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Abuse of the Warranted but Precluded Designation: A Real or Imagined Purgatory

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**ABUSE OF THE WARRANTED BUT PRECLUDED
DESIGNATION:
A REAL OR IMAGINED PURGATORY?**

K. MOLLIE SMITH*

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I. INTRODUCTION

A 2009 estimate indicates that 10,306 plant and animal species are at-risk of extinction while only 1897 are protected by the Endangered Species Act (ESA).¹ Therefore, approximately 8409 species are currently

* J.D., Florida State University College of Law, 2010. I would like to thank Professor J.B. Ruhl for his guidance through this entire process and Ben for his patience and support.

¹ Endangered Species Act, 16 U.S.C. §§ 1531-1599 (2006); see *Overview of Data, NATURESERVE EXPLORER*, <http://www.natureserve.org> (last updated Feb. 2, 2009) (scroll over “Get Data” tab; follow “Animal Data for Download” hyperlink from the drop-down

at-risk of extinction but receive no federal protection. What is equally surprising is that 211 of those at-risk species have been officially recognized by the U.S. Fish and Wildlife Service² (FWS) as warranting protection, but remain unprotected because FWS does not have the time or money to deal with them.³ This designation is otherwise known as the “warranted but precluded” (WBP) designation and was specifically authorized by Congress in 1982.⁴

At its inception, the WBP designation was seen as a short-term solution to slight delays that necessarily come up in day to day agency operations.⁵ However, in the last fourteen years its use has exploded.⁶ Critics claim that the WBP designation is unnecessarily overused in an effort to subvert the purpose of the ESA and delay protections of at-risk species.⁷ The FWS, on the other hand, argues that it has no choice but to utilize the WBP designation because of a large backlog of at-risk species

menu; follow “vertebrate” hyperlink; select either “Plants,” “Vertebrates,” or “Invertebrates” from tabs); *Species Reports*, U.S. FISH AND WILDLIFE SERVICE, http://ecos.fws.gov/less_public/TESSBoxscore (last visited March 15, 2011).

² The FWS is a bureau within the Department of the Interior whose mission is “to work with others to conserve, protect and enhance fish, wildlife and plants and their habitats for the continuing benefit of the American people.” *About the U.S. Fish and Wildlife Service*, U.S. FISH AND WILDLIFE SERVICE, http://www.fws.gov/help/about_us.html (last visited March 15, 2011); ROBIN KUNDIS CRAIG, ENVIRONMENTAL LAW IN CONTEXT 324 (2d ed., Thompson/West) (2005) (The FWS shares responsibility for the administration of the ESA with NOAA-Fisheries. The FWS is responsible for terrestrial and freshwater species while NOAA-Fisheries is responsible for marine and anadromous species.); *Endangered Species Program*, U.S. FISH AND WILDLIFE SERVICE, <http://www.fws.gov/endangered/laws-policies/regulations-and-policies.html> (last updated Aug. 26, 2010). However, the FWS is more active in administering the ESA because it deals with many more species and often more controversy since protection of terrestrial species often means regulation of private property. Therefore, this paper will focus on the actions of the FWS rather than NOAA-fisheries.

³ 2009 Candidate Notice of Review, 74 Fed. Reg. 57,804, 57,866-78 (Nov. 9, 2009) (to be codified at 50 C.F.R. pt. 17); see 16 U.S.C. § 1533(b)(3)(B)(iii) (2006).

⁴ THE ENDANGERED SPECIES ACT AT THIRTY: RENEWING THE CONSERVATION PROMISE 51, 57-58 (Dale D. Goble et al. eds., 2006) [hereinafter THE ENDANGERED SPECIES ACT AT THIRTY]; 16 U.S.C. § 1533(b)(3)(B)(iii) (2006).

⁵ THE ENDANGERED SPECIES ACT AT THIRTY, *supra* note 4, at 57-58.

⁶ *Id.*

⁷ Kieran Suckling, Rhiwena Slack & Brian Nowicki, *Extinction and the Endangered Species Act*, CTR. FOR BIOLOGICAL DIVERSITY, 6-10 (May 1, 2004), available at <http://www.biologicaldiversity.org/publications/papers/ExtinctAndESA.pdf>.

and severe underfunding.⁸ This dispute has earned the WBP designation a tainted reputation as a purgatory for at-risk species, where they go extinct while waiting for ESA protections.⁹ In this paper I intend to test the accuracy of that reputation and of the allegations of abuse.

First, in Section II, I will present a background of the ESA generally, and particularly of the WBP designation. I will provide the purpose of the ESA and a basic summary of the major protections given to species by the ESA. I will also provide information about how a species acquires ESA protection by explaining the listing process provided in Section IV. Finally, I will describe in detail the WBP designation. I will discuss its purpose, and the statutorily mandated elements that FWS must determine exist before a species may be designated as WBP. Additionally, I will explain how the FWS prioritizes species to determine which ones get protected first, and what the FWS must do with the species left on the WBP list, including monitoring and emergency listing duties. To conclude Section II, I will depict the current state of the WBP designation, including statistics about current WBP species.

In Section III, I will discuss the allegations that the FWS abuses the WBP designation to purposefully delay the protection of at-risk species. Specifically, I will discuss the allegations that the FWS utilizes the WBP designation when it should not, and that it manipulates the priorities of the species to delay protections. I will also examine whether the FWS neglects its duty to monitor WBP species and to utilize the emergency listing procedures. Included in this Section is the FWS's response to such allegations and case studies addressing them.

Finally, in Section IV, I will provide recommendations to address the problems with the WBP designation. Specifically, I suggest that time limits should be placed on how long a species can remain on the WBP list, and that those species should receive some minimal protections while on it. Further, I advocate that the FWS reform the way WBP species are prioritized and its monitoring system. Such recommendations would allow the WBP designation to be utilized in a way that furthers the intent of the ESA while still providing the FWS the flexibility that is necessary for its operation. Further, the recommendations would quell

⁸ Save Our Springs Alliance v. Norton, 361 F. Supp. 2d 643, 648 (W.D. Tex. 2005).

⁹ Stephen Ceasar, *Threatened Snake Low on List for Protection*, ARIZ. DAILY STAR (Apr. 2, 2010), http://azstar.com/news/science/environment/article_71afdd57-33d9-5c69-e8ae0b925bc9.html.

some of the concerns of abuse and provide adequate checks on the FWS to ensure it acts appropriately.

Whether the current status of the WBP designation is the result of intentional abuse by the FWS or not, the reality is that 211 species are currently on the WBP list, and many more are imperiled and unprotected.¹⁰ Therefore, something must be done to expedite the protections, otherwise many more species will share the fate of the Alani (*Melicope quadrangularis*), which “was listed as endangered in 1994 – twenty years after the Smithsonian Institution petitioned to have it listed, nineteen years after the [FWS] officially proposed listing, fifteen years after the species was placed on the candidate list, and two years after it went extinct.”¹¹

II. THE ENDANGERED SPECIES ACT

In 1973, Congress enacted the Endangered Species Act “to prevent extinctions facing many species of fish, wildlife and plants” and to conserve such species and their habitat.¹² However, before a species receives any protections under the ESA, it must be listed pursuant the procedures in Section 4.¹³ Once a species is listed, a panoply of protections follows.¹⁴

Generally, Sections 7 and 9 of the ESA provide most of the protections for a listed species.¹⁵ Section 7 requires that all federal agencies¹⁶ conserve listed species, and “insure that any action authorized,

¹⁰ 2009 Candidate Notice of Review, *supra* note 3, NATURESERVE EXPLORER, *supra* note 1.

¹¹ THE ENDANGERED SPECIES ACT AT THIRTY, *supra* note 4, at 51.

¹² *Listing a Species as Threatened or Endangered*, U.S. FISH & WILDLIFE SERVICE, <http://www.fws.gov/Endangered/esa-library/pdf/listing.pdf> (last updated July 2009); 16 U.S.C. § 1531(b) (2006) (stating that the purpose of the ESA is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species. . .”). An additional purpose of the ESA was to implement many international treaties and conventions to which the United States was a signatory. 16 U.S.C. § 1531(a)(4) (2006). However, this paper only focuses on the domestic aspects of the ESA.

¹³ *Id.* See also 16 U.S.C. § 1533 (2006).

¹⁴ *Listing a Species as Threatened or Endangered*, *supra* note 12. See generally 16 U.S.C. §§ 1531-1599 (2006).

¹⁵ 16 U.S.C. § 1536(a)(2) (2006); 16 U.S.C. § 1538(a)-(f) (2006).

¹⁶ “Federal agency” is defined as “any department, agency, or instrumentality of the United States.” 16 U.S.C. § 1532(7) (2006).

funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat.”¹⁷ While Section 7 applies only to federal agencies, Section 9 applies to all persons, including private citizens.¹⁸ Primarily, Section 9 prohibits the “take” of any endangered species,¹⁹ and makes trade of such species illegal.²⁰ As one can see, Congress intended the ESA to comprehensively protect listed species. The key that unlocks such protections, however, is the complicated and often lengthy process of listing.²¹

A. Listing Process

A species may be listed as either threatened or endangered,²² and two paths exist to list a species: the agency-initiated path and the citizen-petition path.²³ Regardless the designation or the path, five factors are relevant for determining whether the species should be listed:

- (1) (A) the present or threatened destruction, modification, or curtailment of [the species’] habitat or range. (B) overutilization for commercial, recreational, scientific, or educational purposes, (C)

¹⁷ *Id.* § 1536(a)(1)-(2).

¹⁸ *Id.* § 1538(a)(1) (2006). “Person” is defined as “an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a state; or any other entity subject to the jurisdiction of the United States.” 16 U.S.C. 1532(13) (2006).

¹⁹ Threatened species do not automatically receive protection under Section 9, but may receive such protections pursuant to agency regulations. 16 U.S.C. § 1538(a)(1)(G) (2006).

²⁰ *Id.* “Take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19) (2006).

²¹ Kalyani Robbins, *Strength in Numbers: Setting Quantitative Criteria for Listing Species Under the Endangered Species Act*, 27 UCLA J. ENVTL. L. & POL’Y 1 (2009).

