

GETTING SPECIES ON BOARD THE ARK ONE  
LAWSUIT AT A TIME: HOW THE FAILURE TO LIST  
DESERVING SPECIES HAS UNDERCUT  
THE EFFECTIVENESS OF THE  
ENDANGERED SPECIES ACT

By  
James Jay Tutchton\*

*This Article, presented by a former general counsel for WildEarth Guardians, discusses the organization’s attempts to protect imperiled species under the Endangered Species Act (ESA). By comparing extinction patterns from the past, we can see that the human impact on the Earth’s biodiversity is similar to that caused by past geological catastrophes. The ESA is the Noah’s Ark of our time, providing the best opportunity to help stem the tide of extinction. In analyzing the ESA, it is clear that the Act serves important human interests and is effective when utilized as intended. However, the United States Fish & Wildlife Service (FWS)—citing budgetary restrictions—has failed to list thousands of species likely warranting protection. WildEarth Guardians, in an effort to prevent humans from driving a large percentage of other species to extinction, developed a strategy in which they filed two “mega-petitions” and conducted a “BioBlitz.” The mega-petitions, which sought the listing of hundreds of species, and the roughly six week BioBlitz finally got the attention of FWS and led to a Multidistrict Litigation settlement. The Article concludes by analyzing the effectiveness of the settlement and its resulting success for the future of the ESA.*

I. INTRODUCTION .....	402
II. THE PROBLEM .....	403
A. <i>We Are in an Extinction Crisis</i> .....	403
B. <i>Humanity Is Responsible for This Extinction Crisis</i> .....	405
C. <i>The ESA Might Stem the Tide</i> .....	406
III. THE IMPORTANCE AND EFFECTIVENESS OF THE ESA .....	407

---

\* © James Jay Tutchton 2014. Senior Staff Attorney, Defenders of Wildlife. J.D., University of California at Los Angeles (UCLA), 1990; B.B.A., University of Notre Dame, 1986. From mid-2007 to mid-2013, I served as General Counsel for WildEarth Guardians. I was involved in—both directly and as a supervising attorney—the Endangered Species Act Section 4 “listing” litigation that concluded with the Multidistrict Litigation settlement, which is discussed in this Article. The views expressed are solely my own. I wish to extend both credit and thanks to WildEarth Guardians’ staff, particularly its Wildlife Program Director during the relevant time period, Nicole J. Rosmarino, its able staff attorneys, and pro bono counsel, all of whom made the efforts discussed in this Article possible.

A.	<i>The ESA Is the Nation's Most Important Species Protection Law</i> .....	407
B.	<i>The ESA Is Also an Important Animal Protection—and Possibly Even an Animal Rights—Statute</i> .....	408
C.	<i>The ESA Serves Important Human Interests</i> .....	410
D.	<i>The ESA Is Effective</i> .....	411
IV.	THE FAILURE TO LIST SPECIES NEGATES THE EFFECTIVENESS OF THE ESA .....	412
V.	THE LISTING PROCESS .....	414
A.	<i>Citizen Petitions and the Listing Standard</i> .....	414
B.	<i>Ninety-Day Findings</i> .....	415
C.	<i>Twelve-Month Findings</i> .....	416
D.	<i>Final Listing Decisions</i> .....	417
E.	<i>The Deadlines</i> .....	417
VI.	THE BLACK HOLE .....	418
VII.	THE “MEGA-PETITIONS,” “BIOBLITZ,” AND MDL SETTLEMENT .....	420
A.	<i>The Mega-Petitions</i> .....	420
B.	<i>The BioBlitz</i> .....	424
C.	<i>The MDL Settlement</i> .....	425
VIII.	DID IT WORK? .....	428
IX.	CONCLUSION .....	429

## I. INTRODUCTION

On behalf of my client WildEarth Guardians, I spent much of the last six years attempting to force the United States (U.S.) Fish & Wildlife Service (FWS)<sup>1</sup> to list, and thereby protect, imperiled species under the Endangered Species Act (ESA).<sup>2</sup> After years of working on numerous single-species ESA listing petitions, two multi-species “mega-petitions,”<sup>3</sup> and a “BioBlitz”<sup>4</sup> of resulting lawsuits, I served as WildEarth Guardians’ lead counsel in the mediation that led to the ESA Section 4 Multidistrict Litigation (MDL) settlement<sup>5</sup> discussed in this Article. Accordingly, I offer the following observations on my experience serv-

---

<sup>1</sup> The Endangered Species Act delegates listing decisions to two cabinet-level Secretaries—Interior and Commerce. 16 U.S.C. § 1533 (2012). The Secretary of Interior has sub-delegated authority to FWS. The Secretary of Commerce has sub-delegated authority to the National Oceanic and Atmospheric Administration (NOAA) and its National Marine Fisheries Service (NMFS). Pursuant to the Reorganization Plan No. 4 of 1970, FWS is responsible for listing decisions involving terrestrial and freshwater species and some marine mammals, and NMFS is responsible for the remainder of marine species and anadromous fish species. *See* 35 Fed. Reg. 15627, 15627 (Oct. 6, 1970) (transferring authority pertaining to marine species and anadromous fish species from the Secretary of Interior to the Secretary of Commerce). This Article discusses only FWS’s listing program, though many of the views expressed apply to NMFS’s listing program as well.

<sup>2</sup> 16 U.S.C. §§ 1531–1544.

<sup>3</sup> Discussed *infra* pt. VII(A).

<sup>4</sup> Discussed *infra* pt. VII(B).

<sup>5</sup> Discussed *infra* pt. VII(C).

ing in the trenches of what another combatant has aptly termed the “listing wars.”<sup>6</sup>

## II. THE PROBLEM

Those striving to ensure the survival of our fellow species on this planet face a problem. If ignorance is bliss, it follows that knowledge is misery. The knowledge that our species, *Homo sapiens*, is driving a large percentage—perhaps the majority—of other species to extinction, torments WildEarth Guardians (Guardians) and those who share its values. Aware of this problem, they feel compelled to fight the tide. Their compulsion springs from multiple sources: morality, ethics, and self-interest. These advocates recognize that human life in a biologically impoverished future will be less interesting, increasingly lonely, and eventually more difficult. As George Bernard Shaw noted: “One touch of Darwin makes the whole world kin.”<sup>7</sup> Guardians and its members want to care for their “kin.”<sup>8</sup>

### A. *We Are in an Extinction Crisis*

The extent of the current extinction crisis is daunting. Scientists generally agree that life on Earth has gone through five previous major extinction spasms: the Ordovician, 440 million years ago; the late Devonian, 365 million years ago; the end-Permian, 225 to 245 million years ago; the end-Triassic, 210 million years ago; and the end-Creta-

---

<sup>6</sup> I have borrowed the phrase “listing wars” from an excellent and comprehensive article on the subject by Benjamin Jesup, an attorney in the Office of the Solicitor, U.S. Department of the Interior, who sat across the table representing FWS during the ESA Section 4 MDL settlement negotiations. Benjamin Jesup, *Endless War or End This War? The History of Deadline Litigation under Section 4 of the Endangered Species Act and the Multi-District Litigation Settlements*, 14 Vt. J. Env'tl. L. 327, 363 (2013). Mr. Jesup’s article traces the history of listing warfare for decades, providing the perspective of one representing FWS throughout. Mr. Jesup discusses the role of WildEarth Guardians, the substantial role of its co-plaintiff in the Multidistrict Litigation, the Center for Biological Diversity, and the significant prior and contemporaneous efforts of other environmental organizations advocating for the increased listing of species. In the present Article, I am not nearly so ambitious, either as to timeframe or scope, discussing only the most recent round of the listing wars that directly led to the MDL settlement, and limiting the scope of this Article to firsthand knowledge of the role of WildEarth Guardians.

<sup>7</sup> George Bernard Shaw, *Back to Methuselah*, in *The Complete Prefaces of Bernard Shaw* 501, 529 (Paul Hamlyn Ltd. 1965).

<sup>8</sup> Professor Edward O. Wilson of Harvard University introduced the term “biophilia,” meaning “the innate tendency to focus on life and lifelike processes.” Edward O. Wilson, *Biophilia* 1 (Harv. U. Press 1984). Arising from this tendency is the desire of the human species to protect other forms of life. *Id.* at 139. For an extended discussion of this aspect of human nature, see *The Biophilia Hypothesis* (Stephen R. Kellert & Edward O. Wilson eds., Is. Press 1993) (presenting diverse academic opinions on aspects of biophilia).

ceous, 65 to 66 million years ago.<sup>9</sup> Scientists use these great extinction events, and the resulting presence or absence of species' fossils in rock layers, to demarcate the Earth's history into these geological epochs.<sup>10</sup> During each of these prior extinction events, at least 12% of the *families* of marine species<sup>11</sup> and at least 65% of total marine species went extinct.<sup>12</sup> Scientists believe that humanity is currently ushering in a "sixth great extinction spasm,"<sup>13</sup> one that future scientists—should there be any—would be able to observe from the absence of currently existing species from future rock layers.

Biologists further agree "that the extinction rate for all species is now fifty to five hundred times higher than the long-term average."<sup>14</sup> Lest one take solace in a belief that these increasing extinctions are primarily of obscure or "minor" species, the science actually indicates the problem is worse among those species we recognize and know best—large-bodied animals.<sup>15</sup> Indeed, a comprehensive study by 130 scientists found that 25% of the 5,487 mammal species known to science are at risk of extinction, including 79% of ape and monkey species in southern Asia and more than one-third of marine mammals.<sup>16</sup>

Moreover, the extinction of the less noticeable, "minor" species has rippling effects. For example, researchers have calculated that the extinction of 6,279 plants listed as vulnerable or endangered by the International Union for Conservation of Nature (IUCN)<sup>17</sup> would also result in the cascading loss of 4,672 species of beetles and 136 species

---

<sup>9</sup> Richard Leakey & Rodger Lewin, *The Sixth Extinction: Patterns of Life and the Future of Humankind* 45 (Doubleday 1995); Edward O. Wilson, *The Diversity of Life* 29 (Belknap Press of Harv. U. Press 1992).

<sup>10</sup> Leakey & Lewin, *supra* n. 9, at 44.

<sup>11</sup> Wilson, *supra* n. 9, at 30.

<sup>12</sup> Leakey & Lewin, *supra* n. 9, at 44.

<sup>13</sup> Wilson, *supra* n. 9, at 32; *accord* Leakey & Lewin, *supra* n. 9 (discussing the current extinction crisis).

<sup>14</sup> Joe Roman, *Listed: Dispatches from America's Endangered Species Act* 34 (Harv. U. Press 2011) (citing David S. Woodruff, *Declines of Biomes and Biotas and the Future of Evolution*, 98 *Procs. of the Natl. Acad. of Sci.* 5471, 5471 (2001)); *see also* Natl. Research Council, *Comm. on Sci. Issues in the Endangered Species Act, Science and the Endangered Species Act* 34 (Natl. Acad. Press 1995) (describing a 1995 study which found that extinction rates are 10 to 1,000 times greater than the normal extinction rates as measured over geological time).

<sup>15</sup> Roman, *supra* n. 14, at 34.

<sup>16</sup> Jan Schipper et al., *The Status of the World's Land and Marine Mammals: Diversity, Threat, and Knowledge*, 322 *Sci.* 225, 227–28 (2008).

<sup>17</sup> IUCN was founded in 1948 and is the largest professional global conservation network. Intl. Union Conserv. of Nat., *About IUCN*, <http://www.iucn.org/about/> [http://perma.cc/93P-YVG5] (updated Feb. 18, 2014) (accessed Apr. 12, 2014). IUCN has more than 1,200 member organizations, including more than 200 government and more than 900 nongovernmental organizations. *Id.* IUCN has approximately 11,000 volunteer scientists and experts working in more than 160 countries. *Id.* It has over 1,000 staff working in 45 offices around the world. *Id.* Its 11,000 experts establish and use definitive standards to evaluate the extinction risk faced by particular species and maintain this information in an online database known as the IUCN Red List of Threatened Species. *Id.*

of butterflies.<sup>18</sup> Some researchers expect the average number of threatened species to rise 7% by 2020, and 14% by 2050.<sup>19</sup> Others project that anthropogenic extinction drivers, such as habitat loss and climate change, will cause the rate of extinction to increase tenfold.<sup>20</sup> Three-fifths of all species on Earth may face extinction from climate change if greenhouse gas emissions are not promptly curtailed.<sup>21</sup> The extinction crisis is both vast and accelerating.

