105TH CONGRESS
*1st Session*
HOUSE OF REPRESENTATIVES
REPORT
105–42

# CITIZEN'S FAIR HEARING ACT OF 1997

MARCH 21, 1997.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. YOUNG of Alaska, from the Committee on Resources, submitted the following

# REPORT

together with

## DISSENTING VIEWS

[To accompany H.R. 752]

[Including cost estimate of the Congressional Budget Office]

The Committee on Resources, to whom was referred the bill (H.R. 752) to amend the Endangered Species Act of 1973 to ensure that persons that suffer or are threatened with injury resulting from a violation of the Act or a failure of the Secretary to act in accordance with the Act have standing to commence a civil suit on their own behalf, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the "Citizen's Fair Hearing Act of 1997".

**SEC. 2. FINDINGS.**

The Congress finds the following:

(1) The Endangered Species Act of 1973 grants broad regulatory authority to various agencies to take actions to protect, preserve, and recover species of plants and animals determined to be in danger of extinction or threatened with becoming so within the foreseeable future.

(2) Recently, private property owners and other persons that have been adversely impacted by Federal agency actions under the Endangered Species Act of 1973 have sought to bring civil actions for judicial review of those agency actions. The United States Circuit Court of Appeals for the 9th Circuit has found that plaintiffs in those actions do not have standing to bring the suits, because they do not fall into the zone of interests protected by the Endangered Species Act of 1973.

**SEC. 3. GIVING PERSONS WITH AFFECTED ECONOMIC INTERESTS EQUAL STANDING TO SUE UNDER THE ENDANGERED SPECIES ACT OF 1973.**

Section 11(g)(1) of the Endangered Species Act of 1973 (16 U.S.C. 1540(g)(1)) is amended by striking so much as precedes subparagraph (A) and inserting the following:

"(g) CITIZEN SUITS.—(1) Except as provided in paragraph (2), any person that satisfies the requirements of the Constitution and demonstrates having suffered or being threatened with economic or other injury resulting from a violation of this Act or a failure of the Secretary to act in accordance with this Act is deemed to be within the zone of protected interests of this Act and shall have standing to commence a civil suit on his or her own behalf—".

## PURPOSE OF THE BILL

The purpose of H.R. 752 is to amend the Endangered Species Act of 1973 (ESA, Public Law 93–205, 16 U.S.C. 1531 et seq.) to ensure that persons who suffer or are threatened with injury resulting from a violation of the ESA or failure of the Secretaries of Interior or Commerce to act in accordance with the ESA have standing to commence a civil suit on their own behalf.

## BACKGROUND AND NEED FOR LEGISLATION

H.R. 752 is intended to reverse the decision rendered in *Bennett* v. *Plenert,* 63 F. 3d 915, decided by the Ninth Circuit Court of Appeal in August, 1995. In *Bennett,* the Court denied standing to sue to a group of plaintiffs who were alleging they would be injured economically by an action of the Secretary of the Interior under the ESA. The case is on appeal to the U.S. Supreme Court and is now entitled *Bennett* v. *Spear.* Oral arguments took place in November with a decision expected in 1997.

In *Bennett,* the Fish and Wildlife Service, pursuant to its ESA Section 7 consultation power, recommended in a biological opinion to the Bureau of Reclamation that it maintain minimum water levels in a reservoir that is home to two endangered fish, the shortnose and Lost River suckers. Thereafter, two ranchers and two water districts sued. The basis of their standing was that they would suffer economic injury if the biological opinion was followed. They challenged the Service's biological opinion, alleging that there was no scientific basis to support the decision, and that evidence actually showed that the sucker populations at issue were not in need of protection. The complaint alleged violations of the ESA and the Administrative Procedure Act. Plaintiffs also raised a claim under the National Environmental Policy Act, but the court of appeals did not consider that claim. The Justice Department, acting on behalf of the Department of Interior, asked the court to dismiss the complaint for lack of standing, and the U.S. District Court in Oregon granted the motion, noting that plaintiffs' purposes conflict with those of the sucker, and were thus not within the ESA's zone of interest.

The Ninth Circuit affirmed the lower court, holding that "plaintiffs who assert no interest in preserving endangered species may [not] sue the government for violating the procedures established in the Endangered Species Act." Thus, the Ninth Circuit in the *Bennett* case has passed over the large class of persons economically injured by ESA enforcement, landing on a position of one-sided public enforcement.

