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THE TIMING OF CHALLENGES TO COMPEL CRITICAL HABITAT DESIGNATION UNDER THE ENDANGERED SPECIES ACT: SHOULD COURTS TOLL THE GENERAL FEDERAL STATUTE OF LIMITATIONS?

Matthew D. Crawford*

Abstract: The Secretary of the Interior, acting through the Fish and Wildlife Service, is directed by the Endangered Species Act to designate critical habitat concurrently with the listing of a species as endangered or threatened. However, the ESA allows FWS to delay critical habitat designation upon a finding that designation is not prudent or that it is not determinable. FWS has liberally exercised these exceptions to avoid designating critical habitat for the majority of listed species. In response, citizen groups regularly file suit to compel designation. Difficulties arise when the failure to designate occurred more than six years before the filed action. Some federal courts hold the general civil statute of limitations, 28 U.S.C. § 2401(a), bars actions to compel designation. Others have relied on principles of equitable tolling to allow actions to go forward. This Note argues that courts should toll the statute of limitations in actions to compel designation where FWS made a “not determinable” finding because it constitutes a failure to act despite a non-discretionary, mandatory duty, but that “not prudent” findings constitute final agency action and should start the clock running for statute of limitations purposes.

Introduction

When the Secretary of the Interior (the “Secretary”) lists a plant or animal species as threatened or endangered, the Secretary is directed by statute to concurrently designate any habitat of such species which is considered essential to its conservation.¹ In spite of this statutory com-

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¹ Endangered Species Act, 16 U.S.C. §§ 1532(5) (A) (i) (I), 1532(16), 1533(a) (3) (A) (i) (2000). The responsibility for administering the Endangered Species Act (ESA) falls pri-
mand, the majority of listed species have never been designated critical habitat. For many of these species, more than six years have passed since the Secretary chose not to designate their critical habitat. Under the general federal statute of limitations for civil actions against the United States, plaintiffs are time-barred from filing claims against the Secretary to compel designation of these species.

This Note discusses whether the statute of limitations should be tolled in challenges to the Secretary’s failure to designate critical habitat more than six years after the right of action accrued. Part I provides a brief overview of the history and evolution of critical habitat designation and the controversy surrounding it. Part II discusses citizen suits to compel critical habitat designation under the Administrative Procedure Act (APA) and the Endangered Species Act (ESA), as well as the standard of review applied by courts. Part III discusses the statute of limitations and the continuing-violations doctrine as a device for equitable tolling of the statute of limitations. Finally, Part IV proposes that

primarily to the Department of Interior (DOI), which passes its responsibilities on to the Fish and Wildlife Service (FWS). 50 C.F.R. § 402.01(b) (2008); Patrick Parenteau, An Empirical Assessment of the Impact of Critical Habitat Litigation on the Administration of the Endangered Species Act 1 (Vt. Law Sch. Faculty Papers, Paper No. 1, 2005), available at http://lsr.nellco.org/vermontlaw/vlsfp/Faculty/1 (follow “Download the Paper” hyperlink); U.S. Department of the Interior, http://www.doi.gov (last visited Mar. 19, 2009). The Department of Commerce also carries out responsibilities under the ESA through the National Marine Fisheries Service (NMFS). 50 C.F.R. § 402.01(b); U.S. Department of Commerce, http://www.commerce.gov (last visited Mar. 19, 2009). However, this Note will focus exclusively on FWS’s administration of the ESA. The ESA defines “Secretary” as either the Secretary of the Interior or Secretary of Commerce. 16 U.S.C. § 1532(15). For the purposes of this Note, “the Secretary” refers to the Secretary of the Interior. When a habitat is designated as critical, the ESA requires that any federal agency consult with the Secretary when planning to take any action that could result in the destruction or adverse modification of that habitat. 16 U.S.C. § 1536(a)(2); Jack McDonald, Critical Habitat Designation Under the Endangered Species Act: A Road to Recovery?, 28 Envtl. L. 671, 681 (1998).


3 Parenteau, supra note 1, at 6. At the date of study, Parenteau identified 833 species without critical habitat. Id. He found 695 of these species were “either pre-1978 species, which are not subject to the ESA’s citizen suit provision, or [were] beyond the six year federal statute of limitations . . . .” Id.

4 28 U.S.C. § 2401(a) (2000). “[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.” Id. See infra Part I.

5 Administrative Procedure Act, 5 U.S.C. §§ 701–706 (2000); see infra Part II.

6 See infra Part III.
courts should toll the statute of limitations in cases of agency inaction, specifically where the Secretary failed to designate critical habitat after a “not determinable” finding.  

I. CRITICAL HABITAT AND ITS IMPORTANCE

A. The Evolution of Critical Habitat


Section 7 of the Endangered Species Act (ESA), as passed in 1973, required that each federal agency “insure that actions authorized, funded, or carried out by them do not . . . result in the destruction or modification of habitat of such species which is determined by the Secretary [of the Interior] . . . to be critical.” This reflected Congress’s recognition that habitat destruction was one of the two major causes of extinction. Despite this recognition, Congress chose not to provide any criteria, definitions, or procedures to guide determination of critical habitat, instead leaving these choices to the Department of the Interior and Department of Commerce and their respective subagencies, the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service.

FWS took time to announce the critical habitat determination standards. Although FWS published proposed rulemaking regarding critical habitat as early as 1975, these guidelines were not codified until 1978. However, once promulgated, the rules set forth were broadly protective of critical habitat. Critical habitat was defined as “any air, land, or water area . . . and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and

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8 See infra Part IV.


14 See McDonald, supra note 1, at 681 (“This was the high-water mark for critical habitat, including not only habitat necessary for survival and recovery, but also habitat necessary for expansion.”).
recovery of a listed species... and may include additional areas for reasonable population expansion.” FWS concluded that only ecological and biological factors would be considered in the critical habitat determination, expressly concluding that socioeconomic factors were irrelevant to the determination. Finally, critical habitat was to be designated whenever the Director of FWS deemed it “necessary and appropriate.”

These rules proved short-lived in the wake of Tennessee Valley Authority v. Hill, a case concerning the snail darter, an endangered species with designated critical habitat in an area of the Little Tennessee River threatened by the completion of the Tellico Dam. Although the dam construction was almost eighty percent complete at a cost of tens of millions of dollars, the Supreme Court concluded that the plain language of section 7 of the ESA barred any federal action which resulted in destruction or modification of the species’s critical habitat. In his dissenting opinion, Justice Powell predicted that Congress would amend the ESA as a result of the decision. This prediction was quickly proven accurate when Congress amended the ESA that very year.

2. The 1978 Amendments and the Creation of the “Not Prudent” Exception to Critical Habitat Designation

The 1978 Amendments to the ESA reflected Congress’s newfound recognition that critical habitat had “developed into one of the most significant portions of the entire statute.” Consequently, the 1978 Amendments made substantial changes to the criteria, definitions, and procedures regarding critical habitat designation. One alteration was the provision of a new definition of critical habitat out of concern that the meaning promulgated by FWS was too expansive. Congress speci-
fied that “critical habitat shall not include the entire geographical area which can be occupied by” a listed species. Thus, the 1978 Amendments narrowed the definition of critical habitat “to clarify that it does not include all of a listed species’s potential habitat nor include, by default, expansion of habitat from the present range of a species.”

Additionally, the 1978 Amendments altered the timing of critical habitat designation, amending section 4 of the ESA to direct the Secretary to concurrently designate critical habitat “to the maximum extent prudent” at the time of a species’s listing as endangered or threatened. In part, this alteration addressed complaints about lengthy delays in designation decisions. Prior to 1978, less than half of critical habitat designations were made concurrently with publication of the listing, and the average delay for the others was two years between listing and designation. However, Congress understood that concurrent designation posed logistical difficulties and included the “to the maximum extent prudent” language to give the Secretary discretion not to designate critical habitat concurrently “where it would not be in the best interests of the species to do so.” This exception was meant to be used sparingly, as Congress felt “[i]t is only in rare circumstances where the specification of critical habitat concurrently with the listing would not be beneficial to the species.”

Finally, in direct response to the fallout from *Tennessee Valley Authority v. Hill*, Congress also amended the ESA to include consideration of
economic factors in the critical habitat designation analysis. This was a marked departure from FWS’s standard, which had expressly rejected consideration of economic factors. Congress required that the Secretary perform a balancing of factors which took into consideration the economic impact of designation. The Secretary may exclude an area if “the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat.” However, the Secretary must designate such an area if failure to do so would result in a species’s extinction. As described by one commentator, this “changed the designation process from a purely biological assessment to a social policy decision.”

