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## THE ENDANGERED SPECIES ACT: THIRTY YEARS OF POLITICS, MONEY, AND SCIENCE

### Riders on the Storm, or Navigating the Crosswinds of Appropriations and Administration of the Endangered Species Act: A Play in Five Acts

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INTRODUCTION

On the thirtieth anniversary of the Endangered Species Act (ESA or Act), many scholars and practitioners can wax eloquently or argue vehemently about the rhetoric and reality of conservation of our nation’s biological diversity. Through virtually all of its history, save for its first few relatively peaceful years of existence, the ESA has been the lightning rod for liberals and conservatives in shaping the debate on species conservation, and the larger questions of land-use and property rights. That history is indeed a rich one. In fact, with a little imagination, one can look at the history of the ESA as a microcosm of the history of Western civilization: from the golden age of the environmental movement when the Act was established, to the early epiphany embodied in *Tennessee Valley Authority v. Hill*,<sup>1</sup> moving through the dark ages of Secretary of Interior James Watt, then into the stormy periods of renaissance and reformation under Secretary Bruce Babbitt.

In recent years, acrimony among all concerned has reached new heights, with the ESA a major factor in the government shut-down of 1995-1996 and lawsuits from all sides ever increasing. The visceral and deeply personal nature of the debate is also growing: conservationists righteously defending lowly insects against continual encroachment of development, ranchers and loggers indignantly defending their traditional jobs and way of life against outsiders, and government bureaucrats defending their honest work despite furloughs and personal threats. This thirtieth anniversary of the ESA is certainly an opportune time for deep reflection of the rhetoric and reality, the successes and failures, of the ESA.

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1. 437 U.S. 153, 184-85 (1977). Not unlike the epiphany of Constantine the Great, who converted to Christianity, in approximately 312 AD. Since the Court’s ruling in *Tennessee Valley Authority v. Hill*, religious imagery associated with the ESA is not uncommon. Apart from the language used by the United States Supreme Court in that case, the Exemption Committee is informally known as the “God Squad,” holding sway over the decision to commit a species to extinction, and academic literature is replete with references to Noah and the ark.

This Article, however, sticks with the prosaic. It focuses on the daily workings of the ESA and the dilemmas faced by the civil servants implementing the Act in light of limited budgets. It explores the basic question of funding and function and considers what happens when the money appropriated to the implementing agency is not adequate for the agency to carry out its mandates. Even more disruptive than a lack of funding is when the little funding that exists is controlled entirely by litigation and court orders, so that the agency has lost all discretion over its own actions.

This is the very real issue faced by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), the two federal agencies charged to implement the ESA (collectively, the Services).<sup>2</sup> The issue comes to a head at the very gates of the ESA: the listing of new species as endangered or threatened and the designation of their critical habitat. The listing and designation processes are laden with mandatory deadlines for the FWS and NMFS. The purpose of those deadlines is to ensure that the Services respond promptly to the need to protect a species threatened by extinction. At the same time, the consequence of those deadlines is to divert funds from other duties of the Services to ensure that the deadlines are satisfied. This is especially true given the inundation of new listing and designation petitions to the FWS,<sup>3</sup> which triggers the deadlines, and the spate of recent litigation to ensure enforcement of those deadlines. The entire ESA budget runs the risk of being consumed by the bottomless pit of litigation-driven listings and designations. It does not end there. As Yogi Berra might say, the bottomless pit is getting even deeper: as soon as the FWS makes a decision driven by a court-imposed deadline, it is being sued on the merits of that decision.

Into this scenario enters the congressional riders—those mandates or conditions imposed on the appropriations bills that identify and approve the funding to the federal government. The congressional riders of the mid-1990s helped create the problem now facing the Services, and

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2. The ESA is implemented by the Secretary of the Interior and the Secretary of Commerce (collectively, the Secretary), pursuant to ESA § 3(15), 16 U.S.C. § 1532(15) (1999). These responsibilities have, in turn, been delegated to the FWS and NMFS, respectively. Pursuant to Reorganization Plan No. 4 of 1970, which established the National Oceanic and Atmospheric Administration (NOAA), the FWS implements the Act with respect to terrestrial and freshwater species, as well as some marine mammals such as polar bears and otters. The NMFS, of the NOAA, an agency within the U.S. Department of Commerce, is charged to implement the ESA with respect to marine species. *See* 35 Fed. Reg. 15,627, 15,627-30 (Oct. 6, 1970).

3. Of the twelve hundred species listed, the FWS has jurisdiction for all but thirty-five, which are under the jurisdiction of the NMFS.

it is the current generation of riders that is helping the Services cope with the same problem. It began with one infamous rider, introduced by Senator Kay Bailey Hutchison, that imposed a moratorium on all new ESA listings and designations by the FWS.<sup>4</sup> The moratorium was included as a rider on the 1995 authorizations bill for the Department of Defense, and was extended for twelve months.<sup>5</sup> During the moratorium, the petitions for listings and designations piled up and the FWS could do nothing. When the moratorium was finally lifted, the backlog was tremendous. As the FWS tried to climb out of the hole, the petitioners began suing on missed deadlines. With no discretion afforded the FWS under the ESA, courts had no choice but to rule against the FWS and to impose court-ordered schedules.<sup>6</sup> These new schedules gave the FWS some breathing room beyond the statutory deadlines, but would put them in a position of contempt if they were to miss the court-imposed deadlines. Compliance with the deadlines was going to consume the bulk of the FWS' entire operating budget for the ESA. The FWS attempted to argue this point to the courts, and while the courts recognized the dilemma, they were universal in their rulings against the FWS. At the request of the Clinton Administration, a Republican Congress agreed to craft a new rider that would limit the funds that the FWS could be required to spend on listings and designations.<sup>7</sup> This bipartisan effort would thus shield other ESA funds from falling into the bottomless pit.

This is where the FWS is today: the decisions relating to ESA listings and designations, arguably the most important decisions under the law because they trigger all other protections, are driven solely by litigation. The FWS has lost all flexibility in making its own determinations as to which species is most endangered and should be listed first, and which habitat is most vulnerable and should be designated as critical. It is an obscure, bipartisan congressional rider that is keeping the system on life support, ensuring that the rest of the FWS budget does not get usurped by compliance with court-ordered deadlines.

Congressional riders thus serve as both a sword and a shield. They can sometimes help, just as much as they can undermine, public policy. They are not *a priori* evil. This is a drastically different viewpoint than the bulk of articles that have thus far appeared on the subject in the

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4. See *infra* note 172.

5. See discussion *infra* notes 191-92.

6. See discussion *infra* notes 256-95.

7. See discussion *infra* note 307.

literature.<sup>8</sup> Even the most moderate of articles condemns the use of riders to dictate policy, especially relating to natural resource management. However, riders have been used by both sides, Democrats and Republicans, to effectuate some policy that could not succeed through the standard legislative channels. To be sure, the use of riders is far from the usual or optimal form of legislative action. It avoids many of the traditional elements of the legislative process that ensure laws are enacted under the public eye, and in the public interest. There are many reasons to frown upon the use of riders. At the same time, they are not a new device. They are still subject to the same ultimate safeguards of every other piece of legislation: a floor vote by each chamber of Congress, approval by the President, and subsequent review by the federal courts. At this point, riders are watched vigilantly by lobbyists for all sides, and it is almost impossible to say that riders can avoid public scrutiny. The problem then, is not in the use of riders per se, but in the difficulty of engineering a vote on an entire bill based on any one rider contained therein.

Returning to the issue at hand, how do understaffed and financially starved agencies like the FWS deal with a growing set of congressionally and judicially imposed mandates? Scholars and practitioners are now beginning to tackle this question. One thing is clear: the use of a congressional rider to cap the funding for FWS listings and designations is not an optimal or long-term solution. Alternative solutions, however, are hard to come by. Certainly, a legislative amendment to the ESA, that moves through the usual channels, is by far the most ideal solution. Such a fix would have to reconcile the realities of limited funding against a limitless array of mandatory deadlines. It is also the most unlikely to occur, given the acrimony that exists among the stakeholders and between the parties on ESA issues. And even if it does occur, once the ESA is open to amendment, the amendments can come from those desiring to weaken the Act as much as those trying to strengthen the Act, all in the name of fixing the Act. Alternatively, the FWS can seek a litigation-based remedy, in which it negotiates a settlement with the majority of litigants and attempts to use that as its basis for settling the

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8. See, e.g., Patti A. Goldman & Kristen L. Boyles, *Forsaking the Rules of Law: The 1995 Logging Without Laws Rider and Its Legacy*, 27 ENVTL. L. 1035, 1036-38 (1997); Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457, 526-27 (1997); Geoffrey Christopher Rapp, Note, *Low Riding*, 110 YALE L.J. 1089, 1093-95 (2001). While Zellmer stops short of saying that appropriations riders are flatly unconstitutional, she states that they “raise constitutional and prudential concerns,” and proposes a constitutional amendment prohibiting their use. Zellmer, *supra*, at 532.

remaining cases and prioritizing administrative actions. There appear to be virtually no administrative remedies that the FWS can attempt on its own. And so, on this thirtieth anniversary of the ESA, it behooves stakeholders from all sides to lay aside pedagogical positions in order to address prosaic problems, and it behooves scholars and practitioners to muster the same creativity that shaped the broad vision of the law and apply it now to its daily workings.

This Article takes the form of a play of five acts. It begins with the set design and a brief descriptive analysis of the legislative process of appropriations and authorization of a law, as well as an overview of the ESA. The action begins, in Act I, with the arrival of the congressional riders of the mid-1990s. The administration responds, in Act II, with a sense of righteous indignation, armed with a series of administrative policies. In Act III, the stakeholders attack, and the administration finds itself utterly defenseless against the strength of the courts. The riders return in Act IV, this time in a much more ambiguous form, in which they still travel through the unlit halls of Congress, but this time they protect the FWS from further injury. The final Act remains unfinished, as the characters await the arrival of the *deus ex machina*—that unexpected, improbable, and often supernatural character in Greek and Roman drama that never fails to intervene in an otherwise hopeless situation and untangle the plot to the satisfaction of all concerned.

#### THE STAGE: A LEGISLATIVE PRIMER

It is important to begin with some background into the nature of congressional legislation, and its two primary forms of authorizations and appropriations. Most of the articles written about the legislative riders of the mid-1990s jump right into a discussion of the substance of the riders, with general diatribes regarding their content and constitutionality,<sup>9</sup> without due regard for the context or history in which riders are used. The fact is that riders on appropriations bills have been used by both sides to effectuate their own purposes, and have existed even before the very creation of the appropriations committees well over 150 years ago.<sup>10</sup> This is not to condone their use, but merely to recognize their place in the legislative landscape.

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9. See *infra* note 8.

10. For an excellent discussion on the history, and general constitutionality and practical considerations of riders, see Louis Fisher, *The Authorization-Appropriations Process in Congress: Formal Rules and Informal Practices*, 29 CATHOLIC U. L. REV. 51 (1979) and Jacques R. LeBoeuf, *Limitations on the Use of Riders by Congress to Effectuate Substantive Policy Changes*, 19 HASTINGS CONST. L.Q. 457 (1992).

*Set 1: Authorizations and Appropriations*

Lawmaking is characterized as a two-step process.<sup>11</sup> The first step, which is the one that the general public associates with Congress, is the formulation of substantive policy—the creation of a new law, a new program, or other initiative.<sup>12</sup> The second step is the funding of those substantive policies, through the budget and appropriations process.<sup>13</sup> This second step “used to be the preserve of insiders and technicians [with] few realiz[ing] that the budgeting and appropriations process was the ‘life-blood of government, the medium through which flowed the essential life-support systems of public policy.’”<sup>14</sup>

Each process is managed by a different set of committees within both the House and the Senate. Authorizing committees are those “standing committee[s] of the House or Senate with legislative jurisdiction over the subject matter of those laws . . . that set up or continue the legal operations of Federal programs or agencies.”<sup>15</sup> Authorizing committees include foreign relations, armed services and defense, energy, environment, education, social welfare, finance, banking, etc. The subject matter of authorizing committees in the House and Senate are not always parallel. Furthermore, even within the Senate or the House, jurisdiction may be divided awkwardly. For example, in the Senate, jurisdiction over the ESA is split between the Committee on the Environment and Public Works which oversees the FWS, and the Committee on Commerce which oversees the NMFS.<sup>16</sup> However, in the House, the jurisdiction of the Committee on Resources is much broader in scope and includes both the FWS and the NMFS, and thus the entire ESA.<sup>17</sup>

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11. See OTTO J. HETZEL ET AL., *LEGISLATIVE LAW AND STATUTORY INTERPRETATION: CASES AND MATERIALS* 847 (3d ed. 2001); see also Fisher, *supra* note 10, at 52.

12. HETZEL ET AL., *supra* note 11, at 847.

13. For a discussion on budget and appropriations, see Robert Keith & Allen Schick, *Manual on the Federal Budget Process*, CONG. RES. SERV., No. 98-720 GOV (1998); Sandy Streeeter, *The Congressional Appropriations Process: An Introduction, Updated May 31, 2002*, CONG. RES. SERV., No. 97-684 GOV (2002); see also Kenneth W. Dam, *The American Fiscal Constitution*, 44 U. CHI. L. REV. 271 (1977).

14. HETZEL ET AL., *supra* note 11, at 847 (citing AARON WILDAVSKY, *THE NEW POLITICS OF THE BUDGETARY PROCESS*, at vii (1988)).

15. See *id.* at 845 (citing U.S. GENERAL ACCOUNTING OFFICE, *A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS* 39 (3d ed. 1981)).

16. See S. DOC. NO. 106-15, at 20-21 (2000).

17. See H.R. DOC. NO. 106-320, at 413 (2001). The House Committee on Resources replaced the House Committee on Merchant Marine and Fisheries, effective January 4, 1995. See Act of June 3, 1995, Pub. L. No. 104-14, § 1(b)(3), 109 Stat. 186, 187 (1995) (providing references to committees with new names).

In general, the authorizing committees manage the processes for substantive legislative actions.<sup>18</sup> A bill can be introduced by any member of the respective house, and is then referred to the appropriate authorizing committee.<sup>19</sup> That committee then determines how to dispose of the bill, to hold hearings, to approve or amend it, or to do nothing. While there are numerous machinations to bring a bill to the floor of either chamber without the committee's involvement, these can get tricky quickly. The typical route is for the authorizing committee to approve it, then to recommend it to the entire chamber of the House or Senate for approval. If approved by both chambers, a reconciliation process seeks to conform the texts of each approved bill, and when successful, the Senate and House vote again if there have been any changes to the originally approved bill.

Appropriations bills, or spending bills, authorize expenditures by the federal government.<sup>20</sup> On the appropriations side, there are two committees of note. The Budget Committee holds the primary responsibility to approve a congressional annual budget resolution, taking into account the President's budget request.<sup>21</sup> This nonbinding resolution is essentially an agreement between the House and Senate as to spending priorities for the year.<sup>22</sup> After that, the Appropriations Committee, which is divided into subcommittees that parallel the

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18. "Authorizing legislation" is defined:

Basic substantive legislation enacted by Congress which sets up or continues the legal operation of a Federal program or agency either indefinitely or for a specific period of time or sanctions a particular type of obligation or expenditure within a program. Such legislation is normally a prerequisite for subsequent appropriations or other kinds of budget authority to be contained in appropriations acts. It may limit the amount of budget authority to be provided subsequently or may authorize the appropriation of "such sums as may be necessary."

*Andrus v. Sierra Club*, 442 U.S. 347, 361 (1979) (citing COMPTROLLER GENERAL OF THE UNITED STATES, *TERMS USED IN THE BUDGETARY PROCESS* 4 (1977)).

19. FRANCIS R. VALEO & FLOYD M. RIDDICK, *ENACTMENT OF A LAW: PROCEDURAL STEPS IN THE LEGISLATIVE PROCESS*, S. REP. NO. 90-35, at 4 (1967).

20. "Appropriation" is defined:

An authorization by an act of the Congress that permits Federal agencies to incur obligations and to make payments out of the Treasury for specified purposes. An appropriation usually follows enactment of authorizing legislation . . . Appropriations do not represent cash actually set aside in the Treasury for purposes specified in the appropriation act; they represent limitations of amounts which agencies may obligate during the time period specified in the respective appropriations acts.

*Andrus*, 442 U.S. at 359 (citing COMPTROLLER GENERAL OF THE UNITED STATES, *TERMS USED IN THE BUDGETARY PROCESS* 3 (1977)).

21. James V. Saturno, *The Congressional Budget Process: A Brief Overview*, CONG. RES. SERV., RS 20095 at 2 (2000).

22. *Id.* at 4.



jurisdiction of the authorizing committees, determines how to allocate the budget for specific programs and activities.<sup>23</sup> These determinations, in the form of general and special appropriations bills, also must go through their respective subcommittees before being reviewed by the full Appropriations Committee and finally being referred to the entire House or Senate for a floor vote.<sup>24</sup> The appropriations for programs and offices generally do not exceed the authorized levels specified in the authorizing legislation, although there have been exceptions,<sup>25</sup> as with the ESA.<sup>26</sup>

The general process for both authorizing and appropriating legislation is identical: the bills are introduced, approved by the committee of jurisdiction (sometimes after approval by a subcommittee), and then approved by the entire representative body of the House or Senate. If both House and Senate have approved bills on the same subject, a reconciliation process must occur to reconcile any differences between them. Overseeing the reconciliation process is a conference committee comprised of members of each the House and the Senate committees of jurisdiction. If the bill as reconciled is different than the bill originally approved by either the House or Senate, then the House or Senate must approve the revised bill. Only after each body of Congress has approved an identical bill can the bill be transmitted to the President for signature.

In terms of timing, authorizing bills can be introduced and approved at any point during the legislative term. The timing for the budget and appropriations process is dictated by statutory deadlines and fiscal requirements.<sup>27</sup> This process begins when the President submits the administration's budget request by the first Monday in February,<sup>28</sup> and it must be completed by October 1 when the new fiscal year begins. There is some flexibility within this period as to when the Budget Committees complete and reconcile the budget resolution, and when the Appropriations Committees introduce and approve their appropriations bills.

In recent years, the deadlines for completing the appropriations bills have become somewhat malleable.<sup>29</sup> If Congress has not completed appropriations bills for any federal agency, it will approve a "continuing

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23. *Id.* at 3-4.

24. *See* VALEO & RIDDICK, *supra* note 19, at 4.

25. *See* Fisher, *supra* note 10, at 62.

26. *See* discussion *infra* note 185.

27. For a summary, see Streeter, *supra* note 13, at 2-5.

28. Budget and Accounting Act of 1921, 31 U.S.C. § 1105 (1996).

29. *See* Streeter, *supra* note 13, at 14-15.

resolution” for that agency to continue to receive funds for operations.<sup>30</sup> The President must sign those resolutions no different than any legislation for enactment. They may roll over funding for several days, or in the case of the government shutdown in 1995, they may extend for several months.<sup>31</sup>

While this description is extremely basic and should be well known to even a casual scholar of administrative or legislative law, it is an important process to underscore. Much that has been written on the recent congressional riders argues that if riders are not legal in nature, they eviscerate the legislative process by shutting out the public, shortchanging procedural safeguards, avoiding normal review channels, etc.<sup>32</sup> Much has also been written depicting the use of riders as a recent phenomenon.<sup>33</sup>

Riders on appropriations bills were used as long ago as the late 1820s, so much so that the House Rules Committee tried to prohibit their use in 1836, and succeeded the following year.<sup>34</sup> The Senate passed a similar rule in 1850.<sup>35</sup> At this time, the prohibitions applied only to riders imposing additional spending. Substantive riders were not common, but not prohibited. In 1855, for example, on the strength of the newly elected Republican Party (sound familiar?), a rider prohibiting funding for federal troops to enforce slavery laws in Kansas was attached to a spending bill for the military.<sup>36</sup> It was characterized as “exercising the ancient right of Englishmen when they imposed conditions on making grants.”<sup>37</sup> In 1871, the House of Representatives attached, to an Indian appropriations bill, a rider prohibiting U.S. recognition of the Indian

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30. For a history on the use of Continuing Resolutions, see Fisher, *supra* note 10, at 81-83.

31. See, e.g., Act of Sept. 30, 1995, Pub. L. No. 104-31, §§ 101-123, 109 Stat. 278, 278-82 (1995) (providing funds for government operations under authority and conditions of 1995 Appropriations Act from September 30, 1995, through November 13, 1995); Act of Jan. 6, 1996, Pub. L. No. 104-92, §§ 101-501, 110 Stat. 16-24 (1996) (providing funds for government operations from December 16, 1995, to January 27, 1996); The Balanced Budget Down Payment Act, Pub. L. No. 104-99, §§ 101-131, 110 Stat. 26, 26-34 (1996) (providing funds for government operations under authority and conditions of 1995 Appropriations Act from January 27, 1996, through March 15, 1996).

32. See, e.g., Zellmer, *supra* note 8, at 457-59.

33. See, e.g., Goldman & Boyles, *supra* note 8, at 1037; Rapp, *supra* note 8, at 1093-95.

34. See Fisher, *supra* note 10, at 54-55 (noting the rule provided “no appropriation shall be reported in such general appropriation bills, or be in order as amendment thereto, for any expenditure not previously authorized by law,” citing IV HINDS, HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 3578 (1907)).

