

**Statement of Robert L. Glicksman
to the House Oversight and Government Reform Committee’s Subcommittee on Interior**

Hearing on “Barriers to Endangered Species Act Delisting, Part I”

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Room 2154 Rayburn Office Building

Chairman Lummis, Ranking Member Lawrence, and members of the subcommittee, I appreciate the opportunity to testify today on the implementation and impact of the Endangered Species Act (ESA).

My name is Robert Glicksman. I am the J.B. & Maurice C. Shapiro Professor of Environmental Law at The George Washington University Law School. I am also a member scholar of the Center for Progressive Reform (CPR), although I am here today strictly in my personal capacity. I have taught and written about environmental, natural resources, and administrative law for 35 years, and am a co-author of the leading treatise on public natural resources law.

I make four main points. First, the Endangered Species Act (ESA) has achieved considerable success in achieving its conservation goals. Second, budgetary constraints have prevented the two agencies that oversee implementation of the statute, the Interior Department’s Fish and Wildlife Service (FWS) and the Commerce Department’s National Marine Fisheries Service (NMFS), from compiling an even better track record.¹ Third, citizen participation in ESA implementation has played an important role in promoting the statute’s goals. Fourth, Congress in 1973 had good reasons for allocating to the federal government the primary responsibility for implementing the ESA (although it also sought to solicit state participation, accommodate state wildlife and water resource policies, and encourage federal-state partnerships), and those reasons remain just as valid today as they were then.

The Impact of the Endangered Species Act

A common criticism of the ESA is that the small number of species delisted by the FWS since the statute’s adoption is a mark of its failure to achieve Congress’s goal of conserving endangered and threatened species.² But the number or percentage of listed species that have been delisted is a simplistic and potentially misleading indicator of the ESA’s success (or lack thereof).³ About ten years ago, the U.S. Government Accountability Office (GAO) issued a pair of reports assessing the reasons why listed species do or do not recover to the point that justifies delisting them. The GAO acknowledged in one of the reports that “one of the most important measures of [the ESA’s] success is the number of species that have ‘recovered,’ or improved to the point that they no longer need the act’s protection.”⁴ It added, however, that determining the extent to which the Act’s provisions have achieved success is a tricky business: “Supporters of the act claim it is an indication of success that

¹ For convenience sake, references in this statement to the FWS are often meant to include both agencies.

² 16 U.S.C. § 1531(c)(1) (2006).

³ The Congressional Research Service reported in 2014 that “[i]n the 40 years since ESA was enacted, 58 U.S. and foreign species or distinct population segments thereof have been delisted.” Congressional Research Serv., *The Endangered Species Act (ESA) in the 113th Congress: New and Recurring Issues* 6 (Jan. 13, 2014). Among these are the American alligator, bald eagle, brown pelican (in two areas), peregrine falcon (two subspecies), gray wolf (in four areas), and gray whale (except the Western Pacific Ocean). *Id.* As of April 17, 2016, the FWS listed 63 species as having been delisted. U.S. Fish and Wildlife Serv., Environmental Conservation Online System, http://ecos.fws.gov/tess_public/reports/delisting-report

⁴ U.S. Government Accountability Office, *Many Factors Affect the Length of Time to Recover Select Species*, GAO-06-730, at 1 (2006).

only nine species protected by the act have become extinct. Critics, on the other hand, claim it is an indication of failure that [at that time] only 17 species protected by the act have recovered.”⁵ The GAO itself took the position that the number of delistings that have occurred is “not a good gauge of the act’s success or failure; additional information on when, if at all, a species can be expected to fully recover and be removed from the list would provide needed context for a fair evaluation of the act’s performance. Similarly, estimates of the total costs to recover the species would be necessary to evaluate whether sufficient resources have been devoted to recovery efforts.”⁶

For what it is worth, as of 2014, three times as many species had been delisted as declared extinct since the ESA’s adoption.⁷ Further, by one account, more than 260 species would have disappeared in the U.S. during the ESA’s first 30 years if they had not been listed and protected under the ESA.⁸ In addition, as of 2014, about three dozen species had been downlisted from endangered to threatened.⁹ The condition of other species has improved, though not enough yet to justify delisting them.¹⁰ Still another approach to measuring the impact of the ESA is to assess the proportion of the recovery objectives identified in species recovery plans that have been achieved. The FWS has provided information that is more nuanced than a calculation of the number of delisted species by describing the status of listed species, which covers a spectrum that includes presumed extinct, declining, uncertain, stable, improving, or recovered and delisted.¹¹ One study has found that 90 percent of species are recovering at the rate specified by their federal recovery plans.¹²

For these reasons, the FWS has rejected delisting as the most accurate benchmark for the ESA’s success. It has argued that:

the success of the Service and the Endangered Species Act (ESA) cannot be measured in delisting alone. Instead, the Service’s effectiveness in its implementation of the ESA should be measured in the number of species that have been saved from extinction since their listing, the

⁵ *Id.* at 2. See also Endangered Species Act, Congressional Working Group, Report, Findings and Recommendations 6 (Feb. 4, 2014), https://drive.google.com/a/law.gwu.edu/folderview?id=0BzLuyVNx7KOIcGxSTUE3YjlnQlk&usp=sharing_eid&ts=5712c7fd&tid=0BzLuyVNx7KOId3dlY3RMZU1FZXM.

