House Western Caucus

Roundtable on the Endangered Species Act

Senate Visitors Center, Room 212-10
24th September 2019

Remarks of
Myron Ebell
Director, Center for Energy and Environment
Competitive Enterprise Institute

Chairman Gosar and Members of the House Western Caucus, thank you for inviting me to speak today at this roundtable discussion on reforming and improving the Endangered Species Act of 1973. My name is Myron Ebell; and I am director of the Center for Energy and Environment at the Competitive Enterprise Institute (CEI), a non-profit, non-partisan public policy institute that focuses on regulatory issues from a free-market and limited-government perspective. CEI accepts no government funding.

I have been involved in various efforts to reform the ESA since 1990, as has CEI. Despite the fact that these efforts have been unsuccessful, I am heartened by two events this year. The first is that the Departments of Interior and Commerce have finalized changes to the rules implementing sections 4 and 7 of the Act that contain significant improvements. These include: restoring the distinction for management purposes between endangered and threatened species, which is in the statute but has been ignored by the Fish and Wildlife Service for decades; tightening the criteria for including areas unoccupied by the listed species as critical habitat; clarifying the de-listing process; and allowing the collection and dissemination of data on the economic costs of listing decisions. These and several other sensible changes made to the ESA's implementing regulations are a step in the right direction.

The second heartening event is the announcement that Members of the Western Caucus plan to introduce an expanded package of ESA reform bills again this year after first introducing a package last year. I am encouraged by this not because it is likely that any of these useful

reforms will be enacted this year. Rather, I am encouraged because it indicates a commitment to pursuing reform over several Congresses. In my experience, one of the main reasons for the continuing failure to enact reforms to the ESA has been the lack of perseverance. Enacting any controversial legislation, and ESA reform has to rank among the most controversial, almost always takes persistent effort over several Congresses. I hope that introducing a package of ESA bills in two successive Congresses means that the Western Caucus has decided that legislative reform can only be achieved over the long haul and therefore must be pursued over the long haul.

I would like to focus my brief remarks this afternoon on an issue that has not I think received sufficient attention over the years—the issue of costs. Last year, CEI published a short study by Robert Gordon titled, "'Whatever the Cost' of the Endangered Species Act, It's Huge." Rob's paper makes a good start looking at the costs of the ESA, and I have brought copies today for those who are interested. It is also available on CEI's web site at https://cei.org/content/whatever-cost-endangered-species-act-its-huge.

Let me quote the conclusion of Rob's paper:

> [T]he bureaucratic paperwork, annual agency expenditures, and anticipated costs for recovery, while often poorly estimated and tracked, amount to tens of billions of dollars alone. Economic impacts are clearly far larger. The inconsistency of economic assessments done in association with critical habitat designations, combined with the fact that such analyses often omit "baseline" costs, clearly hinders efforts to arrive at a detailed assessment of the ESA's overall economic impact. Further, the fact that many species have no designated critical habitat and therefore no such analysis (which should not be interpreted as an argument in favor of more critical habitat) makes it even tougher. Additionally, there are unaccounted large and small economic impacts outside of designated critical habitat for a vast majority of 1,661 listed species. Whatever the ESA's cost is, it is much larger than generally acknowledged, and likely measured in the hundreds of billions of dollars. Unfortunately, the ESA's poor record of recovering species does not indicate that we are getting what we pay for.

The paper goes on to make several useful suggestions for improving the transparency and accountability of costs and economic impacts of ESA listings and critical habitat designations. These recommendations are aimed at the agencies that administer the Act. Let me make two further suggestions for action by Congress.

First, I suggest that Congress authorize a comprehensive audit of the costs to date of the Endangered Species Act. This audit would include not only the costs paid by federal, state, and local governments but also the much larger economic impacts on private landowners. It is true that the costs to regulated parties are much more difficult to identify and quantify than government's costs to regulate. Environmental pressure groups have from time to time claimed that the ESA imposes no or minimal costs on landowners. We all know—and we all

know that they know—that this is ridiculous and completely untrue. But if we are going to make progress in reforming the ESA, it is in my view necessary that we have a much better idea of the actual costs of regulation being put on landowners.

My second suggestion is that your package should include regulatory takings compensation legislation that would apply to Clean Water Act section 404 wetlands, Coastal Zone Management Act, and the National Environmental Policy Act as well as to the ESA. Protecting and providing habitat for endangered species, preserving wetlands, etc. are public benefits. The cost of public benefits should not be borne involuntarily by private individuals. That is a principle enshrined in the Constitution and widely supported by the American people. The House passed regulatory takings compensation in 1995. Oregon did so by statewide referendum in 2004; and Arizona did the same in 2006.

Enacting regulatory takings compensation, or even merely the possibility of enacting it, will encourage regulatory agencies to moderate their regulatory impulses and will encourage Congress to consider the drastic reform of the Endangered Species Act (as well as other statutes) that I believe is necessary both to improve protection of endangered wildlife and to respect private property rights. If you are interested in what such legislation would look like, I refer you to the Endangered Species Recovery and Conservation Incentive Act, introduced as H. R. 2364 (https://www.congress.gov/bill/104th-congress/house-bill/2364/summary/) in the 104th Congress by then-Representative John Shadegg of Arizona.

—Myron Ebell
Director, Center for Energy and Environment
Competitive Enterprise Institute
1310 L Street, N. W., Seventh Floor
Washington, D. C., 20005
(202) 331-1010
mebell@cei.org