35. See *id.* at 55-56.

36. See *id.*

37. See *id.* at 55 (citing R. LUCE, LEGISLATIVE PROBLEMS 426 (1935)).

tribes as sovereign nations.<sup>38</sup> In 1879, President Rutherford B. Hayes complained that his veto power was being curtailed by Congress through the use of riders on certain appropriations bills.<sup>39</sup>

In the wake of the financial strains wrought by the Civil War in 1865, the House split the jurisdiction of the powerful Ways and Means Committee into three committees, including a new Appropriations Committee.<sup>40</sup> The Senate did the same in 1867, creating a new Appropriations Committee from the Finance Committee.<sup>41</sup> Jurisdictional battles between Appropriations Committees and the other standing committees over authorizations and appropriations, in both chambers, began almost immediately.

The result of these battles is that riders are barely legal, but often used. Overall, all parties attempt to maintain the theoretical model of a two-step authorization-appropriations process. Attempts to prohibit and limit riders exist in all arenas. Senate Rule XVI contains a prohibition against legislating in an appropriations bill.<sup>42</sup> House Rule XXI prohibits any appropriation for an expenditure not previously authorized.<sup>43</sup> These rules are actually very stringent with respect to legislative provisions in appropriations bills. Both chambers provide that a member can raise a point of order challenging a bill containing a nongermane rider, or challenging a nongermane legislative amendment to an appropriations bill.<sup>44</sup> If the point is sustained, the amendment is either stricken or the bill is remitted to the Appropriations Committee, as appropriate.

The courts have also weighed in. The Supreme Court, in the very case of *Tennessee Valley Authority v. Hill* recognized the distinction between authorizations and appropriations.<sup>45</sup> It did so again in *Andrus v. Sierra Club*.<sup>46</sup> Lower courts have done the same.<sup>47</sup>

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38. See *Antoine v. Washington*, 420 U.S. 194, 201-02 (1975).

39. Robert V. Percival, *Separation of Powers, The Presidency and the Environment*, 21 J. LAND RESOURCES & ENVTL. L. 25, 29 (2001).

40. See Fisher, *supra* note 10, at 57.

41. See *id.*

42. See S. DOC. NO. 106-15, at 11-12 (2000).

43. See H.R. DOC. NO. 106-15, at 794 (2001).

44. See VALEO & RIDDICK, *supra* note 19, at 4.

45. See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190 (1977).

We recognize that both substantive enactments and appropriations measures are "Acts of Congress," but the latter have the limited and specific purpose of providing funds for authorized programs. When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden.

*Id.* (citing House Rule XXI(2) and Standing Rules of the Senate, Rule 16.4).

46. See 442 U.S. 347, 361 (1979).

Attempts to further restrict and prohibit legislative riders on appropriations bills continue through the present, with added fervor since the rider craze of 1995-1996. In 1999, Senate Majority Leader Trent Lott, one of the major instigators of the riders several years earlier, introduced a Senate resolution to restore enforcement of Senate Rule XVI.<sup>48</sup> The resolution passed along largely party lines, fifty-three to forty-five, with only two Democrats voting in favor.<sup>49</sup> What should have been a debate on the time-honored traditions of Senate procedure came down to partisan politics in campaign finance reform. Senator Lott wanted to ensure the Democratic minority did not load up the campaign finance reform bill with riders.<sup>50</sup>

Despite the two-step Congress in theory, the practical lines between appropriations and authorizations remain blurred. And the blurriness runs in both directions: authorization bills can encroach on appropriations and spending requirements; appropriations bills can reach into substantive policy issues. For example, while authorization bills almost never include direct appropriations, they almost always contain ceilings for maximum spending.<sup>51</sup> They can also contain floors for minimum spending. They sometimes can also create liabilities on the federal government, which essentially forces appropriations to be made so that the liabilities do not accrue.<sup>52</sup> Lastly, there are a variety of “backdoor spending” techniques, such as trust funds and entitlements, to avoid appropriations.<sup>53</sup> Appropriations, on the other hand, do not always need an authorization as a prerequisite to spending money for a particular activity or office.<sup>54</sup> And of course, appropriations bills can contain legislative provisions despite the rules.

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The distinction is maintained “to assure that program and financial matters are considered independently of one another. This division of labor is intended to enable the Appropriations Committees to concentrate on financial issues and to prevent them from trespassing on substantive legislation.” House and Senate rules thus require a “previous choice of policy . . . before any item of appropriations might be included in a general appropriations bill.”

*Id.* (internal citations omitted).

47. See, e.g., *Atchison, Topeka & Santa Fe Ry. Co. v. Callaway*, 382 F. Supp. 610, 620 (D.D.C. 1974) (“It is a general principle that Congress cannot and does not legislate through the appropriation process.”).

48. See S. Res. No. 107-160 (1999); S. 160, 107th Cong. (1999).

49. The two senators voting in favor were Senators Moynihan (D-NY) and Baucus (D-MT). See 145 CONG. REC. S9171-74 (daily ed. July 26, 1999).

50. See 145 CONG. REC. S9171 (daily ed. July 26, 1999) (statement of Sen. Lott).

51. See discussion *supra* note 20.

52. See Fisher, *supra* note 10, at 61.

53. See Dam, *supra* note 13, at 279.

54. See Fisher, *supra* note 10, at 63-64.

While it is true that the use of riders may undermine the slow, deliberate process of formulating public policy, sometimes, however, they do not. Riders may be added to an appropriations bill in the course of subcommittee or committee deliberations, which is the same process that any other amendment would follow. Conversely, germane and important amendments to appropriations bills and spending changes may be added at the last minute during floor negotiations, a process more often associated with riders than bona fide amendments.

Riders have been used by both sides of an issue. In 1982-1983, a Democratic Congress used riders to keep in check anti-environmental policies of the Reagan Administration. For example, when Secretary of the Interior James Watt planned to open federal wilderness lands for development and exploration, Congress prohibited the policy through the use of a rider on the Fiscal Year (FY) 1983 Interior appropriations bill.<sup>55</sup> A very recent example can be found with a pro-environment, pro-safety rider attached to last year's appropriations bill (FY 2002) for the Department of Transportation.<sup>56</sup> An overwhelming majority of members of Congress approved a rider that required various public safety and environmental reviews on Mexican trucks that were going to be allowed to enter the United States beyond the special border trading zone.<sup>57</sup>

Riders have even been used to move popular legislation that has stalled in the authorizing process, which may have occurred for any number of reasons, perhaps relating to special interests, partisan politics, or legislative priorities. One such example is the reauthorization of the Sikes Act, which requires the Armed Services to consult with the FWS in developing management plans for wildlife on lands managed by the Armed Services.<sup>58</sup> The bill reauthorizing the Act had been through hearings in both the House and Senate, had passed the House and referred to the Senate Environment and Public Works (EPW) Committee.<sup>59</sup> With EPW Committee's tacit approval, the bill was appended to the FY 1998 Department of Defense authorization of appropriations bill.<sup>60</sup>

A rider, essentially, has become a pejorative term associated with a provision relating to substantive policy appended to an appropriations bill. Of course, it deserves this negative connotation given its prevalent

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55. See Act of Dec. 30, 1982, Pub. L. No. 97-394, §§ 301-18, 96 Stat. 1966, 1995-2000 (1982) (providing for the Interior Department and related agencies' appropriations for FY 1983).

56. Pub. L. No. 107-87, § 350, 115 Stat. 833 (2001).

57. See *id.*

58. See H.R. REP. NO. 104-107 (1995).

59. See *id.*

60. See *id.*

use in recent years to undermine existing environmental laws. However, one must make an important distinction between the use of riders *a priori*, and the specific use of individual riders to effectuate unpopular policy. Riders are one form of legislation, subject to the same basic risks and safeguards of all other legislation. They can be added or rejected during the course of committee deliberation, floor deliberation, or reconciliation, and both Congress and the President have the option to approve or disapprove not only individual riders and votes thereon, but also the entire bill containing any such riders.

The great worry of environmentalists, in opposing riders, should not be that the riders are inherently bad. They are not. Rather, their worry should come in shoring up the political support to defeat a solitary rider that subverts good public policy, at the price of the entire legislation. They must muster a floor vote defeating an amendment to add a rider, or in passage of the entire bill that contains the rider, or even in a presidential veto of the bill containing the rider. This, too, has happened in recent years, although it is a game of high-stakes political brinkmanship.

The bottom line is this: rather than condemn the use of riders across the board as a matter of black and white clarity, one must recognize the ambiguous, gray nature of riders and develop a set of criteria for their consideration. At what point in the legislative process was the rider tacked onto the legislation? Does it represent a new issue of first impression? Have there been previous legislative initiatives or activities, such as bills or hearings, on the matter? What is the position of the authorizing committee with jurisdiction over the matter? What is the position of the administration? Is there a likelihood that the rider would elicit a veto of the entire legislation? These questions must be addressed in the course of making an accurate assessment of the merits.

### *Set 2: Endangered Species Act*

#### 1. Overview of the Statute

To put the ESA in the context of the discussion above, it is authorizing legislation providing the substantive policy for addressing endangered and threatened species. Its original enactment, and subsequent amendments, were introduced as bills and referred to the appropriate authorizing committees. In the U.S. Senate, these are the Committee on Environment and Public Works and the Committee on Commerce. In the House of Representatives, it was the Committee on

Merchant Marine and Fisheries until the reorganization of the House committees in 1995, when it became the Committee on Resources.<sup>61</sup>

Section 15 of the ESA provides authorization of appropriations, specifically \$41.5 million for the Department of the Interior, and \$6.75 million for the Department of Commerce.<sup>62</sup> It also provides special authorizations for the Department of the Interior to implement the provisions of the Convention on International Trade of Endangered Species of Fauna and Flora (CITES), and the Department of Agriculture for enforcement of the ESA and CITES with respect to importation or exportation of plants.<sup>63</sup> Authorizations are generally provided for a fixed period of time, so that laws and programs can be revisited by Congress periodically, and amendments can be considered. The ESA was last reauthorized in 1988, for a period of five years, until 1992.<sup>64</sup>

In the event that the authorization of a law has expired, as is currently the case for the ESA, Congress may still appropriate funds to implement it. For the ESA, the appropriations are approved for the FWS, through legislation relating to appropriations for the Department of the Interior and related agencies, and for the NMFS, through legislation relating to appropriations for the Departments of Commerce, State, and Justice. Typically, actual appropriations do not exceed authorized levels. However, because it has been so long since the ESA was last reauthorized, actual appropriations of funds for implementation of the ESA have far exceeded authorized figures. For example, appropriations for the FWS have gone from \$91 million in 1998<sup>65</sup> to roughly \$125 million in 2001 and 2002.<sup>66</sup> As part of the appropriations process, Congress can impose earmarks for specific funds, and it does so quite readily with ESA monies. Such earmarks generally come out of the total ESA budget, so that the actual discretionary funding available to the FWS and NMFS is the appropriated amount minus the earmarks.

Despite the controversy it engenders, the ESA is a relatively straightforward law with only a handful of substantive provisions and a well-defined body of case law governing its administration. This

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61. See *supra* note 2 and accompanying discussion.

62. See ESA § 15(a)(1)-(2), 16 U.S.C. §§ 1542(a)(1)-(2) (1999).

63. See ESA § 15(a)(3), 16 U.S.C. § 1542(a)(3) (applying to the Department of Agriculture); ESA § 15(c), 16 U.S.C. § 1542(c) (applying to the Convention).

64. See ESA § 15, 16 U.S.C. § 1542.

65. See Department of the Interior and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-83, 111 Stat. 1543, 1546-48 (1998).

66. See Department of the Interior and Related Agencies Appropriations Act of 2001, Pub. L. No. 106-291, 114 Stat. 922, 926-28 (2000); Department of the Interior and Related Agencies Appropriations Act of 2002, Pub. L. 107-63, 115 Stat. 414, 419-23 (2002).

combination lends itself all too well to legal, philosophical, and political discourse within the law journal literature, which is rich with articles dissecting every section of the statute.<sup>67</sup> This Part presents a brief overview of the ESA and focuses on the deadlines that are at the heart of the present issue.

The goal of the Act is to conserve species on the brink of extinction and the ecosystems upon which they depend for survival.<sup>68</sup> The ESA begins and ends with the determination that a species is endangered or threatened with extinction. If such a determination is made by either the Secretary of the Interior or the Secretary of Commerce (the Secretary), the ESA provisions apply to everything that affects that species; if such a determination is not reached, or a subsequent determination is made that the species is no longer endangered or threatened, the provisions do not apply.<sup>69</sup>

The Secretary is also required to designate any habitat deemed to be critical for the species.<sup>70</sup> Critical habitat is defined as the habitat of the species essential to its conservation or requiring special management considerations.<sup>71</sup> The general requirement is to designate at the time of

67. For an excellent history of the ESA, see MICHAEL J. BEAN & MELANIE J. ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* (3d ed. 1997); DANIEL J. ROHLF, *THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION* (Stan. Envtl. Law Soc'y ed., 1989); Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277, 281-85 (1993).

68. See ESA § 2(6), 16 U.S.C. § 1531(b) (“The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species . . .”).

69. If a species is delisted, there is a continuing duty to monitor its status and report to Congress regularly. Prior to a listing determination, the Act also authorizes the Services to monitor a species as a “candidate species,” a species that may be determined endangered or threatened in the future. See ESA § 4(b)(3), 16 U.S.C. § 1533(b)(3). In addition, the Services have recently negotiated “candidate conservation agreements” to seek protections for species prior to their listing. See Announcement of Final Policy for Candidate Conservation Agreements with Assurances, 64 Fed. Reg. 32,726 (June 17, 1999).

70. See ESA § 4(a)(3)(A), 16 U.S.C. § 1533(a)(3)(A) (“At the time any such regulation is proposed, the Secretary shall also by regulation, to the maximum extent prudent, specify any habitat of such species which is then considered to be critical habitat.”).

71. See ESA § 3(5), 16 U.S.C. § 1532(5).

- (A) The term “critical habitat” for threatened or endangered species means—
- (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 Act, 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 4 of this Act of this



listing, but because the designation is more complicated than the listing decision, the Secretary is authorized to conclude that critical habitat is not then determinable, and may invoke a one-year extension.<sup>72</sup>

The listing determination triggers the two primary protections afforded to species under the ESA. First, each federal agency must ensure that any action funded, authorized, or carried out by it does not likely jeopardize the continued existence of the species or adversely modify any critical habitat.<sup>73</sup> This is by far the strongest provision of the ESA, indeed, of almost all laws.<sup>74</sup> Second, each person is prohibited from taking an endangered species unless the Secretary has issued a permit to do so.<sup>75</sup> A taking is construed very broadly, to include habitat modification even without direct harm to an individual within a species.<sup>76</sup> By virtue of the regulatory authority of the Secretary, this takings prohibition has been extended to include threatened species as well.<sup>77</sup>

In addition to these two requirements, the listing determination also sets in motion the machinery for conservation and recovery of the species.<sup>78</sup> This includes the development and implementation of a recovery plan. Associated with recovery efforts are state cooperative agreements under section 6,<sup>79</sup> federal activities pursuant to section 7(a)(1) that go beyond the “no jeopardy” requirement of section 7(a)(2),<sup>80</sup> and reintroduction of experimental populations under section 10(j).<sup>81</sup>

A word about protections afforded to critical habitat. Over the years, both Congress’s and the Services’ handling of critical habitat has vacillated greatly.<sup>82</sup> As stated above, the Secretary is required to designate critical habitat at the time of listing, even though the

title, upon the determination by the Secretary that such areas are essential for the conservation of the species.

ESA § 3(5)(A), 16 U.S.C. § 1532(5)(A).

72. ESA § 4(c)(6)(C)(iii), 16 U.S.C. § 1533(c)(6)(C)(iii).

73. See ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2).

74. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 173 (1977) (“One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act.”).

75. See ESA § 10(a), 16 U.S.C. § 1539(a).

76. See 50 C.F.R. § 17.3 (2002); see also *Babbitt v. Sweethome*, 515 U.S. 687, 689-700 (1995).

77. See 50 C.F.R. § 17.31.

78. For discussion on recovery provisions of the ESA, see Jason M. Patlis, *Recovery, Conservation and Survival Under the Endangered Species Act: Recovering Species, Conserving Resources and Saving the Law*, 17 PUB. LAND & RESOURCES L. REV. 55 (1996).

79. ESA § 6, 16 U.S.C. § 1535.

80. ESA § 7(a)(1), 16 U.S.C. § 1536(a)(1).

81. ESA § 10(j), 16 U.S.C. § 1539(j).

82. See generally Jason M. Patlis, *Paying Tribute to Joseph Heller with the Endangered Species Act: When Critical Habitat Isn’t*, 20 STAN. ENVTL. L.J. 133 (2001).

information required for designation is different than that required for listing. Both the FWS and the NMFS contend that the information is not available at the time of listing, especially with regard to the economic analysis of the designation, whereas the ESA prohibits an economic analysis of the listing decision. This dichotomous treatment of listings and designations complicates the job of the Services. The Services have defined the two prohibitions against adverse modification and jeopardy to be tied to the appreciable reduction in likelihood of survival and recovery of the species.<sup>83</sup> Consequently, the Services say that these two standards are so similar that they amount to the same thing in all but a small handful of circumstances. Because of the complications in the front-end of the ESA, the listing and designation analyses, and the redundancies in the back end of the ESA, the jeopardy and adverse modification standards, the Services have soured on critical habitat designations. They have taken the position that “the designation of critical habitat consumes an inordinate amount of time, effort, money, and resources for little benefit for conservation, and little consequence to anyone else.”<sup>84</sup>

## 2. The Listing and Designation Process

Let us take a closer look at the listing and designation process in determining whether any species (in the United States or abroad) is endangered or threatened, and whether any habitat of such species is considered “critical.” To justify that the species is endangered, the Secretary must demonstrate the species is “in danger of extinction throughout all or a significant portion of its range”;<sup>85</sup> to justify that the species is threatened, the Secretary must demonstrate that it is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”<sup>86</sup> “Critical habitat” is defined, if the area is occupied by the species, as the area that has biological or physical features either essential to the conservation of the species or that may require special management considerations.<sup>87</sup> If area is unoccupied by the species, “critical habitat” are those areas essential for the conservation of the species.<sup>88</sup>

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83. See 50 C.F.R. 402.02 (2002).

84. Patlis, *supra* note 82, at 137.

85. ESA § 3(6), 16 U.S.C. § 1532(6).

86. ESA § 3(19), 16 U.S.C. § 1532(19).

87. ESA § 3(5)(A)(i), 16 U.S.C. § 1532(5)(A)(i).

88. See ESA § 3(5)(A)(ii), 16 U.S.C. § 1532(5)(A)(ii).

The listing determination must be made “solely on the basis of the best scientific and commercial data available.”<sup>89</sup> This language explicitly prohibits the consideration of economic impacts in determining whether a species is endangered or threatened.<sup>90</sup> The determination must be made after conducting a status review, and after taking into account efforts undertaken by states or foreign governments to protect the species.<sup>91</sup> The factors upon which the determination can be made are identified in section 4(a)(1), and include present or threatened habitat destruction or modification, overutilization of the species itself, disease or predation, inadequacy of existing regulatory mechanisms, or other natural or man-made factors.<sup>92</sup>

There are two ways to begin the process to determine whether the species is endangered or threatened. One way is extremely flexible, while the other way is extremely rigid.<sup>93</sup> On the one hand, the Secretary may undertake his own reviews pursuant to ESA sections 4(a) and (b)(1) to determine whether the species is endangered or threatened, without the imposition of any mandatory deadlines. On the other hand, any “interested person” may petition the Secretary to make a similar determination, pursuant to the general petition process of the Administrative Procedure Act (APA).<sup>94</sup> The Secretary must still follow the substantive criteria laid out in ESA sections 4(a) and (b)(1), but upon receipt of petition, he is subject to extremely stringent procedures laid out in sections 4(b)(3)-(6). If the Secretary has begun his own review of the

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89. ESA § 4(b)(1)(A), 16 U.S.C. § 1533(b)(1)(A).

90. H.R. REP. NO. 97-567, at 20 (1982).

The addition of the word “solely” is intended to remove from the process of the listing or delisting of species any factor not related to the biological status of the species. The Committee strongly believes that economic considerations have no relevance to determinations regarding the status of the species and intends that economic analysis requirements . . . not apply.

*Id.*

91. See ESA § 4(b)(1)(A), 16 U.S.C. § 1533(b)(1)(A). The Secretary must take into account

those efforts, if any, being made by any State or foreign nation, or any political subdivision of the State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

*Id.*

92. See ESA § 4(a), 16 U.S.C. § 1533(a).

93. See *Am. Lands Alliance v. Norton*, 242 F. Supp. 2d 1 (D.D.C. 2003) for a discussion of the two processes.

94. 5 U.S.C. § 553(e) (2000); see also ESA § 4(b)(4), 16 U.S.C. § 1533(b)(4) (“Except as provided in paragraphs (5) and (6) of this subsection, the provisions of section 553 of title 5, United States Code [5 U.S.C. § 553] (relating to rulemaking procedures), shall apply to any regulation promulgated to carry out the purposes of this Act.”).

species, but then receives a petition for the same species, the deadlines relating to the petition apply.<sup>95</sup>

Upon receiving a petition, the Secretary has ninety days to make a finding “as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted.”<sup>96</sup> There is some discretion allowed for the Secretary. First, the finding is made “to the maximum extent practicable,” through which Congress recognized that the Services’ limited resources may be spent on higher priorities.<sup>97</sup> However, a recent case limited the discretion that the Secretary has in delaying a finding, in light of subsequent nondiscretionary deadlines that rely on it.<sup>98</sup> Second, the Secretary has a means to easily dismiss frivolous or unsubstantiated petitions, although he or she has traditionally taken a broad position and entertained petitions even if they do not present a strong case. The standard used by the Secretary is that of a reasonable person.<sup>99</sup> Also known as a “90-day finding,” the Secretary’s decision must be published in the *Federal Register*.<sup>100</sup> If the Secretary finds that the petition does present substantial information, the Service promptly begins a status review of the species.<sup>101</sup>

Within twelve months of receipt of the petition for which the Secretary found substantial information that may warrant action, the Secretary must make one of three decisions.<sup>102</sup> The Secretary can find that the action is not warranted, in which case the process ends; the Secretary can find that the action is warranted, in which case it must publish a proposed determination (in the form of a proposed regulation); or the Secretary can find that the action is warranted, but precluded by

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95. See 50 C.F.R. § 424.14 (2002).