3. The 1982 Amendments and the Creation of the “Not Determinable” Exception to Critical Habitat Designation

The alterations to critical habitat wrought by the 1978 Amendments effectively shut down the listing process. Requiring designation of critical habitat concurrently with a species’s listing freighted the listing process with the “burdensome economic analysis” imposed upon critical habitat designation. Congress sought to remedy this gridlock by passing the 1982 Amendments to the ESA. In the legislative history, Congress acknowledged that the chief impediment to a speedier listing process was requiring critical habitat designation (which re-

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34 Endangered Species Act Amendments of 1978 § 11.
35 Id.
36 Id. In such circumstances, a cabinet-level committee created by the 1978 Amendments known as “the God Squad” could choose to exempt a federal agency from section 7 and allow for a species’s extinction. Id. § 3; see Robert J. Scarpello, Note, Statutory Redundancy: Why Congress Should Overhaul the Endangered Species Act to Exclude Critical Habitat Designation, 30 B.C. ENVT. AFF. L. REV. 399, 408 (2003). “The Committee’s power to extirpate a species gave it its holy nickname,” Salzman, supra note 23, at 321 n.50.
37 See Salzman, supra note 23, at 320.
38 See McDonald, supra note 1, at 682–83; Salzman, supra note 23, at 321–22. Between 1978 and 1982, DOI listed less than five percent of the more than 2000 species proposed for listing and designated critical habitat for less than one percent of the proposed species during the same time period. Salzman, supra note 23, at 322.
39 See Salzman, supra note 23, at 322.
quired analysis of economic factors) with the listing decision (which only considered biological criteria).\textsuperscript{41}

The 1982 Amendments addressed this by providing greater discretion to the Secretary to make the listing decision and critical habitat designation separately.\textsuperscript{42} The new statutory language required the Secretary to designate critical habitat concurrently with the listing decision “to the maximum extent prudent and determinable.”\textsuperscript{43} The addition of the word “determinable” provided the FWS with another method of delaying critical habitat designation in recognition of the difficulties of determining critical habitat within the same time frame allotted for the listing decision.\textsuperscript{44} While Congress required that critical habitat designation and the listing decision be made within one year of a proposed regulation’s publication, Congress further provided discretion to the Secretary to issue a “not determinable” finding, which would allow the Secretary to list a species without concurrently designating its critical habitat for an additional year.\textsuperscript{45} Once this time had elapsed, the Secretary was required to designate critical habitat based on available data “to the maximum extent prudent.”\textsuperscript{46}

4. Current Standards for Critical Habitat Designation

As codified at 16 U.S.C. § 1533, the ESA directs the Secretary to designate critical habitat for an endangered or threatened species concurrently with the species’s listing as endangered or threatened “to the maximum extent prudent and determinable.”\textsuperscript{47} The statute directs the Secretary to make the listing decision and critical habitat determination within one year of the proposed rule’s publication.\textsuperscript{48} If the Secretary concludes that a species’s critical habitat is “not . . . determinable”

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\textsuperscript{42} See Endangered Species Act Amendments of 1982 § 2.
\textsuperscript{43} \textit{Id.}
\textsuperscript{45} Endangered Species Act Amendments of 1982 § 2.
\textsuperscript{46} \textit{Id.}
\textsuperscript{47} 16 U.S.C. § 1533(a)(3) (2000). In order to list a species as endangered and designate its critical habitat, the Secretary first proposes a regulation by publishing general notice and the complete text of the proposed regulation in the Federal Register. \textit{Id.} § 1533(b)(5).
\textsuperscript{48} \textit{Id.} § 1533(b)(6)(A).
\end{footnotesize}
at the conclusion of the one-year period, the statute provides that the period can be extended “by not more than one additional year.”49 At the end of this extension period, the Secretary must designate critical habitat “based on such data as may be available at that time . . . to the maximum extent prudent.”50

Absent statutory definitions, FWS has published rules to define the “not prudent” and “not determinable” exceptions.51 FWS defines designation as “not prudent” in the following situations: “(i) [t]he species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species, or (ii) [s]uch designation of critical habitat would not be beneficial to the species.”52 FWS recognizes the power of this exception, noting in its proposed rule that critical habitat designation “may be foregone completely” upon a finding by the Secretary that “such designation would not be prudent.”53 Congress had long acknowledged the power of the “not prudent” finding and intended that it be used rarely.54 Nevertheless, FWS employs it far more regularly than Congress anticipated.55

FWS defines “not determinable” as covering one or both of the following situations: “(i) [i]nformation sufficient to perform required analyses of the impacts of the designation is lacking, or (ii) [t]he biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.”56 As noted above, 16 U.S.C. § 1533(b)(6)(C)(ii) requires critical habitat designation within one year of a “not determinable” finding.57 Reflective of this deadline, FWS observes that while “a finding that Critical Habitat is not determinable may delay its designation, [it] does not permanently relieve the Secre-

49 Id. § 1533(b)(6) (C)(ii).
50 Id.
55 See Darin, supra note 12, at 224.
56 50 C.F.R. § 424.12(a)(2).
tary from making such a designation.” However, despite this statement, the years following promulgation of this rule saw the Secretary use the “not determinable” finding to justify postponing designation indefinitely.

B. The Ongoing Debate over the Necessity of Critical Habitat

The 1982 Amendments ended the listing logjam, but the subsequent years have seen an ongoing disparity between the number of listed species that have been granted critical habitat and those that have not. In the decade following the 1982 Amendments, the Secretary frequently exercised the “not prudent” exception to list species without concurrently designating their critical habitat. Between 1980 and 1988, FWS declined to designate critical habitat for 320 species, concluding that designation would not have been prudent in 317 cases. A review of listings from 1988 through 1992 revealed a similar trend, with FWS declining to designate critical habitat for 174 out of nearly 200 species, 159 of them due to a “not prudent” finding.

This trend was exacerbated in 1995 when Congress withdrew $1.5 million of FWS’s budget for listing activities and “prohibited the expenditure of remaining appropriated funds for final determinations to list species or to designate critical habitat.” This virtual “moratorium” on listing and critical habitat designation lasted until April 26, 1996 and resulted in “a backlog of proposed listings for 243 species.” In a 1999 Notice, FWS reported that only 113 of the 1179 listed species in the U.S. had been designated critical habitat. The disparity has shrunk

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58 Amended Procedures To Comply With the 1982 Amendments To the Endangered Species Act, 48 Fed. Reg. at 36,063.
59 See Darin, supra note 12, at 229. “Even a cursory review of the Federal Register illustrates that FWS delays critical habitat designation far beyond the one-year extension when it is ‘not determinable’ at the time of listing.” Id.
60 See id. at 224; McDonald, supra note 1, at 683; Salzman, supra note 23, at 332–33.
62 Salzman, supra note 23, at 332.
63 Houck, supra note 61, at 303.
64 See Darin, supra note 12, at 231.
since then; as of August 15, 2007, FWS reported that critical habitat had
been designated for 492 of the 1351 U.S. species then listed as threat-
ened or endangered. Accordingly, the number of listed species to be
designated critical habitat has climbed from roughly nine percent in
1999 to thirty-six percent in 2007. FWS acknowledges that this in-
crease is due, in large part, to litigation.

1. FWS’s Open Disregard for Critical Habitat Designation

According to one commentator, FWS’s public statements about
critical habitat and the extent to which designation has become litiga-
tion-driven reflect an unstated agency policy of avoiding critical habitat
designation. FWS has openly questioned the utility of critical habitat
designation and expressed its long-held belief that “in most circum-
stances, the designation of ‘official’ critical habitat is of little additional
value for most listed species, yet it consumes large amounts of conser-
vation resources.” In a more recent report, FWS admitted that it “as-
signed a relatively low priority to designating critical habitat.” FWS
maintains that critical habitat designation provides

little extra protection to most species, and in some cases it can
result in harm to the species. This harm may be due to nega-
tive public sentiment to the designation, to inaccuracies in the
initial area designated, and to the fact that there is often a
misconception among other Federal agencies that if an area is
outside the designated critical habitat area, then it is of no
value to the species.
FWS further argues that its limited resources are more effectively used to list more species as endangered or threatened.\textsuperscript{74} In testimony before the House Committee on Resources in 2005, Craig Manson, Assistant Secretary of the Interior for Fish and Wildlife and Parks, complained that court orders and settlement agreements related to critical habitat designations had left the Service with “little ability to prioritize its activities to direct resources to listing program actions.”\textsuperscript{75} Manson had previously likened this situation to “an emergency room where lawsuits force the doctors to treat sprained ankles while patients with heart attacks expire in the waiting room.”\textsuperscript{76} FWS’s critical habitat designation is almost exclusively a creature of litigation: between 1990 to 2005, 350 out of 357 critical habitats designated by FWS were the result of litigation.\textsuperscript{77}

2. Criticism of FWS’s Stance Against Critical Habitat Designation

FWS is not the only agency implementing the ESA; the National Marine Fisheries Service (NMFS) also lists species and designates critical habitat under the authority of the ESA.\textsuperscript{78} However, unlike FWS, NMFS has expressed ongoing support for critical habitat designation, stating in 2000 that “[a]ny policy that NMFS agrees to jointly with FWS must clearly state that the Services believe that designation of critical habitat can provide a significant benefit to listed species if used as intended in


\textsuperscript{75} Manson Testimony, supra note 69, at 29. “The Service has stated that because listing activities have been driven by court orders and settlements, staff have been unable to focus on listing species at the greatest risk of extinction or to undertake a more balanced listing program.” U.S. Gen. Accounting Office, Endangered Species Program: Information on How Funds Are Allocated and What Activities Are Emphasized 23 (2002), available at http://www.gao.gov/new.items/d02581.pdf.