### B. *Humanity Is Responsible for This Extinction Crisis*

As explained by Professor Edward O. Wilson of Harvard, the extinction crisis is caused by humanity:

Human demographic success has brought the world to this crisis of biodiversity. Human beings—mammals of the 50-kilogram weight class and members of a group, the primates, otherwise noted for scarcity—have become a hundred times more numerous than any other land animal of comparable size in the history of life. By every conceivable measure, humanity is ecologically abnormal. Our species appropriates between 20 and 40 percent of the solar energy captured in organic material by land plants. There is no way that we can draw upon the resources of the planet to such a degree without drastically reducing the state of most other species.<sup>22</sup>

Humanity's current impacts on the world's biodiversity can be compared to past geologic catastrophes, such as the asteroid impact, hypothesized to have wiped out the dinosaurs 65 million years ago at the end of the Cretaceous epoch.<sup>23</sup> Humanity is on the verge of a similarly impressive, but frighteningly dubious, "accomplishment."

<sup>18</sup> Lian Pin Koh et al., *Species Coextinctions and the Biodiversity Crisis*, 305 *Sci.* 1632, 1633–34 (2004).

<sup>19</sup> Jeffrey K. McKee et al., *Forecasting Global Biodiversity Threats Associated with Human Population Growth*, 115 *Biological Conserv.* 161, 163 (2003).

<sup>20</sup> Georgina Mace et al., *Biodiversity, in Ecosystems and Human Well-Being: Current State and Trends*, vol. 1, 77, 96–99, 114 (Rashid Hassan et al. eds., Is. Press 2005).

<sup>21</sup> Tim Flannery, *The Weather Makers: How Man Is Changing the Climate and What It Means for Life on Earth* 183 (1st Am. ed., A. Mthly. Press 2005).

<sup>22</sup> Wilson, *supra* n. 9, at 272; accord E.O. Wilson et al., *Env. News Serv., Insights: Human Activities Cause of Current Extinction Crisis*, <http://www.ens-newswire.com/ens/may2005/2005-05-19-insltr.asp> [<http://perma.cc/GY9D-NHBM>] (May 19, 2005) (accessed Apr. 12, 2014); *Natl. Geographic, The Sixth Great Extinction: A Silent Extermination*, <http://newswatch.nationalgeographic.com/2012/03/28/the-sixth-great-extinction-a-silent-extermiation/> [<http://perma.cc/6EJG-EZNH>] (Mar. 28, 2012) (accessed Apr. 12, 2014); see e.g. Noel M. Burkhead, *Extinction Rates in North American Freshwater Fishes, 1900–2010*, 62 *BioScience* 798, 798 (2012) ("Inferences that the rates of contemporary extinction will increase are based on . . . the increasing negative effects of human activities on the Earth's biosphere, and the conclusion that such activities will result in higher near-future extinction rates.")

<sup>23</sup> Peter Schulte et al., *The Chicxulub Asteroid Impact and Mass Extinction at the Cretaceous-Paleogene Boundary*, 327 *Sci.* 1214, 1214 (2010); *Natl. Geographic, supra* n. 22; see Navjot S. Sodhi et al., *Causes and Consequences of Species Extinctions*, in *The Princeton Guide to Ecology* 514, 515 (Simon A. Levin et al. eds., Princeton U. Press 2012) (discussing commonalities between the past five great extinctions, and their relevance to the current biodiversity crisis).

### C. *The ESA Might Stem the Tide*

Aware of the human-caused extinction crisis and compelled to take action, groups like WildEarth Guardians turn primarily to their familiar legal tools to change society's behavior—one such tool being the Endangered Species Act (ESA), our nation's most powerful and effective law to protect imperiled species.<sup>24</sup>

However, not unlike the mythological Noah admitting the animals onto his ark two-by-two,<sup>25</sup> the ESA operates on the principle of a "magic list." Species only benefit from substantive legal protections once they are actually listed.<sup>26</sup> Until then, species petitioned by citizens for listing, or even species that the U.S. Fish & Wildlife Service (FWS) has proposed to list, do not receive any of the substantive protections of the Act.<sup>27</sup> Thus, because listing decisions either confer or deny the full legal protection of the ESA, they are highly scrutinized and controversial.

Indeed, interests opposed to the protection of endangered species, or perhaps viewed more charitably, those opposed to limiting human behavior to protect endangered species, frequently target the ESA's listing process. These parties hope to avoid any feared economic impacts that might result from a species' legal protection by preventing

---

<sup>24</sup> Lawsuits brought under the ESA are not the only method of protecting biodiversity pursued by groups such as WildEarth Guardians, though the legal conflicts do attract the most media attention. WildEarth Guardians also promotes private, personal choices, such as a vegan diet, which might help stem the biodiversity crisis. For example, a study by researchers at Carnegie Mellon University calculated that replacing meat and dairy products with vegetables one day a week has a positive environmental impact equal to driving 1,160 miles less each year. Christopher L. Weber & H. Scott Matthews, *Food-Miles and the Relative Climate Impacts of Food Choices in the United States*, 42 *Env'tl. Sci. & Tech.* 3508, 3512–13 (2008). It follows that adopting a vegan diet has a positive environmental impact equal to driving 8,100 less miles each year. *Id.* at 3513. Given that climate change is a leading cause of extinction, becoming a vegan may be the single most significant personal action available to those who seek to conserve biodiversity.

<sup>25</sup> *Genesis* 7:8–9 (New Intl.).

<sup>26</sup> Listed species are entitled to several substantive legal protections. Principal among these is the general prohibition against "taking." 16 U.S.C. § 1538(a)(1)(B). This prohibition means listed species cannot be harassed, harmed, pursued, hunted, shot, wounded, killed, trapped, captured, or collected. *Id.* at § 1532(19). Second, the continued existence of a listed species cannot be jeopardized by federal actions, and listed species are generally entitled to a designated "critical habitat" which cannot be destroyed or adversely modified by federal actions except under limited circumstances. *See id.* at § 1536(a)(2) (prohibiting jeopardy to a species' continued existence and destruction or adverse modification of designated critical habitat by federal actions); *id.* at § 1533(a)(3)(A)(i) (requiring the designation of critical habitat to the maximum extent prudent and determinable concurrently with listing). Additionally, listed species are generally entitled to a federal "recovery plan" to recover them to the point where they no longer need the Act's protection to survive. *Id.* at § 1533(f).

<sup>27</sup> *See id.* at § 1533 (authorizing the Secretary of the Interior to protect listed species by issuing regulations for the conservation of the species, and to remove recovered species from the list).

the species from being listed in the first place.<sup>28</sup> Faced with political pressure and scrutiny, bureaucracies such as FWS and the National Marine Fisheries Service predictably delay taking potentially controversial actions.<sup>29</sup> By listing far fewer species under the ESA than scientists say merit protection, FWS in particular has proven to be a “reluctant Noah” managing the ark of legal protection.<sup>30</sup> WildEarth Guardians, and those of like mind, want rapid action and view an ESA listing as the first step to a species’ recovery,<sup>31</sup> on the theory that you cannot begin to solve the problem until you acknowledge its existence. These advocates are hurriedly trying to avert a crisis. Meanwhile, FWS and the interests benefiting from the status quo prefer to go slowly, studying the problem, quite literally, to death—hence, the genesis of the “listing wars.”

### III. THE IMPORTANCE AND EFFECTIVENESS OF THE ESA

#### A. *The ESA Is the Nation’s Most Important Species Protection Law*

Upon its first occasion to examine the Endangered Species Act of 1973 (ESA), the U.S. Supreme Court declared it “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”<sup>32</sup> Now, four decades later, many other nations have

<sup>28</sup> See Mark Cheater, *Assault on Wildlife: The Endangered Species Act under Attack* 6 (Defenders of Wildlife Sept. 2011) (available at [http://www.defenders.org/publications/assault\\_on\\_wildlife\\_the\\_endangered\\_species\\_act\\_under\\_attack.pdf](http://www.defenders.org/publications/assault_on_wildlife_the_endangered_species_act_under_attack.pdf) [<http://perma.cc/KP7E-L79C>] (accessed Apr. 12, 2014)) (describing the underlying economic concerns behind many of the legislative attacks against the ESA).

<sup>29</sup> See e.g. D. Noah Greenwald & Kieran F. Suckling, *Progress or Extinction? A Systematic Review of the U.S. Fish and Wildlife Service’s Endangered Species Act Listing Program 1974–2004*, at 3 (Ctr. for Biological Diversity May 2005) (discussing generally the lengthy delays in listing species and the devastating effects on species extinction); Mike Corn, Hays Daily News, *Listing Controversy Continues*, <http://hdnews.net/outdoors/LEPC011714> [<http://perma.cc/YZ8L-WE2E>] (Jan. 17, 2014) (accessed Apr. 12, 2014) (discussing the delay regarding the listing of the lesser prairie chicken); Jessica Ferrell, Marten Law, *Natural Resource Decisions Will Bring Continued Controversy in Second Obama Term*, <http://www.martenlaw.com/newsletter/20121221-natural-resource-decisions-controversy> [<http://perma.cc/VSV9-ZUAQ>] (Dec. 21, 2012) (accessed Apr. 12, 2014) (discussing the delay in the listing and the controversy surrounding the dunes sagebrush lizard).

<sup>30</sup> See Greenwald & Suckling, *supra* n. 29, at 6 (noting that “FWS issued far fewer listing determinations and a greater proportion of negative determinations from 2001–2004 than in the previous four years” and that administrative officials are directing FWS biologists to refrain from listing species based on nonscientific reasons).

<sup>31</sup> WildEarth Guardians, *Wildlife, Top Priority Campaigns*, [http://www.wildearthguardians.org/site/PageServer?pagename=programs\\_wildlife](http://www.wildearthguardians.org/site/PageServer?pagename=programs_wildlife) [<http://perma.cc/Q3QT-V7J5>] (accessed Apr. 12, 2014).

<sup>32</sup> *Tenn. Valley Auth. (TVA) v. Hill*, 437 U.S. 153, 180 (1978). The Supreme Court then went on to detail those aspects of the ESA the Court found as evidence of the statute’s strength. See *id.* at 180–81 (Among other evidence, the Court notes that Congress expressly directs the agencies to conserve endangered and threatened species, and remarks on how the term “conserve” encompasses the use of all methods necessary to bring any species to the point at which it no longer requires the protection of the statute.).

since enacted comprehensive species protection laws similar to the ESA,<sup>33</sup> and the ESA remains the nation's most comprehensive law designed to protect endangered species.<sup>34</sup>

*B. The ESA Is Also an Important Animal Protection—and Possibly Even an Animal Rights—Statute*

As the nation's strongest species protection law, it seems appropriate to observe that the ESA could also be viewed as one of the nation's most important animal protection statutes, perhaps even providing a limited recognition of animal rights.<sup>35</sup> Importantly, from an animal rights perspective, the ESA protects not only species from take,<sup>36</sup> but

---

<sup>33</sup> See e.g. Environmental Protection and Biodiversity Conservation Act 1999 (Cth) (available at <http://www.comlaw.gov.au/Details/C2013C00539> [<http://perma.cc/5HMT-V892>] (accessed Apr. 12, 2014)) (Australia); Species at Risk Act, S.C. 2002, c. 29 (available at [http://www.sararegistry.gc.ca/approach/act/sara\\_e.pdf](http://www.sararegistry.gc.ca/approach/act/sara_e.pdf) [<http://perma.cc/9ZF3-3D7U>] (accessed Apr. 12, 2014)) (Canada).

<sup>34</sup> See e.g. *Babbitt v. Sweet Home Ch. of Communities for a Great Or.*, 515 U.S. 687, 698 (1995) (reiterating the Court's statement in *TVA v. Hill* that the ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation"); *Turtle Island Restoration Network v. Natl. Marine Fisheries Serv.*, 340 F.3d 969, 973 (9th Cir. 2003) (same); *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 414 (D.C. Cir. 2004) (same).

<sup>35</sup> This often unconsidered aspect of the ESA is worth some mention in a journal devoted to discussing animal protection law and theories of animal rights. As a personal observation, for many years I have taught two courses as an adjunct professor at the University of Denver, Strum College of Law. One is a seminar on Animal Rights and the second is entitled Wildlife Law. It has frequently occurred to me, and generations of students, that the latter is really a subset of the former—and that, at present, the animals most likely to enjoy a spectrum of "rights" are those living free in the wild.