96. ESA § 4(b)(3)(A), 16 U.S.C. § 1533(b)(3)(A).

97. H.R. REP. NO. 97-835, at 21 (1981); see also Biodiversity Legal Found. v. Babbitt, 146 F.3d 1249 (9th Cir. 1998) (holding that “to the maximum extent practicable” does not impose a mandatory, nondiscretionary duty on the FWS to act within ninety days).

98. See Biodiversity Legal Found. v. Badgley 284 F.3d 1046 (9th Cir. 2002); see also *Am. Lands Alliance*, 242 F. Sup. 2d at 10 (“The plain language of 16 U.S.C. § 1533(b)(3) of the ESA demonstrates that the petition process’s 90-day substantial information finding and 12-month finding are inextricably linked.”).

99. See 50 C.F.R. § 424.14(b)(1); see also 50 C.F.R. § 402.14(b)(2).

The Secretary must consider whether the petition: clearly indicates the administrative measure recommended; contains detailed narrative justification describing numbers and distribution of the species; provides information over the range of the species; and contains supporting documentation.

*Id.*

100. ESA § 4(b)(3)(A), 16 U.S.C. § 1533(b)(3)(A).

101. See ESA § 4(b)(3)(A), 16 U.S.C. § 1533(b)(3)(A).

102. See ESA § 4(b)(3)(B), 16 U.S.C. § 1533(b)(3)(B).

pending proposals.<sup>103</sup> This “warranted but precluded” determination has led to the creation of the list of candidate species, a list published in the *Federal Register* of those species whose determination as endangered or threatened is warranted but precluded by other pending proposals.<sup>104</sup> This “warranted but precluded” finding is contingent on the Secretary making expeditious progress with respect to other listings and delistings.<sup>105</sup> A petition that is “warranted but precluded” returns to the hopper, and is treated as a resubmitted petition to list or delist, but for which there is already substantial information to warrant the action.<sup>106</sup> In other words, the Secretary has one year from the “warranted but precluded” finding to reach a new decision on whether to issue a proposed rule, deny the petition, or make another “warranted but precluded” finding. A court has recently called into question, however, the FWS’ handling of the candidate species list and the manner in which it rolls over “warranted but precluded” findings annually.<sup>107</sup> The Secretary must monitor the status candidate species and use the emergency listing authority pursuant to section 4(b)(7) as necessary.<sup>108</sup>

Once a proposed rule is published, the Secretary must comply with public notice-and-comment procedures that are more rigorous than the generic procedures provided in the APA.<sup>109</sup> In addition to the *Federal Register* notice, the Secretary must give actual notice of the proposed regulation to the relevant state agencies, and to each county, where the species is believed to be found.<sup>110</sup> He must also give notice to professional scientific organizations, publish a summary in a newspaper of general circulation in the area in which the species is believed to be found, and hold at least one public hearing if so requested within forty-five days of the proposal.<sup>111</sup>

The Secretary must make a decision on the proposal within one year of the date of the *Federal Register* notice of the proposed determination.<sup>112</sup> The decision can be one of three possibilities: (1) it can

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103. *See id.*

104. *See, e.g.,* Endangered and Threatened Wildlife and Plants; Review of Plant and Animal Taxa That Are Candidates for Listing as Endangered or Threatened Species, 61 Fed. Reg. 7596, 7596-7613 (Feb. 28, 1996).

105. ESA § 4(b)(3)(B)(iii), 16 U.S.C. § 1533(b)(3)(B)(iii).

106. ESA § 4(b)(3)(C)(i), 16 U.S.C. § 1533(b)(3)(C)(i).

107. *Am. Lands Alliance v. Norton*, 2003 WL 245378 (D.D.C. 2003).

108. *See* ESA § 4(b)(3)(C)(iii), 16 U.S.C. § 1533(b)(3)(C)(iii).

109. *See* 5 U.S.C. 553 (b)-(c) (2002).

110. *See* ESA § 4(b)(5)(A)(iii), 16 U.S.C. § 1533(b)(5)(A).

111. *See* ESA § 4(b)(5)(C)-(E), 16 U.S.C. §§ 1533(b)(5)(C)-(E).

112. *See* ESA § 4(b)(6)(A), 16 U.S.C. § 1533(b)(6)(A). The entire process from the time of receipt of a petition to final rule is, theoretically, supposed to take two years: one year from

be a final regulation to implement the determination or revision,<sup>113</sup> (2) it can be a notice that the proposed regulation is being withdrawn if the Secretary concludes that there is “not sufficient evidence to justify the action proposed by the regulation,”<sup>114</sup> or (3) it can be a notice extending the one-year period by six more months “if there is substantial disagreement regarding the sufficiency or accuracy of the available data.”<sup>115</sup>

This is the process to determine whether a species is endangered or threatened. The determination must then be memorialized by formally adding the name of the species onto the List of Endangered Species or List of Threatened Species, as published by the Secretary of the Interior.<sup>116</sup> It is important to note that the determination prescribed by section 4(a) of the ESA, and the listing prescribed by section 4(c), are two different requirements, and two separate actions by the Secretary. The keeping of a formal list is an anachronism that predates the electronic age. It underscores how long it has been since the ESA was last reauthorized in 1988, and how long overdue the ESA is for updating. There is no conceivable benefit to the distinction between *determinations* and *listings*, both are published in the *Federal Register* in satisfaction of APA requirements.

The FWS is technically the keeper of the list, even for species that are under the jurisdiction of the NMFS. For species under the jurisdiction of the NMFS, the Secretary of Commerce must follow the procedures described above, but must also inform the Secretary of the Interior, who will then actually change the list with a notice in the *Federal Register*.<sup>117</sup> Thus, if the NMFS makes a determination pursuant to

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receipt of the petition to publication of the proposed rule, pursuant to section 4(b)(3)(B), and then one year from proposed rule to final rule, pursuant to section 4(b)(6)(A). However, missing the two year deadline does not render the Secretary in violation of the ESA: Even if the Secretary publishes the proposed rule after the one year deadline in section 4(b)(6)(A), he can still be in compliance with the one year deadline between the proposed rule and the final rule, pursuant to section 4(b)(3)(B). *See* Or. Natural Res. Council, Inc. v. Kantor, 99 F.3d 334, 339-40 (9th Cir. 1996) (holding that the ESA clearly requires the Secretary to publish a final rule on listing within twelve months of the date of the publication of the proposed rule, rather than twenty-four months after filing of a petition).

113. *See* ESA § 4(b)(6)(A)(i)(I)-(II), 16 U.S.C. § 1533(b)(6)(A)(i)(I)-(II).

114. ESA § 4(b)(6)(A)(i), 16 U.S.C. § 1533(b)(6)(A)(i)(IV) (referring to ESA § 4(b)(6)(B)(ii), 16 U.S.C. § 1533(b)(6)(B)(ii)).

115. ESA § 4(b)(6)(A)(i)(III), 16 U.S.C. § 1533(b)(6)(A)(i)(III) (referring to ESA § 4(b)(6)(B)(i), 16 U.S.C. § 1533(b)(6)(B)(i)).

116. ESA § 4(c)(1), 16 U.S.C. § 1533(c)(1) (“The Secretary of the Interior shall publish in the Federal Register a list of species determined by him or the Secretary of Commerce to be endangered species and a list of species determined by him or the Secretary of Commerce to be threatened species.”).

117. *See* ESA § 4(a)(2)(A), 16 U.S.C. § 1533(a)(2)(A).

section 4(a) that a species is endangered or threatened, it must then request that the FWS update the List of Endangered and Threatened Species pursuant to section 4(c).<sup>118</sup> Indeed, if the decision is to delist the species or to revise its status from endangered to threatened, then the Secretary of Commerce must first seek concurrence of the Secretary of the Interior, and only after the Secretary of the Interior concurs will the change be made.<sup>119</sup>

The formal involvement of the Secretary of the Interior in listing of the species under the jurisdiction of the Secretary of Commerce is also an anachronism that dates back to 1973, when the NOAA was still in its infancy. There is no reason that the Secretary of the Interior must concur with decisions made by the Secretary of Commerce, unless there is joint jurisdiction over a species.<sup>120</sup>

This distinction between determinations and listings remains a technicality of little import, except during the existence of the ESA moratorium rider, when Congress neglected to include the NMFS in its moratorium.

In that situation, or other situations, in which listings may not coincide exactly with determinations, there is potential to cause significant confusion. When do the protections of the ESA kick in—at the time of determination, or the time of the listing? Consider language elsewhere in the ESA that relates to the status of the species. Section 7(a)(2) requires that federal agencies ensure that their actions “[are] not likely to jeopardize the continued existence of any endangered species or threatened species.”<sup>121</sup> Section 9 prohibits all persons from taking “any threatened species of fish or wildlife *listed* pursuant to section 4 of this Act.”<sup>122</sup> Section 4(d) authorizes the Secretary to promulgate protective regulations “[w]henver any species is *listed* as a threatened species.”<sup>123</sup> Given these linguistic differences, it can be argued that the federal no-jeopardy mandate is triggered as soon as there is a determination, independent of the actual listing, while the takings prohibition and any section 4(d) rulemaking must wait for the actual listing. In the case of species under the jurisdiction of the NMFS, the determination the NMFS and the listing by the FWS occur at different times, and during this period, the protections afforded a species may be in doubt. While it

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118. See ESA § 4(c), 16 U.S.C. § 1533(c).

119. See ESA § 4(a)(2)(B), 16 U.S.C. § 1533(a)(2)(B).

120. Joint jurisdiction does exist for a handful of species, including sea turtles, Gulf sturgeon, and Atlantic salmon.

121. ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2).

122. ESA § 9(a)(1), 16 U.S.C. § 1538(a)(1) (emphasis added).

123. ESA § 4(d), 16 U.S.C. § 1533(d) (emphasis added).

seems obvious that the substantive determination is the one that should trigger the protections of the ESA, the language of the ESA focuses on the actual listing.

Critical habitat designations must follow the same process and same deadlines as listing determinations, with a few exceptions.<sup>124</sup> In general, the designation must be done concurrently with the listing determination.<sup>125</sup> The basis for designating critical habitat, however, is different than that for determining the status of a species. Whereas the listing determination does not consider economics at all, the designation must expressly do so.<sup>126</sup> Despite this additional consideration, a final regulation designating critical habitat must be published concurrently with the final regulation for the listing determination.<sup>127</sup> There are two exceptions. The first, rarely used, is if the Secretary publishes the listing determination faster than required because “it is essential to the conservation of such species.”<sup>128</sup> The second, commonly used and the basis for the spate of recent lawsuits, is if the Secretary finds that critical habitat “is not then determinable,” in which case the Secretary may invoke a one-year extension.<sup>129</sup> At the end of this extra year, the Secretary must publish a designation “based on such data as may be available at that time” and “to the maximum extent prudent.”<sup>130</sup>

This provision, “to the maximum extent prudent,” has been used by the FWS as a justification to not designate critical habitat, concluding that the designation is not prudent, i.e., not beneficial.<sup>131</sup> However, the FWS has been roundly criticized in all circles for this interpretation,<sup>132</sup> in

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124. For a detailed discussion of the critical habitat process, see generally Patlis, *supra* note 82.

125. ESA § 4(a)(3), 16 U.S.C. § 1533(a)(3).

126. ESA § 4(b)(2), 16 U.S.C. § 1533(b)(2).

The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best available scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any such area from the critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

*Id.*

127. See ESA § 4(b)(6)(C), 16 U.S.C. § 1533(b)(6)(C).

128. ESA § 4(b)(6)(C)(i), 16 U.S.C. § 1533(b)(6)(C)(i).

129. ESA § 4(c)(6)(C)(iii), 16 U.S.C. § 1533(c)(6)(C)(ii).

130. ESA § 4(d)(6)(C)(ii)(A), 16 U.S.C. § 1533(c)(6)(C)(ii)(A).

131. 50 C.F.R. § 424.12(a)(1) (2002).

132. See Patlis, *supra* note 82, at 197. In 1999, the U.S. Senate Committee on Environment and Public Works held a hearing on critical habitat designations, during which



light of the narrow usage intended by Congress.<sup>133</sup> Several cases in the United States Court of Appeals for the Ninth Circuit rejected the majority of reasons put forth by the FWS to justify a not-prudent finding. In *Conservation Council for Hawaii v. Babbitt*, the court held that the FWS could not use generic notions of critical habitat for a not-prudent finding.<sup>134</sup> Rather, the FWS “must consider evidence specific to each species” to determine whether designation was prudent for that species.<sup>135</sup> To the extent that the court did use a generic notion of critical habitat, it held that the FWS’ automatic exclusion of private lands contravenes the intent of Congress because the court saw at least two benefits of critical habitat on private lands: first, it provides protection in the event that federal activity occurs within the habitat later in time; second, it notifies state and local governments and the public as to the important areas for conservation.<sup>136</sup> Much of the reasoning in this case was based on *Forest Guardians v. Babbitt*.<sup>137</sup>

Just as petitions for listing determinations, the Secretary must entertain petitions to revise critical habitat designations.<sup>138</sup> Unlike

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negative comments on the approach of the Service were heard by all witnesses. The Committee itself was very critical in its report on S. 1180, a bill to amend the critical habitat process. *See* S. 1180, 105th Cong. (1997).

The Committee also reiterated the 1978 legislative history that a designation of critical habitat would be “not prudent” only in rare circumstances. It noted that by “finding that designation is not prudent in 228 out of 256 instances since April 1996, the Fish and Wildlife Service has made the designation of critical habitat the exception rather than the rule,” which “is inconsistent with the original purpose” of the law.

Patlis, *supra* note 82, at 197 (citing S. REP. NO. 106-126, at 13 (1999)).

133. *See* H.R. REP. NO. 95-1625, at 16-17 (1978).

The phrase “to the maximum extent prudent” is intended to give the Secretary discretion to decide not to designate critical habitat concurrently with the listing where it would not be in the best interests of the species to do so.

As an example, the designation of critical habitat for some endangered plants may only encourage individuals to collect these plants to the species [sic] ultimate detriment. The committee intends that in most situations the Secretary will, in fact, designate critical habitat at the same time that the species is listed as either endangered or threatened. It is only in rare circumstances where the specification of critical habitat concurrently with the listing would not be beneficial to the species.

*Id.*

134. *See* 2 F. Supp. 2d 1280 (D. Haw. 1998).

135. *Id.*

136. *See id.* at 1284-86.

137. *See* 174 F.3d 1178, 1186-91 (8th Cir. 1999) (discussing the Secretary’s nondiscretionary duty to issue critical habitat designations).

138. *See* ESA § 4(b)(3)(D), 16 U.S.C. § 1533(b)(3)(D) (1999).

petitions for listing, however, the statute is mysteriously open-ended with how the Service must conclude rulemakings initiated by petition.<sup>139</sup>

The reason for these stringent deadlines is to keep the Services honest, to ensure that they are faithfully implementing the ESA and not sitting on listing and designation decisions. The bulk of the deadlines were imposed in the 1982 amendments to the ESA,<sup>140</sup> in response to what Congress saw as the Administration's gross malfeasance in implementing the Act.<sup>141</sup> During the two years prior to that, between January 1981 and May 1982, the FWS had listed only two species, one of which was found entirely on the grounds of the National Zoo.<sup>142</sup> It had not made one designation of critical habitat for any species. The Administration blamed the inability to list species as endangered or threatened on the complexities of the critical habitat designations, which were required to be done concurrently.<sup>143</sup> If the Service could not properly do the designations, it argued, it could not list the species.<sup>144</sup>

The congressional response in 1982 was first to state explicitly that the listings are not to include any economic consideration.<sup>145</sup> It then provided that listings are not to be delayed, apart from the six-month extension for unresolved scientific questions.<sup>146</sup> It lastly allowed for a decoupling of the listing and designation decisions in the event that critical habitat was indeterminable at the time of listing.<sup>147</sup> Congress allowed for the one-year extension if the designation was indeterminable at the time of listing, and then allowed the Secretary to not designate at all if the designation was "not prudent."<sup>148</sup> This is the framework of today's law.

So this provides a rudimentary discussion on authorizations and appropriations, and a detailed legislative background to the ESA listing and designation processes. With the stage set, we are ready to begin.

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139. See ESA § 4(c)(3)(D)(ii), § 1533(c)(3)(D)(ii) ("Within twelve months after receiving a petition that is found . . . to present substantial information indicating that the requested revision may be warranted, the Secretary shall determine how he intends to proceed with the requested revision, and shall promptly publish a notice of such intention in the Federal Register.").

140. See Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, § 2(b), 96 Stat. 1411, 1411-16 (1982).

141. See H.R. REP. NO. 97-567, at 11-12 (1982).

142. *Id.*

143. *Id.*

144. See *id.* at 11-19.

145. See *id.*

146. See *id.*

147. See *id.*

148. *Id.*

## ACT I: THE RIDERS ARRIVE

While riders have come and gone occasionally in legislation passing through the halls of Congress, it was not until 1995 when they stormed the Capitol. It was in that year, the first time in forty years, that the Republicans maintained control over both chambers. The collective giddiness pushed legislative creativity and extremism to unimagined bounds. The steady stream of riders introduced and appended to numerous types of bills was relentless.

*Scene 1: The Onslaught*

The first notable bill carrying riders was an emergency spending measure to provide money to the victims of the bombing of the Edward R. Murrow building in Oklahoma City.<sup>149</sup> At the same time, the bill provided rescissions of funds for other programs in order to pay for the relief efforts and to generally reduce the budget deficit. Included in this bill was a title relating to forestry management, specifically to “salvage” certain timber.<sup>150</sup> The language was extremely broad, and provided for a number of timber sales that were previously suspended or curtailed, in part as a result of the President’s Forest Plan, and in part to comply with other environmental laws.<sup>151</sup> One particular provision provided for the harvest and sale of certain timber “notwithstanding any other law.”<sup>152</sup> Environmental groups brought numerous lawsuits challenging the sales as violative of existing environmental laws, including the National Environmental Policy Act (NEPA),<sup>153</sup> the National Forest Management Act (NFMA),<sup>154</sup> the Forest Land Planning and Management Act (FLPMA),<sup>155</sup> and the ESA.<sup>156</sup> They lost every one. Courts ruled that the language in the rider was explicit in waiving existing environmental laws and, being left with no law to apply, they had to rely on the plain terms of the rider itself, which essentially mandated the sales.<sup>157</sup>

149. See Emergency Supplemental Appropriations for Disaster Relief and Rescissions Act, Pub. L. No. 104-19, 109 Stat. 194 (1995). The original bill, H.R. 1158, was vetoed because of funding cuts to education and the timber salvage rider.

150. Pub. L. No. 104-19, § 2001, 109 Stat. 240, 240-47 (1995).

151. See Goldman & Boyles, *supra* note 8, at 10037-52; Zellmer, *supra* note 8, at 465-66.

152. Pub. L. No. 104-19, § 2001(d), (k), 109 Stat. at 240-47.

153. See NEPA §§ 2-209, 42 U.S.C. §§ 4321-4347 (1989).

154. See 16 U.S.C. §§ 1600-1614 (1999).

155. See 43 U.S.C. §§ 1701-1784 (1995).

156. See ESA §§ 2-18, 16 U.S.C. §§ 1531-1544.

157. Opinions upholding section 2001(b) sales include: *Idaho Sporting Congress v. United States Forest Service*, 92 F.3d 922, 928 (9th Cir. 1996); *Southwest Center for Biological Diversity v. Glickman*, 932 F. Supp. 1189, 1195 (D. Ariz. 1996); *Idaho Conservation League v. Thomas*, 917 F. Supp. 1458, 1468 (D. Idaho 1995), *aff’d*, 91 F.3d 1345 (9th Cir. 1996); *Kentucky*

Numerous articles have been written on the timber salvage rider, discussing in much more detail the terms and interpretations of the rider.<sup>158</sup> The unanimous conclusion is that the rider subverted the traditional legislative process, bypassed public scrutiny, and undermined public policy. To be sure, it was among the most effective pieces of legislation overwriting and tearing down the carefully crafted and negotiated environmental laws of the previous thirty years. What is not mentioned, however, is that there were significant lobbying efforts on all sides to strike the rider prior to congressional enactment, and in the highest levels of the Administration, including the White House, there was talk of vetoing the entire bill, in large part because of the rider. The fact is, that Congress enacted the bill, and the President signed it into law. It is fair to say that nobody (except perhaps the authors of the rider) conceived of the draconian interpretations that the courts would give the rider, but it is not fair to say that nobody was unaware of the rider and its terms as the law was being debated.