⁶ U.S. Government Accountability Office, *Endangered Species: Time and Costs Required to Recover Species Are Largely Unknown*, GAO-06-463R, at 1 (2006). See also *id.* at 5 (“The success of the Endangered Species Act is difficult to measure because some of the recovery plans we reviewed indicated that species were not likely to be recovered for up to 50 years. Therefore, simply counting the number of extinct and recovered species periodically or over time, without considering the recovery prospects of listed species, provides limited insight into the overall success of the services’ recovery programs.”).

⁷ Congressional Research Serv., *supra* note 2, at 6.

⁸ Alisha Falberg, *The Pricelessness of Biodiversity: Using the Endangered Species Act to Help Combat Extinction and Climate Change*, 33 UCLA J. L. & PUB. POL’Y 135, 154 (2015).

⁹ *Id.*

¹⁰ *Id.* at 6-7. See also Daniel B. Evans et al., *Species Recovery in the United States: Increasing the Effectiveness of the Endangered Species Act*, 20 ISSUES IN ECOLOGY 1, 1 (Winter 2016) (“The [ESA] has succeeded in shielding hundreds of species from extinction and improving species recovery over time.”).

¹¹ See, e.g., U.S. Fish and Wildlife Serv., *Report to Congress on the Recovery of Threatened and Endangered Species, Fiscal Years 2009-2010*, at 10-47. By one recent account, 43% of endangered species on the list are considered stable or improving, 30% are considered in decline, 24% are considered in unknown status, while only 1% is believed extinct. Nicholas Primo, *Federal v. State Effectiveness: An Analysis of the Endangered Species Act and Current Attempts at Reform*, 7 PEPPERDINE POL’Y REV., Article 5, at 4 (2014), <http://digitalcommons.pepperdine.edu/ppr/vol7/iss1/5/>.

¹² Daniel J. Rohlf, *The Endangered Species Act at Forty: The Good, the Bad, and the Ugly*, 20 ANIMAL L. 251, 273 (2014) (citing Kieran Suckling et al., Ctr. for Biological Diversity, *On Time, On Target: How the Endangered Species Act Is Saving America’s Wildlife* (May 2012), http://www.esasuccess.org/pdfs/110_REPORT.pdf [http://perma.cc/5VQW-M9F4]).

number of populations that have been stabilized since a species' listing, and the number of populations that have increased since a species' listing even if the species has not been delisted.¹³

Moreover, recovery is not necessarily quick, linear, or uniform across listed species. Based on a review of 31 species listed at the time, the GAO concluded about ten years ago that:

Many factors affect the length of time it will take to recover the 31 species we reviewed, and some may not be recovered at all. These factors range from the successful removal of the primary threat faced by a species, to difficulty protecting a species' habitat or difficulty understanding what threats a species is facing. The length of time it has taken, or is expected to take, to recover these species, ranges from less than a decade to possibly more than a century.¹⁴

For example, FWS biologists told the GAO that 12 of the 31 species the GAO studied could spend more than 50 years on the endangered species list, and some might never recover. The agency's biologists predicted that some species would not recover for many decades, not because the ESA is an ineffective vehicle for promoting recovery, but because those particular species are slow to respond to recovery efforts.¹⁵ Some species, such as the northern right whale and the whooping crane, have a very low population and reproduce slowly or depend on habitat that takes a long time to develop. Others, such as the Indiana bat, face continuing threats that have not yet been abated. The recovery prospects of still other species were slowed because the FWS was having difficulty securing needed habitat, or because the agency lacked critical information about the threats facing the species or how to mitigate them. It is useful to recall that the ESA's listing provisions only kick in when a species, at best, is likely to be in danger of extinction within the foreseeable future. With this "emergency room" focus, it is not surprising that species recovery that justifies delisting can be a lengthy process.¹⁶ Weakening protections for listed species and their habitat would be the worst possible way to increase the pace of species recovery, just as kicking a sick person out of the hospital before she's completely well is the worst way to heal someone.