\textsuperscript{76} 2003 DOI Press Release, supra note 74.


\textsuperscript{78} 16 U.S.C. § 1532(15) (2000); 50 C.F.R. § 402.01(b) (2008).
the Act.”79 Only seven of the thirty critical habitat designations made by NMFS between 1990 and 2005 were “forced by litigation.”80

Some critics argue that FWS has provided no scientific studies to support its claims that critical habitat designation is redundant and adds little protection.81 One survey reviewed multiple studies and concluded that “[t]he consistent correlation between critical habitat and positive recovery trends across differing datasets and methodologies is a strong indication that species with critical habitat are in fact recovering faster than those without it.”82 These commentators contend that DOI’s position is a legal theory rather than a factual conclusion, and one that has been “rejected by numerous federal courts.”83

II. CITIZEN SUITS UNDER THE ESA AND ADMINISTRATIVE PROCEDURE ACT TO COMPEL AGENCY ACTION

The citizen suit provision of the ESA authorizes any person or private entity to bring suit to enjoin violations of the ESA.84 One part of this provision provides a right of action against the Secretary for failure to perform any act or duty which is non-discretionary under section 4 of the ESA.85 Challenges of agency failure to designate critical habitat are often brought under this portion of the ESA citizen suit provision, but it is not the only remedy available.86 Although the existence of a citizen suit provision in a statutory scheme may sometimes preclude application of the Administrative Procedure Act (APA), “[n]othing in the ESA’s citizen-suit provision expressly precludes review under the APA, nor do we detect anything in the statutory scheme suggesting a purpose to do so.”87

79 See Parenteau, supra note 1, at 2 n.7.
80 Id.
82 Id. at 86.
83 Id. at 77.
87 Bennett, 520 U.S. at 175.
A. Standard of Review for Challenges of Agency Action and Inaction

While the ESA provides a right of review, it does not provide a standard of review.\(^88\) Where a statute provides for review but sets forth no standards for review, the Supreme Court has held “consideration is to be confined to the administrative record and that no \textit{de novo} proceeding may be held.”\(^89\) In the absence of internal standards, courts generally apply the APA standard of review when evaluating challenges to agency action under the ESA.\(^90\) In circumstances where an agency fails to act, section 706(1) of the APA provides that a reviewing court must “compel agency action unlawfully withheld or unreasonably delayed.”\(^91\) Where an agency has acted, section 706(2) of the APA provides a reviewing court with the authority to “hold unlawful and set aside agency action” found to be arbitrary and capricious.\(^92\)

1. What Constitutes Reviewable Agency Action

The APA defines agency action as “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.”\(^93\) Section 701 of the APA provides that agency action is subject to judicial review except where there is a statutory prohibition on review or where “agency action is committed to agency discretion by law.”\(^94\) Both of these exceptions have been construed narrowly, rendering most agency actions susceptible to judicial review.\(^95\) Moreover, a challenge of agency action is only cognizable under the APA if \textit{it is made reviewable by statute} or constitutes “\textit{final agency action} for which there is no

\(^88\) Or. Nat’l Res. Council v. Allen, 476 F.3d 1031, 1036 (9th Cir. 2007); \textit{see} 16 U.S.C. § 1540(g).


\(^90\) \textit{Allen}, 476 F.3d at 1036; Sierra Club v. U.S. Army Corps of Eng’rs, 295 F.3d 1209, 1216 (11th Cir. 2002); Biodiversity Legal Found. v. Babbitt 146 F.3d 1249, 1252 (10th Cir. 1998); Sierra Club v. Glickman, 67 F.3d 90, 95 (5th Cir. 1995); Cabinet Mountains Wilderness/Scotchman’s Peak Grizzly Bears v. Peterson, 685 F.2d 678, 685 (D.C. Cir. 1982).


\(^92\) \textit{Id.} § 706(2).

\(^93\) \textit{Id.} § 551(13).

\(^94\) \textit{Id.} § 701(a); \textit{see} Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971).

\(^95\) \textit{Overton Park}, 401 U.S. at 410. To meet the first exception, there must be clear and convincing evidence of a legislative intent to restrict access to judicial review. \textit{Id.} The second exception is “very narrow” and applicable only “in those rare instances where ‘statutes are drawn in such broad terms that in a given case there is no law to apply.’” \textit{Id.} (citation omitted).
other adequate remedy in a court.”96 Two conditions must be met for agency action to be considered “final.”97 First, the action must constitute the “consummation” of the agency’s decision-making process rather than a “merely tentative or interlocutory” step in such a process.98 Second, the action must determine rights or obligations, or result in legal consequences.99

2. What Constitutes Reviewable Agency Inaction

As noted above, a “failure to act” is among the categories of “agency action” listed by the APA.100 In Norton v. Southern Utah Wilderness Alliance (SUWA), the Supreme Court established the “limits the APA places upon judicial review of agency inaction.”101 The Court held that in order to qualify as agency inaction reviewable under the APA, the “failure to act” must be “a failure to take an agency action . . . defined in § 551(13).”102 Moreover, the act the agency failed to take must be a “circumscribed, discrete agency action[].”103 Finally, the Court established that only action which is “legally required” is subject to review under section 706(1) of the APA,104 To wit, the Court held that a challenge of agency inaction “can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take.”105

Yet despite being a category of “agency action,” the Supreme Court in Heckler v. Chaney held that agency inaction is presumptively unreviewable, stating that “an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”106 This conclusion interprets

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98 Id. (citation omitted).
99 Id. at 178.
100 5 U.S.C. § 551(13).
101 542 U.S. at 61.
102 Id. at 62.
103 Id. The Court described “discrete” actions as those categories enumerated in 5 U.S.C. § 551(13). Id. The “limitation to discrete agency action precludes the kind of broad programmatic attack[s]” that “seek wholesale improvement [of agency programs] by court decree.” Id. at 64 (quotation omitted).
104 Id. at 63. The Court held this requirement applied to actions “unreasonably delayed” because “a delay cannot be unreasonable with respect to action that is not required.” See id. at 63 n.1 (quotation omitted).
105 Id. at 64.
106 470 U.S. 821, 831 (1985). The court enunciated several justifications for creating this rebuttable presumption of unreviewability. See id. An agency is “far better equipped
section 701(a)(2) of the APA to preclude judicial review where an agency chooses not to act because this decision is “committed to agency discretion.”\textsuperscript{107} However, this presumption is rebuttable where the substantive statute provides guidelines for agency action.\textsuperscript{108} The Court stated that Congress could limit agency discretion not to act by “setting substantive priorities, or by otherwise circumscribing an agency’s power to discriminate among issues or cases it will pursue.”\textsuperscript{109}

One commentator concluded that the \textit{Chaney} Court recognized that statutory deadlines constitute such a limit by providing “law to apply” in circumstances where an agency refuses to act.\textsuperscript{110} This observation was born out in dicta in \textit{SUWA}, which stated that agency action unlawfully withheld included circumstances where “an agency is compelled by law to act within a certain time period.”\textsuperscript{111} Indeed, the Court’s definition of “failure to act” under the APA as “the omission of an action without formally rejecting a request” included as an example “the failure to promulgate a rule or take some decision by a statutory deadline.”\textsuperscript{112}

3. Deference to the Agency’s Interpretation of the Law

In \textit{Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.}, the Supreme Court established a two-part test for reviewing an agency’s interpretation of a statute that it administers.\textsuperscript{113} First, the reviewing court determines “whether Congress has directly spoken to the precise question at issue.”\textsuperscript{114} If Congress’s intent is clear, this ends the inquiry and the “court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”\textsuperscript{115} If Congress was silent or ambiguous, then the court must determine “whether the agency’s answer than the courts to deal with the many variables involved in the proper ordering of its priorities.” \textit{Id.} at 831–32. An agency does not exercise coercive power when it refuses to act and thus does not trench upon individual liberties or property rights that a court is normally called upon to protect. \textit{Id.} at 832. An agency’s refusal to prosecute or enforce resembles prosecutorial discretion, and thus should receive similar deference, given that agencies typically rest in the executive branch. \textit{Id.}

\textsuperscript{108} \textit{Chaney}, 470 U.S. at 832–33.
\textsuperscript{109} \textit{Id.} at 893.
\textsuperscript{112} See \textit{id.} at 63.
\textsuperscript{113} 467 U.S. 837, 842–43 (1984).
\textsuperscript{114} \textit{Id.} at 842.
\textsuperscript{115} \textit{Id.} at 842–43.
is based on a permissible construction of the statute.” Moreover, the *Chevron* decision stands for the principle that a reviewing court “may not substitute its own construction” of a statute if the agency’s interpretation is permissible or reasonable. With regard to agency interpretation of the law, the Court held that “[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.”

