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## Evaluating the Endangered Species Act: Trends in Mega-Petitions, Judicial Review, and Budget Constraints Reveal a Costly Dilemma for Species Conservation

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EVALUATING THE ENDANGERED SPECIES ACT: TRENDS IN  
MEGA-PETITIONS, JUDICIAL REVIEW, AND BUDGET  
CONSTRAINTS REVEAL A COSTLY DILEMMA  
FOR SPECIES CONSERVATION

“For more than three decades, the Endangered Species Act has successfully protected our nation’s most threatened wildlife, and we should be looking for ways to improve it – not weaken it. Throughout our history, there’s been a tension between those who’ve sought to conserve our natural resources for the benefit of future generations, and those who have sought to profit from these resources. But I’m here to tell you this is a false choice. With smart, sustainable policies, we can grow our economy today and preserve the environment for ourselves, our children, and our grandchildren.”

—President Barack Obama<sup>1</sup>

I. INTRODUCTION

The year 2013 called for a celebration in recognition of the fortieth anniversary of the Endangered Species Act (ESA or Act).<sup>2</sup> In 1973, President Nixon signed the ESA into effect, acknowledging the growing concern that natural resources in the United States were deteriorating.<sup>3</sup> While signing the Act, President Nixon stressed:

Nothing is more priceless and more worthy of preservation than the rich array of animal life with which our

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1. President Barack Obama, *Remarks by the President to Commemorate the 160th Anniversary of the Department of Interior*, WHITE HOUSE (Mar. 3, 2009, 2:13 PM), <http://www.whitehouse.gov/the-press-office/remarks-president-commemorate-160th-anniversary-department-interior> (arguing natural resources can serve both industry and environmentalist interests without conflict); accord Noelle Straub, *We Can Grow Our Economy and Preserve the Environment*, *Obama Says at Interior*, N.Y. TIMES (Mar. 3, 2009), <http://www.nytimes.com/-gwire/2009/03/03/03greenwire-we-can-grow-our-economy-and-preserve-the-enviro-9972.html> (discussing President Obama’s speech for Department of Interior’s 160th anniversary).

2. See *Endangered Species Act 40th Anniversary*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/endangered/ESA40/index.html> (last updated Jan. 7, 2014) (highlighting fortieth anniversary of ESA).

3. *Richard Nixon: Statement on Signing the Endangered Species Act of 1973*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=4090> (last visited Jan. 7, 2014) [hereinafter *Richard Nixon*] (documenting President Nixon’s December 28, 1973 ESA signing statement).

country has been blessed. It is a many-faceted treasure, of value to scholars, scientists, and nature lovers alike, and it forms a vital part of the heritage we all share as Americans.<sup>4</sup>

Four decades later, however, this aging Act desperately needs repair, as it struggles to protect the species President Nixon and others so strongly supported.<sup>5</sup>

Currently, Section Four of the ESA, which outlines the Act's species listing and critical habitat designation requirements, is "more dysfunctional than at any other point in the statute's history."<sup>6</sup> The species listing and critical habitat designation programs have created a battleground for competing interest groups that frequently debate the Act's function and litigate under the ESA.<sup>7</sup> ESA litigation has developed a noticeable pattern: first, environmental groups petition the United States Fish and Wildlife Service (FWS or Agency) to list a certain species or designate particular habitats as critical in order to prevent threatened or endangered species from becoming extinct.<sup>8</sup> If the FWS ignores these petitions, environmentalists often initiate lawsuits against the Agency to force action under the ESA.<sup>9</sup> Alternatively, if the FWS lists a species, industry or landowner groups opposed to federal regulation imposed by the ESA seek judicial review of the FWS's listing or critical habitat designation.<sup>10</sup> By challenging the FWS's determination, opponents seek to demonstrate the action fails the judicial review standards set by the Administrative Procedure Act (APA) so that the reviewing court will set aside the Agency's action.<sup>11</sup> This litigation pattern, accompanied by the heated debate surrounding species protection and looming budget cuts, makes the FWS's compliance with the ESA

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4. *Id.* (quoting President Nixon).

5. For a detailed discussion of how the ESA currently functions, see *infra* notes 172-179 and accompanying text.

6. Daniel J. Rohlf, *Section 4 of the Endangered Species Act: Top Ten Issues for the Next Thirty Years*, 34 ENVTL. L. 483, 496 (2004) (detailing issues arising from ESA's species listing and critical habitat designation requirements).

7. *Id.* (describing contentious issues surrounding ESA Section Four).

8. For a further examination of how citizen groups petition for species listing, see *infra* notes 79-113 and accompanying text.

9. For a discussion of citizens bringing suits against the ESA, see *infra* notes 79-113 and accompanying text.

10. For a further discussion of industry and landowner's judicial review suits, see *infra* notes 114-146 and accompanying text.

11. For a further discussion of judicial review standards for FWS action, see *infra* notes 114-146 and accompanying text.

increasingly difficult.<sup>12</sup> Change in the status quo is uncertain, however, because “[b]ringing some semblance of order to this area continues to present one of the foremost administrative challenges in implementing the entire endangered species program.”<sup>13</sup>

This Comment highlights the current controversy over ESA citizen petitions to the FWS, the contentious litigation that often results from these petitions, and the ongoing debate surrounding such litigation.<sup>14</sup> Though petitioners’ actions may be well-intentioned, the FWS ultimately will have fewer resources to protect plants and animals from extinction if the trend in citizen petitions continues.<sup>15</sup> Part II describes the ESA’s history, discusses the Act’s relevant sections, including the citizen petition clause, and briefly explains judicial review for FWS action.<sup>16</sup> Part III of this Comment begins by explaining the problems stemming from the influx of citizen petitions and environmental group litigation seeking to enforce deadlines and critical habitat requirements.<sup>17</sup> Next, it describes the pattern of landowners and industry groups initiating judicial review of FWS actions.<sup>18</sup> Part III concludes by describing the controversy surrounding the FWS’s request for funding caps and summarizing the impact on the ESA.<sup>19</sup> Part IV explores the possible environmental benefits of maintaining the status quo in regard to citizen petitions.<sup>20</sup> The section further investigates suggested alternatives in favor of reforming the ESA and its bureaucratic deficiencies.<sup>21</sup> Part V concludes with what the United States can expect future ESA protections to resemble, including litigation trends, agency behav-

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12. For a brief discussion of how conservation groups and industry groups put the FWS in a bind, see *infra* notes 172-179 and accompanying text.

13. Rohlf, *supra* note 6, at 496 (describing FWS’s predicament).

14. For a discussion of the controversy surrounding citizen petitions, see *infra* notes 79-113 and 184-232 and accompanying text.

15. For further analysis of the negative impacts of citizen petitions, see *infra* notes 217-232 and accompanying text.

16. For detailed background information of the ESA, see *infra* notes 23-73 and accompanying text.

17. For an examination of the current controversy surrounding increased litigation against the FWS, see *infra* notes 79-113 and accompanying text.

18. For a discussion of judicial review challenges raised by landowners and industry groups, see *infra* notes 114-146 and accompanying text.

19. For a discussion of the FWS’s budget caps requests, see *infra* notes 147-171 and accompanying text. For a discussion on the overall impact on ESA programs, see *infra* notes 172-179 and accompanying text.

20. For a discussion of the pros and cons of the status quo, see *infra* notes 184-232 and accompanying text.

21. For an exploration of the possible alternatives to the problem instigated by citizen petitions, see *infra* notes 233-292 and accompanying text.

ior, and the ultimate outcome for plant, animal, and human protection.<sup>22</sup>

## II. BACKGROUND

In the early 1970s, an environmental revolution was born: environmentalists and politicians alike grew concerned with the nation's dwindling natural resources and the impending extinction of plants and animals.<sup>23</sup> In response to this new wave of environmental consciousness, Congress passed major environmental regulations, including the ESA.<sup>24</sup> Congress itself noted "that our rich natural heritage is of 'esthetic, ecological, educational, recreational, and scientific value to our Nation and its people.'"<sup>25</sup>

Congress enacted the ESA, sometimes referred to as the "pit bull" of environmental laws,<sup>26</sup> to protect endangered and threatened species, as well as ecosystems.<sup>26</sup> Congress designated two agencies to administer the ESA: the United States Department of the Interior's (DOI) Fish and Wildlife Service and the United States Department of Commerce's National Marine Fisheries Service (NMFS).<sup>27</sup> Citizens, industrial leaders, politicians, and the judiciary all quickly recognized the ESA for its aggressive stance on species protection;

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22. For a discussion on the future of the ESA, see *infra* notes 293-323 and accompanying text.

23. Jerry L. Anderson, *The Environmental Revolution at Twenty-Five*, 26 RUTGERS L.J. 395, 395-96 (1995) (describing environmental revolution during 1970s); *ESA Basics: 40 Years of Conserving Endangered Species*, U.S. FISH & WILDLIFE SERV. (Jan. 2013), [http://www.fws.gov/endangered/esa-library/pdf/ESA\\_basics.pdf](http://www.fws.gov/endangered/esa-library/pdf/ESA_basics.pdf) [hereinafter *ESA Basics*] (explaining Congress' motivation in passing ESA).

24. Endangered Species Act, 16 U.S.C. §§ 1531-1544 (2012) (stating goal to preserve endangered and threatened species); *Richard Nixon, supra* note 3 (commending 93rd Congress for enacting ESA).

25. *ESA Basics, supra* note 23 (explaining Congress' recognition that endangered species have value worth protecting).

26. Gregory T. Broderick, *Towards Common Sense in ESA Enforcement: Federal Courts and the Limits on Administrative Authority and Discretion under the Endangered Species Act*, 44 NAT. RESOURCES J. 77, 78 (2004) (describing environmental laws passed in early 1970s); 16 U.S.C. § 1531 (stating purpose of ESA); see also *Endangered Species Act: Overview*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/endangered/laws-policies/index.html> (last updated July 15, 2013) (briefly explaining ESA).

27. *ESA Basics, supra* note 23 (listing agencies responsible for administering ESA). The FWS is responsible for a larger portion of ESA listings because it protects terrestrial and freshwater species, while NMFS, a division of the National Oceanic and Atmospheric Administration, solely protects marine species. See *id.* This Comment is specific to the FWS and does not make assumptions about ESA litigation dynamics for the NMFS listing decisions. For additional information on the NMFS and its listing involvement, see generally *Endangered and Threatened Marine Species*, NOAA FISHERIES, <http://www.nmfs.noaa.gov/pr/species/esa/> (last updated Dec. 13, 2013).

shortly after the Act's enactment, the Supreme Court interrupted the 100 million dollar Tellico Dam project, partly funded by Congress, to protect the snail darter.<sup>28</sup>

The ESA outlines a framework for identifying certain species that need federal protection, assists agencies in creating species recovery plans, and allows the delisting of a species once it recovers.<sup>29</sup> Section Four of the ESA sets forth the requirements for these protections.<sup>30</sup> Section Eleven allows citizens to petition for the FWS to list species or designate critical habitats under the Act and sue the Agency to comply with nondiscretionary deadlines and responsibilities.<sup>31</sup> Notably, any FWS action or inaction concerning the ESA is subject to judicial review under the APA, a "second-level constitution" for government agencies.<sup>32</sup>

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28. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 172 (1978) (enjoining completion of 100 million dollar Tellico Dam project because of conflict with ESA's protection of snail darter); *Broderick, supra* note 26, at 83 (describing ESA as tough). The Supreme Court appropriately characterized the Tellico Dam controversy, stating:

It may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million. The paradox is not minimized by the fact that Congress continued to appropriate large sums of public money for the project, even after congressional Appropriations Committees were apprised of its apparent impact upon the survival of the snail darter. We conclude, however, that the explicit provisions of the Endangered Species Act require precisely that result.

*Tenn. Valley Auth.*, 437 U.S. at 172-73.

29. 16 U.S.C. § 1533(a)-(f) (providing standards for recovering species).

30. 16 U.S.C. § 1533 (establishing framework for listing and delisting threatened or endangered species). For a discussion of Section Four, see *infra* notes 33-49 and accompanying text.

31. 16 U.S.C. § 1540(g)(1) (providing for citizen-initiated action). See generally, Susan D. Daggett, *NGOs as Lawmakers, Watchdogs, Whistleblowers, and Private Attorneys General*, 13 *COLO. J. INT'L ENVTL. L. & POL'Y* 99 (2002) (discussing environmentalists' role in ESA protections). For a discussion of Section Eleven, see *infra* notes 50-64 and accompanying text.

32. 5 U.S.C. § 706 (2012) (providing scope of review of administrative agency action). The term "second-level constitution" was coined by administrative law scholar Joseph Vining. See Joseph Vining, *Administrative Agencies*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 36, 37 (Leonard W. Levy et al. eds., 2000), available at <http://www.gmu.ac.ir/-download/booklibrary/e-library-1/Encyclopedia%20of%20American%20Constitution.pdf>. The APA functions as a regulatory constitution because it "specif[ies] procedures and structural relations within and among [the agencies], and between [the agencies] and other entities." *Id.* For a discussion of judicial review of the FWS action under the APA, see *infra* notes 65-73 and accompanying text.

A. Listing Decisions and Critical Habitat Designations under the ESA

Section Four of the Act mandates the FWS to list endangered and threatened species and to designate a critical habitat for each species listed.<sup>33</sup> Section Four also establishes the procedures for listing and delisting threatened or endangered species.<sup>34</sup> Aside from specifying the listing criteria, this section affords two avenues for listing a species: the FWS can list a species on its own initiative, or it may list a species after receiving a citizen petition requesting the listing of a particular species.<sup>35</sup>

The FWS must consider the following five factors when determining whether to list a species, only one of which must be present to warrant listing: “(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) over-utilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.”<sup>36</sup> The Act establishes an overarching criterion requiring the FWS to evaluate these factors in light of the best available scientific evidence.<sup>37</sup> Further, the FWS must reject protec-

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33. 16 U.S.C. § 1533 (providing framework for listing and delisting species). The ESA defines “endangered species” as “any species which is in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). It defines “threatened species” as “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20).

34. 16 U.S.C. § 1533(a) (providing framework for listing and delisting species).

35. *Id.* (authorizing Secretary to list species); 16 U.S.C. § 1540(g)(1) (permitting “any person” to bring a civil suit to compel FWS action). For a discussion of the citizen petition process, see *infra* notes 79-113 and accompanying text.

