).

Despite this directive, in practice the Services have often treated unoccupied areas as occupied to avoid its obligation to make affirmative findings that the unoccupied area is "essential for conservation." The absence of such an affirmative finding, however, does not permit the Services to arbitrarily define which areas may or may not be occupied simply on the basis of habitat characteristics, as seen in the designation of critical habitat for the Alameda Whipsnake. As ruled in that case, (HBA of No. Calif. v. U.S. Fish & Wildlife Service (1:01-Cv-05722 E.D. Calif., May 9, 2003), an area cannot be labeled as occupied simply because it is deemed essential to the conservation of the species and contains necessary primary constituent elements. As the courts have ruled, such is "an insufficient basis to designate land as occupied critical habitat" and nullifies "the distinction between occupied and unoccupied land, a distinction Congress expressly included in the ESA." Id. at 29.

Likewise, NAHB believes Congress' intent in crafting the ESA is being incorrectly interpreted by the Services when 1.2 million acres were proposed as being "within the geographic area occupied" by the pygmy-owl, a species that, in 2002, numbered 18 individuals. (FR 67 71035). Experience has shown that it can oftentimes be very difficult for the general public to determine whether or not they are in an area labeled by the Services as "occupied." Only after extensive litigation did FWS provide NAHB with site-specific data on where pygmy-owls were located across federal, state, and private lands.

In the end, it is clear that, although already defined in the ESA, "geographical area occupied by the species" and "essential to the conservation of the species" are two terms that have traditionally been misread and misinterpreted. NAHB supports the provisions in H.R. 2933 that seek to correct these past failures.

Conclusion

Mr. Chairman, in closing, I would like to express NAHB's appreciation for your longstanding leadership on the issues surrounding ESA reform, and for holding this important hearing today. On behalf on NAHB, I would also like to thank Congressman Dennis Cardoza for his leadership in introducing H.R. 2933.

Chairman Pombo, and members of the Committee, I thank you for your consideration of NAHB's views on this matter, and hope that as a result of the discussion on this and other ESA reform bills, endangered species conservation in this country becomes less about litigation and gridlock and more about common-sense conservation policies and programs. With the notable exception of linking critical habitat and recovery planning, NAHB believes that H.R. 2933 makes great strides in this direction. NAHB strongly urges the Committee to fully consider both the intentional and unintentional consequences of any ESA reform, so that these hard-fought efforts may leave species conservation better off in the end. I'd be happy to answer any questions you may have for me.

[Mr. Walter's response to questions submitted for the record follows:]

Response to questions submitted for the record by Donald B. Walters, Jr., President, Primary Systems Services Group, LLC., on behalf of the National Association of Home Builders

Questions from the Minority Members

Question: How can we recover species without protecting habitats, including areas where species do not presently live but where they would if populations recovered?

NAHB believes that in order to truly recover species listed as threatened or endangered, there must be an effective and workable means to protect and conserve habitat essential to the conservation of the species. Unfortunately, critical habitat has become an ineffective, and often times inappropriate means of protecting habitat.

Congress intended critical habitat to encompass limited geographic scope. The ESA restricts critical habitat to those "specific" areas that are found "essential" to species conservation—based on the best available scientific data, and after considering the economic impacts of the designation. However, the Services usually designate critical habitat only as the result of litigation. Accordingly, the Services fail to engage in the rigorous scientific and economic analyses required by the Act—and paint with too broad a brush and improperly include huge swaths of historic and potential habitat areas within the "critical" habitat designation. Importantly, this has led to tremendous expense and difficulty for the regulated community, with little or no benefit to listed species.

NAHB believes that statutory reform is needed to correct the Fish and Wildlife Service's abuses in relying too heavily on their limited and exceptional authority to designate "unoccupied" critical habitat areas. Congress intended that, as a benchmark, critical habitat encompass areas "occupied" by the species. Under the Act "unoccupied" areas may also be designated—but only where the Secretary specifically finds that the unoccupied area is "essential to conservation." In practice, however, the Service often treats unoccupied areas as occupied and avoids its obligation to make affirmative findings that the unoccupied area is "essential for conservation."

Importantly, critical habitat, at best, offers only limited protections to species while imposing significant costs on landowners, builders, and homebuyers. Section 7 consultations only apply when the landowner needs a federal permit and only when the other federal permitting agency agrees to enter into consultation with the Fish and Wildlife Service. That means many stakeholders are not affected to the same degree as builders by the designation of critical habitat since they don't typically require federal permits for the majority of their land operations—even though they can affect significant amounts of designated habitat.

Furthermore, significant conservation efforts are often accomplished by builders and others though other ESA mechanisms beyond critical habitat. Builders typically use ITPs (incidental take permits) under Sec. 10 of the Act that require development of detailed species specific plans and the investment of significant dollars and creation and or preservation of species habitat over extended periods of time. Since 1996 there are over 33 million acres in Habitat Conservation Plan (HCP) landmass equal to the size of the State of Louisiana. Included in that number is habitat created and or restored equal to the states of Connecticut and Rhode Island combined. Farmers have also done a significant amount of habitat conservation actions through several U.S. Department of Agriculture (USDA) conversation programs.

The current critical habitat process is not working, and reform is long overdue. As outlined above, a truly effective means of protecting habitat for listed species must involve incentives for private landowners, and must provide private landowners with certainty. As indicated in my written statement, private landowners represent a vital component to ensuring species conservation and preservation. True progress in species conservation and recovery can only be accomplished with the active and creative cooperation of this integral constituency. One way to gain their support is through the creation and implementation of incentive-based policies and programs such as HCPs, Safe Harbor Agreements, Conservation Banking, and the No Surprises Rule. These programs, however, can only be effective if they provide certainty and predictability to the landowners who choose to participate.

NAHB supports the exclusion of HCPs and other species management and conservation plans from critical habitat designations and believes that, in doing so, the Services provide powerful incentives to private landowners to continue entering into such agreements. Accordingly, NAHB supports provisions of H.R. 2933 that automatically exempt HCPs and other management plans from critical habitat designations.

NAHB supports the goals of the ESA in protecting endangered and threatened species and their habitats, but these protection measures must be based on reliable,

accurate and solid biological and scientific data. Our members are often prevented from developing their property or must submit to extensive mitigation requirements based upon what are often hypothetical and speculative impacts to species and their habitats. NAHB looks forward to continuing to work with this Committee, with Congress, and with the Services to ensure that Congress' intent with respect to critical habitat is properly carried out, and that truly effective means of protecting both species and habitat can be realistically employed.

The CHAIRMAN. Thank you. I thank the entire panel for this testimony.

For this panel I am going to change things around a little bit. I am going to recognize Mr. Renzi first for his questions.

Mr. RENZI. Thank you, Mr. Chairman.

I want to thank Don Walters from Flagstaff, Arizona whose family has been up in the Verde Valley since the 1860s and who is a true corporate citizen and a great leader in our community.

I wanted to talk a little bit about economic impact. We had a situation where a rodeo fire killed biologists think between 12 and 14 breeding pair of spotted owls. We had a situation where a pygmy owl was found to be nesting at the Tucson International Airport underneath one of the eaves of the building and there were those in our community who actually felt that we should consider shutting down the airport and now that we have this legislation from Mr. Cardoza that economic impact will be factored in.

You talked about underestimates that have occurred in the past and can you help me understand maybe some of the economic impacts that if they had been done in the past, what they would have revealed? Mr. Walters?

Mr. WALTERS. Well, I would like to answer it this way. The Service should base their decision on economic analyses that are sound and complete, fully addressing the direct and indirect cumulative impacts of critical habitat designation. As such, NAHB supports provisions of H.R. 2933 that would provide this direction to the Service.

Did I answer your question?

Mr. RENZI. I appreciate it very much.

When we are looking at economic impact we have had situations in the past where we had a high school that was getting ready to go into Tucson, Arizona. We spent three or four years fighting over the location. It drove up millions of dollars as to where the location would finally be.

So here we were—state of Arizona, we were about 48th or 49th for public education in America, trying to build a new high school. We have our students that are overcrowded in the local high school and while we are ready to go on and finally had the funding to build the new high school, we were not able to do it for three or four years.

So some of those stories I want to cull out and get on the record as far as economic impact not only being the costs associated but to cost to our future generation, the cost in the education to our children, as well as some of the other absurdities that I have listed today.

I want to welcome you and thank you for your testimony and yield back. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Cardoza.

Mr. CARDOZA. Thank you, Mr. Chairman.

I would like to direct my questions to Supervisor Crookham. My bill requires the Service to provide GIS maps on the Internet when proposing critical habitat. Can you please tell us how this would have impacted the public comment period relative to the vernal pool designation?

Ms. CROOKHAM. Yes, thank you. The problem, I cannot even tell you how many people came into my office and said, "Am I in the proposed designation or not?" We had some really nice fuzzy maps and it was very difficult to see exactly where the line might have gone or was going and it was just a very confusing matter all the way around.

Even if they had talked to us about the maps that we have within our county, we have excellent maps but nobody would approach us. So, as a result, we spent a lot of time trying to help people define whether they were within the proposed designation or not.

So I would think that it would behoove the Service to talk to local entities for whatever kind of mapping they might have, including GIS.

Mr. CARDOZA. As we sit here and discuss this, the anger comes back in me from the meetings that we held. I recall that there were a number of areas that were clearly developed that were included in the original designations.

Ms. CROOKHAM. Including a brand new cancer center that had just opened. It was under the designation. Castle Airport, which I mentioned in my report today, was listed. There were housing developments that had already gone in. It was just like somebody had taken a big brush and gone zoom-zoom-zoom and wherever it happened to land, that is where it was. And when you realize that you had over 300,000 acres in the county that were thrown into this map, you realize that it was not probably defined too clearly.

Mr. CARDOZA. I know from personal experience that residents of Merced County commented in great numbers once they found out about what was happening with the Service regarding their concerns, yet you stated in your testimony initially the community was not aware of the designation or the impacts. How did the community become engaged in this issue?

Ms. CROOKHAM. Well, it is really a long story and I will make it very short. I actually read the article in the paper and I asked somebody what they thought it meant and the person I asked said, "Oh, I do not think it amounts to anything. Do not worry about it." But somehow in the back of my mind it did not feel quite right and I did speak to your staff person, Dee Dee DiAdamo, probably a short time later and she said, "Kathleen, that does matter. It really is very important."

So probably a month passed before I ever heard from anybody again and then I had two constituents call me and say they had heard from someone that probably it was not anything they needed to worry about but they were concerned. And as a result of those two people who came to me and I said, "No, it does matter," and then at that point we had a local businessman who paid for the postage for the first notice that went out to the folks. And the first meeting we had—we had it on the third floor of our county admin-

istration building—people could not even get off the elevator, so many people came. So we mailed out about 1,200 letters.

So then the second meeting we had was at the high school and Congressman Cardoza was there with us and it was amazing. Again we filled the auditorium with people. People were very, very concerned and they wondered how this had gotten this far without anybody taking the time to notify them.

Mr. CARDOZA. And, in fact, people's property were being considered with no notice. The Federal government does not issue notices to people when they put this designation onto their property.

Ms. CROOKHAM. Right. The Service said to us, "Oh, we do not have money to notify people." It was just like they were going to find out through osmosis, I guess.

Mr. CARDOZA. I want to at this point congratulate you and thank you for your leadership in our community. It would not have gotten to the level of attention had you not taken the steps and frankly, I probably would not have been quite as far along as I am today with this bill had you not stepped in.

My bill requires that the Service analyze the impacts of proposed designations on state and local governments. Can you tell us the impact that the vernal pool designation would have had on Merced County?

Ms. CROOKHAM. You know, I wish I could tell you specifically because I know I have those figures someplace along the line but just as many people have mentioned before, it is not the initial impact; it is how the ripping effect affects so much of what goes on. When you start talking about any kind of development, any land use changes, and I guess I have a major concern owning a ranch in eastern Merced County. Can we put a fire guard in if we are going to plow through vernal pools? Can I put a new corral in? Can I remodel a barn? I do not know.

These are the things that I think really raise a lot of questions and a lot of concerns but I know it had a real effect financially on our whole community. And you know, we have huge unemployment, like many of the people in the Central Valley. We are a very poor county and this was just going to be a devastating blow and it probably would have crippled us totally.

And I wanted to say one more thing, please, kind of off. Thank you for the nice compliments but you know really how we got as far as we did was everybody working together and I think that it is a wonderful example of how a small county can marshall its resources and make something happen.

Mr. CARDOZA. Thank you.

Thank you, Mr. Chairman. Again thank you for the bipartisan cooperation on this.

The CHAIRMAN. Mr. Udall.

Mr. UDALL. Thank you, Mr. Chairman, and thank you, members of the panel, for being here today with us.

Let me direct my first question to Mr. Webster here. Turning to critical habitat, which is the subject of this hearing, protecting and maintaining areas important for manatees, which you described the manatees in your testimony, these areas that are important to maintaining them—grass beds, estuaries and rivers—also benefit

the fishing industry and fishing and other marine and freshwater resources and the tourism industry.

And I understand that tourism is one of the top industries in Florida, comprising 20 percent of the economy, and that in a recent University of Miami study, 92 percent of the tourism industry leaders said they agreed or strongly agreed with the statement that protection of the environmental and cultural resources is necessary for their business. Moreover, according to a 2001 opinion survey, 83 percent of Floridians support increasing the number of manatee sanctuaries and making them off-limits to boats and jet skis.

It seems that the sensible checks and balances in place for manatees protection are a win/win situation all around, supported by Floridians and benefiting both Florida's economy and the environment. Could you give me your thoughts on that? It seems like there is a whole other side here, Mr. Webster, on benefits to the environment, to your industry and economics down there in Florida.

Mr. WEBSTER. Mr. Udall, I disagree with everything you just said. I think most people in the state of Florida, especially those who live in coastal areas, would disagree with it. I can assure you that every member of our association disagrees with it. In fact, the studies that you cite are generally studies that are concluded by groups that do have an interest in environmental stakes—not environmental stakes but environmental law stakes in the state of Florida.

There was, for example, a survey that the Manatee Club did which claimed that homes on slow speed zones would increase in value faster than homes not on slow speed zones. That study was so bad that the county appraisers of various counties in Florida actually spoke out publicly to point out the flaws in the study, yet it is still cited to these days.

As far as protection in Florida, we are all for protection. Unfortunately, what is happening with manatees in Florida is not protection; it is the result of litigation. If we were seriously interested—if Fish and Wildlife Service was seriously interested in saving manatee lives and increasing the size of the herd, they would focus on what their own peer-reviewed literature states is the leading cause of deaths and the number two and number three causes of deaths, and let me outline what those are.

The first—

Mr. UDALL. Let me just take a second here because you mentioned—

Mr. WEBSTER. Am I getting off? Sorry.

Mr. UDALL. You mentioned litigation and you talked about the Federal judge in your statement exercising control over new manatee protection measures. As I understood that case you are talking about, those measures actually came about as a result of a compromise settlement agreement between a broad coalition of conservation and animal protection organizations, the Department of Justice, and major industry groups, including the National Marine Manufacturers Association, the Marina Operators Association of America, and the Marine Industries Association of Florida.

If this settlement agreement was so draconian as you have described, then why was it signed by these four major industry groups? It seems to me that this is good compromise here.

Mr. WEBSTER. Well, the reason it was signed by those groups is that they did not want the agreement, the implementation of the settlement going forward without persons from the other side of the table seeing what was happening in the judge's chambers. I can tell you, knowing personally the people involved in that settlement, that if they had it to do over again today, they would have pressed forward with a lawsuit at that time, rather than a settlement. They themselves as respondents spent $2-3 million in legal fees just to watch the process in a courtroom.

My own organization was not allowed as a respondent and even though the purpose of the settlement agreement ultimately says the final mitigation is to restrict dock-building, there was not a dockbuilder on that panel. Nor was there an active boat organization member on that panel that signed that agreement.

No, we do not think it was a broad coalition or representative of the needs of Florida or the people.

Mr. UDALL. But these are four major industry groups that signed on, that were a part of this court settlement. They all had able counsel. So I just do not see, after they do that and they know the conditions of the settlement, to now rewrite it after the fact I think is a little bit late and it seems to me a little bit disingenuous in a way.

Let me ask Mr. McKeel because I am not sure about—you talk about the two plants that existed out there.

Mr. MCKEEL. Yes.

Mr. UDALL. And the land you were trying to lease was not designated as critical habitat for these endangered plant species, right?

Mr. MCKEEL. They were only listed.

Mr. UDALL. No critical habitat.

Mr. MCKEEL. Yes. I think possibly the pools themselves may have been called critical habitat designated at the time of listing but I am not entirely certain of that fact.

Mr. UDALL. Well, I think they were just listed, that there was no critical habitat designation.

Mr. MCKEEL. All right.

Mr. UDALL. In that case this bill would not apply to that situation at all. This bill is restructuring. It is a procedural bill dealing with critical habitat, so this bill would not have helped your situation.

Mr. MCKEEL. I see that you are referring to the bill as pertaining to critical habitat, yes.

Mr. UDALL. That is what my colleague and friend's piece of legislation does, is restructure critical habitat. Your situation dealt with two plants which were listed but critical habitat was not designated.

Now moving on second on that, as a result of the listing, you then had to participate and get involved in the transplanting of the plants. Is that correct?

Mr. MCKEEL. Well, what transpired is we volunteered to relocate the plants at our expense and through needing wetland permitting,

Section 7 came into play. The Fish and Wildlife Service, after considerable months of negotiation, came back with a jeopardy opinion basically that they wanted them left where they were.

I think the crux of our matter was that plants are treated differently than animals and after we withdrew from the permitting process, the landowner was free to move those plants within certain parameters of the Endangered Species Act and he did so.

Now we maintained to the end that we would have rather had a competent biologist or botanist transplant those species or they could have gone into a heritage program at a botanical garden or something of that nature. What wound up happening was through the adversarial position through the Endangered Species Act and the consultation process, the landowner himself ended up having to move the species on his own.

Mr. UDALL. And today you are, in fact, mining on the property. Is that correct?

Mr. MCKEEL. That is correct.

Mr. UDALL. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Inslee.

Mr. INSLEE. Thank you.

Mr. Walters, I think you have probably heard concerns expressed about the failure of the Administration to act within 3 years to adopt better guidance for the definition of critical habitat and the like. Many of us cannot understand why the Administration has not acted to try to clear up some of these issues by means of rulemaking or guidance. It has been 3 years or more now. Is that a concern that you shared during those 3 years with the Administration?

Mr. WALTERS. Sir, I am not qualified to respond on that at this time. If you will submit those in writing to us, we will respond in writing to you.

Mr. INSLEE. Well, do you think that it would have been helpful for the Administration, instead of sitting on their hands for 3 years, to issue a guidance or rulemaking during that 3-year period?

Mr. WALTERS. Again, sir, I do not know enough about the issue to answer on that.

Mr. INSLEE. Well, let me just explain a little bit to you. The situation here is this statute has been in existence for three decades. In 2001 a court struck down what was going on. A lot of people were urging the agency to issue a rule or a guidance in some sense to try to give property owners some certainty about critical habitat and those who were interested in species recovery, and yet the passage of 3 years goes on and the agency did not give property owners any additional guidance or rulemaking enlightenment at all until today, when we have this hearing. All of a sudden we are told that this guidance is going to pop out this week by some miracle apparently, with no hearings, no testimony, no input by anybody.

Do you think that is a good way to run a railroad?

Mr. WALTERS. Sir, again I heard a lot of testimony today. I hear what you are saying now but I heard testimony from the gentleman that was sitting here on panel one and I am not sure I agree with you.

Mr. INSLEE. Mr. Kelley, I am sorry I did not hear to hear your testimony but I note in your written testimony that you said that "We are concerned that the Service does not have the resources or personnel that would allow them to respond in a timely manner to requests for assistance and permits from public and private stakeholders conducting activities in the salamander habitat area."

