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## Center for biological diversity v. Hamilton

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## *Center for Biological Diversity v. Hamilton*: Eviscerating the Citizen Suit Provision of the Endangered Species Act?

The Endangered Species Act (ESA), a common target for opponents of environmental regulation, recently saw its enforcement powers eroded with the *Center for Biological Diversity v. Hamilton* decision by the Eleventh Circuit Court of Appeals.<sup>1</sup> In *Hamilton*, the court found that the Fish and Wildlife Service's failure to designate critical habitat triggered the statute of limitations and that a theory of continuing violation did not apply. The six-year limit, as interpreted by the *Hamilton* court, applies even when the underlying ESA violation—in this case, a mandatory duty to designate critical habitat—remains unresolved.<sup>2</sup> In other words, the *Hamilton* ruling condones agency inaction. If the Department of the Interior fails to designate critical habitat for an endangered species, and this violation of federal law goes unnoticed for six years, the ESA citizen suit provision is no longer applicable.<sup>3</sup> The *Hamilton* decision contravenes the explicit purpose of the ESA by taking away one of the fundamental accountability mechanisms that Congress incorporated into the Act.

### BACKGROUND ON THE ENDANGERED SPECIES ACT AND THE CITIZEN SUIT PROVISION

Once the Fish and Wildlife Service (FWS) lists a species as endangered, the ESA mandates that FWS designate any of the species' habitat "which is then considered to be critical habitat."<sup>4</sup> Once land has been designated as critical habitat, the land "may require special management considerations or protection,"<sup>5</sup> and federal agencies may not take action that might "result in the destruction or adverse modification

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1. *Ctr. for Biological Diversity v. Hamilton*, 453 F.3d 1331 (11th Cir. 2006).  
2. *See id.* at 1335.  
3. *See id.*  
4. 16 U.S.C. § 1533(a)(3)(A)(i) (2006).  
5. *Id.* § 1532(5)(A). The Ninth Circuit has held that management of an endangered species' critical habitat should address the twin goals of recovery and survival for the species. *See Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 378 F.3d 1059 (9th Cir. 2004).

of” the critical habitat.<sup>6</sup> This mandatory obligation to demarcate a species’ critical habitat concurrently with listing the species as endangered has certain exceptions.<sup>7</sup> One exception is that if the critical habitat of the listed species is “not then determinable,” the ESA allows the FWS to postpone designation of this critical habitat for up to one year.<sup>8</sup>

One of the ESA’s great strengths is its citizen suit provision, allowing any person to file suit against the Secretary of the Interior when she believes that a mandatory ESA provision has gone unenforced.<sup>9</sup> A citizen suit can be filed when “there is alleged a failure of the Secretary to perform any act or duty under [section 1533 of the Endangered Species Act] which is not discretionary with the Secretary.”<sup>10</sup> This citizen suit provision has played a vital role in ESA enforcement since budgetary allocations for the Act’s enforcement have never matched its wide-ranging scope.<sup>11</sup> Due to these fiscal constraints, certain ESA mandates, such as the designation of critical habitat for endangered species, have been “driven almost exclusively by litigation” by nongovernmental actors.<sup>12</sup>

THE *CBD V. HAMILTON* CASES: APPLYING A STRICT  
STATUTE OF LIMITATIONS TO ESA CLAIMS

The *Hamilton* case arose from a dispute over the status of two small species of fish in the southeastern United States.<sup>13</sup> The FWS listed the Blue Shiner and the Goldline Darter as endangered on April 22, 1992.<sup>14</sup> Blue Shiners and Goldline Darters are only found in the Cahaba, Coosa, Coosawattee, Ellijay, and Cartecay River systems located in Alabama and Northern Georgia.<sup>15</sup> Once the FWS listed the two species as endangered, it had a duty under the ESA to designate critical habitat within one year. However, the FWS failed to designate critical habitat for the Blue Shiner and the Goldline Darter by the extended deadline of April 22, 1993. When the *Hamilton* case was filed on September 2, 2004,

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6. 16 U.S.C. § 1536(2).

7. *Id.* § 1533(b)(6)(C).

8. *Id.* § 1533(b)(6)(C)(ii).

9. *Id.* § 1540(g)(1)(C).

10. *Id.*

11. *See S. Appalachian Biodiversity Project v. U. S. Fish & Wildlife Servs.*, 181 F. Supp. 2d 883, 886 (E.D. Tenn. 2001).

12. *Id.* at 886.

13. *See Ctr. for Biological Diversity v. Hamilton*, 385 F. Supp. 2d 1330, 1332 (N.D. Ga. 2005), *aff’d*, 453 F.3d 1331 (11th Cir. 2006).