Although the government challenged the plaintiffs' standing based on their failure to be within the "zone of interest" of the ESA at each of the lower court levels, it abandoned the argument at the Supreme Court. In addition, in testimony before the Committee and in a letter to the Committee, the Administration has indicated that it does support the right of citizens to obtain judicial review of agency decisions and that their policy has changed with regard to this issue.

The doctrine of "standing" helps define the classes of persons who may sue in federal court. Article III of the United States Constitution limits the jurisdiction of the federal courts to actual "cases" or "controversies." Congress may grant standing under the laws it enacts; however, the case or controversy requirements of Article III may not be changed by Congress. Courts may also impose limitations on standing through their interpretation of Congressional intent and further limit the classes of persons who may sue the federal government. The rise of federal environmental statutes and the citizen suit provisions contained therein have been the vehicle for these restrictions on "standing."

To meet the standing test one must first meet the requirements of Article III of the U.S. Constitution. In *Lujan* v. *Defenders of Wildlife,* 112 S. Ct. 2130 (1192), the Supreme Court handed down its most recent statement of the Article III standing requirements. First, the plaintiff must suffer an injury-in-fact, which must be both "concrete and particularized" and "actual or imminent." Second, that injury must be fairly traceable to the challenged action. Third, a favorable decision must likely redress the injury. All plaintiffs must meet these requirements before they may argue the merits of their case. Congress may not waive, by statute, this Constitutional requirement for standing.

Ironically, determining "standing" generally requires an economic interest. Regulatory issues before the courts ordinarily involves only two parties: the regulators and the regulated. Citizens suit statutes have brought a third party, the interested private citizen, into the courtroom to enforce the law.

The federal circuits are split on their interpretation of the standing requirement for citizen suits and for judicial review of federal agency action. The Ninth Circuit has been the most restrictive, while the Eighth Circuit in a similar case has allowed standing to the full extent allowed by the Constitution.

*Judicial review under the Administrative Procedure Act*

The Administrative Procedure Act (APA), 5 U.S.C. 702, provides for general review of federal agency rulemaking or decisionmaking. Meeting the standing requirement is the first step in obtaining judicial review of an agency action. If you do not have "standing" you may not bring a suit under a particular law, notwithstanding the merits of the case.

Certain federal appellate court circuits have further limited standing to seek review under the APA by devising a "zone of interest" test. In these circuits, in addition to the requirements of Article III, plaintiffs suing under the APA must be within the "zone of interest" of the statute alleged to be violated by the agency ac-

tion. Under this test, litigants must allege an interest consistent with the purpose of the statute or law in question.

Section 702 of the APA states "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof * * *." Certain courts have interpreted "within the meaning of the relevant statute" to convey the intent of Congress to limit standing to those classes of plaintiffs who may be relied upon to challenge an agency's disregard for the law. Those classes have been determined to be those who allege an interest arguably within the "zone of interest" to be protected or regulated by the statute in question.

*ESA citizen suits*

ESA Section 11(g)(1) authorizes "any person" to sue to enjoin anyone alleged to be in violation of any provision of the ESA or its implementing regulations, to compel the application of the "take" prohibition, or insure that the relevant Secretary complies with Section 4 of the ESA (listings, critical habitat, and recovery plans). Although this broad language appears to expand the classes of person who may sue to challenge agency actions under the ESA, certain courts have also examined the purposes stated in Section 2(b) of the ESA and have concluded that only those seeking to sue to further these purposes have standing. Section 2(b) states the purpose of the ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section." Therefore, anyone suing for any other purpose, such as protecting social, civil, economic, recreational, or legal rights or even the general well-being of a community, is not permitted to seek judicial review under the "zone of interest" doctrine, regardless of the merits of the allegations of violation of the ESA.

*H.R. 752 by Representative Chenoweth*

H.R. 752 is intended to clarify that Congress agrees with the Eighth Circuit that the courts should limit barriers to judicial review of ESA decisions to those prescribed by the Constitution. This legislation ensures that persons who suffer or are likely to suffer harm, whether economic or otherwise, by actions taken pursuant to the ESA may file a citizen suit and seek judicial review under the APA. The bill amends Section 11(g)(1) to provide that any person who meets the constitutional standing test and demonstrates having suffered or being threatened with economic or other injury resulting from a violation of the ESA or a failure of the Secretary of the Interior or the Secretary or Commerce to act in accordance with the ESA, is deemed to be within the zone of protected interests of the ESA and have standing to commence a civil suit.