Many of us are concerned that the agency has not been given the resources necessary to effectively carry out the statute and here we have efforts to change the statute. Many of us believe that the agency needs more resources so it can do its job, both to recover species and to deal with local concerns that you have expressed eloquently that deal with the difficulties associated with these programs.

Were you aware that this Administration actually wants to cut $10 million out of the recovery budget, planning budget, on a national basis?

Mr. WALTERS. I am not aware that they are proposing to cut their funding. I would say that one of the reasons why, as described in my written testimony, that we have embarked on the local initiative to work with the Service, provide much of the resources that they need, as well as we need to facilitate the conservation strategy that would move into the critical habitat designation is because of that concern that I describe.

I also think that if there is a more succinct definition of creating a recovery plan and a critical habitat at the same time, as the bill is being proposed now, that there may not be as much of a need for the resources within the agency to actually accomplish that.

Mr. INSLEE. Well, let me just ask you would you suggest to the Administration that they revisit the decision to cut this agency $10 million or not?

Mr. WALTERS. Well, I would suggest that they review it. I think that as it relates to all of the activities that they are dealing with throughout the country, we know specifically in our area that we have had to come up with our own resources to try to facilitate accomplishing the needs of our area.

Mr. INSLEE. I think what you are seeing is really a microcosm of what is going on nationally, where the Federal government is reneging on some of its obligation and pushing down these obligations onto local governments. You are not just seeing it here. You are seeing it on a whole host of issues and I think that is regrettable. When you get a chance after you do review it, I hope you will help us get this agency the dollars it needs to get this job done because I think there is a twin need—one, so we can recover species but two, to deal with the clear difficulties that property owners do have in getting these permits processed and getting decisions and having certainty so that they can make decisions. Thank you.

The CHAIRMAN. Mr. Walden.

Mr. WALDEN. Thank you very much, Mr. Chairman.

Mr. Walters, you mentioned in your testimony the problems specific to the economic impact of critical habitat for the pygmy owl and you suggest that no attention was paid to a number of regional impacts. Could you explain for us what some of those impacts would have revealed?

Mr. WALTERS. Sir, the Fish and Wildlife Service's study for the economic impact of the critical habitat for the pygmy owl failed to take into account any effect on the local economy, local governments, or tribes and regional economic impacts. Tax revenues, secondary impacts, and increased housing were all excluded because they were assumed to be minimal.

Mr. WALDEN. They were assumed to be minimal? And what would you think they are?

Mr. WALTERS. Again, sir, I am not qualified to express an opinion on that. I just know what I have been told. The information that was gathered and collected was not these items. I think these items need to be taken into account to really understand the economic impact.

Mr. WALDEN. And they were not?

Mr. WALTERS. They were not.

Mr. WALDEN. Supervisor Kelley, there is a pending May 15 decision regarding the CTS in both Sonoma and Santa Barbara Counties. What would you like to see happen and why?

Mr. KELLEY. Well, I think what we would like to see happen is that the listing be downgraded to threatened, which would open up some different options for those of us that are local property owners, as well as local governments, and that the distinct population designation be eliminated because we do not feel that that has been properly studied or considered.

For those two reasons, it would also allow those of us in local government to deal with some of the infrastructure needs that we had. There was a discussion about the costs. The cost of being in limbo and having to do studies just to get a water line in or to do some maintenance on roads are incredible costs to our local taxpayers.

Mr. WALDEN. I had a forest ranger tell me several years ago she had to do an aquatic study to replace the steps on a fire lookout on top of a hill, a fish study. Now there are not too many walking fish out there, but they still had to go through it.

I think one of the issues that at some point Congress needs to address is the overlapping laws and rules and regulations that we put on your backs and every taxpayer's back just to comply, when we ought to focus on the outcome and the goal, which is to protect species in the best way possible.

I was just reading some of the important points put out in the guidance by the Director today apparently and he says things like, "Accordingly, designation should not detract from other conservation efforts that provide greater species benefits." That seems pretty logical guidance. I am actually sort of surprised we have to tell people that.

"Critical habitat designation should not be based on speculation or determinations that lack supporting data." I mean this is the guidance we are hearing so much about. It seems pretty reasonable. "And do not designate critical habitat where existing management or protection measures adequately conserve essential habitat and those measures are likely to continue for the foreseeable future. Protected lands, such as state and national parks, wildlife refuges, national forests, et cetera, are examples of areas that may not need special management or protection."

Are those things that you all agree make sense in terms of guidance and common sense?

Mr. KELLEY. It sure makes a lot of sense and I think there is a lot of common sense to be said that especially for local jurisdictions and local governments that already have property set aside for certain conservation activities that could be used for these activities, as well, thereby obviating the need to impact many of the other infrastructure projects that we have. It makes eminent sense.

Mr. WALDEN. You know, there is another issue that comes up and that is this issue of habitat conservation plans. I know landowners are encouraged to enter into that when half the habitat out there is in private hands. If we are trying going to have a government/private landowner partnership for the benefit of the species, then you have to be able to cooperatively involve private landowners. And it seems to me when you have CHPs in place, those ought to be good and the government should not come back and ask for another bite at the apple.

Do you concur with that? Am I missing something here?

Mr. KELLEY. I would completely concur with that. I think that the issue that we have here and one of the reasons why I think it is so important that providing the road map to recovery and delisting of species is that when you have that road map to recovery and a conservation strategy, then people know what they are actually paying for and they know what they are going to accomplish by paying for that.

The current system has a black hole of dollars and the more dollars you spend, the less you know how much you have to spend in the future and it is kind of once you are in the system or in the maze, there is no road map out. That is one reason why we in local government are serious about wanting the road map and that is one of the reasons why the bill that is before us today would provide that.

Mr. WALDEN. You will especially like this, then. Part of their guidance also says, "Working with landowners, local governments, states and tribes on a voluntary partnership basis often provides conservation benefits superior to the designation of critical habitat."

And finally, there are others here in terms of the guidance. "Complete and accurate administrative records are essential to the process of critical habitat designations."

Now whether this was done in a very bureaucratic way or simply done, the important thing is I think it makes sense what the Administration is suggesting as guidance to the people making these decisions. Use common sense, work with local governments, believe somebody outside of this imperial place back here may have a lick of common sense that might help in recovering a species and protecting habitat in a meaningful way.

Mr. KELLEY. I would concur, Mr. Congressman, and I think, as you will see in my written testimony, the activities that we in Sonoma County have done in some ways are patterned after what those guidelines sound like are being laid out.

Mr. WALDEN. Thank you.

And thank you for your indulgence, Mr. Chairman.

The CHAIRMAN. Thank you.

A couple of points before I get to my questions. One of the things that has been repeatedly brought up during this hearing is that one part of Fish and Wildlife's budget has been cut and I think in full disclosure it should be noted that the Administration's request for Fish and Wildlife Service increases spending by over $60 for Fish and Wildlife Service and their request, while I do not completely agree with where they put all their money, but their request is a response to and reaction to, I believe, a lot of the litigation that has occurred over the past several years where they are trying to shift money to respond to areas where they are being sued and to be able to have money in those accounts.

Just so that no one walks away from this hearing with the idea that we are somehow cutting Fish and Wildlife Service's budget, the request was an additional $60.3 million, a 3 percent increase into Fish and Wildlife's budget.

In terms of the impact that this has had on local government, we have two members of boards of supervisors that testified as part of this panel. I am obviously familiar with both of your areas and I think this is something that a lot of times Congress misses in terms of the overall impact of what we are doing and what it does to real people out there that are trying to live under this Act.

Supervisor Crookham, I can tell you in your answers to Mr. Cardoza you talked about what the impact is of private property owners. If you happen to have a farm, what happens? Can you build a new corral? Can you build a fence? Can you do all of that?

In my area one of my constituents had grazing land, irrigated pasture land, and wanted to shift from a cattle-based operation to planting vineyards. That was considered a conversion to development by the Fish and Wildlife Service and in order for him to accomplish that he would have had to give up over half of his property to Fish and Wildlife Service as mitigation for being able to plant grapes on the rest of his property. They considered that a conversion to development, as if someone was coming in and building houses on this property.

As you know, things are not always good in the cattle business and sometimes you want to do something else that you might make enough money to pay your taxes and this gentleman ultimately ended up having to sell the place because he could not afford to keep it.

Ms. CROOKHAM. We actually have horror stories very much the same as yours in our county and I think that is one of the things that gets so confusing about all of these regulations when people really wish to do a higher and better use of land and then it is called conversion or it is called a development and it really is not. It is just a way of actually increasing the revenue.

And when we talk about how that affects us economically, it does. It affects the person who is trying to make the change. We lose tax dollars, revenue dollars coming back to us. It really needs to be overhauled and I am just so glad that you are looking at it at this point. I probably am not the most objective person when it comes to talking about it.

The CHAIRMAN. Well, I do not think anybody that is testifying is totally objective here. Everybody that is here has an opinion and that is why they are here. It is people that have had to live with

this Act and have had to go through the struggles of trying to comply with it. I think it is important to hear from all of you.

One interesting thing with the fairy shrimp was that when that was originally listed, you were not considered habitat. The only place they looked at was further north in California and if you go back at all of the so-called science that was done on the listing of the fairy shrimp, you were not part of that. It was only after it was listed that they discovered that you were critical habitat.

Ms. CROOKHAM. Right, and as a response to a lawsuit, like most of these things are; then it came into play. Then there was this quick time line and all these things that happened. You are right, totally right.

The CHAIRMAN. One interesting thing about this legislation and the attempt that is being made by Mr. Cardoza here is that it is something that we have seen repeatedly. You are seeing it firsthand but when something is listed as endangered, it is done with incomplete information that causes it to be listed as endangered and Fish and Wildlife is making the decision based on what is incomplete science. They list it and then they go through the process of critical habitat and adopting a recovery plan and all of that and it is at that point that they discover that the species is much more common than it was when it was listed and we go through all the trials and tribulations of trying to manage what is then considered critical habitat.

I found it interesting to hear you talk about land that was developed that was included as critical habitat. In my area we have other endangered species that had court-ordered maps that were listed. In one instance we had a city of over 40,000 people that almost the entire city was included as critical habitat and different things like that where I believe they just looked at a map and decided well, we will just go around all these different areas without ever actually looking at what was on the ground.

For the red-legged frog we had areas that are dry creek beds but on the map it says that it is a creek and it never has water in it. It is just a dry creek bed. When we get a 100-year flood action there might be some water going through there but normally there is no water in there and being from the Central Valley, you are fully aware of how hot it gets in these dry creek beds and to consider that habitat for a frog is pretty outrageous but that is what they did.

I know when it comes to fairy shrimp, which I have fairy shrimp in my district, as well, that a lot of the areas that were considered habitat, if anybody had ever actually looked at them they would know that it was not habitat, that the map did not actually fit, but that is the way it resulted.

I appreciate the testimony of this panel. It was very informative. It is something that not only helps us with this legislation but I think gives us the ability to go back to the Administration and ask some questions about decisions that are being made and what those decisions are based on.

Mr. Walden has legislation dealing with the science that is used in this whole process that I am very interested in looking at and hopefully being able to move forward on, along with the legislation that Mr. Cardoza put in. I think if we look at those two areas we

can have some kind of broad consensus that we can move forward and really start to bring some common sense to the way this law is being implemented out in the real world. I mean we can say all we want back here in these buildings but truth of the matter is it is you people that have to live with it every day.

Mr. CARDOZA. Mr. Chairman?

The CHAIRMAN. Mr. Cardoza?

Mr. CARDOZA. Would you yield for a comment on your colloquy?

The CHAIRMAN. Sure.

Mr. CARDOZA. There are two points I would like to raise. First of all, the comments by Ms. Crookham about the real impacts on individuals because it is widely circulated when these designations are made that there are no impacts on current landowners. That is true if you do not ever want to change anything on your property. The minute you want to change something there are significant and costly impacts to your property, as well as there may be a chilling effect on the value of your property because if you want to sell the property for another use, someone who is purchasing it may very well not purchase it for the same price.

The second point is the notice provision. All this happens to you without any requirement for the Federal government to give you notice that they are doing something to your property and to the value of your asset. And while we did not include that in this bill, it may be something that the Committee needs to think about as we go forward. The Fish and Wildlife Service has indicated privately that that is awfully expensive and that they are already short of funds, but the reality is to take someone's property or affect someone's property without any formal notice is something that I think is foreign to our way of government and I just wanted to raise those two issues.

The CHAIRMAN. I think both of those are extremely important points. Your last point in terms of notice is something that I have been working on for a number of years in terms of how do we do this and there are two real issues. One is notifying the affected property owners that their property is going to be considered critical habitat and two is what restrictions are going to be placed on them because right now they really do not know and no one tells them what restrictions are going to be placed on them.

I think those two issues probably would go a long way in removing some of the fear and concern that property owners have because it would get it all out in the open as to exactly what restrictions would be placed on their property.

So I want to thank this panel very much for your testimony. It is very worthwhile that you were here. Thank you.

I would like to call up the fourth panel—Michael Doebley, Michael F. Martini, Joni L. Gray and Joseph K. Sheldon.

Before we begin with this panel I want to thank you. I know this has been a very long day and you have all been waiting for the opportunity to testify, so I appreciate you all being here and your patience with the Committee.

Mr. Doebley, we are going to begin with you.

STATEMENT OF MICHAEL DOEBLEY, DEPUTY DIRECTOR FOR GOVERNMENT AFFAIRS, RECREATIONAL FISHING ALLIANCE

Mr. DOEBLEY. Thank you, Mr. Chairman and members of the Committee. My name is Michael Doebley. I am the Deputy Director, Government Affairs, for the Recreational Fishing Alliance. RFA is a national grassroots organization representing over 75,000 marine recreational fishermen and the recreational fishing industry on marine fisheries issues. Our mission statement is to safeguard the rights of saltwater anglers, protect marine jobs, and assure the long-term sustainability of our nation's saltwater fisheries.

I am here today very pleased to speak in favor of H.R. 2933, the Critical Habitat Reform Act. There have been a great number of individuals here today who know so much more about the technicalities of the Act. I really wanted to just let you know some of the perspectives and real-world impacts on marine recreational anglers.

One of the biggest issues in the country right now, as you have heard from Mr. Webster, regards how they went about designating critical habitat for manatees in Florida. It was this committee, through the Atlantic Coastal Act of 1933 and the Sustainable Fisheries Act of 1996, that we now see our nation's saltwater fisheries rebuilding and because of that, Florida enjoys some world-class recreational fisheries. People come from everywhere to go fishing there.

The problem they are running into is a problem of access and the access is being denied because of the critical habitat provisions, these no-speed zones for manatees where you have to go a slow or idle speed. First, folks cannot put in the private docks, as Mr. Webster pointed out. But even if they can have the private dock, what used to be perhaps a 15-minute run to the ocean to get to the fishing grounds is now taking over 2 hours.

One of the things that all or most saltwater anglers like to do is you always try to find that little trip that you can sneak in in the morning or at night before work, after work, before you have time with the family or whatever obligations you may have. Going from a 15-minute run to a 2-hour run, it takes you right out of it. Forget it. That is longer than the amount of time you had to maybe get down and run a line. So there is a definite impact on the quality of life there.

Ramp access. Without the private docks and you have to use a ramp, well, ramps are becoming crowded and because of this designation you cannot build new ramps, so the line is so long again you lose the time and some folks cannot use a ramp or launched boat. They either getting older, they have a disability. It is always a dicey proposition, multiple-person operation to get that done. Again access is being denied. So this has become a real problem for us.

There is another example that was brought to my attention by one of our members who heard that I was going to be here today and this deals with piping plowbird habitat. This is a shorebird. It is a shore nesting bird. They are endangered. I do not think there is any question about that. What happens is in many parts of the East Coast piping plowbird arrives in the spring and they set up

a nest literally on the beach. They lay their eggs on the beach. So many areas have been designated critical habitat.

Now the anglers are prohibited from going there for that particular fishing season while the birds are present and we are acceptable to that. We want to preserve the species. But within the first few weeks of those birds showing up, the biologists can go out and determine whether or not those birds are actually present that year.

Some years they go to the critical habitat areas. Being migratory, they go as far as South America. Some years they choose another beach. It would be very easy for the government to go out and look at the beach and say "No birds" and let us on. Instead, those areas are closed year after year after year and we are losing the six best months of the year from May through September-October. So that is just another one of those real-world applications.

Recreational fishing is a huge business. We are talking about over 16 million participants in this country, about $60 billion of activity, hundreds of thousands of jobs. It sounds impressive but it is, as Mr. Webster pointed out, it is as business of small margins, slim profit margins, and any of these actions that are taken without good science and a sound policy certainly have an impact and lead to the loss of jobs, loss of businesses, and again the loss of our quality of life.

We have a tradition of conservation going back over 100 years. We are very proud of that. But we would also like to see a little bit more common sense brought in to how these designations are made and we will be the greatest partners out there for conservation but there is a lot of frustration, especially when we lose access because of the law, and that needs some amendments and being reformed.

So thank you again, Mr. Chairman and members of the Committee, and I will try to answer any questions you may have.

[The prepared statement of Mr. Doebley follows:]

Statement of Michael Doebley, Deputy Director for Government Affairs, Recreational Fishing Alliance

My name is Michael Doebley and I am Deputy Director for Government Affairs for the Recreational Fishing Alliance (RFA). The RFA is a national, grassroots political action organization representing over 75,000 recreational fishermen and the recreational fishing industry on marine fisheries issues. The RFA Mission is to safeguard the rights of saltwater anglers, protect marine, boat and tackle industry jobs, and ensure the long-term sustainability of our Nation's saltwater fisheries. I am pleased to be here to speak in support of the Critical Habitat Reform Act of 2003.

There are numerous individuals here today who can go into great technical detail regarding how the current process of designating critical manatee habitat is fundamentally flawed and restrictions placed on boaters causes unnecessary economic damage to a variety of fishing-related industries such as dock builders, has a negative impact on our members' quality of life, and in some cases may actually cause biological harm to the animals that the designation was intended to protect. The process for designating critical habitat cries out for reform.

Recreational fishing in Florida is enjoyed by 2.5 million people, accounts for almost $3 billion in economic activity and provides about 60,000 jobs. Please understand that while the raw numbers regarding economic activity are huge, recreational fishing support industries are often small businesses with slim profit margins. Even seemingly innocuous rules can lead to the loss of businesses and a way of life.

With the reforms brought to fisheries management that were championed by this Committee such as the Sustainable Fisheries Act of 1996, the Atlantic Coastal Cooperative Fisheries Act of 1993, and steps taken by the State of Florida, Florida now

enjoys truly world-class recreational fisheries. Yet access to these fisheries is for all purposes being denied to many anglers by the current system of designation of critical habitat.

I offer to you some every day, real world scenarios of how the designation of manatee critical habitat areas negatively impacts recreational anglers and the industries they support.

An all-too-common situation is that in the name of manatee protection, the necessary permits for homeowners to install a private dock are denied. Slips in marinas are often at a price that is out of reach of many fishermen. Due to advancing age or disabilities, launching a trailer boat is simply not an option for many recreational anglers. The denial of a permit to build a private dock for all practical purposes effectively denies many anglers access to fishing grounds.

If an angler is capable of launching a trailer boat, they are increasingly finding that there is not a ramp in their area or an adequate number of public ramps available. The same permits that are necessary for the construction of a private dock are needed for a public ramp. These permits are being denied for the same reasons. Again, for all practical purposes, denying anglers access to the fishing grounds.

Once in the water, recreational anglers often find themselves in an area designated as critical manatee habitat despite the fact that these areas were the creation of man. Boat speed must be kept to a slow or idle speed over long distances. As you know, in today's world the most precious commodity most of us have is free time. Many recreational anglers enjoy a quick early morning or evening fishing trip squeezed in around work or other obligations that take up the majority of their day. These trips have been effectively eliminated by the use of slow or idle speed manatee zones. In many parts of Florida, what was once a brief run to fishing grounds of about 15 minutes, can now take up to two hours. The simple act of reaching the fishing grounds can now take longer than the amount of time available for the entire trip. What was once the most enjoyable part of the day is being effectively lost for the angler. The denial of access of course has an impact on the industry that recreational anglers support. Bait and tackle shops suffer, boats are not built, and jobs are lost or simply not created.