<sup>36</sup> The ESA defines a species to include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16). The ESA further defines "fish or wildlife" as "any member of the animal kingdom, including without limitation any mammal, fish, bird . . . amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate." *Id.* at § 1532(8). A "plant" is more simply defined as "any member of the plant kingdom." *Id.* at § 1532(14). The concept of a "distinct population segment" is subject to further regulatory guidance. See 61 Fed. Reg. 4722, 4724 (Feb. 7, 1996) (A distinct population segment must be "discrete" and "significant."). Any of these three listable entities—a species, a subspecies, or a distinct population segment—can be listed as either endangered or threatened, providing six options. A species is listed as endangered if it is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A species is listed as threatened if it is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* at § 1532(20). The phrase "throughout all or a significant portion of its range" in both definitions further expands the Act's reach. Any of the three types of listable entities—a species, subspecies, or distinct population segment—that is threatened or endangered in a "significant portion of its range" must be listed throughout its range. See *WildEarth Guardians v. Salazar*, 2010 U.S. Dist. LEXIS 105253 at \*16 (D. Ariz. Sept. 30, 2010) ("Congress defined endangered and threatened species as species under the plain language of the ESA. . . . The defendant cannot determine that anything other than a species, as defined by the ESA, is an endangered or threatened species."); *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207, 1211 (D. Mont. 2010) (finding that "[t]he Endangered Species Act does not allow the U.S. Fish & Wildlife Service to list

also individual animals as members of a listed species, meaning these animals cannot be killed, harmed, or harassed except in certain limited situations.<sup>37</sup> Though the ESA's scope as an animal protection statute is clearly limited—protecting only those species and the individual members of those species on the edge of extinction<sup>38</sup>—in another important respect the ESA is quite broad, protecting *all* endangered species, including plants.<sup>39</sup> Most importantly, with two limited exceptions,<sup>40</sup> the ESA recognizes that *all species have a right to exist*. The inclusive definition and protection of species, regardless of their popularity or perceived utility to humanity, distinguishes the ESA from nearly all other wildlife protection laws.<sup>41</sup> The ESA's expansive

---

only part of a 'species' as endangered, or to protect a listed distinct population segment only in part").

<sup>37</sup> The ESA prohibits the taking of species that are listed as endangered. 16 U.S.C. § 1538(a)(1)(B). FWS has extended the take prohibition to cover threatened species as well. 50 C.F.R. § 17.31(a) (2012). NMFS may also extend protection against take to threatened species on a case-by-case basis. 16 U.S.C. § 1533(d). "Take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." *Id.* at § 1532(19). The terms "harass" and "harm" are further defined by regulation. "Harass" means "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." 50 C.F.R. at § 17.3. "Harm" means "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." *Id.* One of the major exceptions to the take prohibition allows taking incidental to a federal agency action so long as it will not jeopardize the continued existence of a protected species or adversely modify or destroy its designated critical habitat. 16 U.S.C. § 1536(o). Other exceptions allow taking for scientific purposes or to enhance the survival of a species that are incidental to otherwise legal private activity so long as stringent conditions are met. *Id.* at § 1539(a)(1)(A)–(B).

<sup>38</sup> 16 U.S.C. § 1531.

<sup>39</sup> *Id.* at § 1532(16). However, the ESA's take prohibitions are reduced for plant species. *See id.* at § 1538(a)(2) (providing fewer prohibitions on the take of plant species as compared to the take prohibitions on fish and wildlife species provided in 16 U.S.C. § 1538(a)(1)).

<sup>40</sup> The Act's definition of a "species" excludes "species of the Class Insecta determined by [FWS or NMFS] to constitute a pest whose protection under the provisions of [the Act] would present an overwhelming and overriding risk to man." *Id.* at § 1532(6). The second exception to the Act's inclusive protection is found in the so-called "God Squad" procedure. This procedure allows a committee of certain federal and state representatives appointed by the President to determine that a federal project, likely to jeopardize the continued existence of a protected species, may proceed in certain limited situations despite its potential to drive a species to extinction. 16 U.S.C. § 1536(e)–(p). This author has found no indication that the first exception has ever been used, and the second—the "God squad" procedure—has been invoked only a handful of times, and not at all in the past two decades. Eric Yuknis, Student Author, *Would a "God Squad" Exemption under the Endangered Species Act Solve the California Water Crisis*, 38 B.C. Env'tl. Aff. L. Rev. 567, 578 (2011).

<sup>41</sup> *See e.g.* Bald and Golden Eagle Protection Act of 1940, 16 U.S.C. §§ 668–668d (2012) (providing protections for bald and golden eagles); Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703–712 (2012) (providing protections for migratory birds); Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C. §§ 1331–1340 (2012) (providing

definition of a species also distinguishes it from other state and federal animal protection laws with limited scopes due to restricted definitions.<sup>42</sup>

### C. *The ESA Serves Important Human Interests*

In drafting the ESA, Congress may well have reached its decision to protect all species based on human self-interest, as opposed to an explicit recognition that other species possess an inherent right to exist.<sup>43</sup> In practice, Congress's specific motivations are, at least in part, beside the point; the ESA has the potential to protect all threatened or endangered species, regardless of their known benefit to humanity.<sup>44</sup> This precautionary approach is overwhelmingly supported by scientific knowledge, and perhaps even more so by scientists' recognition of their lack of knowledge.<sup>45</sup> The result is a powerful biodiversity protection

---

protections for wild horses and burros as "living symbols of the historic and pioneer spirit of the West"); Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361–1423h (2012) (providing protections for marine mammals as "resources of great international significance," as well as esthetic and recreational and economic value); Magnuson–Stevens Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801–1882 (2012) (providing protections for "fishery resources[ which] contribute to the food supply, economy, and health of the Nation and provide recreational opportunities"); Wild Bird Conservation Act of 1992, 16 U.S.C. §§ 4901–4916 (2012) (providing protections for birds in the international pet trade).

<sup>42</sup> See e.g. *Animal Leg. Def. Fund, Inc. v. Espy*, 23 F.3d 496 (D.C. Cir. 1994) (unsuccessful challenge to the United States Department of Agriculture (USDA)'s definition of "warm-blooded animal" under the Animal Welfare Act, which excludes birds, aquatic animals, rats, and mice); *Levine v. Conner*, 540 F. Supp. 2d 1113, 1120 (N.D. Cal. 2008) (unsuccessful challenge to the USDA's rule excluding chickens, turkeys, and other poultry species from the Humane Methods of Slaughter Act's definition of "livestock"); *McKinney v. Robbins*, 892 S.W.2d 502, 504 (Ark. 1995) (kitten not "domesticated animal" under Arkansas statute which allows owner to kill a dog that kills the domesticated animal); *Lock v. Falkenstine*, 380 P.2d 278, 282 (Okla. Crim. App. 1963) (fighting rooster or gamecock not an "animal" under Oklahoma statute prohibiting cruelty to animals).

<sup>43</sup> *TVA v. Hill*, 437 U.S. at 178 (The Court explained that Congress had concluded that even "[f]rom the most narrow possible point of view, it is in the best interests of mankind to minimize the losses of genetic variations" because "they are potential resources. They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask." (emphasis in original)).

<sup>44</sup> In examining the legislative history that led to the passage of the ESA in 1973, the Supreme Court found the "proceedings . . . replete with expressions of concern over the risk that might lie in the loss of any endangered species." *Id.* at 177 (emphasis in original). In particular, the Court relied upon the congressional finding that, in driving species to extinction, "we threaten their—and our own—genetic heritage" and "[t]he value of this genetic heritage is, quite literally, incalculable." *Id.* at 178 (emphasis in original).

<sup>45</sup> The overwhelming scientific consensus is that protecting biodiversity "is the key to the maintenance of the world as we know it," and that it is delusional to assume "that people can flourish apart from the rest of the living world." Wilson, *supra* n. 9, at 15, 349; accord Bradley J. Cardinale et al., *Biodiversity Loss and Its Impact on Humanity*, 486 Nat. 59 (2012) (scientific consensus article reviewing two decades of research—over 1700 papers—and exploring the "question of how [ ] loss of biological diversity will alter the functioning ecosystems and their ability to provide society with the goods and ser-

law providing species with what amounts to a right to their continued existence.<sup>46</sup>

#### D. *The ESA Is Effective*

The ESA has proven effective—over 99% of the species listed under the ESA are still in existence today.<sup>47</sup> Researchers have estimated that at least 227 species would have gone extinct in the past thirty years were it not for ESA protection.<sup>48</sup> Meanwhile, “[a]t least 42 species have gone extinct while on the waiting list to be listed.”<sup>49</sup> As expressed by one scientist and recent commenter on the Act’s effectiveness, “[a]lthough it may be decades before we can adequately assess [the ESA’s] effectiveness, it is clear that protection works. If we see the

---

vices needed to prosper”). As expressed perhaps most eloquently by Aldo Leopold decades earlier, “[t]he last word in ignorance is the man who says of an animal or plant: ‘What good is it?’ . . . [W]ho but a fool would discard seemingly useless parts? To keep every cog and wheel is the first precaution of intelligent tinkering.” Aldo Leopold, *A Sand County Almanac: With Essays on Conservation from Round River*, 190 (Random H. Publ. 1966). Plants and wildlife, and the ecosystems of which they are vital parts, are of incalculable worth to humanity. Representative Evans of Delaware stated, during the congressional debate on the House floor during the 1982 amendments to the ESA: “[O]ur wild plants and animals are not only uplifting to the human spirit, but they are absolutely essential—as a practical matter—to our continued healthy existence.” 128 Cong. Rec. 26189 (1982). Importantly, as Representative Evans recognized, it is the “lesser” species that often benefit humanity the most. Professor Wilson explained:

Why should we care? What difference does it make if some species are extinguished, if even half of all the species on earth disappear? Let me count the ways. New sources of scientific information will be lost. Vast potential biological wealth will be destroyed. Still undeveloped medicines, crops, pharmaceuticals, timber, fibers, pulp, soil-restoring vegetation, petroleum substitutes, and other products and amenities will never come to light . . . . In amnesiac reverie it is also easy to overlook the services that ecosystems provide humanity. They enrich the soil and create the very air we breathe. Without these amenities, the remaining tenure of the human race would be nasty and brief. The life-sustaining matrix is built of green plants with legions of microorganisms and mostly small, obscure animals—in other words, weeds and bugs.

Wilson, *supra* n. 9, at 346–47.

<sup>46</sup> One biologist noted:

The [ESA is] part of a deeper historical progression: expanding rights. . . . The Emancipation Proclamation and the abolition of slavery in 1865 gave liberty to African Americans. In the twentieth century, rights were further extended to women (Nineteenth Amendment, 1920), Native Americans (Indian Citizenship Act, 1924), laborers (Fair Labor Standard Act, 1938), and African Americans (Civil Rights Act, 1957). As part of a wave as old as the republic itself, the Endangered Species Act (1973) gave nature, in all its forms, a right to exist.

Roman, *supra* n. 14, at 61–62.

<sup>47</sup> U.S. Fish & Wildlife Serv., *Endangered Species Recovery Program*, <http://www.fws.gov/endangered/esa-library/pdf/recovery.pdf> [<http://perma.cc/36Q4-RUB3>] (June 2011) (accessed Apr. 12, 2014).

<sup>48</sup> J. Michael Scott et al., *By the Numbers*, in *The Endangered Species Act at Thirty, Volume 1: Renewing the Conservation Promise* 16, 31 (Dale D. Goble et al. eds., Is. Press 2006).

<sup>49</sup> Roman, *supra* n. 14, at 132.

glass as half full, most listed species improve or remain stable. Dozens more would have gone extinct without protection.”<sup>50</sup> As noted above, the ESA provides species’ advocates with an effective legal tool while also offering the species themselves the best chance for survival.

#### IV. THE FAILURE TO LIST SPECIES NEGATES THE EFFECTIVENESS OF THE ESA

Adding a species to the Endangered Species Act (ESA)’s “magic list” is the vital first step to the species’ survival and recovery.<sup>51</sup> Accordingly, the failure to list species undercuts the Act’s effectiveness.<sup>52</sup> Many conservationists agree that there are two major hurdles to the Act’s success: lack of funding and an inadequate number of listed species.<sup>53</sup> According to one study, “[f]unding levels in the early 2000s were about 20 percent of the amount needed to get the job done.”<sup>54</sup>

The allegation that the list is too short is indisputable. Even considering only species found within the U.S., the ESA list covers less than one-third of the number of species scientists say are likely threatened with extinction.<sup>55</sup> Indeed, some scientists have an even grimmer estimate. David Wilcove of Princeton University and Lawrence Master of NatureServe reviewed “the best available data on the status of plants, animals, and fungi in the U.S.,” and concluded that “the actual number of known species threatened with extinction is at least ten times greater than the number protected under the [ESA].”<sup>56</sup> Most of these species have yet to be thoroughly studied, and therefore have not received the attention or advocacy to get them listed.<sup>57</sup>

By comparison, scientific organizations not subject to the same political scrutiny and funding restrictions as the U.S. Fish & Wildlife Service (FWS)—such as the International Union for Conservation of Nature (IUCN) and NatureServe—maintain far more expansive lists

---

<sup>50</sup> *Id.* at 305.

