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# Developments in ESA Citizen Suits and Citizen Enforcement of Wildlife Laws

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For decades, private individuals and activist organizations have used citizen suit provisions in federal environmental laws to stop unlawful conduct, effectuate regulatory and policy changes within federal agencies, and halt private commercial activity. One of the most interesting, dynamic, and disruptive modes of citizen suit enforcement has been under the Endangered Species Act (ESA). Unlike other federal environmental laws that seek to balance environmental protection with economic betterment, the ESA is focused almost exclusively on protection of endangered species. That singular statutory focus can produce harsh results. In one of the first major ESA citizen suits, the Supreme Court found that the ESA required an injunction against an almost-completed dam in *TVA v. Hill* to protect the snail darter. 437 U.S. 153 (1978), [http://scholar.google.com/scholar\\_case?case=11603759272819987617](http://scholar.google.com/scholar_case?case=11603759272819987617). Echoes of that opinion, such as the suggestion that the ESA mandates protection of endangered species, regardless of cost, still resonate with courts today.

In the early years of ESA litigation, citizen plaintiffs focused on what would be considered traditional targets: major land development projects such as dams, timber harvests, and natural resource extraction. As the ability of the ESA to halt a project became more widely known, ESA citizen suit litigation has become more varied, with suits touching a broad variety of regulated activity and federal agency actions.

For example, for the past dozen years, the Environmental Protection Agency (EPA), along with the two Services that implement the ESA (the U.S. Fish & Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS)), have been subject to a barrage of litigation alleging that EPA has not complied with ESA section 7 when registering pesticides under the Federal Insecticide, Fungicide and Rodenticide Act. Unlike prior citizen suit litigation that had been focused on a site-specific project, the pesticide cases have involved multiple species across entire regions. The most recent cases involve nationwide impacts of hundreds of pesticides and, for the first time, a challenge to a new product registration.

ESA citizen suits have also become a vehicle for achieving water resource allocation goals of certain litigants. Examples include litigation over continued operation of Columbia River dams in the northwest and mitigation to protect listed salmon (e.g., *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917 (9th Cir. 2008), the delta smelt litigation in California (e.g., *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 541 (9th Cir. 2014)), litigation over the Army Corps'

operation of Missouri River dams and reservoirs in a manner appropriately protective of listed species (*In re Operation of the Missouri River Lit.*, 421 F.3d 618 (8th Cir. 2005)), and litigation over the Corps' operation of rivers and dams in the southeast to benefit Atlanta while still protecting downstream listed species of mollusks (*In re Tri-State Water Lit.*, 639 F. Supp. 2d 1308 (M.D. Fla. 2009)). Most recently in the water rights area, the Fifth Circuit ruled against ESA citizen suit plaintiffs, finding that a state water permitting agency was not the proximate cause of ESA "take" of whooping cranes, and concluding that more traditional injunction tests should apply in ESA citizen suits. *Aransas Project v. Shaw*, — F.3d —, 2014 WL 2932514 (5th Cir. June 30, 2014).

Emerging industries have also felt the impact of ESA litigation, most notably the renewable energy sector. Both wind and solar projects have been challenged based on their alleged impacts on listed species. In *Animal Welfare Institute v. Beech Ridge Energy*, for example, a wind project was found to violate the "take" prohibition in ESA section 9 with respect to an endangered bat, resulting in restrictions on the timing and duration of the wind turbine operation. 675 F. Supp. 2d 540 (D. Md. 2009).

ESA citizen suits have also been directed against the Services' regulatory actions under the act. Recent cases have challenged the full spectrum of listing decisions as well as designations of critical habitat and distinct population segments.

Illustrating how ESA citizen suit litigation is expanding into new areas, one recently filed citizen suit has targeted the transport of oil. The dramatic increase in oil drilling via unconventional methods in both the United States and Canada has caused a spike in the movement of oil by rail and by barge. In *Center for Biological Diversity v. U.S. Coast Guard*, filed in New York federal court on July 17, the plaintiff organization has brought ESA citizen suit claims against both EPA and the Coast Guard related to the agencies' alleged failure to consult and ensure against jeopardy related to their contingency planning for spills and other emergencies that may cause harm to listed species. Whether federal agencies have to engage in ESA § 7 consultation on their emergency planning activities is a first impression question that may be answered in the course of this citizen suit.