14. *Id.* at 1332.

15. *Id.*

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the FWS and the Department of the Interior had still done nothing to designate critical habitat for the two species.<sup>16</sup>

DISTRICT COURT DECISION IN *CBD V. HAMILTON*

The Center for Biological Diversity (CBD) brought suit against Sue Hamilton, Regional Director of the Fish and Wildlife Service, and other parties, seeking an injunction requiring the FWS to designate a critical habitat for the two species of minnows within a year.<sup>17</sup> The FWS did not contest its failure to designate critical habitat—a nondiscretionary duty under the ESA—but it filed a motion to dismiss, claiming that this failure was irrelevant.<sup>18</sup> The FWS argued that CBD’s claim was barred under the Federal Tort Claims Act by the six-year statute of limitations on civil claims against the federal government.<sup>19</sup> According to the Federal Tort Claims Act, this six-year period begins “after the right of action first accrues.”<sup>20</sup> Since the CBD’s right to file a citizen suit on behalf of the minnows began on April 22, 1993—the date when the agency first failed to designate critical habitat—defendants argued that any suit filed after April 22, 1999, was barred by the statute of limitations.<sup>21</sup> The CBD, however, argued that it could proceed under a “continuing violation” theory.<sup>22</sup> According to the CBD, “[d]efendants’ failure to designate a critical habitat for the minnows is a continuing violation, [and] does not constitute final agency action, and, thus . . . the six-year limitations period has not expired.”<sup>23</sup>

The district court in the Northern District of Georgia disagreed with CBD’s continuing violation theory. In the trial court’s opinion, the ESA “does not impose a continuing duty on Defendants to designate a critical habitat.”<sup>24</sup> Rather, the court declared that the ESA allows defendants to designate critical habitat within a one year period after listing the endangered species, “but *not later than* the close of such additional year [Defendants] *must* publish a final regulation, based *on such data as may be available at that time.*”<sup>25</sup> After this one year period, Judge Camp of the Northern District of Georgia reasoned, the ESA afforded defendants no additional time to designate a critical habitat for the minnows and

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16. *Id.* at 1332, 1334.

17. *Id.* at 1332.

18. *Id.*

19. *Id.*

20. 28 U.S.C. § 2401(a) (2006).

21. *Ctr. for Biological Diversity v. Hamilton*, 385 F. Supp. 2d 1330, 1335–36 (N.D. Ga. 2005), *aff’d*, 453 F.3d 1331 (11th Cir. 2006).

22. *Id.* at 1332.

23. *Id.*

24. *Id.* at 1336.

25. *Id.* (quoting 16 U.S.C. § 1533(b)(6)(C)(ii)) (emphasis in opinion).

imposed no continuing duty on defendants regarding such designation.<sup>26</sup> Therefore, the court held there was no continuing violation.<sup>27</sup>

In holding that the six-year time limit applied, Judge Camp reasoned that a holding in favor of a continuing violation would “allow Plaintiffs to sue for the violation in perpetuity.”<sup>28</sup> The court also pointed out that plaintiffs retained an alternate remedy, in that CBD could file a petition with the Secretary of the Interior to establish a critical habitat for the minnows. Such a petition “would trigger a mandatory duty for the Secretary to promptly conduct a review of the situation and take appropriate action.”<sup>29</sup>

In summary, the district court held that any violation of the ESA occurred by April 22, 1993, when the statute of limitations began. Any suit on behalf of the minnows should have been filed within six years of that date.<sup>30</sup>

ELEVENTH CIRCUIT DECISION IN *CBD V. HAMILTON*

After the trial court dismissed the suit, the CBD appealed the verdict to the Eleventh Circuit, which broadly affirmed Judge Camp’s rationale for dismissal.<sup>31</sup> Disagreeing with the CBD’s contention that each day where critical habitat remains undesignated creates an additional cause of action, the Eleventh Circuit found that the ESA favors a single violation, accruing on the day following the deadline.<sup>32</sup> The court held that this interpretation fit with the larger Eleventh Circuit doctrine on continuing violations: “this Circuit distinguishes between the present consequence of a one time violation, which does not extend the limitations period, and the continuation of that violation into the present, which does” extend the statute of limitations.<sup>33</sup> The Court found that only the *effects* of the past violation—harm to the animals from undesignated critical habitat—continued beyond the limitations period, while the violation itself (the failure to designate critical habitat) did not persist. Therefore there was no continuing violation in this case.

Moreover, the court limited the continuing violation doctrine to circumstances where a reasonably prudent plaintiff would have been unaware of a violation: “If an event or series of events should have alerted a reasonable person to act to assert his or her rights at the time of

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26. *Id.*

27. *Id.*

28. *Id.* at 1337.

