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Testimony on "Examining 'Sue and Settle' Agreements: Part 1"
Committee on Oversight and Government Reform
Subcommittee on the Interior, Energy, and Environment
Subcommittee on Intergovernmental Affairs
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Thank you for the opportunity to testify. Holsinger Law, LLC is a small, Denver-based law firm that specializes in lands, wildlife and water law. I am testifying as the manager of Holsinger Law, LLC. In that capacity, I can attest to the damaging impacts sue-and-settle litigation has had on landowners, agricultural entities, water providers, and energy producers.

I. Drowning in Petitions and Flooding with Lawsuits

a. Burdensome Petitions

Between 2005 and 2015, FWS received 1701 petitions to list a staggering 1,446 species under the Endangered Species Act ("ESA") according to a 2017 Government Accountability Office report, "Environmental Litigation: Information on Endangered Species Act Deadline Suits" ("GAO Report")[1] at 11.

Over the past several years, a small cadre of environmental groups has buried the U.S. Fish and Wildlife Service ("FWS") with listing petitions under the ESA. WildEarth Guardians ("WEG"), the Center for Biological Diversity ("CBD") and their like have a long history of filing both numerous and onerous listing petitions with FWS. For example, in 2007 WEG submitted a single petition seeking to list 475 Southwestern species, while another petition submitted the same year sought to list 206 species in the Mountain-Prairie Region (collectively "2007 WEG Petitions"). A 2013 petition sought to list 81 marine species. In a single 2010 petition, CBD petitioned to list 404 species.

These "mega-petitions" (so termed in the GAO Report) serve only to increase FWS's workload—and by extension, the time needed to review and subsequently make determinations on petitions. FWS has already struggled to carry out Section 4 directives "in part because of a high volume of litigation and petitions seeking to add a large number of species to the threatened and endangered species lists." *Id.* Environmental

[1] https://www.gao.gov/assets/690/683058.pdf.

activist groups see this ensuing delay—brought about in part because of the unreasonably extensive petitions they themselves have submitted—as an opportunity to litigate. For example, in 2009 WEG sued FWS for allegedly failing to make 90-day findings on its own mega-petitions (674 species). It is not surprising that, when FWS must review and make determinations on such a large number of species at one time—in addition any other petitions submitted to the agency—delays and missed deadlines will occur.

While the GAO Report primarily analyzed the actions brought against FWS by environmental activist groups as a result of delays in implementing Section 4 directives (e.g., petition review, listing determinations, critical habitat designations—all of which are subject to statutory deadlines), these "deadline suits" can be seen as a microcosm of the larger world of ESA lawsuits. The GAO Report found that between 2005 and 2015, "a variety of plaintiffs" filed 141 deadline suits against both FWS and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service ("NMFS"). GAO Report at 13. CBD and WEG filed 73 of these 141 suits. *Id*. at 17. A majority (101 suits) were settled. *Id*. at 19, 20.

b. Sue-and-Settle Litigation

Federal lawsuits filed by environmental groups surged in recent years. In fact, sue-and-settle agreements almost quintupled during President Obama's administration when compared to the number of occurrences during previous administrations.[2] CBD and WEG alone filed 117 and 55 lawsuits respectively between 2009 to 2012.[3] Collectively, these two groups filed roughly 1,500 lawsuits since 1990.

Sue-and-settle litigation is staggeringly expensive. In a June 19, 2012 press release, the U.S. House Committee on Natural Resources reported that the federal government "defended more than 570 . . . [ESA-related] lawsuits," which cost taxpayers "more than $15 million in attorney fees" between 2008 and 2012.[4] Unfortunately, the true cost of sue-and-settle is impossible to ascertain as neither the agencies nor the Department of Justice seem to keep track.

In 2013, the U.S. Chamber of Commerce published an analysis of the Sue-and-Settle Process, as well as its effects on government policy ("COC Report").[5] The COC Report found that between 2009 and 2012, a total of 71 lawsuits (including one notice of intent to sue) were settled under circumstances such as sue-and-settle. COC Report at 12. These lawsuits pertained to the Clean Air Act, the Clean Water Act, and the ESA. The Report further notes that "settlement of these cases directly resulted in more than 100 new federal rules, many of which are major rules with estimated compliance costs of more than $100 million annually." *Id*.

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[2] https://www.alec.org/article/sue-and-settle-once-again-rears-its-ugly-head/.
[3] House Committee on Natural Resources, available at: http://naturalresources.house.gov/newsroom/documentsingle.aspx?DocumentID=299899.
[4] *Id.*
[5] https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf.

By filing such suits, these groups circumvent the normal rulemaking process and effect immediate regulatory action with the consent of the agencies. *Id.*

In the majority of sue-and-settle cases, environmental groups are awarded litigation costs, including attorneys' fees, at the taxpayers' expense. "Recent investigations . . . show that more than $49 million was quietly funneled to environmental groups through these scams [sue-and-settle litigation] since President Obama assumed office." [6] "According to a 2011 GAO Report, three organizations were awarded with 41% of this entire sue-and-settle payback between 1995 and 2010…."[7] Legislation has been repeatedly introduced (but never enacted) that would curb sue-and-settle.