²² For purposes of this paper I make no differentiation between threatened or endangered species because both designations receive protections under the ESA. However, the ESA differentiates between the two based on the degree of threat facing the species. Specifically, an endangered species is one that is “in danger of extinction;” whereas a threatened species is “one that is likely to become endangered.” 16 U.S.C. § 1532(6), (20) (2006).

²³ *Id.* § 1533(a)-(b) (2006); *Listing a Species as Threatened or Endangered*, *supra* note 12.

disease or predation, (D) the inadequacy of existing regulatory mechanisms, and (E) other natural or manmade factors affecting its continued existence.²⁴

Furthermore, all listing decisions must be made “solely on the basis of the best scientific and commercial data available.”²⁵

When the FWS initiates the listing process for a species, it follows notice and comment rulemaking procedures.²⁶ First, the FWS identifies a species that it believes merits listing; such species are designated as “candidate” species.²⁷ When the FWS decides to list a candidate species it must publish notice in the Federal Register at least ninety days prior to listing, and accept comments from the public.²⁸ Within one year of publishing notice, the FWS must take one of three actions: publish a final rule, withdraw the proposed listing, or give notice of a six month extension.²⁹ However, there are no set timelines for the FWS to address candidate species and, therefore, a species may remain on the candidate list indefinitely.³⁰

One ray of hope for species languishing on the candidate list, and species otherwise not recognized for protection, is the citizen-petition pathway.³¹ Citizens begin this process by submitting a formal petition requesting the FWS to list a species.³² The petition must include supporting biological data.³³ Within ninety days of receiving the petition, the FWS must determine “whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted.”³⁴ Thereafter, within 12 months, the FWS must take one of the following actions: (1) determine that the listing is not

²⁴ 16 U.S.C. § 1533(a)(1)(A)-(E).

²⁵ *Id.* § 1533(b)(1)(A).

²⁶ *Id.* § 1533(a)-(b); *Listing a Species as Threatened or Endangered*, *supra* note 12.

²⁷ *Listing a Species as Threatened or Endangered*, *supra* note 12.

²⁸ 16 U.S.C. § 1533(b)(5)(A) (2006).

²⁹ *Id.* § 1533(b)(6)(A).

³⁰ *Ctr. for Biological Diversity v. Norton*, 254 F.3d 833, 840 (9th Cir. 2001) (“Candidate status does not guarantee a . . . time frame for administrative action [P]otentially qualified species may sit on candidate lists for extraordinarily long periods before becoming the subject of protective rules.”).

³¹ *Listing a Species as Threatened or Endangered*, *supra* note 12.

³² *Id.*

³³ *Id.*

³⁴ 16 U.S.C. § 1533(b)(3)(A) (2006). The FWS is required to follow this timeline to the “maximum extent practicable.”

warranted, and publish a rule in the Federal Register explaining the finding, (2) determine that the listing is warranted and publish notice of the proposed rule in the Federal Register, or (3) determine that the listing is warranted but precluded by higher priority listing activities.³⁵ The last option is otherwise known as the “warranted but precluded” designation.³⁶ When a species is labeled WBP it joins the candidate list, but WBP species receive more attention (if not more protection) than other candidates.³⁷

B. Warranted but Precluded

The WBP designation was added to the ESA in 1982 as a partner to the timelines Congress enacted in the same amendment.³⁸ The purpose of the WBP designation was to allow the listing agencies some flexibility in complying with the timelines and in addressing backlogs.³⁹ It was not intended to allow purposeful delay or foot-dragging by the agency.⁴⁰

1. Statutory Requirements for a WBP Designation

To ensure that the agencies utilized the WBP designation in accordance with its intent, Congress specified two findings that are required for the FWS to make a WBP designation and made judicial review available for those designations.⁴¹ Additionally, the FWS must re-evaluate WBP species each year.⁴²

³⁵ *Id.* §1533(b)(3)(B).

³⁶ Ivan J. Lieben, *Political Influences on USFWS Listing Decisions Under the ESA: Time to Rethink Priorities*, 27 ENVTL. L. 1323, 1333 (1997).

³⁷ See *Candidate Species*, U.S. FISH & WILDLIFE SERVICE, http://library.fws.gov/Pubs9/esa_cand01.pdf (last updated Sept. 11, 2010) (“Candidate species are plants and animals for which the [FWS] has sufficient information . . . to propose them as endangered or threatened . . . but for which development of a proposed listing regulation is precluded by other higher priority listing activities.”); see also 2009 Candidate Notice of Review, *supra* note 3, at 57813 (distinguishing the candidate species that were designated as WBP from the other candidate species).

³⁸ THE ENDANGERED SPECIES ACT AT THIRTY, *supra* note 4, at 57-58.

³⁹ H.R. REP. NO. 97-835, at 21-22 (1982) (Conf. Rep.); see also Lieben, *supra* note 36, at 1333.

⁴⁰ H.R. REP. NO. 97-835, at 21-22 (1982) (Conf. Rep.); see also Lieben, *supra* note 36, at 1333.

⁴¹ 16 U.S.C. § 1533(b)(3)(B)(iii) (2006); see also 16 U.S.C. § 1533(b)(3)(C)(ii) (2006).

⁴² 16 U.S.C. § 1533(b)(6)(A) (2006).

The first finding the FWS must make to designate a species as WBP is that “the immediate proposal and timely promulgation of a final regulation implementing the petitioned action . . . is precluded by pending proposals to determine whether any species is an endangered species or a threatened species.”⁴³ In other words, the listing of the petitioned species must be precluded by a higher priority listing decision in order for the petitioned species to be designated as WBP.⁴⁴ Non-listing decisions, such as the designation of critical habitat, are lower priority than listing decisions, and thus cannot preclude the listing of a species.⁴⁵ Additionally, it must “describe the ‘reasons’ . . . why [the other listing decisions have] a higher priority,” and why they precluded the listing of the WBP species.⁴⁶ These reasons need not be detailed but “must be present.”⁴⁷

The second finding required for a WBP designation is that “expeditious progress is being made to add qualified species to either [the endangered species list or the threatened species list] and to remove from such lists species for which the protections of [the ESA] are no longer necessary.”⁴⁸ In short, the FWS must “explain why more immediate action is not appropriate.”⁴⁹ Although its explanation does not have to provide extensive detail, it must at least provide enough so that “a reasonable mind might accept [it] as adequate to support [its] conclusion.”⁵⁰ Furthermore, this explanation must be published together with the WBP designation; it cannot be retroactively justified.⁵¹

Judicial review is available for all WBP designations,⁵² and in reviewing such designations “the court will . . . be called on to separate justifications grounded in the purposes of the act from the foot-dragging

⁴³ *Id.* § 1533(b)(3)(B)(iii)(I) (2006).

⁴⁴ *Id.*

⁴⁵ *Cal. Native Plant Soc’y v. Norton*, 2005 WL 768444, at *5 (D.D.C. 2005). De-listing decisions are considered listing decisions for this purpose. *See also* H.R. REP. NO. 97-835, at 22 (1982) (Conf. Rep.).

⁴⁶ *Id.* at *8.

⁴⁷ *Id.*

⁴⁸ 16 U.S.C. § 1533(b)(3)(B)(iii)(II) (2006).

⁴⁹ *Ctr. for Biological Diversity v. Norton*, 254 F.3d 833, 838 (9th Cir. 2001).

⁵⁰ *Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv.*, 350 F. Supp. 2d 23, 25 (D.D.C. 2004).

⁵¹ *Ctr. for Biological Diversity v. Kempthorne*, 466 F.3d 1098, 1102 (9th Cir. 2006).

⁵² 16 U.S.C. 1533(b)(3)(C)(ii) (2006); *see also* H.R. REP. NO. 97-835, at 22 (1982) (Conf. Rep.).

efforts of a delinquent agency.”⁵³ The federal Administrative Procedure Act (APA) controls the standard of review for actions by the FWS.⁵⁴ Therefore, WBP designations are “upheld unless they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”⁵⁵ This is a “highly deferential” standard of review and a court “cannot substitute [its] judgment for that of the [FWS], but instead must uphold the agency decisions so long as the agencies have ‘considered the relevant factors and articulated a rational connection between the facts found and the choice made.’”⁵⁶ One way the FWS rationalizes its decisions is through its listing priority guidance.⁵⁷

2. 1983 Listing Priority Guidance

Congress recognized that the statutory requirements for the WBP designation necessitated a system of prioritizing species, and therefore obligated listing agencies to develop “a ranking system to assist in the identification of species that should receive priority review.”⁵⁸ Accordingly, FWS developed the 1983 listing priority guidance (LPG).⁵⁹ Under the LPG, each species is assigned a number from one to twelve, with one being the highest priority and twelve being the lowest.⁶⁰ To determine which priority number a species receives the FWS looks at three factors: “the degree or magnitude of threat is the highest criterion, followed by the immediacy of the threat[,] and the taxonomic distinctiveness of the species (monotypic genus, then species, then

⁵³ H.R. REP. NO. 97-835, at 22 (1982) (Conf. Rep.).

⁵⁴ *Biodiversity Legal Found. v. Babbitt*, 146 F.3d 1249, 1252 (10th Cir. 1998) (citing *Sierra Club v. Glickman*, 67 F.3d 90, 96 (5th Cir. 1995); *Vill. of False Pass v. Clark*, 733 F.2d 605, 609 (9th Cir. 1984)).

⁵⁵ 5 U.S.C. 706(2)(A). See also *Babbitt*, 146 F.3d at 1252.

⁵⁶ *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 953-54 (9th Cir. 2003) (quoting *Wash. Crab Producers, Inc. v. Mosbacher*, 924 F.2d 1438, 1441 (9th Cir.1990)).

⁵⁷ 16 U.S.C. § 1533(h)(3) (2006).

⁵⁸ 16 U.S.C. § 1533(h)(3) (2006).

⁵⁹ *Endangered and Threatened Species Listing and Recovery Priority Guidelines*, 48 Fed. Reg. 43,098, 43,098 (Sept. 21, 1983). The 1983 LPG is distinguishable from the 1997 LPG where the FWS prioritized the type of listing actions, rather than the species, in response to an enormous backlog caused by the 1995 moratorium on listing. *Final Listing Priority Guidance for Fiscal Year 1997*, 61 Fed. Reg. 64,475, 64,475 (Dec. 5, 1996).