36. 16 U.S.C. § 1533(a)(1)(A)-(E) (articulating factors supporting listing under ESA). For a helpful review of the statutory framework for ESA listing and delisting procedures, see *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 103-05 (D.D.C. 1995).

37. 16 U.S.C. § 1533(a)(1)(A)-(E) (outlining listing factors); 16 U.S.C. § 1533(b)(1) (requiring best available science). Congress never explained what meets the best available scientific evidence standard in Section Four. Michael J. Brennan et al., *Square Pegs and Round Holes: Application of the “Best Scientific Data Available” Standard in the Endangered Species Act*, 16 TUL. ENVTL. L.J. 387, 390 (2003). Environmental law scholar Holly Doremus states, however, “In the ESA listing context, science is synonymous with biology. Congress repeatedly equated the two, noting that a listing petition need only present ‘biological information,’ permitting extension of listing deadlines only for disputes over ‘biological information,’ and emphasizing that ‘non-biological considerations’ have no role in listing decisions.” Holly Doremus, *Listing Decisions Under the Endangered Species Act: Why Better Science Isn’t Always Better Policy*, 75 WASH. U. L. Q. 1029, 1056 (1997) [hereinafter *Why Better Science Isn’t Always Better Policy*].

tion cost as a factor for whether to list the species.<sup>38</sup> Once a species is listed, it remains under federal protection until the FWS determines the species has recovered.<sup>39</sup>

To further ensure a species' survival, Section Four mandates the FWS to designate a species' critical habitat at the same time the Agency lists the species.<sup>40</sup> It is often a costly and time-consuming process for the FWS to determine what range of land may be included in this habitat.<sup>41</sup> The Agency must consider "the economic impact, the impact on national security, and any other relevant impact" and weigh the designation benefits against the potential risk of species extinction.<sup>42</sup>

Although Congress established the ESA partially to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," the FWS customarily forgoes critical habitat designation when it lists a species.<sup>43</sup> The FWS justifies its decision not to designate critical habitats according to the ESA timelines because of the inadequate resources available to implement the program, the difficulty in gathering information about a particular species' habitat, and the Agency's doubtfulness that species gain any benefit from habitat designation not already afforded in other required ESA protections.<sup>44</sup> Like listings, critical

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38. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) (noting Congress' plain intent to preserve endangered species at any cost).

39. 16 U.S.C. § 1533(c)(2) (requiring DOI Secretary to periodically review species' status and delist if possible).

40. 16 U.S.C. § 1533(a)(3)(A) (asserting DOI Secretary must designate critical habitat for species concurrently with listing). Critical habitat is defined as:

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) 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 in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A)(i)-(ii).

41. Broderick, *supra* note 26, at 99 (explaining cost of critical habitat designation).

42. 16 U.S.C. § 1533(b)(2) (listing standards for determining critical habitat).

43. 16 U.S.C. § 1531(b) (explaining purpose of ESA); Broderick, *supra* note 26, at 99 (noting FWS's disregard for critical habitat designations); John Kostyack & Dan Rohlf, *Conserving Endangered Species in an Era of Global Warming*, 38 ENVTL. L. REP. NEWS & ANALYSIS 10203, 10208 (2008) (discussing FWS's practice of obstructing implementation of unoccupied critical habitat designations).

44. *Critical Habitat: Questions and Answers*, U.S. FISH & WILDLIFE SERV., 1 (2003), [http://www.fws.gov/endangered/esa-library/pdf/CH\\_qanda.pdf](http://www.fws.gov/endangered/esa-library/pdf/CH_qanda.pdf) (explaining why FWS fails to designate critical habitat concurrent to species' listing).



habitat designations must follow the APA's notice-and-comment rulemaking procedures, which can be resource-intensive.<sup>45</sup> Pursuant to these procedures, the FWS must develop "detailed maps of species' habitats, provide time for public comment, and complete economic analyses of the critical habitat designation before [the designation] can be finalized."<sup>46</sup>

The FWS places a low priority on designations because it disagrees with the value Congress placed on critical habitat; the Agency believes the critical habitat designation process is similar to many of the ESA's other habitat protections and is therefore redundant.<sup>47</sup> Despite the FWS's reluctance, courts repeatedly enforce this provision of the ESA by ordering the FWS to designate critical habitats at the time of listing.<sup>48</sup> Further, courts have held that even when the FWS is short on resources, critical habitat designation is non-discretionary.<sup>49</sup>

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For an example of the FWS's reluctance, see Final Designation of Critical Habitat for the Mexican Spotted Owl, 69 Fed. Reg. 53,182 (Aug. 31, 2004) (to be codified at 50 C.F.R. pt. 17). In that rule designating critical habitat for the Mexican Spotted Owl, the FWS explained that designation "provides little real conservation benefit, is driven by litigation and the courts rather than biology, limits [the FWS's] ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic costs." *Id.*

45. 5 U.S.C. § 553(b)-(c) (2012) (requiring notice and comment); Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 37-38 (2001) [hereinafter *A New Generation*] (explaining challenges with rulemaking); *Critical Habitat: Questions and Answers*, *supra* note 44, at 1 (believing critical habitat designations are burdensome on FWS).

46. *Critical Habitat: Questions and Answers*, *supra* note 44, at 1 (discussing resource costs of critical habitat designations).

47. *Id.* (explaining why critical habitat was low priority). The FWS claims, "active conservation measures are far more important" than critical habitat designations. *Id.* Less expensive and time-intensive measures can be taken to ensure landowners protect listed species while maintaining cooperation between the Agency and landowners. *Id.* By reading the legislative history of the ESA, however, Congress has made plain that "the preservation of a species' habitat is essential to the preservation of the species itself." *Ctr. for Biological Diversity v. Norton*, 240 F. Supp. 2d 1090, 1098 (D. Ariz. 2003).

48. See *Critical Habitat: Questions and Answers*, *supra* note 44, at 1 (discussing court-ordered deadlines); see, e.g., *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434 (5th Cir. 2001) (finding FWS's decision not to designate critical habitat for Gulf Sturgeon was arbitrary and capricious in violation of APA); *Ctr. for Biological Diversity*, 240 F. Supp. 2d at 1090 (finding FWS under-designated critical habitat for Mexican spotted owl); *N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1283 (10th Cir. 2001) (rejecting FWS interpretation of "adverse modification"); see also *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983 (9th Cir. 2010) (upholding critical habitat designation for fifteen threatened or endangered vernal pool species challenged by industry groups).

49. Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 952 (2008) (stating courts compel agency action even when acting would be cost prohibitive). See also *Critical Habitat: Questions and Answers*, *supra* note 44, at 1 (discussing court-ordered deadlines).

## B. The ESA's Citizen-Suit Provision

One of the ESA's most controversial, yet powerful, aspects is the citizen-suit provision found in Section Eleven, which authorizes any person to commence a civil suit against the Agency.<sup>50</sup> The provision effectively empowers citizens to become involved in the listing process, including critical habitat designations for listed species.<sup>51</sup> Congress included this provision because of a concern "that political pressure might discourage the agencies from listing species that warranted protection."<sup>52</sup> Instead, Congress opted to give citizens and citizen groups the ability to compel the FWS to act on its non-discretionary duties under the ESA.<sup>53</sup> Citizens are eligible for declaratory and injunctive relief, civil penalties, and attorneys' fees and litigation costs.<sup>54</sup>

Citizens can bring citizen-suit claims for numerous ESA violations.<sup>55</sup> Frequently, citizens request that the FWS list a species as

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50. 16 U.S.C. § 1540(g)(1) (2012) (permitting citizens to bring suit against administrators of ESA); Berry J. Brosi & Eric G.N. Biber, *Citizen Involvement in the U.S. Endangered Species Act*, Sci., 802 (Aug. 17, 2012), available at [http://www.biologicaldiversity.org/programs/biodiversity/-endangered\\_species\\_act/listing\\_species\\_under\\_the\\_endangered\\_species\\_act/pdfs/brosi-08-17-12.pdf](http://www.biologicaldiversity.org/programs/biodiversity/-endangered_species_act/listing_species_under_the_endangered_species_act/pdfs/brosi-08-17-12.pdf) (analyzing ESA citizen petitions). "Person" is defined in the ESA as:

[A]n individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.

16 U.S.C. § 1532(13).

51. 16 U.S.C. § 1540(g)(1) (authorizing citizen-suits for listing decisions); Brosi & Biber, *supra* note 50, at 802 (studying value of citizen petitions).

52. Eric Biber, *A Risky FWS Proposal to Limit ESA Petitions*, LEGAL PLANET (Apr. 4, 2011), <http://legalplanet.wordpress.com/2011/04/04/a-risky-fws-proposal-to-limit-esa-petitions/> (noting Congress' motivations in permitting citizen involvement); accord Daggett, *supra* note 31, at 99-102 (describing Congress' reasoning for creating citizen petition process). In *Bennett v. Spear*, Justice Scalia articulated that the citizen-suit provision of the ESA was "an authorization of remarkable breadth." *Bennett v. Spear*, 520 U.S. 154, 164 (1997) (holding zone-of-interests test for prudential standing did not exclude irrigation districts and ranchers).

53. See *Defenders of Wildlife v. U.S. Fish & Wildlife Serv.*, 797 F. Supp. 2d 949, 952 (D. Ariz. 2011) (requiring plaintiff to show that Agency failed to take non-discretionary action to bring citizen-suit); *Conservation Force v. Salazar*, 753 F. Supp. 2d 29, 35 (D.D.C. 2010) (requiring plaintiffs to identify non-discretionary duty under Section Four to compel agency action through citizen-suit provision).

54. Daggett, *supra* note 31, at 102 (describing available legal remedies for citizen-suits). Congress allowed recovery on attorneys' fees because it wanted to compel citizens to get involved without being deterred by the cost of litigation. *Id.*

55. 16 U.S.C. § 1540(g)(1)(A)-(C) (listing available actions for citizen-suit claims). Three types of actions for citizen-suit claims exist: (1) "to enjoin any person, including the United States and any other government instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter [thirty-

endangered or threatened under the ESA through a citizen petition.<sup>56</sup> The citizen-suit provision then allows citizens to sue the FWS to compel agency action if (1) the agency does not comply with the strict ESA deadlines requiring the FWS to respond to the citizen's petition or to complete a nondiscretionary task, or (2) the petitioner is dissatisfied that the FWS rejected the petition.<sup>57</sup>

When the FWS receives a petition to list a species, it must adhere to the deadlines outlined in Section Four.<sup>58</sup> The FWS is given ninety days to determine whether the species' listing may be warranted.<sup>59</sup> This determination centers on "whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted."<sup>60</sup> If the FWS finds the petition brings sufficient evidence signaling the species' listing is warranted, it must conduct a full investigation to determine whether the species should be listed and must respond to the citizen petition within one year of receipt.<sup>61</sup> Once investigations are complete, the FWS then makes a final listing determination and either concludes that (1) listing is not warranted, (2) listing is warranted, or (3) listing is warranted, but the species is precluded from listing because other species have higher priority for federal protection.<sup>62</sup> If listing is warranted, the FWS has an additional year to publish a proposed rule on the species' listing.<sup>63</sup> Because courts consider listing decision deadlines to be non-discretionary and are

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five] or regulation issued under the authority thereof;" (2) "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 (3) "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." *Id.*

56. See Biber, *supra* note 52 (discussing citizen petition); *Listing and Critical Habitat: Petition Process*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/endangered/what-we-do/listing-petition-process.html> (last updated July 15, 2013) (explaining citizen petition process).

57. Biber, *supra* note 52 (discussing citizen petition).

58. For a discussion of ESA deadlines, see *infra* notes 59-64 and accompanying text.

59. 16 U.S.C. § 1533(b)(3)(A) (giving Secretary ninety days after petition to determine whether petition is warranted).

60. *Id.* (marking standards for determining whether petition is warranted).

61. 16 U.S.C. § 1533(b)(3)(B)(i-iii) (listing Secretary's possible findings after investigation).

62. *Id.* (listing three findings Secretary may make in final listing determination).

63. 16 U.S.C. § 1533(b)(6)(A) (giving deadline for publishing listing in Federal Register).

likely to enforce them, citizens have significant power to compel the FWS to list petitioned species.<sup>64</sup>

### C. Availability of Judicial Review Under the APA

The APA governs judicial review of federal administrative agencies.<sup>65</sup> A citizen who brings a citizen-suit against the FWS for the Agency's failure to perform a non-discretionary action does so under the APA.<sup>66</sup> Often, a dissatisfied individual or group will bring suit seeking judicial review of the FWS's determination not to list a species or designate a critical habitat.<sup>67</sup> Under the APA, a reviewing court must inquire whether the agency's decision was "arbitrary, capricious, or an abuse of discretion."<sup>68</sup> During this inspection, many courts apply a "hard look" review of the agency's decision-making process, a review steeped in skepticism of the agency's action.<sup>69</sup>

While the hard look review standard affords deference to agency action, it probes the agency's decision-making.<sup>70</sup> A court

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64. For a discussion of citizen-suits, see *infra* notes 79-113 and accompanying text.

65. 5 U.S.C. § 706(2)(A) (2012) (listing judicial review standards).

66. *Id.* (providing for judicial review of agency action); 16 U.S.C. § 1540(g) (allowing citizens to bring lawsuit against agency).

67. For a discussion of judicial review, see *infra* notes 114-146 and accompanying text.

68. 5 U.S.C. § 706(2)(A) (describing standard of judicial review).

69. See, e.g., *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 52-57 (1983) (finding National Highway Traffic Safety Administration was arbitrary and capricious when it revoked standard requiring passive restraints in automobiles because it failed to provide reasoned analysis). Originally, this arbitrary and capricious standard was very deferential and easy for agencies to meet. See *id.* Now, however, many courts apply a stricter standard that is often referred to as "hard look" review. *A New Generation*, *supra* note 45, at 36. Courts originally intended hard look review to mean courts had the power to require agencies to take a "hard look" at salient aspects of [the agency's] decision problem." Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 ADMIN. L. REV. 753, 754 n.1 (2006). Courts today have re-appropriated the term to mean "that courts are supposed to take a 'hard look' at the agency's decision process." *Id.* In other words, hard look review requires that agencies give an adequate explanation of their decision-making process including a "rational connection between the facts found and the choice made." *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962). This higher level of judicial scrutiny likely came from the judicial branch's desire to add a needed judicial check on administrative agencies. Stephenson, *supra*, at 754.