Ultimately, the GAO concluded that:

For all but one of the species we reviewed, recovery plans played an important role in recovery efforts by identifying many of the actions that the services' biologists deem most important to the recovery of the species. Although not all of these species are nearing recovery, the

¹³ U.S. Fish and Wildlife Serv., *Report to Congress on the Recovery of Threatened and Endangered Species, Fiscal Years 2009-2010*, at i.

¹⁴ U.S. Government Accountability Office, *Many Factors Affect the Length of Time to Recover Select Species*, GAO-06-730, at 3 (2006).

¹⁵ See U.S. Fish and Wildlife Serv., *Report to Congress on the Recovery of Threatened and Endangered Species, Fiscal Years 2009-2010*, at i:

[R]ecovery cannot be fully measured by delistings and reclassifications from endangered to threatened (downlistings) alone. Most species' declines occur over decades and centuries prior to their listing, thus it may take many years and generations of a species before that species may be delisted or downlisted. Upon their listing, most species are so critically imperiled that the Service must first focus on population stabilization efforts in order to impede the species' rapid progression towards disastrously low population levels.

¹⁶ U.S. Government Accountability Office, *Many Factors Affect the Length of Time to Recover Select Species*, GAO-06-730, at 3-4 (2006).

services' biologists report that the success that these species have had can be attributed, at least in part, to actions in the species' recovery plans.¹⁷

In particular, the GAO found that of the 31 species it studied, implementation of ESA recovery plans was the primary driver in recovery that had already occurred or was expected to occur.¹⁸

Resource Constraints

To the extent that the ESA is not operating in the way Congress intended, or is not promoting the degree of species conservation it is capable of achieving, resource constraints are surely a factor. For more than 20 years, Congress has funded the ESA through annual appropriations at levels inadequate to enable the FWS to comply with its statutory duties on a timely basis. As one researcher succinctly put it, the “[a]gencies responsible for recovery of listed species are faced with an increasing workload and decreasing resources.”¹⁹ Others have estimated that over the past 15 years, total spending in protecting listed species has covered only about a third of their recovery needs.²⁰ A study by the Center for Biodiversity Outcomes and School of Life Sciences at Arizona State University published last month in the *Proceedings of the National Academy of Sciences* found “a strong correlation between recovery funding and [species] status. In particular, funding influences the relative frequency of success (i.e., increasing population) and failure (i.e., decreasing population) for listed species.”²¹ The study's author found that only about 12 percent of listed species are receiving as much or greater funding than prescribed in their recovery plans, but that recovery goals are 2.5 times more likely to be met for those species than for those inadequately funded. Conversely, “among species in a state of injurious neglect, more than 100 species are receiving less than 10% of the investment needed as defined by their recovery plans.”²²

Further, federal expenditures are concentrated on a small number of listed species. Between 1998 and 2012, for example, “80 percent of all government spending went to support 5 percent of all listed species, whereas 80 percent of all listed species shared less than 5 percent of all funds.”²³ Part of the reason for this distribution has been congressional earmarks that “limit the Services' abilities to distribute funds more equitably.”²⁴ In addition, discretionary allocation of funds by the FWS are not always driven by the comparative biological needs of listed species, but may be influenced by factors such as congressional representation, staff workload, and opportunities to secure matching funds.²⁵ The FWS seems especially resource poor compared to the NMFS. Even though the FWS manages more than 15 times as many listed species as the NMFS does, the 2012 FWS budget for endangered

¹⁷ *Id.* at 4.

¹⁸ *Id.* at 19-20.

¹⁹ Leah R. Gerber, *Conservation triage or injurious neglect in endangered species recovery*, 113 PROCEEDINGS OF THE NAT'L ACAD. SCI. 3563, 3565 (Mar. 29, 2016).

²⁰ Evans, *supra* note 10, at 10.

²¹ Gerber, *supra* note 19, at 3564.

²² *Id.*

²³ *Id.* For figures on how much money was spent on each listed species in fiscal year 2014, see U.S. Fish and Wildlife Service, *Federal and State Endangered and Threatened Species Expenditures: Fiscal Year 2014*, https://drive.google.com/a/law.gwu.edu/folderview?id=0BzLuyVNx7KOIYUVBT3IPQThaSk0&usp=sharing_eid&ts=5712c7fd&tid=0BzLuyVNx7KOId3dLY3RMZU1FZXM.

SPECIES EXPENDITURES

²⁴ Evans, *supra* note 10, at 10.