According to the Chamber, "a review of a portion of their database revealed attorney's fees were awarded in at least 65% (49 of 71) of the cases. These fees are not paid by the agency itself, but are paid from the federal Judgment Fund. In effect, advocacy groups are incentivized by federal funding to bring sue and settle lawsuits and exert direct influence over agency agendas." COC Report at Footnote 14.

In addition to the attorney fees, environmental groups like WEG and CBD often receive extensive funding from the federal government. WEG's 2016 income totaled at $3,789,258, of which $800,104 was from government grants. This is an increase of $315, 368 from the organization's 2015 government grant income of $523,038.[8] NRDC received at least $6.5 million in grants from the EPA since 2000.

i. Examples of recent CBD and WEG Litigation

Since the inauguration of President Trump, CBD, WEG, and other environmental activist groups have ramped up their litigious efforts.

CBD has filed or co-filed approximately 16 lawsuits[9] against the federal government since mid-March 2017 alone. Many of these lawsuits have challenged executive orders or memoranda issued by President Trump in addition to Congressional Review Act ("CRA") bills signed by the president.

> 5/11/2017 – *CBD et al v. USDA.* Suit against APHIS Wildlife Services regarding predator control in Idaho.
> http://www.biologicaldiversity.org/news/press_releases/2017/wildlife-services-05-11-2017.php

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[6] http://www.newsmax.com/LarryBell/epa-lawsuits/2016/10/31/id/756165/.
[7] *Id.*
[8] WEG's annual reports documenting the organization's financials are available at: http://www.wildearthguardians.org/site/PageServer?pagename=publications_annual_reports#.WR4EAdxumCo.
[9] CBD's "Trump Lawsuit Tracker" webpage, which lists all of the current lawsuits CBD has filed against the Trump administration, can be accessed here: http://www.biologicaldiversity.org/campaigns/trump_lawsuits/index.html.

5/3/2017 – *CBD, NRDC, Sierra Club, et al v. President Trump, DOI Secretary Ryan Zinke, and Wilbur Ross.* Suit over the executive order lifting a ban on new offshore oil and gas drilling in the Arctic and Atlantic Oceans. http://www.biologicaldiversity.org/news/press_releases/2017/offshore-drilling-05-03-2017.php

5/3/2017 – *CBD v. EPA.* Suit claiming that the agency failed to comply with a FOIA request for documents relating to Administrator Scott Pruitt's "close ties" to oil companies and "other polluting industries." http://www.biologicaldiversity.org/news/press_releases/2017/scott-pruitt-05-03-2017.php

5/3/2017 – *CBD et al v. Scott Pruitt*. Suit regarding his "failure to finalize deadlines by which D.C. and Philadelphia must meet 2008 clear-air standards" re controlling smog. http://www.biologicaldiversity.org/news/press_releases/2017/clean-air-05-03-2017.php

5/2/2017 – *CBD et al v. USFS and BLM*. Suit regarding oil and gas in Ohio's Wayne National Forest. http://www.biologicaldiversity.org/news/press_releases/2017/wayne-national-forest-05-02-2017.php

4/20/2017 – *CBD v. Zinke*. Suit challenging the constitutionality of the Congressional Review Act to overturn an Obama administration rule prohibiting predator control efforts. http://www.biologicaldiversity.org/news/press_releases/2017/wildlife-services-04-12-2017.php

5/18/2017 – *CBD v. U.S. Department of State*. Suit demanding information on the route of the Keystone KL Pipeline, as well as contracts and correspondence with private consultants involved. http://www.biologicaldiversity.org/news/press_releases/2017/keystone-xl-pipeline-05-18-2017.php

Other lawsuits filed by CBD (and its allies) during this same period challenged: the approval of the Keystone XL Pipeline; coal leasing on public lands; a land exchange for a copper mine in Minnesota; efforts to secure the nation's border; and Colorado's predator control program.

c. Equal Access to Justice Act

The Equal Access to Justice Act ("EAJA") is another favored tool for environmental litigants. While it was intended to protect individual citizens and businesses from the long arm of government regulation, environmental groups have co-opted it to recover exorbitant legal fees.

The first major problem with the EAJA is transparency. Although it originally required a public report of amounts paid out, Congress repealed that requirement in 1995. As a result, large environmental groups make sizable profits suing federal agencies with no public disclosure regarding the cost to taxpayers. Net-worth caps (that serve to limit recovery) do not apply to 501(c)(3)s—allowing wealthy environmental groups to game the system. Moreover, environmental attorneys have been able to bypass the $125/hour statutory cap on attorneys' rates. Finally, the courts have interpreted the term "prevailing party" with great leniency. In *Natural Resources Defense Council v. Salazar*, No. 1:05-cv-01207-OWW-GSA (E.D. Cal. 2011), the plaintiffs kept the agency in court for more than six years and won only a single order relative to a biological opinion. Nonetheless, NRDC received a $1,906,500 payout.[10]

d. Holsinger Law, LLC Litigation

I have been involved in approximately one dozen federal cases over the past 13 years on behalf of agriculture, counties, oil and gas, trade associations and other clients. Many of these were actions to intervene in litigation filed by environmental groups. Others were Freedom of Information Act ("FOIA") cases where agencies refused to divulge information that should have already been public. Recently, Holsinger Law, LLC represented four Colorado counties in challenging Obama Administration land use plan amendments on greater sage-grouse. Among other things, the counties allege state and local plans and conservation efforts were ignored in favor of eleventh-hour mandates from Washington, D.C.