A closely related issue is under consideration in the Ninth Circuit, which recently heard oral argument in a case challenging the approval of Shell's Oil Spill Response Plans for its proposed Arctic Outer Continental Shelf oil and gas exploration. Relying on *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), the approving agency within the Department of the Interior, the Bureau of Safety and Environmental Enforcement, contends that ESA consultation is not required prior to issuing such approvals because they are nondiscretionary under the Clean Water Act. Environmental

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groups challenging the approval disagree. The Ninth Circuit's decision will likely further define the concepts of "discretionary" federal actions, for which ESA section 7 consultation is required, and "nondiscretionary" actions, for which it is not.

While ESA citizen suits are brought primarily by environmental groups, the Supreme Court's decision in *Bennett v. Spear*, 520 U.S. 154 (1997), [http://scholar.google.com/scholar\\_case?case=17916430611727262660](http://scholar.google.com/scholar_case?case=17916430611727262660), recognized that industry groups have standing to raise ESA compliance claims. One recent example is a suit in which pesticide registrants convinced an appellate court that a Service biological opinion was arbitrary in its overprotective assumptions and analyses. *Dow AgroSciences v. Nat'l Marine Fisheries Serv.*, 707 F.3d 462 (4th Cir. 2013).

As evidenced from this varied array of cases, it should be expected that ESA citizen suits will continue to evolve in their substance and will continue to be filed. The following discussion reviews the basic structure and foundation for such citizen suits, analyzes the interactions between the Administrative Procedure Act (APA) and the ESA, and describes how other federal wildlife laws can and have been used for private enforcement.

### **Endangered Species Act Citizen Suits**

The ESA may be enforced by both the federal government and the public via citizen suits. In practice, citizen suits are the primary mechanism by which the ESA is enforced against government agencies and private entities. ESA § 11(g)(1) creates a private right of action allowing a private entity (e.g., an environmental group) to sue any private or public "person" to enjoin an alleged violation of the ESA or an ESA rule. 16 U.S.C. § 1540(g)(1), [www.law.cornell.edu/uscode/text/16/1540](http://www.law.cornell.edu/uscode/text/16/1540). Thus, Congress in the ESA, as in many EPA-administered statutes, provided for private enforcement of statutory duties against both government entities and private actors.

ESA section 11(g)(1) and (5) make it clear that injunctive relief is available. By negative implication, monetary penalties are not available in private suits (although attorney fees and litigation costs are available). Courts differ on whether the traditional prerequisites to injunctive relief apply in ESA cases, or whether a curative injunction is more easily available for an ESA violation under decisions like *TVA v. Hill*. Following that case, Congress amended the ESA to provide alternate procedures in such a case.

Under ESA section 11(g)(2), suit may not be commenced until sixty days after the prospective plaintiff provides notice of the alleged ESA violation to the alleged violator and to the Secretary of the Interior or Commerce. The sixty-day window provides an opportunity to settle disputes. After the Supreme Court's decision in *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989), lower courts have required strict compliance with the notice-of-intent-to-sue requirements. E.g., *Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515 (9th Cir. 1998).

ESA § 11(g)(4) allows a court to award litigation costs, including reasonable attorney fees, to any party where appropriate. Courts have found that fees are available only to a party who achieves some success on the merits. Some people believe that allowing environmental group staff attorneys to obtain attorney fees at hourly rates prevailing in the private sector creates an economic incentive to bring ESA citizen suits.

### **The Administrative Procedure Act and ESA Citizen Suits Against Federal Agencies**

The APA provides a general mechanism to challenge a final federal agency action, provides for deferential review, and limits review to the administrative record before the agency at the time of its decision. 5 U.S.C. §§ 702, 706. Questions quickly arise in ESA citizen suit litigation against a federal agency about whether APA judicial review principles apply, such as whether review is limited to the record before the agency at the time of the challenged decision, or whether citizen plaintiffs can provide the court with post- and extra-record material to buttress their claims. In short, the question of how the APA and ESA interact when a citizen suit brings ESA claims against a federal agency is critical and is still under development in the courts.