B. *Courts Regularly Overturn FWS’s “Not Prudent” and “Not Determinable” Findings*

Between 1990 and 2005, federal courts overwhelmingly ruled against FWS and ordered the agency to designate critical habitat. A small sampling of this substantial body of case law indicates courts have been unreceptive to FWS’s arguments for not designating critical habitat. The willingness of federal courts to overturn FWS’s determinations reflects a significant departure from the deference normally accorded to agency actions.


Courts have reviewed FWS’s “not prudent” findings as agency action and applied the “arbitrary and capricious” standard set forth by section 706(2)(A) of the APA to set them aside. In *Sierra Club v. U.S. Fish and Wildlife Service*, the Fifth Circuit set aside a “not prudent” finding as

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116 *Id.* at 843.
117 *Id.* at 844.
118 *Id.* at 843 n.9.
119 Manson Testimony, *supra* note 69, at 29. “We have been inundated with lawsuits for our failure to designate critical habitat . . . . Almost universally, the courts have declined to grant relief.” *Id.* One statistical study covering the period between 1999 and 2005 indicates that FWS lost or settled cases which led to habitat designation for 373 species. See Parenteau, *supra* note 1, at 4 n.16 (spreadsheets on file with author).
121 See *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415–16 (1984) (stating that agency actions are entitled to a presumption of regularity and courts cannot substitute their judgment for that of an agency); *see also Scarpello*, *supra* note 36, at 427 (arguing courts do not rely on congressional intent that the “not prudent” exception be used rarely when they criticize FWS’s factual findings and evidence).
122 *Sierra Club*, 245 F.3d at 445; *NRDC v. DOI*, 113 F.3d at 1127; *Conservation Council for Haw.*, 2 F. Supp. 2d at 1288.
arbitrary and capricious because it relied on a facially invalid regulation promulgated by FWS. The regulation was invalidated, in part, because it increased the frequency with which FWS would find critical habitat designation “not prudent,” a “result . . . in tension with the avowed intent of Congress that a ‘not prudent’ finding regarding critical habitat would only occur under ‘rare’ or ‘limited’ circumstances.”

The Ninth Circuit set aside a “not prudent” determination in *Natural Resources Defense Council v. U.S. Department of the Interior* (NRDC v. DOI) on the grounds it was arbitrary and capricious because the FWS failed to “articulate a rational basis for invoking the rare imprudence exception.” The court also found FWS’s reasoning that critical habitat designation would not be beneficial to most of the species reflected an “expansive construction of the ‘no benefit’ prong to the imprudence exception . . . inconsistent with clear congressional intent.”

The Ninth Circuit emphasized that Congress had intended the “not prudent” exception to be exercised rarely and only in extraordinary circumstances.

In *Conservation Council for Hawai’i v. Babbitt*, the District of Hawaii set aside “not prudent” findings for 245 listed plant species as arbitrary and capricious. The district court held that FWS’s proffered rationales were insufficient and that the FWS’s determination was arbitrary and capricious.

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123 245 F.3d at 447. The regulation defined “destruction or adverse modification” as “a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species.” Id. at 439. The court held this conflicted with the ESA, which defined critical habitat as including areas essential for the “conservation” of a species—“a much broader concept than mere survival.” Id. at 441–42.

124 Id. at 443. “In practice, the Services have inverted this intent, rendering critical habitat designation the exception and not the rule. The rarity of designation is attributable, in part, to the manner in which the Services have defined the jeopardy and destruction/adverse modification standards.” Id. (footnotes omitted).

125 113 F.3d at 1127. At issue was FWS’s determination that critical habitat designation for the coastal California gnatcatcher was “not prudent” because identification posed an increased threat of deliberate destruction of gnatcatcher habitat by landowners and would not appreciably benefit the gnatcatcher. Id. at 1123.

126 Id. at 1126. The court held that the Service provided inadequate explanation and evidence for its “increased threat” rationale, concluding this reflected a “fail[ure] to balance the pros and cons of designation” as expressly required by section 4 of the ESA. Id. at 1125.

127 Id. at 1126. One commentator has suggested that NRDC v. DOI could stand for the proposition that FWS’s stated policy that critical habitat provides little benefit conflicts with the law of the Ninth Circuit. McDonald, supra note 1, at 679.

128 2 F. Supp. 2d 1280, 1288 (D. Haw. 1998). FWS supported its “not prudent” finding with one or more of the following reasons: designation would increase the likelihood of illegal taking and vandalism, provide little benefit to most species primarily located on private land, and not increase government precautions for those species on federal land. Id. at 1283. The district court rejected all three rationales on reasoning similar to that of
ales for issuing “not prudent” determinations, particularly those which discounted the benefits of critical habitat designation, contravened congressional intent that the “not prudent” exception be used rarely. The court concluded that in the case of all 245 listed plant species, FWS had failed to heed NRDC v. DOI’s command to make “a rational connection between the facts found and the choice made.” The sheer number of “not prudent” findings set aside by Conservation Council for Hawai’i is an extreme example of the willingness of courts to reject FWS’s reasoning where perceived as inconsistent with Congress’s intent that the “not prudent” finding be issued rarely.

2. Courts Compel Designation of Critical Habitat Where FWS Failed to Act Within the Statutory Deadline After a “Not Determinable” Finding

Courts have compelled agency action under section 706(1) of the APA where FWS failed to designate critical habitat within the statutory deadline set by section 1533(b)(6)(C)(ii) of the ESA after an initial finding of “not determinable.” The Tenth Circuit in Forest Guardians v. Babbitt held that by failing to designate critical habitat by the statutory deadline required by the ESA, the Secretary had unlawfully withheld agency action in violation of section 706(1) of the APA. The court concluded that where “Congress by organic statute sets a specific deadline for agency action, neither the agency nor any court has discretion . . . . [A] reviewing court must compel the action unlawfully withheld.” The case was remanded to the district court with instructions that the Secretary be ordered to issue a final critical habitat designation “without regard to the Secretary’s other priorities under the ESA.”

NRDC v. DOI, chiefly relying on FWS’s perceived failures to provide adequate evidence and reasoning for each of the aforementioned rationales. Id. at 1283–87.

See id. at 1285.

Id. at 1286 (quoting Natural Res. Def. Council v. U.S. Dep’t of the Interior, 113 F.3d 1121, 1126 (9th Cir. 1997)).

Id. at 1285.

Forest Guardians v. Babbitt, 174 F.3d 1178, 1193 (10th Cir. 1999).

Id.

Id. at 1190. The Secretary argued that resource limitations should justify failure to comply with the mandatory duties imposed by the ESA, but the court rejected this argument. Id. at 1188–89.

Id. at 1193.
III. THE STATUTE OF LIMITATIONS AND THE CONTINUING VIOLATIONS DOCTRINE

As previously noted, citizen suits against FWS for failure to designate critical habitat within the statutory deadline disproportionately succeed and are almost exclusively responsible for FWS’s designation. However, several of these lawsuits have involved species listed many years ago and in these cases FWS argues that the statute of limitations bars claims where the final agency action—generally considered to be FWS’s conclusion that critical habitat is “not determinable” or “not prudent”—occurred more than six years prior to the filing of the case. In response, citizen groups regularly argue that courts should apply the continuing violations doctrine to toll the statute of limitations.

A. Statute of Limitations as a Term of Waiver of Sovereign Immunity

As a sovereign, the United States is immune from suit unless Congress consents to a cause of action. The citizen suit provision of the ESA reflects just such consent, allowing “any person” to bring a civil suit against the Secretary for failure to perform any non-discretionary act or duty. Additionally, Congress has consented to suit for any agency action via section 702 of the APA, which provides that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” However, the Supreme Court has held that Congress may set the terms of consent to be sued that define any court’s jurisdiction to hear the case.

136 Parenteau, supra note 1, at 4 n.16 (spreadsheets on file with author); see Manson Testimony, supra note 69, at 29 (noting that “[a]lmost all of the FY 2004 and FY 2005 proposed and final designations were the result of court orders or settlement agreements”).


142 Sherwood, 312 U.S. at 586.
According to 28 U.S.C. § 2401(a), “every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.” The Supreme Court has ruled that the principal purpose of statutes of limitations is to “protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.” Where a statute creates a right for civil action against the federal government, the United States has waived its sovereign immunity, but this waiver is conditioned on the applicability of a statute of limitations and courts “should not . . . extend the waiver beyond that which Congress intended.” The Supreme Court has commanded that statutes of limitations be strictly observed and not easily implied or overridden with exceptions.

However, in *Irwin v. Department of Veterans Affairs*, the Supreme Court held that the “rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States.” The Supreme Court concluded this general rule was a “realistic assessment of legislative intent” that did not substantially broaden the congressional waiver in a federal statute of limitations. One situation provided as exemplary of when a court should allow equitable tolling was “where the complainant has been induced or tricked by his adversary’s misconduct into allowing the filing deadline to pass.” *Irwin’s* rebuttable presumption of equitable tolling of statutes of limitations generally supplants the Supreme Court’s prior ad hoc approach to determine when a statute of limitations was subject to equitable tolling.

