Statement of the U.S. Chamber of Commerce

ON: **"REVIEWING 40 YEARS OF THE ENDANGERED SPECIES ACT AND SEEKING IMPROVEMENT FOR PEOPLE AND SPECIES"**

TO: **HOUSE ENDANGERED SPECIES ACT WORKING GROUP FORUM**

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DATE: **OCTOBER 10, 2013**

The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on issues are developed by Chamber members serving on committees, subcommittees, councils, and task forces. Nearly 1,900 businesspeople participate in this process.

BEFORE THE HOUSE ENDANGERED SPECIES ACT WORKING GROUP FORUM

"Reviewing 40 Years of the Endangered Species Act and Seeking Improvement for People and Species"

Testimony of Matthew Hite
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U.S. Chamber of Commerce
October 10, 2013

Good morning, Chairman Hastings and Representative Lummis and distinguished members of the Committee and Working Group. My name is Matthew Hite and I am the Policy Counsel for the Environment and Agriculture Committee in the Environment, Technology and Regulatory Affairs Division at the U.S. Chamber of Commerce. The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than three million businesses and organizations of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and is dedicated to promoting, protecting, and defending America's free enterprise system. My statement provides an overview of the Chamber's policy and position on the Endangered Species Act (ESA).

I first want to thank you for your efforts in creating the Endangered Species Act Working Group. We are thankful for your leadership in addressing this critical issue. The Endangered Species Act is an issue of great importance to our membership due to its impact on the business community.

When it comes to the ESA, the Chamber's main objective is to ensure that the listing of endangered species and the designation of critical habitats are based upon sound science and balance the protection of endangered species with the costs of compliance and the rights of property owners.

Four decades after implementation, the ESA has failed to achieve its purpose while simultaneously stifling economic development and burdening landowners. The Chamber is very concerned about the massive increase in ESA litigation and the use of "sue and settle" by environmental activist groups.

The ESA was last reauthorized in 1988, and the Chamber agrees that now, especially with the slow recovery of our economy, is the time for Congress to look at ways to improve it. According to the U.S. Fish and Wildlife Service (FWS), as of May 9, 2013, there were 1,440 species listed under the ESA in the United States. The FWS has

declared that only 28 species on this list have recovered, representing a 2 percent recovery rate.

Over the past several years, the business community has expressed growing concern with the tactic of "sue and settle," where interest groups use lawsuits against federal agencies and subsequent, court-approved settlements to shape the regulatory agendas of agencies. Recent sue and settle arrangements have fueled fears that the rulemaking process itself is being subverted to serve the ends of a few favored interests groups.

With these serious concerns in mind, the Chamber set out to determine how often sue and settle actually happens, to identify major sue and settle cases, and to track the types of agency actions involved. After an extensive effort, the Chamber was able to compile a database of sue and settle agreements and their subsequent rulemaking outcomes. The overwhelming majority of sue and settle actions between 2009 and 2012 occurred in the environmental context, particularly under the Clean Air Act, Clean Water Act, and the Endangered Species Act.

The Chamber's report *Sue and Settle: Regulating Behind Closed Doors*, details that from 2009 to 2012, a total of 71 lawsuits were settled under circumstances that can be categorized as "sue and settle" cases under the Chamber's definition. Significantly, settlement of these cases directly resulted in more than 100 new federal rules, many of which are major rules with compliance cost tags of more than $100 million annually.

The ESA has been subject to an extensive amount of litigation and sue and settle agreements. In the past four years, FWS has been petitioned to list an additional 1,230 species. In a 2011 sue and settle deal with environmental advocacy groups, the FWS agreed to a consent decree that required the agency to propose an additional 757 species as new candidates to the list of endangered species under the ESA. To add this many species all at once imposes an overwhelming, new burden on the agency. In turn, the agency has to redirect resources away from other - often more pressing- priorities in order to meet deadlines.

It's clear that sue and settle cases and other lawsuits are now very much driving the regulatory agenda of the ESA program at FWS. This was further highlighted by the FY 2011 FWS budget which allocated $20.9 million for endangered species listing and critical habitat designation; the agency was required to spend more than 75% of this allocation ($15.8 million) undertaking the substantive actions required by court orders or settlement agreements resulting from litigation.

Through sue and settle, advocacy groups also significantly affect the regulatory environment by getting agencies to issue substantive requirements that are not

required by law. Even when a regulation is required, agencies can use the terms of sue and settle agreements as a legal basis for allowing special interests to dictate the discretionary terms of the regulations. Third parties have a very difficult time challenging the agency's surrender of its discretionary power, because they typically cannot intervene and the courts often favor settlement of the case.

One of the primary reasons advocacy groups favor court-approved, sue and settle agreements is because the court retains long-term jurisdiction over the settlement, which means the plaintiff group can readily enforce perceived noncompliance with the agreement by the agency. The court in the endangered species agreements discussed above will retain jurisdiction over the process until 2018, thereby binding FWS Directors in the next Administration to follow the requirements of the two 2011 settlements. For its part, the agency cannot change any of the terms of the settlements (e.g., an agreed deadline for a rulemaking) without the consent of the advocacy group. Thus, even when an agency subsequently discovers problems in complying with a settlement agreement, the advocacy group typically can force the agency to fulfill its promises in the consent decree, regardless of the consequences for the agency or regulated parties.

For all these reasons, "sue and settle" violates the principle that if an agency is going to write a rule, the goal should be to develop the most effective, well-tailored regulation that is based on sound science. Instead, rulemakings that are the product of sue and settle agreements are often rushed, sloppy, and poorly thought-out. These flawed rules often take a great deal of time and effort to correct.

Conclusion

The ESA is in need of reform. There needs to be a balance between ensuring property and water right protection while successfully recovering and conserving species. ESA listings can have a negative economic impact on the business community because critical habitat designations often stymie growth and development. That is why it is important to reexamine the Act, and identify needed reforms, in a thoughtful and inclusive manner.

The Chamber respectfully requests that you consider addressing the following issues when looking at reforming ESA:

> ESA improvements should discourage agencies from agreeing to the above-described sue and settle deals.

ESA reform also should require more transparency from the agencies implementing the ESA, such as the posting of notices of intent to sue by special interest groups and the posting of any legal complaints filed against the agencies.

Clear and objective standards for evaluating species listings and critical habitat designations under the ESA, including standards requiring the use of sound science, best available peer reviewed studies, and detailed cost-benefit considerations for the affected community.

Greater protection for the rights of property owners impacted by ESA listings and critical habitat designations.

Require that economic analyses are completed before a species is listed as threatened or endangered, as required by the ESA.

I want to thank you for letting me testify today.