Recreational anglers have a history of seeking the conservation of marine resources which dates back over 100 years. We are very proud of this tradition. Yet sound conservation also requires a dose of common sense and the need to consider man and his role in the marine ecosystem. In the case of designating critical habitat for manatees, we believe a well-intentioned law has become so distorted that it does nothing to offer any real protection for manatees and is ruinous for our members.

Thus, we respectfully request your full support for H.R. 2933 and help put an end to the manatee madness, and to clarify the law so it more closely resembles the original intent of Congress.

The CHAIRMAN. Well, thank you very much.

Mr. Martini?

STATEMENT OF MICHAEL F. MARTINI, COUNCIL MEMBER, CITY OF SANTA ROSA, CALIFORNIA

Mr. MARTINI. Good afternoon, Mr. Chairman and members of the Resource Committee. My name is Mike Martini and I serve on the City Council for the City of Santa Rosa and I am very happy to be here today to allow me to discuss some of the impacts the listing of the California tiger salamander has had on our communities. My written testimony is before you so I will abbreviate my comments in the interest of time.

It is interesting to me that Santa Rosa shares with this committee a lot of the values that have been discussed throughout this hearing today. Its citizens embrace the preservation of resources, the cessation of sprawl and the protection of the environment, so much so that every single municipality in Sonoma County has adopted voter-approved urban growth boundaries. In addition, as Supervisor Kelley pointed out, we have a voter-approved quarter-cent sales tax for the acquisition and protection of open space. Millions of dollars are used each year for the public acquisition of com-

munity separators, agricultural lands, habitat preservation, and restoration.

And it would be safe to say that if a poll was taken of the citizens of the City of Santa Rosa, similar to what was discussed earlier today, that the vast majority of its citizens would support the Endangered Species Act. But as Rosanna Rosanna Dana often would say, it is always something.

And it is not just the Endangered Species Act. It is the interaction of the Endangered Species Act with the other public policy decisions that we make that cause local government consternation. A couple of examples.

A lot of conversation today was around housing but by imposing voter-approved urban growth boundaries, we have set aside, we have made a statement in our general plans where we expect to see urban growth and where we expect to see the urban separators, where we expect to see agriculture.

The listing of the tiger salamander overlays one quarter of the area of the City of Santa Rosa, which is earmarked in our general plans for our future growth and the studies that are required because of that listing are easily adding $20-30,000 per finished house and that does not count in any mitigation for the loss of habitat.

Santa Rosa shares with the Chairman's district in terms of the cost of housing. It is quite high in Sonoma County and that is great news to our homeowners but it is very difficult news to our children, who can no longer buy a home in the town that they grew up in. And as a parent of a 20-year-old, I am beginning to think he may never move out of the house.

Another example where we have come in conflict is in our waste-water treatment. Santa Rosa, in cooperation with the county and working with the listing of the endangered species in the Russian River of coho salmon and steelhead, we have tried to modify the flow of waste-water into the river. We treat the water to an advanced tertiary-treated level. We ship it 42 miles up to a steam field and generate green energy out of about half of it and the other half is used for agricultural irrigation and this has proven to be a wonderful support for agriculture in our area, maintaining an economic balance, but it requires storage because, as you may know, agriculture does not need water all year long.

The expansion of this system would require additional storage and the listing of the tiger salamander is going to have a significant impact on that and has already forced us to spend thousands of dollars in studies.

Transportation is another area that I identify in my written testimony. Homeless shelters is another area that I identify in my testimony, as well as sewer lines.

But I think what is really important is coming here today, I am encouraged that this committee is taking a look at the Endangered Species Act and how it does not act in a vacuum. I am very encouraged that you are considering the legislation that is being proposed. And most importantly, I am encouraged that Mr. Wayne White of the regional office for Fish and Wildlife Service is working closely with the city and private property owners, as well as the environmental community, to come up with a conservation plan so

we are not dealing with this on a piece-by-piece basis but we are actually doing something about the recovery of a species, as opposed to just studying it to death. Thank you very much.

[The prepared statement of Mr. Martini follows:]

Statement of Michael F. Martini, Council Member, Santa Rosa, California

Good afternoon, Mr. Chairman and Members of the Resource Committee. My name is Mike Martini and I have the honor of being the past Mayor and current Council Member for the City of Santa Rosa, California. I am pleased to be here today with other elected representatives from Santa Barbara and Sonoma Counties. We appreciate the time allowed to discuss the impacts of the listing of the California Tiger Salamander on our communities.

Santa Rosa, along with the entire County of Sonoma, is very much like any other community in California. Its citizens embrace the preservation of resources, the cessation of sprawl and the protection of the environment. So much so that every city in the county has voter-approved Urban Growth Boundaries. The citizens have also voted in a quarter-cent sales tax to protect open space. Millions of dollars are used each year for public acquisition of community separators, agricultural lands, and habitat preservation and restoration.

It would be safe to say that the majority of Santa Rosa citizens support the spirit of the Endangered Species Act.

This sense of preservation along with a healthy and balanced economy and a wonderful climate have resulted in Santa Rosa being named as one of the most desirable places to live!

As wonderful as it is, it is not without its problems. We in local government struggle to provide necessary services in the face of shrinking budgets and increasing regulation.

The character Rosanna Rosanna Dana was correct—it is always something.

We as elected officials do a great job when we focus on a problem but all too often as we focus on one solution we neglect how it impacts other actions we have taken. This is where we find ourselves with the listing of the California Tiger Salamander.

In Sonoma County, the United States Fish and Wildlife Service included in the potential geographic range of the salamander approximately 50,000 acres—an area of the county that is about 21 miles by 7 miles across at the widest point. This includes major areas of planned development for the cities of Santa Rosa, Rohnert Park and Cotati. The growth projected for these areas represents 65% of the county's future planned residential growth. Most of the City of Santa Rosa's affordable housing units are slated for this area. Further, it impacts development of more than 15,000 housing units and several million square feet of nonresidential development.

In addition to creating problems for private landowners looking to develop their lands, the listing has had an impact on the city and county's infrastructure needs.

The Santa Rosa Subregional Water Reclamation System serves 200,000 residents of central Sonoma County. The Santa Rosa system treats wastewater to an advanced tertiary level and recycles 80 percent, twenty five percent for irrigation of agricultural lands, currently identified within the salamander range. Continuation and expansion of this system is threatened by the listing of the salamander. It has added considerable costs in studies as construction of additional storage ponds and irrigation of agricultural lands are not consistent with CTS habitat conservation under the current regulatory environment. Application of the Services' current regulatory approach jeopardizes the sub-regional water recycling system. Should the Service conclude that continued irrigation is not permitted; the system would need to be replaced at a cost of $200 million or about $5,000 per household. Ironically, this system was devised to respond to the need to minimize diversion of waters from salmon habitats used for irrigation. A further irony is that agriculture assured preservation of open space that the salamander currently relies upon, and now the ESA threatens agriculture.

Affordable housing is another issue that has been negatively impacted by the listing. Santa Rosa, as is true with most cities throughout California, has struggled with providing affordable housing to its citizens. Strong demand with limited supply has resulted in a very high cost of housing. Santa Rosa has now topped $465,000 as its median housing price. This is great news for those who are fortunate to own their own homes but has made it extremely difficult for children to settle down in the town where they grew up. It puts great demands on our transportation infrastructure as service employees are forced to live far from their jobs. Most affordable

housing—i.e., workforce housing that allows some of the communities most valued citizens: our teachers, police officers and firefighters, access to the dream of buying a home—was planned for the most impacted area. That dream appears more difficult to achieve as it is estimated that as a result of the CTS alone, the cost of a single housing unit will increase by $30,000. This lack of affordability has exacerbated a homeless problem.

Transportation Infrastructure, specifically the only freeway through our county (Highway 101) project is another challenge. In Sonoma County, we are working to expand the major artery within its existing boundaries. The 101-impacted area is 21 miles running north to south. As a result of the listing, highway safety projects reliant on federal money are forced to spend what scarce dollars they have on studies that will likely delay the projects while using up precious resources: This results in a public safety issue as well.

The City of Rohnert Park's main sewage line is nearing its capacity. Until expansion of the sewer line, the City will not be able to implement its General Plan. Line construction could mean costly surveys to determine absence/presence of salamander. Perhaps more challenging than the actual cost of the surveys is the environmental risks of delays. We already know that the CTS is present and the City is prepared to do what is necessary to prevent impacts to the species. The City is counting on having the new line operational in 2006, which, given current protocol procedures, is impossible. The City of Rohnert Park is in the process of reviewing applications of five future Specific Plan Areas. Development within these Areas will require construction of a new sewer main to the subregional treatment facility. The alignment goes through the center of tiger salamander habitat. If the City were to follow the current protocol it would need to conduct two years of surveys to determine absence or presence of salamanders before expanding the line. We know that salamanders are present. Currently, surveys are predicted to cost $450,000. This does not include the cost of mitigation.

Application of the Services' current regulatory approach jeopardizes our ability to provide for the neediest in our community. The City sought to convert an existing building to a homeless shelter in an underserved part of the community. The building is being acquired from GSA under the California Desert Act, paying full value to allow additional uses of community center and public safety training. These components are needed to respond to neighborhood needs and concerns about a homeless shelter. The listing of the salamander triggered the need under the California Environmental Quality Act for an environmental impact report adding costs to the already underfunded project. To avoid these costs, the City substantially reduced the scope of the project. Instead of providing a police outreach station, day care facilities and playground for children of homeless families at the homeless shelter, these important project elements were postponed for the necessary review even though more than 10 acres of the 12.5 acre parcel was being set aside as habitat. Fortunately, the City is moving forward to convert the existing building to an 80-bed shelter with the addition of the other components as the process is worked out.

We are willing to accept responsibility for addressing these challenges, however, we are unable to effectively do so without active participation from the Fish and Wildlife Service. Since the listing the City, County and private stakeholders have made many attempts at working with the Service to craft policies and procedures that would ameliorate the concerns of all impacted.

We discovered that the Service had few resources and limited personnel. The Service lacks key information and staff resources to make decisions that have long-lasting impacts on the economy and on the environment. For example:

The Service lacks the personnel to respond to project review requests in a timely fashion. An example involves a stakeholder requesting an initial consultation on a 6-acre parcel as required by law. The Service told the stakeholder that staff would be available to meet nine months after the initial request.

Field survey requirements have been inconsistently applied to landowners as a condition of property development. Where required, the surveys can cost in excess of $180,000 for a ten-acre parcel per year for two years. Total cost for surveys on what is designated potential habitat on private land over the last two years has easily exceed several million dollars. In the case of my City, we spent this last winter $600,000 on a study that has not been approved. If the full survey protocol is required next winter it will cost up to $8 million dollars to comply with Service survey protocols. The Service lacks the resources to develop criteria for the appropriate geographic boundaries for the salamander habitat. The result is hundreds of thousands of dollars are spent on what may very well be unnecessary surveys.

Due to lack of information and resources, different Service staff makes inconsistent determinations about the potential of a proposed project to adversely affect salamander habitat or actual salamanders. Projects are denied or approved on a

case-by-case basis. If a conservation plan and a recovery strategy had been developed, we would be conserving the species, and not abusing the regulated community with unnecessary economic hardship.

In summary, the Service, which is required under the Act to base its decisions on "best available science," instead defines the needs of the salamander on a project-by-project basis.

Perhaps our experiences in Sonoma County can serve to bring about much needed changes in the current process. We are relying on the success of the "conservation team" strategy that Wayne White of the Sacramento Office of the Fish and Wildlife Service has supported putting in place.

This team should serve as an example of how regulators and the regulated community can work together to ensure success in meeting the demands of the Endangered Species Act as well as the needs of the impacted human population. The process should be encouraged and supported: Perhaps with the assistance of our Congressional Members, and more specifically this Committee, we can continue to work together for the betterment of all concerned.

As Supervisor Kelley has pointed out, our efforts are consistent and supportive of the components contained in Congressman Cardoza's legislation.

I would like to thank the Committee again for the opportunity to testify today on this important issue. I would be happy, at this time, to answer any questions Members of the Committee may have.

[Mr. Martini's response to questions submitted for the record follows:]

Response to questions submitted for the record by Michael F. Martini, Council Member, City of Santa Rosa, California

Questions from Chairman Richard Pombo

1) Council Member Martini, in reading through your testimony, it sounds like you are seeing inconsistent decisions from staff biologists.

- **Is that the case?**

There are times when this is indeed the case.

- **Do you have examples?**

Yes, several. One specific example is as follows: I have a constituent who has a parcel of land already graded, curbs in place, gutters and lights on site. Additionally, the site had two large commercial buildings. This individual provided letters from California Department of Fish & Game and a local Biologist, permitted to survey for CTS, indicating absence of breeding and aestivation habitat. An absence determination was due to current ground disturbance and a creek that separated the parcel from any known CTS sitings. He sought a letter of "Not Likely to Adversely Affect" from the Service and was rejected. The letter indicated that the current development of the parcel did not preclude the site from serving as aestivation habitat.

However, a parcel several blocks from the site, completely undeveloped, was given a "No Effect" letter from the Service. The reasons for issuing a "No Effect": "buildings and storage units would severely limit dispersal to the project site from the south...In addition. Roads, curbs and a perennial stream presented a severe impediment to dispersal from the northwest." (The perennial stream is the same creek that borders the aforementioned property).

- **And, why do you think that is the case?**

I think that not enough biological information existed that clearly defined CTS habitat. Additionally, the FWS did not have clear policies and procedures relevant to such requests for "No Effect" determinations. Combined, these allowed for broad and subjective interpretation from individual staff Biologists.

2) We have heard that federal agencies could do a better job when it comes to informing communities of critical habitat designations. Communities deserve to be partners in this process.

There are also instances where it is unclear how the federal agency determined critical habitat.

Example: The Final Rule for Santa Ana sucker critical habitat is based on two "personal communications" between with biologists and that nearby communities were not informed of these communications.

- **Will the bill improve cooperation and coordination with local governments?**

Yes, I believe that it will. The current "team" in place in Sonoma County includes a local government representative. She has a voice in what will be needed to recover

the species on the Santa Rosa Plain. Consistent with that need, the local government representative is intimately familiar with current conservation plans and regionally protected properties. These areas should be excluded from Critical Habitat designation, but included, where appropriate, in what is required to "recover" the species.

By sharing information, the local jurisdictions can do away with costly and duplicative efforts. This would save time and money—valuable resources to all parties. Information shared would include potential economic impacts. Any conservation requirements should be delineated in detail from shared information.

The CHAIRMAN. Thank you.

Miss Gray?

STATEMENT OF JONI L. GRAY, DISTRICT 4 COUNTY SUPERVISOR, SANTA BARBARA COUNTY BOARD OF SUPERVISORS, SANTA BARBARA, CALIFORNIA

Ms. GRAY. Thank you and it is always a pleasure to follow someone with the name Martini in the afternoon. And I wanted to particularly thank the members of Congress who are here to chat with us today and hear what we have to say.

I am from a district called Santa Barbara County but I am from the north end, so my district is more like Chairman Pombo's and The Honorable Mr. Cardoza. So it is great to be here. I am very impressed with the bipartisan support.

My county is made up of about 400,000 people. My district is 80,000 and I represent the district that is the most ag-oriented district.

As a local official I work with mayors, city council members. In fact, I have City Councilmember Alice Patino here with me from the City of Santa Maria. I work with school trustees, work with special district members, and we all take this responsibility very, very seriously, as you do. And given the responsibility that we have to meet the challenges of providing for our communities with these very limited resources that we have, we have to, and you know—I have heard it all morning and I am so appreciative of this. I have learned more by sitting here than I could ever have imagined. You guys really know a whole heck of a lot, so that is encouraging. I want to thank you.

But we want balance, so I am going to give you my story, not just my story but the story of what happened in Santa Barbara County. On January 19, 2000, the United States Fish and Wildlife Service in an emergency rulemaking listed a subset of the California tiger salamander species in Santa Barbara County as an endangered distinct population segment. The rulemaking became final January 2001. Now true, there are disagreements as to whether it is scientific, whether it is right, whether it is wrong, but as a public servant, I, my fellow mayors, city council people, school trustees, we have to work with that.

Now some of the impacts that you heard today, because everyone has much more of an ability to tell you this than I do, have talked about the things. In my district we have had a delay on a project to build a food bank. No, you cannot build a food bank because there might be a red-legged frog there. We have a 6-month delay on an animal shelter, a shelter that would stop the euthanasia of animals, because the tiger salamander might live there.

We have had tremendous problems with attracting new business. There is delay in both residential and industrial construction. There is delay in the needed infrastructure, such as roads, flood control, water, sewer, all those types of things, and this has greatly impacted our ability to provide affordable housing, housing for those children that need to move out. This guy has one that is 30 years old, so the story is going to get worse as we go along here. We also have delays on our high schools. We cannot build high schools because there is a problem.

The salamander is probably thank you to my district. One of my friends who has lived on a ranch for many, many years tells her daughter, "Would it not be a great idea to study this little yellow and black lizard that has been on our ranch for I know 100 years?" Daughter and mom start digging around. They are finding things. They are talking to—whoops, the mistake—a UCSB scientist. So from that point forward she is now in a heated controversy over the protection of the tiger salamander.

Well, Mrs. Sainz—her name is Janette Sainz—thought this is a challenge. I will just give them some property and that tiger salamander can go live there. California Department of Fish and Game said great idea; let us do that. They decided we are all ready to go forward, we are going to plant grapes, we are going to change this property. Whoops, the Fish and Wildlife Service came in and said not acceptable.

So Mrs. Sainz, the winery, and Mrs. Sainz's daughter have now caused a problem and no one has the answer. That is what all of you have said today that is the single most important thing.

Let me move along. There are thousands of people in my community that would like very much to coexist and get along and do what the plan is if they knew the plan or if they were included in the plan.

It really came down on my community this January 22. The United States Fish and Wildlife Service proposed 14,000 acres of critical habitat for the protection of the tiger salamander in northern Santa Barbara County. The proposal was totally prepared by scientists that were chosen by the Service who met privately—underline that word privately. Their meetings with what they call stakeholders—that is us ordinary people—only occurred once in a very, very limited amount of time.

Once they decided to publish the proposal, they announced that there would be a meeting. Now they did not notify the county and they did not notify city officials, but they said there would be a meeting and the meeting only identified the 14,000 acres.

Now it was not until the day of that meeting, which was March 10, when my constituents, government representatives, raised their voices so strongly and so angrily that the Fish and Wildlife has now scheduled another hearing for May 11 where there will be a public hearing and we can talk about it.

In a way, we are the reverse of Sonoma County because first they drew the map, then they whispered around about what was—they, meaning the Department of Fish and Wildlife—then finally, they talked to us. And what causes that problem is that people become so angry.

I am going to hurry along and I would like to thank Paul Henson, the assistant manager of the Sacramento office, and Diane Noda in the Department of Fish and Wildlife. They are finally recognizing that it is going to be a problem for us.

I want to thank Congressman Cardoza because I think if his bill would have been in place, critical habitat designation would be made concurrent with the recovery plan. Properties that are a part of a conservation plan already in effect or protected by another state agency would be excluded. Darwin and Janette Sainz could plant their grapes and the salamander could have protection. At the time the critical habitat is designated, economic impacts would be considered. Then the affected jurisdictions, with few resources available to deal with this listing, could be adequately noticed and we would not have our constituents rising up screaming and yelling and having a fit.

It was interesting; the gentleman from Washington talked about why had not Mr. Manson, who was sitting this seat, done something sooner. In my experience he has. Three years ago, prior to his taking over the administration of Fish and Wildlife, we could not get answers, we could not get responses, we could not even get a no, we could not get a yes. We could maybe get a maybe but the maybe changed 2 weeks later.