<sup>51</sup> See e.g. Sen. Rpt. 97-418 at 10 (May 26, 1982) (“Listing is critically important because it sets in motion the [ESA’s] other provisions, including the protective regulation, consultation requirements, and recovery efforts.”). As a result, Congress aptly described Section 4 of the ESA—the section that sets out the process for listing a species—as “[t]he cornerstone of effective implementation of the [ESA].” *Id.*; see H.R. Rpt. 97-567 at 10 (May 17, 1982) (“The listing process under Section 4 is the keystone of the [ESA].”).

<sup>52</sup> See generally Martin F. J. Taylor et al., *The Effectiveness of the Endangered Species Act: A Quantitative Analysis*, 55 *BioScience* 360 (Apr. 2005) (suggesting the ESA’s effectiveness can be improved by prompt listing, protection of critical habitat, and dedicated recovery plans).

<sup>53</sup> Roman, *supra* n. 14, at 132.

<sup>54</sup> Julie K. Miller et al., *The Endangered Species Act: Dollars and Sense?*, 52 *BioScience* 163, 167 (Feb. 2002).

<sup>55</sup> J. Michael Scott et al., *supra* n. 48, at 22.

<sup>56</sup> David S. Wilcove & Lawrence L. Master, *How Many Endangered Species Are There in the United States?*, 3 *Frontiers in Ecology & the Env.* 414, 414 (Oct. 2005).

<sup>57</sup> Roman, *supra* n. 14, at 132.

of threatened and endangered species.<sup>58</sup> Scientists who have compared the IUCN Red List—the most commonly accepted international listing of threatened and endangered species<sup>59</sup>—to the ESA list have concluded that 40.3% of IUCN-listed birds found in the U.S. are not listed by the ESA and that most other groups of species are under-recognized by more than 80%.<sup>60</sup>

FWS cites to budgetary restrictions for its failure to list all deserving species, but this budgetary excuse is partial at best. According to the Department of the Interior Inspector General’s critical review in 1990:

Timely progress has not been made toward officially listing and protecting endangered and threatened plant and animal species. Approximately 600 domestic candidate species deemed by the Service to merit immediate protection under the Act have thus far not been officially listed. Also, the Service has identified an additional 3,000 species that are suspected to be threatened or endangered, but action has not been taken to list and protect these plants and animals. During the last 10 years, at least 34 animal and plant species have been determined to be extinct without ever having received full benefit of the Act’s protection . . . .<sup>61</sup>

What caused the delay? While FWS cites to the salary-intensive nature of listing, the Inspector General’s report found that “the Service does not record and track actual employee time by program subactivities . . . .”<sup>62</sup> As a result, the Department of the Interior “could not obtain accurate data on the amounts spent for listing activities.”<sup>63</sup> Now, more than twenty years later, the ESA list is still nowhere close to including the 3,600 species identified as potentially needing protection back in 1990.<sup>64</sup>

---

<sup>58</sup> *Id.* at 264 (The ESA list is “dwarfed by two others that [are] not as politically driven: the IUCN Red Data Books and the list compiled by NatureServe.”). The obvious reason that the IUCN and NatureServe are not under the same scrutiny as FWS is that their listings of species as endangered do not come with any legal protection that engenders political opposition.

<sup>59</sup> Intl. Union for the Conserv. of Nat., *Red List Overview, Introduction*, <http://www.iucnredlist.org/about/red-list-overview#introduction> [<http://perma.cc/7FZY-6FCG>] (2013) (accessed Apr. 12, 2014); see J. Berton C. Harris et al., *Conserving Imperiled Species: A Comparison of the IUCN Red List and U.S. Endangered Species Act*, 5 *Conserv. Ltrs.* 64, 64 (2012) (describing the IUCN Red List as “the most widely used global imperiled species list”).

<sup>60</sup> Harris et al., *supra* n. 59, at 67.

<sup>61</sup> Memo. from Harold Bloom, Asst. Inspector Gen. for Audits, Dept. of Int., to Asst. Sec. Fish & Wildlife & Parks, *Final Audit Report on the Endangered Species Program, U.S. Fish and Wildlife Service (No. 90-98)* (Sept. 27, 1990) (copy on file with *Animal Law*).

<sup>62</sup> U.S. Dept. of the Int., Off. of Inspector Gen., *Audit Report: The Endangered Species Program Rpt. No. 90-98*, 7 (Sept. 1990).

<sup>63</sup> *Id.*

<sup>64</sup> See U.S. Fish & Wildlife Serv., *Summary of Listed Species Listed Populations and Recovery Plans*, [http://ecos.fws.gov/tess\\_public/pub/boxScore.jsp](http://ecos.fws.gov/tess_public/pub/boxScore.jsp) [<http://perma.cc/D7V4-NZEA>] (accessed Apr. 12, 2014) (indicating the current total number of listed species is just over 2,140); see 50 C.F.R. at § 17.11(h) (providing a full list of endangered and

More importantly, FWS has consistently refused to ask for an adequate budget to do the necessary work.<sup>65</sup> Indeed, starting in 1998, and in every year since, FWS has requested Congress cap or limit the amount of money it can spend on listing decisions.<sup>66</sup> According to Professor Oliver A. Houck of Tulane University Law School:

The problem is not money if one refuses to ask for money. The problem is why one refuses. In this case, [FWS] has refused because it would have to become more active in the conservation and restoration of endangered species—the very purpose of the ESA. In this light, funding for listing—particularly in such small amounts—is not a genuine constraint. It becomes, rather, an opportunity to limit the Act.<sup>67</sup>

In sum, the ESA's effectiveness is diminished by the underinclusive nature of its "magic list." While it is true that FWS's budget is part of the problem, the agency's budgetary woes are, at least in part, a self-inflicted wound. The problem is deeper; FWS has failed to list all deserving species at anywhere near the rate at which scientists have determined that species will go extinct without conservation action.<sup>68</sup> This is the underlying problem WildEarth Guardians sought to address through the litigation leading to the Multidistrict Litigation settlement described in Part VII(C). However, before turning to the litigation and the settlement, some understanding of the underlying legal structure of the listing process is necessary.

## V. THE LISTING PROCESS

### A. *Citizen Petitions and the Listing Standard*

Any interested person can initiate the process of adding a species to—or removing a species from—the endangered and threatened species list by filing a petition with the U.S. Fish & Wildlife Service (FWS).<sup>69</sup> The agency can also begin either the listing or delisting process of its own accord.<sup>70</sup> FWS is required to list as threatened or en-

---

threatened wildlife); *id.* at § 17.12(h) (providing a full list of endangered and threatened plants).

<sup>65</sup> See e.g. Ctr. for Biological Diversity, *Is There Really No Money for the Endangered Species Act? How the Bush Administration Has Manufactured a Budget Crisis to Withhold Protections from Endangered Species and Critical Habitats* 1 (available at [http://www.biologicaldiversity.org/campaigns/candidate\\_project/pdfs/esa-budget-crisis-nowicki.pdf](http://www.biologicaldiversity.org/campaigns/candidate_project/pdfs/esa-budget-crisis-nowicki.pdf) [<http://perma.cc/B8KU-VGA4>] (accessed Apr. 12, 2014)) (noting that FWS stated it needed approximately \$153 million for the ESA listing budget in 2003, yet the agency only requested \$9 million for this program for 2003 and \$12 million for fiscal year 2004).

<sup>66</sup> Roman, *supra* n. 14, at 183 (citing D. Noah Greenwald et al., *The Listing Record, in The Endangered Species Act at Thirty, Volume 1: Renewing the Conservation Promise* 51, 61 (Dale D. Goble et al. eds., Is. Press 2006)).

<sup>67</sup> 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, 294 (1993).

<sup>68</sup> J. Michael Scott et al., *supra* n. 48, at 22.

<sup>69</sup> 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(a) (2012).

<sup>70</sup> 50 C.F.R. at § 424.10.

dangered any species facing extinction due to any one, or any combination of, five factors:

- (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) overutilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence.<sup>71</sup>

Conversely, if FWS is evaluating a delisting decision, it must examine whether the threat(s) presented under any of the five listing factors no longer exist.<sup>72</sup>

FWS's listing and delisting decisions are limited solely to considerations of the five listing factors.<sup>73</sup> In considering the five listing factors, FWS must employ "the best available scientific and commercial information regarding a species' status, without reference to possible economic or other impacts of such determination."<sup>74</sup> The Act also directs FWS to take into account "those efforts, if any, being made by any State or foreign nation . . . 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."<sup>75</sup> Finally, FWS is also directed

to give consideration to species which have been—

- (i) designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement; or
- (ii) identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish or wildlife or plants.<sup>76</sup>

### B. Ninety-Day Findings

Upon receipt of a petition, FWS is required to make an initial finding, known as a "90-day finding."<sup>77</sup> Specifically, within ninety days of receipt, "to the maximum extent practicable," FWS must determine whether the petition presents "substantial scientific or commercial information indicating that the petitioned action [listing or delisting]

<sup>71</sup> 16 U.S.C. § 1533(a)(1)(A)–(E).

<sup>72</sup> 50 C.F.R. at § 424.11.

<sup>73</sup> 16 U.S.C. § 1533(a)(1)(A)–(E).

<sup>74</sup> 50 C.F.R. at § 424.11(b). The language for this regulation originates from 16 U.S.C. § 1533(b)(1)(A) ("The Secretary shall make determinations . . . solely on the basis of the best scientific and commercial data available . . .").

<sup>75</sup> 16 U.S.C. § 1533(b)(1)(A).

<sup>76</sup> *Id.* at § 1533(b)(1)(B)(i)–(ii).

<sup>77</sup> See U.S. Fish & Wildlife Serv., *Candidate Conservation, ESA Actions*, <http://www.fws.gov/southeast/candidateconservation/esaaactions.html> [<http://perma.cc/9BS4-HP62>] (updated Aug. 9, 2013) (accessed Apr. 12, 2014) (listing recent initial findings as "90-day Findings").

may be warranted.”<sup>78</sup> The Endangered Species Act (ESA)’s implementing regulations define “substantial information” as “that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted.”<sup>79</sup> If FWS finds that the petition presents substantial information (a positive ninety-day finding), it must publish its finding in the *Federal Register* and “shall promptly commence a review of the status of the species concerned.”<sup>80</sup> Negative ninety-day findings must also be published in the *Federal Register* and are subject to judicial review.<sup>81</sup>

### C. Twelve-Month Findings

In the case of a positive ninety-day finding, FWS has twelve months from the date that the petition was received to make one of three findings: (1) the petitioned action is not warranted; (2) the petitioned action is warranted; or (3) the petitioned action is warranted, but presently precluded by other pending proposals to list species of higher priority, provided that FWS is making expeditious progress in listing other, more threatened species.<sup>82</sup> This second finding is known as a “12-month finding.”<sup>83</sup>

If FWS makes a twelve-month finding that a petitioned action is not warranted, it must publish its finding in the *Federal Register*.<sup>84</sup> Negative twelve-month findings are subject to judicial review.<sup>85</sup> If FWS makes a twelve-month finding that the petitioned action is warranted, then it must publish a proposed rule to list the species as endangered or threatened in the *Federal Register*.<sup>86</sup> Such species are referred to as “proposed species.”<sup>87</sup> It is FWS’s third option at the twelve-month finding stage, the warranted-but-precluded option, that has proven problematic. To make a valid warranted-but-precluded finding, FWS must satisfy two criteria: first, that “the immediate pro-

<sup>78</sup> 16 U.S.C. § 1533(b)(3)(A).

<sup>79</sup> 50 C.F.R. at § 424.14(b)(1).

<sup>80</sup> 16 U.S.C. § 1533(b)(3)(A).

<sup>81</sup> *Id.* at § 1533(b)(3)(B)(i), (C)(ii).

<sup>82</sup> *Id.* at § 1533(b)(3)(B); 50 C.F.R. at § 424.14(b)(3).