Significantly though, the Court recently held in *John R. Sand & Gravel Co. v. United States* that the rebuttable presumption in *Irwin* does not apply to statutes of limitations for which the Court “previously provided a definitive interpretation.” The Court identified two types of

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145 Id. at 117–18.
148 Id. at 95.
149 Id. at 96.
151 Id.
Most constitute an affirmative defense against stale or unduly delayed claims which are “subject to rules of forfeiture and waiver” and typically permit tolling “in light of special equitable considerations.” However, some are so-called “jurisdictional” statutes that seek to promote broader goals of administrability, limiting the scope of governmental waiver of sovereign immunity and promoting judicial efficiency. The Court opined that the time limits imposed by these “jurisdictional” statutes are construed “as more absolute” and less prone to equitable tolling.

The Supreme Court did not rule on the applicability of equitable tolling to 28 U.S.C. § 2401 prior to Irwin. Justice Ginsberg’s dissent in John R. Sand & Gravel noted that courts of appeals are divided on the “jurisdictional” nature of 28 U.S.C. § 2401(a) and that the majority’s decision “implies that Irwin governs the interpretation of all statutes we have not yet construed—including, presumably, the identically worded § 2401.” Thus, it remains an open question whether the Irwin rebuttable presumption would be applicable to § 2401.

While the Supreme Court has never expressly stated that the general federal statute of limitations applies to federal agency actions, sev-

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152 Id. at 753.
153 Id.
154 Id.
155 Id.
156 John R. Sand & Gravel Co., 128 S. Ct. at 760-61 (Ginsburg, J., dissenting). The Court held that because it had previously defined the Court of Claims statute of limitations as “jurisdictional” in nature, the decision in Irwin did not alter this long standing interpretation. Id. at 755 (majority opinion). Essentially, the “definitive earlier interpretation of the [Court of Claims] statute” rebutted the presumption of tolling Irwin set forth. Id. at 756. The Court concluded that “[b]asic principles of stare decisis” required it to recognize different interpretations of “different, but similarly worded, statutes,” rather than overrule its precedent. Id.
157 Id. at 760–61. (Ginsburg, J., dissenting).
158 See id.
eral circuit courts have concluded that it does.\textsuperscript{160} The Ninth Circuit has held 28 U.S.C. § 2401(a) applies to challenges of agency action under the APA and the District of Oregon relied on this for the purposes of a critical habitat designation challenge.\textsuperscript{161} The Eleventh Circuit has also concluded that that the general statute of limitations applies to the challenges brought under the ESA.\textsuperscript{162} The Western District of Missouri cited the Ninth Circuit when concluding the general statute of limitations applies to the challenges of federal agency action.\textsuperscript{163} Finally, the Western District of Louisiana and Eastern District of Tennessee decided the general statute of limitations applies to agency failure to designate critical habitat.\textsuperscript{164}

B. Continuing Violations Doctrine

The continuing violations doctrine tolls a statute of limitations where a claim in isolation would be time-barred, but subsequent violations restart the clock and prevent accrual.\textsuperscript{165} As noted by the Western District of Louisiana, “[t]he scope of the doctrine is unclear, and the United States Supreme Court has not ruled on the issue.”\textsuperscript{166} Courts have applied the continuing violations doctrine in the context of employment and civil-rights litigation.\textsuperscript{167} Several federal courts have also extended the continuing violations doctrine to apply in cases where plaintiffs allege agency noncompliance with statutory deadlines.\textsuperscript{168}

The Southern District of New York has held that where an agency fails to perform a non-discretionary duty under the Clean Water Act

\textsuperscript{160} See Sierra Club v. Slater, 120 F.3d 623, 631 (6th Cir. 1997); Wind River Mining Corp. v. United States, 946 F.2d 710, 713 (9th Cir. 1991); Geyen v. Marsh, 775 F.2d 1303, 1307 (5th Cir. 1985).


\textsuperscript{162} See Hamilton, 453 F.3d at 1334.


\textsuperscript{165} Schoeffler, 493 F. Supp. 2d at 817.

\textsuperscript{166} Id.


(CWA), a claim to compel action “is not subject to any statute of limitations.”

The Fox court held that a state’s ongoing failure to adhere to a provision of the CWA “creates a continuing duty of the Administrator [of the Environmental Protection Agency (EPA)] to disapprove of the state’s actions.”

Thus, although the initial act triggering the Administrator’s duty occurred outside of the statute of limitations, the continued failure to act constituted a continuing violation. In another case concerning the CWA, the Eastern District of Virginia applied the continuing violations doctrine to toll the statute of limitations and allow a claim against the EPA for unreasonable delay under section 706(1) of the APA. Similar to Fox, the Eastern District of Virginia concluded that EPA’s delay despite “clear and specific time limits for agency action” constituted a continuing violation which could be challenged at any time so long as the delay continued.

The D.C. Circuit has “repeatedly refused to hold that actions seeking relief under [section 706(1) of the APA] to ‘compel agency action unlawfully withheld or unreasonably delayed’ are time-barred if initiated more than six years after an agency fails to meet a statutory deadline.” Challenges of agency inaction are not barred because they do “not complain about what the agency has done but rather about what the agency has yet to do.”

C. Some Courts Apply the Statute of Limitations to Bar Challenges to Compel Critical Habitat Designation

The Eleventh Circuit and Western District of Missouri have held that 28 U.S.C. § 2401(a) bars challenges to FWS’s failure to designate critical habitat filed after the six-year statutory deadline.

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169 Fox, 909 F. Supp. at 159. The claim concerned a statutory duty under the Clean Water Act requiring the Environmental Protection Agency to approve state water-quality standards and, upon disapproval, establish standards for the state. Id. at 157.

170 Id. at 160.

171 See id.

172 Am. Canoe Ass’n, 30 F. Supp. 2d at 925.

173 Id. at 925 & n.25.


175 Id. at 589 (citation omitted).

1. One Court Has Held a “Not Prudent” or “Not Determinable” Finding Constitutes Final Agency Action That Starts the Clock for Statute of Limitations Purposes

In Missouri ex rel. Nixon v. Secretary of the Interior, the Western District of Missouri concluded that the statute of limitations barred a challenge to compel critical habitat designation more than six years after FWS had issued “not prudent” findings for two species. The court construed 28 U.S.C. § 2401(a) “not [as] a waivable defense, but a jurisdictional one” and stated it was “to be strictly observed and not easily implied or overridden with exceptions.” The court held that FWS’s publication of the “not prudent” determinations constituted final agency action subject to challenge. The court concluded that the statute of limitations began to run at the time of a regulation’s publication and plaintiff’s complaint was filed well beyond the six year period prescribed by 28 U.S.C. § 2401(a), and was therefore barred.

The Nixon court rejected the State of Missouri’s argument that section 706(1) of the APA applied in the instant case because the “not prudent” determination constituted affirmative agency action and could be challenged once made. The Nixon court distinguished American Canoe, explaining that the statute of limitations was tolled in that case because the unreasonable agency delay constituted a continuing violation of the relevant statute. The Nixon court further distinguished Forest Guardians v. Babbitt on the grounds that FWS had not made a critical habitat determination and that the statute of limitations issue was not raised in that case. The court found that in each case,

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177 158 F. Supp. 2d at 986, 990. The two species at issue were the least tern and the pallid sturgeon. Id. at 986.
178 Id. at 988.
179 Id. at 989. Notably, the FWS also issued a “not determinable” finding for the pallid sturgeon. Id. at 986.
180 Id. at 988–89.
181 Id. at 989.
183 Nixon, 158 F. Supp. 2d at 990 (citing Forest Guardians v. Babbitt, 174 F.3d 1178, 1182 (10th Cir. 1999)). It appears that the Western District of Missouri misconstrued the facts of Forest Guardians, stating no decision concerning critical habitat designation was made in that case when, in fact, the Service in Forest Guardians had issued a “not determinable” finding. See id. Contra Forest Guardians, 174 F.3d at 1182. The “not determinable” finding is a preliminary agency decision which “allows the Secretary a grace period in which to designate a critical habitat.” Steven J. Blair, Casenote, Forcing the Issue: Applying a Statute of Limitations to Challenges of Agency Inaction Under the Endangered Species Act, 6 Mo. Envtl. L & Pol’y Rev. 53, 63 (2002). Under section 704 of the APA, preliminary, procedural, or in-
the agency concerned had not made a decision, whereas FWS’s “not prudent” determination constituted a final decision that triggered the statute of limitations.184

The court considered it significant that the plaintiff’s complaint did not allege the Service unreasonably delayed action in violation of section 706(1) of the APA.185 The court stated that the “bifurcated structure” of section 706 indicated Congress’s understanding that “there is a distinction between a failure to act and acting in an arbitrary and capricious manner.”186 Accordingly, FWS’s decision to issue “not prudent” findings constituted affirmative action challengeable as arbitrary and capricious under section 706(2)(A), not a failure to act under section 706(1).187 The Western District of Missouri concluded that “a finding of ‘not determinable’ or ‘not prudent’ starts the statute of limitation to run at the time the decision is made” because either finding constitutes final agency action.188

2. One Court Has Held FWS’s Failure to Act Within the Statutory Deadline Set by 16 U.S.C. § 1533(b)(6)(C) Starts the Clock for Statute of Limitations Purposes

In Center for Biological Diversity v. Hamilton, the Eleventh Circuit held that the continuing violations doctrine does not toll the statute of limitations in challenges of agency failure to designate critical habitat within the statutory deadline set by 16 U.S.C. § 1533(b)(6)(C).189 In this case, concerning “not determinable” findings for two species, the Secretary failed to designate critical habitat within the statutory deadline.190 The only issue before the Eleventh Circuit was whether the Secretary’s failure to designate critical habitat was a “continuing violation.”191 The court reasoned that “nothing in the language of the [ESA]” supported a

Intermediate agency actions cannot be directly reviewed, but are reviewable upon review of final agency action. 5 U.S.C. § 704 (2000).