This point is underscored with another example of a funding bill that same year, the Balanced Budget Reconciliation Act of 1995.<sup>159</sup> In its original version, the bill contained a provision that allowed for oil and gas drilling in the Arctic National Wildlife Refuge (ANWR).<sup>160</sup> The refuge is among the largest remaining pristine wilderness areas, home to numerous species including the porcupine caribou herd, which happens to sit atop what is estimated to be one of the country's largest oil fields.<sup>161</sup> The highly polarized debate on the fate of ANWR dates back several decades. In 1995, Congress passed the version of the law with the oil and gas drilling provision, despite great efforts on the part of environmental groups to defeat it, and several attempts by members of Congress to strike the provision.<sup>162</sup> In the end, the President vetoed the bill, in large part because of the ANWR provision.<sup>163</sup>

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*Heartwood v. United States Forest Service*, 906 F. Supp. 410, 412-13 (E.D. Ky. 1995); *Ozark Chapter/Sierra Club v. Thomas*, 924 F. Supp. 103, 106 (E.D. Mo. 1996); *Inland Empire Public Lands Council v. Glickman*, 911 F. Supp. 431, 436 (D. Mont. 1995), *aff'd*, 88 F.3d 697 (9th Cir. 1996). With respect to section 2001(d) sales see, for example, *Oregon Natural Resource Council v. Thomas*, 92 F.3d 792 (9th Cir. 1996); *Sierra Club v. United States Forest Service*, No. 94-6245-TC (D. Or. 1995), *aff'd*, 93 F.3d 610 (9th Cir. 1996). With respect to 2001(k), see *Northwest Forest Resources Council v. Glickman (NFRC I)*, 82 F.3d 825, 831-32 (9th Cir. 1996); *NFRC v. Glickman (NFRC II)*, 97 F.3d 1161, 1165-67 (9th Cir. 1996).

158. See, e.g., Goldman & Boyles, *supra* note 8.

159. See Balanced Budget Reconciliation Act, H.R. 2491, 105th Cong. (1995).

160. See *id.*

161. See *id.*

162. See *id.*

163. See *id.*

These two bills, the emergency supplemental appropriations bill and the balanced budget bill, epitomize the practice and politics of riders. While clearly riders do not receive the same careful deliberation that the underlying legislation receives, they are openly known and debated, and they shape success or failure of the bill. Their survival—like all legislation—comes down to the political winds of the moment. In the case of the supplemental appropriations bill, the President did not desire to veto a politically popular bill that was crafted around aid to the victims of America's worst terrorist attack at that time. There was a sense that the riders could be contained administratively, limiting negative impacts. The President signed the bill into law.<sup>164</sup> In the case of the balanced budget bill, there was no popular cause driving the legislation, so the risks of a veto were not as great. At the same time, the opening of ANWR would have far-reaching consequences into the distant future. The President vetoed the bill.<sup>165</sup>

These two bills also served as harbingers of things to come. The appropriations cycle for FY 1996 brought the ideological differences between the Republican Congress and the Clinton Administration to a head. Two aspects of the appropriations bills led to the impasse that resulted in the government shutdown during the winter of 1995-1996. First, the spending limits contained within the appropriations bills were very different than the President's budget request, and specifically targeted his priorities. Second were the legislative provisions, or riders, attached to the appropriations bills. Numerous appropriations bills for FY 1996 were rife with riders, perhaps none so much as the appropriations bill of the Department of the Interior. There were great battles of the floors of the Senate and House, but in the end, Congress passed the Interior appropriations bill with many riders still intact.<sup>166</sup> The President vetoed the bill.<sup>167</sup>

As a result of the veto, and the veto of most of the other appropriations bills, very few appropriations bills for FY 1996 were ready for enactment at the start of FY 1996. Congress enacted, and the President signed into law, a Continuing Resolution (CR) to keep the federal government afloat and provide for funding under authority and conditions of FY 1995 appropriations.<sup>168</sup> That CR, and subsequent ones,

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164. See Emergency Supplemental Appropriations for Disaster Relief and Rescissions Act, Pub. L. No. 104-19, 109 Stat. 194 (1995).

165. See *id.*

166. See *id.*

167. See *id.*

168. See Act of Sept. 30, 1995, Pub. L. No. 104-31, § 101-23, 109 Stat. 278, 278-82 (1995) (providing funding from Sept. 30, 1995 through Nov. 13, 1995).

were renewed every few weeks.<sup>169</sup> A total of thirteen CRs were enacted during the period of October 1, 1995, through April 26, 1996.

Funding was provided by a varying array of complex equations, either amounting to the average of the FY 1996 appropriations levels if the House and Senate both passed a relevant appropriations bill, or the lowest of either the House approved FY 1996 level, the Senate approved FY 1996 level, or the FY 1995 level.<sup>170</sup> The ninth CR offered a slight variation with respect to the FWS and NMFS: funding was provided at the levels provided in the FY 1996 Conference Reports of the House and Senate for the Department of the Interior and Department of Commerce appropriations, which had not been signed into law by the President, but which had resolved most issues between the two houses of Congress.<sup>171</sup>

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Section 101(a) Such amounts as may be necessary under the authority and conditions provided in the applicable appropriations Act for the fiscal year 1995 for continuing projects or activities including the costs of direct loans and loan guarantees (not otherwise specifically provided for in this joint resolution) which were conducted in the fiscal year 1995 and for which appropriations, funds, or other authority would be available in the following appropriations Acts. . . . The Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1996; The Department of the Interior and Related Agencies Appropriations Act, 1996.

*Id.* at 278.

169. *See id.* at 278-82 (providing funding from Sept. 30, 1995 through Nov. 13, 1995); Act of Nov. 20, 1995, Pub. L. No. 104-56, § 104-124, 109 Stat. 548, 548-553 (1995) (providing funding from November 20, 1995, through December 15, 1995); Act of Jan. 6, 1996, Pub. L. No. 104-92, §§ 101-112, 110 Stat. 16, 16-18 (1996) (providing funding from December 15, 1995, through March 15, 1996); Act of Jan. 6, 1996, Pub. L. No. 104-94, § 1-2, 110 Stat. 25, 25 (1996) (providing provision of funding in section 106(c), 109 Stat. at 550 from December 15, 1995, to January 26, 1996); Balanced Budget Down Payment Act, Pub. L. No. 104-99, §§ 101-113, 110 Stat. 26, 26-34 (1996) (providing funding from January 27, 1996, through March 15, 1996); Act of March 29, 1996, Pub. L. No. 104-122, 110 Stat. 876, 876 (1996) (extending provision of funding); Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-34, 110 Stat. 1321 (1996).

170. *See, e.g.*, Pub. L. No. 104-31, §§ 101(b), (c), 109 Stat. at 279.

171. *See* Pub. L. No. 104-99, § 126, 110 Stat. at 33 (relating to the Department of Interior); *id.* § 201, 110 Stat. at 34-35 (relating to the Department of Commerce). Language generally provided that funds would be available based on the rate established in the House-Senate conference report for FY 1996.

Section 126. Notwithstanding any other provision of this title of this Act, such amounts as may be necessary are hereby appropriated under the authority and conditions provided in the applicable appropriations Act for the fiscal year 1995 for continuing, at a rate for operations provided for in the conference report and joint explanatory statement of the Committee of Conference (House Report 104-402) on the Department of the Interior and Related Agencies Appropriations Act, 1996 (H.R. 1977), as passed by the House of Representatives on December 13, 1995, for the following projects or activities including the costs of direct loans and loan guarantees (not otherwise specifically provided for in this Act) which are conducted in the fiscal year 1995: all projects or activities of the . . . United States Fish and Wildlife Service, notwithstanding any other provision of law.

With the government on life support, a consolidated appropriations bill was being negotiated among the Senate, the House, and the Administration. The bill was not without its fair share of riders, but they were being individually negotiated among all three bodies. Congress finally put together the Consolidated Rescissions and Appropriations Act of 1996, combining appropriations for five agencies, which the President signed into law on April 26, 1996, with the fiscal year more than half over.<sup>172</sup>

*Scene 2: The Listing Moratorium*

It was a rider attached to an emergency supplemental appropriations and rescissions bill, primarily for the Department of Defense but including many other agencies, such as the Departments of Commerce and the Interior, that imposed a moratorium on the listing of species as endangered or threatened, and on the designation of critical habitat.<sup>173</sup> The amendment to the bill introduced in the Senate by Senator Kay Bailey Hutchison from Texas, in order to have a “time out” from the ESA, which had been last reauthorized in 1988, and had expired in 1992. Hutchison’s reasoning was that the moratorium would first relieve landowners of what she termed listings of “baitfish,” and “salmon that are running the wrong way in a stream,” and second, put pressure on lawmakers to take up the stalled ESA reauthorization.<sup>174</sup> Senator Reid

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*Id.*

172. See § 101, 110 Stat. at 1321, Pub. L. 104-134.

173. See Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104-6, ch. 4, 109 Stat. 73, 86 (1995) (appropriating funds to the Department of Interior and related agencies).

Of the funds made available under this heading in Public Law 103-332—

- (1) \$1,500,000 are rescinded from the amounts available for making determinations whether a species is a threatened or endangered species and whether habitat is critical habitat under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.); and
- (2) none of the remaining funds appropriated under that heading may be made available for making a final determination that a species is threatened or endangered or that habitat constitutes critical habitat (except a final determination that a species previously determined to be endangered is no longer endangered but continues to be threatened).

To the extent that the Endangered Species Act of 1973 has been interpreted or applied in any court order (including an order approving a settlement between the parties to a civil action) to require the making of a determination respecting any number of species or habitats by a date certain, that Act shall not be applied to require that the determination be made by that date if the making of the determination is made impracticable by the rescission made by the preceding sentence.

174. 141 CONG. REC. S4009-03 (daily ed. Mar. 16, 1995) (statement of Sen. Hutchinson).

I just want common sense to come into the equation, and that is the issue here. My amendment will say time out. The time has come for us to look at the policies. And

moved to strike the rider, pursuant to Senate procedure; the motion was appealed, and a vote ensued.<sup>175</sup> The vote was in the form of a motion to table the amendment, and the motion was defeated, by an amazing sixty to thirty-eight vote, along not-so-amazing party lines.<sup>176</sup>

The rider rescinded \$1.5 million of the FWS' total listing program budget of almost \$8 million.<sup>177</sup> The language was incredibly sloppy. It was limited to final determinations of listing decisions and designations.<sup>178</sup> It certainly did not help the hand of landowners and conservatives. It also allowed the Service to work on listing decisions right up to the point of *Federal Register* publication,<sup>179</sup> which would consume FWS resources with no tangible benefit for either side. More importantly, it would ultimately cost a great deal more in government resources to overcome the backlog that would accrue during the moratorium. Some of these views were expressed, in a letter signed by thirty-nine senators, to the Senate conferees urging removal of the language from the bill.<sup>180</sup> Interestingly, the House version of the bill did not include the moratorium language.<sup>181</sup> However, the House-Senate conferees adopted it, and the language stayed in. The conferees reiterated the sentiments expressed on the Senate floor, calling for a "time-out."<sup>182</sup> The bill was signed into law on April 10, 1995.<sup>183</sup>

Because it was included in the Interior appropriations title of the emergency supplemental appropriations and rescissions bill, and not also included in the Commerce appropriations title, it was clear that the

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we are going to take up the reauthorization of the Endangered Species Act. . . . I am trying to say, "time out," so that silly things will not happen, so that bait fish and golden checked warblers and jaguars and salmon that are running the wrong way in a stream will not take precedence over the rights of farmers and ranchers.

*Id.* at S4028-34.

175. *Id.* at S4034.

176. *Id.* Several years later, Senator Reid would state that this amendment set the precedent for future riders for the next four years and fundamentally altered the Senate. *See* 145 CONG. REG. S9171 (daily ed. July 26, 1999) (statement of Sen. Reid).

177. *See* Endangered and Threatened Wildlife and Plants: Restarting the Listing Program and Final Listing Priority Guidance, 61 Fed. Reg. 24,722 (May 16, 1996) (to be codified at 50 C.F.R. pt. 17).

178. *See id.*

179. *See id.*

180. Letter to Senate Conferees from Senator Baucus et al., Mar. 20, 1995 (on file with author).

181. *See* H.R. 889, 104th Cong. (1995).

182. Joint Explanatory Statement of the Committee of Conference, 141 CONG. REC. H4328 (daily ed. Apr. 5, 1995).

183. *See* Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104-6, ch. 4, 109 Stat. 73, 86 (1995).



moratorium applied to FWS actions and not NMFS actions. However, as discussed above, the NMFS could not complete the listing process by itself; once it completed the determination, it needed to inform the FWS which would then update the actual list. The FWS refused to do this. The FWS could have argued technically that the language precluded the FWS from making determinations under section 4(a) but still allowed the FWS to list any NMFS species under section 4(c); this, however, would have been political suicide. The congressional intent was clear, even if the language was not (a court, however, would have likely ruled in favor of NMFS listing). So the NMFS could actually determine that a species was endangered or threatened, but the species would not be added to the list, and therefore not all the protections would apply.<sup>184</sup>

As the year progressed and Congress drafted the spending bills for FY 1996, it clarified and cleaned up the moratorium language. For the FY 1996 appropriations bill for the Department of the Interior, it explicitly prohibited funds for implementation of subsections (a), (b), (c), (e), (g), and (i) of section 4 of the ESA.<sup>185</sup> An exception was allowed for activities relating to delisting species and reclassifying species from endangered to threatened.<sup>186</sup> Section 4(d) rulemakings, which applied to threatened species and were considered to be a relaxation of the section 9 taking prohibition otherwise applicable, were allowed to be promulgated.<sup>187</sup> Implementation and development of recovery plans pursuant to subsection (f) were also allowed to continue.<sup>188</sup> The moratorium would be in place for the fiscal year or until the ESA was reauthorized, whichever was earlier.<sup>189</sup>

Congress also fixed the situation with respect to the NMFS. At first, the House merely zeroed the line-item for the NMFS' ESA listing

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184. See ESA § 4(c)(1), 16 U.S.C. § 1533(c)(1)(1999); *supra* notes 117-119 and accompanying text.

185. See Omnibus Consolidated Rescissions and Appropriation Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-159 to -160 (1996).

That no monies appropriated under this or any other Act shall be used by the Secretary of the Interior or by the Secretary of Commerce to implement subsections (a), (b), (c), (e), (g), or (i) of section 4 of the Endangered Species Act of 1973 (16 U.S.C. § 1533), until such time as legislation reauthorizing the Act is enacted or until the end of fiscal year 1996, whichever is earlier, except that monies may be used to delist or reclassify species pursuant to sections 4(a)(2)(B), 4(c)(2)(B)(i), and 4(c)(2)(B)(ii) of the Endangered Species Act, and to issue emergency listings under section 4(b)(7) of the Endangered Species Act.

*Id.*

186. See *id.*

187. See *id.*

188. See *id.*

189. See *id.*

program, without including any moratorium language. Given court orders and reprogramming authority, this action by the House would not be adequate. The Senate fixed the potential problem by including identical language in both the Interior appropriations bill and the appropriations bill for the Departments of Commerce, State, and Justice.<sup>190</sup>

Fixing the technicalities was a moot issue for those appropriations bills, because they were continually vetoed by the President. At the start of FY 1996, the continuing resolutions governed spending. They in turn referred to the terms and conditions governing FY 1995 spending, so that the listing moratorium on FWS activities was automatically renewed with the continuing resolutions.<sup>191</sup> It did not apply, however, to the NMFS, which was not subject to the moratorium under FY 1995 spending terms. The NMFS was finally ensnared with the ninth CR, which shifted the terms and conditions for spending from FY 1995 to FY 1996.<sup>192</sup> By the ninth CR, Congress had worked out several of the conference reports for FY 1996 spending, and even though the reports were vetoed by the President, the CR spending levels and conditions were tied to those conference reports for both the Department of the Interior and the Department of Commerce.<sup>193</sup> The FY 1996 Conference Report for the Department of the Interior contained moratorium language for the FWS, so the moratorium remained in effect for the FWS, but gave the agency a little more funding.<sup>194</sup> The FY 1996 Conference Report for the Department of Commerce had both zeroed out the line-item for listings, and had language prohibiting listings.<sup>195</sup>

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190. In introducing the amendment to the Commerce, State, and Justice appropriations bill, Senator Slade Gorton (R-WA) stated:

What this amendment does is to ensure that both the Secretary of Interior and the Secretary of Commerce—both of whom have jurisdiction over the implementation of the ESA—are implementing the law consistently. If the full committee adopts my amendment, both Secretaries will be held to the same standard.

141 CONG. REC. S14671 (daily ed. Sept. 29, 1995) (statement of Sen. Gorton).

191. See *infra* notes 201-214.

192. See Balanced Budget Down Payment Act, Pub. L. 104-99, §§ 101-131, 110 Stat. 26, 26-34 (1996).

193. See *id.* § 126 (regarding the Department of the Interior); *id.* § 201 (regarding the Department of Commerce).

194. See *id.* § 123

195. See *id.* § 201 (referring to H.R. REP. NO. 104-378 (1995)); H.R. REP. NO. 104-378, title II, § 207 (1995) (regarding line-item for listings and limitation in § 207 in H.R. REP. NO. 104-378).

In the end, the omnibus appropriations bill that was signed into law still contained the listing moratorium language.<sup>196</sup> However, it also contained a proviso that allowed the President to suspend the moratorium.<sup>197</sup> The President suspended the moratorium simultaneously with the signing. The moratorium thus came to end on April 26, 1996, 381 days after it began.

#### ACT II: THE ADMINISTRATION RESPONDS

At least initially, the FWS maintained its program under the surface. It was prohibited from making final determinations for species or designations of critical habitat.<sup>198</sup> It was not prohibited from either preparing final rulemaking documents (which could not be published) or from conducting other activities under the listing program.<sup>199</sup> The FWS chose to redirect its efforts from preparation of the final rulemaking documents, to other activities relating to proposed and candidate species.<sup>200</sup> For any pending proposed rules, the FWS decided that it

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196. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, 110 Stat. 1321, 1321-159 to -160 (1996).

197. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-34, 110 Stat. 1321-159 to -160 (1996).

*Provided further*, That the President is authorized to suspend the provisions of the preceding proviso if he determines that such suspension is appropriate based upon the public interest in sound environmental management, sustainable resource use, protection of national or locally-affected interests, or protection of any cultural, biological or historic resources. Any suspension by the President shall take effect on such date, and continue in effect for such period (not to extend beyond the period in which the preceding proviso would otherwise be in effect), as the President may determine, and shall be reported to the Congress.

*Id.*

198. Memorandum From Director of FWS, to Regional Directors Regions 1-7 (Apr. 21, 1995) (on file with author).

199. *Id.*

The Service is interpreting the moratorium language to mean that the Service cannot publish final rules, including emergency rules, to list species or designate critical habitat under section 4(a)(1) or 4(a)(3) of the endangered species act. However, I want the service to continue to develop and publish petition findings, findings on candidate reclassifications, appropriate listing proposals, and conduct public hearings.

*Id.*

200. *Id.*

To do otherwise would lead to the continued expenditure of scarce resources on the preparation of final rulemaking documents that cannot be presented for final action during this fiscal year. In my judgment, the Service cannot afford to waste its remaining listing funds in FY 95 by continuing work on final listing documents and should instead work on resulting its candidate species list, especially those candidates identified as Category 1 of priorities of 2 or 3.

*Id.*

would complete the public comment period but merely archive comments received during the period.<sup>201</sup>

Pending litigation posed additional complications for the FWS. One court-sanctioned settlement—the *Fund for Animals* settlement—required that the FWS make expeditious progress in resolving the status of Category 1 candidate species, by either publishing proposed listing determinations, or finding that a proposed listing is not warranted.<sup>202</sup> The moratorium language essentially superseded the terms of the settlement with respect to final determinations. With respect to proposed determinations, the Service sought to prioritize the *Fund for Animals* settlement.<sup>203</sup>

This guidance carried the FWS through the remainder of FY 1995. However, the prognosis for FY 1996 was looking worse. The language regarding the listing moratorium was broader and harsher in several versions of bills for FY 1996 appropriations bills for the Department of the Interior and the Department of Commerce. Those bills, however, were never signed into law. Instead, given the stalemate, the continuing resolutions took effect in the beginning of FY 1996.

In light of the language of the continuing resolutions, which extended the moratorium, and the draft appropriations bills, which broadened the moratorium, the FWS revised its guidance on October 13, 1996, and took a more restrictive view than it previously had.<sup>204</sup> The

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201. *Id.* “For the course of the moratorium, the listing process for proposed rules will stop with the completion of the public comment period. The comments received will be archived. Analysis of the comments and preparation of final rules will commence when the moratorium is lifted.” *Id.*

202. *Id.*

203. *Id.*

The section significantly hinders, especially in Region 1, the Service’s ability to meet the conditions of the settlement. Therefore, with regard to any current court orders or court-approved settlement agreements that constrain the service’s ability to focus exclusively on the resolution of Category 1 candidate species . . . I am requesting the Department of Justice to enter into negotiations with opposing parties and, if necessary, seek judicial relief to maximize our capability to invest our remaining funds on the resolution of these high priority candidate species.