⁶⁰ *Endangered and Threatened Species Listing and Recovery Priority Guidelines*, 48 Fed. Reg. 43,098, 43,102-03 (Sept. 21, 1983).

subspecies, variety, or vertebrate population).”⁶¹ The FWS claims that it “gives no preference to popular species or so-called ‘higher life forms.’”⁶² However, it admits that “[priority] assessments are subjective to some degree, and individual species may not be comparable in terms of all considerations.”⁶³ Therefore, the FWS set up the priority system as guidance rather than an “inflexible framework for determining resource allocations.”⁶⁴

Due to the fact that the LPG is only discretionary guidance, assigning a priority number to a species alone is likely not subject to judicial review.⁶⁵ Even so, the priority number is a factor in the judicial review of a WBP designation because the agency must justify the WBP designation, which includes an explanation of why other species are higher priorities.⁶⁶ However, because the standard of review for WBP designations is arbitrary and capricious, and prioritization of species is left to agency discretion, courts tend to give the FWS a large amount of deference regarding these decisions.⁶⁷ Furthermore, since the FWS is

⁶¹ *Listing a Species as Threatened or Endangered*, *supra* note 12; see also *Endangered and Threatened Species Listing and Recovery Priority Guidelines*, *supra* note 59.

⁶² *Listing a Species as Threatened or Endangered*, *supra* note 12.

⁶³ *Endangered and Threatened Species Listing and Recovery Priority Guidelines*, *supra* note 59.

⁶⁴ *Id.*

⁶⁵ Neither the Citizen Suit provision of the ESA nor the Administrative Procedure Act allows judicial review for discretionary agency action. 16 U.S.C. § 1540(g)(1)(C) (2006). See also 5 U.S.C. 704 (2006). Therefore, because the ESA only requires the FWS to utilize a priority system, and does not specify how it must rank species, the only mandatory action is implementing some kind of priority system; how that system is applied to particular species is left to agency discretion and thus is likely not subject to judicial review. See *infra* notes 66-70 and accompanying text for a discussion of how courts have applied a similar logic in monitoring cases.

⁶⁶ 16 U.S.C. § 1533(b)(3)(B)(iii)(II) (2006) (“[T]he [FWS] shall promptly publish [a WBP] finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based.”). see also *Ctr. for Biological Diversity v. Norton v. Norton*, 254 F.3d 833, 840 (9th Cir. 2001); *Cal. Native Plant Soc’y v. Norton*, 2005 WL 768444, at *8 (D.D.C. 2005).

⁶⁷ 5 U.S.C. § 706(2)(A) (2006). See also *Sierra Forest Products, Inc. v. Kempthorne*, 2008 WL 2384047, at *2 (E.D. Cal. 2008) (Under the APA, administrative decisions involving the ESA are upheld unless they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”); *Cal. Native Plant Soc’y v. Norton*, 2005 WL 768444, at *4 (D.D.C. 2005) (“When dealing with scientific questions

required to review the species each year, it has the opportunity to re-evaluate the species' priority which makes deference more probable because the FWS has the opportunity to fix any mistakes itself.⁶⁸

Yearly review is not the only attention WBP species receive from the FWS. Congress also required that the FWS monitor all WBP species and utilize the emergency listing procedures when necessary.⁶⁹

3. Monitoring and Emergency Listing Requirements

Congress amended the ESA in 1988, requiring that the FWS "implement a system to monitor effectively the status of all [WBP] species . . . and shall make prompt use of the [emergency listing] authority . . . to prevent a significant risk to the well being of any such species."⁷⁰ Congress's intent was for the FWS to utilize the emergency listing procedures prophylactically in regards to WBP species in order to ensure their well-being.⁷¹

The emergency listing provision provides that if there is "any emergency posing a significant risk to the well-being of any species" the FWS may bypass the normal listing procedures.⁷² Under this provision, the FWS is only required to "publish[.] . . . detailed reasons why such regulation is necessary" and "give[.] actual notice of such regulation to the State agency in each State in which such species is believed to occur."⁷³ Once the emergency listing is in place, it is only effective for 240 days, unless FWS lists the species pursuant to the normal listing procedures.⁷⁴

entrusted to agency expertise . . . agency decisions are entitled to 'great deference.'" (quoting *West Virginia v. Env'tl. Prot. Agency*, 362 F.3d 861, 867 (D.C. Cir. 2004)).

⁶⁸ 16 U.S.C. § 1533(b)(3)(C)(i) (2006).

⁶⁹ *Id.* § 1533(b)(3)(C)(iii).

⁷⁰ 16 U.S.C. § 1533(b)(3)(C)(iii) (2006). *See also* *Friends of the Wild Swan, Inc. v. U.S. Fish & Wildlife Serv.*, 945 F.Supp. 1388, 1395 n.7 (D. Or. 1996) ("[T]he ESA joins the monitoring duty and the duty to use emergency listing authority with an 'and,' suggesting that they are independent, not sequential, duties."). While these requirements are technically two separate duties, their intertwined nature makes it appropriate to discuss them together.

⁷¹ *City of Las Vegas v. Lujan*, 891 F.2d 927, 932-33 (D.C. Cir. 1989) ("At least with respect to [WBP] species, Congress indicated that the [FWS] was to use [its] emergency powers less cautiously – in a sense to 'shoot first and ask [all of the] questions later.'").

⁷² 16 U.S.C. § 1533(b)(7) (2006).

⁷³ 16 U.S.C. § 1533(b)(7) (2006).

⁷⁴ *Id.*

The scope of judicial review is uncertain because of the unique circumstances of emergency listing.⁷⁵ Outside of the WBP context, the failure to list a species under the emergency listing procedures is not subject to judicial review because listing is committed to agency discretion.⁷⁶ However, because the 1988 amendment requires the FWS to utilize the emergency listing procedures for WBP species, it may be mandatory and therefore subject to judicial review.⁷⁷ Furthermore, it is unclear whether a citizen may petition the FWS to utilize the emergency listing procedure, or if review is only available when the FWS initiates emergency review.⁷⁸ If, however, the FWS does list a species under the emergency procedures, that decision is subject to judicial review because it is a final agency action.⁷⁹

Similar controversy surrounds the monitoring requirement since it encompasses both a mandatory and discretionary aspect.⁸⁰ Congress mandated that the FWS monitor WBP species, but the system of monitoring is left to agency discretion.⁸¹ Because of this duality, judicial review of the monitoring requirement is severely restricted. Under the ESA citizen suit provision, citizens may sue the FWS for failure to “perform any act or duty under section 1533 of [the ESA] *which is not discretionary*.”⁸² Alternatively, a citizen may bring suit under the APA.⁸³ However, the APA also precludes review of “agency action committed to agency discretion by law.”⁸⁴ Accordingly, the only issue subject to

⁷⁵ *Fund for Animals, Inc., v. Hogan*, 428 F.3d 1059, 1064 (D.C. Cir. 2005); *WildEarth Guardians v. Kempthorne*, 592 F. Supp. 2d 18, 24 (D.D.C. 2008).

⁷⁶ *Fund for Animals*, 428 F.3d at 1064; *WildEarth Guardians*, 592 F. Supp. 2d at 24.

⁷⁷ *WildEarth Guardians*, 592 F. Supp. 2d at 27; *Friends of the Wild Swan, Inc. v. U.S. Fish & Wildlife Serv.*, 945 F. Supp. 1388, 1395 (D. Or. 1996).

⁷⁸ *WildEarth Guardians*, 592 F. Supp. 2d at 22 n.4; *Fund for Animals*, 428 F.3d at 1064.

⁷⁹ See *City of Las Vegas v. Lujan*, 891 F.2d 927, 932-35 (reviewing the FWS’s decision to emergency list the Mojave population of the Desert Tortoise).

⁸⁰ *Cal. Native Plant Soc’y v. Norton*, No. Civ.A.03-1540(JR), 2005 WL 768444, at *9 (D.D.C. 2005) (“The word ‘shall’ of course connotes a statutory command, but the word ‘effectively’ renders discretionary the details of how the command is executed.”).

⁸¹ *Id.*

⁸² 16 U.S.C. § 1540(g)(1)(C) (2006) (emphasis added).

⁸³ 5 U.S.C. § 704 (1966) (“Agency action made reviewable by statute and final action for which there is no other adequate remedy in court are subject to judicial review.”); see also *Bennett v. Spear*, 520 U.S. 154, 175 (1997) (“[I]t would not be maintainable . . . that the causes of action against the Secretary set forth in the ESA’s citizen-suit provision are exclusive, supplanting those provided by the APA.”).

⁸⁴ 5 U.S.C. § 701(a)(2) (2006).

judicial review is whether the FWS monitored a WBP species *at all*, not whether it was effectively monitored.⁸⁵

The current form of monitoring species, which seems to have passed judicial muster,⁸⁶ is the annual candidate review process.⁸⁷ The FWS asserts that “[d]ata collection methods necessarily vary with each species, but for all species, monitoring involves assessing habitat conditions, threats, and/or population trends.”⁸⁸ Additionally, FWS admits that it does not conduct full status reviews of species often, but “sufficient information should be obtained to alert FWS to any significant changes, positive or negative, in the species’ status.”⁸⁹ Along with the FWS’s monitoring efforts, the agency “requests specific information from the public . . . which aids FWS in monitoring changes in the status of candidate species.”⁹⁰ Thus, the FWS has not implemented specific monitoring procedures for WBP species outside of the statutorily mandated yearly review.

4. Current Status of the WBP Designation

Currently, there are 249 species on the candidate list, 211 of which are WBP.⁹¹ None of those species are designated as a priority one, but eighty-four have a priority of two and forty have a priority of three.⁹² In other words, over half (58.77%) of WBP species face a high, imminent threat of extinction.⁹³ Additionally, one estimate shows that WBP species spend an average of nineteen years on the WBP list.⁹⁴ However, it is

⁸⁵ *Cal. Native Plant Soc’y*, 2005 WL at *9.

⁸⁶ *Id.*

⁸⁷ Defendants’ Cross-motion for Summary Judgment and Opposition to Plaintiffs’ Motion for Summary Judgment at 24, *Cal. Native Plant Soc’y v. Norton*, 2005 WL 768444 (D.D.C. 2005) (No. 1:03CV01540), 2004 WL 5609413 at *36.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ 2009 Candidate Notice of Review, 74 Fed. Reg. 57,804, 57,865 (Nov. 9, 2009).