²⁵ *Id.* at 11.

species management was \$161 million, while the NMFS budget for ESA and related Marine Mammal Protection Act implementation during that same time was \$174 million.²⁶

One result of the agency's limited funding has been that recovery plans have not always included measures biologists deemed important to species recovery. Worse yet, resource constraints have contributed to the FWS's failure to even develop recovery plans for some listed species.²⁷ By necessity, the FWS has sought to prioritize its efforts to promote the recovery of listed species based on factors such as (1) the degree of threat confronting the species, (2) recovery potential (the likelihood for successfully recovering the species), and (3) taxonomy (genetic distinctiveness). Nevertheless, the agency has spent no money at all promoting recovery of some listed species for significant periods of time.²⁸ The GAO summarized the agency's plight as follows:

The Service faces a very difficult task—recovering more than 1,200 endangered and threatened species to the point that they no longer need the protection of the Endangered Species Act. Many of these species face grave threats and have been imperiled for years. There are few easy solutions. Like many other federal agencies, the Service has limited funds with which to address these challenges.²⁹

Congress should redress the chronic underfunding of the ESA, as FWS Director Dan Ashe has called on it to do. He has also recommended increasing financial incentives for species conservation by private landowners.

Instead of continuing or increasing programs that assist states and private parties in conserving listed species, Congress is cutting or ending these effective programs. For example, Congress has balked at reauthorizing the Land and Water Conservation Fund despite overwhelming support from the states. Money from the Fund helps states and federal agencies protect habitat for listed species. The House also voted to cut funds for the Conservation Stewardship Program, which among other things helps farmers protect biodiversity on their land.

The Role of Citizen Petitions and Listing Suits

Some observers trace the resource quandary facing the FWS to the activities of citizen groups who have sought to compel the agency to list additional species or designate critical habitat for species for which such habitat has not been identified. Aside from the usual ability of interested persons to provide input through the notice and comment rulemaking process, the ESA contains two principal mechanisms for participation by individuals and groups in its implementation. First, § 4(b) of the ESA requires the FWS, in accordance with a specified schedule, to respond to petitions by interested persons to add a species to or remove a species from the list of endangered or threatened species or to revise a critical habitat designation.³⁰ Second, like many of the federal environmental statutes, the ESA includes a citizen suit provision. These provisions typically authorize two kinds of actions: suits

²⁶ Natalie Lowell & Ryan P. Kelly, *Evaluating agency use of "best available science" under the United States Endangered Species Act*, 196 BIOLOGICAL CONSERVATION 53, 58 (2016).

²⁷ See U.S. Government Accountability Office, *Endangered Species Act: Many GAO Recommendations Have Been Implemented, but Some Issues Remain Unresolved*, GAO-09-225R, at 5 (2008) (listing figures for number of listed species and approved recovery plans).

²⁸ See U.S. Government Accountability Office, *Fish and Wildlife Service Generally Focuses Recovery Funding on High-Priority Species, but Needs to Periodically Assess Its Funding Decisions*, GAO-05-211, at 13 (2005).

²⁹ *Id.* at 30.

³⁰ 16 U.S.C. § 1533(b)(3)(A) (2006).

against regulated entities alleged to be in violation of statutory or regulatory provisions, and suits against the agencies responsible for administering the statutes for failure to perform nondiscretionary duties – i.e., those that Congress compelled the agency to take but which the agency has failed to take.

Congress has consistently recognized the vital role that citizens can play in helping to assist in the enforcement of laws that range from civil rights, voting rights, consumer protection, and environmental statutes, among others. Citizen suit provisions and other avenues for judicial review of agency decisions are critically important tools for ensuring that individuals and groups from across the political spectrum and with a wide range of interests can solicit the aid of the federal courts in promoting the accountability of administrative agencies and prevent them from straying from the constraints Congress placed on them when it delegated authority to them to administer these laws. In the context of the ESA, both those contending that agencies have been too aggressive and those arguing they have not been aggressive enough in species protection efforts – those who want less government intervention and those who want more – have consistently taken advantage of these avenues of access to the courts. The founding fathers understood the need for an independent judiciary to hold other branches of government accountable.

The ESA’s citizen suit provision authorizes both suits to enforce the ESA’s provisions and suits to compel the FWS to perform nondiscretionary duties (what I have referred to as agency-forcing suits).³¹ Under the ESA, a citizen suit against the FWS to compel the performance of nondiscretionary duties covers alleged violations of § 4 of the statute, which governs decisions concerning species listings and critical habitat designations.³² Like other environmental citizen suit provisions, the ESA’s provision allowing suits to compel performance of nondiscretionary duties is conditional. Litigants must provide the FWS with 60 days prior notice,³³ which provides a window of opportunity for the agency to settle with the prospective plaintiff before suit is even commenced.³⁴

Senator Edmund Muskie, the principal drafter of the Clean Air and Water Acts, justified legislation authorizing agency-forcing suits prior to the adoption of the Clean Air Act in 1970:

The concept of compelling bureaucratic agencies to carry out their duties is integral to democratic society. . . . The concept in this bill is that administrative failure should not frustrate public policy and that citizens should have the right to seek enforcement where administrative agencies fail.³⁵

Agency-forcing suits can enhance agency accountability, increase opportunities for citizen participation in the policymaking process, and induce agencies to overcome political obstacles to following legislative instructions.³⁶ Although agency-forcing suits may take a toll on agency autonomy, and interfere with agency agenda-setting and priorities, these factors should take a back-seat when litigants ask courts to compel agency compliance with nondiscretionary duties that Congress

³¹ Robert L. Glicksman, *The Value of Agency-Forcing Suits to Enforce Nondiscretionary Duties*, 10 WIDENER L. REV. 353 (2004).