*Id.*

204. Memorandum from Director of FWS, to Regional Directors Regions 1-7 (Oct. 13, 1995) (on file with author).

Due to the associated and severe listing funding constraints in the Continuing Resolution as well as in the FY 96 Appropriations Bill, the service must now make a new policy call relative to which listing activities, that had been permitted under the April 21, 1995, instructions, will be continued and which will now be suspended. We must take into account the circumstances we expect to be in place throughout FY 96 as we make the decisions. It is not cost-effective to start actions now that we will not be able to complete later in the year. Also, expending funds at a high rate during the

FWS had very limited funds: under the terms of the CR, the FWS had available the average of the zero funds provided in the House appropriations bill, and \$750,000 provided in the Senate bill, approximately \$43,000 during this time period.<sup>205</sup> The FWS chose to limit its activities to those relating to the following: completion of ongoing comment periods and public hearings for proposals published during FY 1995; completing petition findings; and processing of delisting and down-listing actions.<sup>206</sup>

The early warning signs of an administrative disaster were already visible. In addition to the *Fund for Animals* settlement requirements, the FWS already had five court-ordered critical habitat designations to publish, and it was prohibited from doing so.<sup>207</sup> Petitions were still being submitted; by March 11, 1996, forty-one new petitions had been received during the moratorium. The FWS had proposed listings already published for 243 species, with the one-year statutory clock still ticking.<sup>208</sup> Lastly, 180 species were identified as candidates, which also had statutory deadlines.<sup>209</sup> The restrictions of the moratorium, the requirements of the ESA, and the decisions of the courts were on a collision course.

The speed towards the impending collision only got faster with the extension of the Continuing Resolutions. The FWS had to shut down its listing program and reassign personnel because, after the first CR, no additional funds were available for the program.<sup>210</sup> It was not until the

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Continuing Resolution, and then having little or no remaining funding during the balance of FY 96, would only hurt the program in the long run.

205. See Endangered and Threatened Wildlife and Plants; Restarting the Listing Program and Final Listing Priority Guidance, 61 Fed. Reg. 24,722, 24,723 (May 16, 1996).

206. *Id.*

207. See *id.* at 24,728. The court-ordered critical habitat rules which were still pending (Klamath fish, marbled murrelet, western snowy plover, and the Virgin River chub/woundfin) were prevented by the FY 1995 moratorium, the CR, the FY 1996 moratorium, and the lack of funding. The Department of Justice was requested to petition the relevant courts for relief in light of the moratorium and funding circumstances. *Id.*

208. See Endangered and Threatened Wildlife and Plants; Interior Listing Priority Guidance, 61 Fed. Reg. 9651, 9651-53 (Mar. 11, 1996) (to be codified at 50 C.F.R. pt. 17).

209. See *id.*

210. Memorandum from Director of FWS, to Service Directorate (Nov. 22, 1995) (on file with author).

Based on the rate structure established in the CR in the allocation process, . . . no funds are available for listing or prelisting during the period covered by the two CRs, Nov. 14, 1995 through Dec. 15, 1995. During this period no funds are to be expended in the listing or prelisting program elements and no prelisting or listing actions funded from these program elements will be conducted. Staff currently funded by these program elements should be reassigned to conduct other activities in the region that have work to be accomplished and sufficient funding.

ninth CR, which restored funding under authority and conditions prescribed by the FY 1996 appropriations conference report vetoed by the President, that the FWS got a little funding to apply to its listing program.<sup>211</sup> But the FWS was wary about replacing personnel into the listing program only to furlough or reassign them again.<sup>212</sup> Under the FY 1996 conference report, the FWS was scheduled to receive \$750,000 for the year for its listing program. It used that figure as the benchmark to determine how much to spend during the current CR. Essentially it had \$100,000—\$750,000 prorated over forty-nine days.<sup>213</sup>

Whereas the FWS had begun the moratorium the previous year by working on proposed rules and designations, by now all activities had stalled. With the limited funding provided in the most recent CR, it published a revised Candidate Notice of Review, updating the list of candidate species.<sup>214</sup> It also published an interim guidance, in anticipation of the lifting of the moratorium.<sup>215</sup>

The interim guidance stated that the priority for handling species determination would be based on the “immediacy and magnitude of the threats” facing the species.<sup>216</sup> The FWS would “focus its efforts on actions that will provide the greatest conservation benefits to imperiled species in the most expeditious manner.”<sup>217</sup> It had long previously developed guidance for making listing and designation decisions, and how to prioritize such decisions.<sup>218</sup> However, it needed to significantly revamp that guidance in light of the backlog.

*Id.*

211. Balanced Budget Down Payment Act, Pub. L. 104-99, §§ 101-131, 110 Stat. 26, 26-34 (1996).

212. See Memorandum from Director of FWS to Service Directorate (Feb. 1, 1996) (on file with author).

Further complicating out situation, the listing program was suspended and all listing personnel were reassigned to other activities and programs based on the CRs that covered the period from Nov. 14, 1995, Jan. 26, 1996, when no funding was available for listing activities under the rate set in the CR. . . . It is not cost effective . . . nor is it prudent to continuously shift personnel into and out of the listing program thereby putting them at greater risk of Reductions in Force (RIFs) or furloughs.

*Id.* at 2.

213. See *id.*

214. Endangered and Threatened Wildlife and Plants; Review of Plant and Animal Taxa That Are Candidates for Listing as Endangered or Threatened Species, 61 Fed. Reg. 7596, 7596-7613 (Feb. 28, 1996).

215. See Endangered and Threatened Wildlife and Plants; Interior Listing Priority Guidance, 61 Fed. Reg. 9651, 9651-53 (Mar. 11, 1996) (to be codified at 50 C.F.R. pt. 17).

216. *Id.* at 9652.

217. *Id.*

218. See Fish and Wildlife Service Endangered and Threatened Species Listing and Recovery Priority Guidelines, 48 Fed. Reg. 43,098, 43,102-03 (Sept. 21, 1983).

When the moratorium expired, the situation was bleak. The FWS was left with a backlog of 243 species proposed as endangered or threatened, 57 new petitions, a candidate list of 281 species, 60 lawsuits, and an additional 300 notices of intended lawsuits.<sup>219</sup> All of this needed to be addressed with a budget less than half its usual size. The previous year, FY 1995, the FWS had a listing budget of almost \$8 million; this year, for FY 1996, it had a budget of \$4 million, of which \$233,000 had been expended during the pendency of the CRs.<sup>220</sup>

The NMFS was faring a little better. The moratorium finally swept up the NMFS with the enactment of the ninth CR, which referred to the FY 1996 House and Senate Conference Report.<sup>221</sup> That Conference Report had zeroed out the funding for the NMFS listing program. The NMFS issued guidance that called for a halt to all section 4 activities connected to determinations and listings.<sup>222</sup> After the moratorium was lifted on April 26, 1996, it too issued listing priority guidance for restarting the program.<sup>223</sup> It identified three principles for setting priorities: the degree of biological risk to the species; the biological benefits of the action taken; and the amount of agency resources in taking the action. Applying these principles, it determined the following six priorities in order: (1) emergency listings; (2) final determinations for species where risk factors are currently high and not specifically addressed, and work is almost completed; (3) proposed determinations for species meeting the same criteria as in (2); (4) final determinations for species already receiving some degree of protection or which will require significant resources; (5) proposed determinations for species that will require significant resources; and (6) proposed and final critical habitat designations.<sup>224</sup> This guidance was slightly different than that of the FWS; it offered slightly more triage in accommodating staff resources and workloads. However, because the backlog was only a

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219. See Endangered and Threatened Wildlife and Plants; Restarting the Listing Program and Final Listing Priority Guidance, 61 Fed. Reg. 24,722, 24,723-25 (May 16, 1996) (to be codified at 50 C.F.R. pt. 17).

220. See *id.* at 24,723.

221. See H. REP. No. 104-378 (1995).

222. Memorandum from Rolland A. Schmitten, Director, to Regional Directors (Feb. 7, 1996) (on file with author) ("NMFS must suspend work on proposed or final listings or designations of critical habitat under the ESA until further notice."); see also Memorandum from William Stelle, Director Northwest Region, to Rolland Schmitten, Phase-Down Plan for ESA Listing Activities in NWR and SWR (Jan. 23, 1996).

223. Memorandum from Rolland Schmitten, Director, to Regional Directors (May 22, 1996).

224. See *id.*

handful of species, the NMFS was able to climb out fairly quickly and return to its normal schedules.

The FWS revised “listing priority guidance” was an attempt to focus funds and effort on those actions that would be the most beneficial to the most imperiled species.<sup>225</sup> It was meant to be driven by the biological priorities of the species, and the administrative importance of the particular action. In this way, it was fundamentally different than the listing priority guidance of 1983, which focused on prioritizing species, not specific administrative decisions for any one species.

Through its guidance, the Service sought to take charge over its own schedule, rather than let the rising tide of litigation carry it away.<sup>226</sup> It very perceptively saw the threats that the onslaught of litigation was to bring, with competing demands for limited resources.<sup>227</sup> It expressly stated that it would not let litigation drive its priorities or schedules.<sup>228</sup> It

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225. See *Endangered and Threatened Wildlife and Plants: Restarting the Listing Program and Final Listing Priority Guidance*, 61 Fed. Reg. 24,722, 24,725 (May 16, 1996) (to be codified at 50 C.F.R. pt. 17).

The publication of the priority guidance is intended to explain to the public (including litigants and reviewing courts) precisely how the Service believes it should use its limited listing appropriations to maximum effect to carry out the purposes of the Act. . . . The main principle underlying the listing priority guidance is to focus the limited listing resources on those actions that will result in the greatest conservation benefit for the species in the most urgent need of the act’s protections.

226. See *id.* at 24,723-24.

Biological need, not the preferences of litigants, should drive the listing process. The Service will work closely with the Department of Justice to defend its priority system in those cases where plaintiffs, in pending or new cases, request actions that would cause the Service to diverge from the principles discussed here, and therefore, in the judgment of the Service, would divert resources from providing prompt protection to those species the Service believes to be in greatest need of the protections of the Endangered Species Act.

*Id.*

227. See *id.* at 24,724.

This pending and threatened litigation presents many competing and conflicting claims, and in the current budgetary situation translates into expensive demands on inadequate resources. Actions requested by plaintiffs cover the entire spectrum of listing activities, from petitions to add species to the list to requests to overturn existing listings. Taken collectively, these pending and potential cases seek different and sometimes diametrically opposed results. Defending existing and any new lawsuits can divert considerable resources away from the Service’s efforts to conserve endangered species. When the Service undertakes one listing activity, it inevitably forgoes another. In some cases courts have ordered the Service to complete activities that are simply not, in the Service’s expert judgment, among the highest biological priorities.

*Id.*

228. *Id.* at 24,728.

The Service will not elevate the priority of proposed listings for species simply because they are subjects of active litigation. To do so would let litigants, rather than expert



would apply the guidance to specific situations and present its justifications to courts.<sup>229</sup> At the same time, it would follow any court orders issued.<sup>230</sup>

The FWS established five priorities. The highest was emergency listings, pursuant to ESA section 4(b)(7), which was to address a threat that “poses a risk to the well-being of the species.”<sup>231</sup> They were effective for 240 days. The next highest was the processing of final listing decisions for species that had already been proposed to be listed. Priority within Tier 2 was given to species facing the greatest and most imminent threats.<sup>232</sup> Tiers 3 and 4 related to processing petitions leading to proposed rules; the particular tier depended on the threats facing the species at issue.<sup>233</sup> Delistings and reclassifications were considered Tier 4.

At Tier 5, critical habitat designations were given the lowest priority.<sup>234</sup> The FWS reasoned that critical habitat “consumes large amounts of the Service’s listing appropriation and generally provides

biological judgments, control the setting of listing priorities. The Regional Office with responsibility for processing such packages will need to determine the relative priority of such cases based upon this guidance and the 1983 listing priority guidelines and furnish supporting documentation that can be submitted to the relevant Court to indicate where such species fall in the overall priority scheme.

229. *Id.*

The Service will assess the relative priority of all section 4 petition and rule-making activities that are the subject of active litigation using this guidance and the 1983 listing priority guidelines. In many cases, simply identifying the tier in which an activity falls will suffice to determine whether the Service will undertake that action during the time this priority guidance is in effect. The Service, through the Office of the Solicitor, will then notify the Justice Department of its priority determination and request that appropriate relief be requested from each district court to allow those species with the highest biological priority to be addressed first.

*Id.*

230. *Id.* (“To the extent that the courts do not defer to the Service’s priority guidance and the 1983 listing priority guidelines, the Service will of course comply with court orders despite any conservation disruption that may result.”).

231. ESA § 4(b)(7), 16 U.S.C. § 1533(b)(7) (1999).

232. *See* Endangered and Threatened Wildlife and Plants: Restarting the Listing Program and Final Listing Priority Guidance, 61 Fed. Reg. 24,722, 24,725 (May 16, 1996) (to be codified at 50 C.F.R. pt. 17).

Within Tier 2, highest priority will be given to species facing the highest magnitude and most imminent threats. For species with equal listing priority assignments, the following types of actions will receive subsequent priority—listing packages that cover multiple species; listing packages that can be quickly cleared (e.g., those with few public comments or factual questions presented); and proposals that have been pending the longest.

233. *See id.* at 24,725. Tier 3 was for “new proposed listings for species facing high-magnitude threats, and screening petitions for emergency situations.” *Id.* Tier 4 was for “new proposed listings for species facing moderate- or low-magnitude threats.” *Id.*

234. *See id.*

only limited conservation benefits.<sup>235</sup> The fact that critical habitat was treated separately from listings was a big change. Since the initial priority guidance was published in 1983, designations were treated part and parcel with the listing determination.<sup>236</sup> The FWS' position with respect to critical habitat designations already had a long, tortured history, which became much more greatly tortured after the moratorium and as a result of the listing priority guidance.<sup>237</sup>

The FWS published a revised listing priority guidance for FY 1997.<sup>238</sup> It reported that the listing budget for FY 1997 was only \$5 million, significantly less than the President's budget request of \$7.5 million.<sup>239</sup> The FWS openly discussed the dilemma of complying with the court order in the *Fund for Animals* litigation to review candidate species, or spending resources to publish final listing determinations.<sup>240</sup> It established, this time, a four tier listing priority guidance, as follows: (1) processing emergency listings; (2) processing final rules; (3) pro-

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235. *Id.* at 24,728.

236. *See id.* at 24,724-25. The FWS explained the change as follows:

The 1983 guidelines do not establish priorities among different types of listing activities, which include processing pending proposed listings, new proposed listings, the listings or reclassifications, petition findings, and critical habitat determinations. The backlog of proposed species created by the moratorium and the recent funding constraints prompted the Service to establish priorities among the areas of listing activities.

*Id.*

237. *See* Patlis, *supra* note 82, at 177, 198. Despite the inflexible, upfront deadline of the designation simultaneous with the listing decision, the designation requires comprehensive studies of the conservation needs of the species, and a cost-benefit analysis of the designation. The listing itself requires neither. This dichotomous treatment of listings and designations has made the designations difficult to complete within the statutory deadline, even with the one-year extension invoked. As a result, the Service was never fond of designating critical habitat. After the moratorium, with a huge backlog and little funding, the Service's disdain for the designation requirement grew even deeper. "It refused to designate critical habitat in almost all circumstances, relying on the two exemptions allowed under the ESA. It found critical habitat either not prudent or not determinable, or made no determination whatsoever." *Id.*

238. *See* Endangered and Threatened Wildlife and Plants; Final Listing Priority Guidance for Fiscal Year 1997, 61 Fed. Reg. 64,475 (Dec. 5, 1996).

239. *See id.* at 64,476.

240. *See id.* at 64,477.

The Service's entire FY 1997 listing budget is insufficient to comply with the Fund for Animals Settlement Agreement. If it attempted to comply, it would devote no resources to making final listing decisions on the remaining 151 proposed species, the vast majority of which face high-magnitude threats. Though so close to receiving the full protection of the Act, these species would move no closer to that goal while all the Service's efforts would be bent toward deciding whether to move candidate species closer to proposed listing, where they receive some limited procedural protection (the Section 7 conference requirement, see 16 U.S.C. 1536(a)(4)), but not the full substantive and procedural protection afforded by final listing.

*Id.*

cessing petitions, ninety-day findings, and proposed rules; and (4) processing critical habitat designations, reclassifications, and delistings.<sup>241</sup> The language regarding litigation and judicial deference to the guidance remained largely the same as the previous guidance.<sup>242</sup>

The FWS issued a priority listing guidance again in 1998, as well as 1999.<sup>243</sup> Congress approved \$5.19 million for listings in FY 1998, and \$5.76 million in FY 1999. For those two years, the FWS adopted a three-tier system, in which emergency listings were Tier 1; all listing activities, ninety-day findings, and proposed and final rules, were Tier 2; and critical habitat designations were Tier 3.<sup>244</sup> Despite a barrage of negative comments received in the treatment of critical habitat designations, the FWS “remain[ed] firm in its policy that critical habitat generally provides little or no additional conservation benefits beyond those provided by the consultation provisions of Section 7 and the prohibitions of Section 9, while cost of designation remains high.”<sup>245</sup> In FY 1999, the FWS separated administrative costs associated with delistings and reclassifications from endangered to threatened status, these actions began to be handled with funding from the recovery program budget.<sup>246</sup>

It then issued guidance again for FY 2000.<sup>247</sup> The FWS had come a long way to recover from the backlog.<sup>248</sup> Despite ongoing litigation, the

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241. *Id.* at 64,479-80.

242. *See id.* at 64,480.

[T]o the extent that [the guidance] do not receive deference in the courts, the Service will need to comply with court orders despite any conservation disruption that may result subject to any appeals that may be undertaken on a case-by-case basis. The fact that the Service acknowledges its duty to comply with court orders should not, however, be interpreted to mean that it acquiesces in the idea that all such court orders are consistent with this guidance without regard to how disruptive they may be to the Service’s effort to make the most biologically sound use of its resources.

*Id.*

243. *See* Endangered and Threatened Wildlife and Plants; Final Listing Priority Guidance for Fiscal Years 1998 and 1999, 63 Fed. Reg. 25,502 (May 8, 1998).

244. *Id.* at 25,509-11. Within Tier 2 were subpriorities for each action in the listing process. “Pursuant to the 1983 listing priority guidelines, final determinations on proposed rules dealing with taxa believed to face imminent, high-magnitude threats have the highest priority within Tier 2.” *Id.* at 25,509.

245. *Id.* at 25,505.

246. *See* Personal Communication with Gary Fraser, Assistant Director, FWS (Jan. 24, 2003).

247. *See* Endangered and Threatened Wildlife and Plants; Final Listing Priority Guidance for Fiscal Year 2000, 64 Fed. Reg. 57,114 (Oct. 22, 1999).

248. *See id.* at 57,115.

Since the end of FY 1998, and up to July 31, 1999, 38 final determinations, eighteen proposed rules, fifteen petition findings, five proposed delistings, one final delisting, and two proposed and three final critical habitat designations have been completed.

FWS remained resolute: “[W]e will not adjust our biological priorities to reflect the threat of litigation.”<sup>249</sup> The Service again emphasized that litigation-driven actions prioritize only those species that have a plaintiff behind them (and often a larger political objective), rather than those species that are most endangered.<sup>250</sup> In putting forth its priorities, it established four tiers: (1) emergency listings; (2) processing final listings; (3) processing decisions relating to candidate species; and (4) processing petitions for new listings.<sup>251</sup> This time, however, it handled critical habitat designations separately.<sup>252</sup> Isolating a small percent of its listing program budget—17% for designations—it effectively precluded any serious efforts to prepare and publish future designations, especially any designations that might be controversial. Costs for such designations could be exceedingly high. For example, the cost of the designation reached as much as \$1 million for the Northern spotted owl.<sup>253</sup> Since the end of the moratorium in April 1996, through July 1999, the Service had failed to designate critical habitat in all but two of the 256 listings published during that time. And the lawsuits came . . .

### ACT III: ATTACK OF THE COURTS

. . . in droves. Four stages of battle have been fought in the courts. The first stage was an attack on the moratorium itself. The second was an attack on the listing decisions of the Service immediately following the moratorium, with allegations that the Service was not devoting enough resources generally to the endeavor, and not enough resources for the particular species at issue in the lawsuit. The third stage focused on failure to make designations. The Service is presently in the fourth stage, handling challenges to the merits of the decisions that it made in response to the previous stage of litigation.

The first attack against the moratorium itself failed miserably. The court decisions relating to the moratorium were almost unanimous. The

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The proposed critical habitat designations, Tier 3 activities, were undertaken to comply with court orders.

*Id.*

249. *Id.* at 57,118.

250. *See id.* (“For instance, in response to litigation, we might spend our entire listing budget designating critical habitat for species already listed and therefore subject to most of the protections of the Act, while a gravely imperilled species without the benefit of an interested litigant would be denied the Act’s protection.”).

251. *Id.*

252. *See id.* (“Critical habitat actions will be conducted within a specified amount of funding (\$979,000 (17% of total) for FY 99) which has been set aside out of the listing subactivity.”).

253. *See id.*

language of the moratorium was clear and unambiguous on its face, and there was no question that it rescinded funding to comply with the ESA requirements.<sup>254</sup> Courts drew a careful distinction, however, between saying that the rider repealed or modified the ESA, and that the rider rescinded funding for the ESA.<sup>255</sup> The courts held that while the Secretary was in violation of the ESA requirements, it could not comply until the moratorium was lifted. In one case to list the red-legged frog, the FWS was given “a reasonable time after appropriated funds are made available” to comply with the deadline,<sup>256</sup> and in another case to list the steelhead trout, the NMFS was given thirty days to comply with the deadline.<sup>257</sup>

There was one chink in the armor of the moratorium, however. The rider stated that agencies need not comply with a court order (including a court-ordered settlement) requiring a listing or designation determination “if the making of the determination is made impracticable by the rescission.”<sup>258</sup> In two cases, the courts held that the FWS had to proceed with the designations of critical habitat that were already subject to court order notwithstanding the rider.<sup>259</sup> In each case, the court reversed the wording to say that the FWS was required to designate critical habitat for the marbled murrelet unless the designation was “impracticable.”<sup>260</sup> Each court then took a very narrow view of the meaning of “impracticability,” holding that as the FWS had some ability in fact to publish the designation, it was required to do so.<sup>261</sup> In *Marbled Murrelet v. Babbitt*, for example, the court considered the FWS’ declarations regarding its listing budget and the projected costs to complete the designation, and held that it could in fact publish a designation.<sup>262</sup> In *Silver v. Babbitt*, the

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254. See, e.g., *Envtl. Def. Ctr. v. Babbitt*, 73 F.3d 867, 871 (9th Cir. 1995); *Marbled Murrelet v. Babbitt*, 918 F. Supp. 318, 320 (W.D. Wash. 1996).