⁹² *Id.*

⁹³ 48 Fed. Reg. 43,098, 43,102-03 (Sept. 21, 1983) (explaining that species with a priority of 1, 2, or 3 face a high, imminent threat); *see also* 2009 Candidate Notice of Review, 74 Fed. Reg. at 57,805.

⁹⁴ John Nielsen, *Wading Through an Endangered Species Backlog*, NPR, Mar. 29, 2008, <http://www.npr.org/templates/story/story.php?storyId=89209746> (quoting Noah Greenwald) (“[O]n average, [WBP species have] been waiting for protection for 19 years.”).

difficult to precisely state this number since there is often significant delay between the date the FWS receives a petition for listing and the date when it makes the “twelve-month” finding.⁹⁵ Thus, the years of delay depend on whether one looks at the technical time on the WBP list, or the time including delay before the official WBP designation.⁹⁶ For example, a petition to list the Miami Blue Butterfly was filed in 2000, but the FWS did not make the twelve-month finding that it was WBP until 2005.⁹⁷ Therefore, technically the butterfly has only been on the WBP list for six years, but in reality it has been in limbo for eleven. Due, at least in part, to these delays, no less than forty-two species have gone extinct while designated as WBP.⁹⁸

III. ALLEGATIONS OF ABUSE

Critics claim that the FWS abuses the WBP designation in order to purposefully delay the listing of species and to consider improper factors, such as economics, political pressure and public opinion.⁹⁹ Specifically, three areas of the WBP designation provide potential for abuse. The first area is the actual designation of a species as WBP.¹⁰⁰ Environmental Groups, such as Center for Biological Diversity (CBD), claim that the FWS utilizes the WBP designation to purposefully delay protections for species and that “[t]he candidate list has become an extinction waiting room.”¹⁰¹ The second area of possible abuse is in the LPG.¹⁰² Due to the large amount of agency discretion and imprecise standards, the FWS has the ability to manipulate a species’ priority so that listing is significantly delayed.¹⁰³ Finally, the last allegation of potential abuse is that the FWS

⁹⁵ See Amy Writenour Ando, *Delay on the Path to the Endangered Species List: Do Costs and Benefits Matter?*, J.L. ECON. (Apr. 1999), available at <http://www.rff.org/documents/RFF-DP-97-43-REV.pdf> (discussing the factors in delays between proposals and actual listings according to ESA guidelines).

⁹⁶ *Id.*

⁹⁷ *Species Assessment and Listing Priority Assignment Form, Miami Blue Butterfly*, U.S. FISH & WILDLIFE SERV., http://ecos.fws.gov/docs/candforms_pdf/r4/I02Q_I01.pdf (last visited March 15, 2011).

⁹⁸ THE ENDANGERED SPECIES ACT AT THIRTY, *supra* note 4, at 51.

⁹⁹ Suckling, *supra* note 7, at 6-10.

¹⁰⁰ *Id.*

¹⁰¹ Suckling et al., *supra* note 99, at 6-10.

¹⁰² See *id.* at 10.

¹⁰³ See *supra* notes 68-69.

is neglecting its duty to monitor WBP species and to utilize the emergency listing procedures.¹⁰⁴

A. *Purposeful Delay by WBP Designation*

The most prominent criticism of the WBP designation is that the FWS utilizes it to purposefully delay the listing of species, contrary to the express directive of Congress that the WBP not be used for foot-dragging.¹⁰⁵ Kalyani Robbins appropriately summarized the allegations stating that “[the WBP designation] has become a major source of additional discretion, leading to politically-based decisions rather than prioritization on the basis of threat. The category is an ER waiting room strewn with the corpses of those species who were forced to wait too long.”¹⁰⁶

The FWS claims that it is not abusing the WBP designation, but rather that court orders and settlement agreements combined with a severe lack of funding necessarily results in delay.¹⁰⁷ In fact, as recently as 2005 the FWS admitted that it was “woefully behind in making [listing] determinations, according to the timetables prescribed in the [ESA].”¹⁰⁸ However, the FWS argues that the backlog is not due to any inappropriate behavior on its part.¹⁰⁹ Rather, the backlog is a result of

¹⁰⁴ See *supra* note 85, at 2.

¹⁰⁵ 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, 285-86 (1993); Lieben, *supra* note 36, at 1333; Joe Mann, Note, *Making Sense of the Endangered Species Act: A Human-Centered Justification*, 7 N.Y.U. ENVTL. L.J. 246, 299 (1999); Robbins, *supra* note 21, at 8.

¹⁰⁶ Robbins, *supra* note 105, at 8.

¹⁰⁷ See, e.g., *Ctr. for Biological Diversity v. Kempthorne*, 466 F.3d 1098, 1100-01 (9th Cir. 2006); *Save Our Springs Alliance v. Norton*, 361 F. Supp. 2d 643, 648 (W.D. Tex. 2005); *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 350 F. Supp. 2d 23, 25 (D.D.C. 2004). It appears that the FWS is continuing this position under the Obama administration. See also *Endangered and Threatened Wildlife and Plants; Review of Native Species That Are Candidates for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions*, 74 Fed. Reg. at 57,814 (“Congress and the courts have in effect determined the amount of money available for other listing activities. Therefore, the funds in the listing cap, other than those needed to address court-mandated critical habitat for already listed species, represent the resources we must take into consideration when we make our determinations of preclusion and expeditious progress.”).

¹⁰⁸ *Save Our Springs Alliance*, 361 F. Supp. 2d at 648.

¹⁰⁹ See *id.*

actions taken by Congress.¹¹⁰ Specifically, the FWS claims that much of the delay stems from the 1995 listing moratorium.¹¹¹ In 1995 Congress imposed a twelve-month listing moratorium¹¹² largely in response to a glut of litigation over listing actions.¹¹³ In fact, between 1991 and 1995 “66 percent of all species were listed following lawsuits.”¹¹⁴ The moratorium, however, did not stop new petitions and litigation.¹¹⁵ So, when listing was reinstated the FWS faced numerous court orders requiring it to list certain species.¹¹⁶ Therefore, the FWS argues that it did not have a choice in how to prioritize species; the court orders created the priority list.¹¹⁷ Furthermore, because court orders necessarily took priority over new listing petitions, the FWS continued to miss deadlines for new petitions.¹¹⁸ Thus, the court orders and settlement agreements created a snowball effect and buried the FWS in a backlog of listing petitions.¹¹⁹

The obvious rebuttal to the FWS’s argument is that the moratorium was fourteen years ago, giving the FWS ample time to catch up.¹²⁰ The FWS, however, claims that the detrimental combination of an existing backlog and “chronic under funding of the agency since that time” has

¹¹⁰ *See id.*

¹¹¹ *See id.*

¹¹² Endangered and Threatened Wildlife and Plants; Final Listing Priority Guidance for Fiscal Year 1997, 61 Fed. Reg. at 64,476.

¹¹³ *See* THE ENDANGERED SPECIES ACT AT THIRTY, *supra* note 4, at 58 (“Prior to 1991 only eight species were listed due to lawsuits—and six of those occurred in 1990. From 1991 to 1995, however, 237 species were listed following litigation.”).

¹¹⁴ *Id.* at 59.

¹¹⁵ *See* Endangered and Threatened Wildlife and Plants; Final Listing Priority Guidance for Fiscal Year 1997, 61 Fed. Reg. at 64,476.

¹¹⁶ *See id.* at 64,476-77.

¹¹⁷ *See, e.g.*, Notice of Review of Species Which Are Candidates or Proposed for Listing, Findings on Recycled Petitions, and Progress on Listing Actions, 66 Fed. Reg. 54,808, 54,815 (Oct. 30, 2001) (to be codified at 50 C.F.R. pt. 17) (“[A]most all of our limited listing budget has been needed to take various listing actions to comply with court orders and court-approved settlement agreements.”); Endangered and Threatened Wildlife and Plants; Review of Native Species That Are Candidates for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions, 74 Fed. Reg. at 57,814.

¹¹⁸ *See* Endangered and Threatened Wildlife and Plants; Final Listing Priority Guidance for Fiscal Year 1997, 61 Fed. Reg. at 64,476.

¹¹⁹ *See id.* at 64,477.

¹²⁰ *See id.* at 64,476.

made it impossible to do so.¹²¹ In fact, both critics and supporters agree that insufficient funding is a “perennial problem for the listing program.”¹²² Where critics and supporters differ, though, is why there is a lack of funding.¹²³ The FWS seems to blame Congress and claim that it is a “function of resource scarcity,” while critics assert that it “reflects the low priority placed on listing species by the Department of Interior.”¹²⁴ In 2003, the FWS estimated \$153 million was necessary to address the listing backlogs, and yet the Department of Interior has typically asked for less than \$9 million per year for listing and “in fiscal years 1998-2003, it asked Congress to cap spending on listing.”¹²⁵ Even if the allegations are true, the allegations do not necessarily reflect an abuse of the WBP designation, or any inappropriate behavior on the part of the FWS. Funding is inevitably a politically driven aspect of the ESA, and there is no prohibition against under-funding the listing program.¹²⁶ The question is, then, given the resources the FWS has, does the FWS act properly in designating species as WBP?

Generally, this argument arises under the second statutory requirement of a WBP finding: whether the FWS is making expeditious progress on its higher priority listing activities.¹²⁷ The FWS defines expeditious progress as “that amount of work that could be achieved with . . . the amount of money that Congress appropriated for the Listing Program.”¹²⁸ Critics, like the CBD, claim that even if this is the FWS’s definition is the correct definition of expeditious progress, “FWS is not making such progress.”¹²⁹ According to CBD’s assessment, the “FWS

¹²¹ *Save Our Springs Alliance v. Norton*, 361 F. Supp. 2d 643, 648 (W.D. Tex. 2005).

¹²² See THE ENDANGERED SPECIES ACT AT THIRTY, *supra* note 4, at 64.

¹²³ *Id.*

¹²⁴ *Id.* (“Because the FWS is an agency within the Department of Interior, the Department of Interior requests funding from Congress for the FWS.”).

¹²⁵ See THE ENDANGERED SPECIES ACT AT THIRTY, *supra* note 4, at 64.

¹²⁶ Holly Doremus, *Lessons Learned, in THE ENDANGERED SPECIES ACT AT THIRTY*, *supra* note 4, at 201.