³² 16 U.S.C. § 1540(g)(1)(C) (2006).

³³ 16 U.S.C. § 1540(g)(2)(C) (2006).

³⁴ Kirsten Nathanson, Thomas R. Lundquist & Sarah Bordelon, *Developments in ESA Citizen Suits and Citizen Enforcement of Wildlife Laws*, 29-WINT. NAT. RESOURCES & ENV’T 15, 16-17 (2015).

³⁵ 1 COMM. ON PUB WORKS, A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 351 (1970) (remarks of Se. Muskie).

³⁶ Glicksman, *Agency-Forcing*, *supra* note 31, at 383.

has seen fit to impose on the agency, thereby divesting the agency of autonomy with respect to performance of that duty.

The ESA's citizen suit provision rests on these same foundations. The rationale for allowing citizens to sue the agency for failing to comply with nondiscretionary statutory duties relating to species listings was to address Congress's concern that "political pressure might discourage the agencies from listing species that warranted protection."³⁷ Further, there is evidence that citizen suits and listing petitions are serving their intended functions. Professor Holly Doremus has concluded that citizen suits "have played an important role in almost every phase of ESA implementation, including obtaining the protections of the ESA for noncharismatic species."³⁸

There is no doubt that the FWS faces a backlog in responding to petitions for listing-related actions. But, according to one account, "[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,"³⁹ which has been in effect since 1998. These efforts to bolster the FWS's ability to defend its delayed action in the face of citizen petitions appear counter-intuitive in that they respond to resource shortages by seeking to reduce agency funds still further.⁴⁰ The agency's task has only become more onerous as increasing numbers of species merit the ESA's protections. According to ESA expert Dan Rohlf, "[i]n an age of accelerating threats to biodiversity," which include from habitat loss from climate change and the proliferation of invasive species, the budgets for Fish and Wildlife Service have not even been close to keeping up with the demands on the agency."⁴¹

The diversion of FWS resources from species and actions on which the agency prefers to focus to matters that are the subject of citizen petitions and citizen suits might be troublesome if the result has been to shift protection and recovery efforts from species with more urgent needs to those with less. But this does not seem to be the case. A recent empirical analysis of ESA-listed species compares FWS-initiated species with species whose listing processes were initiated by citizen petition or agency-forcing litigation.⁴² The study's authors concluded that "citizen-initiated species (petitioned and/or litigated) face higher levels of biological threat, and that "[l]itigated species are more threatened than nonlitigated."⁴³ In addition, they found that citizen-initiated species are more likely to be in conflict with development, and that species in conflict with development face greater biological threat levels than species not in conflict with development.⁴⁴ These findings led them to conclude that "[c]itizen groups play a valuable role in identifying at-risk species for listing under the ESA. . . . Our findings thus do not support calls for reducing or eliminating citizen involvement in the ESA."⁴⁵ They added:

³⁷ Candee Wilde, *Evaluating the Endangered Species Act: Trends in Mega-Petitions, Judicial Review, and Budget Constraints Reveal a Costly Dilemma for Species Conservation*, 25 VILLANOVA ENVTL. L.J. 307, 315 (2014).

³⁸ Holly Doremus, *Adaptive Management, the Endangered Species Act, and the Institutional Challenges of "New Age" Environmental Protection*, 41 WASHBURN L.J. 50, 58 (2001).

³⁹ Wilde, *supra* note 37, at 329. See also Eric Biber, *A Risky FWS Proposal to Limit ESA Petitions* (Apr. 4, 2011), <http://legal-planet.org/2011/04/04/a-risky-fws-proposal-to-limit-esa-petitions/> ("One reason FWS has so many deserving species waiting for listing is that for years Congress (at FWS's request) has placed a cap on the amount of money that can be spent on finalizing listing decisions.").

⁴⁰ Wilde, *supra* note 37, at 330.

⁴¹ Todd Woody, *Wildlife at Risk Face Long Line at U.S. Agency*, N.Y. TIMES, Apr. 20, 2011 (quoting Rohlf).

⁴² Berry J. Brosi & Eric G.N. Biber, *Citizen Involvement in the U.S. Endangered Species Act*, 337 SCI. 802 (Aug. 17, 2012).