In *Bennett v. Spear*, the Supreme Court addressed the limits of ESA citizen suits and the availability of APA review in a case challenging the adequacy of a Service's biological opinion. There the Court distinguished between: (1) "substantive" ESA "violations" as those that can be enforced, if at all, under ESA section 11(g); and (2) "maladministration" claims, which are not subject to an ESA citizen suit, but which could be brought under the APA. 520 U.S. at 173–74. Of course, a wildlife "take" in violation of section 9 would be a substantive violation.

With respect to alleged violations of ESA section 7, courts have found that a claim against the Service for an inadequate biological opinion is a "maladministration" claim subject only to an APA action. *Bennett v. Spear*, 520 U.S. at 173–74. In contrast, most courts find that a section 11(g) citizen suit is the proper vehicle for allegations that an action agency is violating its section 7(a)(2) "duty to insure" its action will not result in jeopardy to a listed species or adverse modification of critical habitat. See, e.g., *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024 (9th Cir. 2005); *Env'tl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073 (9th Cir. 2001). Some case law further indicates that a suit against an action agency for a procedural error also is within the scope of an ESA citizen suit. See *id.*, 413 F.3d at 1034; but see *Earth Island Inst. v. Albright*, 147 F.3d 1352, 1357 (Fed. Cir. 1998).

Another commonly encountered issue when an ESA claim is brought against a federal agency is whether background APA review principles (e.g., deferential judicial review, review limited to the administrative record, see 5 U.S.C. § 706) apply to such an ESA citizen suit. Most courts find that, because ESA section 11(g) does not establish a standard of review, the APA "arbitrary and capricious" standard applies to ESA claims against a federal agency. See, e.g., *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1205–06 (9th Cir. 2004). Some courts further reason that, because 5 U.S.C. § 559 provides that the APA applies unless it is expressly superseded by another statute, and because the ESA is silent on the scope of judicial review, background APA principles apply fully to ESA claims against a federal agency action, including the principle that judicial review is limited to the administrative record. E.g., *Cabinet Mountain Wilderness v. Peterson*, 685 F.2d 678, 685 (D.C. Cir. 1982).

However, some Ninth Circuit decisions follow a rationale that ESA section 11(g) provides an injunctive relief remedy which means that the APA does not apply to ESA claims against a federal agency (due to language in 5 U.S.C. § 704 that the APA does not apply when another statute provides an effective remedy). As a result, courts within the Ninth Circuit are more likely to find that ESA claims against a federal agency are not limited to the administrative record, and that extra-record

evidence is admissible. *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 497 (9th Cir. 2010). Still, the en banc Ninth Circuit recently stated that an “agency’s compliance with the ESA is reviewed under the Administrative Procedure Act” and is a “record review” case. *Karuk Tribe v. U.S. Forest Serv.*, 681 F.3d 1006, 1012 (9th Cir. 2012) (en banc). Consequently, there is uncertainty and tension in Ninth Circuit case law on the relationship between the ESA citizen suit provision and the APA provisions that normally govern review of federal agency actions.

As a practical matter, however, an environmental group seeking to enforce various provisions of the ESA may use both statutes. It is common for a party to file its complaint making only claims under other statutes and APA claims and then to seek leave to amend the complaint to add ESA claims upon the expiration of the sixty-day notice period, but some courts have begun to disallow this tactic, holding that it renders the statutory notice “merely superficial.” *Alliance for the Wild Rockies v. USDA*, 938 F. Supp. 2d 1034 (D. Mont. 2013). To ensure that the sixty-day notice provision has the intended effect of allowing parties to reach a resolution prior to litigation, those courts have held that a later-filed amendment adding an ESA claim for the same “conduct, transaction, or occurrence” would relate back to the original filing date, resulting in a loss of jurisdiction for the ESA claims if the original suit was filed less than sixty days after the ESA citizen suit notice was provided. *Id.*; see also *Proie v. Nat’l Marine Fisheries Serv.*, No. 11-cv-5955, 2012 WL 1536756 (W.D. Wash. May 1, 2012).

This strategy backfired for a coalition of environmental groups when challenging the amendment of a habitat conservation plan for forest logging in a case that forced the court to partition claims of maladministration of the ESA, brought under the APA, from claims of substantive ESA violations, brought under section 11(g). *Sierra Club v. Salazar*, 961 F. Supp. 2d 1172 (July 22, 2013). While the court agreed with the environmental groups’ partition of claims between the APA and the ESA, it signaled disapproval for the plaintiffs’ anticipated “two-step” filing strategy.