## COMMITTEE ACTION

On February 13, 1997, Congresswoman Helen Chenoweth (R–ID) and 45 other Members of Congress introduced the H.R. 752, the

Citizen's Fair Hearing Act of 1996. The bill was referred to the Committee on Resources, and retained by the Full Committee which has jurisdiction over the Endangered Species Act. H.R. 752 is virtually identical to H.R. 3862 which was introduced during the 104th Congress on July 22, 1996. On September 17, 1996, the Committee on Resources held a hearing on H.R. 3862, the Citizen's Fair Hearing Act of 1996. The hearing focused on whether citizens who have suffered economic, social, or legal harm may sue under the citizen suit provision of the Endangered Species Act.

The Administration testified in opposition to H.R. 3862 on September 17, 1996, and in a letter to the Committee dated March 11, 1997, restated its opposition to H.R. 752. The letter also restated the Administration's support for the right of citizens to obtain judicial review of agency decisions under the ESA. On March 12, 1997, the Committee on Resources met to mark up H.R. 752. Congresswoman Chenoweth made a unanimous consent request to make a technical correction to the short title of the bill, changing the year "1996" to "1997". No objection was heard. An amendment to expand the remedies available to plaintiffs, along with changes in the 60 notice of intent to sue requirement, was offered by Congressman Bruce Vento (D–MN.) but was rejected on a point of order based on a lack of germaneness to the bill. The bill as amended was approved and ordered favorably reported to the House of Representatives by voice vote in the presence of a quorum.

Following the Full Committee consideration of H.R. 752, on March 19, 1997, the U.S. Supreme Court issued a unanimous decision in the case of *Bennett* v. *Spear* that citizens who suffer economic or other injury have standing under the Section 11(g) to file a citizen suit and that these citizens also have standing to bring suit for judicial review under Section 702 of the Administrative Procedure Act.

## SECTION-BY-SECTION ANALYSIS

*Section 1. Short title*

Section 1 states that the Act may be cited as the "Citizen's Fair Hearing Act of 1997."

*Section 2. Findings*

Section 2 sets forth the findings that the ESA grants the federal government broad regulatory powers and that some citizens have been denied access to the courts to seek judicial review of decisions made pursuant to that regulatory authority.

*Section 3. Giving persons with affected economic interests equal standing to sue under the Endangered Species Act of 1973*

Section 3 amends the introductory paragraph to Section 11(g) to clarify that any person who satisfied the Constitutional requirements for standing to sue and demonstrates having suffered or being threatened with economic or other injury resulting from a violation of the ESA or a failure of the Secretaries of Interior or Commerce to act in accordance with the ESA is deemed to be within the zone of protected interests of the ESA and shall have stand-

ing to commence a civil suit on his or her own behalf under Section 11.

## COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

With respect to the requirements of clause 2(l)(3) of rule XI of the Rules of the House of Representatives, and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee on Resources' oversight findings and recommendations are reflected in the body of this report.

## CONSTITUTIONAL AUTHORITY STATEMENT

Article I, section 8 of the Constitution of the United States grants Congress the authority to enact H.R. 752.

## COST OF THE LEGISLATION

Clause 7(a) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out H.R. 752. However, clause 7(d) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974.

## COMPLIANCE WITH HOUSE RULE XI

1. With respect to the requirement of clause 2(l)(3)(B) of rule XI of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, H.R. 752 does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.
2. With respect to the requirement of clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives, the Committee has received no report of oversight findings and recommendations from the Committee on Government Reform and Oversight on the subject of H.R. 752.
3. With respect to the requirement of clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 752 from the Director of the Congressional Budget Office.

## CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
*Washington, DC, March 20, 1997.*

Hon. DON YOUNG,
*Chairman, Committee on Resources,*
*House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 752, the Citizen's Fair Hearing Act of 1997.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Deborah Reis.

Sincerely,

JUNE E. O'NEILL, *Director.*

Enclosure.