255. See, e.g., *Envtl. Def. Ctr.*, 73 F.3d 871 (“We agree with EDC that the rider does not repeal the Secretary’s listing duty under the ESA. We agree with the Secretary, however, that the rider prevents him from taking final action on the petition at this time.”).

256. *Id.* at 872.

257. *Or. Natural Res. Council v. Brown*, Civ. No. 95-CV-3117 at 1 (N.D. Cal. June 24, 1996).

258. Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub. L. 104-6, ch. 4, 109 Stat. 73, 86 (1995).

259. See *Silver v. Babbitt*, 924 F. Supp. 972, 976 (D. Ariz. 1995); *Marbled Murrelet*, 918 F. Supp. at 320.

260. See *Silver*, 924 F. Supp. at 975; *Marbled Murrelet*, 918 F. Supp. at 320.

261. See *Silver*, 924 F. Supp. at 976; *Marbled Murrelet*, 918 F. Supp. at 320;.

262. The FWS filed an affidavit that designation would cost \$163,000 to complete, while it had, at that time under the CR, only \$43,000 remaining in the budget. The court found that the identified costs were either overhead that should not be attributable to the designation, or not necessary given the fact that the FWS had spent almost four years on the designation already, and

FWS itself conceded that “final habitat designation is not impracticable as a factual matter.”<sup>263</sup> In each case, the court agreed with plaintiffs that it would be an unconstitutional violation of the separation of powers if the rider were interpreted to overturn outright a court order.<sup>264</sup> Each court further rejected FWS arguments that designation would contravene the intent of the rider to call a “time out,” as discussed in the legislative history.<sup>265</sup> In each case, the court found that the rider was clear and unambiguous, so that there was no need to go to the legislative history.<sup>266</sup> Interpreting “impracticability” to be very narrow, each court ordered the FWS to proceed with the designation despite the moratorium.<sup>267</sup>

As soon as the moratorium was lifted, the shield was gone. The second stage of attack presented instant victories for plaintiffs and no mercy for the Services. In the case involving the red-legged frog mentioned above, in which the circuit court mandated listing within a reasonable period of time, the district court entertained a hearing ten days after the moratorium ended and required listing fourteen days after that.<sup>268</sup> A mere seventeen days after the moratorium was lifted, a California district court<sup>269</sup> showed little sympathy to the FWS’ arguments that it had limited funds.<sup>270</sup> It ordered compliance with the requirement to complete a ninety-day finding for three species of freshwater fish, no later than forty-five days from the date of the decision.<sup>271</sup> That court refrained from judgment on the FWS interim guidance, saying that it “expresses no view on the propriety or enforceability of the Secretary’s proposed ‘interim guidelines,’ with respect to prioritization of activities.”<sup>272</sup>

The case of *Forest Guardians v. Babbitt*, in the United States Court of Appeals for the Tenth Circuit, epitomizes the issues and conflicts of the cases characterized in the second and third stage of assaults against missed deadlines for both listings and designations.<sup>273</sup> The district court recognized that the FWS had a mandatory duty to designate critical

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had only three months to go before the original court-ordered deadline. See *Marbled Murrelet*, 918 F. Supp. at 321-22.

263. 924 F. Supp. at 976.

264. *Id.*; *Marbled Murrelet*, 918 F. Supp. at 321.

265. *Silver*, 924 F. Supp. at 974-75; *Marbled Murrelet*, 918 F. Supp. at 321.

266. *Silver*, 924 F. Supp. at 975; *Marbled Murrelet*, 918 F. Supp. at 320.

267. *Silver*, 924 F. Supp. at 976; *Marbled Murrelet*, 918 F. Supp. at 323.

268. *EDC v. Babbitt*, CV-95-2867-R (D.C. Cal. May 6, 1996).

269. *Cal. Trout v. Babbitt*, No. C-95-3961 SI (N.D. Cal. May 14, 1996).

270. This was in large part because the FWS had missed the deadline even before the moratorium took effect—noncompliance dating back to Dec. 4, 1994.

271. See *Cal. Trout*, No. C-95-3961 SI at 3.

272. *Id.*

273. See 174 F.3d 1178, 1181 (10th Cir. 1998).

habitat for the Rio Grande silvery minnow.<sup>274</sup> In crafting equitable relief for the plaintiffs, however, the court relied on the FWS listing priority guidance and declarations of no funding for designations.<sup>275</sup> It granted the FWS motion to stay proceedings for eighteen months.<sup>276</sup> It was a major victory for the FWS. On appeal, the appellate court defined the question: “[W]hether resource limitations can justify the Secretary’s failure to comply with mandatory, nondiscretionary duties imposed by the ESA.”<sup>277</sup> The court held that they cannot.<sup>278</sup> It further saw the eighteen-month stay granted by the lower court as effectively denying the plaintiff’s request for injunctive relief, despite the Secretary’s mandatory duty.<sup>279</sup>

The appellate court then did something quite odd. In crafting a remedy in the form of injunctive relief for the plaintiffs, it looked to the APA instead of the ESA.<sup>280</sup> The ESA allows citizen suits to be brought against the Secretary for failure to perform his mandatory, nondiscretionary duties under Section 4 of the Act.<sup>281</sup> It further explicitly provides that “district courts shall have jurisdiction . . . to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be.”<sup>282</sup> There is significant case law under the ESA as to how courts should fashion equitable relief for ESA violations.<sup>283</sup> Instead, the court looked at the standards and case law under the APA, and analyzed the distinction between agency action “unlawfully withheld” or “unreasonably delayed.”<sup>284</sup> It concluded that since the organic statute mandated action by a certain date, and the agency missed the deadline, the action was unlawfully withheld, rather than unreasonably delayed.<sup>285</sup> In such a case, the court concluded, it had no discretion to delay injunctive relief further, and must order compliance at the earliest possible time, independent of all other

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274. *See id.* at 1184.

275. *See id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *See id.* at 1185-86.

280. *See id.* at 1187.

281. *See* ESA § 11(g)(1)(C), 16 U.S.C. § 1540(g)(1)(C) (1999); *Bennet v. Spear*, 520 U.S. 154, 171 (1997).

282. ESA § 11(g)(1), 16 U.S.C. § 1540(g)(1)(C).

283. *See* *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 193-94 (1977).

284. *Forest Guardians*, 174 F.3d at 1189-90.

285. *See id.* at 1190-91.

priorities and mandatory duties.<sup>286</sup> The court essentially invited the FWS to return and argue that it was impossible to meet the deadline in the context of a contempt hearing. From earlier victory, the FWS was issued a stunning defeat.

No other circuit has applied the APA standard or the reasoning of the *Forest Guardians* court. Other circuits have not been so rigid as the Tenth Circuit as to not consider other factors. While many courts acknowledge the Service's predicament, only one has given any deference to the FWS priority listing guidance. In *Sierra Club v. Babbitt*, the court found that the guidance was reasonable.<sup>287</sup> In another case, *Southern Appalachian Biodiversity Project v. U.S. Fish & Wildlife Service*, the court enjoined the FWS to make decisions regarding the designations for sixteen species of plants, but it deferred to the FWS request for a very slow schedule, more than eighteen months from the court decision to the deadline for a not-prudent finding or a proposed designation.<sup>288</sup> The court "frankly states that it feels that it has been forced to be an unwilling accessory to a violation of law, but the circumstances leave no real alternative."<sup>289</sup> The court stated the dilemma quite plainly.<sup>290</sup> Other courts, however, had no qualms expressing their

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286. See *id.* at 1193 ("We remand the case to the district court with instructions to order the Secretary to issue a final critical habitat designation for the silvery minnow as soon as possible, without regard to the Secretary's other priorities under the ESA.").

287. See 948 F. Supp. 56, 57 (E.D. Cal. 1996).

Given that it would be "impossible," for defendants to discharge their § 1533(6)(A) obligation as to all pending species within this fiscal year, the court finds that defendants' prioritization scheme, predicated upon biological need, is reasonable in light of the Endangered Species Act's purpose. Sporadic and disorganized judicial interference with defendants' priorities would result in a game of musical chairs plainly disruptive to a thoughtful and reasoned allocation of defendants' limited resources.

*Id.* (internal citations omitted).

288. See 181 F. Supp. 2d 883, 888 (E.D. Tenn. 2001).

289. *Id.*

290. See *id.* at 886.

Stated crassly and starkly, it is money, more accurately, the lack of money, that has precipitated this suit and others like it. Congress has charged the Fish and Wildlife Service with the responsibility of identifying endangered or threatened species and the critical habitat for those species. To state the obvious, it requires money to fulfill this statutory duty. Unfortunately for all concerned, Congress has declined to curtail the scope of the Fish and Wildlife Service's duty under the Endangered Species Act yet, has refused to adequately fund the Service to enable it to carry out those duties. As a result, the designation of critical habitat is not driven almost exclusively by litigation. Of course, a court is concerned only with the issues and parties before it in any given suit. Upon finding that the Fish and Wildlife Service has not fulfilled its statutory duty to designate critical habitat, an injunction to do so is essentially the only alternative available to the court. As time has passed, the Service now finds itself confronted with a plethora of suits and injunctions; it must devote its limited resources to comply with



views on the guidelines, and all concluded that they were meaningless in confronting the statutory deadlines.<sup>291</sup>

Despite requiring stringent compliance close to the deadlines, courts have remained cognizant of the Anti-Deficiency Act.<sup>292</sup> This statute prohibits federal agencies from spending more funds than appropriated and available for any given year.<sup>293</sup> Criminal sanctions can be imposed on civil servants who willfully and knowingly violate the Act's provisions.<sup>294</sup> The courts have never had to entertain a situation in which the FWS alleged that any one specific action will render the agency in violation of the Anti-Deficiency Act. Rather, the FWS has used it as a more generic defense of impracticality and as a basis for a more lenient schedule. Again, absent a specific factual basis of running afoul of the law, courts have figured that the FWS can raise the defense of "impossibility" in the context of a contempt proceeding if it violates a court order.<sup>295</sup> Such was the reasoning of the Tenth Circuit in *Forest Guardians*.<sup>296</sup> Some plaintiffs have raised arguments that the Anti-Deficiency Act cannot trump the ESA, but this question of statutory interpretation has not been answered yet.

Now we come to the fourth stage of battle: the merits of the decisions. The merits of the designations in particular have always been vulnerable given the FWS interpretation of both the section 4 requirements for economic analysis, and the section 7 interpretation of adverse modification. The vulnerability is even greater as the FWS struggles to meet court-ordered deadlines for actions it does not want to do—it seems all too obvious that the commitment and quality would suffer. Sure enough, it has taken only two cases to bring down the FWS interpretations on either side of the designation. The United States Court of Appeals for the Fifth Circuit focused on the back end of designations, the application of the adverse modification standard, in *Sierra Club v. U.S. Fish & Wildlife Service*.<sup>297</sup> It held that the Service's regulations defining adverse modification were arbitrary and capricious, in violation

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judicial orders at the expense of curtailing or even abandoning its search for as-yet-identified endangered species. As injunction is heaped upon injunction, the Service's problems are compounded; to comply with the requirements of one court's injunction may require it to delay compliance with the orders of another court, and so it goes.

291. See, e.g., *Biodiversity Legal Found. v. Badgley*, 1999 WL 1042567 (D. Or. 1999).

292. See 31 U.S.C. § 1341 (1996).

293. *Id.* § 1341(a)(1)(A).

294. *Id.* § 1350.

295. See, e.g., *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1192 (10th Cir. 1998).

296. *Id.*

297. See 245 F.3d 434 (5th Cir. 2001).

of the ESA.<sup>298</sup> Specifically, it held that the functional equivalence between “jeopardy” and “adverse modification” was not tenable, in light of the definition of critical habitat, which is based on the conservation needs of the species.<sup>299</sup> The Tenth Circuit, on the other hand, focused on the front end of designations, in *New Mexico Cattle Growers Ass’n v. U.S. Fish & Wildlife Service*.<sup>300</sup> It concluded that the limitation of the economic analysis only to those incremental impacts independent of the listing, an analysis that the Services had historically applied, was arbitrary and capricious.<sup>301</sup> The FWS was wounded from both sides.

So in reaching the end of Act III, as with all good plays, we have come to the climax of the story. In Act I, we bore witness to the great battle waged by Congress and the President—the power of the purse versus the power of the veto. The riders became crucial weapons in the arsenal of Congress to attempt to force the President’s hand on *bona fide* spending issues. In Act II, we saw the Administration try to recover from the wreckage of war, climbing its way out from the piles of casualties, namely the backlog of imperiled species waiting for protections, before the Administration could make much progress. In Act III we saw an attack from a new flank, by a new source, the courts. The attack was devastating, shutting down all possible escape routes, with one exception, return to the halls of Congress, the scene of its original battles.

#### ACT IV: RETURN OF THE RIDERS

While defending its listing priority guidance, the FWS sought assistance from Congress. Litigation ate through the budget for activities under section 4 of the ESA and was threatening to encroach on the budgets for other ESA activities. The FWS asked Congress to cap appropriations for section 4 activities. Such a measure would create a firewall between expenses for listing and related litigation, and expenses for implementing the other provisions of the law. In 1997, Congress

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298. *See id.*

299. *Id.*

300. *See generally* 248 F.3d 1277 (10th Cir. 2001).

301. *See id.* at 1285.

[W]e conclude Congress intended that the FWS conduct a full analysis of all of the economic impacts of a critical habitat designation, regardless of whether those impacts are attributable coextensively to other causes. Thus, we hold the baseline approach to economic analysis is not in accord with the language or intent of the ESA.

begrudgingly acceded to the FWS' request,<sup>302</sup> which has been repeated every year since.<sup>303</sup>

One initial question to ponder: is the listing cap, as it is known, a rider? On the one hand, by limiting the resources that can be devoted to section 4 activities, it is imposing legislative policy in the appropriations bill. It is no different in structure than the original listing moratorium, the only difference is that now there is some funding appropriated, whereas before there was none. On the other hand, it is appropriating funds for mandatory ESA activities, which is precisely the purpose of an appropriations bill. Every line item has, by definition, a ceiling of funding available. Is this any different from any other line item in the budget?

The answer is, more or less, no. The answer largely (but not entirely) turns on whether the limitation or cap applies to funding the programs under consideration in the appropriations bill, or whether the limitation includes additional requirements or conditions, or relates to money in other appropriations bills.<sup>304</sup> Consider Fisher's summary of the House Rules:

Since Congress, under its rules, may decline to appropriate for a purpose authorized by law, "so it may by limitation prohibit the use of the money for part of the purpose while appropriating for the remainder of it." According to House precedents, the limitations must apply solely to the money of the appropriation under consideration and may not be made applicable to money appropriated in other Acts. Although an amendment or language in the appropriation bill may not impose additional duties or require judgments and determinations not required by law, certain incidental duties are allowed.<sup>305</sup>

This passage would certainly conclude that the listing cap is not a rider in the sense that it is legislation in an appropriations bill. It is a spending limitation, and thus allowed under House and Senate rules. The Congressional Research Service echoes this sentiment, observing that "[C]ongress is not required to provide funds for every agency or purpose authorized by law," and can provide funds for some, but not all, activities

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302. See Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-182 to -189 (1996). For comments from the authorizing committee in the Senate, see S. REP. NO. 104-319, at 15-17 (1996).

303. See, e.g., Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681-235 to -236 (1998).

304. See Fisher, *supra* note 10, at 73.

305. *Id.* (citations omitted).

within a program.<sup>306</sup> Under House rules, limitations may not amend, repeal, or create existing law.<sup>307</sup>

Consider, however, that Congress is not appropriating an arbitrary amount for a purpose authorized by law. Rather, it is appropriating an amount for nondiscretionary activities that are mandated by law. Consequently, it can be argued that Congress has an obligation to appropriate an amount that approximates the cost of complying with those mandated activities. To the extent that Congress deliberately chooses to appropriate less money than is required to implement those activities, it can be said that Congress is legislating policy through the appropriations process. This is certainly not the conventional notion of a limitation, but it should be entertained in light of the policies behind it.

Let us first consider the numbers: the following chart depicts total appropriations for the FWS for the ESA, the budget request for the listing cap, and the appropriated cap.

ENDANGERED SPECIES ACT APPROPRIATIONS DEPARTMENT OF THE INTERIOR <sup>308</sup>			
YEAR & LAW	APPROPRIATION (IN \$ MILLIONS)		PRESIDENT'S BUDGET REQUEST ON THE LISTING CAP
	<i>Total</i>	<i>Listing Program</i>	
1998 (PL 105-83)	91	5.2 (5.7 %)	5.2
1999 (PL 105-277)	125	5.7 (4.5%)	7.4
2000 (PL 106-113)	125	6.2 (5.0%)	7.5, with 1.0 for Critical Habitat
2001 (PL 106-291)	126	6.3 (5.0%)	7.2
2002 (PL 107-63)	126	9.0 (7.1%), with 6.0 for Critical Habitat	8.5

The numbers are small; the entire listing program is capped at between 4.5% and 7.1% of the entire endangered species budget. Even though the listing program funds continue to increase, the increases are small. This certainly seems incongruous to the need. Some blame the Administration for not requesting more; some blame Congress for not appropriating more. There is enough blame for both.

306. Sandy Streeter, *Earmarks and Limitations in Appropriations Bills*, CONG. RES. SERV. 98-518, at 2 (1999).

307. *See id.*; *see also* H.R. DOC. NO. 106-320, at 195 (2001).

308. *See* Biodiversity Legal Found. v. Norton, 215 F. Supp. 2d 140 (D.D.C. 2002).

Let us consider now the language of the listing cap. It has been refined over the years. In FY 1997 and 1998, the language was basic, merely capping all activities under sections 4(a), (b), (c), and (d), relating to petitions for listings and designations.<sup>309</sup> In FY 1999, the language was changed to exclude actions relating to maintaining the periodic review for recovered species, reclassifications from endangered to threatened, and delistings.<sup>310</sup> The FWS had made the decision to fund these activities directly from the recovery program, rather than the listing program.

The FY 2000 budget request by the President featured an interesting development. The President's budget included a special limitation of \$1 million "for any activity regarding the designation of critical habitat."<sup>311</sup> This was the first time that there was a proposal for a subcap for designations within the cap for the listing program. With this proposal, the FWS would still be engaged in listing activities regardless of the litigation on designations. Congress did not agree, however; it did not approve the subcap. Congress did, however, refine the language again. This time, only species indigenous in the United States were included in the listing cap.<sup>312</sup> Petitions to list foreign species were to be handled by

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309. See Department of the Interior and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-83, 111 Stat. 1543, 1546-47 (1998).

For expenses necessary for scientific and economic studies, conservation, management, investigations, protection, and utilization of fishery and wildlife resources . . . and of which not to exceed \$5,190,000 shall be used for implementing subsections (a), (b), (c), and (e) of section 4 of the Endangered Species Act of 1973, as amended.

*Id.*

310. Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681-235 to -236 (1998).

For necessary expenses of the United States Fish and Wildlife Service, for scientific and economic studies, conservation, management, investigations, protection, and utilization of fishery and wildlife resources . . . . That not to exceed \$5,756,000 shall be used for implementing subsections (a), (b), (c), and (e) of section 4 of the Endangered Species Act, as amended, for species that are indigenous to the United States (except for processing petitions, developing and issuing proposed and final regulations, and taking any other steps to implement actions described in subsections (c)(2)(A), (c)(2)(B)(i), or (c)(2)(B)(ii)).

*Id.*

311. FWS FY 2000 BUDGET JUSTIFICATION, at 1.

Provided further, that of the \$7,532,000 referred to above, not to exceed \$1 million shall be used for any activity regarding the designation of critical habitat pursuant to subsection (a)(3) of section 4 of the Endangered Species Act, as amended, including, but not limited to: (1) processing petitions, (2) developing and issuing proposed rules and final regulations, (3) making determinations regarding prudence and determinability, and (4) evaluating environmental, economic, and other impacts.

*Id.*

312. See Act of Nov. 29, 1999, Pub. L. 106-113, Appendix C, 113 Stat. 1501 (1999).

the international programs office of the FWS, rather than the listing program. This was true also in FY 2001 and 2002.