¹²⁷ *Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv.*, 350 F. Supp. 2d 23, 24 (D.D.C. 2004).

¹²⁸ *Endangered and Threatened Wildlife and Plants; Review of Native Species That Are Candidates for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions*, 74 Fed. Reg. at 57,814.

¹²⁹ 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*

listed 30 species per million dollars” in 1997, but listing progress declined rapidly, and the FWS only listed approximately five species per million dollars in 2004.¹³⁰ CBD asserts that such numbers “demonstrate[e] that FWS is not efficiently using available funds to make expeditious progress.”¹³¹

Although raw numbers can be misleading, at least one court shares the CBD’s concerns. In *Center for Biological Diversity v. Kempthorne*, the CBD challenged the FWS’s determination that a large number of bird and butterfly species were warranted but precluded.¹³² In assessing whether the FWS was making expeditious progress, the Court noted that “if the Service were allowed to continue at its current rate, it is hard to imagine any time in the near future or distant future when these species will be entitled to listing. Such delay hardly qualifies as ‘expeditious progress’ and conflicts with the purpose of the ESA.”¹³³ The Court went on to state that at the current rate of listing “many of the species in question may very well be extinct by the time they are found to warrant a listing.”¹³⁴ Ultimately, the Court held that the FWS’s claim that it was “over-obligated and under-funded” was insufficient to justify the FWS’s inability to meet the statutory requirements of the ESA.¹³⁵

The Court did not, however, go so far as to directly accuse the FWS of wrongdoing. Rather, the Court expressed frustration with Congress and demanded that the FWS fulfill the purpose of the ESA in spite of insufficient funding, and if the FWS had a problem with that to take it up with Congress.¹³⁶ Other courts, while perhaps just as frustrated, are willing to allow the FWS an opportunity to explain how it is limited by underfunding and obligations to comply with court orders and settlement

1974-2004, CENTER FOR BIOLOGICAL DIVERSITY, at 7 (May 2005), <http://www.biologicaldiversity.org/publications/papers/esareport-revised.pdf>.

¹³⁰ *Id.* at 8.

¹³¹ *Id.*

¹³² See *Ctr. for Biological Diversity v. Kempthorne*, No. C 06-07117 WHA, 2008 WL 205253 (N.D. Cal. 2008).

¹³³ See *Ctr. for Biological Diversity v. Kempthorne*, No. C 06-07117 WHA, 2008 WL 205253, *8 (N.D. Cal. 2008).

¹³⁴ *Id.*

¹³⁵ *Id.* at *9.

¹³⁶ See *id.* (“[T]o the extent the [FWS] feels aggrieved by Congress’ failure to allocate proper resources in which to comply with [its] statutory duty, Congress, not the courts, is the proper governmental body to provide relief.”).

agreements.¹³⁷ Such courts, however, require more than an assertion that FWS has used its resources efficiently.¹³⁸ At the very minimum, the FWS must present “evidence in some detail of the agency’s budget for listing activities for each of the last few years, a description of the court orders and settlements that have required listing activities, and an accounting of how the listing activities mandated by litigation have reasonably exhausted available resources.”¹³⁹

Thus, the unsatisfying answer as to whether the FWS is making expeditious progress is that it is hard to tell. Looking at the sheer number of species on the WBP list, and the years that FWS has spent on it, provokes the assumption that there *must* be abuse; otherwise, such an expansive list of WBP species would not exist. Therefore, critics also allege that the FWS skews science to fit its political agenda,¹⁴⁰ and this allegation is supported by at least one concrete example.

FWS abuse is reflected in the upheaval caused by former Deputy Assistant Secretary for Fish, Wildlife and Parks in the Department of Interior, Julie MacDonald.¹⁴¹ MacDonald had “oversight of FWS operations including the examination of [ESA] reviews” which includes reviews of WBP species.¹⁴² Her approach to such reviews was to make the science fit her political policies.¹⁴³ To accomplish this goal, MacDonald essentially bullied FWS employees into “chang[ing] documents and ‘ignor[ing] good science’ related to the [ESA].”¹⁴⁴ She additionally refused to “accept the field’s scientific findings and would apply science from alternative outside sources MacDonald would then use information from these sources as ‘the best science’ and insist

¹³⁷ *Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv.*, 350 F. Supp. 2d 23, 26 (D.D.C. 2004); *Cal. Native Plant Soc’y v. Norton*, No. Civ.A.03-1540(JR), 2005 WL 768444, at *7 (D.D.C. 2005).

¹³⁸ *Ctr. for Biological Diversity*, 350 F. Supp. 2d at 25.

¹³⁹ *Id.* at 26.

¹⁴⁰ NOAH GREENWALD, *CTR. FOR BIOLOGICAL DIVERSITY, POLITICIZING EXTINCTION: THE BUSH ADMINISTRATION’S DANGEROUS APPROACH TO ENDANGERED WILDLIFE 11* (2007), <http://biologicaldiversity.org/publications/papers/PoliticizingExtinction.pdf>.

¹⁴¹ OFFICE OF INSPECTOR GEN., *INVESTIGATIVE REPORT ON ALLEGATIONS AGAINST JULIE MACDONALD, DEPUTY ASSISTANT SEC’Y, FISH, WILDLIFE, AND PARKS 2*, <http://www.doioig.gov/images/stories/reports/pdf/Macdonald.pdf> (last visited Sept. 7, 2010) [hereinafter *INVESTIGATIVE REPORT*].

¹⁴² *Id.*

¹⁴³ *Id.* at 5.

¹⁴⁴ *Id.* at 4.

field employees revise their findings to fit what she wanted.”¹⁴⁵ Along with such despicable actions, MacDonald also released confidential information to sources, such as an attorney for the Pacific Legal Foundation,¹⁴⁶ which was attempting to oppose conservation efforts by the FWS.¹⁴⁷ Of course, MacDonald resigned before she was fired, but the repercussions of her actions had a huge effect on both at-risk species and the public’s faith in the FWS to protect them.¹⁴⁸

One particular species that is still suffering from the effects of MacDonald’s interference is the Sage Grouse.¹⁴⁹ It was petitioned for listing in 1999, and deemed WBP in 2001.¹⁵⁰ When MacDonald was appointed to the position of Deputy Assistant Secretary, in 2004, it was still on the WBP list.¹⁵¹ Therefore, when the time came to review the WBP status of the Sage Grouse, MacDonald had oversight authority, which she used to “edit” its risk analysis.¹⁵² Not only did MacDonald make “changes to reports to reflect [her] political philosophy, but [she] took it a step further by involving herself at the field level,” even though she “ha[d] no background in biology.”¹⁵³ The Sage Grouse is still on the WBP list, waiting for protection.¹⁵⁴

¹⁴⁵ *Id.* at 5.

¹⁴⁶ Pacific Legal Found., <http://community.pacificlegal.org> (last visited Sept. 7, 2010) (The Pacific Legal Foundation “is a public-interest legal organization that litigates for property rights, limited government, free enterprise and a balanced approach to environmental protection.”).

¹⁴⁷ INVESTIGATIVE REPORT, *supra* note 141, at 147.

¹⁴⁸ Elizabeth Williamson, *Interior Dept. Official Facing Scrutiny Resigns*, WASH. POST, May 2, 2007, <http://www.washingtonpost.com/wpdyn/content/article/2007/05/01/AR2007050101920.html>.

¹⁴⁹ Cornell Lab of Ornithology, *All About Birds, Greater Sage Grouse*, http://www.allaboutbirds.org/guide/Greater_Sage-Grouse/id (last visited Sept. 8, 2010) (The Sage Grouse, or Greater Sage Grouse, is a “[l]arge chicken-like bird” that is “[g]rayish in color” with a black belly and a “[l]ong tail, with spiky tail feathers.”).

¹⁵⁰ U.S. FISH AND WILDLIFE SERV., SPECIES ASSESSMENT AND LISTING PRIORITY ASSIGNMENT FORM FOR THE GREATER SAGE-GROUSE, COLUMBIA BASIN DISTINCT POPULATION SEGMENT, http://ecos.fws.gov/docs/candforms_pdf/r1/B06W_V01.pdf (last visited March 15, 2011) [hereinafter LISTING PRIORITY ASSIGNMENT FORM FOR THE GREATER SAGE-GROUSE].

¹⁵¹ *Id.*; INVESTIGATIVE REPORT, *supra* note 141, at 4.

¹⁵² INVESTIGATIVE REPORT, *supra* note 141, at 4.

¹⁵³ *Id.*

¹⁵⁴ LISTING PRIORITY ASSIGNMENT FORM FOR THE GREATER SAGE-GROUSE, *supra* note 150, at 1.

Certainly, MacDonald's actions illuminate the ability for the government to abuse the WBP designation; however, even if it were possible to eliminate all such abuse, WBP designations would still be inevitable. Such a mass of species exists with such a small amount of funding that there truly is no way for the FWS to address even the species with a priority of two.¹⁵⁵ Until congressional and executive anti-conservation agendas change and the listing program has adequate funding, the FWS will have no choice but to list some species as WBP. Even if Congress fully funded the listing program tomorrow, there is no way of knowing that FWS would not abuse the WBP designation. On the contrary, that would be the time when concern over WBP abuse would be more appropriate. Presently, though, remedying whatever purposeful delay under the WBP designation exists would do little for at-risk species because funding would still be inadequate and therefore listing delays would still occur. In sum, oversight of erroneous WBP designations must continue in order to avoid situations like the Julie MacDonald scenario, but even with the best oversight, the WBP purgatory cannot be fully eliminated until Congress decides it wants to further the purpose of the ESA and properly fund the listing program.

B. Manipulation of the Listing Priority Guidance

Unlike purposeful delay via WBP designations, allegations of inappropriate manipulation of the LPG are independent of funding problems.¹⁵⁶ Critics allege that the FWS hides species it wants to delay by assigning them to a lower priority.¹⁵⁷ As discussed, the LPG is a somewhat vague and flexible standard which gives the FWS "wiggle room."¹⁵⁸ While species are categorized by magnitude of threat, immediacy of threat, and taxonomy, the FWS did not precisely define

¹⁵⁵ D. NOAH GREENWALD & KIERAN F. SUCKLING, CTR. FOR BIOLOGICAL DIVERSITY, PROGRESS OR EXTINCTION? A SYSTEMATIC REVIEW OF THE U.S. FISH AND WILDLIFE SERVICE'S ENDANGERED SPECIES ACT LISTING PROGRAM 1974-2004, at 8 (2005), <http://biologicaldiversity.org/publications/papers/esareport-revised.pdf>.