70. For a discussion of hard look review, see *supra* notes 65-69 and *infra* notes 71-73 and accompanying text. Administrative law scholars are divided on whether hard look review provides a good model for judicial review of administrative agencies. Stephenson, *supra* note 69, at 761-67. Proponents argue hard look review encourages agencies to heighten decision-making standards, increases agency efficiency, corrects for any agency bias, and ensures quality in regulatory decisions. *Id.* at 761-63. Opponents, however, assert hard look review of an agency's "formalized

must not “substitute its judgment for that of the agency.”<sup>71</sup> Instead, the court must evaluate “whether the [agency’s] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”<sup>72</sup> Because the hard look review standard does not extend automatic deference to agency decision-making, those seeking judicial review have an opportunity to convince the court to vacate the agency’s decision.<sup>73</sup>

### III. CURRENT TRENDS IN LITIGATION AND FEDERAL BUDGET CONSTRAINTS

The ESA is a source of contentious litigation concerning listing decisions and critical habitat designations.<sup>74</sup> Environmental organizations, such as WildEarth Guardians, the Center for Biological Diversity (CBD), and Earthjustice, regularly petition the FWS to act and initiate lawsuits against the Agency when it misses the ESA’s statutory deadlines to respond to the petitions.<sup>75</sup> ESA opponents often respond to FWS action by challenging the FWS’s determinations under the APA as arbitrary and capricious.<sup>76</sup> The FWS’s response to current litigation patterns has been to insist on a cap for the amount of funding it receives for its listing program from the

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statements of reasons offered in an administrative record” does not correlate to the agency’s real decision-making process. *Id.* at 763. Opponents also argue hard look review allows judges to “strike down policies they dislike on substantive grounds,” despite case precedent urging that a court must not impose its own judgment over the agency’s judgment. *Id.* at 765; accord *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). For critics of hard look review, the standard ultimately fails to contribute to effective decision-making and wastes excessive amounts of agency resources. See Stephenson, *supra* note 69, at 764-65. Despite differences in opinion, however, courts are likely to stick with the current trend in using hard look review when reviewing administrative agency action. See generally *id.*

71. *Overton Park*, 401 U.S. at 416 (asserting court may not impose its own judgment on agency decision-making).

72. *Id.* (explaining court may look at various factors to determine whether agency was arbitrary and capricious). In *State Farm*, the Supreme Court further stated that to meet the arbitrary and capricious standard, an “agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines*, 371 U.S. at 168) (internal quotation marks omitted).

73. For a discussion of how judicial review is used in court for ESA claims, see *infra* notes 114-146 and accompanying text.

74. For a discussion of current litigation patterns, see *infra* notes 79-146 and accompanying text.

75. For a discussion of citizen-suits, see *infra* notes 79-113 and accompanying text.

76. For a discussion of current trends in judicial review, see *infra* notes 114-146 and accompanying text.

federal government.<sup>77</sup> The tension between frequent litigation and a lack of adequate funding plays out at the direct expense of at-risk species because the reversal of agency action removes federal protection for that species.<sup>78</sup>

#### A. Save The Animals! Save The Animals! Save The Animals!

The ESA mandates the FWS to consider citizen petitions requesting the Agency to list a species, designate a critical habitat, or comply with ESA deadlines.<sup>79</sup> If the Agency denies the citizen petition, petitioners can react with lawsuits to force the FWS to act.<sup>80</sup> Because the ESA grants broad authority to citizens to influence the FWS's listing agenda, citizens "wield substantial power" in the environmental protection realm.<sup>81</sup> Environmental organizations acting as "citizens" under the ESA "have taken up their role as watchdogs and enforcers with enthusiasm, and now, arguably, have assumed at least some of the fundamental functions of the federal government, particularly the executive power."<sup>82</sup>

Citizen groups can have a considerable impact on environmental lawmaking through litigation.<sup>83</sup> Non-governmental organizations (NGOs) have initiated many seminal environmental law cases through citizen petitions and judicial review.<sup>84</sup> For example, in

77. For a discussion of the FWS's response to challenges to its decision-making under the ESA, see *infra* notes 147-171 and accompanying text.

78. For a discussion of result of competing litigation patterns, see *infra* notes 172-179 and accompanying text.

79. See Helen Thompson, *Citizen Provision Found Beneficial to US Endangered Species Act*, NATURE NEWS BLOG (Aug. 16, 2012, 5:43 PM), <http://blogs.nature.com/news-/2012/08/citizen-provision-found-beneficial-to-us-endangered-species-act.html> (acknowledging FWS's requirement to consider citizen petitions). For a general historical background on why citizen petitions are a part of federal environmental protection, see Daggett, *supra* note 31, at 99-101 (giving background information on citizen petition).

80. See Thompson, *supra* note 79 (noting citizen group trend in bringing lawsuits after petition).

81. Daggett, *supra* note 31, at 99 (explaining role citizens play in environmental protection).

82. *Id.* at 102 (describing citizens as "watchdogs" of ESA). One environmental organizations, Defenders of Wildlife, spells out its role in the ESA:

We develop new ways to make the act more effective, advocate to protect and increase federal funding for the ESA, oppose all legislative attacks that would weaken the law, and make sure that those responsible for implementing the Act's provisions and regulations are held accountable when they fail to enforce the law.

*Endangered Species Act 101*, DEFENDERS OF WILDLIFE, <http://www.defenders.org/endangered-species-act/endangered-species-act> (last visited Jan. 7, 2014).

83. Daggett, *supra* note 31, at 103 (explaining NGO role in lawmaking).

84. *Id.* at 102-05 (articulating NGO role in citizen-initiated litigation). See, e.g., *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 406 (1971) (granting

*Overton Park v. Volpe*,<sup>85</sup> NGOs successfully petitioned the United States Department of Transportation to stop construction of a highway through Overton Park, a 342-acre city park containing nature trails, forest area, and other natural landscape.<sup>86</sup> Citizen groups, furthermore, are well-known for enforcing the ESA by exposing instances when the FWS disregards its own rules.<sup>87</sup>

Opponents criticize the ESA citizen-suit clause, claiming it impedes the ESA's success by "becom[ing] a tool for excessive litigation."<sup>88</sup> Critics argue that citizen petitions force the FWS to spend its limited resources combating mega-petitions and their resulting litigation instead of focusing on species conservation.<sup>89</sup> According to FWS Director Dan Ashe, the FWS spent more than seventy-five percent of its resource-management budget on litigation related expenses in 2011.<sup>90</sup>

Citizen petitions and related suits involving the ESA have increased substantially and without precedent in recent years.<sup>91</sup> In the last four years, a small number of environmental groups have submitted over twelve hundred petitions for species to be listed — an exponential jump from the twenty-species average of the past twelve years.<sup>92</sup> These groups attribute the recent overhaul in petitions to an increase in mass species extinctions resulting from critical habitat destruction and climate change; they assert entire ecosystems are in need of protection, not just individual species.<sup>93</sup>

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citizens' petition by halting construction of highway through city park); *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 436, 445 (5th Cir. 2001) (providing win for citizen groups by emphasizing critical habitat important for environmental species conservation).

85. 401 U.S. 402 (1971).

86. *Id.* at 406 (halting construction of six-lane highway).

87. Daggett, *supra* note 31, at 105 (describing NGOs' well-known role as whistleblowers and watchdogs).

88. Rep. Doc Hastings, *Time to Improve the Endangered Species Act*, WASH. TIMES (May 18, 2012), <http://www.washingtontimes.com/news/2012/may/18/time-to-improve-the-endangered-species-act/> (noting citizen petitions are harmfully increasing litigation against FWS).

89. *See id.* (explaining how petitions hinder FWS).

90. *See id.* (noting FWS Director Dan Ashe's statement on litigation related expenditures).

91. Todd Woody, *Wildlife at Risk Face Long Line at U.S. Agency*, N.Y. TIMES (Apr. 20, 2011), [http://www.nytimes.com/2011/04/21/science/earth/21species.html?\\_r=0](http://www.nytimes.com/2011/04/21/science/earth/21species.html?_r=0) (explaining recent surge in citizen petitions).

92. *Id.* (highlighting unusually high number of recent petitions requested).

93. *Id.* (explaining petitioners' rationale for dramatic increase in requests).

In 2011, the FWS reached a settlement agreement with the CBD and WildEarth Guardians.<sup>94</sup> The CBD and WildEarth Guardians agreed to halt lawsuits that involved over two hundred and fifty species in exchange for a six-year plan to investigate possible aid to the species.<sup>95</sup> This settlement afforded little relief to the FWS, however, because in July 2012, the CBD brought another mega-petition requesting the FWS list fifty-three amphibians and reptiles.<sup>96</sup>

The FWS maintains mega-petitions are a challenge for the Agency because of the significant costs and human capital resources required to investigate the petitioners' claims.<sup>97</sup> According to Gary Frazer, the FWS's assistant director for the Endangered Species Program:

These megapetitions are putting [the FWS] in a difficult spot, and they're basically going to shut down [the FWS's] ability to list any candidates for the foreseeable future . . . . If all our resources are used responding to petitions, we don't have resources to put species on the endangered species list. It's not a happy situation.<sup>98</sup>

The entire purpose of the ESA is undermined if the FWS cannot continue to do its statutorily mandated job of listing species because it must spend its limited resources handling citizen petitions.<sup>99</sup> The mega-petition problem is further exacerbated when organizations seek to enforce ESA deadlines and thereby force the FWS to reallocate resources to meet these deadlines.<sup>100</sup>

94. Thompson, *supra* note 79 (discussing recent settlement agreement between FWS, CBD, and WildEarth Guardians). The CBD and WildEarth Guardians bring the largest portion of citizen petitions, filing "over 90 percent of the listings petitions since 2007." Woody, *supra* note 91. For a discussion of the latest settlements, see Michael Wines, *Endangered or Not, but at Least No Longer Waiting*, N.Y. TIMES (Mar. 6, 2013), <http://www.nytimes.com/2013/03/07/science/earth/long-delayed-rulings-on-endangered-species-are-coming.html?pagewanted=all&r=0>.

95. Thompson, *supra* note 79 (noting details of FWS's settlement agreement). For details of this plan, see *U.S. Fish and Wildlife Service Listing Program Work Plan Questions and Answers*, U.S. FISH & WILDLIFE SERV., [http://www.fws.gov/endangered/improving\\_esa/FWS%20Listing%20Program%20Work%20Plan%20FAQs%20FINAL.pdf](http://www.fws.gov/endangered/improving_esa/FWS%20Listing%20Program%20Work%20Plan%20FAQs%20FINAL.pdf) (last visited Jan. 7, 2014).

96. Thompson, *supra* note 79 (highlighting CBD's recent mega-petition).

97. Woody, *supra* note 91 (posing FWS's argument that mega-petitions harm Agency).

98. *Id.* (quoting Gary Frazer on stunting mega-petitions).

99. *See id.* (noting petitions are problematic in light of budget constraints).

100. Gersen & O'Connell, *supra* note 49, at 928 (articulating problem with administrative deadlines).



Notably, the issue of citizens abusing the right to petition appears unique to the FWS.<sup>101</sup> The DOI is one of few federal agencies that consistently receives many judicially imposed deadlines.<sup>102</sup> In 2008, the DOI “reported 209 judicial deadlines and 279 statutory deadlines, suggesting an ongoing dispute with the courts” and by implication with citizen petitioners.<sup>103</sup> Courts generally enforce statutorily mandated deadlines, despite the Agency’s lack of resources to meet a particular deadline.<sup>104</sup> Accordingly, if the FWS cannot meet the deadlines imposed by the ESA to respond to citizen petitions, it “will pretty much automatically lose in court and be ordered by the court to respond within a short timeframe.”<sup>105</sup>

In addition to the mega-petition strategy, citizen petitioners have also employed a “sue and settle” tactic involving what some have called “secret settlements” with the FWS.<sup>106</sup> Secret settlements occur when environmental groups that have brought mega-petitions settle listing determinations privately with the FWS, as demonstrated recently when the FWS agreed to list several hundred species waiting on its backlog.<sup>107</sup> These settlements often deny landowners and industry groups — those most heavily affected by the settlements — the opportunity to give input on the FWS’s decisions.<sup>108</sup> Secret settlements exclude important parties to the litigation, in effect not allowing landowners and industry groups to “present any evidence, make any argument to the judge or react to the proposed settlement in any way.”<sup>109</sup>

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101. For a discussion on the large number of petitions to the FWS, see *infra* notes 102-105 and accompanying text.

102. See Gersen & O’Connell, *supra* note 49, at 940 (describing high numbers of judicially imposed deadlines on DOI).

103. See *id.* (listing number of DOI’s judicial and statutory deadlines).

104. *Id.* at 952 (referencing judicial trend to compel Agency to meet deadlines); accord *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004) (demonstrating how courts can use statutory deadlines to force agency action under Section 706(1) of APA).

105. Biber, *supra* note 52 (noting judicial trend to compel FWS to comply with deadlines).

106. Sen. David Vitter, *Endangered Species Act’s Hidden Costs*, WASH. TIMES (Feb. 8, 2013), <http://www.washingtontimes.com/news/2013/feb/8/endangered-species-acts-hidden-costs/> (describing sue and settle tactic). For a discussion on negotiated rulemaking, see *A New Generation*, *supra* note 45, at 87-94.

107. Vitter, *supra* note 106 (describing secret settlements). For a discussion of recent settlements, see *supra* notes 94-96 and accompanying text.

108. Vitter, *supra* note 106 (explaining how landowners are left out of FWS decision-making).

109. *Id.* (explaining legal problem with secret settlements). But see Taylor Jones, *Letter to the Editor: Endangered Species Act Is Worth the Fight*, WASH. TIMES (Feb. 21, 2013), <http://www.washingtontimes.com/news/2013/feb/21/endangered-species-act-is-worth-the-fight/> (countering Senator David Vitter). Jones articulates

Thus, citizen petitions that lead to court ordered deadlines or related backroom settlements greatly impact the FWS's agenda for species and habitat conservation.<sup>110</sup> The Agency, unfortunately, is forced to reallocate its budget to address petitions, prepare for court, and negotiate settlements.<sup>111</sup> If the FWS is ordered to meet a deadline, it arguably does less effective work because it is rushed and constrained by a budget.<sup>112</sup> Challenges for judicial review, therefore, logically follow from citizen petitions and related citizen-suits.<sup>113</sup>

## B. This Land is My Land

The FWS incurs substantial opposition to species listings and critical habitat designations from landowners and industry groups.<sup>114</sup> These groups "continue to regard ESA enforcement as a potentially debilitating regulatory straightjacket."<sup>115</sup> Economic factors are an important reason why these groups disfavor the ESA; landowners and industry groups "see ESA restrictions as a threat to the profitable use of their land."<sup>116</sup> To avoid the potential financial loss from compliance with the ESA, landowners and industry groups seek judicial review of the FWS's listings and critical habitat designations to ask the court to set aside the action.<sup>117</sup>

The ESA's mandatory protections for listed species and critical habitats can significantly constrain a landowner's use of his or her

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backdoor settlement agreements have "streamlined the listing process, reduced litigation, provided regulatory certainty for public and private land users and spurred crucial protection for our nation's most imperiled plants and animals." *Id.*

110. For a discussion of problems arising from citizen petitions, see *supra* notes 79-109 and *infra* notes 111-113 and accompanying text.