⁴³ *Id.* at 802.

⁴⁴ *Id.*

⁴⁵ *Id.* at 803.

Contrary to criticisms of citizen involvement in the ESA, petitions and litigation are potentially very important in selecting species worthy of protection. In many cases, outside groups could serve as the only impetus for protection of biologically threatened taxa that would otherwise be ignored because they conflict with development projects and related political pressures or because they are low-profile subspecies.⁴⁶

The study stated that limited FWS budget and staff make it unlikely that the agency “will ever contain enough expertise to identify all species most worthy of protection”⁴⁷

One logical solution to both the resource constraints facing the FWS and the backlog of listing (and delisting)-related actions it faces would be to provide the agency with more, not less funding. As one observer explained:

Increased funding would ultimately benefit the FWS because it would allow the FWS to exercise higher quality decision-making. With more money, the FWS could increase staffing in order to address its requirements under the ESA effectively. 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.⁴⁸

It is important to note that after a settlement with environmental groups who had agency-forcing actions to list additional species, the FWS is good progress in clearing its backlog of more than 250 species that FWS had said deserve protection of the ESA, but for which the agency had said it lacked the resources to go through the process to actually list them. For several of these species, including the sage grouse, the FWS eventually found that it no longer needed to list them after the agency, in consultation with states and private landowners, helped devise cooperative conservation strategies that avoided the need for listing.

Recovery of Attorney’s Fees

Under the so-called American Rule, the losing party in litigation is responsible for paying its own attorney’s fees.⁴⁹ But Congress has created exceptions to that rule. In the Equal Access to Justice Act (EAJA) and in the judicial review provisions of many of the federal environmental statutes, Congress has authorized recovery of reasonable, market-based fees by prevailing parties. The ESA includes such a provision, which applies to citizen suits seeking to compel compliance with the FWS’s listing duties, and which allows courts to require the government to reimburse successful citizen suit plaintiffs for reasonable attorney’s fees.⁵⁰ These provisions are designed to facilitate individuals and groups to participate in statutory implementation and enforcement by acting as “private attorney generals.”⁵¹ The Supreme Court recognized decades ago that a citizen bringing an enforcement action “does so not

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Wilde, *supra* note 37, at 339.

⁴⁹ *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240 (1975).

⁵⁰ 16 U.S.C. § 1540(g)(4) (2006) (authorizing fee awards “whenever the court determines such award is appropriate”). The Supreme Court has interpreted similar language in other environmental statutes to restrict fee awards to prevailing parties. *See Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983).

⁵¹ *See S. REP. NO. 92-414*, at 79080 (1971).

for himself alone but also as a ‘private attorney general,’ vindicating a policy that Congress considered of the highest priority.”⁵²

Congress enacted citizen suit provisions like the one in the ESA to help hold agencies accountable.⁵³ The fee-shifting provisions of the ESA and similar legislation are designed to enable ordinary citizens to take steps to ensure that agencies comply with statutory directives and implement the laws as Congress intended. Efforts to cap or otherwise restrict the recovery of market-based fees by litigants who succeed in demonstrating that the government has violated the law will only make it more difficult for citizens to hold agencies accountable in this manner. As the Supreme Court has noted, if a citizen lacks the resources to pursue an action to assure compliance with the law, “his day in court is denied him [and] the congressional policy which he seeks to assert and vindicate goes unvindicated.”⁵⁴ Further, as FWS Director Ashe has pointed out, the amount of money the government pays out in attorney’s fees in ESA litigation is only a small fraction of the millions it spends each year implementing the statute.⁵⁵ He has characterized the operation of the citizen suit and attorney’s fee provisions as a strength, not a weakness, of the ESA.⁵⁶

Suits for civil rights violations and denial of veterans and social security benefits result in the vast majority of fee awards against government agencies. Broad-reaching efforts to eliminate or reduce these fee-shifting provisions would therefore penalize veterans and individuals who have been treated unjustly by federal agencies. Landowners and industry groups who successfully challenge agency decisions under the ESA are also entitled to fee awards, so that fee recovery is not limited to environmental public interest groups seeking additional listings. More targeted efforts directed at environmental public interest groups would be difficult to justify on equity grounds.

Judicial Review of Agency Science

The ESA requires the FWS to make its listing and delisting decisions on the basis of “the best scientific and commercial data available.”⁵⁷ Courts have construed the “best data available” language as not obligating the FWS to conduct studies to obtain missing data, but it cannot ignore relevant available biological information.⁵⁸ Judicial review of agency scientific determinations under the ESA tends to be deferential. This approach is consistent with how courts in a variety of contexts have reviewed agency scientific determinations under a host of environmental laws. They have afforded considerable deference to such determinations – what some observers have referred to as “super deference”⁵⁹ – in applying the Administrative Procedure Act’s arbitrary and capricious standard of

⁵² *Newman v. Piggie Bank Enter., Inc.*, 390 U.S. 400, 402 (1968).