So all we are asking for is a plan and I think that is what all of you are attempting to do. The public needs to know. Just give us the plan and we will do it.

Thank you so much, Chairman, for letting me be here and I admire your effort.

[The prepared statement of Ms. Gray follows:]

Statement of Joni L. Gray, 4th District Supervisor, Santa Barbara County, California

I am grateful to have the opportunity to testify on H.R. 2933, sponsored by a member of my State's Congressional delegation, The Honorable Dennis Cardoza. I am encouraged that the legislation has received bipartisan support. My name is Joni Gray, and I represent the 4th Supervisorial District of Santa Barbara County. I was born and raised in Orcutt, a small community within my district. I attended Santa Maria Public Schools, and earned my Bachelor's of Science and Master's Degree in Education at Cal Poly, San Luis Obispo. I hold teaching credentials in Secondary Education, Adult Education, Counseling and Guidance and in General Administration. Additionally, I am a member of the Family Law and Taxation Sections of the State Bar of California. For many years I worked in the classroom teaching at Santa Maria High School, and later at Allan Hancock Community College. I subsequently practiced law. Those experiences provided me a unique insight into the workings of public agencies and how they can best serve community needs.

In August of 1998, I was appointed by Governor Pete Wilson to serve as the Fourth District Supervisor for Santa Barbara County. In November 1998, I won the seat in the General Election and have continued to serve as Fourth District Supervisor since that time. Before taking office, I served as Chairperson of the Santa Barbara County Planning Commission. Today, I sit on many community organization Boards as well. These years of public and private service have inspired a deep commitment to address the concerns of the people who have been my friends and family all of my life. That commitment takes on additional significance, as I present them to this elected body today.

As a locally elected official, I take my responsibility to these people very seriously: a responsibility that proves challenging as we attempt to meet the varied and many needs within the community with increasingly limited resources. I have learned that no matter what we do, or how hard we work, we will never be able to address individual needs without considering where they fall into the larger picture of community needs. We must therefore look at solutions that are balanced in their approach: incorporating the needs of both. That is why I am here today, to ask that, as Mem-

bers of Congress, you apply that sense of balance to the implementation of the Endangered Species Act.

I would like to share the story of the existing Act's impact on my community, and how I believe that Congressman Cardoza's legislation could bring that much-needed sense of "balance" to resolving the challenges that my constituents now face. And while the California Tiger Salamander is but one of the many endangered species listed in my district, it is the focus of my testimony.

On January 19, 2000, the United States Fish & Wildlife Services, in an emergency rulemaking, listed a subset of the California Tiger Salamander species in Santa Barbara County, as an endangered, Distinct Population Segment. That rulemaking became final in June of 2001. Although there is strident disagreement over the process as well as the scientific basis for the listing, as an elected official I am obligated to aide in charting a course that allows my impacted constituents to move forward with their economic lives. Some of those impacts include:

- Delays in vital projects that serve the most needy in our community, specifically the delay in the construction of a Food Bank that has resulted in turning away over 2 million pounds of donated food, vitamins, and agricultural products;
- An impediment to attracting new business and industry to the Santa Maria Valley;
- Delays in residential, commercial and industrial construction. This includes the Santa Maria Airport project that has spent hundreds of thousands of dollars over the last decade in planning;
- Delays in much- needed infrastructure, including: repairs to streets, initiation of flood control projects and completion of utility projects;
- Reduced ability to provide affordable housing while laboring under a mandate by the State to build housing or risk fiscal penalty,
- Delays and added expenses in school construction;
- Escalation in housing prices; and
- Subsequent job loss and employment opportunities.

Aside from impacts I have just referenced, the story of the California Tiger Salamander is rather personal and individual as well. Over thirty years ago, Janette Sainz, a life-long resident of Los Alamos encouraged her young daughter to make this salamander the focus of a school project. And while the critter was novel for her daughter, Janette knew that the spotted salamander had existed on her ranch her entire life. The ranch has been in Janette's family for over 100 years.

Both mother and daughter were enthusiastic about this school project. They began looking for details about the habitat and life patterns of the creature. Janette contacted a Santa Barbara scientist, who immediately expressed intrigue by the finding. Until that time, it was not recognized that the California Tiger Salamander lived that far south. The school project was a success for the Sainz's daughter—however, thirty years later that discovery placed Janette in the middle of a heated discussion over the protection of the salamander.

Not easily deterred by a challenge, Janette and her husband Darwin, prior to the listing, volunteered to set aside acreage for the preservation of the species. The California Department of Fish and Game agreed with an independent scientist that the land to be set aside was sufficient for the sustainability of the species. However, the Federal listing preempted consummation of the agreement, and four years later, the Sainz are still unable to use their land. Today, Janette and Darwin have approximately 500 acres of property that is leased to a winery for the growing of grapes. Due to the listing, 360 acres of the property has remained uncultivated and unplanted. The loss in terms of dollars to both the winery owners that lease the land, and the Sainz family that own it is dramatic.

It was always the intent of Janette and Darwin to continue sharing their land with the salamander that had called it home for as long ago as Janette could remember. In her own words: "Our family has lived with the salamander for years, and we have always gotten along just fine."

This story is but one of hundreds: people, willing to work with regulators to provide for the protection of a species, yet coexistence has been denied. Their proposals are not denied because of the ultimate demise of the species in question, but rather because current demands of the Endangered Species Act offer limited opportunity for delisting of the species, and no opportunity for economic protection of the individual impacted.

This point was well-demonstrated when on January 22, 2004, the United States Fish & Wildlife Service proposed designation of nearly 14,000 acres of critical habitat for protection of the California Tiger Salamander in Santa Barbara County. The Service stated that these 14,000 acres, the vast majority of which are privately held, are essential to the species conservation. My constituents feel that the proposal was in large part prepared by scientists chosen by the Service, who met privately. Their

meetings with stakeholders were infrequent, and because stakeholder's participation was so limited, it was impossible for them to constructively contribute to the recovery teams' efforts. Post publishing of the proposed Critical Habitat, an informational meeting on March 10th was scheduled. This meeting was open to invitees only, and convened merely to notify stakeholders of the designation. County or City elected officials were not even notified.

It was not until the day of the meeting, March 10th, 2003, when constituents and governmental representatives alike, raised their voices in anger that the Service agreed to reopen the comment period and on May 11th, allow for a public hearing on the proposed Critical Habitat. One of the grave concerns expressed at that time was that the Service proposed publishing Critical Habitat prior to the completion of an economic analysis, largely ignoring the economic needs of the community impacted. The community has been informed that the economic analysis is underway that identify impacts relative to the proposed critical habitat designation. In the words of the Fish & Wildlife Service, "It will be released separately for public review and comment." We have since received a commitment from the Fish & Wildlife that a public hearing will be held on the economic analysis as well. If not for the efforts of Mr. Paul Henson, Assistant Manager, Ecological Services in the Sacramento Office of the Fish & Wildlife Services, and Diane Noda, Field Supervisor of the Ventura Office of the Fish & Wildlife Services, we would not have the opportunity to participate in public hearings.

This chronology highlights the need for the proposed changes offered by Congressman Cardoza that would balance the needs of the community with that of the protected species. If his proposed changes were in place, the story of Santa Barbara would be quite different.

Critical Habitat designation would be made concurrent with a recovery plan. Currently, critical habitat designation is so large, and appears to be such large taking of private and public lands that we were placed in a combative and contentious position from the moment that proposed habitat was published. By developing an inclusive plan first, and than designating critical habitat there is opportunity for input from all stakeholders, and the ultimate decision on critical habitat, while still painful, would be inclusive.

Properties that are already a part of a "conservation plan" or offered protection by other State or Federal conservation programs would be excluded from Critical Habitat designation. In the case of Janette and Darwin, they would have a plan in place that protects the species but also allows them useful access to their land.

At the time that Critical Habitat is designated, economic impacts would have already been considered. This would allow for a much more balanced approach when determining what is needed for the coexistence of the salamander and the human population. The legislation requires that the analysis reflect direct, indirect and cumulative impacts. It would have to consider the loss of revenues to private property owners such as Janette and Darwin, and Local governments such as Santa Barbara County.

Affected jurisdictions, with few resources available to deal with the listing would receive additional notification of critical habitat proposals. The information would have to be shared—precluding the employment of firms to aid in gathering information pertinent to the listing. This would have eliminated much consternation and frustration at the county level with respect to the most recent meeting referenced earlier.

Finally, the legislation's proposed word change from "essential to the conservation of the species" to "essential to the conservation of the species as areas which are absolutely necessary and indispensable to conservation," would undoubtedly have resulted in development of a recovery plan and than designation of Critical Habitat that was less than the 14,000 acres currently proposed.

My colleague, Supervisor Joe Centeno, and I have scheduled a meeting with the Service and impacted constituents on May 5th. We hope that this will be the opening of a dialogue that will allow us to consider a more balanced approach to the challenges presented by the current law. Further, we are encouraged that the Service has responded to our requests to re-open the public comment period on Critical Habitat designation and a public hearing is now scheduled for May 11th. Perhaps the bottom line is that if Congressman Cardoza's "balanced approach" legislation had been in place, Santa Barbara County would be well on its way to conservation of the species while at the same time recognizing the economic needs of those affected.

Chairman Pombo, thank you for allowing me to testify before your Committee today.

[Ms. Gray's response to questions submitted for the record follows:]

Response to questions submitted for the record by Joni L. Gray, 4th District Supervisor, Santa Barbara County Board of Supervisors, Santa Barbara, California

Questions from Chairman Richard Pombo:

1) Supervisor Gray, what do you think of the methodology used by FWS to craft a recovery plan? Would the elements of this bill make it a more inclusive and open process?

The Recovery Plan process that recently occurred in Santa Barbara County left many people frustrated and disenfranchised. That included many elected officials as well as constituents. A Recovery Plan, in my estimation should be all-inclusive—people who have the most at stake should have a seat at the table as well as scientists familiar with subject species. Further, I think that various Biological perspectives should be represented—this too would eliminate distrust in the end product.

Currently the Recovery Plan process is broken. The USFWS has failed to provide timely recovery plans and this has prolonged a process (denial of certain land uses) that is costly to local governments and landowners. As currently structured the ESA requires certain actions to be completed within specific timeframes following a listing. This bill would require these actions to be completed concurrent with the listing, thus improving the performance of the USFWS.

The bill requires that concurrent with Critical Habitat designation would be the presentation of the Recovery Plan. This Plan would outline what is required to recover the species. Additionally, the economic analysis would have already been considered, ensuring that protection for the species does not economically devastate a specific region.

The experience in Santa Barbara County is that vast tracts of public and private land are sequestered while the USFWS evaluates data and determines what kind of protections are required, if any. By preparing a Recovery Plan prior to establishing a critical habitat designation all of the scientific merits would be fully developed, goals established and the need to protect the species fully justified BEFORE action is taken.

All of these are important not only to the sustainability of a species but the sustainability of the Act itself. People need to feel that they are a part of the process—elements of Cardoza's bill go a long way in ensuring that this is the case.

2) Supervisor Gray, if the Cardoza bill had been in effect, how would your experience in Santa Barbara be different?

The provision of the bill that require Critical Habitat designation to be made concurrent with a recovery plan would have eliminated a great deal of consternation among my constituents. Currently, critical habitat designation for the Tiger Salamander is so large (14,000 acres) and appears to be such large taking of private and public lands that we are placed in a combative and contentious position from the moment that proposed habitat is published.

By developing an inclusive plan first, establishing the recovery goals and then designating critical habitat there is opportunity for input from all stakeholders, and the ultimate decision on critical habitat, while still painful, would be inclusive and fully justified.

Additionally, at the time that Critical Habitat is designated, economic impacts would have already been considered. This would allow for a much more balanced approach when determining what is needed for the coexistence of the salamander and the human population. The bill goes on to require that the analysis reflect direct, indirect and cumulative impacts. Designation would have to consider the loss of revenues to private property owners such as Janette and Darwin Sainz—constituents I referenced in my testimony, and local governments such as the City of Santa Maria and Lompoc.

It is logical to conclude that if a Recovery Plan had been required for each species listed in Santa Barbara County that many would not have been listed. The premise of the Recovery Plan is that a species population has diminished and to bring it back to a sustainable population. To successfully accomplish these actions it is necessary to fully understand the species in question, its historical range and its habitat.

3) We have heard that federal agencies could do a better job when it comes to informing communities of critical habitat designations. Commu-

nities deserve to be partners in this process. There are also instances where it is unclear how the federal agency determined critical habitat.

Example: The Final Rule for Santa Ana sucker critical habitat is based on two "personal communications" with biologists and that nearby communities were not informed of these communications.

- **Will the bill improve cooperation and coordination with local governments?**

The use of "personal communications" from listing advocates seems to be a common occurrence as the endangered species listings are reviewed. Requiring a Recovery Plan as part of the listing process will allow technical issues, such as the historical range and census counts of the subject species, to be fully vetted prior to any federal action.

Requiring the USFWS to publish these communications so that knowledgeable members of the community can evaluate their relevance and provide comment is an important step forward.

Requiring the USFWS to notify every jurisdiction within the proposed recovery area is of utmost importance. Frequently people in Santa Barbara County have been ignored in the process. For example when the Pacific Coast Population of the Western Snowy Plover was proposed for listing the notice only appeared in the Los Angeles and San Francisco area newspapers. No notice was provided in Santa Barbara County media, however the listing of the WSP has had a significant impact on my constituents.

Affected jurisdictions, with few resources available to deal with the listing would receive additional notification of critical habitat proposals. The information would have to be shared—precluding the employment of firms to aid in gathering information pertinent to the listing. This would have eliminated many of the concerns at the County level with respect to the Critical Habitat designation.

Few Federal agencies have an understanding of the needs of a particular area. However, locally elected officials have a very good idea. By working together we can create solutions that would allow for recovery of the species—often through voluntary action—that promote co-existence between the human populations with that of the protected species.

The communication process today appears to be designed to exclude the public in general. Few people have the time or energy to read the Federal Register on a daily basis. This limits the ability of the public in general to participate in decisions that can have a dramatic impact on their lives.

The bottom line is that unless the Congress adequately funds the ESA process there will be continued abuses of the system. This bill seeks to improve the process by clarifying the policy and establishing new requirements. Funding and interpretations by the judicial system will limit the successful execution of this policy.

In conclusion, I would ask that you examine the ECOS website. This is a Summary of Listed Species and Recovery Plans as of 06/02/04. http://ecos.fws.gov/tess—public/TESSBoxscore

This is a very telling statistic. Less than half of the species listed have recovery plans. The impact of the proposed amendment to the ESA would cut the list in half.

*There are 1855 total listings (1292 U.S.). A listing is an E (endangered) or a T (threatened) in the "status" column of 50 C.F.R. 17.11 or 17.12 (The Lists of Endangered and Threatened Wildlife and Plants).

**There are 541 distinct approved recovery plans. Some recovery plans cover more than one species, and a few species have separate plans covering different parts of their ranges. This count includes only plans generated by the USFWS or jointly by the USFWS and NMFS, and includes only listed species that occur in the United States.

Thank you for allowing me to give additional testimony.

The CHAIRMAN. Thank you.

Dr. Sheldon?

STATEMENT OF JOSEPH K. SHELDON, PH.D., PROFESSOR OF BIOLOGY AND ENVIRONMENTAL SCIENCE, MESSIAH COLLEGE, GRANTHAM, PENNSYLVANIA

Dr. SHELDON. Chairman Pombo and members of the Committee on Resources, Honorable Mr. Cardoza, it is a pleasure and an honor to be here today. I applaud your efforts to strengthen the En-

dangered Species Act but there are some areas that I have some concern about and I would like to address those specifically.

I direct my comments to you as a Christian and as a conservation biologist. I have been invited to speak out of my concern for the stewardship of biodiversity that was wrought into existence and is sustained by God.

Many Christians consider themselves to be stewards of God's creation and their stewardship to be an act of worship. Others see stewardship of creation as an act of responsibility for their children and grandchildren. In both cases we are not the owners but rather, act on behalf of either the one above or those to come and our efforts to maintain and assure the fruitfulness of God's creation.

A responsible steward must have sufficient foresight to anticipate and prevent problems from occurring in the first place. Lost, threatened and endangered species, as a result of human impact, testify to our past failure as stewards. Yes, we must address problems when they are recognized but it is your responsibilities as high stewards in Congress to make meetings like this unnecessary in the future as we are doing our job properly in preserving the creation.

As stated by theologian Steven Bouma Predager, all creatures are designed to sing the praises of God. To see a tree only as so many board feet or a river as only a place to fish are forms of nearsighted utilitarianism that reduce all value to human terms. A focus only on human use, even if wise use, is a stunted viewpoint that fails to acknowledge intrinsic value in a world that is not of our making.

H.R. 2933 reduces some of the essential protection from present and future species. It strengthens other areas that are necessary.

Habitat destruction and degradation is the primary factor responsible for more than 80 percent of the U.S. species that are currently listed under the Endangered Species Act. By the time a species qualifies for ESA listing, their viability is already seriously threatened and they often survive only in degraded and marginal habitat, and that is critical to understand. The remnant population of most endangered species could still be recovered by removing the factors that have threatened them. Often this will require suitable habitat currently unoccupied by the species for reintroduction or recolonization.

Rather than assuring adequate habitat for recovery, H.R. 2933 limits habitat protection to absolutely necessary and indispensable landscape presently occupied by the species. That does not give any room for reintroduction or recolonization. I am assuming that the critical habitat is also habitat that has been identified by the best scientific means and it is not the middle of a tennis court or a housing development that already exists. I am talking about critical habitat that is necessary for the sustainable living of the species.

A minimum viable population requires a minimum dynamic habitat but a minimum viable population is hardly the fruitful population described in Genesis 1:22. Are we not stealing the birthright of God's creatures when we fail to provide them with the essentials necessary not just to survive but to flourish? Resource managers base their production goals on maximum sustained

yields yet when God's creatures stand in our way we set minimum viable populations as an acceptable standard.

The Endangered Species Act is an act in process. It demands adaptive management from the scientific end and adaptive legislation from your end. The steward's role, your role, must be to craft a win/win solution for all stakeholders and to transform the ESA into an act that is supported by property owners who see value in preserving and enhancing the fruitfulness of their piece of creation, not the current practice of shoot, shovel and shut up.

We live in the richest nation that the world has ever known. We have a national heritage of conservation that has persisted even through the worst of economic times. Surely we can and we must have the political will to commit the necessary resources to live sustainably within God's creation.

Humanity was placed in Eden, in the garden, to serve and to care for creation. Adam's first task in the garden was to name the animals. It is this act of loving servant leadership that must characterize our lives today. As we step back and evaluate our job as stewards, let us remember that we have only one chance to do the job right.

A real danger lurks here. Webster's New Collegiate Dictionary defines blasphemy as the act of insulting or showing contempt or lack of reverence for God or the act of claiming the attributes of God. If we deny the fruitfulness of God's creatures, have we crossed an unacceptable line?

In our arrogance we have created a committee that we call the God squad to decide whether a species is worthy of continued existence. Section 3 of the current bill extends this policy by inserting an economic impact argument as the primary determining factor on evaluating whether to protect critical habitat. It is the steward's job to care for creation. Only the creator has the right to determine when it is time to call a species home.

I applaud your efforts. I encourage you. We need to change the Endangered Species Act but we need to do it in a way that will guarantee the fruitfulness of the species that have been placed in our hands to care for. Thank you.

[The prepared statement of Dr. Sheldon follows:]

Statement of Joseph K. Sheldon, Ph.D., Professor of Biology and Environmental Studies, Messiah College, Grantham, Pennsylvania, Representing Au Sable Institute of Environmental Studies, American Scientific Affiliation, The Evangelical Environmental Network

Chairman Pombo, Ranking Member Rahall, and Members of the Committee on Resources:

It is an honor and privilege to be here today. I direct my comments to you as a Christian and as a conservation biologist. I have been invited to speak out of my concern for the stewardship of biodiversity that was wrought into existence and is sustained by God. Many Christians consider themselves to be stewards of God's creation and their stewardship to be an act of worship. Others see stewardship of creation as an act of responsibility for their children and grandchildren. In both cases, we stewards are not the owners, but rather act on behalf of the One above or those to come to maintain and assure the fruitfulness of God's Creation.