e. Financial Impacts of Sue-and-Settle Litigation

Listings and litigation are unlikely to go away. According to the Western Legacy Alliance, from 2000 to 2009 the Center for Biological Diversity (CBD) filed 409 lawsuits; followed by 180 lawsuits filed by WildEarth Guardians (WEG) and 91 filed by Western Watersheds Project, among many others.

CBD and WEG entered into settlement agreements with DOI In May and July of 2011 over petitions to list over 775 species under the ESA through a myriad of lawsuits and petitions. These groups collected over $125,000 in taxpayer-funded attorney fees on these actions alone. Currently, there are 1,620[11] domestic species listed under the ESA. How can the FWS possibly process these voluminous petitions with the "best available science" standard under the ESA?

[10] *See also* Lowell E. Baier, *Inside the Equal Access to Justice Act: Environmental Litigation and the Crippling Battle over America's Lands, Endangered Species, and Critical Habitats* (Rowman & Littlefield 2015).
[11] http://www.nmfs.noaa.gov/pr/species/esa/.

Western Energy Alliance discovered that, subsequent to CBD and WEG's massive settlements in 2011, WEG and CBD filed 38 of 53 petitions to the FWS encompassing 113 of 129 species.[12]

Regulations implemented through sue-and-settle have staggering economic costs. According to the Heritage Foundation, the ten most costly regulations from sue-and-settle agreements cost in excess of $100 billion annually.[13]

IV. Sue-and-Settle Litigation Stifles Conservation

Sue-and-settle litigation benefits only litigious environmental groups. It burdens local, state and federal governments and inhibits real, on-the-ground conservation work. When just a single listing could have dramatic impacts to agriculture, water, utilities, industry and others—the effects of listing hundreds of new species would be devastating.

For listed species, activities that require federal permits, licenses or authorizations require consultation with the FWS under Section 7 of the ESA. This can result in significant delays and costly project modifications. For example, surveys may be required for some listed species that are not present for significant months out of the year. And existing federal permits, licenses or authorizations could be subject to reinitiation of consultation upon new listings or information. Finally, some actions on public or private lands could be construed to "take" listed species or their habitat under Section 9 of the ESA. Violations of the ESA are subject to substantial civil and criminal penalties.

Incredibly, agencies like the BLM are requiring permitting and red-tape even for projects that improve or enhance habitat. National Environmental Policy Act (NEPA) compliance, along with the ESA, is stifling true conservation work.

V. Litigation Reform

With a few major exceptions, the EAJA is the federal statute that provides environmental plaintiffs with a cause of action for attorneys' fee awards. It is a powerful tool often exploited by environmentalists to fund their unending stream of lawsuits. There are a number of aspects of the EAJA warranting legislative reform due to enabling excessive and abusive environmental litigation.

There is no reason that non-profits should be immune from the net-worth cap – especially when they hold hundreds of millions of dollars in assets. Another potential reform measure for the EAJA would be to add provisions limiting the amount of attorneys' fees recoverable under the Act. Environmental plaintiffs use the EAJA repeatedly and routinely recover attorneys' fees at a rate that far exceeds the statutory maximum. A final necessary reform for the EAJA is to reinstitute transparency through tracking EAJA

[12] *See also* https://www.westernenergyalliance.org/knowledge-center/legal/sue-and-settle.
[13] http://www.heritage.org/crime-and-justice/report/regulation-through-sham-litigation-the-sue-and-settle-phenomenon.

payments. In regard to sue-and-settle more generally, litigation cost awards received by environmental groups must be limited and must be made public.

VI. Conclusion

It is high time to end the strong-arm litigation tactics of these radical environmental litigants. Congress and the Administration should be working to reduce frivolous litigation, streamline permitting to promote on-the-ground conservation efforts, alleviate economic burdens and promote jobs. Scarce resources are being wasted on litigation driven by a handful of activist groups with little or no real conservation benefits. Reforms such as those proposed in the Sunshine for Regulatory Decrees and Settlements Act of 2017 ("SRDSA") are long overdue. Among other things, SRDSA would require notice of such lawsuits and settlement agreements in order to allow the public to comment on the proposed action. It would also require transparency in accounting for the cost of such agreements. I urge the Subcommittees to help enact the SRDSA and to work to remove the perverse statutory incentives to litigate such as those in the EAJA and the ESA. Thank you again for the opportunity to testify.

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Kent Holsinger is the managing partner of Holsinger Law, LLC. Kent has been recognized for his work on ESA issues by the Wall Street Journal, the Washington Times and CNN.com, among many others. He currently represents a broad array of clients in complex ESA, NEPA, water and land use issues.