111. See Robert L. Fischman, *Predictions and Prescriptions for the Endangered Species Act*, 34 ENVTL. L. 451, 472 (2004) (articulating Agency must reallocate resources from its priorities to deal with litigation). For a discussion of the FWS's resource allocation, see *infra* notes 147-171 and accompanying text.

112. For a discussion of how the FWS is constrained by deadlines and budget, see *infra* notes 147-171 and accompanying text.

113. For a discussion of trends in judicial review, see *infra* notes 114-146 and accompanying text.

114. See CHARLES E. GILLILAND & MICHAEL MAY, TEX. A&M UNIV., ENDANGERED SPECIES ACT: A LANDOWNER'S GUIDE 1 (2003), available at <http://recenter.tamu.edu/pdf/-1648.pdf> (discussing trend in challenging ESA decisions).

115. *Id.* (explaining landowner problems with ESA).

116. *Id.* (noting ESA makes certain land use unprofitable).

117. See Susan Combs, *Preserving Endangered Species the Texas Way*, WASH. TIMES (Feb. 28, 2013), <http://www.washingtontimes.com/news/2013/feb/28/preserving-endangered-species-the-texas-way/> (explaining how disgruntled industry groups and landowners turn to courts when mega-petitions encourage FWS to take action according to environmentalist agenda).

property.<sup>118</sup> For example, it is illegal under Section Nine of the Act to “take” a listed species.<sup>119</sup> “Take” is defined broadly by the FWS to include any activity that “actually kills or injures wildlife” and can occur if the activity causes harm directly or indirectly.<sup>120</sup> For example, an illegal taking may occur when a landowner wishes to develop or use a property in any way other than as a habitat for the endangered or threatened species.<sup>121</sup> Violators of the ESA’s taking provision could face civil and criminal penalties.<sup>122</sup>

While listings may recover certain species, they also have the potential to destroy entire industries and the communities that rely on them.<sup>123</sup> For example, in 1990, the FWS listed the Northern Spotted Owl as a threatened species because it believed the logging industry was jeopardizing the owl’s survival.<sup>124</sup> Since then, over two hundred logging mills in the Pacific Northwest have closed and thousands of logging employees have lost their jobs because the industry cannot exist while FWS regulations protecting the owl’s habitat are in place.<sup>125</sup> To make matters worse, Northern Spotted Owl populations have not recovered and may still be declining; new evidence released by the FWS indicates the primary threat to the Northern Spotted Owl’s survival is actually competition from an-

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118. GILLILAND & MAY, *supra* note 114, at 1 (explaining ESA restrictions on landowners). Housing developers, for example, “who build near endangered species can be required by the Clean Water Act and other measures to acquire federal permits and to avoid adversely affecting imperiled wildlife . . . . [A]cquiring permits is lengthy and complex, and the definition of adverse impact [is] vague.” *Wines, supra* note 94.

119. 16 U.S.C. § 1538(a)(1) (2012) (forbidding taking of species).

120. *See* GILLILAND & MAY, *supra* note 114, at 1, 4 (describing “take” provision of Section Nine of ESA); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 55 U.S. 687, 704-05 (1995) (allowing FWS’s broad interpretation of “take”). The ESA defines “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19).

121. GILLILAND & MAY, *supra* note 114, at 2 (describing landowner action that may result in a taking). Landowners can apply for permits to escape liability from incidental takings. *Id.* at 3.

122. *Id.* at 2 (explaining penalties for landowners who take species). The civil penalties range from \$25,000 to \$50,000 per take. *Id.* The criminal penalties may include a prison sentence of up to one year. *Id.*

123. *Combs, supra* note 117 (explaining demise of logging industry as result of ESA regulation). *Combs* notes, “Heavy-handed federal regulation can put some of our communities on the endangered list, hurting local industries as well as government finances.” *Id.*

124. *Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Northern Spotted Owl*, 55 Fed. Reg. 26114-01 (June 26, 1990) (to be codified at 50 C.F.R. pt. 17) (listing Northern Spotted Owl as threatened). *See Combs, supra* note 117 (noting Northern Spotted Owl listing and impact on logging industry).

125. *Combs, supra* note 117 (describing downfall of logging industry).

other species, the Barred Owl.<sup>126</sup> The Northern Spotted Owl, therefore, is an example of how a listing decision could negatively impact an entire industry and still fail to achieve its purpose of protecting the listed species.<sup>127</sup>

The cattle grazing industry is another major source of tension for the FWS.<sup>128</sup> The FWS has listed many species under the ESA due to threats from overgrazing by permitted cattle grazers in the western United States.<sup>129</sup> Cattle grazers are opposed to these listings because the imposed regulation hinders their ability to profit from livestock grazing.<sup>130</sup> In many areas of the Southwest, “livestock grazing . . . is not economically viable at environmentally sustainable levels.”<sup>131</sup> Grazers maintain that other external factors, such as other wildlife, recreational users, and land developers, are the true threat to species’ existence.<sup>132</sup> For several decades, cattle grazers have instigated lawsuits to restrict the FWS’s listing program and have been successful in getting courts to set aside or limit FWS action.<sup>133</sup>

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126. *Id.* (asserting ESA regulation affecting logging industry unnecessary because Northern Spotted Owl population is still declining).

127. *Id.* (explaining how industry could have survived without listing).

128. Daggett, *supra* note 31, at 105-08 (describing cattle grazing industry’s effect on endangered species and resulting litigation). See *Arizona Rancher’s Legal Defense Fund Litigation Raffle*, ARIZ. CATTLEMEN ASS’N, <http://azcattlemensassoc.org/litigation.aspx> (last visited Jan. 7, 2014) (discussing history of cattle growers’ litigation). For an in-depth analysis of cattle grazing litigation, see Harold S. Shepherd, *The Future of Livestock Grazing and the Endangered Species Act*, 21 J. ENVTL. L. & LITIG. 383, 408-24 (2006) (providing details of ESA lawsuit).

129. Daggett, *supra* note 31, at 105-06 (explaining problem with overgrazing for endangered and threatened species).

130. *Id.* (articulating grazers’ economic motivations for fighting against listing decisions).

131. *Id.* (describing economic downside for cattle growers if they must consider presence of endangered species).

132. Erik LeDuc, *Cattle Grower’s Association Protests Potential Endangered Species Listing of New Mexico Meadow Jumping Mouse*, RUIDOSO NEWS (July 5, 2013, 8:04 AM), [http://www.ruidosonews.com/ci\\_23603576/cattle-growers-association-protests-potential-endangered-species-listing?source=most\\_emailed](http://www.ruidosonews.com/ci_23603576/cattle-growers-association-protests-potential-endangered-species-listing?source=most_emailed) (discussing cattle growers’ perspective on ESA). Rex Wilson, president of the New Mexico Cattle Growers Association, stated:

Environmental activist groups like to blame everything on overgrazing, but that’s seldom the problem. Riparian areas are few and far between in New Mexico, attracting wildlife, recreational users, developers and more. Under the ESA, about the only thing that the [FWS] can effectively restrict is grazing, which is frustrating for those of us who are out on the ground, caring for the land on a daily basis.

*Id.*

133. See Daggett, *supra* note 31, at 105-06 (describing cattle grazers’ litigation); see, e.g., *Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1251 (9th Cir. 2001) (finding FWS arbitrary and capricious in issuing incidental take statements and failing to specify amount of excessive take); *Ariz. Cattle*

The latest settlement agreements between the FWS and environmental groups have further aggravated the dispute between landowners, industry groups, and the FWS.<sup>134</sup> If the FWS were to list the eight hundred or more species it has agreed to consider for listing, endangered species would inhabit substantially more territory than they do now and affect more property.<sup>135</sup> In light of the size of potentially affected property and past judicial review trends, landowners and industry groups will likely flood the courts with suits challenging the listings.<sup>136</sup> An increase in lawsuits would only fuel animosity between the competing interest groups and cause the FWS to expend even greater resources to manage the increase in litigation.<sup>137</sup>

When landowners and industry groups challenge agency action, they often argue under the APA that the FWS was arbitrary and capricious in its decision-making.<sup>138</sup> Many courts will exercise hard look review to examine whether the FWS considered all necessary factors when making its decision.<sup>139</sup> When the FWS rushes to meet statutory deadlines for agency action, the action is often of poor quality and thus fails under the arbitrary and capricious standard of review.<sup>140</sup> The FWS is thus likely to lose its judicial review suit when it rushes to meet deadlines for listing species and designating critical habitats in response to environmental group petitions.<sup>141</sup>

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*Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1067 (9th Cir. 2010) (finding FWS was not arbitrary and capricious in designation of critical habitat for Mexican spotted owl).

134. See *Wines*, *supra* note 94 (discussing developer and industry groups' discontent with latest settlements).

135. *Id.* (explaining growth of endangered species list and potential sixty percent increase in territory).

136. *Id.* (describing resistance to ESA listings).

137. *Id.* (explaining likelihood that landowners and industry groups will bring challenges to listing decisions). The FWS has already seen backlash from industry groups, such as the petroleum industry's complaints on listing the lesser prairie chicken and the Gunnison sage grouse. *Id.*

138. See *Gersen & O'Connell*, *supra* note 49, at 963 (explaining arbitrary and capricious standard in light of judicial review).

139. See *id.* (explaining courts' approach to challenges of agency action under arbitrary and capricious standard). For a discussion of hard look review in judicial review cases, see *supra* notes 65-73 and accompanying text. See also Holly Doremus, *The Purposes, Effects, and Future of the Endangered Species Act's Best Available Science Mandate*, 34 ENVTL. L. 397, 430 (2004) [hereinafter *Best Available Science Mandate*] (describing trends in judicial review for best available science requirement).

140. See *Gersen & O'Connell*, *supra* note 49, at 963 (articulating problem with rushed agency action and arbitrary and capricious review).

141. *Id.* (describing how rushed agency action leads to lost suits against those claiming agency was arbitrary and capricious).

The ESA appears to receive harsher review than other statutes.<sup>142</sup> According to environmental scholar Holly Doremus, “In the ESA context, judicial review has been far from a rubber stamp. Indeed, courts have been far tougher than scientific peer review on the wildlife agencies.”<sup>143</sup> For example, when reviewing listing determinations, courts take a hard look at the FWS’s scientific evidence on species and habitats and often find the evidence fails the best available science standard outlined in the ESA’s Section Four.<sup>144</sup> Twenty-five of a sample of thirty-two listing decisions reviewed by the court in 2003 were set aside for reasons including the FWS’s failure to use the best available science.<sup>145</sup> In contrast, courts afford a noticeable level of deference to other agencies for technical decision-making related to scientific evidence.<sup>146</sup>

### C. Money Doesn’t Grow on Trees

In recent years, the FWS has requested that Congress cap the FWS’s budget for citizen petitions.<sup>147</sup> This budget cap proposal asks “Congress to intervene and impose a limit on the number of species it must consider for protection” and would only increase the tension between competing interest groups, including the FWS, if granted.<sup>148</sup> Despite prior proposals failing in 2001 and 2011, the FWS is likely to continue to request that Congress artificially limit the FWS’s ability to respond to citizen petitions.<sup>149</sup> President Obama’s 2013 budget proposal for the FWS included a listing pro-

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142. See *Best Available Science Mandate*, *supra* note 139, at 431 (discussing more stringent judicial review for ESA).

143. *Id.* (discussing enhanced judicial review of ESA action).

144. *Id.* (describing judicial review of best available science standard). For a discussion of the best available science mandate, see *supra* note 37 and accompanying text.

145. *Id.* (describing statistics of judicial review ruling against agency for listing decisions).

146. *Balt. Gas & Elec. Co. v. Natural Res. Defense Council, Inc.*, 462 U.S. 87, 103 (1983) (deferring to agency’s decision-making based on scientific evidence). In *Balt. Gas & Elec.*, the Supreme Court stated “a reviewing court must remember that the [Nuclear Regulatory] Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.” *Id.*

147. For a discussion of the FWS’s requested budget caps, see *infra* notes 148-171 and accompanying text.

148. Woody, *supra* note 91 (noting significance of FWS’s request for budget cap).

149. Brosi & Biber, *supra* note 50, at 802 (predicting FWS’s intent on ESA budget cuts).

gram cap of \$1.5 million ceiling out of the FWS's \$22,431,000 budget for response to citizen petitions.<sup>150</sup>

This budget cap request carries “legal significance because the [FWS] routinely struggles to meet court deadlines dealing with ESA issues” and the FWS could use its inadequate funding as a legal defense to stall for more time.<sup>151</sup> Courts enforce the ESA by requiring the FWS to meet the ESA's deadlines and by extending court orders when the FWS fails to meet those deadlines.<sup>152</sup> If Congress approves a cap in the upcoming years, courts will need to recognize that the FWS's delay in listing species or designating critical habitat is “outside of [the FWS's] control.”<sup>153</sup>

Presently, the FWS has a large backlog of in-need species that cannot receive protection because the FWS lacks the necessary resources.<sup>154</sup> A major reason for this backlog is that the FWS contrived its own lawful impediment for funding species protection when it requested and received a budget cap from Congress for its final listing decisions.<sup>155</sup> The FWS's current proposal requests a budget cap on the entire listing process, including a cap for citizen petitions, because the FWS claims it cannot meet the demand of existing warranted but precluded species.<sup>156</sup>

Even without the requested budget cap, the FWS has insufficient funding to meet its current demands.<sup>157</sup> The FWS's 2012

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150. Bob Berwyn, *Endangered Species Short-Shrifted in Federal Budget*, SUMMIT COUNTY CITIZENS VOICE (Feb. 19, 2012), <http://summitcountyvoice.com/2012/02/19/endangered-species-short-shrifted-in-federal-budget/> (identifying dollar amount of budget cap).