Some Biblical and Scientific Perspectives on Species Protection:

A RESPONSE TO H.R. 2933, CRITICAL HABITAT REFORM ACT OF 2003 AND WHY H.R. 2933 SHOULD NOT BE SUPPORTED

How many are your works, O LORD! In wisdom you made them all; the earth is full of your creatures...teeming with creatures beyond number. May the glory of the LORD endure forever; may the LORD rejoice in his works.

FROM PSALM 104:24,25,31.

Introduction

Taking care of endangered species engenders heated debate. What are our priorities? Is it worth the expense? Should government be involved? H.R. 2933, the Critical Habitat Reform Act of 2003, weakens the Endangered Species Act by denying adequate habitat protection and by requiring a cost-benefit analysis. The steward's responsibility is to preserve the fruitfulness of God's creatures and the sustainability of all the Earthly Creation. This bill, if approved, will compromise that task. It should not be approved.

Individuals with a Judeo-Christian heritage need to think biblically about these issues? How can Scripture inform our discussion? What would be a biblical response to the endangered species debate? What might God think of endangered species? Here are some guidelines for reflection on how we might follow Christ and respond with godliness to the needs of his creatures.

Important Scriptures

Is it not enough for you to feed on the good pasture? Must you also trample the rest of your pasture with your feet? Is it not enough for you to drink clear water? Must you also muddy the rest with your feet? From Ezekiel 34:18.

Hear the word of the Lord...because the Lord has a charge to bring against you who live in the land: There is no faithfulness, no love, no acknowledgment of God in the land. ... Because of this the land mourns, and all who live in it waste away; the beasts of the field and the birds of the air and the fish of the sea are dying. From Hosea 4:1-3.

The creation waits in eager expectation for the sons of God to be revealed—in hope that the creation itself will be liberated from its bondage to decay and brought into the glorious freedom of the children of God. From Romans 8:19-21.

Thy kingdom come, thy will be done, on earth as it is in Heaven...(Matthew 6:10). "This is the common denominator among Christians. Life is a primer for eternity, learning to love God as he loves us, by practicing that redemptive love in the framework of our daily lives. Not building utopia, not the final completion or redemption, but being good neighbors to all, especially to the least among us—human and nonhuman alike" (David Foster, Messiah College).

Biblical and Theological Perspectives

- Goodness of creation. Scripture expresses God's delight at the myriad of species. Gen. I pronounces them "good" (vv. 21, 25). The creation story also repeats the word "kinds" (seven times in five verses, Gn. 1:20-25) showing that God gave special attention to variety. The Creator also commissioned Adam to name each specie: Gn. 2:19-20. Scripture also affirms the goodness of the human creation: Gn. 1:26-28, Ps. 8:3-8, Mt. 10:31. Despite the grandeur of creation, humans must be careful to worship God alone: Is. 42:8, Rm. 1:18-25.
- God's Joy. Throughout Scripture, we find the Creator rejoicing in his works (Ps.104:24-25, 31, etc.) and paying attention to even the most insignificant (Mt. 10:29). God describes his creatures with awe, admiration and pleasure. Dare we diminish the joy God finds with his handiwork?
- God's concern. Matt. 10:29-31. Not a sparrow falls to the ground apart from the will of the Father. This reveals an intense involvement in the daily, seemingly inconsequential affairs of creation. It reveals a God who is not a scientist collecting cold data, but a Creator intimately leading creation toward the accomplishment of his will. Also revealed is the supreme value of the human creation: If God so esteems slugs and salamanders, what does this imply about me? It could be said that advocating for the protection of species elevates the stature of the human as well. When we know what is out there, it makes the human all the more valuable. Could it be said that a contributing factor to the demeaning of human existence is a loss of contact with the Creator God and his splendid creation?
- Human responsibility toward creation. Humans have a very special and exalted place within creation (Gn. 1:26-28, Ps. 8:3-8, Mt. 10:31). However, Scripture provides us with no mandate or calling to destroy; our commission is to serve as

stewards of creation: Gn. 1:28, 2:15. Genesis 1:28 is a strong passage that refers to ruling over creation. The ancient Hebrew word is redah and it generally is used to describe the righteous and loving rule of a good and kindly king. Genesis 2:15 describes how this rule is to be carried out. The two key words in Genesis 2:15 are "till" (abad in Hebrew) and "keep" (samar). In other texts, abad is translated to "serve." Joshua 24:15 says, "we will serve (abad) the Lord." What kind of service would our God require of us? Responsible or destructive? How would our God have us serve (abad) creation? Samar, on the other hand, describes the type of keeping that is illustrated in Numbers 6:24 where the Lord through the prophet Aaron speaks of his keeping of the Israelites. "The Lord bless you and keep (samar) you." Certainly, God keeps his people in such a way as to demonstrate his great love and care. His keeping would cause his people to thrive. In a similar fashion, we are charged with the "keeping" of creation. Creation deserves our love and our labors that contribute to its health and vitality.

- Human Concerns. Most Scripture would seem to lend support for preserving species for their own sake. Scripture also teaches that humans can enjoy the benefits of creation: Gn. 1:29-30. It would be difficult to enjoy the benefits of something which no longer exists. Also, all creation is to enjoy these benefits as well: Gn. 1:30.
- Fruitfulness. Scripture commands us to tend creation so that it can be preserved and regenerate itself. Dt. 22:6-7.
- God Sustains. The Bible says that God sustains his creation: Ps.145:15-16, Mt. 6:26,30. By what calling do humans override God's involvement with what he has made?
- Covenant. God made a very specific covenant with all life: Gn. 9:8-17; it is not to be destroyed.
- God's Will. In the Noah story, God has revealed his will that all life be preserved, Gn. 6:19-20, 7:1-3, 7:14-16, 8:17, and in such a way that it may regenerate itself: Gn. 6:19b, 20b, 7:3b, 8:17c. Natural extinctions will sometimes occur as a part of God's will, but this is not a human prerogative.
- God's Witness. "For since the creation of the world God's invisible qualities—his eternal power and divine nature—have been clearly seen, being understood from what has been made, so that men are without excuse." (Romans 1:20). Who are we, through our actions, to degrade the witness to God's power and divinity? Who will face him on the Judgment Day and give an explanation for our actions? What will we say to him?
- Worship. The Bible says that all creation praises God: Ps. 96:11-13, Rev. 5:13. Silenced voices of praise are a great tragedy, a symphony "finished" in an untimely manner.
- Human Worship. Can one read Psalm 104 or Job 38-41 without experiencing awe and wonder as the Lord describes the creatures of His creation? To know what God has made is to know him better and to be better equipped to worship him.
- Human Responsibility. God gave to Noah and to Adam specific responsibilities regarding the care of creation. Are we called to be any less responsible than Adam and Noah? If we claim to know the Creator and to have a personal relationship with him, then how can we not be grieved at the destruction of the cherished gift that has been placed in our hands?
- Ethical questions. It would be easy to consider some species as more important than others. Most of us are far more appreciative of butterflies than slugs. But can we really make such decisions? Who are we to determine which species are more important than others? Could we call this "playing God"? Are we given a scriptural mandate to destroy? That is the prerogative of the Creator, not the steward. Our responsibility is to tend the garden.
- Judgment. "Your wrath has come. The time has come for judging the dead ... and for destroying those who destroy the earth." Rev.11:18. Our destruction of species is most often rooted in sin and for this we will be judged. Environmental degradation results from forms of idolatry, greed and pride: our technological pursuits lead us to forget about and be ignorant of God's work in creation; we presume the importance of our work and needs, to the point of destroying God's work; the powerful among us ignore the needs of the weak, destroying what provides subsistence for the poor or forcing them to marginal frontiers where they must live destructively in order to survive. In contrast to God's knowledge, our ignorance is such that we don't know all the different species that exist, how they interrelate, or how they might be useful or even necessary to us.

Species extinction is symptomatic: It is a problem reflecting the sinfulness and unsustainability of lifestyles and our economy. "The sins of the father are visited

on the sons," says the Lord in Deut. 5:8-10. We now see that the sins of humanity are visited on other species as well.

- Evangelism. The unbelieving world is waiting for Christians to take a relevant stand on a variety of issues, including species protection. Ultimately, Christian involvement in species protection will be undertaken for its own sake as a way to honor God. Nonetheless, we can expect some in the unbelieving world to respond positively. Our work in species protection will speak powerfully about the very character of our God.

Scientific Perspectives

- Introduction. The branch of science which focuses on the protection of the world's species is referred to as conservation biology. In scientific circles it is known as a "crisis discipline"—often called upon to act or advise with little or no warning, with a limited knowledge base, and frequently dealing with emergency situations. In many ways it is similar to a medical emergency room; only the patients are not humans, but rather the other creatures of our Lord's magnificent creation. Each is a Mona Lisa in its own right—painted into existence by the Lord's own hand. The very fact that conservation biology exists is reason for concern, especially for Christians: it is testimony to our failure to properly steward creation.
- What do we know about species? Science tells us that there are between 5 and 40 million species alive today. Approximately 1.7 million have been identified and catalogued. We know that millions of unidentified species exist. How many we are not sure. The temperate areas where the great majority of scientists work and reside are relatively well-known, but our knowledge of the species of the tropics and the deep oceans where the majority of the world's species reside remains largely a mystery. But the point is not the sheer number of species. The crisis involves what is happening to known species as well as to the myriad unknown.
- What are the primary causes of extinction? Many factors contribute to the loss of species including the impact of introduced species, global climate change, pollution, disease, and excess hunting and other forms of harvesting which exploit species at a rate that exceeds their reproductive potential. But the single largest and expanding threat is habitat destruction caused by human actions. No species can continue to exist when its ecosystem, its very home is destroyed; the occupied habitat of most endangered is reduced to a fragment of its former area and is often marginal in quality at best. It should be noted that in January 2004 a major research paper in the journal Nature identified Global Climate Change as a major contributing factor, perhaps equal or greater to habitat destruction.
- What species are going extinct? The best known groups of organisms are birds and mammals. Since the year 1600, a total of 83 known mammals species (2.1%) and 113 birds (1.3%) have become extinct. This number is expected to rise rapidly as the breeding populations of many species continue to decline. But even before the advent of modern technology, humanity took a heavy toll on creation. Approximately 70% of the known bird species have become extinct in the Hawaiian Islands since humans first arrived. Indeed, large-scale extinctions of Pacific island birds apparently was widespread. Recent evidence points to a loss from these islands in excess of 2,000 species following human habitation—a 20% reduction in the world's bird species. Evidence also links the colonization of Australia and North America with the disappearance of many species of large mammals (over 100 pounds). More than 50 mammal species have become extinct since the arrival of humans in North America. Fossils of extinct species have been found with spear and arrowheads imbedded in their bones. A few thousand years ago, western grasslands rivaled the great savannas of Africa in terms of the enormous numbers of animals. Both large grazing mammals and their predators were in abundance. Where are they today?

Determining present extinction rates and even the status of most species is difficult for all but a few well-known groups. For example, we know that 17 of the 22 crocodile and alligator species are threatened with extinction from habitat destruction and overhunting. But what about the world's plants or its insects? Peter Raven, perhaps the world's leading specialist on tropical botany has stated that 25% of the world's plant species are seriously threatened. And what about beetles which represent approximately 25% of all known species? You may be wondering why we should be concerned about beetles at all. After all, a bird or mammal must be far more important than a species of insect! Not necessarily. Each species plays a unique role in creation. The loss of any species has ripple effects across the fabric of creation. In recent studies of Central and South America, more than 90% of the

beetles collected were from unknown species. A single tree may have as many as 1200 species of beetles of which 20% (160) are specialist feeders that occur only on that species of tree. There are approximately 50,000 species of tropical trees—each with its specialist beetle population. If the tree becomes extinct, so will the other species associated with it. And there are many other specialists on tropical trees besides beetles!

- How are scientists able to estimate the numbers of animals going extinct? There is a direct relationship between the size of an area and the number of species that it contains. A square yard of temperate forest habitat may have 10 species of plants, while an acre will often number in the hundreds. The larger the area, the more species encountered—up to a point. Of equal importance is the size of the area occupied by each species. Species that are restricted to small geographic areas are much more likely to go extinct than are those with widespread distributions. Also the smaller the population, the higher the probability of extinction. And here lies a disturbing fact. It is thought that tropical species commonly have smaller populations and much more restricted distributions. Thus, destroying an acre of tropical forest will likely have a much higher extinction impact than the loss of an acre of temperate forest.

With this limited information, it is possible to explain how estimates of species extinction rates are obtained. In a major tropical forest research study, scientists found that if 50% of the habitat was destroyed then approximately 10% of the species disappeared. When habitat destruction reached 90%, then 50% of the species were lost. At least 12 African and eight Asian countries have lost more than 50% of their wildlife habitat. In some cases (Hong Kong and Bangladesh), habitat destruction exceeds 90%. Using this logic, Dr. Edward Wilson of Harvard University estimates that, if 1% of the world's tropical rain forests are destroyed each year (a conservative estimate based on current rates of deforestation), then 0.2 to 0.3% of all species would become extinct per year. Over 100 years, this would be a loss of at least 20% of all species, if extinction rates remain constant. Based on a total of 10 million species, the current annual loss has been calculated to be 20,000 to 30,000 species. Are these numbers real? Some current studies indicate that the rate of species loss may be somewhat less that the model predicts. There is no question, however, that unless the escalating rate of habitat destruction is reversed, the extinction toll will continue to rise. And if recent evidence from studies on Global Climate Change proves to be true, atmospheric modification may become the major threat to species in the future. It appears that we are entering a major extinction episode with unknown global consequences. It is time that those in Congress join the rest of the world in addressing these problems. Long-term ecosystem sustainability must be our first priority as we carry out our role as stewards of God's creation.

- Is a minimum minimum viable population ecologically extinct already? The answer is probably yes. All species occupy an ecological niche and as such contribute to important processes of ecosystem function. When a species population is reduced to the point that it would qualify as a "minimum viable population" its contribution to these ecosystem processes is minimal. Such a species can be considered to be ecologically extinct. Many of our large predators fall into that category through much of their former range, if they exist there at all. The American Bison as well as many other species that are not currently listed by the ESA are functionally already extinct. They certainly do not exhibit the biblical concept of fruitfulness.
- What about those animals, like the dinosaurs, that would go extinct anyway? Isn't it true that many species have become extinct in the past due to natural events? If so, why should we be concerned about more extinctions today? Yes, it is true that extinctions have taken place in the past. Indeed, scientists have identified at least five major periods of extinction in the fossil record when large numbers of species disappeared during a "short" (geologically speaking) period of time. Various explanations have been proposed to account for these sudden losses. Perhaps the most well-known is the asteroid-impact hypothesis. But even if extinctions have taken place in the past, is this sufficient reason to cause more today? Indeed, I think not. Peter Raven, Director of the Missouri Botanical Garden, describes the present crisis as one of the greatest extinction episodes in the history of the Earth. What we are facing today is a catastrophic loss of the species that God placed here to share Creation with us. They are the species that God entrusted to humanity to name and to care for. We also have been given the privilege to use this special trust to meet our own needs—but it must be done in a sustainable fashion. We may take from the fruitfulness (the "interest") of creation, but must not destroy its "principal." This is clearly illustrated in Deuteronomy 22:6-7 where the Lord instructs the Israelites that

"If you come across a bird's nest beside the road, either in a tree or on the ground, and the mother is sitting on the young or on the eggs, do not take the mother with the young. You may take the young, but be sure to let the mother go, so that it may go well with you and you may have a long life."

- What good are many of these species anyway? "When it comes to a snail darter or a dam, I vote for the dam! After all...what use is a snail darter?" More and more frequently we find ourselves forced to make a choice between human activities and species protection. Rarely (if ever) is the choice between the life of humans and the life of a non-human species. When conflicts arise they typically involve economic restrictions, projected or actual loss of jobs, and inconvenience. In response to these conflicts some are suggesting that the Endangered Species Act should be weakened and that all proposed listings under the act be examined through the eyes of a cost-benefit analysis. What is the value of the project vs. the value of the species? This raises a difficult question. How does one actually determine the value of the species? What constitutes value? Can a monetary value be established for a species in the same way that we can measure the monetary value of a dam or the lumber cut from a tree? Let's briefly look at the question of establishing value.

There are many types of value that are recognized. Some are easy to associate with monetary value, others are perhaps impossible. A species that can be harvested and sold in the open market has economic value that is relatively easy to determine. Clothing (wool, cotton, silk), building materials (lumber), and medicinal products extracted from plants (taxol to cure cancer) provide obvious examples. But what about values not yet discovered? Wild plant species provide the primary source for new medicines and genes for new agricultural strains. Does a species whose use has not yet been discovered have a value? How is it to be determined? What if the species becomes extinct before its use is discovered? Another value is ecosystem value. Plants produce oxygen and remove pollutants from the air. Marshes are biological filtering systems. All species remove energy through food chains and are involved in the cycling of materials. Can one determine the value of the oxygen produced by a single tree? Or the amount of toxic air pollution that it removes? These are values that benefit the entire ecosystem. In most cases we will never know the ecosystem value of a species. Each plays a unique role in the functioning of Creation. If there is no obvious value directly to humans, does that mean the species is worthless? Another form of value involves esthetics. Can we reduce the beauty of a monarch butterfly, a zebra, or a mountain goat as it bounds across a snowfield in the high Rockies to a monetary cash value? Is it even right to try? Perhaps most difficult is the concept of intrinsic value. Do species have an intrinsic right to exist? Are humans the measure of all value or is God? When we read in Genesis 1:12 and 1:21 that God declared that the plants and animals of Creation are good, what does it mean? Can the value of goodness be reduced to cold, hard cash? Perhaps there is a higher value that we often ignore. This value is related to our responsibility as stewards. We are not asked to care for our Lord's creatures because of their economic or even intrinsic value to us. We are asked to he stewards because of Creation's value to the One who painted it into existence.

CONCLUSION

When thinking about endangered species, it is easy to get caught up in political and economic agendas. Certainly, these many issues must be debated. However, the faithful disciple of Jesus Christ must first ask the question, "Is there anything spiritual about this debate? How would my faith inform my own position on this matter?" These questions have rarely been asked by evangelicals. It is time to ask such questions.

In the opinion of a growing number of evangelicals, the protection of species is supported by Scripture and therefore, must be the concern of all God's people everywhere.

As pointed out in the oral testimony and more fully explained from a Biblical perspective above, H.R. 2933, Critical Habitat Reform Act of 2003, if enacted will significantly weaken our ability to protect species under the Endangered Species Act. It withdraws habitat protection from land that is not currently occupied by the species. This unoccupied habitat will frequently be needed for reintroduction and/or recolonization if the species is to recover. It also introduces a cost/benefit analysis as a primary determinant in whether to list a species. Neither change is acceptable; both compromise the responsibility/ability of a steward to preserve God's creatures. As pointed out in the oral testimony, it is the stewards responsibility to maintain the fruitfulness of God's creatures; only God has the right to determine when their time on Earth is has come to an end.

H.R. 2033 SHOULD NOT BE SUPPORTED.

[Dr. Sheldon's response to questions submitted for the record follows:]

Response to questions submitted for the record by Joseph K. Sheldon, Ph.D., Professor of Biology and Environmental Science, Messiah College, Grantham, Pennsylvania

Questions from Congressman Tom Udall

1)"Dr. Sheldon, you indicated that many of the non-charismatic creatures that often go unrecognized by the general public are included in the most important elements of biodiversity to preserve. You also suggested that we must move beyond a focus on individual species; that it is critical to preserve essential ecosystem processes as part of our task. How should the Committee on Resources address these issues?"