<sup>83</sup> U.S. Fish & Wildlife Serv., N. Fla. Ecological Servs. Off., *Frequently Asked Questions: Service 12-Month Finding on Petition to List the Gopher Tortoise (Gopher polyphemus) in the Eastern Portion of Its Range*, [http://www.fws.gov/northflorida/gophertortoise/12-month\\_Finding/2011\\_faqs\\_Gopher\\_Tortoise\\_ESA\\_12-month\\_Listing\\_finding.htm](http://www.fws.gov/northflorida/gophertortoise/12-month_Finding/2011_faqs_Gopher_Tortoise_ESA_12-month_Listing_finding.htm) [http://perma.cc/X3DM-NGCD] (July 26, 2011) (accessed Apr. 12, 2014) (“At the end of the 12-month period [following a 90-day finding], the Service determines whether the listing is or is not warranted; this is referred to as the 12-month finding.”).

<sup>84</sup> 16 U.S.C. § 1533(b)(3)(B)(i); 50 C.F.R. at § 424.14(b)(3)(i).

<sup>85</sup> 16 U.S.C. § 1533(b)(3)(C)(ii).

<sup>86</sup> *Id.* at § 1533(b)(3)(B).

<sup>87</sup> A proposed species does not receive the substantive protection of the ESA. The only protection the ESA offers a proposed species is that it requires any other federal agency to confer with FWS on planned action, if that action could jeopardize the continued existence of a proposed species, or adversely modify or destroy proposed critical habitat. *Id.* at § 1536(a)(4). However, such a conference does not limit the commitment of resources to the planned project as it would for a listed species. *Id.*

posal and timely promulgation of a final regulation implementing the petitioned action . . . is precluded by pending proposals to determine whether any species is an endangered or threatened species”; and second, that “expeditious progress is being made to add qualified species to either [the threatened or endangered species list] and to remove from such lists species for which the protections of [the ESA] are no longer necessary.”<sup>88</sup>

Warranted-but-precluded findings are subject to judicial review.<sup>89</sup> Additionally, FWS must reexamine its warranted-but-precluded finding annually—effectively recycling the twelve-month finding.<sup>90</sup> Such warranted-but-precluded species are generally referred to as “candidate species.”<sup>91</sup> Finally, if FWS has initiated the listing process of its own accord, it may add species directly to its candidate list.<sup>92</sup> Thus, both species that FWS is considering for listing of its own accord, and species for which the agency has made a warranted-but-precluded finding, are collectively referred to as candidate species.

#### D. Final Listing Decisions

Within one year of the publication of a proposed rule to list a species, FWS must make a final decision on the proposal, or extend the deadline by up to six months in cases of scientific uncertainty.<sup>93</sup> At this final decision point, FWS may list the species or withdraw its proposal.<sup>94</sup> Both actions are subject to judicial review.<sup>95</sup>

#### E. The Deadlines

As described above, the listing process is governed by deadlines of varying strength.<sup>96</sup> All nondiscretionary deadlines governing the treatment of citizen petitions in Section 4 of the ESA are subject to

<sup>88</sup> *Id.* at § 1533(b)(3)(B)(iii).

<sup>89</sup> *Id.* at § 1533(b)(3)(C)(ii).

<sup>90</sup> 16 U.S.C. § 1533(b)(3)(C)(i).

<sup>91</sup> See Jason M. Patlis, *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*, 16 Tul. Envtl. L.J. 257, 277 (2003) (“This ‘warranted but precluded’ determination has led to the creation of the list of candidate species . . .”).

<sup>92</sup> See 50 C.F.R. at § 424.02(b) (defining “candidate” as “any species being considered by the Secretary for listing as an endangered or a threatened species, but not yet the subject of a proposed rule”); *id.* at § 424.15 (providing that the Secretary may from time to time publish notices of review indicating whether sufficient scientific or commercial information is available to warrant proposing to list a candidate).

<sup>93</sup> 16 U.S.C. § 1533(b)(6)(A)–(B).

<sup>94</sup> *Id.* at § 1533(b)(6)(B)(ii).

<sup>95</sup> *Id.* (“The finding on which a withdrawal is based shall be subject to judicial review.”); see Administrative Procedure Act of 1946, 5 U.S.C. § 706(2)(A) (2012) (providing that final agency action shall be held unlawful and set aside if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

<sup>96</sup> Jesup, *supra* n. 6, at 336 (“[T]he procedural framework laid out by the ESA imposes deadlines of various degrees of rigidity for different parts of the process.”).

citizen suits seeking enforcement.<sup>97</sup> However, there are no deadlines concerning FWS's ability to list species of its own accord; consequently, the agency has rarely done so.<sup>98</sup> The deadline for making a ninety-day finding on a petition is somewhat flexible, modified by the "maximum extent practicable" language;<sup>99</sup> however, courts have held that this flexibility to extend a ninety-day finding does not exceed one year.<sup>100</sup> The deadline provision for twelve-month findings and final listing decisions uses explicit "shall" language,<sup>101</sup> but the existence of the warranted-but-precluded option at the twelve-month stage allows FWS to opt out of the deadline-driven process and place the species on an apparently endless waiting list.<sup>102</sup> As discussed in Part VI, over the years of listing warfare, FWS gravitated towards this warranted-but-precluded option as its only way around the deadline-driven system and its only relief from lawsuits seeking to enforce the Act's deadlines.<sup>103</sup>

## VI. THE BLACK HOLE

As envisioned by Congress, the Endangered Species Act (ESA) sets out a two to two-and-one-half year timeline (in cases of scientific uncertainty) for listing species via citizen petition.<sup>104</sup> Congress gave citizens the power to drive the process forward by filing litigation to enforce the Act's deadlines.<sup>105</sup> However, the huge number of species needing protection; the ability of citizens to petition for these numerous species and force rulings on their petitions through "missed deadline" litigation; the U.S. Fish & Wildlife Service (FWS)'s limited (or self-limited) resources to respond to petitions; and its political reluctance to list species, resulted in an inevitable train wreck.<sup>106</sup> Petitions

---

<sup>97</sup> 16 U.S.C. § 1540(g)(1)(C).

<sup>98</sup> See Roman, *supra* n. 14, at 183 ("Between 1997 and 2003, only eleven species were added at the agency's discretion (ten of these under the Clinton Administration); 90 percent of recent listings have been the result of lawsuits.").

<sup>99</sup> 16 U.S.C. § 1533(b)(3)(A).

<sup>100</sup> See *e.g.* *Biodiversity Leg. Found. v. Badgley*, 309 F.3d 1166, 1176 (9th Cir. 2002) (ruling that Congress intended to limit the flexible deadline governing ninety-day findings by enacting the firm deadline for twelve-month findings, and that consequently both findings must be made within one year of the agency's receipt of the petition).

<sup>101</sup> 16 U.S.C. § 1533(b)(3)(B).

<sup>102</sup> See K. Mollie Smith, *Abuse of the Warranted but Precluded Designation: A Real or Imagined Purgatory?*, 19 S.E. Envtl. L.J. 119, 145 (2010) ("The overreaching criticism of the [warranted-but-precluded] list is that it is a 'black hole' where species disappear while waiting to be listed.").

<sup>103</sup> See Eric Biber & Berry Brosi, *Officious Intermeddlers or Citizen Experts? Petitions and Public Production of Information in Environmental Law*, 58 UCLA L. Rev. 321, 374–75 (2010) (suggesting that the placement of a species in the warranted-but-precluded category is unlikely to provoke litigation).

<sup>104</sup> H.R. Nat. Resources Comm., *The Endangered Species Act: How Litigation Is Costing Jobs and Impeding True Recovery Efforts: Hearings on H.R. 112-88*, 112th Cong. 33 (Dec. 6, 2011).

<sup>105</sup> 16 U.S.C. § 1540(g).

<sup>106</sup> See *e.g.* Daniel J. Rohlf, *Section 4 of the Endangered Species Act: Top Ten Issues for the Next Thirty Years*, 34 Envtl. L. 483, 494 (2004) ("The vast scope of modern

piled up; FWS missed petition-finding deadlines and then lost or settled the resulting deadline litigation.<sup>107</sup> Yet the deadline litigation ultimately only resulted in new deadlines for petition findings, but this time, under court order and subject to contempt sanctions.<sup>108</sup> It is not surprising that FWS sought relief in the only way it could—by making warranted-but-precluded findings.<sup>109</sup>

Warranted-but-precluded findings are incredibly frustrating from the petitioner's perspective because they allow FWS to agree with the petitioner that the species deserves ESA protection.<sup>110</sup> However, the "but precluded" finding simultaneously thwarts the petitioner's efforts to actually protect the species because the agency claims it is simply too busy to confer the warranted protection.<sup>111</sup> During the 1990s and 2000s, FWS made hundreds of warranted-but-precluded findings, and continually maintained a candidate species list of over 200 species.<sup>112</sup> Those seeking to protect endangered species began to refer to this candidate list as the "black hole" into which petitions to list species disappeared, never to emerge.<sup>113</sup> Indeed, researchers began to identify the existence of the warranted-but-precluded finding as a principal reason

---

threats to biodiversity, coupled with both limited agency resources and section 4's process allowing for any interested individual or group to petition [FWS] to list a certain species, set up inevitable conflict between the huge task of listing all deserving species as threatened or endangered, and [FWS's] limited ability to do the job.").

<sup>107</sup> See 61 Fed. Reg. 64475, 64476 (Dec. 5, 1996) (noting that when the moratorium on listing was lifted in October 1996, the agency had "accrued a backlog of proposed listings for 243 species"); Smith, *supra* n. 102, at 134 (describing how the one-year moratorium placed on listing decisions in 1995 created a "snowball effect and buried the FWS in a backlog of listing decisions").

<sup>108</sup> See Smith, *supra* n. 102, at 134 (noting that "FWS faced numerous court orders requiring it to list certain species"); see e.g. Daniel R. Mandelker et al., *NEPA Law and Litigation*, § 4:65.20 (2d ed., Thomson Reuters 2013) (noting that the "Supreme Court has recognized that an appropriate remedy for an agency's failure to comply with a court order requiring compliance with [its statutory mandate] would be to hold the agency in contempt").

<sup>109</sup> See Smith, *supra* n. 102, at 120 (When the warranted-but-precluded designation was first authorized in 1986, it "was seen as a short-term solution . . . . However, in the last fourteen years its use has exploded.").

<sup>110</sup> See 16 U.S.C. § 1533(b)(3)(B) (explaining how a petition finding may be warranted but not listed).

<sup>111</sup> See e.g. 62 Fed. Reg. 28653, 28657 (May 27, 1997) (FWS's notice of its twelve-month finding for the Canada lynx, in which the agency states that it "has determined that the overall magnitude of all threats to the small population of Canada lynx . . . is high and the threats are ongoing, thus they are imminent" but that "development of a proposed rule at this time is precluded by work on other higher priority species").

<sup>112</sup> See e.g. 75 Fed. Reg. 69222, 69224 (Nov. 10, 2010) (251 candidate species); 72 Fed. Reg. 69034, 69035 (Dec. 6, 2007) (280 candidate species); 69 Fed. Reg. 24876, 24876 (May 4, 2004) (279 candidate species); 66 Fed. Reg. 54808, 54808 (Oct. 30, 2001) (252 candidate species); 64 Fed. Reg. 57534, 57534 (Oct. 25, 1999) (258 candidate species); 62 Fed. Reg. 49398, 49398 (Sept. 19, 1997) (207 candidate species).

<sup>113</sup> Jesup, *supra* n. 6, at 342 ("Those groups worried that FWS's ability to make warranted-but precluded findings and put species on the candidate list instead of actually listing them created an administrative 'black hole' where imperiled species would languish without protection, in some cases causing extinction.").

the ESA's list of threatened and endangered species was so much smaller than other lists of such species maintained by nongovernmental, expert organizations.<sup>114</sup>

## VII. THE "MEGA-PETITIONS," "BIOBLITZ," AND MDL SETTLEMENT

This was the state of the playing field before the most recent round of the listing wars: (1) groups like WildEarth Guardians (Guardians) could petition for virtually unlimited numbers of species, choosing from among the thousands of deserving species not protected by the Endangered Species Act (ESA) but identified by scientists as threatened with extinction; (2) these groups could file easily winnable deadline litigation to force rulings on their petitions;<sup>115</sup> and yet (3) these groups could not obtain their ultimate objective—forcing the U.S. Fish & Wildlife Service (FWS) to actually list petitioned species—because FWS merely placed meritoriously petitioned species on its warranted-but-precluded or candidate list, leaving them unprotected.<sup>116</sup>

Believing that urgent action was necessary to address the biodiversity crisis and terrified by its scope, Guardians adopted an "all of the above" strategy in an attempt to break the bureaucratic logjam. First, Guardians began to attack FWS's warranted-but-precluded findings. The organization filed lawsuits asserting that FWS was failing to satisfy the two prerequisites for a valid warranted-but-precluded determination.<sup>117</sup> Guardians believed that by continuing to maintain hundreds of species on the candidate list for decades, while resolving the listing status of only a handful of species per year, FWS was failing to make the expeditious progress required by the ESA.