184 Nixon, 158 F. Supp. 2d at 990.
185 Id.
186 Id.
188 Nixon, 158 F. Supp. 2d at 989–90. One commentator argues that the court “needlessly extend[ed] the holding to include the ‘not determinable’ exception.” Blair, supra note 183, at 64.
189 453 F.3d 1331, 1335 (11th Cir. 2006).
190 Id. at 1334.
191 Id.
finding that the agency’s failure to designate critical habitat within the statutory deadline constituted a continuing violation.192

The Eleventh Circuit interpreted 16 U.S.C. § 1533(b)(6)(C) as “creat[ing] not an ongoing duty, but a fixed point in time at which violation for the failure of the Secretary to act [arose].”193 As such, the Secretary’s failure to designate critical habitat was a single violation that accrued on the day after the deadline passed.194 The court also interpreted language in 16 U.S.C. § 1533(b)(6)(C) requiring the Secretary to rely on “such data as may be available at the [sic] time” when designating critical habitat as indicative of Congress’s intent that the duty was not ongoing.195 The court concluded that finding an ongoing duty would make this provision “anomalous” because it would effectively bar the Secretary from considering new information after the deadline.196

The Eleventh Circuit found that such an interpretation was a proper limitation on the scope of applicability of the continuing violations doctrine.197 The court distinguished between the continuing effects of a discrete violation and continuing violations, categorizing the failure to designate critical habitat within the deadline as the former.198 Moreover, the court stated that application of the continuing violations doctrine is limited to situations where “a reasonably prudent plaintiff would have been unable to determine that a violation had occurred.”199 The court held that the Secretary’s failure to act by the statutory deadline would have made the reasonably prudent person aware that a violation had occurred, and therefore, “the continuing violation doctrine does not apply.”200

The Hamilton court further concluded that 28 U.S.C. § 2401(a) is a “jurisdictional condition attached to the government’s waiver of sover-

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192 Id. at 1335.
193 Id.
194 Id.
196 Hamilton, 453 F.3d at 1335.
197 Id. at 1334–35.
198 Id. at 1335. “The Center complains of the continuing effects of the failure of the Secretary to determine the critical habitat by the statutory deadline, a one-time violation under the Act.” Id.
199 Id.
200 Id. One commentator states that “[t]he Eleventh Circuit’s holding places the burden on citizen groups and private plaintiffs . . . to monitor and enforce the [ESA]. While governmental oversight by watchdog groups should be encouraged, the responsibility to enforce the law lies with the government, not the advocacy groups.” Stephen Butler, Center for Biological Diversity v. Hamilton: Eviscerating the Citizen Suit Provision of the Endangered Species Act?, 34 Ecology L.Q. 1137, 1143 (2007).
eign immunity, and as such must be strictly construed."\textsuperscript{201} The court cited Supreme Court and courts of appeals precedent for the proposition that 28 U.S.C. § 2401(a) is a waiver of sovereign immunity which must be “strictly observed [with] exceptions thereto . . . not to be implied.”\textsuperscript{202} Since 28 U.S.C. § 2401(a) “unambiguously imposes a six-year statute of limitations,” the court concluded that barring the application of the continuing violations doctrine was consistent “with principles of sovereign immunity.”\textsuperscript{203} Notably, Hamilton was cited in Justice Ginsberg’s dissent in John R. Sand & Gravel Co. as reflective of the “theoretical incoherence and practical confusion” which surrounds the question of whether 28 U.S.C. § 2401(a) is “jurisdictional” or whether Irwin’s rebuttable presumption of equitable tolling applies.\textsuperscript{204} The Hamilton court also noted that the existence of an alternative remedy further indicated Congress did not intend for the continuing violations doctrine to apply.\textsuperscript{205} The alternative remedy available to plaintiffs was to petition the Secretary to designate critical habitat under 50 C.F.R. § 424.14(d).\textsuperscript{206} The court made clear that even the absence of an alternative remedy would not prompt them to create an exception to the statute of limitations.\textsuperscript{207}

D. Cases That Toll the Statute of Limitations to Allow Challenges to Compel Critical Habitat Designation

Three federal district courts have tolled the statute of limitations to allow challenges against FWS for failure to designate critical habitat within the statutory deadline set by 16 U.S.C. § 1533(b)(6)(C).\textsuperscript{208} Several courts have held that FWS’s failure constitutes a continuing viola-

\textsuperscript{202} Hamilton, 453 F.3d at 1335(citations omitted).
\textsuperscript{203} Id. at 1335–36.
\textsuperscript{204} John R. Sand & Gravel Co., 128 S. Ct. 750, 760 (Ginsburg, J., dissenting).
\textsuperscript{205} 453 F.3d at 1336.
\textsuperscript{206} Id.
\textsuperscript{207} Id.
tion of its statutory duty that resets the statute of limitations clock. One court also held that FWS’s failure to act does not provide concerned parties “actual or constructive knowledge” of a right of action and thus does not start the clock for statute of limitations purposes. Additionally, one court has held 28 U.S.C. § 2401(a) does not apply to challenges of FWS’s inaction because the agency exceeds its statutory authority under the ultra vires doctrine.

1. Several Courts Have Held Failure to Designate Critical Habitat Before the Statutory Deadline After a “Not Determinable” Finding Is a Continuing Violation That Tolls the Statute of Limitations

The Eastern District of Tennessee tolled 28 U.S.C. § 2401(a) and compelled the FWS to designate critical habitat for nine species because the agency’s failure to designate critical habitat within the statutory deadline after an initial finding of “not determinable” constituted a continuing violation. Every day that FWS failed to fulfill its statutory duty constituted a new violation of that duty and caused the statute of limitations to run anew. The court acknowledged that Congress had failed to adequately fund FWS to carry out its statutory duty to designate critical habitat. As a result, the Service “finds itself confronted with a plethora of suits and injunctions” which require it to “devote its limited resources to comply with judicial orders at the expense of curtailing or even abandoning its search for as-yet-unidentified endangered species.” However, the court stated that “non-repeal of 16 U.S.C. § 1533(b)(6)(C) . . . must be presumed to be an indication of Congress’s wishes.” Effectively, the continuing violations doctrine was applied to prevent the statute of limitations from ever commencing to run.

Similarly, in Schoeffler v. Kempthorne, the Western District of Louisiana held FWS’s failure to designate critical habitat within the statutory

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210 Schoeffler, 493 F. Supp. 2d at 816.
211 Inst. for Wildlife Prot., 2007 WL 4117978 at *5.
212 See S. Appalachian Biodiversity Project, 181 F. Supp. 2d at 885, 887. The case concerned sixteen species total, seven of which had been issued “not prudent” findings. However, FWS admitted that the appropriate criteria had not been used to make the “not prudent” determinations and requested voluntary remand to reconsider them. Id. at 885.
213 Id. at 887.
214 Id. at 886.
215 Id. at 887.
216 Id.
deadline after an initial finding of “not determinable” constituted a continuing violation that prevented accrual of the statute of limitations. The Schoeffler court held that the statute of limitations did not bar the plaintiffs’ challenge on other grounds described below, but nonetheless addressed the applicability of the continuing violations doctrine. The court explained that “[o]nly continuous unlawful acts or a series of separate wrongful actions can form the basis of a continuing violation,” as distinguished from “a discrete one-time violation with lingering effects or consequences.”

The court opined that “the Secretary’s ongoing and continuous failure to perform his non-discretionary duty . . . constituted an actionable violation of the ESA” and that the duty continued “until the final regulation is published.” Thus, the court held “the Secretary’s violation is ongoing and does not constitute a discrete one-time violation with lingering effects or consequences.” Moreover, the court noted that “[t]he Secretary’s representations and attempted proposals effectively link[ed] conduct” during the initial violation and limitation period with conduct leading up to the filing of the litigation.