¹⁵⁶ See Timothy Bechtold, *Listing the Bull Trout Under the Endangered Species Act: The Passive-Aggressive Strategy of the United States Fish and Wildlife Service to Prevent Protecting Warranted Species*, 20 PUB. LAND & RESOURCES L. REV. 99, 128-29 (1999).

¹⁵⁷ *Id.*

¹⁵⁸ Ivan J. Lieben, Comment, *Political Influences on USFWS Listing Decisions Under the ESA: Time to Rethink Priorities*, 27 ENVTL. L. 1323, 1359 (1997).

these terms.¹⁵⁹ It reasoned that “circumstances applying to most species are individualistic enough as to be incapable of precise definition or quantification beyond the level [in the LPG].”¹⁶⁰ The result, however, has been nearly unbounded agency discretion in setting the priority of a species.¹⁶¹

One well documented example of the FWS prioritizing species in a manner contrary to the intent of the ESA is the case of the Bull Trout.¹⁶² The FWS recognized the Bull Trout as a candidate¹⁶³ species as early as 1985, but took no further listing action until it was petitioned to do so on October 2, 1992.¹⁶⁴ The petition was initiated by two conservation groups, Friends of the Wild Swan, Inc. (FOWS) and Alliance for the Wild Rockies, Inc. (AWR).¹⁶⁵ On June 10, 1994 the FWS announced that the Bull Trout was WBP.¹⁶⁶ As this was prior to the 1995 listing

¹⁵⁹ See generally Endangered and Threatened Species Listing and Recovery Priority Guidelines, 48 Fed. Reg. 43,098, 43,099-100 (Sept. 21, 1983) (discussing comments and recommendations that deal with the LPG criteria).

¹⁶⁰ *Id.* at 43,100.

¹⁶¹ Bechtold, *supra* note 156, at 109.

¹⁶² *Id.* at 100.

¹⁶³ Endangered and Threatened Wildlife and Plants; Review of Vertebrate Wildlife, 50 Fed. Reg. 37,958, 37,958 (Sept. 18, 1985) (FWS recognized two categories of “candidates” in 1985); Endangered and Threatened Wildlife and Plants; 12-Month Petition Finding on the Bull Trout, 59 Fed. Reg. 30,254 (June 10, 1994) (Category one was essentially the same as the current candidate list while category two consisted of “species for which the Service has some evidence of vulnerability but for which substantial information is not currently available to support a proposal to list the species as endangered or threatened.”). Endangered and Threatened Wildlife and Plants; Review of Vertebrate Wildlife, 50 Fed. Reg. 37,960 (shows Bull Trout was in the second category in 1985). See Endangered and Threatened Wildlife and Plants; Review of Native Species That are Candidates for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions, 74 Fed. Reg. 57,804 (Nov. 9, 2009) (FWS has eliminated the second category of candidates and recognizes one category of candidates).

¹⁶⁴ Friends of the Wild Swan, Inc. v. U.S. Fish and Wildlife Serv., 945 F. Supp. 1388, 1392 (D. Or. 1996) (noting that the FWS was petitioned to list the Bull Trout on Oct. 27, 1992); U.S. FISH AND WILDLIFE SERV., *Species Profile: Bull Trout*, U.S. Fish and Wildlife Service, <http://ecos.fws.gov/speciesProfile/profile/speciesProfile.action?spcode=E065> (displaying all Federal Register documents related to the Bull Trout) (last visited March 15, 2011).

¹⁶⁵ 12-Month Petition Finding on the Bull Trout, 59 Fed. Reg. at 30,254.

¹⁶⁶ *Id.*

moratorium, the FWS was still actively able to list species with a priority number of one through six, but lower priority species were designated as WBP.¹⁶⁷ Thus, “in 1994 only species facing a ‘high’ magnitude of threat receive[d] the [ESA’s] protections.”¹⁶⁸ Since the FWS determined that the Bull Trout only faced a “moderate” threat, it was given a listing priority of nine, and therefore precluded from listing by higher priority species.¹⁶⁹

FOWS and AWR challenged the WBP designation as arbitrary and capricious.¹⁷⁰ They asserted that the determination that the Bull Trout only faced a moderate threat was not supported by the scientific data (and therefore neither was the priority of nine).¹⁷¹ They argued that in actuality the species faced an imminent threat.¹⁷² Due to this imminent threat, FOWS and AWR argued that the Bull Trout should have been given a priority of three and, as a result, should not have been designated as WBP.¹⁷³

The District Court agreed with FOWS and AWR and concluded that the “FWS’s determination that the Bull Trout faces a ‘moderate’ threat [as opposed to a ‘high’ threat] is arbitrary and capricious.”¹⁷⁴ Specifically, the Court found that the FWS relied on a “factor that Congress did not intend it to consider, contradicting congressional purposes” when it considered “the plans of other federal agencies.”¹⁷⁵ Additionally, the Court held that the FWS’s conclusion that “the presence of bull trout in protected areas reduces the magnitude of the threat to the species” was “contradicted by the record with no corresponding support.”¹⁷⁶ Finally, the Court noted that the FWS “relied on a third factor that appears to be inconsistent with its own biological findings.”¹⁷⁷ Indeed, before the Bull Trout was assigned a priority

¹⁶⁷ 12-Month Petition Finding on the Bull Trout, 59 Fed. Reg. 30,254; *Friends of the Wild Swan*, 945 F. Supp. at 1391-92.

¹⁶⁸ *Friends of the Wild Swan*, 945 F. Supp. at 1391.

¹⁶⁹ 12-Month Petition Finding on the Bull Trout, 59 Fed. Reg. at 30,254.

¹⁷⁰ *Friends of the Wild Swan*, 945 F. Supp. at 1392-93.

¹⁷¹ *Id.* at 1396-97.

¹⁷² *See id.* at 1392-93.

¹⁷³ *See id.* at 1392, 1396-97.

¹⁷⁴ *Id.* at 1400.

¹⁷⁵ *Id.* at 1399, 1400.

¹⁷⁶ *Friends of the Wild Swan*, 945 F. Supp. at 1398, 1400.

¹⁷⁷ *Friends of the Wild Swan*, 945 F. Supp. at 1398, 1400.

ranking “the [FWS’s] own bull trout status review team . . . indicat[ed] a high and imminent threat of extinction.”¹⁷⁸

By the time this litigation came to an end it was 1997 and, rather than listing the Bull Trout, the FWS split it up into five distinct population segments, proposing to list only two of the segments.¹⁷⁹ Finally, in 1999, seven years after the initial petition for listing and fourteen years after it became a candidate, the entire Bull Trout population was listed as threatened.¹⁸⁰

Unfortunately, it is unlikely that “hidden” species today will have even as much success as the Bull Trout. As previously discussed, today only the very highest priority species receive attention; the FWS does not have the ability to address all of the priority two species.¹⁸¹ Additionally, due to the large number of species facing high, imminent threats, it is almost impossible to utilize the LPG in a manner that actually determines which species should receive higher priority.¹⁸² Furthermore, this uncertainty makes judicial review of WBP species more difficult because the court must point to concrete evidence that the FWS acted arbitrarily in designating a species as WBP.¹⁸³

C. Ineffective Monitoring

Another area where uncertainty makes judicial review difficult is the monitoring requirement.¹⁸⁴ Because neither the ESA nor the FWS provides any guidance for how species must be monitored, critics claim that the FWS is able to ineffectively monitor species without proper judicial review.¹⁸⁵ One example of an alleged failure to monitor is *California Native Plant Society v. Norton*.¹⁸⁶ In that case, California Native Plant Society (CNPS) “objected to the treatment of the San Fernando Valley Spineflower . . . the listing of which [had] been deemed

¹⁷⁸ Bechtold, *supra* note 156, at 115.

¹⁷⁹ *Id.* at 120.

¹⁸⁰ Determination of Threatened Status for Bull Trout in the Coterminous United States, 64 Fed. Reg. 58,910, 58,910 (Nov. 1, 1999) (to be codified at 50 C.F.R. pt. 17).

¹⁸¹ *Friends of the Wild Swan*, 945 F. Supp. at 1391 (D. Or. 1996).

¹⁸² See Endangered and Threatened Species Listing and Recovery Priority Guidelines, 48 Fed. Reg. 43,098, 43,099 (Sept. 21, 1983).

¹⁸³ *Id.* at 1394.

¹⁸⁴ See *Cal. Native Plant Soc’y v. Norton*, 2005 WL 768444, No. CIV.A. 03-1540(JR), at *9 (D.D.C. Mar. 24, 2005).

¹⁸⁵ See *id.*

¹⁸⁶ *Id.*

[WBP] for a number of years.”¹⁸⁷ Prior to 1999, the Spineflower was thought to be extinct—the last recorded sighting of it being 70 years prior in 1929.¹⁸⁸ However, it was rediscovered in 1999 at one site in California and was placed on the candidate list as a priority three.¹⁸⁹ Then another population was discovered in 2000 at the Newhall Ranch in Los Angeles County, California.¹⁹⁰ In 2001, the Spineflower was designated as WBP due to “a great number of court-ordered listing activities, court-approved settlement agreements, mandatory statutory deadlines, and higher priority listings.”¹⁹¹ Prior to the time of the litigation, in 2005, California took some steps to conserve the Spineflower and “discussions [were] ongoing between Newhall and FWS regarding a possible Candidate Conservation agreement¹⁹² to further protect the Spineflower.”¹⁹³ Despite such efforts, however, CNPS viewed construction planned at the Newhall Ranch as a significant threat to the Spineflower and challenged the WBP designation.¹⁹⁴ CNPS also claimed that the FWS failed to effectively monitor the Spineflower because it was unable to appropriately respond to the threat at the Newhall Ranch.¹⁹⁵ Specifically, CNPS claimed that “the FWS had been involved in no discussions with Newhall and lacked the basic information required to

¹⁸⁷ See *Cal. Native Plant Soc’y v. Norton*, 2005 WL 768444, No. CIV.A. 03-1540(JR), at *1 (D.D.C. Mar. 24, 2005).