*H.R. 752—Citizen's Fair Hearing Act of 1997*

CBO estimates that enacting H.R. 752 would have little or no impact on the federal budget. Because the bill would not affect direct spending or receipts, pay-as-you-go procedures would not apply. H.R. 752 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act of 1995 and would impose no costs on state, local, or tribal governments.

H.R. 752 would amend the Endangered Species Act of 1973 (ESA) to clarify that the citizen suit provisions of the statute apply to any person who can satisfy the requirements of the United States Constitution regarding standing to sue and show past or threatened economic or other injury stemming from a violation of the ESA (or from failure of the federal government to act in accordance with the statute). The bill would not expand existing remedies under the act.

CBO estimates that H.R. 752 would have little or no impact on the activities of any federal agency or court, largely because a recent Supreme Court decision in *Bennet et al.* v. *Spear et al.,* _____ S. Ct. _____ (March 19, 1997) resolved the issues addressed by the bill. Even in the absence of the Supreme Court's ruling, however, CBO estimates that H.R. 752 would have had little budgetary impact nationally because the clarifications made by the bill would have affected only the one or two federal courts that have held that injured persons such as property owners lacked standing to seek judicial review under the ESA. (Other jurisdictions already hear such lawsuits, and the bill would have had no effect on their caseloads or budgets.)

The CBO staff contact for this estimate is Deborah Reis. This estimate was approved by Paul N. Van de Water, Assistant Director for Budget Analysis.

## COMPLIANCE WITH PUBLIC LAW 104–4

H.R. 752 contains no unfunded mandates.

## CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

## SECTION 11 OF THE ENDANGERED SPECIES ACT OF 1973

PENALTIES AND ENFORCEMENT

SEC. 11. (a) * * *

* * * * * * *

[(g) CITIZEN SUITS.—(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—]

*(g) CITIZEN SUITS.—(1) Except as provided in paragraph (2), any person that satisfies the requirements of the Constitution and demonstrates having suffered or being threatened with economic or other injury resulting from a violation of this Act or a failure of the Secretary to act in accordance with this Act is deemed to be within the zone of protected interests of this Act and shall have standing to commence a civil suit on his or her own behalf—*

(A) * * *

* * * * * * *

## DISSENTING VIEWS

This bill presents a solution to a problem that no longer exists.

As the Majority acknowledged at the committee markup on March 12, 1997, the primary intent of H.R. 752 is to override the Ninth Circuit decision in *Bennett* v. *Spear,* a case involving access to the courts by economic interests affected by the Endangered Species Act (ESA). Despite the protests of Democratic Members that a decision from the Supreme Court on the appeal was imminent—and that legislation was premature and inappropriate—the Majority chose to report this bill. In addition to attempting to resolve the issues in the *Bennett* v. *Spear* case, this bill sets forth a broad rewrite of the ESA section authorizing citizens suits, opening the door to further litigation and interpretation by the courts.

On March 19, 1997, only one week after the committee markup, the Supreme Court issued its unanimous opinion in *Bennett* v. *Spear* (No. 95–815), expressly overturning the Ninth Circuit's holding that the plaintiffs lacked standing under the zone of interests test. Instead, the Supreme Court held that the plaintiffs could bring their claims under the ESA's citizens suit provisions.

Now that the Supreme Court has expressly overturned the Ninth Circuit's decision, making it clear that economic interests are to be fairly considered under the ESA, this bill is unnecessary and should not move forward in the legislative process. Unfortunately, however, the Majority's premature decision to mark up this bill sets an ill-advised precedent of the Committee trying to intervene in the judicial process to predetermine the outcome of a pending Supreme Court case.

In addition, we remain concerned about the potential impact of the language in H.R. 752. During markup, the Majority characterized their intent as simply to bring ESA standing law in the Ninth Circuit into conformity with precedent from the other federal circuits. It is not clear that H.R. 752's complete rewrite of the statute (for example, by deleting the existing language that "any person may commence a civil suit on his own behalf") is as benign or as limited in scope as portrayed by the Majority. In the wake of the Supreme Court's clarification of the law in *Bennett* v. *Spear,* it would make no sense to now amend the statute and clog the courts with further litigation and confusion.

GEORGE MILLER.
MAURICE D. HINCHEY.
SAM FARR.
BRUCE F. VENTO.
ED MARKEY.
WILLIAM DELAHUNT.

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