⁵³ See Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 L. & CONTEMP. PROBS. 235 (1984).

⁵⁴ *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986).

⁵⁵ A Government Accountability Office Report issued last year found that FWS data show that the agency paid about \$1.6 million in attorney’s fees in the 26 cases from fiscal years 2004 through 2010. U.S. Gov’t Accountability Office, *Information on Cases against EPA and FWS and on Deadline Suits on EPA Rulemaking*, GAO-15-803T, at 13 (2015).

⁵⁶ Laura Peterson, *Lawsuits Not Hurting Endangered Species Act – FWS Director*, GREENWIRE, July 5, 2012.

⁵⁷ 16 U.S.C. § 1533(b)(1)(A) (2006).

⁵⁸ *Friends of Blackwater v. Salazar*, 691 F.3d 428, 434 (D.C. Cir. 2012); Congressional Research Serv., *supra* note 6, at 8-9.

⁵⁹ See, e.g., Emily Hammond, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science* 109 MICH. L. REV. 733 (2011).

review.⁶⁰ The courts are typically wary of second-guessing the scientific expertise of the agencies, which they cannot hope to match.

Yet, the courts regard themselves as competent to remand to the agency if the agency's reasoning process in support of its scientific determinations is flawed. For example, courts in environmental cases, including but not limited to ESA cases, will remand if the agency's decision failed to explain how it moved from one step in a supposedly logical reasoning process to another, did not articulate at all how it dealt with a relevant statutory factor, rested on evidence that lacked any basis in the administrative record, or was internally inconsistent. In each instance, the deficiency is a gap in the agency's chain of reasoning.⁶¹ In assessing judicial review of U.S. Forest Service decisions under the National Forest Management Act's mandate to preserve biological diversity in the national forests as well as decisions implementing the ESA, I concluded several years ago that "[t]he courts have been wary of second-guessing the manner in which the environmental agencies have interpreted and applied science."⁶² Notwithstanding this deferential posture, courts did invalidate science-based decisions in circumstances such as an agency's application of a model based on assumptions that were obviously flawed or arbitrary.⁶³ I believe this remains an accurate depiction of judicial review of agency scientific determinations in federal environmental cases, including those decided under the ESA. Courts have also reversed listing decision that were based on extraneous factors, such as political pressure from elected state officials, or when the agency's decision was inconsistent with the recommendations of its own staff scientists.⁶⁴ These situations tend to raise red flags that the decision was not solidly grounded in the science and that courts should scrutinize the scientific record more closely than they ordinarily would be willing to do.

Every case has a winning and a losing side. Sometimes the party unhappy with the result is the agency, sometimes it is an environmental NGO, and sometimes it is a commercial entity affected by the agency's decision to permit or restrict development. Just because that party does not like the court's result does not necessarily mean that the court applied insufficiently rigorous or excessive scrutiny to the scientific determinations of the agency whose decisions were at issue.

Federal vs. State Authority to Manage Wildlife

Beginning in 1970, Congress chose to carve out an expanded role for the federal government in environmental protection. It did so for a host of well understood reasons relating to collective actions problems that include the advantages of resource pooling, a desire to restrict negative inter-jurisdictional spillovers, and an effort to put a stop to the anticipated race to the bottom. I will not explain here these justifications for a strong federal presence, although I have done so in my

⁶⁰ 5 U.S.C. § 706(2)(A) (2006).

⁶¹ Christopher H. Schroeder & Robert L. Glicksman, *Chevron, State Farm and EPA in the Courts of Appeals in the 1990s*, 31 ENVTL. L. REP. 10351, 10403 (Apr. 2001).

⁶² Robert L. Glicksman, *Bridging Data Gaps through Modeling and Evaluation of Surrogates: Use of the Best Available Science to Protect Biological Diversity Under the National Forest Management Act*, 83 IND. L.J. 465, 483 (2008).

⁶³ *Id.* at 485. See also Holly Doremus, *The Purposes, Effects, and Future of the Endangered Species Act's Best Available Science Mandate*, 34 ENVTL. L. 397 (2004) (describing willingness of courts in some cases to reverse agency decisions based on scientific determinations).