In that case, the U.S. Fish & Wildlife Service (FWS) had approved an amendment to a habitat conservation plan governing logging in southwest Washington. In a sixty-day notice letter, environmental groups led by Sierra Club alleged that FWS failed to take required steps prior to approving the amendment. The notice letter alleged two violations: a violation of ESA section 7 for failure to reinstate consultation and complete a new biological opinion and a violation of section 10 for approving the amendment as a “minor” amendment rather than a “major” one that would have required substantial additional process. The groups then filed suit under the APA on their ESA section 10 claims thirty-five days later.

The government moved to dismiss, arguing that the environmental groups jumped the gun because the § 10 claim is “intrinsically tied or analogous” to § 7 claims, which, under Ninth Circuit precedent were considered “substantive” and therefore must be filed only under the ESA and preceded by sixty-days notice. 961 F. Supp. 2d at 1174–75. The court denied the motion to dismiss, holding that the plaintiffs’ section 10 claims were properly pled under the APA, but cautioned the plaintiffs that it would relate any subsequently filed section 7 claims back to the original filing date. Thus, the plaintiffs won the right to keep their section 10 claims in court on the current schedule, but at the cost of their section 7 claims.

These cases suggest that all litigants should carefully

scrutinize the APA-ESA relationship and the local precedent in any ESA citizen suit against a federal agency. The resolution of such issues can affect jurisdiction over claims, the scope of material the court can review, the judicial review standards, and the potential availability of attorney fees. We expect this precedent to continue to develop in both pending and future cases against federal agencies.

### **Citizens’ Ability to Enforce Other Wildlife Laws Against Federal Agencies**

Among the major federal wildlife statutes (e.g., Bald and Golden Eagle Protection Act, Marine Mammal Protection Act, Migratory Bird Treaty Act (MBTA)), the ESA is the only one with an express citizen suit provision. This means that a private entity, such as an environmental group, cannot directly sue another private entity to enjoin an alleged violation of, for example, the MBTA.

But private parties can sue federal agencies under the APA (5 U.S.C. § 706) to set aside and enjoin actions that are in violation of law, including most wildlife laws. And where a private entity needs a federal permit or other authorization to operate lawfully, a successful injunction suit against a federal entity can end up effectively enjoining the connected private activity.

There are some interesting twists on these general principles. For example, the MBTA is a criminal statute. Can it be enforced civilly against a federal agency under the APA? The answer in the D.C. Circuit is yes, though other courts have reached different results. *Compare Humane Soc’y of U.S. v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000), with *Newton Cnty. Wildlife Ass’n v. U.S. Forest Serv.*, 113 F.3d 110 (8th Cir. 1997).

Further, even within the D.C. Circuit, a district court found that no MBTA take permit is required prior to certain wind-energy-related actions. The court also suggested that the MBTA may not apply to speculative future deaths inadvertently caused by a wind project. See *Pub. Emps. for Env’t Responsibility v. Beaudreu*, — F. Supp. 2d —, 2014 WL 985394 (D.D.C. 2014). The result might have been different in an ESA citizen suit. The ESA more clearly makes even incidental take unlawful. And, though ESA § 11(g)(1) is phrased in terms of enjoining a current ESA violation, some courts have found that ESA § 11(g) allows suits to enjoin “imminent” future take, and have enjoined projects where ESA take may not occur for years. *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781 (9th Cir. 1995); *Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540 (D. Md. 2009).

In sum, the ESA citizen suit provision has evolved to become the major tool for enforcing the ESA against both federal agencies and private development interests. It is a powerful tool given the availability of injunctions and attorney fees, and its use has expanded beyond traditional land development targets. ESA section 11(g) citizen suits can be brought against a broad array of actions given factors such as (1) the distribution of listed species in the vast majority of counties in the U.S.; (2) the application of ESA section 7 to virtually every discretionary federal agency action; (3) the application of a strict ESA section 9 take prohibition to both private and federal actors; and (4) the availability of suits against either governmental or private actors. This will continue to be an evolving and dynamic area of environmental litigation, requiring close attention to ESA compliance by both private and federal government regulators. 🌱