The Schoeffler court further announced that “[n]othing in the language of the ESA indicates that Congress intended that the Secretary’s mandatory duty to designate critical habitat be discharged when the Secretary first fails to abide by a deadline.” The court opined that “to hold that the Secretary is only responsible for timely performance,” and that his failure to designate within the statutory deadline only violated the law “for an instant of time at the passing of the deadline and no more once the deadline passed,” would contradict Congress’s intent and the goals of the ESA. Therefore, the court reasoned, where the

217 See 493 F. Supp. 2d 805, 821 (2007). FWS listed the Louisiana black bear as a threatened species on January 7, 1992, and stated its critical habitat was “not . . . determinable,” invoking 16 U.S.C. § 1533(b)(6)(C) to extend the deadline for determination by one year. Id. at 810. Over the next two years, the Secretary made proposals to designate critical habitat on several occasions, culminating in a September 27, 1995 publication of a recovery plan that stated designation of the bear’s critical habitat was in progress and under review. Id. at 810–11. No further action was taken by FWS to designate and publish the bear’s critical habitat. Id. at 811.

218 Id. at 817.

220 Schoeffler, 493 F. Supp. 2d at 820.

24 Id. “It is nonsensical that Congress intended that endangered animals be left unprotected simply because the time by which the protection should have been provided passed.” Id. at 823–24.
Secretary has a mandatory, non-discretionary duty to act, “it is logical and equitable that the citizen suit provision should also still be available to compel the required performance.” To rule otherwise would effectively give FWS the power to evade its duty with impunity, thereby effectively repealing the statutory mandate.

In Institute for Wildlife Protection, the District of Oregon held that “each day that FWS does not act” within the statutory deadline after a “not determinable” finding “is a discrete, single violation of the ESA.” The Institute for Wildlife Protection court found the reasoning of the D.C. Circuit persuasive concerning challenges to agency inaction, namely that the statute of limitations was inapplicable where plaintiffs were not complaining about “what the agency has done but rather about what the agency has yet to do.” The court advised that any statute of limitations is “grounded in equity and based on the principles of avoiding stale claims, achieving finality, and protecting those who rely on the law.” The District of Oregon concluded that these principles “are not advanced by and do not support barring claims that seek to hold an agency accountable for actions it is required by statute to perform.”

Thus, the court held that 16 U.S.C. § 1533(b)(6)(C)(ii) creates an “ongoing, binding statutory duty to designate critical habitat” and that “there is nothing in the ESA to indicate that FWS’s duty . . . is finite or expires at a certain point.” The court cited other language in the relevant statute that supported a conclusion that FWS’s duty was an ongoing one. The court concluded it would not apply 28 U.S.C. § 2401(a) to

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225 Schoeffler, 493 F. Supp. 2d at 824.
226 Id.
227 Inst. for Wildlife Prot. v. U.S. Fish & Wildlife Serv., No. 07-CV-358-PK, 2007 WL 4117978, at *6 (D. Or. Nov. 16, 2007). FWS listed the Oregon Chub on October 18, 1993, at which time the Service deferred designation for an additional year pursuant to 16 U.S.C. § 1533(b)(6)(C)(ii). Id. at *2. FWS did not make a critical habitat designation and admitted its failure to comply with the statute. Id. at *1.
228 Id. at *5 (internal citations omitted).
229 Id.
231 Id.
232 Id. 16 U.S.C. § 1533(c)(2) “requires FWS to perform periodic status reviews of [listed] species to monitor [their] improvement or decline” and 16 U.S.C. § 1533(a)(3)(A)(ii) provides that the agency may intermittently revise existing critical habitat designations. Id. Additionally, the District of Oregon found that the broad waiver of sovereign immunity that Sec-
“nullify, in effect, FWS’s ongoing duty . . . and to insulate the agency from challenges to any continued inaction.”  

2. One Court Has Held that FWS’s Failure to Act Does Not Provide “Actual or Constructive Notice” of a Cause of Action and Does Not Start the Accrual of the Statute of Limitations

The Schoeffler court tolled 28 U.S.C. § 2401(a) and compelled FWS to designate critical habitat on the grounds that the Secretary’s failure to designate critical habitat by the deadline neither “carr[ied] the weight of a definitive statement of the agency’s position,” nor gave “actual or constructive notice of a right of action.”  

Hence, the plaintiff’s cause of action did not accrue upon the initial violation of the deadline. In the Fifth Circuit, a cause of action accrues when a party has either actual or constructive knowledge of the violation and a right to enforce his claim. The Schoeffler court concluded that if FWS issued a “not prudent” decision or designated critical habitat, either would have constituted final agency action “concretely and definitively affecting the plaintiffs’ interest, thus triggering the statute of limitations.”  

Instead, the Secretary “maintained the interim ‘not yet determinable’ finding and by all appearances and representations, has further extended the course of investigation into the matter.” Thus, the FWS’s obligation to make a determination “remained open pending a final determination.”  

The court held “[p]laintiffs could not have inferred . . . that the defendant’s ongoing failure to finalize a habitat determination should be perceived as a situation of adverse action, rather than bureaucratic bungling or foot dragging.”

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235 Id.
236 Id. at 815 (construing Vigman v. Cmty. Nat’l Bank & Trust Co., 635 F.2d 455, 459 (5th Cir. 1981)).
237 Id. at 816.
238 Id. at 815. The court found that the Secretary’s actions subsequent to listing the bear—“proposing rules, accepting public comments, holding public hearings, and even promising designation would be forthcoming”—“confirmed plaintiffs’ reasonable, good faith belief that the Secretary would ultimately comply with the law, even if at a time after the statutory deadline.” Id.
239 Schoeffler, 493 F. Supp. 2d at 815.
240 Id. at 816.
3. One Court Has Held that FWS’s Failure to Act Constitutes Ultra Vires Action

In Institute for Wildlife Protection, the District of Oregon also concluded that the statute of limitations is inapplicable to challenges of FWS’s failure to designate critical habitat within the statutory deadline after a “not determinable” finding because it constitutes agency action “ultra vires; i.e., in excess of its statutory authority.” The District of Oregon stated that the Ninth Circuit had recognized an exception to the application of the statute of limitations where an agency acted in excess of its statutory authority. The District of Oregon concluded that FWS lacked the discretion to ignore its mandatory, statutory duty and that its continuing “noncompliance with the ESA exceeds its statutory authority.” As such, the court held 28 U.S.C. § 2401(a) did not apply to plaintiff’s challenge to compel critical habitat designation.

IV. SHOULD THE STATUTE OF LIMITATIONS BE TOLLED?

There are significant policy justifications for subjecting alleged abuse of the “not prudent” or “not determinable” exception by FWS to judicial review despite accrual of the statute of limitations—namely to prevent the agency from ignoring its statutory duties, thereby undermining clear congressional intent. Moreover, 28 U.S.C. § 2401(a) should be construed as subject to the rebuttable presumption of equitable tolling the Supreme Court announced in Irwin v. Department of Veterans Affairs. However, procedural differences between the two exceptions dictate that the statute of limitations bars challenges of a “not prudent” finding, but it should not bar challenges of agency failure to designate within the statutory deadline after a “not determinable” finding.
A. Significant Policy Considerations Are Implicated by Application of the Statute of Limitations to Bar Challenges of FWS’s “Not Prudent” and “Not Determinable” Exceptions

FWS has employed the “not prudent” and “not determinable” exceptions with such frequency that it has, for all intents and purposes, adopted a policy against critical habitat designation.\(^{248}\) This reflects its stated belief that “designation of ‘official’ critical habitat is of little additional value for most listed species.”\(^{249}\) This is in direct derogation of Congress’s intent that “in most situations the Secretary will, in fact, designate critical habitat at the same time that a species is listed as either endangered or threatened.”\(^{250}\) As observed by the Fifth Circuit, “[i]n practice, the Services have inverted [Congress’s] intent, rendering critical habitat designation the exception and not the rule.”\(^{251}\)

The extent to which courts have set aside FWS’s findings and compelled the agency to designate critical habitat indicates a rejection of FWS’s devaluation of designation.\(^{252}\) Moreover, FWS has acknowledged it has no scientific evidence to support its conclusions about the utility of critical habitat designation.\(^{253}\) However, one recent survey of scientific studies indicates that “species with critical habitat are in fact recovering faster than those without it.”\(^{254}\) Strict application of the statute of limitations could bar hundreds of species from ever receiving a critical habitat designation.\(^{255}\) As stated by the Southern District of New York in *Natural Resources Defense Council v. Fox*, where an agency “charged with a duty by Congress . . . cannot be forced by the Court to carry out its duty because of a statute of limitations, the practical result is a repeal of the mandatory duty itself.”\(^{256}\)

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\(^{248}\) See Parenteau, *supra* note 1, at 1–2, \& n.6. “[FWS has] taken a hard line position against designating critical habitat, not just at the time of listing, but ever.” *Id.* at 1–2.

\(^{249}\) Endangered and Threatened Wildlife and Plants; Notice of Intent To Clarify the Role of Habitat in Endangered Species Conservation, 64 Fed. Reg. 31,871, 31,872 (June 14, 1999).


\(^{251}\) Sierra Club v. U.S. Fish & Wildlife Serv., 245 F.3d 434, 443 (5th Cir. 2001).


\(^{253}\) Suckling & Taylor, *supra* note 71, at 76.