### A. *The Mega-Petitions*

At the same time, as a second prong to its strategy, Guardians decided to double-down on its petitioning efforts and deadline litiga-

---

<sup>114</sup> Harris et al., *supra* n. 59, at 70 (concluding that the warranted-but-precluded findings, among other factors, "likely contribute to the classification gap between [the International Union for the Conservation of Nature] and ESA lists").

<sup>115</sup> See e.g. Juliet Eilperin, *Since '01, Guarding Species Is Harder; Endangered Listings Drop under Bush*, Wash. Post A1 (Mar. 23, 2008) ("Since 2001, Jay Tutchton, general counsel for WildEarth Guardians, has filed 25 suits seeking listings and critical habitat designations for 45 species for several clients. He has won every time.")

<sup>116</sup> Jesup, *supra* n. 6, at 356.

<sup>117</sup> Guardians challenged the warranted-but-precluded determinations on a number of species. See e.g. Pet. for Rev. of Agency Action, *WildEarth Guardians v. Salazar* (D. Colo. Aug. 31, 2010) (No. 10-cv-2129 (JLK)) (on file with *Animal Law*) (lesser prairie-chicken); Compl. for Declaratory & Injunctive Relief, *WildEarth Guardians v. Guertin* (D. Colo. Aug. 17, 2010) (No. 10-cv-1959 (JLK)) (on file with *Animal Law*) (Canada lynx); Compl. for Declaratory & Injunctive Relief, *WildEarth Guardians v. Salazar* (D. Ariz. July 15, 2010) (No. 10-cv-420 (RCC)) (on file with *Animal Law*) (New Mexico meadow jumping mouse).

tion, hoping to increase the pressure on FWS to break the logjam. Guardians believed that, even if its petitions only resulted in an increase to the warranted-but-precluded list, the growing candidate list would negate any claim by FWS that it was making expeditious progress to list species. This made Guardians' claims that the agency was failing to make such progress more likely to succeed. The two strategies were complementary.

Guardians began by filing two large petitions, nicknamed the "mega-petitions," seeking to list hundreds of species through single petitions.<sup>118</sup> Guardians' logic was simple: past efforts in petitioning single species at a time were too slow. Moreover, highly respected scientific organizations had already determined which species were in danger of extinction.<sup>119</sup> Therefore, there was no need to reinvent the wheel—Guardians simply needed to get FWS to act on the existing best available scientific information as the ESA required.

Accordingly, unlike its prior single-species petitions, for which Guardians had laboriously conducted independent scientific research, Guardians' two mega-petitions simply relied on information previously compiled by an online database called NatureServe Explorer.<sup>120</sup> At the time of the mega-petitions, FWS had relied on NatureServe Explorer for years as an authoritative source of the best available scientific information, stating:

NatureServe Explorer is a source for authoritative conservation information on more than 50,000 plants, animals and ecological communities of the U.S. and Canada. NatureServe Explorer provides in-depth information on rare and endangered species, but includes common plants and animals too.

---

<sup>118</sup> WildEarth Guardians (formerly Forest Guardians) filed two "mega-petitions" in 2007. The first sought the listing of 475 species in FWS's Southwest Region. Nicole J. Rosmarino & James J. Tutchtton, Forest Guardians, *A Petition to List All Critically Imperiled or Imperiled Species in the Southwest United States as Threatened or Endangered under the Endangered Species Act* (June 18, 2007) (available at [http://www.wildearthguardians.org/site/DocServer/petition\\_protection-475-species\\_6-21-07.pdf](http://www.wildearthguardians.org/site/DocServer/petition_protection-475-species_6-21-07.pdf) [<http://perma.cc/GX62-6VKM>] (accessed Apr. 12, 2014)) [hereinafter *Southwest Petition*]. The second sought the listing of 206 species in FWS's Mountain-Prairie Region. Nicole J. Rosmarino & James J. Tutchtton, Forest Guardians, *A Petition to List 206 Critically Imperiled or Imperiled Species in the Mountain-Prairie Region of the United States as Threatened or Endangered under the Endangered Species Act* (July 24, 2007) (available at [http://www.wildearthguardians.org/site/DocServer/petition\\_protection-206-species-r6\\_7-24-07.pdf](http://www.wildearthguardians.org/site/DocServer/petition_protection-206-species-r6_7-24-07.pdf) [<http://perma.cc/7J4D-HP83>] (accessed Apr. 12, 2014)) [hereinafter *Mountain-Prairie Petition*]; see also Jesup, *supra* n. 6, at 363 (noting that the 2007 petitions were nicknamed "mega-petitions").

<sup>119</sup> See *supra* n. 58–59 and accompanying text (discussing the IUCN Red List); *infra* nn. 120–121 and accompanying text (discussing the NatureServe Explorer database, which provides in-depth information on rare and endangered species).

<sup>120</sup> NatureServe, *NatureServe Explorer, An Online Encyclopedia of Life*, <http://www.natureserve.org/explorer> [<http://perma.cc/6TJK-EFUN>] (updated July 2013) (accessed Apr. 12, 2014); see also Jesup, *supra* n. 6, at 363 (describing NatureServe as "a non-profit clearinghouse for species data from natural-heritage programs").

NatureServe Explorer is a product of NatureServe in collaboration with the Natural Heritage Network.<sup>121</sup>

Guardians' two mega-petitions asked FWS to list all currently unlisted species NatureServe had identified as critically imperiled or imperiled in two of FWS's regions: the Southwest region and the Mountain-Prairie region.<sup>122</sup> The large number of species in the petitions, 475 in the Southwest region<sup>123</sup> and 206 in the Mountain-Prairie region,<sup>124</sup> was the result of the underinclusive nature of FWS's ESA list versus that maintained by NatureServe.<sup>125</sup> Guardians saw no reason for the two lists to be so disparate.

In its petitions, Guardians argued that NatureServe's definitions of a "critically imperiled" species and an "imperiled" species were analogous to the ESA's definitions of "endangered" and "threatened" species.<sup>126</sup> Guardians asserted that FWS should accept NatureServe's assessments of the species' imperiled status and proceed to list the species.<sup>127</sup> At a minimum, Guardians believed that NatureServe's species assessments presented at least "substantial scientific or commercial information indicating that the petitioned action may be warranted,"

<sup>121</sup> This language is included on webpages for every listed U.S. species in FWS's on-line Threatened and Endangered Species System (TESS). See e.g. U.S. Fish & Wildlife Serv., *Species Profile, Black Abalone* (*Haliotis cracherodii*), <http://ecos.fws.gov/species-profile/profile/speciesProfile.action?spcode=G0FU> [<http://perma.cc/XW26-E3TU>] (updated Mar. 27, 2014) (accessed Apr. 12, 2014) (including this language).

<sup>122</sup> *Mountain-Prairie Petition*, *supra* n. 118, at 2; *Southwest Petition*, *supra* n. 118, at 2. FWS's Mountain-Prairie Region (Region 6) covers Colorado, Kansas, Montana, Nebraska, North Dakota, South Dakota, Utah, and Wyoming. See U.S. Fish & Wildlife Serv., *Mountain-Prairie Region: About Us*, <http://www.fws.gov/mountain-prairie/aboutus.html> [<http://perma.cc/GRU9-ND2L>] (accessed Apr. 12, 2014). FWS's Southwest Region (Region 2) covers Arizona, New Mexico, Oklahoma, and Texas. See U.S. Fish & Wildlife Serv., *About the Southwest Region: About Us*, <http://www.fws.gov/southwest/AboutUs/index.htm> [<http://perma.cc/A2PL-75MV>] (accessed Apr. 12, 2014). The Mountain-Prairie Region is where WildEarth Guardians maintains offices and does most of its work. See WildEarth Guardians, *About Us*, <http://www.wildearthguardians.org/site/PageServer?pagename=about> [<http://perma.cc/N8Z6-Y3EQ>] (accessed Apr. 12, 2014) (indicating the organization's main office is located in Santa Fe, New Mexico, with other offices in Tucson, Denver, Missoula, and Salt Lake City).

<sup>123</sup> *Southwest Petition*, *supra* n. 118, at 2, 16–54.

<sup>124</sup> *Mountain-Prairie Petition*, *supra* n. 118, at 2, 17–37.

<sup>125</sup> See *supra* nn. 58–60 and accompanying text (noting that the lists maintained by organizations such as NatureServe are much more inclusive than those maintained by FWS).

<sup>126</sup> *Mountain-Prairie Petition*, *supra* n. 118, at 5–6; *Southwest Petition*, *supra* n. 118, at 5–6. NatureServe's critically imperiled and imperiled species ranking system defines "critically imperiled" as "[a]t very high risk of extinction or elimination due to very restricted range, very few populations or occurrences, very steep declines, very severe threats, or other factors," and "imperiled" as one "[a]t high risk of extinction or elimination due to restricted range, few populations or occurrences, steep declines, severe threats, or other factors." NatureServe, *NatureServe Conservation Status*, <http://www.natureserve.org/explorer/ranking.htm#globalstatus> [<http://perma.cc/MJA9-HP3H>] (2013) (accessed Apr. 12, 2014).

<sup>127</sup> *Mountain-Prairie Petition*, *supra* n. 118, at 2; *Southwest Petition*, *supra* n. 118, at 2.

thus entitling Guardians to positive ninety-day findings and shifting the burden of performing necessary scientific research to confirm NatureServe's assessments to FWS during the species' status reviews that follow the ninety-day finding.<sup>128</sup> Finally, by attempting to list all critically imperiled and imperiled species at once, Guardians also hoped to avoid FWS's other excuse for making warranted-but-precluded findings—that the agency was working on higher priority listings. Guardians' petitions included all those species NatureServe had identified as closest to extinction (i.e., the highest priority species).<sup>129</sup>

When FWS missed the deadline for making ninety-day findings on the mega-petitions, Guardians followed by filing suit alleging that FWS had failed to meet its mandatory ninety-day preliminary finding.<sup>130</sup> Despite the large number of species involved in the mega-petitions, Guardians believed it was entirely reasonable to request FWS to make timely ninety-day findings because NatureServe had already done the necessary work.<sup>131</sup> The standard for issuing a positive ninety-day finding is whether the petition presents "substantial scientific or commercial information indicating that the petitioned action may be warranted."<sup>132</sup> The ESA's implementing regulations define "substantial information" as "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted."<sup>133</sup> Accordingly, because Guardians believed NatureServe was composed of reasonable persons who ranked species based on the best scientific information available, and because FWS had referred to this work as authoritative, Guardians asserted that it should not be difficult for FWS to review NatureServe's work and agree.<sup>134</sup>

Ultimately, after the litigation seeking deadlines for action, FWS issued positive ninety-day findings that Guardians' mega-petitions presented substantial information that listing may be warranted for 96 species.<sup>135</sup> Though Guardians was surprised that NatureServe's assessments of over 600 species as critically imperiled or imperiled had

<sup>128</sup> *Mountain-Prairie Petition*, *supra* n. 118, at 4 n. 10; *Southwest Petition*, *supra* n. 118, at 4 n. 10.

<sup>129</sup> *Mountain-Prairie Petition*, *supra* n. 118, at 6; *Southwest Petition*, *supra* n. 118, at 6.

<sup>130</sup> First Amend. Compl. for Declaratory Judm. & Injunctive Relief, *WildEarth Guardians v. Kempthorne* (D.D.C. Jan. 14, 2009) (No. 08-cv-472 (CKK)) (on file with *Animal Law*); see 74 Fed. Reg. 66866, 66867 (Dec. 16, 2009) (noting Guardians' complaint).

<sup>131</sup> *Mountain-Prairie Petition*, *supra* n. 118, at 6; *Southwest Petition*, *supra* n. 118, at 6.

<sup>132</sup> 16 U.S.C. § 1533(b)(3)(A).

<sup>133</sup> 50 C.F.R. at § 424.14(b).

<sup>134</sup> *Mountain-Prairie Petition*, *supra* n. 118, at 6; *Southwest Petition*, *supra* n. 118, at 6; see *supra* n. 121 and accompanying text (providing language FWS includes on its website in reference to NatureServe).