In its FY 2002 budget request, the FWS tackled the issue of litigation head-on. The budget cap not only contained a monetary ceiling, or limitation, on the listing program but it also proposed legislative text that would effectively supersede the requirements of the ESA. First, it provided funding not to exceed \$8,476,000, “notwithstanding the specific time frames and deadlines of section 4(a) and (b) of the Endangered Species Act of 1973.”<sup>313</sup> This language would serve to override the mandatory deadlines and thus eliminate any liability for the FWS in the event of missed deadlines. In addition, the request stated that funding within the cap would be provided for only to comply with existing court orders or settlements, and to undertake actions consistent with the priorities in the listing priority guidance.<sup>314</sup> This language was sharply criticized in the media.<sup>315</sup> At the same time, the Bush Administration found support from an unlikely ally: Bruce Babbitt, former Secretary of the Interior in the Clinton Administration.<sup>316</sup> Congress failed to act on the FWS’ budget request with respect to the substantive text, especially given the bad press that it received. It did, however, return to the language suggested by the Administration several years previously, a subcap for critical habitat designations. This provision places, within the listing program, a ceiling on the amount of appropriations available for designations. Specifically, Congress

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For necessary expenses of the United States Fish and Wildlife Service, for scientific and economic studies, conservation, management, investigations, protection, and utilization of fishery and wildlife resources . . . . *Provided further*, That not to exceed \$6,232,000 shall be used for implementing subsections (a), (b), (c), and (e) of section 4 of the Endangered Species Act, as amended, for species that are indigenous to the United States (except for processing petitions, developing and issuing proposed and final regulations, and taking any other steps to implement actions described in subsection (c)(2)(A), (c)(2)(B)(i), or (c)(2)(B)(ii)).

*Id.*

313. FWS BUDGET JUSTIFICATION, FY 2001.

314. *Id.*

315. See Douglas Jehl, *Moratorium Passed on Suits That Seek to Protect Species*, N.Y. TIMES, Apr. 12, 2001, at A1; Michael Drunwald, *Bush Seeks to Curb Endangered Species Suits*, WASH. POST, Apr. 12, 2001, at A2.

316. See Bruce Babbitt, *Bush Isn't All Wrong About the Endangered Species Act*, N.Y. TIMES, Apr. 15, 2001, § 4, at 11 (Op-Ed). (“[D]uring my tenure as Interior Secretary I repeatedly asked Congressional leaders to write budget restrictions that would prevent money for important endangered species programs from being syphoned off into premature ‘critical habitat’ mapmaking. This request was denied every year. The Bush administration now proposes something similar.”).

provided \$9 million for the listing program, of which no more than \$6 million could be spent on designations.<sup>317</sup>

ACT V: WHITHER *DEUS EX MACHINA*?

The situation is now at an impasse, a stalemate that can remain indefinitely. The courts continue to entertain lawsuits; the Service continues to defend them and prepare the listings and designations as best they can pursuant to court-ordered deadlines; and Congress continues to cap the funds that go to those efforts by the Service. It is hard to say that this example of checks and balances among the three branches of the federal government is what the Framers had in mind when they wrote the Constitution. So the question is this: What unexpected, improbable force is going to arrive on the scene, intervene in an otherwise hopeless situation, and resolve this mess?

*Scene 1: Dire Consequences*

While the status quo can certainly maintain itself for an indefinite period, there are potentially grave consequences that can arise in all three arenas of government—administrative, judicial, and legislative.

The situation is particularly bleak at the administrative level. The hands of the Services are tied. In July 2002, it had a backlog of 250 candidate species for which listing proposals were required; 50 final rules, reclassifications, and designations were pending; critical habitat designation for about 420 species, as well as listing actions for 25 species, were required pursuant to court order or settlement agreement; re-evaluation of 180 “not prudent” findings relating to critical habitat were under court order; and about 30 to 40 petitions for new listings and

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317. See Department of the Interior and Related Agencies Appropriations Act of 2002, Pub. L. 107-63, 115 Stat. 419 (2002).

For necessary expenses of the United States Fish and Wildlife Service, for scientific and economic studies, conservation, management, investigations, protection, and utilization of fishery and wildlife resources . . . . *Provided further*, That not to exceed \$9,000,000 shall be used for implementing subsections (a), (b), (c), and (e) of section 4 of the Endangered Species Act, as amended, for species that are indigenous to the United States (except for processing petitions, developing and issuing proposed and final regulations, and taking any other steps to implement actions described in subsection (c)(2)(A), (c)(2)(B)(i), or (c)(2)(B)(ii)), of which not to exceed \$6 million shall be used for any activity regarding the designation of critical habitat, pursuant to subsection (a)(3), excluding litigation support, for species already listed pursuant to subsection (a)(1) as of the date of enactment of this Act.

*Id.*

designations were coming in annually.<sup>318</sup> The best the Service can do is carry on, churning out listings and designations that, once issued as final decisions, will likely get challenged on the merits. It has finally aborted efforts to persuade the courts of the merits of its listing priority guidance.

It is important to note how litigation has inverted FWS spending priorities. The FWS has long maintained that critical habitat designations afford little protection for the species, and is the FWS' lowest priority. Yet, because of the litigation, the FWS will use the entire amount capped for designations—\$6 million—for that purpose.<sup>319</sup> It is thus devoting two-thirds of its already inadequate listing program, \$6 million out of \$9 million, to actions it believes have little value for the species. The irony has grave consequences on the ground, where listings of species, the action that first throws the protective blanket around the species, have taken a back seat to designations, the action that measures the size of the blanket, without strengthening the fabric.

The FWS has been criticized for not requesting additional funds for the listing program. To be sure, Congress has appropriated, in most of the last few years, slightly less than the Administration has requested. But the FWS could make a political statement by significantly increasing its request. This of course, will require Peter to pay Paul, and it will need to make requisite decreases in its request for appropriations to implement other provisions of the ESA.

Even if it wanted to commit more funds towards listing and designations, the FWS is prohibited from doing so by virtue of the listing cap and the designation subcap. It cannot commit funds from the listing or designation budgets of future years, nor can it commit funds from sources other than its appropriations budget (e.g., revenues derived from fines and forfeitures), because of the Anti-Deficiency Act.<sup>320</sup> It would need to request any changes in funding levels directly from Congress. The FWS did just that for FY 2003, requesting an additional \$2.5 million for the listing program.<sup>321</sup> For a program funded at \$9.0 million, this request represents almost a 30% increase.

To the extent that it can, the Service has squeezed blood from a stone, by shifting the source of funds for delistings and reclassifications from endangered to threatened status. Rather than use funds for these

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318. See U.S. FISH & WILDLIFE SERV., DEVELOPING AN ENDANGERED SPECIES LISTING ACTION PRIORITY SYSTEM 5 (July 2002) (working draft) (on file with author).

319. Personal Communication with Gary Fraser, Assistant Director, FWS (Jan. 22, 2003).

320. See 31 U.S.C. § 1341 (1996).

321. Press Release, Dario Bord, U.S. Fish and Wildlife Service, Bush Budget Emphasizes Partnerships for Fish and Wildlife Conservation (Feb. 4, 2002), available at <http://news.fws.gov/newsreleases> (last visited May 26, 2003).



actions from the listing program, the FWS now uses funds from the recovery line-item. This makes eminent sense, as delistings and reclassifications are the formal recognition that species are recovering. As noted earlier, the FWS has also moved listing activities for foreign species out of the listing program as well.

The Service does have a few tools, however, that may take some pressure off. If it needs to list a species that, in its own opinion, is more imperiled than other species whose listings are mandated by court order, the Service can proceed with an emergency listing.<sup>322</sup> This does not, of course, relieve the FWS of the budgetary burdens of listing and designation requirements; indeed, it adds to it, but it does put the FWS in control of its priorities as to what species are more important than others. The threshold for this is relatively high, however, and the FWS uses it rarely.<sup>323</sup> Nevertheless, the Service has used it occasionally with success when it chose to shift priorities for an imperiled species from a court-ordered listing.

A more important opportunity exists with the FWS in revising the basis on which it makes prudency determinations. Currently, pursuant to its regulations, it can make a “not-prudent” finding if it finds that the designation is not beneficial.<sup>324</sup> The FWS has made “not-prudent” findings based on its perceived notion that designations add no substantive protections to the species once a species is listed.<sup>325</sup> This line of reasoning has been rejected time and again by the courts, and the FWS finally realizes that a “not-prudent” finding does not help their administrative burdens. It may save them time and costs initially to address the statutory requirement for a decision, but it costs the FWS dearly subsequently, when there will almost certainly be a challenge on the decision.

The FWS can amend the basis for its not-prudent findings in a slight but significant manner. It can move away from the reason relating to the conflation of the jeopardy-adverse modification standards, which has been rejected by the Fifth Circuit in the gulf sturgeon case.<sup>326</sup> Instead, the Service can argue that it is not beneficial to designate critical habitat

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322. ESA § 4(b)(7), 16 U.S.C. § 1533(b)(7) (1999).

323. *See, e.g.*, Endangered and Threatened Wildlife and Plants; Emergency Rule to list the San Bernardino Kangaroo Rat as Endangered, 63 Fed. Reg. 3835 (Jan. 27, 1998) (to be codified at 50 C.F.R. pt. 17); Endangered and Threatened Wildlife and Plants: Emergency Listing of the Jarbidge River Population Segment of Bull Trout as Endangered, 63 Fed. Reg. 42,757 (Aug. 11, 1998) (to be codified at 50 C.F.R. pt. 17).

324. 50 C.F.R. § 424.12(a)(1)(ii) (2002).

325. *See, e.g.*, 68 Fed. Reg. 12,982, 13,021 (Mar. 18, 2003).

326. *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 444 (2001).

in light of its limited funds and higher priorities. Essentially, it can base a prudence determination on an administrative cost-benefit analysis, in which the FWS calculates the administrative and budgetary costs against the additional protections and other gains afforded by the designation. This is not inconsistent with the cost-benefit analysis that the statute requires on behalf of landowners and other regulated entities.<sup>327</sup> It is hard to say that this reasoning will gain any more deference with the courts than the previous reasoning. However, it certainly presents a more honest argument. It recognizes that there are benefits to critical habitat designations, but concludes that those benefits to the species do not outweigh the costs to the agency in preparing the designation.

Continued litigation brings potentially dire consequences for the Service. The Service remains unable to complete the listing or designations within the statutory deadlines and within the terms of a settlement agreement. Consequently, it is only a matter of time before a court will hold the Service in contempt for failing to designate critical habitat in a timely manner. The Tenth Circuit in *Forest Guardians* essentially invited the FWS to argue its case of impossibility in a contempt proceeding, rather than in a determination of equitable relief. The Service has already had two close calls, but in one case a last-minute settlement was reached, and in a second case, the FWS filed a motion immediately preceding the hearing.<sup>328</sup>

In addition, steady litigation has significantly drained the human and financial resources of the FWS and the Department of Justice. Informal estimates are that almost 30% of the FWS Office of the Solicitor is tied up with listings and designations. The FWS has paid out about \$1.5 million from 1995 to 2001 for attorneys' fees for cases it has lost.<sup>329</sup> This number is not larger only because the missed-deadline cases are such open-and-shut winners for the plaintiffs that the lawyers need not put in much work, so that there are no significant fees associated with most of the cases.

The most dangerous consequence for both the FWS and the ESA is the steadily building political pressure to reform the Act. As the FWS continues to lose cases, and thousands of acres of land fall under purview of the courts, the public (on both sides) is crying more and more loudly for legislative changes to fix a broken law. The big losers in the

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327. ESA § 4(F)(1)(B)(iii), 16 U.S.C. § 1533(f)(1)(B)(iii).

328. Personal Communication with Ben Jesup, Office of the Solicitor, Dept. of Interior (Jan. 31, 2003).

329. Personal Communication with Seth Barsky, Wildlife Section, Environment and Natural Resources Division, U.S. Dept. of Justice (Feb. 7, 2003).

legislative arena will very likely be the big winners in the courtroom: the environmental groups. Environmentalists will argue that the Act needs greater funding; landowners will point to the Act's rigid deadlines and inflexibility. Congress is much more likely to move to greater flexibility given limited resources, rather than to maintain the unforgiving deadlines and increase funding.

*Scene 2: Rescue Efforts?*

In light of these consequences, one must consider whether there are adequate remedies that exist. The realistic answer is, beyond maintaining the status quo, no. There are remedies that may not be adequate but that are certainly ameliorative.

1. Administrative Self-Help?

Administratively, the FWS is engaged in a number of initiatives to ameliorate the situation, although there is little cause for optimism. Under pressure from all sides, in 1999, the FWS published a notice soliciting views on the role of habitat in ESA implementation.<sup>330</sup> It discussed the controversy surrounding the FWS view of critical habitat, but mentioned that it would not consider revision of the regulations conflating jeopardy and adverse modification.

In addition, the FWS is currently revising its listing priority guidance to reflect the string of dismal losses in the courts and to consider species' listings in a broader, more comprehensive, ecosystem-based, and more efficient manner. The FWS has so far held a series of stakeholder meetings with regulated entities and environmental groups to discuss new concepts for listing. A number of new concepts have been proposed so far. The first is based on species risk.<sup>331</sup> This is similar to the existing guidance, and places the emphasis on individual species at risk of extinction.<sup>332</sup> The second is to list based on "species hot spots."<sup>333</sup> In this concept, the FWS would prioritize species that coexist with other species at risk. A third concept is to prioritize species in areas where the ESA has little exposure.<sup>334</sup> The concept is to widen the net of the ESA into areas where there is little ESA protection. A fourth concept is to prioritize species in areas where the ecosystem as a whole is under

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330. See Notice of Intent to Clarify the Role of Habitat in Endangered Species Conservation, 64 Fed. Reg. 31,871 (June 14, 1999).

331. FWS Documents (on file with author).

332. *Id.*

333. *Id.*

334. *Id.*

greatest threat.<sup>335</sup> A fifth concept is to list species based on their potential for recovery, or the beneficial effects of the listing, with the idea of focusing on the biggest bang for the buck.<sup>336</sup> Another concept is to list species based on genetic distinctiveness, with the focus on preventing loss of genetic diversity.<sup>337</sup>

These ideas present some promising ways to prioritize listings. The Service has rightly zeroed in on three dispositive criteria: biological need of the species; management effectiveness, or the biological benefit to the species; and administrative burden. After dozens of losses in the courtroom, the FWS finally conceded that courts believe that they have no latitude to defer to the listing priority guidance. It will no longer rely on it in litigation, but it still intends to use it for internal purposes, to guide spending priorities.<sup>338</sup>

The Service is also developing draft guidelines on performing the economic analysis required with the designation. In previous years, the FWS did not perform any quantifiable analysis, because it took the qualitative position that critical habitat afforded the species no additional protections beyond those triggered by the listing itself.<sup>339</sup> Assuming this, the Service argued that the designation could have no economic costs associated with it that were independent of the listing. The improved economic analysis will likely help the FWS in litigation, particularly in suits brought by landowners who challenge the merits of the designation based on inadequate economic analysis.

In addition to improved economic analysis, the FWS is attempting to more exactly define critical habitat by identifying discrete boundaries of critical habitat within broad areas. These boundaries often come down to a project-by-project basis, in which more precise exclusions are being made.<sup>340</sup> This is in contrast to previous designations, which designated critical habitat as a geographically wide range that met the criteria.<sup>341</sup> The basis for the exclusions can be either that the habitat is not essential for the conservation of the species, or because it is already protected through

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335. *Id.*

336. *Id.*

337. FWS, Some Concepts to Consider for a Listing Action Priority Process (Sept. 6, 2002) (unpublished manuscript, on file with author).

338. Personal Communication with Gary Frazer, Deputy Director, FWS (Jan. 22, 2003).

339. *See supra* text accompanying note 126; *see also* Patlis, *supra* note 82, at 162-65.

340. *See, e.g.*, Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for Three Plant Species from the Island of Lamai, Hawaii, 68 Fed. Reg. 1220, Jan. 9, 2003.

341. *See, e.g.*, Critical Habitat Designation for Marbled Murrelet, 61 Fed. Reg. 26,256 (to be codified at 50 C.F.R. pt. 17).

other measures and special management measures are not needed.<sup>342</sup> These section 4(b)(2) exceptions are being used with greater frequency.

The benefit of these efforts is to make designations more accurate, with better supporting documentation, such as the economic analysis. This will strengthen the FWS' position in a challenge to the merits of the designation. The downside of these efforts, however, is to make the designations much more costly. The designations now require an economist and biologist both on the ground, making an assessment and conducting surveys. The great irony is that although the Service is expending significantly extra resources on designations, it still believes that designations are virtually worthless paper exercises. With increasing costs, there will be fewer designations at greater expense. This will contribute to the backlog, and with no change to the deadlines, the lawsuits will continue. Perhaps even increase.

## 2. Judicial Equities?

There are some opportunities for breathing room in the courts. In several recent cases, the government has argued, with some success, that the plaintiffs' lawsuit is barred by the general six-year statute of limitations for civil actions against the federal government.<sup>343</sup> Codified at 28 U.S.C. § 2401(a), the statute time-bars lawsuits against the federal government after six years.<sup>344</sup> The purpose, as with all statutes of limitations, is to protect the potential defendant—in this case, the federal government—against stale claims, and in the case of the federal government, it is considered a condition of the waiver of sovereign immunity.<sup>345</sup>

In *Wild Alabama v. Babbitt*, plaintiffs challenged the FWS on a finding that critical habitat for the Cahaba shiner, found in certain areas of Alabama, was not prudent.<sup>346</sup> The lawsuit was brought in 1998 for a finding that was made on October 25, 1990, in conjunction with a final rule listing the species as endangered.<sup>347</sup> Plaintiffs argued that the FWS

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342. ESA § 4(b)(2); 16 U.S.C. § 1533(b)(2) (1999).

343. See, e.g., *S. Appalachian Biodiversity Project v. U.S. Fish & Wildlife Serv.*, 181 F. Supp. 2d 883, 885 (E.D. Tenn. 2001).

344. See 28 U.S.C. § 2401(a) (2002) (“Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.”).

345. See *United States v. Kubrick*, 444 U.S. 111, 117 (1979). The court upheld Congress's intent that “the right to be free of stale claims in time comes to prevail over the right to prosecute them.” *Id.* (quoting *R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944)).

346. *Wild Ala. v. Babbitt*, No. CV 99-0093-Sat., slip op. at 1 (N.D. Ala. Sept. 7, 1999).

347. See 55 Fed. Reg. 42,963 (Oct. 25, 1990).

duties to list species, designate habitat, and review those decisions under the ESA were mandatory and continuous, so that the statute of limitations could not apply and begin to run.<sup>348</sup> The court disagreed. It held that “FWS seemingly complied with all the mandatory procedural requirements associated with making a determination about critical habitat designation.”<sup>349</sup> The choice to make a “not-prudent” finding was within the allowable procedures, and did not amount to a failure to act.<sup>350</sup> Furthermore, the court held, the duty to designate critical habitat is not ongoing.<sup>351</sup> Consequently, the six-year statute of limitations began running with the final decision on October 25, 1990, and that critical habitat was “not prudent,” so that the current lawsuit was time-barred.<sup>352</sup>

This does not provide much relief, however. The ESA allows interested persons to petition for revisions to critical habitat designations and new listings, including reclassifications of species already listed.<sup>353</sup> A prospective plaintiff desiring to challenge a listing or designation decision made more than six years ago need only first petition the FWS or the NMFS to make the desired change. The new petition effectively starts the clock all over again. Indeed, the court in *Wild Alabama v. Babbitt* suggested as much to the plaintiffs.<sup>354</sup>

A better possibility for breathing room exists through settlement opportunities. Of course, most of the cases already are being settled; there is no choice, because even if plaintiffs win, and a court renders a mandatory deadline, it is unlikely that the Service would be able to meet it. So a victorious plaintiff has as its only practical remedy a settlement agreement. The Service can look to negotiate a global settlement for outstanding cases related to missed deadlines, and work out an agreement among the majority of litigants. There are several precedents for this. In the late 1980s, the Service had fallen behind in listing

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348. *Wild. Ala.*, No. CV 99-0093-Sat., slip op. at 3.

349. *Id.* at 4.

350. *Id.*

351. *Id.* The court observed, because the ESA § 4(a)(3)(A) provides that the Secretary *may* revise designations “from time to time,” the duty to revise habitat designations was not ongoing and mandatory once an initial decision was made. *Id.*

352. *Id.*

353. ESA § 4(b)(3)(A); 16 U.S.C. § 1532(b)(3)(A) (1999).

354. No. CV 99-0093-Sat., slip op. at 4. While there is no mandatory continuation of the Secretary’s duty to designate critical habitat subsequent to the final agency determination, any person may submit a written petition to the Secretary of the Interior requesting that a critical habitat be established for an endangered species. Such a submission would trigger a mandatory duty for the Secretary to promptly conduct a review of the situation and take appropriate action. Therefore, while plaintiffs may be barred by the statute of limitations from challenging the Secretary’s initial decision regarding critical habitat, they may be successful in forcing the Secretary to review the decision in light of new discoveries. *Id.*

petitions by several hundred species. Lawsuits were filed in multiple circuits. The Service negotiated an agreement in *Fund for Animals*,<sup>355</sup> and that agreement set the pace for listings for the next several years.

Something similar was done for listings and designations last year. Called the “mini-global,” a consent decree was entered between the FWS and four plaintiffs across the country.<sup>356</sup> The FWS agreed to issue final listing decisions for fourteen species and publish proposed listings for eight additional species, and the plaintiffs agreed to extend deadlines for eight critical habitat determinations.<sup>357</sup> In this instance, everyone wins. The FWS gets additional time and some certainty; the plaintiffs get dates certain with which the FWS can comply; landowners are getting designations with better, more accurate analyses.