Response: Thank you for the opportunity to continue our discussion of this critical issue. Before I respond to your questions, I would like to clarify my response to two previous questions associated with my oral testimony.

First, I was asked, as an evangelical Christian, what my view was on evolution/creation. I responded that God did it, but I did not provide a more detailed response. My short answer is that we need to move beyond the debate of "how god did it." It is a done deal. Now we need to act as responsible stewards of God's Creation. It is my personal belief that God used a process over time. Some refer to it as theistic evolution; others as continuous creation. Even as God continues to act creatively and to sustain Creation, our role is to tend the garden.

Second, I spoke earlier of our home on one-acre in Pennsylvania and my effort to enhance the fruitfulness of that tiny piece of Creation. I was asked what I would do if I was faced with the necessity to grow my own food to feed my family. Would I cut down and destroy what is precious to me to provide food? Such hypothetical questions trouble me; they frequently are diversion tactics to avoid having to deal with the real issue of the stewardship of biodiversity and sustainable living. If this were to happen, however, it would indicate the failure of our elected officials to carry out their task of governing our country with foresight and thus assuring long-term sustainability. I trust that I will not be faced with that choice.

My assumption in answering this question is that a primary goal of the Committee on Resources is to protect the integrity and functionality of our biological diversity as an essential part of the Committee's task of stewardship. Success in this effort will require both adaptive management on the scientific side and adaptive policy making within Congress as we adjust to meet the needs of dynamic ecological systems and as our level of understanding of the problems/solutions matures. On your part, the Committee on Resources must begin to think "out of the box". ESA in its current form has indeed helped. But it must be improved and strengthened. There are species alive today that would now likely be extinct if it were not for ESA. The California Condor, eastern Peregrine Falcon, and Black-footed Ferret are good examples. Neither would we have recovering Gray Wolf or Grizzly Bears populations. But ESA in its current form is not the sole answer. ESA needs revision so that it can indeed accomplish its intended purpose. Efforts to weaken protection are not the answer. Congress must craft ESA into a much more powerful and effective piece of legislation, but also one that is seen by all stakeholders as positive.

But ESA alone will not solve the problems that we face. ESA addresses single species issues. It is the little Dutch boy with his finger in the dike—essential in the short term, but not the long-term solution. Congress must continue to address the threats to individual species but at the same time must determine how to solve the problems leading to species loss. This will require extending our thinking to the ecosystem and landscape levels. Healthy ecosystems = healthy species.

Ecosystem-level management at the functional level focuses on understanding and maintaining essential processes (biological and physical) that provide the integrity of the system. It is these ecosystems processes that are critical for long-term global ecological sustainability. As I pointed out earlier in my testimony, species not recognized as significant by the general public are the ones that drive the essential processes. These include soil dwelling organisms, decomposers, herbivores, parasites, and predators. Placing the ESA focus on more charismatic species may be popular with the public but will loose the battle in the long run. It is easy to dismiss something as insignificant that we do not understand.

What is known as the "Greater Yellowstone Ecosystem" provides an excellent example of landscape-level thinking that will be required to adequately protect many of the species within Yellowstone National Park. The park itself is not sufficient in size to maintain fruitful populations of all if its species. The boundaries of Yellow-

stone Park are artificial and do not coincide with the boundary of the ecoregion that contains the park. Essential seasonal habitat for Yellowstone species falls outside of the park. Stewardship of Yellowstone's species will require ecoregional-level management involving multiple government agencies, states, and other stakeholders. To the degree that this is done, Yellowstone will serve as a model of ecological wholeness.

2)"You indicated that it is critical to preserve essential ecosystem processes as part of our long-term efforts as we focus on biodiversity preservation, critical habitat, and the Endangered Species Act. How and where should federal efforts be focused?"

Response: First we must identify those areas (ecosystems) that are unprotected or underprotected. It was suggested in the hearing that we should increase our focus on federally managed land. We must recognize that existing federal land does not include many essential ecosystems and historically represents the "leftovers" of the pioneer days. Much of this federal land is in the western states at high elevation. Other areas including the majority of BLM land are arid to semi-arid. These landscapes are important in terms of their biodiversity, but other areas not represented by significant federal protection support much higher levels of biodiversity including important endemic species. The coastal mountains and lowlands of southwestern California are recognized as a global biological hot spot for endemic species (species unique to the area). Southern Texas and Florida also provide examples of both high biodiversity and high population pressure. Here the Biblical admonition in Isaiah 5:8 (NIV) must be taken very seriously in our planning from the local to federal level—"Woe to you who add house to house and join field to field till no space is left and you live alone in the land." We must not seeking quantity of human life, but rather quality. And quality of human life can only be found when it is embedded within a healthy ecological region. What percentage of an ecosystem's area should the human steward use for personal gain and how much must be left to maintain the integrity of the ecological system processes? Scientists and policy makers must join together to address these difficult questions. We currently do not have all the answers. I recommend that the Resources Committee invite input from The Society of Conservation Biologists and The Nature Conservancy—organizations that contain the scientific expertise necessary to provide insight and direction.

The mission of Congress must be goal driven—to assure long-term sustainability of biological diversity at the genetic, species, and ecosystem levels. The playing field will not be level; hurdles are ahead. Global warming and its associated effect on shifting distribution patterns of species and ecosystems will have to be faced. Adaptive management will be required. It will take strong leadership and commitment from elective officials who understand and are committed to the stewardship and sustainability of the world in which we live. We have put humans on the moon and landed spacecraft on Mars. Surely we can also have the commitment to care for the world that we call home.

3) How would you suggest federal land managers work with developers and landowners to help develop sustainable win-win solutions to the frequent ESA-land development debates?

Response: Regional planning that recognizes and includes essential ecosystem elements will be central to this effort. The planning must take place with key stakeholders as active participants in the process. We must begin to think, plan, and live differently. Traditional unplanned urban sprawl must be replaced with regionally sustainable growth plans. The non-human creation must be included within the matrix to provide for healthy human and non-human living space. Several important "tools" for implementation include regional and local zoning, the purchase of development rights, and selective use of tax breaks and other monetary incentives for conservation efforts. For our efforts to be successful, we must learn to value and to live with biological diversity. Reserves and wilderness areas are critical, but more important will be the desire and willingness to live as partners with God's Creation in our own back yards. The National Wildlife Federation's "Backyard Wildlife Habitat Program" is a good example of what can be done by an individual landowner to enhance wildlife and habitat (see http://www.nwf.org/backyardwildlifehabitat/). The question is how to work with developers and landowners to eliminate the bulldozer mentality. Too often the scenario is: enter the bulldozers, remove a thriving forest, put up walls, and then plant quick-growing junk trees and exotic grass species. To a large degree this will require a world-view shift empowered by re-education of the public regarding the essentials of sustainable ecosystem living as partners with creation.

We must find ways to avoid conflicts between species protection and the human community. The critical habitat designation of the California Tiger Salamander appears to exemplify failure in both policy and process. Or perhaps the problems

emerged because of insufficient funding Regardless of the cause of the conflicts in this particular case, it is clear that critical habitat designations must be based on the best available science. Actual and potential habitats must be identified with care to define real boundaries. Good maps are essential as is adequate public comment and notification. It should also be noted that tiger salamanders require both a vernal wetland plus sufficient upland buffer. Essential buffers may extend as far as 100 meters or more from the vernal ponds depending on the situation and species. Salamanders breed in the pond but spend most of the year in the upland buffer. A matrix that includes connectedness for movement between breeding/living sites must also be included. Lack of adequate connectedness in this metapopulation will result in genetic isolation of the subpopulations and eventual extinction. Adequate funding and commitment to solving the problem is the key to doing the job right. It seems that in this particular case, there was definitely a lack of funding and questionable commitment to really solving the problem.

An effective way to kill ESA is to botch the job of critical habitat designation such that the general public is unnecessarily hurt. The outcry will turn public sentiment against ESA and politicians will respond to the public outcry. A way to guarantee that this happens is to under fund ESA on an annual basis.

Species and ecosystem protection is not an option, but a necessity. The longer we delay, the greater the problems that will face us and the more expensive will be the solution. I urge members of the Committee on Resources to face this challenge today with passion and a unified heart. If we fail, our children and grand children will view us as a ship of fools. God, on the other hand, has spoken with a clear voice: "The time has come for judging the dead, and for rewarding your servants the prophets and your saints and those who reverence your name, both small and great—and for destroying those who destroy the earth (Rev. 11:18 NIV).

The CHAIRMAN. Thank you. And I want to thank the entire panel for their testimony.

To begin with, I will start with Mr. Martini. You talked about the impact of costs, housing costs, that you have locally. Obviously in your position you know that there are hundreds if not thousands of things that impact housing costs. The decisions that are made by city councils, by boards of supervisors impact housing costs, supply and demand. There are a lot of things that impact the cost of housing in a particular area.

What you described was a community that I think took a step beyond what is typical with local government. In your general plan, your long-term planning, you set aside areas that would be permanent agriculture, permanent open space, as well as what is proposed for housing and industrial development off into the future.

In my understanding of the way that you described that, you have this plan for the future and the area that was set aside as potential development land, it is that land that is now habitat. Is that accurate?

Mr. MARTINI. The range that has been listed includes that area. It also includes areas outside of the city's urban growth boundaries. And I want to say that the City of Santa Rosa has probably done as many things to artificially increase the cost of housing. We have urban growth boundaries. We have said this is all we are going to grow. We have growth management. We say we are only going to build 950 homes a year. That, in conjunction with a very high demand in our area, drives the prices up.

But at the same time this is a community that is very concerned about maintaining balance, not becoming so gentrified that only the wealthy can live there. We have inclusionary zoning policies. We have in-lieu fees that are paid by builders to help subsidize. We are very active and aggressive in going after Federal and state tax credits. We have at least three major not-for-profit builders in our

community who work very hard at providing housing available to low and very low income families.

We set aside money from our real estate transfer tax so that as people gain in their appreciation of the property when they sell it, that money goes back in. We have an equity-sharing pool that the community set up, recognizing that we need to have that balance in our community. You need to have a place for your service workers, for your teachers, for your firemen because if you do not have that, what you have now done is you have exacerbated your transportation problems, your infrastructure problems, and everything else that goes along with that.

We are not perfect. We are trying very hard to arrange a level of balance where we respect and preserve resources but, at the same time, allow that economic balance to take place.

We thought we had a lot of the pieces in place and then the listing of the tiger salamander came along and, as I said, many in my community would support that but in overlaying in that one major portion of our community, it has significantly impacted what plans we had in place to try to address some of the inequities that we were facing in terms of housing.

And it is that conflict as we try to deal with the various public policies of affordable housing, of responsible waste treatment, providing homeless shelters, improving transportation infrastructure. Those are all concerns that I have to balance as a local policymaker. When we look at it with blinders on to a certain extent that you have one entity, the Endangered Species Act, you have to take into account the rest of these items.

The CHAIRMAN. In the context of all of that and both of my local elected officials that are here come from areas that in many ways are similar in terms of being outlying areas outside of the major urban areas that have experienced growth over recent years, but in the context of everything you are doing, Santa Barbara County is a very progressive area. They do a lot of things, as well as the city that you represent.

But you heard earlier a discussion of a poll that was done—do you support the Endangered Species Act? Do you think that we ought to set aside more habitat? You know, all of those issues that are asked in a very black-and-white way. My guess is that overwhelmingly your constituents would answer in the affirmative as those questions were asked because that, I believe, is a moral value that we as Americans share. We do not want species to become extinct. We feel it is our responsibility to keep animals, to keep plants, to keep wildlife from becoming extinct.

Yet if you asked people in a little different way, would it be OK if we set aside this land in our town if it meant that your house was going to cost $50,000 more, they may answer a little differently and that is kind of what we are struggling with. I mean it is your responsibility as local elected officials to determine your rate of growth, where you are going to grow, what is going to remain open space. All of that is your responsibility. It should not be ours. It should not be Congress's.

And yet we are taking away from you the tools that are necessary for you to make those decisions because we are stepping in

on top of you with land use decisions through the Endangered Species Act.

Ms. GRAY. In response to your question about the poll, the answer would be that by far the majority of my constituents would have supported the Endangered Species Act maybe 5 years ago but today there are bumper stickers in my community that say "Free Surf Beach" because the plowbird is there and the folks cannot go to the beach. There are bumper stickers that say, "Eat salamander; save the broccoli." Things are changing here, which is not the direction that we would like to move.

So the answer to the poll is there is an attitude developing out there that is an attitude because of frustration, and I think that is what you are moving to do.

Also, the man who wanted to build a patio onto his house in an urban area, urban meaning semi-rural—you know, he lived in a subdivision. I want to build onto my house. Oops, you cannot; you are in the circle where there may be an endangered species. Those are the kinds of things that cause the attitude to change and folks to get a little bit testy.

Mr. MARTINI. Chairman, if I can just add to that, the piece of this poll that is important is also to change the question. You are right. You ask the question of anybody walking down the street, "Should we save endangered species?" You are right. It is a value system and everybody says yes.

But if you ask the citizens of Santa Rosa, now is it appropriate to spend $500,000 of very scarce transportation dollars to study whether or not the salamanders can get across an existing four-lane freeway in order to add a third lane, or do we take 250,000 of those dollars and acquire habitat, to acquire or to support financially a conservation or a recovery plan, clearly they would jump at the latter, as opposed to the prior.

That is why we are encouraged by what you are doing here, what Wayne White is doing in the area, so that we are not just spending money identifying more studies but that we are actually spending money to accomplish the thing that we are trying to accomplish. I think that is the key that we have to look at, that in addition to having it in balance with all of the other priorities we have in a municipality.

The CHAIRMAN. Thank you.

Mr. Cardoza?

Mr. CARDOZA. Thank you, Mr. Chairman. As usual, we are on the same wavelength in that my questioning goes to exactly the same area.

It has been my contention for some time that misapplication of the Endangered Species Act, specifically the critical habitat aspects of this Act, are constantly degrading public support for what should be the overarching goal of preservation. And when we start dealing with Mr. Baca's problems about the Delhi sand-loving fly—

The CHAIRMAN. Delhi sandflower-loving fly.

Mr. CARDOZA. Thank you. Versus the bald eagle, not that all species are not deserving of being protected, but there are differentiations amongst the public sentiment for different creatures. In fact, as Mr. Baca said, we are out swatting flies and we are crying about the fact that there are not enough bald eagles or there were

not. Actually, that is probably a poor case because my understanding is they have come back and that is one of the success stories. But there really is a differentiation.

I just want to, in my question, ask if you are not seeing that on the local level like I am seeing it at home, as well, that, in fact, when you talk about the Endangered Species Act, what you see is not people caring about it but the frustration on their faces immediately about what they have seen happen in their communities. Even though they care about the overarching goal of preserving species, they are very frustrated by the bureaucratic processes that government has set up to deal with that concern.

Ms. GRAY. You have it nailed. That is exactly what it is because it is the misapplication and not the fault, in my opinion, of the Department of Fish and Wildlife. It is because they did not have a plan.

And the fellow that said if you are going to build a house, you do not go down to Home Depot and buy everything in the store and then figure out how it is going to—I mean he nailed it. That is what we are trying to do.

I live in a county that is so pro-environment that every person in planning and development comes out of the University of California at Santa Barbara environmental studies and even they say, "Just give us the plan. We do not know what to tell the people that come in."

And that is why your bill is working, because we need to know. We will do it. We might gripe. Someone said we might gripe. But we will do it, but we need to know how to do it. So you got it nailed.

Mr. CARDOZA. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Rehberg.

Mr. REHBERG. Thank you, Mr. Chairman. I think just exactly like you, as well.

The CHAIRMAN. Today.

Mr. REHBERG. Today, yes.

I want to go off in the same direction but on a little different point. I apologize that I do not know California as well as I should so I am not specifically knowledgeable about your area. You are county commissioners. And you are a mayor?

Mr. MARTINI. I was a mayor. I am a city council member now.

Mr. REHBERG. OK. Are you aware of the unequal application of the Endangered Species Act between the East versus the West? I specifically asked the staff if there was any discussion today and perhaps you had heard while sitting here of a case back in Washington, D.C. right here of sludge being dumped into the Potomac and a lawsuit that was filed by the good guys, although we came up with an environmental name so that we would sound like environmentalists, and the lawsuit was it is not good for you to be dumping sludge from the Georgetown sewer into the Potomac, affecting the snub-nosed sturgeon.

Unfortunately, a stay of execution was given by the Federal government saying well, it is OK for the next 5 years until you can get your act together for you to continue dumping the sludge in, affecting that endangered species. And oh, by the way, you can go ahead and build the Wilson Bridge.

Are you aware of some of the inconsistencies that are occurring throughout the nation, in deference to the problems that you are having most recently in your city and your county?

Ms. GRAY. My answer is no. The only time there is unequal application is when the Service changes a worker. So if there is one scientist there that sees it one way, then her interpretation will be what we are working with in year 2000. If that scientist moves, then we are working with the interpretation of 2001. But that is different from what you are setting forth. Mine is just being back begging for the plan again.

Mr. MARTINI. And just following a theme of being on exactly the same wavelength as not only the Chairman but everybody on the Committee today, it would be far from me to ever comment that Washington, D.C. is treated differently than—

Mr. REHBERG. And Virginia and Maryland, unfortunately. I guess my point is I am from Montana and Congressman Walden and I and Mr. Pombo for a different reason, but we fought the Healthy Forest Initiative, trying to get it passed. We were up against a brick wall until Colorado started having fires and then I will be darned if Southern California did not start having fires and then Mr. Daschle made a special exception for the Black Hills and all of a sudden we had our coalition built to pass this and it never would have occurred if it had not been real to people in California, Colorado and South Dakota.

My point is I hope you will go back to the National Association of Counties and I hope you will go back to the League of Cities and Towns and tell them of the problems that you are having and the inconsistencies that are occurring nationwide because until we develop enough of a coalition to get people to support the repeal or the reform of the Endangered Species Act as we know it, it is not going to occur.

We have felt the problems in our individual district and our individual states but it is now starting to boil. Again I apologize for not knowing California but I welcome you now to the fight. It is nice to have you. You see what we have been up against.

Ms. GRAY. And I was commenting on that because I was doing my research in the bar last night to find out what people thought of stuff—

Mr. REHBERG. So you are an insider in Washington.

Ms. GRAY. Right. So one of the things that kept occurring as the conversations were going was the difference in the eastern interpretation of what is going on with the endangered species than the western. I did not think that the other part of the country saw it as a problem, as we do in California. We have so many—Wyoming obviously, Montana, Nevada, Florida—so it is coming. I hear what you are saying.

Mr. REHBERG. Real quickly, Mr. Martini, was it you that mentioned the 14,000 acres?

Ms. GRAY. It was me.

Mr. REHBERG. It was you, Ms. Gray. Is that private land? And are—

Ms. GRAY. Mostly private land. Some public airport. Mostly private.

Mr. REHBERG. Do you have a map? Did they hand you as part of the process—it was a secret procedure, right?

Ms. GRAY. Right.

Mr. REHBERG. You were not involved, so they unveiled something. Is it clearly defined with legal descriptions?

Ms. GRAY. No. It is just a circle. We need the GPS so we know exactly. We still do not know exactly. We just have panic guessing.

Mr. REHBERG. A question I have then, Mr. Chairman, is can the executive create an executive order to establish critical habitat, similar to what they did in Montana in the last throes of the Clinton Administration, saying well, we have lost our position, we are not going to be President and Vice President anymore, so here it is? For all eternity, this is the Missouri Breaks Monument without deference to us being involved in the determination of the boundaries. Can a President do the same?

The CHAIRMAN. That is, in essence, what they are doing, is unilaterally drawing a circle on a map. In my instance with my district, it was not a circle. It did look like somebody took a brush and just went like that and everything within that area became habitat. Anybody that actually knew what was on the ground would not have drawn the map the way they did. And I am taking from this testimony that that is the—

Ms. GRAY. Right. They located pools where they thought that the salamander might breed and then they said we will go so far from there and that should work. But no, maybe we ought to go a little further, and that should work. So then pretty soon it resulted in a big circle that started from little circles, very similar to what happened to you in your vernal pool situation, very similar.