151. Lawrence Hurley, *Obama Plan to Cap Funding for Endangered Species Act Petitions Angers Litigants*, N.Y. TIMES (Mar. 24, 2011), <http://www.nytimes.com/gwire/2011/03/24/24-greenwire-obama-plan-to-cap-funding-for-endangered-speci-79833.html> (noting legal significance of Congress-imposed budget caps).

152. *See id.* (discussing budget caps as method to combat court ordered deadlines).

153. *Id.* (quoting Gary Frazer, Assistant Director for Endangered Species, FWS on budget cap). The FWS views the budget caps as a “common-sense approach” to balancing agency priorities. *Id.*

154. Biber, *supra* note 52 (discussing FWS backlog).

155. *See id.* (discussing current budget cap on finalizing listing decisions).

156. *See id.* (explaining FWS's motivation for budget cap on citizen petitions). To put the FWS's costs in perspective, the FWS spends nearly \$400,000 on critical habitat designations and about half as much on listing a species. *Critical Habitat: Questions and Answers*, *supra* note 44, at 3 (noting costs of species' listing and critical habitat designation).

157. For a discussion of why the FWS has inadequate funding, see *supra* notes 147-156 and *infra* notes 158-171 and accompanying text. For a discussion of the FWS's budget, see Donald C. Baur, Michael J. Bean & Wm. Robert Irvin, *A Recovery Plan for the Endangered Species Act*, 39 ENVTL. L. REP. NEWS & ANALYSIS 10006, 10010-12 (2009) (detailing ESA budget problems).

budget request for the endangered species listing program was \$24.6 million, an eleven percent increase from fiscal year 2011.<sup>158</sup> Leading environmental scholar Daniel J. Rohlf has argued, however, this increase will still be grossly inadequate to support the FWS's responsibilities under the ESA.<sup>159</sup> According to Rohlf, "[i]n an age of accelerating threats to biodiversity, not just from habitat loss from invasive species and climate change, the budgets for Fish and Wildlife Service have not even been close to keeping up with the demands on the agency."<sup>160</sup> To put the Agency's costs into perspective, the FWS spends an average of \$39,267 for a ninety-day finding that a species warrants listing and an average of \$100,690 for a twelve-month finding.<sup>161</sup>

Furthermore, it is unlikely the Agency will receive adequate funding in the upcoming years.<sup>162</sup> On March 1, 2013, a sequestration period took effect because both Congressional Republicans and Democrats could not agree on a compromise to reduce the federal deficit.<sup>163</sup> During the 2013 sequestration, the federal government was forced to cut nearly eighty-five billion dollars from federal spending to stabilize the budget deficit.<sup>164</sup> To meet this target, the sequester made across-the-board federal spending cuts.<sup>165</sup> In December of 2013, Congress passed a federal spending plan that took away the forced spending cuts from the sequestration.<sup>166</sup> Although President Obama has stated that the budget compromise was "a good first step away from the shortsighted, crisis-driven decision-making that has only served to act as a drag on our economy,"

158. See Woody, *supra* note 91 (discussing FWS's budget).

159. See *id.* (asserting Daniel J. Rohlf's critique of FWS's budget request).

160. See *id.* (quoting Daniel J. Rohlf).

161. Heather Hansen, *Swapping Politics for Science*, HIGH COUNTRY NEWS (May 2, 2011, 4:00 PM), <http://www.hcn.org/blogs/range/swapping-politics-for-science> (noting price of listing and protecting species is high).

162. Sean Reilly, *OMB: Plan for Hundreds of Thousands of Furloughs if Budget Deal Fails*, FED. TIMES (Jan. 14, 2013, 5:52 PM), <http://www.federaltimes.com/article/20130114/-PERSONNEL03/301140007/OMB-Plan-hundreds-thousands-furloughs-budget-deal-fails> (explaining United States' tough financial situation).

163. Josh Lederman, *Sequestration 2013: With Cuts in Place, Obama and GOP Brace for Next Fight*, HUFFINGTON POST (Mar. 2, 2013, 6:03 AM), [http://www.huffingtonpost.com/2013/-03/02/sequestration-2013\\_n\\_2796289.html](http://www.huffingtonpost.com/2013/-03/02/sequestration-2013_n_2796289.html) (explaining 2013 sequester).

164. *Id.* (discussing causes of March 2013 sequester).

165. *Id.* (describing sequestration).

166. Ted Barrett & Tom Cohen, *Senate Approves Budget, Sends to Obama*, CNN .COM, <http://www.cnn.com/2013/12/18/politics/senate-budget-deal/> (last updated Dec. 18, 2013) (explaining 2013 budget compromise).



it remains to be seen how this budget compromise will affect federal agencies like the DOI.<sup>167</sup>

Because the FWS is already facing a grave financial crisis, its solution to cap funding to reduce the amount of citizen petitions is counterintuitive in that it limits the FWS's resources even further.<sup>168</sup> The request runs contrary to the spirit of the ESA: The FWS is statutorily mandated to list species and protect them by designating critical habitats, and the FWS deliberately fails to meet this mandate when it keeps itself from funds to protect species.<sup>169</sup> Currently, the polarized agendas of environmental groups and their counterpart landowner and industry groups force the FWS to reallocate funding necessary for its listing program to meet the costs of appeasing both sides, but the FWS's solution to cap the budget may not ultimately resolve the FWS's dilemma.<sup>170</sup> Notably, environmentalists, landowners, and industry groups all disfavor the FWS's proposed budget cap because they think it functions as another excuse for the FWS to remain inactive on pending ESA petitions or challenges to listing.<sup>171</sup>

#### D. Going Around in Circles

The combination of citizen-involved petitions, suits brought to compel FWS action, and litigation requesting judicial review of FWS action presents "a difficult dilemma for the agency."<sup>172</sup> Citizen groups have ignited a surge in wildlife protection efforts by bring-

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167. *Id.* (quoting President Obama) (noting compromise is helpful for economic stability); accord Lisa Desjardins, *Budget deal: who wins, who loses?*, CNN.COM, <http://www.cnn.com/2013/-12/17/politics/budget-winners-losers/index.html> (last updated Dec. 18, 2013) (explaining how more than one trillion dollars will be divided among agencies).

168. For a discussion of why the FWS's budget cap request is illogical, see *supra* notes 147-169 and accompanying text.

169. For a discussion of why the FWS has inadequate funding to meet its statutory mandates, see *supra* notes 147-169 and accompanying text.

170. For a discussion of the FWS's litigation and resulting resource dilemma, see *infra* notes 172-179 and accompanying text.

171. Hurley, *supra* note 151 (discussing groups who disfavor FWS's budget cap request). Environmental groups dislike the budget cap proposal because it reduces the amount of money needed for adequate listing procedures. *Id.* Opponents of new listings, such as landowners and industry groups, argue that this will provide the FWS with an excuse to get out of court, rather than resolve pending suits. *Id.*

172. See Broderick, *supra* note 26, at 100 (explaining time constraint quandary for FWS). Legal scholar Richard B. Stewart noted, "[r]egulation is widely regarded as a zero-sum game in which lawyer-mercenaries battle in an interest group struggle from which only the lawyers profit." Richard B. Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 Wis. L. Rev. 655, 655-56 (1985) [hereinafter *The Discontents of Legalism*].

ing thousands of citizen petitions asking the FWS to list a species or designate a critical habitat.<sup>173</sup> Additionally, these environmental groups continuously and successfully sue the FWS to force compliance with the ESA's short time frames for listing species and designating critical habitats.<sup>174</sup> Because the FWS already has a limited budget, it has only two options to meet court ordered deadlines: (1) risk the quality of work in order to achieve deadlines timely, or (2) settle with environmental groups.<sup>175</sup> Neither option is optimal because both may result in a judicial review suit, risking the possibility that the FWS's listing or designation will be set aside in court.<sup>176</sup>

This litigation pattern results in squandered resources and limited progress with respect to protecting endangered species.<sup>177</sup> The FWS's dilemma is compounded by its request to cap funding for addressing citizen involvement in the ESA process.<sup>178</sup> In short, "the FWS's already meager resources are wasted in its bureaucratic two-step through the courts, which is aimed at avoiding only the most immediate problems."<sup>179</sup>

#### IV. SUGGESTED ALTERNATIVES TO THE FWS'S CURRENT DILEMMA

The rising trend in mega-petitions and related lawsuits is harmful to endangered species because it siphons resources from "on-

173. Woody, *supra* note 91 (noting recent trend in rapid rise in petitions).

174. Broderick, *supra* note 26, at 100-01 (noting litigious behavior of environmental citizen groups that compel FWS action).

175. *Id.* (explaining FWS's race to complete work required by ESA petitions). The FWS attempts to settle lawsuits with citizen petitioners to avoid the high costs of litigation and therefore produces rushed or poorly conceived critical habitat designations. *Id.* at 113-14. When an agency is forced to meet an unreasonably demanding deadline, "a natural inference is that the quality of the output will be sacrificed." Gersen & O'Connell, *supra* note 49, at 933. Thus, it is no surprise when the quality of the FWS's listings fails to meet the procedural or substantive standards outlined by Congress. *See id.* at 932-33.

176. Broderick, *supra* note 26, at 100-01 (highlighting common success of environmental groups in suits for judicial review of agency action).

177. Broderick, *supra* note 26, 101 (explaining how competing litigation strategies stunt FWS's species protection progress). The National Environmental Policy Act (NEPA) is in a similar situation, as agencies administering it must balance significant litigation burdens against underlying environmental goals. *See generally* Kevin H. Moriarty, *Circumventing the National Environmental Policy Act: Agency Abuse of the Categorical Exclusion*, 79 N.Y.U. L. REV. 2312 (2004).

178. For a discussion of FWS's budget caps, see *supra* notes 147-171 and accompanying text.

179. Broderick, *supra* note 26, at 101 (concluding that wasted money and resources result from excess litigation by citizens). *See Critical Habitat: Questions and Answers*, *supra* note 44, at 2 (identifying continuous cycle of lawsuits challenging and re-challenging critical habitat designations).

the-ground conservation efforts” designed to protect species before listing is needed and prevent those species already listed from becoming extinct.<sup>180</sup> The FWS, environmentalists, landowners, industry groups, and Congress find themselves in an intense debate over whether the ESA needs to be reformed and, if so, in what fashion.<sup>181</sup> The following section explores whether the status quo is ineffective.<sup>182</sup> It then proposes ways to increase the efficiency of the ESA and better protect endangered and threatened species.<sup>183</sup>

#### A. Does the ESA Need a Change of Scenery?

Some argue citizen petitions, however well-intentioned, promote serious and direct harm to endangered species.<sup>184</sup> Recently, however, scholars have questioned the premise that citizen petitions contribute to the FWS’s failures.<sup>185</sup> In August 2012, researchers Berry J. Brosi and Eric G. N. Biber released an objective scientific study of the effect of citizen petitions on the ESA.<sup>186</sup> The study compared species listed by the FWS on its own initiative with species listed as a result of citizen petition litigation.<sup>187</sup> It investigated the biological threat to each species and determined that if the biological threat to citizen-initiated species is higher than or

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180. *Critical Habitat: Questions and Answers*, *supra* note 44, at 2 (noting litigation is potentially detrimental to endangered species because ESA effectiveness hits roadblock).

181. For a discussion of the debate surrounding ESA reform, see *infra* notes 233-292 and accompanying text.

182. For the pros and cons of the current system, see *infra* notes 233-292 and accompanying text.

183. For a discussion of the circulating proposals for fixing the ESA, see *infra* notes 233-292 and accompanying text.

184. For a discussion of critics’ concerns about citizen petitions, see *supra* notes 88-113 and *infra* notes 217-228 and accompanying text.

185. For a discussion of recent scholarship on the effectiveness of citizen petitions, see *infra* notes 186-232 and accompanying text.

186. Brosi & Biber, *supra* note 50, at 802 (studying citizen petitions for ESA). For information on the study’s scientific methods, see *id.* For a discussion of the study, see Thompson, *supra* note 79 (explaining recent study on citizen-initiated petitions).

187. Brosi & Biber, *supra* note 50, at 802 (establishing methodology for objective analysis of listed species litigation). Brosi and Biber’s study asked three questions:

- (i) Do FWS-initiated species face greater biological threats than citizen-initiated species?
- (ii) Do citizen-initiated species show signs consistent with what critics deem politically-motivated listing: (a) more conflict with development than FWS-initiated species; and (b) a greater proportion of subspecies or populations as opposed to ‘full’ species compared with FWS-initiated species?
- (iii) What is the relation between biological threat and both conflict with development and taxonomic status?

*Id.*

equal to the biological threat for FWS-initiated species, citizen involvement under the ESA is productive.<sup>188</sup> Such a finding would confirm the need for preserving citizen involvement in the ESA process.<sup>189</sup> An alternate finding would suggest citizen involvement hinders the FWS's ability to list species with the most need, or highest biological threat.<sup>190</sup>

Brosi and Biber's study found "[c]itizen-initiated species (petitioned and/or litigated) face[d] higher levels of biological threat than species identified by FWS."<sup>191</sup> It also found FWS-initiated species were less likely than citizen-initiated species to conflict with development, although species in conflict with development were found to face "greater biological threat levels than species not in conflict with development."<sup>192</sup> Based on these findings, the researchers concluded it would be illogical to "reduc[e] or eliminat[e] citizen involvement in the ESA."<sup>193</sup>

Critics of citizen involvement charge that such petitions are politically motivated.<sup>194</sup> They argue petitioners focus on species that are more likely to be in conflict with development and therefore unfairly target landowners and industry groups.<sup>195</sup> Although the critics' claims may be grounded in some truth, Brosi and Biber's study demonstrated citizen-initiated species do indeed have the greatest need for preservation and may include biologically threatened species not otherwise captured by FWS data and initiatives.<sup>196</sup> Citizen-petitioned species, therefore, still warrant listing

188. *Id.* (articulating "biological threat" as threshold test for incurring benefits from citizen involvement).

189. *Id.* (asserting researchers' finding that citizen involvement is beneficial for identifying biological threat supports maintaining citizen petition clause of ESA).

190. *Id.* (suggesting if citizen-initiated species had lower biological threat than FWS-initiated species, ESA is ineffective by allowing citizen petitions).