\(^{254}\) *Id.* at 85–86.

\(^{255}\) See Parenteau, *supra* note 1, at 4 n.16, 6 (spreadsheets on file with author).

B. 28 U.S.C. § 2401(a) Should Be Subject to Irwin’s Rebuttable Presumption of Equitable Tolling

The rebuttable presumption of equitable tolling of statutes of limitations in suits against the government established by Irwin should apply to 28 U.S.C. § 2401(a).257 The Court’s recent decision in John R. Sand & Gravel Co. v. United States—which held that a “definitive earlier interpretation of the statute [of limitations]” as “jurisdictional” in nature rebuts this presumption of equitable tolling—bolsters this conclusion.258 As Justice Ginsburg stated, the Court’s holding in John R. Sand & Gravel Co. “implies that Irwin governs the interpretation of all statutes we have not yet construed—including, presumably . . . [28 U.S.C.] § 2401.”259 Indeed, the Ninth and Fifth Circuits have held that 28 U.S.C. § 2401(a) is subject to the rebuttable presumption of equitable tolling.260 The Eleventh Circuit’s conclusion in Center for Biological Diversity v. Hamilton that 28 U.S.C. § 2401(a) is “jurisdictional” failed to even mention Irwin and relied on a D.C. Circuit decision recently called into doubt by the D.C. Circuit itself.261 Applying Irwin’s rebuttable presumption of equitable tolling to 28 U.S.C. § 2401(a) would allow application of the continuing violations doctrine to toll the statutes of limitations.262

C. Despite Policy Concerns, a “Not Prudent” Determination Should Start the Clock for Statute of Limitations Purposes.

Although FWS’s overuse of the “not prudent” exception undermines clear congressional intent that it be exercised rarely, publication does properly start the clock for statute of limitations purposes.263 A “not prudent” finding constitutes final agency action challengeable as arbitrary and capricious under section 706(2) of the APA upon final

259 Id. at 760–61 (Ginsburg, J., dissenting).
260 Cedars-Sinai Med. Ctr. v. Shalala, 125 F.3d 765, 770 (9th Cir. 1997). The Fifth Circuit holds that § 2401(a) is susceptible to the doctrine of equitable tolling. Clymore v. United States, 217 F.3d 370, 374 (5th Cir. 2000).
262 See Irwin, 498 U.S. at 96.
The ESA sets forth no deadline requiring designation of critical habitat after a “not prudent” finding and the decision can stand indefinitely absent challenge. In issuing a “not prudent” finding, the agency takes an affirmative action that can be challenged immediately upon its issuance. As such, because the “not prudent” determination “concretely and definitively affect[s]” the interests of a would-be plaintiff, it starts the clock for the purposes of the statute of limitations.

This comports with the Fifth Circuit’s understanding that a cause of action accrues for the purposes of 28 U.S.C. § 2401(a) when “a party has either actual or constructive knowledge of the violation and a right to enforce his claim.” The publication of a final rule by the Secretary containing a “not prudent” finding is an event which signals to concerned observers that a listed species has not received the protections of critical habitat. Moreover, a “not prudent” determination may serve as the Secretary’s ultimate decision regarding a species’s critical habitat and constitutes a fulfillment of his statutory duty. This makes the Secretary’s “not prudent” determination more like a single, discrete violation of the ESA with lingering effects, as compared to a continuing violation of his ongoing duty. Thus, the clock starts with such a determination for statute of limitations purposes.

D. Failure to Act Within the Statutory Deadline After a “Not Determinable” Finding Should Not Start the Clock for Statute of Limitations Purposes

By contrast, the Secretary’s failure to designate critical habitat within the statutory timeline created by 16 U.S.C. § 1533(b)(6)(C) after a “not determinable” finding is a “failure to act” challengeable under both section 706(1) of the APA and section 1540(g)(1)(C) of the citi-

266 See Nixon, 158 F. Supp. 2d at 989.
267 Schoeffler, 493 F. Supp. 2d at 816.
268 Id. at 815 (citing Vigman v. Community Nat’l Bank & Trust Co., 635 F.2d 455, 459 (5th Cir. 1981).
269 See id. at 816.
272 Id. at 816.
zen suit provision of the ESA. The ESA establishes a mandatory deadline after the Secretary exercises the “not determinable” exception; at deadline’s end, the Secretary must either make a “not prudent” finding or designate critical habitat. FWS acknowledges that the “not determinable” exception is an interim decision that only temporarily delays its duty to designate critical habitat.

The fact that 16 U.S.C. § 1533(b)(6)(C)(ii) has not been repealed or augmented and “unequivocally directs the Service to designate critical habitat . . . must be presumed to be an indication of Congress’s wishes.” The ESA establishes a nondiscretionary, mandatory duty which requires FWS to designate critical habitat to the maximum extent prudent within one year of issuing a “not determinable” finding. In Norton v. Southern Utah Wilderness Society, the Supreme Court stated that section 706(1) of the APA permits review where “an agency failed to take a discrete agency action that it is required to take.” Here, where “Congress by organic statute sets a specific deadline for agency action . . . [t]he agency must act by the deadline.”

Challenges of FWS’s failure to designate critical habitat within the statutory deadline should not be time-barred because the plaintiff “does not complain about what the agency has done but rather about what the agency has yet to do.” “[T]he principles that underlie the purpose of a statute of limitations are not advanced by and do not support barring claims that seek to hold an agency accountable for actions it is required by statute to perform.” Moreover, the statute of limitations should be tolled because the Secretary’s ongoing failure to per-

275 Amended Procedures to Comply with the 1982 Amendments to the Endangered Species Act, 48 Fed. Reg. at 36,065. “[A] finding that Critical Habitat is not determinable may delay its designation, but does not permanently relieve the Secretary from making such a designation.” Id.
276 See S. Appalachian Biodiversity Project, 181 F. Supp. 2d at 887.
279 Forest Guardians v. Babbitt, 174 F.3d 1178, 1190 (10th Cir. 1999).
form his statutory duty to designate critical habitat within the deadline prescribed by section 1533(b)(6)(C)(ii) of the ESA constitutes a continuing violation. The agency’s failure to act does not resemble final agency action, particularly where the Secretary often takes subsequent steps which suggest to concerned citizens that the agency may eventually take the appropriate action. Indeed, because it prevents concerned parties from having “actual or constructive knowledge” of the violation and a right to enforce their claim, the continuing violations doctrine is appropriately applied.

Schoeffler is exemplary of this scenario, where FWS engaged in ongoing proposals and made gestures which the plaintiffs believed indicated that a critical habitat designation would be forthcoming. As such, strict application of the statute of limitations unfairly punishes citizen groups for relying upon FWS’s assertions. As argued by one commentator, strict application of the statute of limitations places undue responsibility for enforcement of the ESA on private citizens and advocacy groups. The Eleventh Circuit’s conclusion that a “reasonably prudent plaintiff would have been aware of the failure of the Secretary to act on the day following the deadline” ignores the troubled history of critical habitat designation and inaccurately construes the agency’s inaction to constitute final agency action. Moreover, such an argument also punishes the agency by discouraging cooperation with citizen groups that may yield designation of critical habitat without litigation.

**Conclusion**

FWS’s unofficial policy against designation of critical habitat has left the majority of endangered and threatened species without the additional protections Congress intended for them to have. Only legal action by concerned citizens groups has been effective in forcing the agency to fulfill its statutory mandate under the ESA. Unfortunately for

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282 See id. at *6; Schoeffler v. Kempthorne, 493 F. Supp. 2d, 805, 821 (W.D. La. 2007).
283 See Schoeffler, 493 F. Supp. 2d at 815.
284 Id. at 816, 820–21.
285 See id. at 816.
286 See id.
287 Butler, supra note 200, at 1143.
288 See Ctr. for Biological Diversity v. Hamilton, 453 F.3d 1331, 1335 (11th Cir 2006); Schoeffler, 493 F. Supp. 2d at 816 (noting that plaintiffs could not infer that FWS’s “ongoing failure to finalize a habitat determination should be perceived as a situation of adverse action, rather than bureaucratic bungling or foot dragging”).
289 See Hamilton, 453 F.3d at 1335; Schoeffler, 493 F. Supp. 2d at 816; Butler, supra note 200, at 1143.
those who believe in the added protections critical habitat designation affords, it appears that the general federal statute of limitations effectively shields FWS from suit where it has abused the “not prudent” finding.

However, FWS’s failure to designate critical habitat after the statutory deadline set by section 1533(b)(6)(C)(ii) of the ESA justifies equitable tolling. The Supreme Court has arguably established a rebuttable presumption that equitable tolling applies in suits against the United States. Moreover, courts have stated FWS’s failure to designate critical habitat violates clear congressional intent. Where, after a “not determinable” finding, FWS subsequently fails to designate critical habitat within the deadline prescribed by section 1533(b)(6)(C)(ii) of the ESA, courts should toll the statute of limitations by application of the continuing violations doctrine. This conclusion furthers the purposes of the ESA by ensuring FWS does not avoid its statutory responsibility to designate critical habitat.