¹⁸⁸ *Id.* at *2.

¹⁸⁹ *Id.*

¹⁹⁰ *Cal. Native Plant Soc’y*, 2005 WL 768444 (D.D.C. 2005).

¹⁹¹ *Cal. Native Plant Soc’y*, 2005 WL 768444 at *2; 2001 Candidate Notice of Review, 66 Fed. Reg. 54,808, 54,815-16 (Oct. 30, 2001) (to be codified at 50 C.F.R. pt. 17).

¹⁹² A “Candidate Conservation Agreement” is a “voluntary conservation agreement[] between the [FWS] and one or more public or private parties. The [FWS] works with its partners to identify threats to candidate species, plan the measures needed to address the threats and conserve these species, identify willing landowners, develop agreements, and design and implement conservation measures and monitor their effectiveness.” *U.S. Fish and Wildlife Service*, Endangered Species Program, Candidate Conservation Agreements, <http://www.fws.gov/endangered/what-we-do/cca.html> (last visited Oct. 10, 2010). Some CCAs provide assurances that limit future conservation obligations. *Id.*

¹⁹³ *Cal. Native Plant Soc’y*, 2005 WL 768444 at *3.

¹⁹⁴ *Id.*

¹⁹⁵ Plaintiffs’ Memorandum of Points and Authorities in Opposition to Cross-Motion for Summary Judgment and Reply in Support of Motion for Summary Judgment at *9, *Cal. Native Plant Soc’y v. Norton*, 2005 WL 76844 (D.D.C. 2005) (No. 1:03CV01540), 2004 WL 2057010.

monitor the Newhall Ranch population.”¹⁹⁶ Furthermore, CNPS alleged that by the time the FWS learned that “Newhall was allegedly ‘systematically bulldozing’ Spineflower habitat” it “was unable to respond due to its failure to gather the most basic information required for effective monitoring.”¹⁹⁷

As discussed previously, the court never addressed whether the FWS’s monitoring system was effective because it determined the system was wholly within the discretion of the agency.¹⁹⁸ However, the case of the Spineflower reveals the potential for the FWS to eviscerate its mandatory duty to monitor species by making its system of monitoring ineffective.¹⁹⁹

D. Neglect of Emergency Listing Duty

Connected to the allegation of a defective monitoring system is the allegation that the FWS neglects its emergency listing duty in regard to WBP species because less effective monitoring makes it easier to justify the refusal to emergency list.²⁰⁰ Although the FWS does occasionally list WBP species under the emergency procedures, it does not appear to follow Congress’s directive to shoot first, and ask questions later.²⁰¹ The case of *Wilderness Society v. Wisely* is illustrative.²⁰²

The Wilderness Society alleged that “FWS [violated] its mandatory duty . . . to emergency list the DeBeque phacelia—an imperiled plant endemic to the South Shale Ridge area—upon finding that oil and gas activities pose a significant risk to this ‘warranted-but-precluded’ species.”²⁰³ The controversy centered on the Bureau of Land Management’s decision to re-open oil and gas leases in the DeBeque phacelia’s habitat.²⁰⁴ The FWS found that “proximity to exploration

¹⁹⁶ *Id.*

¹⁹⁷ Plaintiffs’ Memorandum of Points and Authorities in Opposition to Cross-Motion for Summary Judgment and Reply in Support of Motion for Summary Judgment at *9, *Cal. Native Plant Soc’y v. Norton*, 2005 WL 76844 (D.D.C. 2005) (No. 1:03CV01540), 2004 WL 2057010.

¹⁹⁸ *Id.*

¹⁹⁹ See Lieben, *supra* note 36, at 1342.

²⁰⁰ See *id.*

²⁰¹ *City of Las Vegas v. Lujan*, 891 F.2d 927, 932 (D.C. Cir. 1989).

²⁰² *Wilderness Soc’y v. Wisely*, 524 F. Supp. 2d 1285 (D. Colo. 2007).

²⁰³ First Amended Complaint at 2, *Wilderness Soc’y v. Wisely*, 524 F. Supp. 2d 1285 (D. Colo. 2007) (No. 1:06cv00296), 2006 WL 1360226.

²⁰⁴ *Wilderness Soc’y*, 524 F. Supp. 2d at 1307.

activities rendered the phacelia vulnerable to soil disturbances and possible destruction of critical seed banks” but that “despite the rapid increase in threats, potential impacts to the species were not likely to destroy a significant portion of the species’ habitat in the next two years.”²⁰⁵ Consequently, the Court determined that the FWS’s failure to emergency list the DeBeque phacelia was not “inherently arbitrary or capricious.”²⁰⁶

While it is easy to see why the Court has upheld the FWS’s actions based on the arbitrary and capricious standard of review, it is equally as clear that the FWS is not following the intent behind Congress’ demand that it utilize emergency listings prophylactically for WBP species.

IV. RECOMMENDATIONS

As the foregoing discussion highlights, the FWS has ample opportunity to abuse the WBP designation, and many situations where improper actions can be inferred. However, few instances exist where the FWS has acted so egregiously that remedial action may properly be demanded. Therefore, I propose four changes to the WBP designation and its components, aimed at either alleviating the potential for abuse or mitigating the negative impacts of the designation. First, I propose time limits for how long a species may remain on the WBP list. Second, I suggest that the FWS reform its LPG. Additionally, the FWS should develop a standard monitoring system beyond yearly review. Lastly, but I believe most importantly, species should receive limited protections while on the WBP list.

A. *WBP Automatic Listing Timelines*

The overarching criticism of the WBP list is that it is a “black hole” where species disappear while waiting to be listed.²⁰⁷ Furthermore, even if the FWS engages in no inappropriate behavior, it will still be limited by an endless backlog and minimal funding.²⁰⁸ Therefore, I propose the establishment of a timeline for how long a species may remain on the WBP list. However, I believe this timeline must be different than that imposed upon listing decisions. The failure of the FWS to meet a listing deadline results in litigation, which further delays listings and reduces

²⁰⁵ *Id.*

²⁰⁶ *Wilderness Soc’y*, 524 F. Supp. 2d at 1307.

²⁰⁷ Houck, *supra* note 105, at 286.

²⁰⁸ *Id.* at 281.

funds.²⁰⁹ Due to the enormity of existing litigation under the ESA listing program, I do not think providing a litigation-enforced timeline would benefit at-risk species or the listing process. Rather, I propose that the timelines be enforced by automatically listing the species as threatened after the timeline has elapsed.

Due to the sheer size of the current WBP list, the initial time limit should be five years. Therefore, if a species spends five years on the WBP list, it is automatically listed as threatened. Eventually, as the WBP list diminishes in size and timely evaluations become possible, I think that the time frame should be reduced to two years. The FWS is then free to review each species and de-list it if appropriate. However, de-listing would be tempered by the fact that an arbitrary de-listing decision may be challenged in court.

I believe that the benefits from an automatic listing timeframe would be two-fold. Obviously, it would eradicate the "black hole" problem by forcing WBP species to be addressed or to be protected. Furthermore, the timeline would provide Congress with an incentive to properly fund the listing program. Under the current system, members of Congress who oppose the listing of species have an incentive to underfund the listing program because reducing funding decreases the chances of a species becoming listed²¹⁰. However, under the automatic listing timeframe, if Congress under funded the listing program more species would be listed. Species that would have otherwise been deemed "not warranted" would automatically be listed for at least a short time.

One possible perverse incentive, however, may be for the FWS to arbitrarily take a species off the WBP list by classifying it as "not warranted" before the time limit has expired. While this is a possibility, I do not think it would be pervasive because such determinations are subject to judicial review. Moreover, even if that did happen to a handful of species, under the current system, they receive no protections anyway. At least the majority of WBP species would receive some ESA protections under automatic listing timeframes.

B. Reform of the LPG

In 1983, the FWS did not anticipate the importance of the LPG because it believed that its use of the WBP designation would be

²⁰⁹ *Id.* at 293 ("To an obvious degree, the pace of listing has reflected the pace of funding.").

²¹⁰ Houck, *supra* note 105, at 286.

limited.²¹¹ However, it is obvious today that a species' listing priority essentially determines whether it is listed or not.²¹² Additionally, given the fact that only the very highest priority species currently have any hope of being listed,²¹³ the FWS should make sure that those species are indeed the ones that deserve it. Therefore, I propose that the FWS set more scientifically definite factors under the LPG and shift to an ecosystem approach.

The ability of the FWS to manipulate the LPG stems from the LPG's vague factors.²¹⁴ This flexibility was built into the LGP so that the FWS could "assign[] species priorities in a straightforward manner without the need for complex analysis."²¹⁵ While I agree with that basic concept, I think that more scientifically definite factors, like a magnitude of threat factor, would not disrupt this purpose. More tangible factors could simplify priority-setting because agency officials would not have to "reinvent the wheel" for each species.

Along with more precise scientific indicators, I think that the FWS should incorporate an ecosystem factor into its LPG. An ecosystem factor would require the FWS to consider each species' importance in its ecosystem and accord higher priority to those species that influence their ecosystems more. This was an idea initially proposed by citizen comments in 1983 when the original LPG was published, but the FWS declined to adopt it at the time.²¹⁶ Its reasoning was that such "information is seldom available at the time a species is considered for listing and, if included would only raise it in priority above species that

²¹¹ Endangered and Threatened Species Listing and Recovery Priority Guidelines, 48 Fed. Reg. 43,098, 43,099 ("It should be recognized that the setting of listing priorities is an intermittent, rather than continuous, activity, and that information developed on a species believed to have a high priority may indicate that a lower priority is justified").

²¹² *Friends of the Wild Swan, Inc. v. U.S. Fish and Wildlife Serv.*, 945 F. Supp. 1388, 1391 (D. Or. 1996); see also Lieben, *supra* note 36, at 1346.

²¹³ *Friends of the Wild Swan*, 945 F. Supp. at 1391.

²¹⁴ Houck, *supra* note 105, at 281 ("It is clear that Congress intended the listing process to be an open door, the broadest possible net for species threatened with risk to their survival. Congress has provided loopholes, qualifiers, and escape valves for nearly every succeeding provision of the Act").