⁶⁴ *E.g.*, *Save Our Springs v. Babbitt*, 27 F. Supp. 2d 739, 745, 748 (W.D. Tex. 1997).

scholarship.⁶⁵ Suffice it to say that these remain persuasive reasons for federal leadership on endangered species protection.⁶⁶

At the same time, Congress recognized that states had long played a leading role in wildlife management, and it did not seek to oust the states from that role. Instead, it accommodated state authority and polices, to the extent they do not conflict with federal law, and it encouraged active state involvement in ESA implementation.⁶⁷ Section 6 of the ESA, for example, requires the FWS to cooperate “to the maximum extent practicable” with the states and authorizes federal financial assistance to states entering cooperative agreements for state establishment of adequate and active programs for species conservation.⁶⁸

In recent years, the FWS has cooperated with the states on significant issues related to endangered species. For example, I already referred to cooperative efforts with the states that led to a decision not to list the sage grouse. The same kind of process avoided the need to list dunes sagebrush lizards. The FWS has also used its authority under § 4(d) of the ESA⁶⁹ to tailor protections for threatened species in a way that largely defers to state authority – northern long-eared bats are a recent example. And the FWS has largely deferred to the state of Florida to authorize actions that “incidentally take” threatened species.⁷⁰

Although some states have taken up the challenge and become active participants in ESA protection efforts, others have been more reluctant, or have adopted different priorities than those reflected in the ESA. For example, Congress passed an appropriations rider in 2011 delisting gray wolves in Montana and Idaho, but not Wyoming, based on the two states’ efforts to adopt adequate protective measures.⁷¹ Wyoming subsequently revised its wolf management plan, which the FWS accepted. But a court rejected the agency’s decision to delist the wolf in Wyoming because the state’s plan lacked binding commitments to implement the regulatory mechanisms needed to protect the wolf.⁷² The court rejected a challenge to the agency’s scientific determinations, however, deferring to the FWS’s finding of sufficient genetic exchange between Wyoming wolves and other populations of wolves in the northern Rocky Mountains, and characterizing the plaintiff’s challenge as amounting to “nothing more

⁶⁵ See Robert L. Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation*, 102 NW. U. L. REV. 579 (2008); Robert L. Glicksman, *Climate Change Adaptation: A Collective Action Perspective on Federalism Considerations*, 40 ENVTL. L. 1159 (2010).

⁶⁶ See, e.g., Primo, *supra* note 11, at 10:

The federal government, for all of its slow and bureaucratic methods of implementing any policy, has the most resources, the widest scope and the greatest authority to gather and disseminate important information crucial to formulating policies. This is especially the case for environmental policy, as only the federal government has the resources and manpower to fund government research on the latest methods of species protection and conservation. Only the federal government has the scope to study and interact with all 50 states to see emerging trends as well as dangers to the species that inhabit the country. Without the federal government through its stewardship from the Secretary of the Interior and the policy actions of the USFWS, states would struggle greatly not only to innovate but to maintain their endangered species protective policies, if not fail outright.

⁶⁷ See, e.g., 16 U.S.C. § 1531(a)(5) (2006) (encouraging states to develop and maintain conservation programs that meet national and international standards); *id.* § 1501(c)(2) (declaring federal policy of cooperation with state and local agencies to resolve water resource issues in conservation of endangered species).

⁶⁸ 16 U.S.C. § 1535(a), (c)-(d) (2006). See also *id.* § 1535(f) (saving state laws that do not conflict with the ESA).

⁶⁹ 16 U.S.C. § 1533(d) (2006).

⁷⁰ See Nathan Hale, *Enviros Balk at Federal Plan To Let Florida Enforce ESA*, LAW 360 (Mar. 29, 2013), <http://www.law360.com/articles/428540/enviros-balk-at-federal-plan-to-let-florida-enforce-esa>.

⁷¹ Department of Defense and Full-Year Continuing Appropriations Act of 2011, Pub. L. No. 112-10, § 1713, 125 Stat. 38 (2011).

⁷² *Defenders of Wildlife v. Jewell*, 68 F. Supp. 3d 193 (D.D.C. 2014). That decision is currently pending on appeal.

than competing views about policy and science.”⁷³ The court also found the FWS’s analysis of what constituted a “significant portion of the [wolf’s] range” to be reasonable. Some observers have attributed the court’s rejection of the Wyoming plan to the state’s “reticence to commit to wolf recovery,” and in particular, to “adopt regulatory mechanisms to supplant the ESA’s protection from human caused mortality.”⁷⁴ The court’s rejection of the plan, in this view, reflected neither overly rigorous judicial review of the FWS’s scientific determinations nor an attempt by Congress or the FWS to shut the state out of the process of crafting species protection policies. Rather, the decision was based on the court’s determination that the statute precludes delisting absent a demonstration of the state’s commitment to taking the steps needed to prevent species from slipping back into danger.

⁷³ *Id.* at 207.

⁷⁴ Martha Williams, *Lessons from the Wolf Wars: Recovery v. Delisting under the Endangered Species Act*, 27 FORDHAM ENVTL. L. REV. 106, 148-49, 155 (2015).