Mr. REHBERG. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Udall.

Mr. UDALL. Thank you, Mr. Chairman. And thank you, members of the panel, for being here. Sorry I did not get to hear all of you but I did get to hear some.

Mr. Chairman, I have two statements to put in the record. Our colleague, Congressman Grijalva, I would like to submit his statement for the record, and then comments of the North American Section of the Society for Conservation Biology. Can I have permission to—

The CHAIRMAN. Without objection, they will be included in the record.

Mr. UDALL. Thank you very much.

[The prepared statement of Mr. Grijalva follows:]

Statement of The Honorable Raul Grijalva, a Representative in Congress from the State of Arizona

The Endangered Species Act is a law that aims to conserve and recover species which have reached a critical point in their existence. The law attempts to assist wildlife and plants that without changes in management or human activity will likely head down the road toward extinction.

The goals of the ESA are lofty ones. We as a society have decided that we want to take care of imperiled species and help make them healthy again.

But, the goal of the ESA is not to preserve wildlife and plants in zoos and laboratories. Instead, the Act aims to conserve species through the designation of natural habitat in which the species can recover.

In my community in Arizona, we are attempting to set aside habitat, and allow for reasonable growth, in order to recover not only listed species, but those that have not yet reached the point of needing the Act's protection. Several years ago,

the cactus ferruginous pygmy owl was listed, and later critical habitat was designated for the species. As a consequence of listing and critical habitat, a multi-species conservation plan, which attempts to protect and recover over 50 Sonoran desert species, was put together. This planning process involved a broad range of stakeholders in the area who sat down together and created this ground-breaking plan. Governmental representatives, environmentalists, homebuilders, and business owners, among others, were all represented. The plan contains areas that will be set aside for habitat, and other areas that will be developed for homes or commercial space. Currently we have widespread support for bond measures that will fund the plan.

I am convinced that the listing and critical habitat designation for the pygmy owl were the impetus for something very special. The ESA presented us with an opportunity to comprehensively address the future growth and health of our community and our environment. We sat down together and decided what we wanted over the long term for our community, which we would not have done but for the ESA's requirements.

Critical habitat designation is an essential element of endangered species protection. Without adequate habitat, species cannot survive, much less reach a point of no longer needing human assistance. And, without the requirements of the ESA, communities like mine will not have the impetus or opportunity to take a comprehensive look at their environment.

I believe the bill before us today will render the ESA's critical habitat provision toothless, and no longer able to provide help to species as it was intended to do. I cannot support this legislation because it will do nothing to further the goals of the ESA and will instead make it more difficult and less likely that we will be able to recover species.

The proposed legislation would limit habitat designations to areas where species currently live. This will preserve the smallest possible area, and will make it impossible to recover species to a point where they no longer need listing. The bill would also prioritize economic impacts over environmental impacts in the designation process.

For the sake of argument, if assume that, as critics claim, the ESA is not working to recover species, the stated goal of the Act, we have to ask and answer the question: Why isn't it working? Before we go about changing a law that has been in place for over 30 years, we should find out the real reason that the Act is not working, if it is true that it is not.

We should look at the original legislative language and ask the question: Is the ESA being properly implemented according to legislative intent?

Criticisms of the ESA have often focused on the plethora of lawsuits that environmental groups bring under the Act's listing and critical habitat provisions. However, I would emphasize that the reason these lawsuits are necessary is that the agencies involved often have failed to meet their duties under the ESA. The agencies consistently delay listing when evidence that species are imperiled is clear and convincing. Moreover, agencies do not designate critical habitat on time and often the critical habitat designated is not enough to meet a species' basic needs. Because there is no deadline for completion of recovery plans, they often are not created or implemented.

Adding to the problem, the agencies that have jurisdiction over the ESA have consistently requested lower amounts from Congress than is necessary to complete their work in listing and designating critical habitat. They do not ask for enough funding to address the backlog of actions that are needed to assist species in trouble. These same agencies later claim that lawsuits and other actions are crippling the budgets of the agencies, when in reality this problem appears to be self-created.

Before we take the radical and drastic step of changing one of our fundamental environmental laws, it would be more appropriate to properly fund the agencies that manage wildlife so that they can carry out their duties in the manner as intended under the Act, and at the same time require more accountability from these agencies in terms of their inaction to list, designate critical habitat, and create recovery plans in order to address species protection.

This bill would take us backwards in our goal of recovering endangered species. It will result in less protection for species and a reduced likelihood that species will recover. I strongly urge my colleagues to reject this legislation.

[The statement of the North American Section of the Society for Conservation Biology follows:]

Statement submitted for the record by the North American Section of the Society for Conservation Biology on H.R. 2933, The Critical Habitat Reform Act of 2003 [1]

PREPARED FOR THE SECTION BY KATHRYN KENNEDY AND KAREN HODGES

23 APRIL 2004

In this document, we provide a section-by-section analysis of certain sections of H.R. 2933, highlighting various scientific issues pertaining to the conservation of endangered species and the designation of critical habitat.

ANALYSIS OF KEY SECTIONS OF H.R. 2933

Section 2: Designation of Critical Habitat concurrent with approval of Recovery Plan

Issue 1. Proposed change in language to Sec 4 (a) General.- section 4 (a) (3) **FROM** "The Secretary, by regulation promulgated in accordance with subsection (b) and to the maximum extent prudent and determinable—designate"..critical habitat..." **TO** "The Secretary, by regulation promulgated in accordance with subsection (b) and to the maximum extent practicable, economically feasible, and determinable...designate...critical habitat".

Comment: This proposed text is a significant change in the criteria for determination of critical habitat. The current inclusion of the word "prudent" places the emphasis on the benefit to the species that may accrue both biologically and functionally through designation of critical habitat and implementation of its associated regulations. Currently, the Fish and Wildlife Service (hereafter, FWS) examines the biological importance of any designated habitat in terms of survival and recovery. Agency biologists also consider their ability to reliably determine and evaluate the elements needed to define critical habitat. This approach relies on a scientific analysis of benefits. The proposed change in wording shifts the focus to matters of "practicality" and "economic feasibility" as well as determinability. The proposed wording is a significant change in focus away from the needs of the species. Loss of the term "prudent" essentially removes the concept of biological importance to the species from the criteria. It weakens the ability of critical habitat to serve as a conservation tool under the Endangered Species Act.

The "prudency" standard also provides an important exemption from critical habitat designation in cases where designation would likely increase a species risk of extinction, as could be the case when specific georeferencing would enable vandals or collectors to locate and damage the population (this issue is particularly pertinent for populations of at-risk plants or species such as raptors with few nesting locations). Although FWS use of the "prudency" exemption has far outstripped this intention, we are concerned that loss of the possibility of a "prudency" exemption could actually damage protection and recovery efforts by forcing designation in cases where "take" of a species could increase as a result. Although this issue likely affects the minority of listed species, it could be highly damaging to them.

Furthermore, these new criteria of "practicality" and "economic feasibility" are not well defined. As written they introduce great uncertainty to the process. We anticipate that, as written, the proposed legislation would lead to additional litigation. A careful definition of terms and a clear understanding of the implications of the wording are essential in preventing legislative and judicial gridlock. We thus fear that this proposed wording change will do little to stem the existing problems with ESA implementation.

We are also concerned that imposing a criterion of "economic feasibility" rather than the present requirement of "taking into consideration the economic impact" may reduce the decision to one of current or near term budgetary and economic factors, rather than emphasizing long-term stewardship or benefits of designation to the species, habitat function, and economic sustainability. This concern is amplified by the suggested removal of the prudency standard. Under the proposed wording, "practicality" and "economic feasibility" could be volatile and inconsistently interpreted on the basis of agency staff priorities, budgets, or current economic conditions. For example, a strict interpretation of these proposed criteria today could be grounds for making no critical habitat designations simply given current limitations in FWS staff levels and budgets—regardless of potential benefits to the species under consideration. Similarly, significant areas necessary for the survival and recovery of the species could be excluded based on temporary economic conditions

[1] This document represents the opinions of the North American Section of the Society for Conservation Biology only. It does not necessarily represent the opinions of the Society for Conservation Biology as a whole or of any of its other sections.

which may be the result of the same forces that make the species vulnerable. Failure to designate critical habitat based on economic issues alone would increase the risk of extinction.

Issue 2. Proposed language further amending the current section 3 **FROM** "The Secretary...(A) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat..." **TO** "The Secretary...(i) shall, concurrent with the approval of a recovery plan for a species under subsection (f), designate any habitat of such species which is then considered to be critical habitat".

Comment: Many scientists and practitioners believe this change has some advantages. At the time of listing there is seldom as much information about the species, its range, and its habitat requirements as there is following the development of a recovery plan. Hence, the process of evaluating critical habitat would be enhanced by the recovery planning process, and allowing more time may yield more well-defined designations and give the FWS more time to work with the public to help them understand the process. Further, critical habitat is supposed to meet the needs of the species for survival and recovery, but at the time of listing recovery criteria have not been determined. Consequently, estimated recovery goals must be used.

However, the potential drawback to having critical habitat designation concurrent with recovery planning is that some species are under severe threat from ongoing activities, and the legal protection afforded by critical habitat would be delayed. In cases where there are immediate threats to an at-risk population from human-induced habitat alteration, then delaying critical habitat designation and the attendant protections afforded to the species could substantially increase the risk of extinction. Further, recovery plans in many cases lag behind statutory requirements, and many species do not have approved recovery plans,1 which means that the potential benefits of critical habitat might not be realized even if designation were delayed until the recovery planning stage.

In 1995, at the request of Congress, a panel of the National Research Council2 reviewed some ESA issues. They recommended that at least some habitat be designated at the time of listing, which can then be modified at a later date—whether or not the entire designation process is deferred. This suggestion remains viable. Species are listed on the biological grounds that they are threatened with extinction: listing implies that human activities in their ranges need to be controlled in order to reduce the risk of extinction. For species where populations have dangerously low viability, threats are imminent, or there are clear current land use controversies, delaying the use of species recovery tools such as critical habitat designation would increase extinction risks, and perhaps may also increase species protection costs when actions are finally implemented. In such cases, we think it is essential to preserve the ability to act early and then refine the protection. This option is clearly biologically preferable to delaying such decisions. Such a policy could be developed as a parallel to the existing "emergency listing," with only some species receiving a temporary critical habitat designation at the time of listing. While it may be feasible for all newly listed species to receive some critical habitat protection that is later modified during recovery planning, the costs and logistics of doing so for species with less critical situations needs to be weighed against the benefits that accrue to the community by taking more time to define recovery needs and inform the public about the process, and putting those dollars to more direct recovery implementation.

Finally, for some species, full recovery is not possible (for example, when very few patches of suitable habitat remain) and the best we can hope for is that population size will be stabilized. In such cases, critical habitat may be important to protect the remaining patches of habitat, but a recovery plan will not be developed. To ensure that critical habitat can be used as a protection tool in such cases, there should be a requirement for critical habitat designation at the time a recovery plan is approved or a determination is made that such a plan will not benefit the species.

Issue 3. Addition of a new section 4 (a)(3) (B) {the previous section (B) having been amended to become 3 (A)(ii)} adding the following language:

"(B) Notwithstanding subparagraph (A), the Secretary may not designate an area as critical habitat of a species, and any designation of critical habitat of a species shall not apply to an area, if the area is subject to—

> "(i) a habitat conservation plan under section 10 (a)(2) that the Secretary determines provides protection for habitat of the species that is substantially equivalent to the protection that would be provided by such designation; or

"(ii) a State or Federal land conservation program that the secretary determines provides protection for habitat of the species that is substantially equivalent to the protection that would be provided by such designation"

Comment: This exemption permits the FWS to exclude certain areas from the designation of critical habitat based on current protection afforded to the habitat by other plans, programs or regulations. This proposed change further reduces the biological emphasis on whether a conservation benefit to the species would occur, with little justification for this proposed change. The phrase "substantially equivalent to the protection that would be provided by such designation" is undefined. The basis for the Secretary to make a determination of "equivalence" is unclear, and could be subject to abuse and inconsistent application if left discretionary. We expect inconsistency in application as differences emerge in the way it is interpreted, followed by litigation as people challenge those interpretations. Such lack of clarity has two likely impacts. First, it could significantly reduce the areas benefiting from critical habitat designation. Second, the contention and litigation that would follow would deepen rather than reduce the existing problems in ESA implementation. At-risk species are the ultimate losers in this scenario.

Furthermore, the Act already provides for exclusions based on benefits comparison. Under Section 4 (b) 2 the Secretary may exclude any area from critical habitat, "if he determines the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." It seems that the existing provision for exclusions is sufficient.

The existing language emphasizes benefit to the at-risk species, whereas the proposed text is less clear in demanding careful benefits analysis. The exclusion from critical habitat designation of areas with state and federal conservation programs may damage recovery efforts. Areas currently under conservation programs are often areas where many types of federal funding and jurisdiction are involved. Costs of evaluation and implementation of critical habitat are likely lower in these areas, as there is often more information, and federal and state agencies have staff able to undertake the process. It makes little sense to exempt areas where federal actions are common and conservation of the species is likely to be both cost effective and relatively uncontroversial.

Plant species make up more than half of the federally listed species under ESA, and critical habitat for listed plants on federal lands managed for conservation has the potential to benefit these species. Prohibitions on activities harmful to listed plants are limited on private lands. Federal lands are those where damage and destruction of listed plants are violations of the Act and listed plants receive more protection. These are exactly the situations where critical habitat is most likely to benefit plant species via the consultation process, and may significantly assist reaching recovery objectives.

Moreover, exemptions based on today's activities and protections may be shortsighted. Under this proposed amendment, habitat conservation areas and areas covered by state and federal conservation programs would be exempted from designated critical habitat based on our current perception of what constitutes substantially equivalent levels of habitat protection, and our estimation of likely activities that might affect the species and trigger Sec. 7 consultation requirements. This determination would not allow for unanticipated future activities that "may affect" listed species and which current HCP provisions or state and federal conservation programs may not protect against. This provision would then foreclose options for future benefits from the process.

Furthermore, once we allow designated critical habitat to exclude lands covered by other protections, shifts in the protections afforded by these other plans, programs or permits and regulations would open species to additional hazards. To be sure that species receive the same benefits from other protections as would accrue from critical habitat, the FWS would have to constantly review and re-certify these exclusions. The more cost-effective and assured approach for habitat protection of listed species would be to designate critical habitat even in areas protected under other plans, programs, or regulations.

These exclusions from critical habitat designation are not likely to reduce the regulatory process for permits and approvals. With or without critical habitat, in most cases a "may affect" activity would still trigger the need for a section 7 consultation and biological opinion, so exempting these areas from critical habitat designations is not particularly advantageous, nor is it likely to cut costs beyond the initial savings of not designating critical habitat. Designating critical habitat in these areas is still important because it highlights the issue that species protection requires more than just the prohibition on "take," since habitat is necessary for the behaviors and reproduction for the species to maintain itself.

Listed species and the regulated public are probably better served in the designation of critical habitat if sound biological information is used to identify all the areas necessary for the survival and recovery of the species. Otherwise, critical habitat designation becomes a piecemeal approach that does not reflect the biological needs of the species. Under the proposed amendment, we anticipate that critical habitat designations would not be accurate reflections of areas where it is advisable to avoid any adverse modification. As a result, the public and agencies would not be as well informed for determining "may affect" findings, evaluating recovery needs, and tracking the condition of the habitat and the species.

We oppose provisions for exempting areas under other programs, plans, permits, or regulations from the designation of critical habitat, with the exception of areas covered by safe harbor agreements, where the potential imposition of critical habitat could deter private landowners from participating in habitat restoration and enhancement efforts. We believe that at a minimum, it should be clear that the Secretary may not exclude areas when the failure to designate such an area will result in the extinction of the species, as currently required under Section 4 (b)(2)—and indeed, increasing the extinction risk of a species would mean that the jeopardy standard in ESA was being transgressed. We feel that this provision should instead be broadened to include "may significantly increase the likelihood of extinction" rather than the current "will result in the extinction of the species."

Section 3: Bases for Determination

Issue 4. Adding to Section 4(b)(2) a requirement (B) "that in determining whether an area is critical habitat, the Secretary shall seek and if available, consider information from local governments in the vicinity of the area, including local resource data and maps."

Comment: It is our understanding that the FWS usually seeks this sort of information now, and provided that the FWS is not required to give undue credence or emphasis to locally provided information over information from other sources, this change poses no particular problems or added expense over current practice. We think the major issue with using information during critical habitat designation is to ensure that information from more credible sources is given more weight than information from less credible sources, rather than assigning emphasis based on the geographical origin of such information. It could weaken critical habitat designation if very poor but local information was given more credence than very strong information from a different location.

Issue 5. Adding to Section 4(b)(2) a requirement "(C) Consideration of economic impact under this paragraph shall include"

> "(i) the direct, indirect, and cumulative economic impacts of the designation, including consideration of lost revenues to landowners and to the Federal Government and State and local governments;"

Comment: This is an extension of the existing requirement that economic impacts be considered in designating critical habitat (see Sec. 4 (b) (2)). The ESA currently requires economic evaluation and we feel the appropriate place for specifying how that evaluation is to be undertaken should be in agency guidelines, where more detail can be provided. This more explicit requirement will require additional guidance, implementing standards, and regulations, at considerable expense. It may also open additional areas for litigation, as estimating indirect and cumulative costs is difficult. It will also likely increase the costs and time needed to evaluate potential determinations, to the detriment of intended protection and progress toward recovery objectives.

> "(ii) costs associated with the preparation of reports, surveys, and analyses required to be undertaken, as a consequence of a proposed designation of critical habitat, by landowners seeking to obtain permits or approvals required under Federal, State or Local law."

Comment: This provision puts an expensive burden on the FWS that is not justifiable when one examines the differences between consultation regarding areas with and without critical habitat. Because critical habitat regulations only come into play in the context of Section 7 consultations, and in most cases exclusion from critical habitat would not obviate the need for a Section 7 consultation altogether, the landowner's and agency expenses for biological reports, surveys, and analyses associated with the process are likely similar. We do not think this provision would enhance species protection nor reduce implementation costs.

Section 5. Clarification of the Definition of Critical Habitat

Issue 6. This section adds more language to define the terms "geographical area occupied by the species" and "essential to the conservation of the species" as used in Section 3 (5)(A).

The statute currently states: "The term 'critical habitat' for a threatened or endangered species means—

(i) the specific areas within the geographical area occupied by the species at the time it is listed...on which are found those physical or biological features essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed".upon a determination by the Secretary that such areas are essential for the conservation of the species."

The proposed legislation adds a section 5(D)(i) (I) and (II), as follows:

Adding language: 5(D)(i) for purposes of subparagraph (A)(i)—

(I)"the term 'geographical area occupied by the species' means the specific area currently used by the species for its essential behavioral patterns, including breeding, feeding and sheltering; and

(II) "the term essential to the conservation of the species means, with respect to a specific area, that the area has those physical or biological features which are absolutely necessary and indispensable to conservation of the species concerned."

Comment: The proposed wording change establishing the definition of "geographical area occupied by the species" is potentially damaging to species recovery efforts. There are two issues here. First is how habitats that are sometimes occupied are classified. Some species may use particular habitats for only part of a year or part of a life cycle. It is essential that these habitat types be recognized as "occupied," despite the periods of time when they are not being used by the species. Insofar as the proposed wording would enable this classification, it could be useful.