191. *Id.* (concluding citizen-initiated species suffer higher biological threat than FWS-initiated species).

192. Brosi & Biber, *supra* note 50, at 802 (studying citizen-initiated species affected by development and biological threat levels).

193. *Id.* at 803 (concluding citizen involvement beneficial to ESA purpose and scope).

194. *Id.* at 802 (noting critics' argument that petitions are politically motivated).

195. *Id.* (dispelling critics' concern that citizen group petitions are politically motivated).

196. *Id.* at 803 (finding petitions warranted for species in conflict with development). *But see* Marco Restani & John M. Marzluff, *Funding Extinction? Biological Needs and Political Realities in the Allocation of Resources to Endangered Species Recovery*, 52 *BIO SCIENCE* 169, 174 (2002) (articulating that "citizens petitioned more threatened species than endangered species"); Katrina Miriam Wyman, *Rethinking*

under a biological threat criterion despite possible negative effects on landowners and industry groups.<sup>197</sup>

Brosi and Biber's study further acknowledges that citizen groups are particularly well-positioned to propose listing decisions because citizen groups often have in-depth knowledge about a particular species and its habitat.<sup>198</sup> Importantly, FWS assistant director Gary Frazer conceded "[c]itizen involvement is valuable and useful" to the FWS.<sup>199</sup> Indeed, many argue that the ESA's "improvements are not just the result of better laws — they are the result of better enforcement, and most of that enforcement has been at the hands of citizen groups."<sup>200</sup>

If Congress limits the ability of citizens to petition for species listings or critical habitat designations, Congress further limits the effectiveness of federal programs designed to protect a large number of species that are in need of environmental protection.<sup>201</sup> Without pressure from citizen petitioners, the FWS has a poor record of instigating listings and designating critical habitats.<sup>202</sup> Although Congress mandated the FWS to prioritize listing decisions, even when costs were heavy, the FWS has "moved at a glacial pace in listing species as threatened or endangered" and has taken even more time to designate critical habitats for these species.<sup>203</sup> Citizens have submitted thousands of petitions in response to the FWS's delay in the listing process.<sup>204</sup> Although listing and critical habitat designations are time-consuming and resource-heavy processes, the petitioners forced the FWS to list approximately 650 species from 1990 to 2000.<sup>205</sup> Thus, there is little doubt citizen peti-

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*the ESA to Reflect Human Dominion over Nature*, 17 N.Y.U. ENVTL. L.J. 490, 496 (asserting skepticism that environmentalists bring petitions for most at-risk species).

197. Brosi & Biber, *supra* note 50, at 802 (asserting citizen groups do petition for most at-risk species).

198. *Id.* at 803 (noting citizen groups have particular knowledge necessary for listing species).

199. Thompson, *supra* note 79 (quoting Gary Frazer of FWS on value of citizen involvement).

200. Daggett, *supra* note 31, at 100-01 (explaining NGOs' role in ESA success).

201. *See* Brosi & Biber, *supra* note 50, at 803 (articulating need for citizen involvement to preserve species). Importantly, citizen petitions prompt the FWS to make determinations on species that may be unpopular choices for listing. *Id.*

202. *See* Daggett, *supra* note 31, at 109 (asserting that NGOs, rather than FWS, are agenda setters).

203. *Id.* (describing FWS's slow pace for listing species).

204. *Id.* at 111 (describing NGO petition strategy when FWS delays listing process).

205. *Id.* (describing NGO success in getting FWS to list species).

tions play an important role in encouraging the FWS to list and protect species.<sup>206</sup>

If Congress approves the FWS's budget cap proposal, the ESA will suffer because the budget cap will limit its ability to utilize citizens as a resource for species conservation.<sup>207</sup> A budget cap would be detrimental to the endangered species program because "the petition process appears to, on average, have helped improve the ESA listing process."<sup>208</sup> The FWS claims, however, that without federal intervention to reduce resources, the trend in citizen petitions will (1) continue to permit groups to set FWS's agenda and (2) force the FWS to reallocate its budget at a cost to high-priority listings.<sup>209</sup>

Brosi and Biber's study on citizen petitions puts the FWS's first claim to rest: Citizen petitioners are as good as or better than the FWS at identifying at-risk species.<sup>210</sup> In fact, "[i]t also appears pretty clear that litigation is offsetting political pressure on FWS not to list species that might interfere with major development projects."<sup>211</sup> Thus, while environmental organizations may set or restrict the FWS's agenda, no true harm has come from this agenda setting, and the organizations help the FWS's decision-making process by better identifying at-risk species.<sup>212</sup>

With regard to the FWS's second concern, a cap for citizen petitions would likely reduce the number of citizen petitions filed and therefore maintain the FWS's own priority system.<sup>213</sup> The result, however, may be unfavorable to the FWS because citizen petitions may help the ESA.<sup>214</sup> If there was a stringent cap, petitioners would likely have less motivation to prepare quality petitions, which can be very labor-intensive, due to the increased likelihood the FWS would ignore the petition.<sup>215</sup> With fewer high-quality petitions generated, the probability of citizen petitions continuing to aid the ESA will likely reduce.<sup>216</sup>

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206. *Id.* at 109-12 (explaining role citizens play in environmental protection).

207. Biber, *supra* note 52 (arguing against budget cap requests).

208. *Id.* (arguing that citizen petitions help ESA).

209. *Id.* (discussing FWS's concerns with citizen petitions).

210. *Id.* (discussing study Biber co-authored with Brosi). For an in-depth discussion of Brosi and Biber's study, see *supra* notes 185-200 and accompanying text.

211. *Id.* (arguing citizen groups were good balance against developers).

212. Biber, *supra* note 52 (concluding FWS decision-making not harmed by citizen petitions).

213. *Id.* (discussing merit to FWS's concern).

214. *Id.* (discussing problem with taking away too much power to create citizen petition).

215. *Id.* (articulating problem with citizen petition caps).

216. *Id.* (discussing likelihood that fewer citizen petitions would be as advantageous to FWS).

Opponents of the citizen petition clause disagree with the preceding arguments.<sup>217</sup> Opponents argue that not only is an environmental agenda unfavorable to industry and landowner groups, but it may also be injurious to certain species because listing decisions may no longer be made according to what species have the greatest need.<sup>218</sup> Each organization has separate and sometimes conflicting priorities, and so ultimately it becomes a question of which organization can petition first and exert influence on the court.<sup>219</sup> Concerns about citizen agenda setting, however, may ultimately be trivial because “the species that citizen groups tend to care about are those that make the biggest difference from an ecological standpoint.”<sup>220</sup> Still, the ad hoc nature of these listing decisions may be an inefficient and disorganized way to establish FWS policy.<sup>221</sup>

Opponents further contend citizen petitions hinder the FWS’s ability to utilize resources needed for species’ protection by tying up funds and resources in litigation.<sup>222</sup> With the recent increase in mega-petitions draining FWS resources, the FWS may “collapse under the weight of all of them.”<sup>223</sup> It therefore might not be a question of whether citizens should be involved, but rather to what extent.<sup>224</sup>

Furthermore, even if petitions are good for listing decisions, money wasted in litigation for critical habitat designation may disable the FWS.<sup>225</sup> According to Craig Manson, then Assistant Secretary of the DOI, “This flood of litigation over critical habitat designation is preventing the [FWS] from protecting new species and reducing its ability to recover plants and animals already listed.”<sup>226</sup> Although courts have disagreed, the FWS argues critical habitat designations provide insignificant benefits to a species once

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217. For a discussion of arguments raised by opponents of the citizen petition clause, see *infra* notes 218-232 and accompanying text.

218. Daggett, *supra* note 31, at 112 (labeling NGOs as ESA agenda setters).

219. *Id.* (explaining how NGOs set agenda of FWS).

220. *Id.* (describing reasons why NGO agenda setting may benefit species).

221. *Id.* (describing ultimate problem with policymaking if NGOs set agenda).

222. See Fischman, *supra* note 111, at 473 (explaining how FWS must divert funds to citizen petitions).

223. Biber, *supra* note 52 (explaining argument that number of petitions is simply too high to be productive). Biber asserts that the argument that the high number of petitions hinders the FWS is not without merit; however, he articulates that there may be risk in creating a budget cap that is too low because of the value petitions have on ESA process. *Id.*

224. For an opposing view, see *supra* notes 184-216 and accompanying text.

225. Rohlf, *supra* note 6, at 527 (articulating problem with critical habitat designation petitions).

226. *Id.* at 526 (quoting Craig Manson on critical habitat designations).

the FWS lists the species.<sup>227</sup> Despite a lack of data on whether critical habitat designations benefit listed species, it is possible that, as the FWS argues, no benefits ensue from these designations.<sup>228</sup>

Considering the recent findings by Brosi and Biber, the FWS may have to concede that some quantity of citizen-involved listings is vital to the success of the ESA from a preservationist perspective.<sup>229</sup> The trend in mega-petitions, however, raises the question of whether environmental groups are taking their right to compel FWS action too far.<sup>230</sup> The pro-petition approach that emphasizes biological threat fails to consider other viewpoints and agendas, including consideration for the substantial cost to landowners and industry groups that comes with compliance with federal regulation of listed species.<sup>231</sup> Future considerations of the ESA must contemplate more than just the effectiveness of citizen petitions in identifying at-risk species if the ESA is going to withstand its opposition.<sup>232</sup>

## B. Is There Possible Reform on the Horizon?

The ESA is dysfunctional in its current state and desperately needs reform.<sup>233</sup> Considering the complicated facets of the FWS's current dilemma, however, adequate reform is a daunting task.<sup>234</sup> Accordingly, “[i]t is a key moment to strategize how to earn protection for as many species as possible, as efficiently as possible,” rather

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227. *Id.* at 527 (debating whether critical habitat designations benefit species). Environmental groups and their counterpart landowner and industry groups disagree on the value of critical habitat designation. *Id.* at 528. Environmental groups side with the courts by asserting critical habitat designations are crucial for effective conservation. *Id.* Landowners and industry groups, on the other hand, find ways to invalidate the FWS's habitat designations by arguing, for example, the FWS needs to make economic analyses of the designations. *Id.*

228. *Id.* at 528 (suggesting it is unclear whether critical habitat designations are effective species conservation tools).

229. For a review of Brosi and Biber's findings, see *supra* notes 184-216 and accompanying text.

230. For a discussion of why a flood of petitions might cripple the ESA, see *supra* notes 217-228 and accompanying text.

231. For a discussion of costs to landowners and industrial groups, see *supra* notes 114-146 and accompanying text.

232. For a discussion of possible ESA solutions, see *infra* notes 233-292 and accompanying text.

233. Rolhf, *supra* note 6, at 496 (articulating need for ESA reform). A recent poll suggests Americans are in favor of strengthening or maintaining the ESA, but opposed to weakening it. *Poll: Two-thirds of Americans Want Congress to Strengthen, Protect Endangered Species Act*, CENTER FOR BIOLOGICAL DIVERSITY (Mar. 4, 2013), [http://www.biologicaldiversity.org/news-/press\\_releases/2013/endangered-species-act-03-04-2013.html](http://www.biologicaldiversity.org/news-/press_releases/2013/endangered-species-act-03-04-2013.html). Furthermore, more than half of the United States believes the FWS has not done enough to protect species from extinction. *Id.*

234. Rolhf, *supra* note 6, at 496 (noting reform is difficult).



than waste time debating about budget caps that hinder the FWS's ability to protect species.<sup>235</sup> Despite what many consider to be a great need, reform seems unlikely in the near future.<sup>236</sup>

One solution to the FWS's dilemma is for the FWS to request a significant increase in its budget so it can comply with its responsibilities under the ESA.<sup>237</sup> The FWS's current approach of requesting budget caps to stop citizen petitions is illogical and harmful to the goals of the ESA because species protection requires sufficient funding to be successful.<sup>238</sup> Currently, the FWS lacks adequate funding in all of its programs and as a result cannot properly "list[ ] species on the brink of extinction, designat[e] critical habitat, and prepar[e] adequate recovery plans."<sup>239</sup> The FWS could ask for the requisite funding to execute these programs properly, rather than deliberately seeking less funding to avoid battling mega-petitions.<sup>240</sup>

Increased funding could benefit threatened and endangered species and satisfy environmentalists.<sup>241</sup> If the FWS had sufficient funding, it could clear its backlog of species warranted for listing but precluded from protection.<sup>242</sup> It could also pay for the expensive critical habitat designations it currently considers low priority.<sup>243</sup> If the FWS used this increased funding to list species and designate critical habitats according to ESA deadlines, the number of citizen petitions, settlements, and related litigation would likely

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235. Hansen, *supra* note 161 (discussing strategies for species conservation). Environmentalists, for example, suggest "more funding, broader application and stronger enforcement of the ESA" as solutions for enhanced species protection. Ike C. Sugg, *Caught in the Act: Evaluating the Endangered Species Act, Its Effects on Man and Prospects for Reform*, 24 CUMB. L. REV. 1, 69 (1993-1994).

236. See Sugg, *supra* note 235, at 69 (recommending ESA reform); Broderick, *supra* note 26, at 121 (stating legislative reform is unlikely).

237. See Hurley, *supra* note 151 (quoting attorney Brendan Cummings of CBD on budget increases); Robert L. Fischman, *supra* note 111, at 471-75 (describing money as solution to problems with citizen petition).

238. Daggett, *supra* note 31, at 111-12 (describing FWS's refusal to request needed resources). For a discussion of why FWS's budget caps are counterintuitive, see *supra* notes 147-171 and accompanying text.

239. Fischman, *supra* note 111, at 471-75 (explaining how FWS programs suffer from lack of funding).

240. *Id.* (describing money as solution to problems with citizen petition).

241. For a discussion of how increased funding would benefit listed species and satisfy environmentalists, see *infra* notes 242-244 and accompanying text.

242. See Daggett, *supra* note 31, at 111-12 (detailing FWS's backlog and refusal to demand more federal funds). According to a few scholars, as of 2009, the FWS needed \$160 million to clear its backlog. Baur, Bean & Irvin, *supra* note 157, at 10010-11.