<sup>135</sup> See 74 Fed. Reg. 41581, 41662 (Aug. 18, 2009) (finding that the Mountain-Prairie petition presented enough information to warrant the listing of 29 out of 38 species considered); 74 Fed. Reg. 66563, 66905 (Dec. 16, 2009) (finding that the Southwest peti-

fared so poorly in FWS's opinion,<sup>136</sup> Guardians had moved ninety-six species closer to listing through two relatively simple petitions. This was dramatic progress. More importantly, because FWS took over a year to make all ninety-six positive ninety-day findings, the agency missed ninety-six mandatory deadlines for making twelve-month petition findings.<sup>137</sup> Thus, these mega-petitions had created a large, legal vulnerability for FWS, and Guardians moved on to a new round of deadline litigation dubbed the "BioBlitz."

### B. *The BioBlitz*

Conducted in late 2009 and early 2010, WildEarth Guardians' BioBlitz involved celebrations of the 2010 International Year of Biodiversity and the thirty-sixth anniversary of the passage of the ESA.<sup>138</sup> This celebration happened concurrently with the filing of ESA listing petitions and lawsuits to force increased protection for endangered species every workday for thirty-six days in a row.<sup>139</sup> Though not all of these petitions or lawsuits were against FWS—some were directed at the National Marine Fisheries Service (NMFS)—most targeted FWS's listing program.<sup>140</sup> Many of the cases were deadline suits alleging that FWS had missed deadlines for twelve-month findings for species included in the two mega-petitions.<sup>141</sup>

---

tion presented enough information to warrant the listing of 67 out of 192 species considered).

<sup>136</sup> That is, FWS concluded that NatureServe's species assessments were accurate for only 96 of the over 600 species included in the two mega-petitions. See 74 Fed. Reg. 14662; 74 Fed. Reg. at 66905 (providing the Federal Register notices finding that the Mountain-Prairie petition and the Southwest petition presented enough information to warrant the listing of twenty-nine and sixty-seven species, respectively).

<sup>137</sup> See 74 Fed. Reg. at 66867 (explaining how Guardians filed a complaint specifying that FWS failed to meet its finding deadlines regarding the mega-petitions).

<sup>138</sup> Press Release, WildEarth Guardians, *Conservation Group Celebrates Year of Biodiversity with "BioBlitz"* (Dec. 28, 2009) (available at [http://www.wildearthguardians.org/site/News2?news\\_iv\\_ctrl=1&page=NewsArticle&id=5938](http://www.wildearthguardians.org/site/News2?news_iv_ctrl=1&page=NewsArticle&id=5938) [<http://perma.cc/92T4-X5VS>] (accessed Apr. 12, 2014)) [hereinafter BioBlitz Press Release].

<sup>139</sup> *Id.*

<sup>140</sup> See WildEarth Guardians, *2010: International Year of Biodiversity*, [http://www.sararegistry.gc.ca/approach/act/sara\\_e.pdf](http://www.sararegistry.gc.ca/approach/act/sara_e.pdf) [http://www.wildearthguardians.org/site/PageServer?pagename=priorities\\_wildlife\\_ESA\\_listing\\_year\\_biodiversity#BioBlitz](http://www.wildearthguardians.org/site/PageServer?pagename=priorities_wildlife_ESA_listing_year_biodiversity#BioBlitz) [<http://perma.cc/M2KW-RR9D>] (accessed Apr. 12, 2014) (detailing all of the petitions filed during the BioBlitz in January and February 2010).

<sup>141</sup> Guardians' lawsuits alleged that the Secretary had "failed to comply with his mandatory duty to make a '12-month finding' on Guardians' petition[s] to list" a myriad of species as threatened or endangered. See e.g. Compl., *WildEarth Guardians v. Salazar* (D. Colo. Feb. 8, 2010) (No. 10-cv-256 (MSK)) (on file with *Animal Law*) (Yellowstone sand verbena); Compl. for Declaratory & Injunctive Relief, *WildEarth Guardians v. Salazar* (D. Colo. Jan. 12, 2010) (No. 10-cv-57 (REB)) (on file with *Animal Law*) (Platte River caddisfly); Compl., *WildEarth Guardians v. Salazar* (D. Colo. Dec. 26, 2009) (No. 09-cv-2997 (JLK)) (on file with *Animal Law*) (mist forestfly).

### C. The MDL Settlement

The BioBlitz got FWS's attention. More accurately perhaps, it got the attention of the Department of Justice (DOJ), which was suddenly faced with the challenge of defending a potentially unending series of lawsuits in different jurisdictions, most of which it would assuredly lose because FWS had missed the statutory deadlines.<sup>142</sup> Indeed, as Guardians publicly announced that it was working its way through ninety-six late petition findings resulting from the mega-petitions,<sup>143</sup> it must have been clear to both FWS and DOJ that Guardians had over three months worth of potential lawsuits available to continue its daily blitz. The government responded to Guardians' BioBlitz and the Center for Biological Diversity (CBD)'s related litigation by moving to consolidate all pending ESA Section 4 listing deadline litigation in front of a single judge under the Judicial Panel on Multidistrict Litigation (MDL panel).<sup>144</sup>

The government succeeded in transferring all of Guardians' cases to a single forum and judge.<sup>145</sup> The MDL panel ordered twelve of Guardians' cases from four judicial districts transferred to Judge Emmet Sullivan of the U.S. District Court for the District of Columbia.<sup>146</sup> Subsequently, with the consent of the parties, Judge Sullivan referred the consolidated cases to mediation.<sup>147</sup>

As Guardians' lead counsel in the resulting negotiations, I am unable to discuss any of the communications that took place during the court-ordered mediation.<sup>148</sup> However, without revealing any confidences, I can make some observations based on the history of listing warfare described above and the public record. Each side obviously had something the other wanted. Guardians could offer FWS something it had been unable to obtain and was unlikely to obtain absent a settlement—relief from the blitz of ESA listing petitions and litigation over FWS's subsequent statutory deadline violations.<sup>149</sup> FWS could also offer Guardians something it had, to date, been unable to obtain through litigation—movement of species out of the warranted-but-pre-

---

<sup>142</sup> Jesup, *supra* n. 6, at 378 ("FWS, of course, had violated the deadlines at issue in the consolidated cases.").

<sup>143</sup> BioBlitz Press Release, *supra* n. 138 (announcing the BioBlitz launch); Press Release, WildEarth Guardians, *Moby Dick Versus the Federal Government* (Feb. 16, 2010) (available at [http://www.wildearthguardians.org/site/News2?news\\_iv\\_ctrl=1&page=NewsArticle&id=5514](http://www.wildearthguardians.org/site/News2?news_iv_ctrl=1&page=NewsArticle&id=5514) [<http://perma.cc/92T4-X5VS>] (accessed Apr. 12, 2014)) ("By the close of the BioBlitz, Guardians will have taken actions for over 100 species . . .").

<sup>144</sup> Jesup, *supra* n. 6, at 370–71 (discussing the DOJ's filing of a motion with the MDL panel).

<sup>145</sup> *Id.* at 372.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> D.D.C. Local Civ. R. 84.9(a); *see also* Jesup, *supra* n. 6, at 372 (noting Mr. Jesup's inability to discuss the mediation under the same constraints).

<sup>149</sup> Jesup, *supra* n. 6, at 373.

cluded “black hole.”<sup>150</sup> Guardians could continue to petition new species and force petition findings. However, if these petition findings simply resulted in more species being added to the warranted-but-precluded list, then those species would not receive the substantive legal protections of the ESA in a timely manner.

The parties also had some common interests. The warranted-but-precluded list represented a point of agreement among the parties: candidate species warranted the protection of the ESA, but ESA protection was being withheld because FWS asserted it did not have sufficient resources to move forward.<sup>151</sup> Thus, if a settlement made resources available by reducing FWS’s obligations to rule on new petitions for additional species, the agency should be able to address its backlog of warranted-but-precluded species. Accordingly, both parties were motivated to strike a “grand bargain,” not only to resolve the limited number of cases consolidated in the MDL proceedings, but also to attempt to steer FWS’s listing program to a better course.

The public record of the MDL settlement agreement is as follows: On May 10, 2011, after nine months of negotiation, FWS and Guardians reached a settlement agreement and filed it with the court.<sup>152</sup> The principal thrust of the Guardians–FWS agreement is its attempt to clear the backlog of warranted-but-precluded (or candidate) species.<sup>153</sup> In the Guardians–FWS agreement, for each of the 251 candidate species on FWS’s November 2010 Candidate Notice of Review,<sup>154</sup> FWS agreed to issue a proposed listing rule or make a not-warranted finding subject to judicial review (including suits by Guardians) by the end of the agency’s fiscal year (FY) 2016 (September 30, 2016).<sup>155</sup> FWS further agreed to make final listing determinations on any resulting proposed rules in accordance with the ESA’s statutory deadlines.<sup>156</sup> That is, within one year of the publication of a proposed rule to list a species, FWS must make a final decision on the proposal, or extend the deadline by up to six months in cases of scientific uncertainty.<sup>157</sup> In turn, Guardians made three principal commitments: (1) not to bring any ESA Section 4 deadline litigation (or challenges to warranted-but-precluded findings) prior to March 31, 2017; (2) to limit itself to filing petitions to list no more than ten species in any of FWS’s fiscal years through the end of FY 2016 (September 30, 2016); and (3) to move jointly with FWS to dismiss five existing cases challenging warranted-

---

<sup>150</sup> *Id.* at 372.

<sup>151</sup> *Id.* at 377.

<sup>152</sup> Stip. Settle. Agreement, *In re Endangered Species Act Sec. 4 Deadline Litig.*, [http://www.wildearthguardians.org/site/DocServer/FWS\\_ESA\\_Settlement\\_Agreement\\_As\\_Filed\\_5.10.11.pdf?docID=2493&AddInterest=1262](http://www.wildearthguardians.org/site/DocServer/FWS_ESA_Settlement_Agreement_As_Filed_5.10.11.pdf?docID=2493&AddInterest=1262) [<http://perma.cc/6WSV-8Y34>] (D.D.C. May 10, 2011) (Misc. Action No. 10-377 (EGS)) (accessed Apr. 12, 2014) [hereinafter Guardians–FWS Settlement].

<sup>153</sup> Jesup, *supra* n. 6, at 373.

<sup>154</sup> 75 Fed. Reg. 69222, 69222 (Nov. 10, 2010).

<sup>155</sup> Guardians–FWS Settlement, *supra* n. 152, at 6.

<sup>156</sup> *Id.* at 7.

<sup>157</sup> 16 U.S.C. § 1533(b)(6)(A)–(B).

but-precluded findings.<sup>158</sup> These cases challenging existing warranted-but-precluded findings, alleging FWS's failure to make expeditious progress in adding species to the ESA list, had been the other front in Guardians' litigation discussed above.<sup>159</sup>

The Center for Biological Diversity (CBD), which was not a party to the Guardians–FWS agreement, initially opposed the agreement.<sup>160</sup> However, on July 12, 2011, CBD and FWS filed a separate settlement agreement with the district court.<sup>161</sup> The agreement between CBD and FWS does not require FWS to address all the outstanding candidate species.<sup>162</sup> Rather, CBD took a different approach by requiring FWS to take action on approximately forty specific species by certain dates.<sup>163</sup>

In contrast, the Guardians–FWS agreement requires action on all the candidates by September 30, 2016,<sup>164</sup> mostly in the order of FWS's choosing.<sup>165</sup> CBD also did not agree to limit its petitioning of new species and deadline litigation to the same extent as Guardians; however, it did agree that if its petitioning and deadline litigation exceeds certain bounds, the specific deadlines it had obtained in its agreement for findings on specific candidate species will be extended until September 30, 2016.<sup>166</sup> Finally, CBD agreed to drop its opposition to the Guardians–FWS settlement agreement and agreed that its own agreement would be terminated if the district court did not approve the Guardians–FWS agreement.<sup>167</sup> Ultimately, the settlement agreement between CBD and FWS “can be viewed as an addendum to the agreement with Guardians.”<sup>168</sup>

---

<sup>158</sup> Guardians–FWS Settlement, *supra* n. 152, at 8–11.

<sup>159</sup> WildEarth Guardians, *On the ESA Waiting List*, [http://www.wildearthguardians.org/site/PageServer?pagename=priorities\\_wildlife\\_ESA\\_listing\\_waiting\\_list&AddInterest=1262](http://www.wildearthguardians.org/site/PageServer?pagename=priorities_wildlife_ESA_listing_waiting_list&AddInterest=1262) [<http://perma.cc/9LX7-5ECK>] (accessed Apr. 12, 2014).