²¹⁵ Endangered and Threatened Species Listing and Recovery Priority Guidelines, 48 Fed. Reg. 43,098, 43,100 (Sept. 21, 1983).

²¹⁶ *Id.* at 43,100-01.

were equal in all other respects under the system.”²¹⁷ However, since July 1, 1994 the FWS has recognized the importance of an ecosystem approach to the ESA, and takes ecosystems into account in other areas, such as recovery of species.²¹⁸ I merely propose that it should make the ecosystem factor an official part of the LPG.

Two benefits would derive from an ecosystem factor: Other species in the ecosystem would receive benefits from the protection of ecologically important species and the inadequacies of the taxonomy factor would be reduced. The first benefit is fairly obvious; however, the second may need explanation. The current taxonomy factor fails to “encompass all the potentially listable entities,” such as distinct population segments.²¹⁹ Furthermore, with the current backlogs, taxonomy can automatically move a species out of listing reach even if it is vital to its ecosystem. Therefore, an ecosystem factor could give those species the nudge they need to be listed.

C. Monitoring System

The FWS claims its current monitoring system is sufficient to fulfill Congress’s mandate to monitor all WBP species.²²⁰ However, it appears that only a bare minimum yearly review is required.²²¹ The FWS may be doing more for some species, but without standard monitoring procedures, it cannot be held accountable and may choose to neglect its monitoring duties. Furthermore, if Congress believed that the requirement to re-evaluate a species on a yearly basis was sufficient, it would not have added an affirmative duty to monitor in 1988;²²² such an amendment would have been redundant. Under the current WBP system, monitoring is the only protection WBP species receive,²²³ and while I

²¹⁷ *Id.* at 43,101.

²¹⁸ Notice of Interagency Cooperative Policy for the Ecosystem Approach to the Endangered Species Act, 59 Fed. Reg. 34,273, 34,274 (July 1, 1994).

²¹⁹ Donald C. Baur, Michael J. Bean & Wm. Robert Irvin, *A Recovery Plan for the Endangered Species Act*, 39 ENVTL. L. REP. NEWS & ANALYSIS, 10,006, 10,007 (2009).

²²⁰ Annual Notice of Findings on Resubmitted Petitions, 73 Fed. Reg. 75,176, 75,184 (Dec. 10, 2008) (to be codified at 50 C.F.R. pt. 17).

²²¹ 16 U.S.C. § 1533(b)(3)(C)(iii) (2006); *see also* Cal. Native Plant Soc’y v. Norton, No. CIV.A.03-1540(JR), 2005 WL 768444, at *2 (“New findings as to warranted but precluded species must be made and published annually.”).

²²² 16 U.S.C. § 1533(b)(3)(C)(iii) (2006).

²²³ U.S. Fish and Wildlife Serv., Candidate Species, *supra* note 37.

advocate for other changes to the system, the FWS must assure that at least this minimal protection is given.

Effective monitoring would also enhance the emergency listing duty and likely reduce unnecessary litigation over emergency listings. If the FWS effectively monitors a species, it will have the appropriate information to determine whether a species should be emergency listed. If it chooses not to list the species, it will have adequate evidence to back up its decision. Therefore, challenges to such a decision will be less likely. On the other hand, if the FWS neglects its duty to emergency list WBP species, citizens will be able to successfully challenge those situations because the court will have scientific evidence pertaining to the need for an emergency listing.

D. Limited Protections for WBP Species

At the heart of the WBP problem is the fact that species receive no protections under the ESA unless listed as threatened or endangered. Therefore, even though the FWS recognizes that WBP species need protection, none is given.²²⁴ I propose that the FWS should provide limited protections to species while they are on the WBP list. Specifically, WBP species' habitat must be protected. Although FWS "encourages" conservation of WBP species,²²⁵ notice that a species may be listed actually creates a perverse incentive for destruction of that species' habitat. This is particularly true for private landowners who intend to develop the land. If a private landowner discovers that his land contains habitat for a species that will likely be listed, he has an incentive to get rid of the habitat before the species makes it to the endangered or threatened list; doing so will enable him to avoid regulation of his property. Such incentives exacerbate the threat WBP species face and make it more likely that they will need protections or go extinct.

Voluntary programs, such as Candidate Conservation Agreements ("CCA") and Safe Harbor Agreements ("SHA"), are a step in the right direction, but fall short of adequately protecting WBP species. CCAs are agreements between public or private land owners and the FWS that identify candidate species (including WBP species) and create voluntary

²²⁴ U.S. Fish and Wildlife Serv., Candidate Species, *supra* note 37. *See also* Houck, *supra* note 105, at 281 ("Listed species receive . . . protections. The corollary is equally important: [U]nlisted species do not.").

²²⁵ U.S. Fish and Wildlife Serv., Candidate Species, *supra* note 37.

protections for those species.²²⁶ SHAs are similar, but are only available to private land owners.²²⁷ Under both programs, the FWS generally provides an assurance that if the landowner protects the species according to the agreement, when the species becomes listed, the land will not be subject to further regulations under the ESA.²²⁸ While such agreements have had some success, there are still problems with the process. In particular, the agreements can be long, complicated and expensive.²²⁹ Additionally, because the programs are voluntary, they do not protect all WBP species. Therefore, while the FWS should continue investing in these programs, something else needs to be done to protect WBP species.

Thus, I propose a notice requirement should be imposed upon both public and private land owners whose property contains WBP species habitat. Specifically, if land contains such habitat and the landowner intends to develop her property or in any way destroy the habitat, she should be required to notify the FWS of her plans. An automatic response by the FWS would then be to provide all such landowners with information about voluntary agreement programs, such as CCAs and SHAs. The FWS would then have sixty days to take action. Either the FWS could emergency list the species, engage in negotiation with the landowner to enter into a voluntary agreement, or do nothing. Once the sixty days have passed, the landowner would be free to develop her land in the absence of FWS action.²³⁰ Of course, a penalty scheme must also

²²⁶ U.S. Fish and Wildlife Serv., Candidate Conservation Agreements, <http://www.fws.gov/endangered/esa-library/index.html> (under "For Landowners" section, select "Candidate Conservation Agreements Fact Sheet" hyperlink) (last visited March 15, 2011).

²²⁷ U.S. Fish and Wildlife Serv., Safe Harbor Agreements for Private Landowners, <http://www.fws.gov/endangered/esa-library/index.html> (under "For Landowners" section, select "Fact Sheet" under the "Safe Harbor Agreement" subsection) (last visited March 15, 2011).

²²⁸ U.S. Fish and Wildlife Serv., Candidate Conservation Agreements, *supra* note 226.

²²⁹ Michael J. Bean, *Second-Generation Approaches*, in *THE ENDANGERED SPECIES ACT AT THIRTY* 274, 275-80 (Dale D. Goble et al. eds. 2006).

²³⁰ This type of notification program is not unusual in environmental regulation. *See, e.g.*, 33 U.S.C. § 1344(e) (requiring individuals who wish to engage in dredge and fill activities that have been approved under the general permit program to notify the Army Corps of Engineers and wait thirty days before beginning the project); *see also* 33 C.F.R. § 330.1(e) (describing the notification procedures required for many of the nationwide general permits, including a thirty-day waiting period). The waiting period for WBP species should be substantially longer than for general permits. Under the Clean Water Act, general permits undergo a full rulemaking process prior to their issuance. 33 C.F.R. § 330.1(b). Therefore, the Army Corps may rely in large part on the public interest

be implemented for landowners who failed to notify the FWS. Otherwise, the incentive to destroy habitat would only marginally decrease.

One of the benefits from a notification program would include better monitoring by the FWS because it would be aware of the actions taken in relation to a WBP species' habitat. Furthermore, such a program would encourage voluntary agreements. Because voluntary agreements are relatively new and experimental, many land owners may not even be aware that they have the option. Thus, the notification program would educate both private landowners and the FWS. Additionally, the perverse incentive to destroy habitat before a species becomes listed would be mitigated. Admittedly, such an incentive may still exist, but if landowners knew they could face fines for destroying habitat, the incentive would be lessened. Also, as information about voluntary agreements spreads, landowners may have an incentive to keep the existing habitat and enter into an agreement to avoid future regulations.

V. CONCLUSION

The WBP designation has evoked many criticisms and allegations of abuse throughout its twenty-nine years of existence.²³¹ Evidence of such concerns was apparent in the 1988 amendments that added the monitoring and emergency listing requirements.²³² Such allegations became particularly prominent after the 1995 listing moratorium when the size of the list swelled beyond what was anticipated when the designation was first added to the ESA. Consequently, discontent with the WBP designation has intensified. As the foregoing discussion points out, sometimes such criticism was warranted, but sometimes it was simply a reflection of the circumstances facing the FWS and at-risk species.

analysis already conducted. On the other hand, the FWS would be required to evaluate the potential harm of each project proposed by a landowner wishing to destroy WBP species habitat without the benefit of previous analysis.

²³¹ See generally Bean, *supra* note 229 (noting the time-consuming, complex, and costly nature of CCAs); Bechtold, *supra* note 156 (underscoring the negative effects of unbounded agency discretion in setting the priority of a species, exemplified by the case of the Bull Trout); Houck, *supra* note 105 (describing the listing process as overly broad and riddled with loopholes and "escape valves"); Robbins, *supra* note 105 (comparing the WBP designation to an "ER waiting room strewn with the corpses of those species who were forced to wait too long").

²³² 16 U.S.C. § 1533(b)(3)(C)(iii) (2006).

The WBP designation is the messenger who announces “the ESA is not working the way we wanted it to.” It is where the failures of the ESA listing process cumulate as a tangible problem. The first reaction is to shoot the messenger and instantly determine that the WBP designation itself is the problem. However, as this paper illustrates, the WBP designation does have its problems but it is also a necessary element of the ESA listing process. The FWS must be given flexibility, particularly in the face of substantial under funding. Such flexibility must, however, be tempered by appropriate checks on the FWS’s discretion. The solution, therefore, is not to abolish the designation altogether, but rather to reform it to better suit the current state of the listing program. My hope is that the four recommendations described in this paper will provide the flexibility and accountability necessary for successful agency proceedings, while also providing crucial protections for WBP species. If such a feat can be accomplished, I believe that the ESA’s purpose of preventing extinctions and conserving at-risk species and their habitat can be accomplished through the WBP designation.