243. For a discussion of why the FWS dislikes designating critical habitats, see *supra* notes 42-49 and accompanying text.

decrease because environmental groups would no longer need to monitor and enforce these provisions of the ESA.<sup>244</sup>

Increased funding would ultimately benefit the FWS because it would allow the FWS to exercise higher quality decision-making.<sup>245</sup> With more money, the FWS could increase staffing in order to address its requirements under the ESA effectively.<sup>246</sup> Further, adequate funding would give the FWS the resources needed to take thought-out, timely action, which would result in a greater unlikelihood that courts find the FWS's actions arbitrary and capricious in judicial review suits.<sup>247</sup>

Landowners and industry groups may initially oppose a budget increase that leads to increased FWS action because such an increase in listed species may contribute to conflicts with development, land use, and industry.<sup>248</sup> FWS-initiated action, however, may actually benefit these groups more than the status quo if it means that they will not be left out of the "secret settlement" negotiations that preference an environmentalist agenda.<sup>249</sup> With the current budget crisis and a history of underfunding, however, landowners and industry groups may not need to become alarmed about the potential increase in ESA listings.<sup>250</sup> This utopian proposal for increased funding has little chance of success; however, it is nevertheless an option to consider.<sup>251</sup>

Another set of options includes ESA reform by Congress.<sup>252</sup> First, Congress could change the listing criteria for species so that the ESA no longer requires a scientific basis for listing.<sup>253</sup> Cur-

244. See generally, Daggett, *supra* note 31 (explaining NGO's various roles). For a discussion of citizen-suits, see *supra* notes 79-113 and accompanying text.

245. See Gersen & O'Connell, *supra* note 49, at 963 (articulating problem when Agency rushes to complete action).

246. Baur, Bean & Irvin, *supra* note 157, at 10011 (discussing need for funding increase to staff agency appropriately).

247. See Gersen & O'Connell, *supra* note 49, at 963 (explaining how failure to meet deadlines results in finding of arbitrary and capricious).

248. For a discussion of landowner and industry groups' complaints with listing, see *supra* notes 114-146 and accompanying text.

249. See Vitter, *supra* note 106 (explaining how industry and other interest groups dislike being left out of FWS agenda setting).

250. Baur, Bean & Irvin, *supra* note 157, at 10010-11 (discussing likelihood of receiving budget increase).

251. For a discussion of current federal budget constraints, see *supra* notes 147-171 and accompanying text.

252. For a discussion of possible congressional reform, see *infra* notes 253-282 and accompanying text.

253. Rohlf, *supra* note 6, at 501-07 (suggesting Congress could remove listing decision's scientific evidence factor); see also *Best Available Science Mandate*, *supra* note 139, at 398 (asserting allowing thin scientific evidence is more efficient than increasing scientific standards). *But see* Baur, Bean & Irvin, *supra* note 157, at

rently, the ESA requires the FWS to consider factors for listing in light of the best scientific evidence available, but does not permit the FWS to consider any other factors, including policy judgments.<sup>254</sup> Certain listing decisions, such as determining “the threshold that marks whether a given species is secure or in peril of extinction,” cannot be made on pure science alone.<sup>255</sup> A better solution might be to permit an inquiry into both policy and science, which would more accurately reflect the Agency’s listing decision-making process and eliminate easy procedural challenges to the FWS’s scientific evidence.<sup>256</sup> A policy-based factor could also reduce disputes between competing interest groups and the FWS because the FWS could develop transparent policy that signals how varying interests are considered in agency decision-making.<sup>257</sup>

Second, Congress could amend Section Four of the ESA to require the FWS to make its critical habitat designation during the recovery planning process instead of at the time of listing.<sup>258</sup> Al-

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10007 (articulating reasons why FWS should adopt science-based approach to listing priority guidelines).

254. Rohlf, *supra* note 6, at 502 (explaining importance of policy concerns for listing species). Important policy considerations include, for example, whether species should be ranked to factor in whether the species is an indicator, keystone, or umbrella species. *Id.* at 507. When a species is an “indicator species,” its health provides evidence that other species in its habitat are also healthy and thriving. See Douglas H. Chadwick, *Yellowstone Grizzly Bears: Are They Still Endangered, or a Danger?*, HUFFINGTON POST (May 7, 2012, 11:57 AM), [http://www.huffingtonpost.com/2012/05/07/yellowstone\\_grizzly\\_bears\\_n\\_1478701.html?page=2](http://www.huffingtonpost.com/2012/05/07/yellowstone_grizzly_bears_n_1478701.html?page=2). When a species is a “keystone species,” the species “affect[s] prey populations directly through hunting, scavenge[s] large carcasses in between, and redistribute[s] tons of nutrients.” *Id.* An “umbrella species” guards its habitat to provide security for other wild animals and humans. See *id.*

255. Rohlf, *supra* note 6, at 502 (discussing how value judgments are necessary for species conservation).

256. *Why Better Science Isn’t Always Better Policy*, *supra* note 37, at 1138-39 (explaining how FWS could survive judicial review if policy were valid factor). According to Doremus, policy is a hidden factor in FWS decision-making, however, problems arise because the FWS’s decision must masquerade as being based in “science.” *Id.* at 1130-31. For example, “the ESA’s ‘strictly science’ mandate rests on the assumption that conservation policy decisions can be made objectively on the basis of existing or reasonably attainable scientific knowledge. Because that assumption is wrong, the mandate has been impossible to implement.” *Id.* at 1056. For a discussion of the FWS’s difficulty in meeting the arbitrary and capricious standard of review, see *supra* notes 114-146 and accompanying text.

257. *Why Better Science Isn’t Always Better Policy*, *supra* note 37, at 1153 (explaining how policy-based decision-making might resolve ESA conflict). The ESA’s science mandate has been the subject of considerable debate between different interest groups, in part because a science-based policy masks the FWS’s policy considerations, and these groups cannot readily see how their interests are taken into account. *Id.*

258. Rohlf, *supra* note 6, at 530 (proposing change in critical habitat designation deadlines).

though this amendment would give the FWS enough time and resources to designate the species' habitat adequately, similar amendments proposed in the past have failed in Congress.<sup>259</sup> Despite Congress' failure to pass an amendment in recent years, the idea to amend Section Four of the ESA to delay critical habitat designations until recovery planning is perhaps worth a second look.<sup>260</sup> A shift in the deadline would give scientists enough time to research listed species' critical habitats, which would in turn help the FWS to meet the best available scientific evidence standard needed to prevail in court.<sup>261</sup> As a result, the higher quality scientific data and increased likelihood of surviving hard look review could reduce the amount of suits brought by landowners and industry groups.<sup>262</sup>

Further, a change in critical habitat designation deadlines may encourage cooperation with various interest groups, which would substantially reduce the FWS's burden.<sup>263</sup> The FWS believes if critical habitat designation were discretionary at the time of listing, landowners would be less likely to oppose species preservation because the Agency would not designate critical habitat on the land-

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259. *Id.* (advocating for critical habitat designation reform). In 1999, Senator Lincoln Chafee of Rhode Island brought a bill that proposed changing the deadlines for critical habitat designations to the planning stage. Broderick, *supra* note 26, at 121-22; John H. Chafee, Amendments to the Critical Habitat Requirements of the Endangered Species Act of 1973, S. Rep. No. 106-126 (1999). Although the bill received bipartisan support, it did not pass in the Senate, presumably because "the political price for reforming the Act was simply too high, even though it was a sensible change." Broderick, *supra* note 26, at 122. Former Representative Richard Pombo of California articulated that a main reason why ESA reforms were impossible to pass was that representatives disagreed on how small property owners, often affected by the ESA, should be taken into consideration. Becky Oskin, *Endangered Species Act at 40: Rivals Find Common Ground*, LIVE SCI. (Feb. 14, 2013, 5:00 PM), <http://www.livescience.com/27155-endangered-species-act-rivals-meet.html>.

260. Ronny Millen & Christopher L. Burdett, *Critical Habitat in the Balance, Science, Economics, and Other Relevant Factors*, 7 MINN. J.L. SCI. & TECH. 227, 294-96 (2005) (explaining value of amending Section Four's critical habitat designation deadlines).

261. *Id.* (discussing benefits of shifting deadlines for critical habitat designations).

262. *See Why Better Science Isn't Always Better Policy*, *supra* note 37, at 1076-77 (discussing how agency's scientific evidence may be found arbitrary and capricious if not strong enough). For a discussion of best scientific evidence available standard and its use in court, see *supra* note 37 and notes 114-146 and accompanying text.

263. For a discussion of how landowner, industry, and environmental groups may respond to a change in critical habitat designation deadlines, see *infra* 264-266 and accompanying text.

owner's property without proper investigation.<sup>264</sup> The plan could also remove a legal foothold for citizen groups that use the FWS's failure to designate a critical habitat as a tool to overwhelm the FWS with litigation.<sup>265</sup> Although the prior failure of similar attempts to reform may suggest disapproval, such a proposal would likely garner support from the FWS, industry groups, and environmentalists because similar proposals have previously received strong bipartisan support.<sup>266</sup>

One barrier to this proposal is that it would require changes to recovery planning deadlines if it were to maintain similar habitat protections.<sup>267</sup> Under Section Four of the ESA, recovery plans do not have deadlines.<sup>268</sup> If Congress refrained from amending Section Four to accommodate for recovery planning deadlines, the process of acquiring a sufficient recovery plan could take years and, from an environmentalist perspective, untenably delay critical habitat designations.<sup>269</sup> Although the FWS would likely embrace any solution without critical habitat or recovery planning designation deadlines, the solution would receive strong opposition from environmentalists, particularly with respect to controversial listings.<sup>270</sup> Nevertheless, recovery planning deadlines would be prudent because without a set deadline, the FWS would have a better excuse to refuse to designate critical habitats.<sup>271</sup>

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264. See *Critical Habitat: Questions and Answers*, *supra* note 44, at 1 (explaining ways landowners can cooperate with FWS). The FWS articulates the problem with rushed designations:

Because both the statutory deadlines in the ESA and the court orders generally do not allow time to research [habitats], the [FWS] must often make decisions on incomplete information, or base decisions on where to designate critical habitat on inferences from the needs of similar species, or from the occurrences of types of vegetation often associated with a species, rather than actual knowledge of the needs of a species.

*Id.* at 2.

265. For a discussion on petitioners' tactics to bring the FWS to court, see *supra* notes 79-113 and accompanying text.

266. See Millen & Burdett, *supra* note 260, at 295 (suggesting plan would be well-received); Rohlf, *supra* note 6, at 530 n.182 (describing proposal's support).

267. Millen & Burdett, *supra* note 260, at 294-95 (explaining how recovery plan deadlines should be implemented).

268. 16 U.S.C. § 1533(f) (2012) (outlining recovery planning).

269. Kostyack & Rohlf, *supra* note 43, at 10208 (describing benefit of recovery plan deadlines).

270. For a discussion of the FWS's lack of motivation to designate critical habitats, see *supra* notes 43-49 and accompanying text. See Kostyack & Rohlf, *supra* note 43, at 10208 (explaining necessity for recovery plan deadlines).

271. For a discussion of the FWS's critical habitat designation track record, see *supra* notes 43-49 and accompanying text.

Third, Congress could also amend Section Eleven of the ESA to make citizen petitions and related settlements more transparent.<sup>272</sup> In February 2013, Republican Senator John Cornyn of Texas introduced the ESA Settlement Reform Act, a bill intending to reduce citizen-suit abuses of the ESA.<sup>273</sup> To give landowner and industry groups a voice in the settlement discussions, Senator Cornyn's bill proposed the inclusion of local interest groups in discussions between the FWS and environmentalists.<sup>274</sup> In a statement released after introducing the bill, Senator Cornyn stated, "ESA litigation abuse has shut out those folks most affected by the kind of closed-door settlements we've seen."<sup>275</sup> Senator Cornyn further noted that his "bill opens up the process to give job creators and local officials a say."<sup>276</sup>

If Senator Cornyn's bill is successful, those most likely to bring claims against the FWS for review of the Agency's listings and designations would have an opportunity to intervene in backroom settlements before agency action is taken.<sup>277</sup> The proposed change could open up dialogue between opposing parties and reduce litigation and subsequent costs.<sup>278</sup> The bill is unpopular with environmentalists, however, who believe the change will only delay listing and designations and increase litigation.<sup>279</sup> Thus, environmentalists would likely be unsatisfied with the loss of power and would opt to bring suits against the FWS rather than settle.<sup>280</sup> The increase in

272. See The Endangered Species Settlement Reform Act, S. 19, 113th Cong. (2013), available at <http://thomas.loc.gov/cgi-bin/query/z?c113:S.19>: (proposing amendment to Section Eleven of ESA).

273. *Id.* (describing Senator Cornyn's proposed bill); *Cornyn Introduces Bill to Prevent Abuse of Endangered Species Act Litigation*, JOHN CORNYN (Feb. 27, 2013), [http://www.cornyn.senate.gov/public/index.cfm?p=NewsReleases&ContentRecord\\_id=63eab662-4ab2-4611-86a7-9997f8ce4221](http://www.cornyn.senate.gov/public/index.cfm?p=NewsReleases&ContentRecord_id=63eab662-4ab2-4611-86a7-9997f8ce4221) [hereinafter *Cornyn Introduces Bill*] (discussing Senator Cornyn's proposal to curb backroom settlements).

274. Cole Shooter, *John Cornyn Introduces Endangered Species Act Settlement Reform Act*, KFYO (Feb. 27, 2013, 6:33 PM), <http://kfyo.com/john-cornyn-introduces-endangered-species-act-settlement-reform-act/> (discussing Senator Cornyn's bill).

275. *Cornyn Introduces Bill*, *supra* note 273 (quoting Senator Cornyn on settlement agreements).

276. *Id.* (quoting Senator Cornyn on his proposed bill).

277. See *Cornyn Favors Special Interests, Industry over Democracy, Protection of Species*, CENTER FOR BIOLOGICAL DIVERSITY (Feb. 27, 2013), [http://www.biologicaldiversity.org/news/-press\\_releases/2013/settlement-reform-act-02-27-2013.html](http://www.biologicaldiversity.org/news/-press_releases/2013/settlement-reform-act-02-27-2013.html) [hereinafter *Cornyn Favors Special Interests*] (discussing unfavorable power shift to industry if Senator Cornyn's bill accepted).

278. *Cornyn Introduces Bill*, *supra* note 273 (explaining Senator Cornyn's new bill).

279. *Cornyn Favors Special Interests*, *supra* note 277 (describing downside of Senator Cornyn's new bill).