<sup>160</sup> See Press Release, Ctr. for Biological Diversity, *Judge Halts Settlement over Hundreds of Endangered Species, Orders Parties Back to Negotiations* (May 17, 2011) (available at [http://www.biologicaldiversity.org/news/press\\_releases/2011/839-species-05-17-2011.html](http://www.biologicaldiversity.org/news/press_releases/2011/839-species-05-17-2011.html) [<http://perma.cc/A96L-T4WY>] (accessed Apr. 12, 2014)) (“Today’s ruling gives us an opportunity to fix this deeply flawed agreement . . . . These plants and animals need a strong, binding agreement that guarantees their protection.” (internal quotations omitted)).

<sup>161</sup> Stip. Settle. Agreement, *In re Endangered Species Act Sec. 4 Deadline Litig.*, [http://www.biologicaldiversity.org/programs/biodiversity/species\\_agreement/pdfs/proposed\\_settlement\\_agreement.pdf](http://www.biologicaldiversity.org/programs/biodiversity/species_agreement/pdfs/proposed_settlement_agreement.pdf) [<http://perma.cc/L8DX-42K6>] (D.D.C. July 12, 2011) (Misc. Action No. 10-377 (EGS)) (accessed Apr. 12, 2014) [hereinafter CBD–FWS Settlement].

<sup>162</sup> *Id.*; see also Jesup, *supra* n. 6, at 375 (noting the agreement between CBD and FWS is “substantially less ambitious than the settlement with Guardians in that it did not require FWS to address all of the outstanding candidates”).

<sup>163</sup> CBD–FWS Settlement, *supra* n.161, at 5.

<sup>164</sup> Guardians–FWS Settlement, *supra* n. 152, at 9.

<sup>165</sup> *Id.*

<sup>166</sup> CBD–FWS Settlement, *supra* n. 161, at 7–8.

<sup>167</sup> *Id.* at 6.

<sup>168</sup> Jesup, *supra* n. 6, at 376.

The district court subsequently approved both settlement agreements by orders dated September 9, 2011.<sup>169</sup> Collectively, the two agreements have been referred to as the MDL settlement.<sup>170</sup>

### VIII. DID IT WORK?

To date, the U.S. Fish & Wildlife Service (FWS) is in compliance with the Multidistrict Litigation (MDL) settlement.<sup>171</sup> More importantly, FWS is again listing—and thus protecting—deserving species.<sup>172</sup> WildEarth Guardians (Guardians) anticipated that most of the 251 species on the candidate list as of November 2010 would be listed under the terms of its settlement agreement.<sup>173</sup> After all, FWS had already found these species warranted protection.<sup>174</sup> However, by entering into a settlement agreement that forced FWS to make final decisions on the listing status of these species but did not require FWS to actually list them, Guardians obviously faced some risk that it might not achieve its ultimate objective: getting these species listed. Instead, the organization would have to file a series of lawsuits challenging FWS's decisions to withdraw candidate species from listing consideration. Guardians accepted that risk, because anything—even a challenge to a unfavorable final decision—was better than the “black hole” of endless indecision.

However, the record thus far appears to be consistent with Guardians' optimistic assumption that FWS would list most of the candidate species. As of the end of FWS's fiscal year 2013 (September 30, 2013), FWS had listed 77 of the 251 candidates and proposed another 39 of the 251 species for listing, while withdrawing 15 candidate species.<sup>175</sup> FWS also listed an additional 54 species during the course of the MDL settlement.<sup>176</sup> In sum, FWS has listed 136 species during the first two

---

<sup>169</sup> Or. Granting Jt. Mot. for Approval of Settle. Agreement & Or. of Dismissal of WildEarth Guardians' Claims, *In re Endangered Species Act Sec. 4 Deadline Litig.*, [http://www.fws.gov/endangered/improving\\_esa/order\\_re\\_approval\\_of\\_WEG\\_agreement.pdf](http://www.fws.gov/endangered/improving_esa/order_re_approval_of_WEG_agreement.pdf) [<http://perma.cc/RV9Y-HJT9>] (D.D.C. Sept. 9, 2011) (Misc. Action No. 10-377 (EGS)) (accessed Apr. 12, 2014) (order approving the Guardians–FWS settlement); Or. Granting Jt. Mot. for Approval of Settle. Agreement & Or. of Dismissal of Ctr. for Biological Diversity's Claims, *In re Endangered Species Act Sec. 4 Deadline Litig.*, [http://www.fws.gov/endangered/improving\\_esa/order\\_re\\_approval\\_of\\_CBD\\_agreement.pdf](http://www.fws.gov/endangered/improving_esa/order_re_approval_of_CBD_agreement.pdf) [<http://perma.cc/BZX4-M8SZ>] (D.D.C. Sept. 9, 2011) (Misc. Action No. 10-377 (EGS)) (accessed Apr. 12, 2014) (order approving the CBD–FWS settlement).

<sup>170</sup> Jesup, *supra* n. 6, at 331.

<sup>171</sup> 77 Fed. Reg. 69994, 69994 (Nov. 21, 2012).

<sup>172</sup> *Id.*

<sup>173</sup> 75 Fed. Reg. at 69222.

<sup>174</sup> *Id.*

<sup>175</sup> Email from Taylor Jones, Endangered Species Advoc., WildEarth Guardians, to Jay Tutchton, Author, *Re: Final 2013 Obligations Doc* (Oct. 7, 2013, 1:48 p.m. MDT) (on file with *Animal Law*).

<sup>176</sup> *Id.* (discussing how the listing of these additional fifty-four species resulted from other requirements in the settlement agreement).

years of the agreement, a rate of 68 species per year.<sup>177</sup> While this rate of addressing the potentially thousands of species in need of Endangered Species Act protection is still objectively paltry, it does represent progress and improvement. In comparison, prior to Guardians' BioBlitz, only seven new species were listed during the Obama administration's first year.<sup>178</sup>

Of course, things could always go off track: FWS's budget could be cut or resources diverted. Nonetheless, even if the agency faces budgetary limits, it should be motivated to fulfill its obligations under the agreement because, without the MDL settlement, things might be worse for FWS. Importantly, but for its compliance with the MDL settlement, it is entirely likely that FWS would lose cases challenging its warranted-but-precluded findings for failure to make expeditious progress.<sup>179</sup> Additionally, if the MDL agreement were to collapse, Guardians could always return to its prior approach of swamping FWS with petitions and deadline lawsuits. Thus, FWS should be motivated to have the MDL agreement succeed despite any difficulties resulting from limited resources. At present, Guardians also should be somewhat satisfied with the progress. True, the vast extinction crisis is still accelerating<sup>180</sup> and inadequately addressed, but at least FWS is making progress listing the species which both sides agreed deserve priority: the warranted-but-precluded candidates.<sup>181</sup> These species are finally emerging from the ESA's black hole and most of them should find a place on the ark.

## IX. CONCLUSION

We are undoubtedly in the midst of a human-caused extinction crisis. The loss of our planet's biodiversity puts the quality of human life—possibly even the existence of human life—at risk. There is no remedy for extinction, but we can help prevent human-caused extinction. As Ralph Waldo Emerson eloquently stated: “In skating over thin ice, our safety is in our speed.”<sup>182</sup> Time is of the essence.

<sup>177</sup> See U.S. Fish & Wildlife Serv., *Envtl. Conserv. Online Sys., U.S. Federal Endangered and Threatened Species by Calendar Year*, [http://ecos.fws.gov/tess\\_public/pub/speciesCountByYear.jsp](http://ecos.fws.gov/tess_public/pub/speciesCountByYear.jsp) [<http://perma.cc/5FXE-Z3XS>] (accessed Apr. 12, 2014) (showing that a total of fifty-two species were listed in 2012 and eighty-four species in 2013).

<sup>178</sup> See *id.* (showing that seven species were listed in 2009).

<sup>179</sup> See *e.g. W. Watersheds Project v. U.S. Fish & Wildlife Serv.*, 2012 U.S. Dist. LEXIS 13771 at \*\*6–7 (D. Idaho Feb. 2, 2012) (indicating that, but for FWS's commitments in the MDL settlement agreement, the court would have held that FWS's warranted-but-precluded finding for the greater sage grouse was arbitrary and capricious based on the agency's failure to make expeditious progress).

<sup>180</sup> *Supra* pt. II(A); see Ctr. for Biological Diversity, *The Extinction Crisis*, [http://www.biologicaldiversity.org/programs/biodiversity/elements\\_of\\_biodiversity/extinction\\_crisis/](http://www.biologicaldiversity.org/programs/biodiversity/elements_of_biodiversity/extinction_crisis/) [<http://perma.cc/K385-5NZZ>] (accessed Apr. 12, 2014) (“We're currently experiencing the worst spate of species die-offs since the loss of the dinosaurs 65 million years ago.”).

<sup>181</sup> See *supra* pt. V(C) (discussing FWS's warranted-but-precluded list).

<sup>182</sup> R.W. Emerson, *Prudence*, in *Essays* 201, 214 (new ed., James Munroe & Co. 1850).

Because the Endangered Species Act (ESA) is the nation's strongest and most effective law to prevent anthropogenic extinction,<sup>183</sup> we should—indeed must—use it to address this crisis. The ESA's ark of legal protection begins with listing. The quicker species can be listed and thus protected, the quicker and more easily they can recover.<sup>184</sup> The science is out there. Highly credible, nongovernmental expert organizations such as NatureServe and the International Union for Conservation of Nature (IUCN) have compiled extensive lists of species in danger of extinction that exceed the length of the ESA's list by orders of magnitude.<sup>185</sup> We do not need to reinvent the wheel. Rather, we need to act on this best available science, as the ESA requires.<sup>186</sup> These ideas were the heart of WildEarth Guardians' mega-petitions that began the chain of events directly leading to the Multidistrict Litigation (MDL) settlement.

Despite having worked to achieve the MDL agreement for most of six years, I readily acknowledge it is at best a half-measure. The extinction crisis remains depressingly titanic and largely unaddressed. The MDL agreement began with the easiest part of the problem: obtaining relief for those species that the U.S. Fish & Wildlife Service (FWS) and petitioners agreed warranted, but were denied, ESA listing because of bureaucratic delays. While this is progress, more must be done, quickly. Thousands of deserving species are not yet in line to receive ESA protection.

The true promise of the MDL settlement is its potential to move us beyond the listing wars. Listing is diagnostic: is a species threatened with extinction? As a general matter, it does little good to deny, delay, or prevent accurate diagnosis, which must be solely a scientific decision, as the ESA requires.

The course of treatment for listed species is another matter. That is where competing political and economic interests should come into play. Species listed under the ESA are entitled to a legally prescribed course of treatment. However, this course of treatment is not inflexible. The ESA's post-listing provisions allow room for debate as to what actions should be taken to save a species from extinction. How much human activity should be modified to allow a species to survive, by what methods, and at what cost? Those are discussions worth having and fights worth fighting. Listing warfare has, in large measure, resulted from FWS's attempts and the attempts of those subject to regu-

---

<sup>183</sup> See *supra* pt. III(A) (discussing the importance of the ESA as the nation's most comprehensive law designed to protect endangered species).

<sup>184</sup> See David S. Wilcove et al., *What Exactly Is an Endangered Species? An Analysis of the U.S. Endangered Species List: 1985–1991*, 7 *Conserv. Biology* 87, 92 (1993) (finding population size and number of populations at the time of listing are often critically low).

<sup>185</sup> See *supra* nn. 58–60 and accompanying text (discussing the IUCN Red List); *supra* nn. 120–121 and accompanying text (discussing the NatureServe Explorer database).

<sup>186</sup> 16 U.S.C. § 1533(b)(1)(A).

lation to deny or delay the obvious—that thousands of species are threatened with extinction. While it is true that recognizing the true scope of the problem would result in an added burden to FWS, and would anger politically powerful and entrenched interests, we must ask ourselves: Will we honor the promise of the ESA? Are we committed to preventing human-caused extinction? If the answer is yes, then we must act.

Though it is tempting to argue that no one has benefitted from the ongoing delay, unfortunately many have, and those who profit from the status quo will continue to benefit. Thus, groups like WildEarth Guardians, seeking to divert the course of the juggernaut, will continue to need tools like citizen listing petitions and deadlines lawsuits to bring attention to the powerless. It would be naive to believe we can put such tools aside, but we might, over time, redirect the legal conflict. The legal resources currently being exhausted in opposition to listings could be better spent working to recover populations and prevent extinctions.

Putting a species on a list is a simple task compared to figuring out how to save it from extinction once it is listed. True, listing drives the other debates and will remain both important and controversial, but it is the second debate that we should join rapidly: how do we save these species? Listing (i.e., diagnosis) or recognition of the problem is the first step among many, and one that should not take years of litigation to resolve. The MDL agreement holds the potential to allow us to move on to the next step in the process: determining what must be done to guard these species from extinction.