The FWS can look to engage additional plaintiffs in other lawsuits to address the deadlines, and develop one comprehensive schedule that covers as many species as possible. While all lawsuits would not likely be resolved because there will certainly be litigants that are not interested in a settlement, it may resolve the lion’s share. For those cases not included, courts may be more deferential to the FWS’ commitments and limited resources in light of a universal court-sanctioned settlement. Again, the Tenth Circuit in *Forest Guardians* seemed to rule out all flexibility in balancing the equities,<sup>358</sup> but other circuits may be more inclined to defer to a court-ordered settlement than to the FWS’ internal guidance.

The FWS can get even more creative in seeking settlement options. A universal settlement could even attempt to bring in other litigants, such as landowners, and include issues relating to the merits of the designations, such as economic analyses. It could consider bringing in other issues relating to the listing program, such as appropriations. While of course the FWS cannot guarantee additional spending, it could commit to increased budget requests.

The greatest opportunity lies with the court’s equitable powers for relief, however. No court has yet used it, but it is there. A court has within its power the ability to grant injunctive relief, based on a likelihood of success on the merits and a balancing of the equities.<sup>359</sup> In *Tennessee Valley Authority v. Hill*, the Supreme Court altered this

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355. *Fund for Animals v. Lujan*, Civ. No. 92-800 (D.D.C., Dec. 15, 1992); see 61 Fed. Reg. 24,726 (May 16, 1996).

356. *Ctr. for Biological Diversity v. Norton*, Civ. No. 01-2063 (D.D.C. 2001).

357. *Id.*

358. See *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1189 (10th Cir. 1999).

359. See, e.g., *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987).

formula with respect to substantive violations of section 7 of the ESA.<sup>360</sup> It concluded that the clear mandate to not jeopardize the continued existence of a species existed no matter the cost of that decision.<sup>361</sup> Consequently, any discretion otherwise available to the court to use its equitable powers in crafting a balanced remedy did not apply in the case of a substantive ESA violation.<sup>362</sup> Lower courts have extended this reasoning to procedural violations that may lead to substantive violations.<sup>363</sup>

Despite these restrictions, there is still some room for equitable relief. There is a distinction to be made in a substantive or procedural violation relating to section 7, that may lead to immediate extinction of a species or adverse modification of its habitat, and a missed deadline for a critical habitat designation where immediate survival is not at issue. To be sure, listings and designations trigger the ESA protections, and therefore a procedural violation can lead to potential jeopardy or adverse modification without ESA protections. This, however, is exactly where the court should balance the equities. Just as Congress spoke clearly on the substantive mandate of no-jeopardy, Congress also spoke clearly on the need for a time-out of listings and designations. This is not merely a case of inadequate agency resources, but congressionally mandated inadequacy of resources. The courts recognized this up until the day the moratorium was suspended; they should not have ignored its twelve-month existence the very next day. Consider that virtually all case law on the subject of injunctive relief upholds the principle that district courts retain equitable discretion to fashion relief as appropriate, which can be “displaced only by a clear and valid legislative command.”<sup>364</sup> While the Supreme Court determined that such a command inherently exists in section 7, the fact that Congress has vacillated wildly on listings and designations over the years, most recently with the moratorium, demonstrates that the same command does not exist with section 4. Consequently, the courts should not preclude their own authority to balance the equities.

### 3. Legislative Reform?

The last possibility is legislative. Legislative changes can run the gamut, from tackling the problem head-on to stepping along the

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360. *See* 437 U.S. 153 (1978).

361. *Id.* at 194.

362. *See* *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982).

363. *See* *Sierra Club v. Marsh*, 816 F.2d 1376, 1383-84 (9th Cir. 1987).

364. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001).



perimeter. First, along the perimeter, there is maintaining the status quo in some form or another. Tackling the issue head-on, there are two very straightforward but very opposite solutions: increase appropriations funding so that the FWS can comply with all relevant deadlines; or remove, reduce, or delay the deadlines so that the Service maintains flexibility and is not bound to drain its resources chasing after impossible deadlines. There is a fourth way, and that itself can take a number of variations. The fourth way involves congressional authorization to the FWS to balance the competing deadlines in light of biological necessity and administrative reality. These four options are described in more detail below.

The first option keeps the status quo. As mentioned, this would be a form of life-support, preventing litigation from eating the entire FWS budget, but not allowing the FWS to take control over its listing program, instead surrendering it to the courts. Perhaps to make the listing cap and designation subcap more palatable, they can be written into section 15 of the ESA, relating to authorization of appropriations. In this way, they would be approved by the authorizing committees, and not seen as a quasi-rider or limitation in an appropriations bill. This would conform the appropriations language with the authorization language, so that the “two steps” of authorization and appropriation described earlier would be harmonized. Functionally, however, it would be the same. It would not address the underlying problem: the FWS would still be liable for the deadlines. It would thus be a treatment of the symptom, but not a cure for the problem.

The second option—increasing appropriations—would, of course, be ideal. But highly unlikely. In this era of high deficits, there is little expectation that Congress would increase ESA appropriations significantly. Budgetary restrictions, such as pay-as-you-go requirements, prevent appropriations committees from increasing budgets for one program without reducing budgets in another program. Given the jurisdictional boundaries within the appropriations committees, shifting appropriations across sectors is extremely difficult.

The third option is to remove, reduce, or change the deadlines. To a large extent, this was attempted in a bipartisan Senate bill several years ago, S. 1180, which was unanimously approved by the Senate Committee on Environment and Public Works.<sup>365</sup> It merged critical habitat designations with the recovery planning process, so while deadlines were

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365. S. 1180, 106th Cong. (1999).

still maintained, they were considered to be much more manageable.<sup>366</sup> First, there was additional time.<sup>367</sup> Second, the time coincided better with the available information commensurate with the action.<sup>368</sup> One reason the FWS cannot meet the deadlines for critical habitat designations is the lack of necessary data at the time of listing. Moving the deadlines to recovery planning, which comes two years later, would allow the FWS to obtain the data it needs to do an adequate job that could withstand a court challenge.

The fourth option is the most creative. This legislative remedy would essentially authorize the use of a listing priority guidance to make decisions in light of limited funding. Congress could, most simply, authorize the FWS to develop a prioritization scheme. It could impose standards and guidelines to limit the FWS discretion in developing and using such a scheme. If this were done, a cap or ceiling of funds for listing activities may not be necessary, although maintaining one in the law would provide extra security for the FWS' budget for its other programs. An alternative to a prioritization scheme could be the adoption of a waiting list for petitioned species and habitats. This would be similar to the candidate species list, but not require a status review. As another piece to the equation, Congress could establish some form of protection to species on the candidate list, i.e., species warranted but precluded, so that even if the FWS were not able to complete the listing or designation process due to limited funds, the species would not be entirely without protections.

### *Scene 3: The Broader Picture*

The fundamental issue is this: what does a government agency do when it has mandatory duties to fulfill under the law, and yet it does not have adequate funding? This question of increasing agency burdens in light of shrinking budgets is looming larger and larger, and is an issue generating more and more attention. There certainly are numerous examples of agencies that have missed statutory deadlines, and for which they have been sued and lost.<sup>369</sup> The general scenario is that the agency has a deadline to meet, misses it, gets sued, and then a court will impose

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366. *Id.*

367. *Id.*

368. *Id.*

369. For examples of missed deadlines under the Freedom of Information Act and the Clean Water Act, as well as an early decision under the ESA, see Richard J. Pierce Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 70 (1997).

a later deadline, with which the agency will comply, renegotiate, or risk contempt.<sup>370</sup> Ultimately, it scrounges up the needed funding perhaps by using existing funds within the program's budget, or by reprogramming funds from other programs, or by requesting additional funds from Congress. A situation that presents numerous instances of noncompliance is rare, and recurrence of noncompliance of the same deadlines is even rarer. The situation facing the FWS represents the most extreme example of the issue.

The question has also been asked from the perspective of the courts. As Judge Patricia Wald of the United States Court of Appeals for the District of Columbia Circuit posed (paraphrasing Professor Richard Pierce):

Should courts take off their blinders and accept the reality that resource-starved agencies simply do not have the person power or appropriations to comply with the rigors of administrative law—i.e., that all the courts' remonstrances to do better are like whipping a dying horse to make it get up and gallop faster—and should they therefore deal with such agencies under a rule of administrative “lenity”? Or should courts require agencies to adhere to deadlines and perform all duties that are statutorily required because it is not the job of the courts to pick and choose which congressional mandates to enforce?<sup>371</sup>

The question also applies to Congress. Should Congress continue to ignore the dichotomy it creates in imposing additional mandates on agencies, while at the same time restricting agency budgets? Recent trends in Congress have only exacerbated the problem. On the one hand, Congress is engaging in greater oversight activities, to ensure that the agency is performing its legislative mandates. On the other hand, Congress is imposing an increasing number of earmarks for specific activities within the agency's program, thus limiting the discretionary spending available to the agency. In sum, agencies are receiving overall less funding, greater earmarks for the limited funding there is, and more intensive scrutiny into its actions.

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370. Judge Wald's description is as follows:

In my experience, the usual pattern goes like this: the agency misses the deadline, because of, it invariably contends, a lack of resources or competing statutory mandates; then a watchdog citizens' group sues to enforce the deadline; then the court “negotiates” with the parties for a new deadline; then the agency asks for successive extensions until the court finally loses patience and says “Do it!”

Judge Patricia M. Wald, *Judicial Review in the Time of Cholera*, 49 ADMIN. L. REV. 659, 663-64 (1997).

371. *Id.* at 659.

So where does the burden for reform lie? Does it lie with the agencies, to do a better job prioritizing their responsibilities in light of limited funds? The FWS tried that with its listing priority guidance, which was flatly rejected by the courts. Ironically, Judge Wald recommends the very thing that the FWS tried: “to make more aggressive use of risk prioritizing,” and to develop a rational basis for juggling a number of competing statutory deadlines.<sup>372</sup> Consider her comments in response to whether courts should stick to strict enforcement of deadlines, and let Congress deal with the ramifications:

I think the better answer lies in encouraging agencies to make more aggressive use of risk prioritizing. An internal control mechanism for meeting competing statutory deadlines in the order of their risk to public health and safety would certainly aid the court in deciding whether to be tough or lenient when the agency misses a due date. Eventually such a mechanism should aid the agency in arguing its case to Congress as well. *A rational plan for accomplishing its statutory duties deserves to trump ad hoc statutory deadlines that do not reflect such a comparative risk assessment.* In sum, I agree that courts should not accept a blanket assertion that the agency cannot meet the deadline because it is overworked, but a court might be justified in accepting an argument that the agency is confronting several statutory deadlines and has ranked them in order of their public importance.<sup>373</sup>

Judge Wald’s position captures exactly the strategy of the FWS. The agency had carefully, deliberately developed a priority system based on the risk to species’ survival and benefits of administrative action, balancing benefits to the species versus its own resources. The FWS even had foresight to develop this prioritization scheme prior to the end of the original listing moratorium in 1995-1996; their listing priority guidance was not a post-hoc attempt at redressing its failings. The FWS did everything within its authority to anticipate and address the coming tsunami. Yet its actions were categorically rejected.

Few will disagree with the conclusion that the onus rests first with Congress. Congress can either impose less deadlines and overhaul structural limitations within agencies, or dole out greater appropriations. Instead, Congress washes its hands of the dilemma once it creates the law and funds the agency, and leaves it to the courts to enforce.<sup>374</sup> Professor Pierce relates this back to the authorization-appropriations dichotomy,

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372. *Id.* at 664.

373. *Id.* (emphasis added).

374. *See id.* at 663 (“Congress seems to be looking to the courts to police the agencies, not to offer them a safe harbor.”).

discussed in the beginning of this Article, and blames it on the ease with which lawmakers can adopt unpopular decisions in the unlit chambers of appropriations committees.<sup>375</sup>

Of course, Congress's hands are tied more than one might realize at first blush. Partisan politics often prevent would-be reformers from opening a law for a narrow amendment, for fear that the legislative process would quickly run astray. As previously mentioned, appropriators can be restricted by budgetary rules and procedures in increasing funding for one agency without identifying commensurate reductions elsewhere. Entitlement programs and off-budget programs lock away much of the overall budget as well.

That leaves the courts. Pierce attributes many of the problems facing agencies now to be the fault of the courts.<sup>376</sup> Many of the due process requirements relating to fair hearings were imposed by the courts, for example.<sup>377</sup> The requirement to take "a hard look" at the issue, and address virtually all comments received on a proposed rulemaking, was based on a Supreme Court decision,<sup>378</sup> and requires inordinate amounts of resources and time on the part of the agency.<sup>379</sup> The courts are also responsible for the elaborate interpretation of the APA requirement that a rulemaking include a "concise general statement of basis and purpose."<sup>380</sup> A perfect example in ESA implementation exists with the decision in *American Land Alliance v. Norton*, in which the court held invalid the FWS petition management guidance, in part because the agency published only a notice of availability in the *Federal Register*, rather than the guidance document itself,<sup>381</sup> and further because

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375. See Pierce, *supra* note 369, at 69.

[I]t is much easier for politicians of both parties to strip agencies of the resources required to pursue their statutorily assigned missions. The dearth of discussion of the dramatic reductions in discretionary spending urged by both parties in the great budget debate illustrates what political scientists have long recognized: Enacting appropriations statutes is a much less visible legislative activity than is enacting regulatory statutes. The path of least resistance for any politician is to enact or retain the politically valuable rhetoric embodied in absolutist regulatory statutes; to decline to appropriate the funds necessary to implement the statutes; and then to chastise the agencies for failing to perform their statutorily assigned tasks.

*Id.*

376. See *id.* at 87-89.

377. See *id.* at 71.

378. See *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43-44 (1982).

379. See Pierce, *supra* note 369, at 71.

380. *Id.* at 71-72.

381. See 242 F. Supp. 2d 1, 11 (D.D.C. 2003).

the final document differed from the draft document.<sup>382</sup> This would require endless iteration of the notice-and-comment process.

What can courts do to alleviate the problems they helped create? As discussed above, the courts seem to have it within their equitable power to give the FWS some slack. Pierce makes a strong argument for reasoned decisionmaking and judicial latitude when it comes to discretionary agency actions, but he takes a stringent view when it comes to statutory deadlines.<sup>383</sup> He states that the Congressional mandate is too clear and unambiguous for the courts to read in any latitude,<sup>384</sup> and that courts must enforce the plain mandates of Congress, leaving it to Congress to amend them if they are too burdensome.<sup>385</sup> This position, however, is unrealistic in light of, and contradictory to, Pierce's earlier observation that Congress seems incapable of meaningful legislative reform because of the "symbolic rhetoric that dominates the political and electoral process."<sup>386</sup> The legislative absolutism that he sees in substantive mandates is certainly no different than the absolutism seen in

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382. *See id.* at 12.

383. *See* Pierce, *supra* note 369, at 93.

Judicial review of agency failures to comply with statutory deadlines is unlike the scope of the duty to engage in reasoned decisionmaking or the scope of the discretionary function exception in an important respect: The entirety of the duty to comply with statutory deadlines is of legislative origin. Congress has instructed agencies to take specific actions by a date certain, and it has instructed courts to enforce those statutory mandates against agencies.

*Id.*

384. *See id.* ("A court cannot deviate from those clear commands without doing violence to the principle of legislative supremacy. That principle is too valuable to sacrifice even when adherence to the principle is certain to produce a plethora of unintended adverse effects.")

Pierce makes an interesting point with respect to the ESA moratorium. In the context of the circuit court decision of *Environmental Defense Center v. Babbitt*, he recognizes that Congress had created two conflicting mandates: to list the species pursuant to the ESA, but to prohibit all funding in order to do so pursuant to the moratorium. Thus, during the period of effectiveness of the moratorium, Pierce allows the court to exercise discretion:

Courts should excuse agencies from the duty to comply with a statutory deadline only in unusual cases like *Environmental Defense Center v. Babbitt*, where the agency could comply with a statutory mandate only by violating another statute. In a case of that type, Congress has forced a court to compromise the principles of legislative supremacy by enacting inconsistent statutes.

*Id.* at 93-94. Pierce does not, however, address the situation immediately following the moratorium, where there is no longer a direct statutory conflict, but where the repercussions are just as strong.

385. *Id.* at 94.

386. *Id.* at 68 ("Those statutes employ the rhetoric of health and safety absolutism; the rights conferred are not qualified with reference to the many other social goals with which they inevitably conflict. Moreover, they require the use of rhetorically attractive, but highly inefficient, command-and-control regulation.")

deadlines; indeed, deadlines often give lawmakers an even higher moral ground on which to stand, and so the reasoned decisionmaking he advocates for the courts in balancing substantive discretionary duties should equally apply to balancing procedural deadlines. Judge Wald recognizes the administrative consequences of such rigorous adherence to deadlines when she observes that hastily crafted rules “will probably stand a greater risk of being thrown out eventually for lack of reasoned decisionmaking.”<sup>387</sup> Why does the burden of a solution fall to the courts? Because the agency lacks the authority, and Congress lacks the desire. The courts have the authority, and the responsibility.

#### CONCLUSION

Let us review the bidding. Those who assail the use of riders are right in many of their observations. Riders can more readily subvert public policy than other forms of legislation. Riders also lead to careless legislation. Consider the confusion created between the NMFS and the FWS during the listing moratorium as a result of sloppy work. An authorizing bill would not likely have created the same problems. At the same time, riders have been a constant presence in the legislative landscape for 150 years, and the basic checks and balances apply. Presidents have vetoed bills because of specific riders; they have approved bills despite the presence of specific riders. Particularly in today’s political environment, riders and appropriations bills generally receive as much, if not more, attention than authorization bills, which if anything, is securing their place in the arsenal of legislative reform.

The use of riders has become much more ubiquitous, and much more aggressive, however, in recent years. This was particularly true during the 105th Congress in 1995-1996. It was during this period that the ESA listing moratorium was approved as a rider, which has had devastating impacts for implementation of the ESA. These impacts are still being felt, seven years later, in the form of backlogs in critical habitat designations and species listings, and increasing litigation on enforcing deadlines and on decisions made under the deadlines. The impacts are also being felt in agency priorities that are driven solely by litigation, and agency efforts to limit liability in the courtroom by limiting its available funding to address court-ordered actions. Ironically, the FWS must spend two-thirds of its listing budget this year to designate critical habitats, which it believes has virtually no conservation value, and only one-third of its listing budget on actual listings, which triggers the

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387. Wald, *supra* note 370, at 664.

substantive requirements of the ESA. To further exacerbate the problem, in order to answer litigants' challenges, it is spending more money on each designation it still deems meaningless.

All three branches of government are to blame for the current situation. Congress imposed the original ESA moratorium, and failed to address the consequences once the moratorium was lifted; the FWS had long disdained critical habitat designations and saw the moratorium as a way to justify its decisions to not designate critical habitat, and obstinately refused to change course despite the onslaught of litigation; the courts have been unduly harsh in their treatment of the FWS (notwithstanding the FWS' faults), and have refused to recognize the stark reality facing the FWS. All three branches have shirked their responsibilities in this fiasco.

All three branches have a duty to resolve the situation. Despite the FWS' faults, it has been the most progressive in attempting to ameliorate the situation. Even before the moratorium was lifted, it saw the impending rush of deadlines and the likely litigation crisis, and it developed guidance for prioritizing competing statutory mandates. To be sure, the FWS could have then and now requested significant additional funds, but it is highly doubtful that this would have been granted.

Congress, of course, has the greatest responsibility in first creating, and now prolonging, the situation. It created the moratorium, and now it maintains funding for listings and designations at an inadequate level. And Congress, of course, has the greatest opportunity to fix the situation by amending the law. And furthermore, Congress, of course, will not act because it can engage in the political dishonesty of mandating deadlines and imposing moratoria for purposes of public rhetoric, and then refuse to fund adequate resources to satisfy the deadlines outside of public scrutiny.

The courts represent the greatest hope to resolving the situation, even if they have not lived up to it yet. Simply, they have the authority where the Service does not, and they have the willingness where Congress does not. Up until now, the courts have seen no room for equitable relief. This stems from the clear and unambiguous language of the ESA, particularly with respect to section 7, and the Supreme Court's refusal to balance the equities in *Tennessee Valley Authority v. Hill*. Lower courts have extended this stringent position across all procedural as well as substantive mandates of the ESA, as courts have been adamant not to substitute their judgment for that of Congress. This has generally been a good thing for ESA implementation.



It has been disastrous, however, with respect to the ESA moratorium. Ever so briefly, courts allowed for the missed deadlines during the moratorium itself, but immediately upon its suspension, courts gave the FWS no flexibility. Abiding by their refusal to craft equitable relief for the FWS, courts refuse to substitute their own judgment for that of Congress. In doing so, they seem to have forgotten that Congress itself substituted its own judgment for something else. The moratorium had a brief life, but it nevertheless represented Congressional judgment for the duration.

This would seem to be the open door that courts need to craft equitable relief for the FWS. Courts recognized the conflicting statutory mandates of the ESA and the moratorium while they existed, but refused to look further at the long-term consequences of those conflicting mandates once the moratorium was lifted. This example of judicial shortsightedness plays into the hands of Congress. Congress can impose temporary mandates, then let the courts and agency spend years afterwards grappling with the consequences. It is one thing for an agency to miss statutory deadlines merely because of shrinking resources and inadequate appropriations; it is an entirely different scenario when Congress prohibits the agency from acting for twelve months, and then leaves the agency to meet its original deadlines together with new deadlines. In this situation, it falls upon the courts to use their equitable powers to provide relief for the FWS, and deference to the FWS' efforts to address, in a rational manner, its competing duties. In navigating the crosswinds of appropriations and administration of the ESA, in attempting to beat back the riders on the storm, it is the courts that can once again even the keel and return to a steady course.