280. See *id.* (inferring without settlement agreements, environmental organizations will sue FWS to get species listed).

lawsuits would further clog the courts and force the FWS to surrender to the environmentalist agenda.<sup>281</sup> While many find it unlikely that legislative reform will happen in the near future due to a lack of past ESA reform success, it remains to be seen whether Senator Cornyn's bill will garner enough support.<sup>282</sup>

Another possible solution would be to change how courts enforce agency deadlines.<sup>283</sup> Court enforced deadlines can be critical to the outcome of a particular litigation:

If courts do not give agencies greater leeway because of the deadline, then agencies will be more likely to lose arbitrary and capricious challenges. If agencies do not have sufficient time to adequately consider and evaluate relevant factors or evidence, all else equal, decisions are more likely to be overturned.<sup>284</sup>

In other words, if courts did not require the FWS to meet the strict deadlines of the ESA, the FWS would not lose as many suits to environmentalists and their counterpart landowner and industry groups.<sup>285</sup> If deadlines were less likely to be enforced, much of the tension coming from environmentalists and opponents of the ESA would cease; therefore, the FWS would be free to do its job rather than spend its time in court.<sup>286</sup>

If courts were to allow more flexible deadlines, however, they may create "greater uncertainty and instability in administrative law . . . because of exceptions to long-standing doctrine."<sup>287</sup> Consequently, greater uncertainty might lead to more litigation and ex-

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281. *Id.* (asserting FWS will have more lawsuits if Senator Cornyn's bill passes).

282. See Broderick, *supra* note 26, at 123 (explaining unlikelihood of reform).

283. See Gersen & O'Connell, *supra* note 49, at 973 (articulating role of courts in agency effectiveness).

284. *Id.* (explaining problem with arbitrary and capricious review for agency deadlines). Alden F. Abbott, Deputy Director of the United States Federal Trade Commission, argues, "[S]tatutory deadlines frequently impose three types of costs on society: (1) 'wasted resource costs' . . . (2) 'agency resource misallocation costs' . . . and (3) 'regulatory inefficiency costs.'" Alden F. Abbott, *Case Studies on the Costs of Federal Statutory and Judicial Deadlines*, 39 ADMIN. L. REV. 467, 467 (1987).

285. See Gersen & O'Connell, *supra* note 49, at 973 (explaining concern with arbitrary and capricious review for agency deadlines).

286. See *id.* (explaining relaxed court-imposed deadlines would grant Agency ability to win lawsuits). The FWS contends it cannot perform many other important ESA tasks when it must spend its time and resources litigating critical habitat designations. *Critical Habitat: Questions and Answers*, *supra* note 44, at 1.

287. Gersen & O'Connell, *supra* note 49, at 973 (posing problems with alternative to courts' strict imposition of deadlines).

pense if the FWS declines to voluntarily administer the ESA.<sup>288</sup> Courts would need to weigh “the costs to weakened coordination from deadlines . . . against the benefits to regulatory outputs that would not occur but for deadlines, or that would occur much more slowly.”<sup>289</sup> The question therefore is whether the FWS would be motivated to engage in listing species and designating critical habitats without congressional or judicial pressure to do so, or whether the deadlines are necessary to force the FWS to do its job.<sup>290</sup> If, as many contend, statutory deadline enforcement impairs the FWS, deadlines may be unproductive for the FWS and “may result in less effective regulatory policy.”<sup>291</sup> Ultimately, it is possible the FWS could do its job more efficiently if courts were less strict in enforcing statutory deadlines.<sup>292</sup>

#### V. THE FUTURE OF THE ESA: COULD SECRETARY JEWELL BE THE DOI’S DIAMOND IN THE ROUGH?

More than forty years after the ESA was enacted, many consider it ineffective because it fails to preserve the species it was meant to protect.<sup>293</sup> Despite obvious problems with the ESA and numerous proposals for change, it is improbable that the ESA will be reformed in the near future.<sup>294</sup> First, it is more likely that the FWS will see a stark decrease in its budget in the coming years, rather than the increase it so greatly needs.<sup>295</sup> Second, Congressional reform is doubtful, as previous attempts to reform the Act have been unsuccessful.<sup>296</sup> Even sensible solutions, such amend-

288. *See id.* (explaining potential negative effect of relaxing deadlines).

289. *Id.* at 977 (articulating normative arguments for and against deadlines).

290. *See id.* (discussing competing claims over value of enforcing or relaxing deadlines).

291. *Id.* (discussing normative argument for deadlines).

292. *See Gersen & O’Connell, supra* note 49, at 977 (weighing benefit and detriment of statutory deadlines for effective agency action).

293. *See Rolhf, supra* note 6, at 496 (discussing dysfunctional nature of ESA programs).

294. *See Sugg, supra* note 235, at 69 (arguing for ESA reform); *see also Broderick, supra* note 26, at 121 (stating legislative reform is unlikely).

295. For a discussion of financial proposals to ESA reform, *see supra* notes 237-251 and accompanying text.

296. Broderick, *supra* note 26, at 121 (explaining unlikelihood of reform). Since Senator Chafee’s bill in 1999, at least a dozen reform bills have been proposed, however none succeeded. *Id.* at 122. *See generally Assault on Wildlife: The Endangered Species Under Attack*, DEFENDERS OF WILDLIFE (Sept. 2011), [http://www.defenders.org/sites/default/files/publications/-assault\\_on\\_wildlife\\_the\\_endangered\\_species\\_act\\_under\\_attack.pdf](http://www.defenders.org/sites/default/files/publications/-assault_on_wildlife_the_endangered_species_act_under_attack.pdf) (describing recent ESA reform bills that undermine ESA). For examples of failed bills, *see* The Critical Habitat Reform Act, H.R. 2933, 108th Cong. (2004) (aiming to amend critical habitat designations to give Secretary unfettered discretion in designating critical habitats); The Critical



ments to Section Four of the ESA to allow critical habitat designations to be made at the time of recovery planning, have been turned down due to political policy concerns.<sup>297</sup>

Unfortunately, because of conflicts between environmentalists, politicians, landowners, and industry groups, the FWS finds itself in a bureaucratic snare that gives the Agency little room to protect species effectively.<sup>298</sup> As more resources are funneled toward litigation and settlements, wildlife and the environment suffer.<sup>299</sup> It is particularly disheartening that well-intentioned environmental groups actually create the FWS's dilemma.<sup>300</sup>

Furthermore, it is possible that with the FWS's requests for budget caps and the current budget crisis, species conservation may be facing even greater threats.<sup>301</sup> Although the ESA expired in 1993, it has continued to exist because of ongoing congressional funding.<sup>302</sup> A quick way to kill the Act would be for Congress to stop giving money to the FWS to protect endangered and threatened species.<sup>303</sup> This appears to be what the FWS is asking for when it continually requests that its budget be capped in order to justify its failure to perform its mandated duties.<sup>304</sup> Even without these requests, the United States government has been reducing funding to the FWS and is currently under substantial budget con-

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Habitat Enhancement Act of 2005, H.R. 1299, 109th Cong. (2005) (seeking to amend ESA critical habitat designations); Threatened and Endangered Species Recovery Act of 2005, H.R. 3824 109th Cong. (2005) (attempting to revise provisions of ESA, but rejected by senate because too controversial).

297. See Rohlf, *supra* note 6, at 530 (proposing change in critical habitat designation deadlines).

298. See Rohlf, *supra* note 6, at 496 (discussing problems between conflicting groups); see also Woody, *supra* note 91 (explaining how FWS is failing). Patrick Parenteau stated that the FWS "does seem to be reaching a political tipping point." *Id.* (quoting Parenteau). For a discussion of how disputes between conflicting groups place the FWS in predicament, see *supra* notes 172-179 and accompanying text.

299. See Fischman, *supra* note 111, at 472 (discussing how FWS diverts resources to citizen petitions that should go toward species protection).

300. For a discussion of citizen-instigated litigation, see *supra* notes 79-113 and accompanying text.

301. For a discussion of the FWS's requested budget caps, see *supra* notes 147-171 and accompanying text.

302. See Oskin, *supra* note 259 (noting Representative Pombo's comments on expired ESA).

303. See *id.* (describing Representatives Pombo and McCloskey's view on ESA stability).

304. For a discussion of the FWS's counterintuitive budget caps, see *supra* notes 147-171 and accompanying text.

straints.<sup>305</sup> Any additional decrease in funding would be detrimental to those species most in need of federal protection.<sup>306</sup>

Fortunately, a change in the DOI cabinet position may have an effect on the FWS's policies and practices.<sup>307</sup> In 2013, Secretary of the Interior Ken Salazar asked to step down from his cabinet position.<sup>308</sup> Replacing him is Sally Jewell.<sup>309</sup> While it is unclear how a change in a cabinet member will affect DOI policy, including its influence on the FWS and the ESA, Secretary Jewell's background suggests big changes.<sup>310</sup> At her nomination ceremony, President Obama said, Jewell "knows the link between conservation and good jobs. She knows that there's no contradiction between being good stewards of the land and our economic progress – that, in fact, those two things need to go hand in hand."<sup>311</sup>

Favored by environmental and business groups alike, Secretary Jewell's pragmatic, business background might help the DOI and the FWS resolve issues between business-minded landowner and industry groups and cause-oriented environmentalist organizations.<sup>312</sup> Her experience appears to have already reflected a shift in DOI policy that could bridge the gaps in ongoing ESA disputes.<sup>313</sup> For example, Secretary Jewell has committed to reaching out to state, landowner, and environmental groups to resolve the controversial sage grouse listing in a way that would satisfy all these groups' varying interests.<sup>314</sup> Secretary Jewell has also expressed her

305. See Oskin, *supra* note 259 (describing lack of ESA funding).

306. For a discussion of the costs of federal protection of listed species, see *supra* notes 157-161 and accompanying text.

307. See Matthew Daly, *Sally Jewell Picked to Be Interior Secretary by Obama*, HUFFINGTON POST (Feb. 6, 2013, 7:13 PM), [http://www.huffingtonpost.com/2013/02/06/sally-jewell-interior\\_n\\_2629550.html](http://www.huffingtonpost.com/2013/02/06/sally-jewell-interior_n_2629550.html) (discussing change in DOI Secretary).

308. *Id.* (discussing Ken Salazar's decision to step down). The Secretary cabinet position has often gone to western politicians such as Ken Salazar, who served as a Colorado Senator before taking the cabinet position. *Id.*

309. *Id.* (describing Secretary Jewell).

310. *Id.* (explaining Secretary Jewell's credentials). Secretary Jewell worked as president and CEO of REI, a large outdoor retailer, and therefore has both a respect for outdoors and business knowledge. *Id.* Prior to working at REI, Secretary Jewell worked in the banking industry and was an engineer at Mobil Oil Corp. *Id.*

311. *Id.* (quoting President Obama).

312. See Daly, *supra* note 307 (discussing Secretary Jewell's qualifications).

313. See *id.* (describing Secretary Jewell as nominee).

314. *First Session to Consider the Nomination of Sally Jewell to be the Secretary of the Interior: Hearing Before the Committee on Energy and Natural Resources United States Senate*, 113th Cong. (2013) [hereinafter *Jewell First Session*] (noting her commitment to considering various interest groups' concerns when listing wildlife). The Gunnison Sage Grouse listing was a major topic during Secretary Jewell's confirmation hearing. See *id.* The proposed listing is highly controversial in several western

commitment to agency transparency, and she intends to incorporate this value into the DOI's "sue and settle" case resolutions.<sup>315</sup>

Although we must acknowledge the harsh reality that we may never be able to protect every species from extinction, it is imperative that we keep the ESA itself from going extinct.<sup>316</sup> Species conservation affects not only the species in need of federal protection, but human life as well.<sup>317</sup> Species' health is an indicator of risks to both human and environmental health.<sup>318</sup> Furthermore, biodiversity plays a crucial role in science and medical advancements.<sup>319</sup> For example, the rosy periwinkle, once nearly extinct, is now used in the cure for Hodgkin's disease.<sup>320</sup> The Yew, once valued only as firewood, is now used to treat ovarian and breast cancer.<sup>321</sup> Preserving our plant and animal life is of the utmost importance because it may lead to the next big cure.<sup>322</sup> As the fortieth anniversary of the ESA has concluded, Congress should consider options for increas-

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states because of the economic impact the listing and critical habitat designation will have on various interest groups. Amy Joi O'Donoghue, *Service: Gunnison Sage Grouse Listing, Protection Will Cost Millions to Utah, Colorado*, DESERET NEWS (Sept. 18, 2013, 7:11 PM), <http://www.deseretnews.com/article/865586666/Service-Gunnison-sage-grouse-listing-protection-will-cost-millions-to-Utah-Colorado.html?pg=all>. One economic analysis indicates federal protection will cost twelve million dollars for Utah and Colorado during the next twenty years. *Id.*

315. *Jewell First Session*, *supra* note 314 (expressing Secretary Jewell's commitment to transparency). In her testimony, Jewell stated, "At REI, I ran a business rooted in transparency and integrity. If confirmed as Secretary of the Interior, I pledge to abide by those same principles." *Id.*

316. *See* Rohlf, *supra* note 6, at 494 (discussing how lack of resources affects FWS's ability to protect species). According to Rohlf, "The entirety of the threatened and endangered lists still does not add up to the number of plants in the original Smithsonian tally, and perhaps thousands of additional species today face a very uncertain future with no federal legal protections." *Id.*

317. Sarah Matsumoto, Cara Pike, Tom Turner & Ray Wan, *Citizens' Guide to the Endangered Species Act*, EARTHJUSTICE, 8 (2003), available at [http://earthjustice.org/sites/default/files/-library/reports/Citizens\\_Guide\\_ESA.pdf](http://earthjustice.org/sites/default/files/-library/reports/Citizens_Guide_ESA.pdf) [hereinafter *Citizens' Guide*] (discussing species' value to humans).

318. *Id.* (explaining how species can warn humans of risks to human health). According to Robert L. Fischman, "Not only are endangered species indicators of broader ecological problems, but ESA recovery solutions will likely repair damage to the health of land, water, and (to a lesser extent) air." Fischman, *supra* note 111, at 475.

319. *Citizens' Guide*, *supra* note 317 (articulating how species are crucial for medical and scientific advances).

320. *Id.* (explaining how rosy periwinkle helped medical and scientific advances).

321. *Id.* (noting how yew helped medical and scientific advances).

322. *Id.* (explaining how species are crucial for medical and scientific advances).

ing the ESA's efficiency if it wants the Act to be successful in the next forty years.<sup>323</sup>

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323. See *Richard Nixon*, *supra* note 3 (explaining value of ESA).

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