However, the second issue, and the more important one, is to what extent unoccupied habitat can be designated as critical habitat. ESA makes it very clear that species recovery is the ultimate aim, and species recovery in many if not most cases will require reoccupation of former areas of a species' range. Thus it is essential that critical habitat designation be possible for currently unoccupied habitat so that it is available for recolonization during recovery. The proposed wording change would hinder designation of non-occupied habitat. Thus the proposed wording change would make it so that critical habitat designation collapses down to being a bare minimum of where populations are continuously present, which is a minimalistic approach to species protection and recovery, and is counter to ESA's mandate.

The addition of a specific definition of "essential for the conservation of the species" as "absolutely necessary and indispensable to conservation of the species concerned" does not provide any biological or semantic clarification. It therefore is not helpful in evaluations or determinations. We think it aggravates imprecision, and might actually increase confusion and subsequent litigation.

References

1. Hoekstra, J. M., W. F. Fagan, and J. E. Bradley. 2002. A critical role for critical habitat in the recovery planning process? Not yet. Ecological Applications 12:701-707.
2. National Research Council. 1995. Science and the Endangered Species Act. National Academy Press, Washington, D.C.

Mr. UDALL. Dr. Sheldon, you have been sitting here today, I assume, for a bit listening to what has been going on and you are a conservation biologist. Is that right?

Dr. SHELDON. That is right.

Mr. UDALL. You have been teaching conservation biology and been involved—

Dr. SHELDON. I have been a member of the North American Society of Conservation Biologists for 20 years.

Mr. UDALL. One of the things I am wondering, you sitting here as a conservation biologist, you hear a lot of the arguments here and you hear all the down sides of saving species and the problems. This panel and the previous panel and many of the witnesses today have brought those home in a passionate way and looked at those specifics and brought them to light for us and I applaud them for doing that.

I wonder if you could help us on the up sides of a healthy ecosystem. I mean what is in it for men and women, having a healthy environment? When you hear these kinds of arguments, what comes to your mind when you think of the Endangered Species Act and why it is important to have a balanced, healthy ecosystem?

Dr. SHELDON. Critical habitat provides green space in the middle of an urban area, which otherwise would be wall-to-wall houses. It gives place for enjoyment. It gives place to celebrate the awe and wonder of creation. I mean green space is essential.

And there is a point, I think, at which in some communities, as we have heard, we have boundaries for growth but too often we simply assume that our economy and our society can grow infinitely within a finite world. And if it is a choice between human growth and the protection of species, there is always going to be enough political power to push us on the side of human growth at the expense of the species. There has to be a balance. It is not an either/or. It has to be a both/and.

We somehow must find the willpower to recognize that there are limits to growth. We have to have quality of life, but quality of life depends upon a healthy creation around us. It is necessary. It is very similar to the analogy that has been given that if you have an airplane, what we are arguing about is how many of the rivets can fall out of the wing before the wing falls off? There are thresholds within the ecological system beyond which the system will crash and we do not know where those thresholds are right now.

The critical thing from a conservation biology perspective, and it is widely applied in many of our lives, is to operate by the precautionary principle. We do not have to have all of the information in to be absolutely sure before we err on the side of conservation. Sometimes that means that we may protect habitat in the beginning and realize that the habitat is not necessary in the long run, can be released.

I am hearing the pain of some of the people around here and I hear it loudly where we did not have enough funding in the ESA to draw adequate maps so that we knew own the ground what the distribution was of the critical habitat to protect for the tiger salamander. That is a classic example of a failure not to release enough funding to do the science adequately to allow us to live sustainably within our communities.

It is a joy to be able to say I have an endangered species in my back yard. I have one acre of land and I have identified 109 species of birds on that one acre of land. I have a house on it. It is covered with wild flowers. I have 19 species of trees on my one acre. I walk out onto my back porch and I celebrate the beauty around me. I do not have to go on a vacation to feel a release from the pressure. I just walk out onto my porch because I have landscaped for wildlife and invited them to be part of my backyard, too.

I think the question is whether we have the willpower in the country to learn that we have to live with the creation instead of against it, and figure out how to do that. That is the essence of what you have to do here, is to come together and recognize that there are going to be boundaries. We have to recognize when we say no. We have to be able to have a quality of life.

I look back—I grew up in Oregon. I am from the Pacific Northwest. I teach during the summer at the Arava Institute of Environmental Studies on Whitby Island northwest of Seattle. It is a gorgeous place. But when I was growing up in my high school and my grade school in St. Helens, Oregon I did not know of a single person in my entire history in the school who had asthma. And as I went to church all my life I never knew of a single person that suffered from cancer, as a child.

When I ask my class today how many of you in my class have asthma, 25 percent of my students acknowledge the fact that they are suffering from asthma today. And you look around you and ask how many people in your community are struggling with cancer.

This is not dealing with the Endangered Species Act but it is very much part of the message that we are fouling our nests. We have to learn what quality of life is. We have to learn how to say no. And when it comes to the Endangered Species Act, as I said in my testimony, we have to figure out how to craft that Act so that we have a win/win situation instead of a win/lose situation, as it so often happens.

Frankly, if we have enough money to give a half a trillion dollars in tax rebates to bail the country out for short-term economic stability, we certainly have got enough money to provide a sufficient amount of funds to maintain the biodiversity that not only we depend upon but all of creation depends upon. And it is a matter of choices. We simply have to determine what is important. And for me and my household, we will serve the Lord. And for me and my household, we have to maintain the sustainability of the global creation.

So that is how I would answer your question. It is a matter of choices and we in this room all are living with problems. We are all struggling with aspects of an Endangered Species Act that frankly is broken and it needs to be fixed. Part of the current bill will indeed move us in that direction but critical habitat, the critical habitat description, that aspect is absolutely necessary but the critical habitat is the habitat that the species needs to flourish on and we have to have good science to provide us with that information.

Then we are going to have to recognize that sometimes we have to make the choice of having a tiger salamander in my back yard is really great but there may be a financial cost to it, too, but we need to preserve the species.

The CHAIRMAN. The gentleman's time has expired.

Mr. Walden?

Mr. WALDEN. Thank you, Mr. Chairman.

I think what we are hearing is a growing consensus on the need for critical habitat reform. This dates back to the days of Secretary Babbitt or Jamie Rappaport Clark or Michael Bean, the environmental defense attorney. Republicans, Democrats on this committee today, we must focus on how we can get recovery, which is what the Cardoza bill does, and we must improve science. I fully agree with that. I think that is the foundation for our decisions so we do not make decisions that are actually harmful to the species, which is what happened in my district when one agency—two

agencies made two bad decisions, both of which were threatening to the very species they were supposed to protect.

As one agency said, let us flow warm water out of a lake down a river system that had microsprings in it that kept the water cold, and when you diluted that with warmer water, it imperiled the salmon they were supposed to protect.

Another agency said to maintain a high lake level because we think that is the thing to do, when the history and the science showed just the opposite once the National Academy of Sciences did the review.

So sometimes to me government rushes to make decisions that are not based on sound science and in doing so, not only upends an economy perhaps but also may actually imperil the very species we are supposed to protect, we are supposed to be stewards of. We need to get it right and that is why Mr. Cardoza's legislation makes sense to me and it is why my legislation requires outside independent peer review.

I think it makes sense for the Endangered Species Act modernization. This is a 30-year-old law that we are seeing some result from but I think it could do more and do it better than 12 or 13 species out of 1,300 or whatever the number is after 30 years.

And we have learned a lot. You talk about growing up in St. Helens. I grew up in the Dalles and Hood River and I have to tell you people are living longer today in this country than they did 20, 30, 40, 50 years ago and we are detecting some of these diseases because of the miracles of modern technology and the things we have learned.

I mean technically—we were just looking this up—under the ESA it is probably a violation to rid the face of the globe of polio if you read the statute correctly and clearly. The only exception are insects that are a threat to humanity. That is the only specific exception. So are we doing something terrible here because we are going to rid the face of the globe of polio or some other disease that we as a civilization decide is bad for us?

To me, we can find a balance and to me, there is a certain sense that communities and countries that are strong economically probably are more engaged to protect, preserve and enhance their environment than those that are struggling to develop. I have seen that in China when I have been there. I have seen that in other Third World countries, certainly. They do not care.

And what my colleague from Montana said I think made a lot of sense. Right out here in this river system one of the first listed species, the short-nosed sturgeon, gets to swim through sewer sludge because it would take 5 years to fix the problem.

In my home state there is a city that every other day on average dumps sewage into the Willamette River and they get 10 or 15 years to fix it because it is a big problem and an extraordinarily expensive problem and I understand that, but we can do better. We should do better.

I think every once in a while it is a good idea to look at one of these laws and say is it working? Does it make sense? Is it causing hardships that are not necessary? Can we do it a better way with a partnership, especially when the bulk of the lands that are needed for habitat are private?

Sir, I would say I admire you for what you do on your property. It sounds splendid. But there could come a day when they come and say your house is in the way and we need to have you tear it down. You probably would say fine, take it; I'll find something else to do. But for a lot of people trying to change out from running a cattle ranch to planting grapes should not be upended. They should not lose their property over that, in my opinion. That is part of what this country is about, is private property rights.

So we need to find a balance in the law, Mr. Chairman, and I appreciate your work on this issue and Mr. Cardoza, yours, as well. I think together we can come and find solutions that work to modernize the Endangered Species Act to protect the species, to allow for our country to have a strong economy and not poverty. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Pearce.

Mr. PEARCE. Thank you, Mr. Chairman. I will not stoop to declare that my beliefs are the same as yours, but I would like to associate myself with the comments of Mr. Cardoza and Mr. Rehberg, in just in case it works well.

I was fascinated by Dr. Sheldon's comments and his perspective. Growing up on a five-acre farm as one of six kids in the 140-degree temperatures of southern New Mexico, I began to believe the words of the Lord when it says in Genesis 3:17-20 that the ground is going to be painful for you to toil and it is going to produce thorns and thistles by the sweat of your brow. I learned that very carefully and at an early age and have not gone back to that five-acre farm since leaving, but I appreciate that.

Dr. Sheldon, you did say that you are a practicing evangelical, right?

Dr. SHELDON. Yes.

Mr. PEARCE. If many evangelicals come down in a debate that falls very close to your field, choosing creation theory over evolution theory. Where do you fall in that?

Dr. SHELDON. God did it. I am not defining what process he used.

Mr. PEARCE. And also just to put it in perspective, the question of your one-acre farm and the way that you are able to use that, if no one else in the world produced anything, food, would you plow up that habitat to provide your family with food? That comes down to the essential question for all of us because if we choose one thing with our own property, depending on others to do with their property, to mine the ore that is used in the metal for our cars, to drill the wells on their property to get the fuel for the cars that we drive if we drive cars, or if we fly in airplanes, then sometimes we, I think, simplify the decisions before the society and in these equations.

So how would you use your one acre if no one else produced food?

Dr. SHELDON. No one else produced it? That is a very interesting question.

Mr. PEARCE. I will just let you ponder that. I really don't want—

Dr. SHELDON.—moving to Whitby Island because I will have five acres there. I will be moving there in 4 years and I have a garden spot planned. But it is a question that we have to—

Mr. PEARCE. It is a very deep question that we all are troubled with and—

Dr. SHELDON. I would struggle with the question. I certainly would not cut all of the trees on my half an acre that I might be forced to grow my produce on. Can you feed a family on one acre?

Mr. PEARCE. But you see there is a quandary for all of us if you have—we have members in this body with 12 people in the family.

Anyway, before my 5 minutes expires, Miss Gray, thank you very much for the balance that you bring into this and you expressed the frustrations that all of us do, that we must have some common sense. We have to reach the balance somewhere here. I made comments earlier today in this same hearing that we are taking away private property rights from people and that is not in the best interest of the country. If we just have a plan, almost all of us will live by it.

I was really amazed that people talk about Republicans and their concern for the environment. In January the Clear Skies Initiative was discussed and we have in the Clear Skies Initiative by the President 70 percent reduction in emissions under the President's plan; never before. Usually the reductions are in 10 and 12 or 4 and 3 percentages. Seventy percent reductions and business is saying we can do those in return for one thing—certainty.

Just stick with those rules. We can do almost anything here. It is when we set the rules and we begin to move them around that I think that the entire balance, the need to preserve a species with the need to have jobs and the need to provide livings and food sources and heat sources for our entire civilization so, I hope, Mr. Chairman, that we will drive ourselves to that again.

Mr. Cardoza, thank you for presenting the valuable discussion and if any of you want to make comments on the things I brought up, feel free to until the red light goes on. Thank you.

Mr. UDALL. Would the gentleman yield?

The CHAIRMAN. His time is up.

Mr. UDALL. I just wanted to get a last question on his time, Mr. Chairman.

The CHAIRMAN. You can ask one more question.

Mr. UDALL. OK, thank you.

Dr. Sheldon, one of the things that has struck me today listening to the testimony is that people have an emotional connection to different kinds of critters. Clearly you have the American bald eagle and it is a national symbol and everybody loves the eagle and we have done an incredible job at recovering the bald eagle. But there are all these other insects and plants that are out there and everybody can probably think of the little plants and insects that they like the least—flies and chiggers and ticks. You can think of all of those.

But is it dangerous to judge species based on an emotional perception? When we are talking about ecological balance and the whole equation, you need all the—flies are part of the pollenization—flies and bees are part of the pollination process. I mean what would be your comment on this kind of emotional attachment, that we are going to save the things we really like but the others, we do not? Do you have any comment on that?

Dr. SHELDON. Conservation biology is recognizing the difference between fine-filtered approach and coarse-filtered approach to solving the biodiversity crisis. The fine-filtered approach is linked in

with the Endangered Species Act. We identify critical species and we try to help them one at a time.

The coarse-filtered approach recognizes that we have so many species that are currently threatened that that is not a long-term viable solution. The only long-term solution is actually ecosystem-level protection. If we preserve the ecosystems that the species depend upon sufficiently, the species themselves will remain viable within the ecological system.

What is critical here is to recognize what are referred to as ecosystem processes, energy flow and biogeochemical cycles within the ecological systems. And what is interesting there is that many of the players, many of the absolutely critical players in ecosystem processes, the key functioning that drives the sustainability of the system, those key players are the microscopic organisms. They are the things that we are by and large unfamiliar with. That is what is generating and recycling the soils. If it were not for those creatures, you would be up to your eyeballs in dead dinosaurs right now. We have to have the recycling, the program within the system.

It is part of what I would describe as the fruitfulness that has been built into the ecological system itself from the beginning by the creator. It is what keeps the system going.

So we are very quick to identify with the pandas and the bald eagles. My work currently is I am working on a research project on the grasshoppers of Pennsylvania. It has never been done. The last work on the Northeastern grasshoppers was done in 1922. We cannot identify the species that are there. We have no idea what the distribution is. And the Nature Conservancy has no idea what rare or endangered species even exist in Pennsylvania because they are so poorly known.

But the point is that some of the things that we feel have essentially no value—the fly that we will swat or the grasshopper that we will render into a grease spot with mechanical control while we are walking down a sidewalk—those are the species that are the glue that holds the whole system together. That is what keeps the integrity of the processes going.

It is not the few species that we see on the top, the big, charismatic species. Too often those are already so few, their populations have been reduced to the point from an ecological perspective that they are already extinct. I mean we do have American bison in the U.S. but from an ecological perspective they are an extinct species. There is virtually no place in the country where they are carrying out the keystone roles that the American bison were known for.

There are not any wolves or cougars in the Eastern United States. The keystone predators are missing and as a result, we are having an explosion of coyotes and the mesopredators in the middle are taking over, filling in the role.

Those animals we can identify with but it is the other things that we often are very hesitant to even acknowledge with the Endangered Species Act because if you start listing grasshoppers under the Endangered Species Act everybody is going to scream their head off if there is habitat description set aside, protected

areas for grasshopper species because most people cannot recognize their value at all.

I think that is one of the big issues that we are struggling with. How do we really deal with the preservation of all of the creatures, even those that we as a general public do not see as being critical for the functioning of the ecosystems?

So it is the processes that are important on an ecosystem level. It is the landscape processes that we have to maintain. The Endangered Species Act is critical because it is filling in the gap and it is protecting species in the short run. In the long run we have to have habitat protected sufficiently to maintain those processes. And as we do that we should not lose that many more endangered species. If we are preserving the integrity of the habitat, if we are learning to live with creation itself, maintaining its fruitfulness, then a lot of the problems that we are addressing here are not going to be ones that are going to be major problems in the future. It is simply learning to live with the system.

Mr. UDALL. Thank you, Dr. Sheldon. Thank you to the rest of the panel and Mr. Chairman, thank you for your indulgence.

The CHAIRMAN. Thank you.

Just in wrapping up this hearing, first of all, I want to thank Mr. Cardoza for his legislation, for his work in trying to bring people together on what has proven to be a controversial issue over many years. It is efforts such as his to try to bring balance to the Act, to try to bring so many different people together to come to a compromise, knowing that there are some people that are just going to be opposed to it no matter what. And it does not matter what the bill says; their response to it will be that it is gutting the Act.

Dr. Sheldon, to you, I found it very interesting to listen to you and your responses, not only your testimony but your responses to the questions that were asked. I would like you to think about maybe on a somewhat larger scale, what you are talking about on your one acre. Your one acre, you want your home, what is necessary for you to live, and the rest of your acre you are using as habitat. And it not just endangered species. It is wildlife. It is the beauty of God's creation surrounding you.

When you talk about—Mrs. Gray talked about somebody with their farm and it does not matter if it is one acre, 1,000 acres, 10,000 acres. They are setting aside what is necessary for them to live and thrive and produce and the rest of it, they are willing to set aside as wildlife habitat.

That is all we are asking. We are asking for the flexibility in the Act for Mr. Cardoza's constituents to be able to earn a living off of a farm and set aside the rest as that habitat and be able to do that in a proactive way and to remove some of the disincentives that exist under the current Act and its implementation so that people can do that.

I grew up in the California Delta and I loved every day of it. I can tell you what it is like to see a bald eagle or a hawk hunting. I can tell you what it is like to be out in those rivers fishing. That is what I grew up with and I never wanted to leave it. I mean that, to me, was paradise growing up as a kid.

Yet so many of my friends and neighbors are terrified today that you are going to find an endangered species on their property be-

cause they are afraid they are going to lose it. They are afraid they are going to lose the ability to use that property and that is what drove me to get involved in this crazy game to begin with and to be able to come back here and be part of the effort that is being made to bring some rationality, some common sense back into the Act.

I believe that the members of this committee can sit down and come to a compromise, can come to an Endangered Species Act that accomplishes exactly what you describe and, at the same time, takes care of the issues that these local elected officials are having to deal with every day.

You know, in listening to all the debate today and all the talk today, people talk about setting aside habitat. How much? At what point do we say OK, this is enough? The Federal government owns a third of our country right now. A lot of that could be used to recover endangered species. A lot of that should be used to recover endangered species.

We have land in my district, in Dennis's district that is set aside with conservation easements on it and land that has been paid for under habitat conservation plans. That all ought to be part of what the ultimate solution is. But the way the Act is being implemented today, we still have things where the City of Santa Rosa is running into problems, where the County of Santa Barbara is running into problems.

Balance is what we need to find. That is how we need to come up with a solution that removes some of the negative incentives, the perverse incentives that exist under the Act today and turn it into a positive if you find an endangered species on somebody's property. That is what we need to do, but the law right now does not allow that. That is not the way it is being implemented and that is why it gets so frustrating for those of us that are up here trying to deal with this because I agree with most of what you are saying. I think you are right, but that is not the Endangered Species Act we are living with and we need to change that.

So I appreciate the testimony of this panel, all of the panels that were here today. I think this was a very worthwhile hearing to have. I think we got a lot of very important information. I know that Mr. Cardoza and I can go back and sit down and take another look at this bill and see if there are things that we can change that address some of the issues that been brought up today. I think it is a good bill in general. I think it is a very good bill and it is something that we need to move forward with.

So I thank all the panels. I thank the witnesses for your testimony today. I thank the members of the Committee for sticking around during all of this. I know it has been a long day.

So thank you all very much. The hearing is adjourned.

[Whereupon, at 4:02 p.m., the hearing was adjourned.]

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