29. *Id.*

30. *Id.*

31. *Ctr. for Biological Diversity v. Hamilton*, 453 F.3d 1331, 1333 (11th Cir. 2006).

32. *Id.* at 1334–35.

33. *Id.* at 1335 (quoting *City of Hialeah v. Rojas*, 311 F.3d 1096, 1101 (11th Cir. 2002)).

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the violation, the victim cannot later rely on the continuing violation doctrine.<sup>34</sup> In this case the court found that a reasonably prudent plaintiff should have known of the failure to designate critical habitat on the day after the deadline passed, so there was no continuing violation.<sup>35</sup> Since there was no continuing violation, plaintiffs were entitled to no relief, and furthermore, the FWS had no continuing duty to designate critical habitat for the Blue Shiner and the Goldline Darter.

A CRITIQUE OF THE *HAMILTON* HOLDING

The *Hamilton* holding dilutes the ESA by harshly applying strict limits on “continuing violation” theories for governmental inaction. Moreover, the *Hamilton* court wrongly shifted the burden for ESA enforcement within the statute of limitations period from the FWS to private parties.

1. *The Continuing Violation Debate in CBD v. Hamilton versus Southern Appalachian*

The *Hamilton* decision greatly undermined the purpose of the ESA. The ESA is widely acknowledged as the most powerful wildlife protection statute in existence and is intended to conserve endangered species and their ecosystems.<sup>36</sup> The Eleventh Circuit, by hewing to its narrow definition of a continuing violation for statute of limitations purposes, strayed from the far-reaching nature of the Endangered Species Act.

Interestingly, a neighboring federal district court reached the opposite conclusion as that of the *Hamilton* court. In *Southern Appalachian Biodiversity Project v. United States Fish and Wildlife Services*, a suit was brought in a district court in Tennessee (a court located in the Sixth Circuit) on behalf of sixteen endangered or threatened species—not far from the native habitat of the *Hamilton* minnows.<sup>37</sup> Magistrate Judge Inman of the Eastern District of Tennessee held that although critical habitat was not designated by the deadline of

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34. *Id.* (quoting *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1222 (11th Cir. 2001)).

35. *Id.*

36. See, e.g., Federico M. Cheever, *An Introduction to the Prohibition Against Takings in Section 9 of the Endangered Species Act of 1973: Learning to Live With A Powerful Species Preservation Law*, 62 U. COLO. L. REV. 109 (1991); see also *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) (halting a multimillion dollar and nearly-completed dam construction project to protect the endangered snail darter fish, because “[t]he plain intent of Congress in enacting [the Endangered Species Act] was to halt and reverse the trend toward species extinction, *whatever the cost.*” (emphasis added)).

37. *S. Appalachian Biodiversity Project v. U. S. Fish & Wildlife Servs.*, 181 F. Supp. 2d 883, 884 (E.D. Tenn. 2001).

March 17, 1994, the § 2401(a) statute of limitations did not bar a suit filed on June 29, 2000, a few months past the six-year limit.<sup>38</sup> Judge Inman declared that the FWS's failure to designate critical habitat must be construed as a continuing violation of the Endangered Species Act:

The non-repeal of 16 U.S.C. § 1533(b)(6)(C), which unequivocally directs the [FWS] to designate critical habitat within one year of listing a species as endangered, must be presumed to be an indication of Congress' wishes . . . . The statute of limitations continues to run anew each and every day that the Service does not fulfill the affirmative duty required of it. In short, the statute of limitations has never commenced to run.<sup>39</sup>

In both *Southeast Appalachian* and *Hamilton*, six years had clearly passed since a cause of action had accrued. Yet the *Southern Appalachian* court adopted a much more reasonable interpretation of the statute of limitations issue, adhering to the spirit of ESA far better than the *Hamilton* holding. In *Hamilton*, the court twisted the ESA's meaning by viewing it in the light of protecting bureaucratic inertia rather than protection of endangered species. The *Hamilton* trial court declared that any violation occurred only once: "upon expiration of the one-year period."<sup>40</sup> After this, the FWS would have no further responsibility to designate critical habitat, even though the species' need for such habitat would still continue to exist.

The *Hamilton* holding does not mesh well with the ESA's explicitly stated purpose of ensuring lasting endangered species protection. The ESA's purpose is to conserve endangered species and their habitats; this sort of conservation necessitates a long-term strategy.<sup>41</sup> Clearly the authors of the Act did not intend it as a one-time fix to an environmental crisis. The ESA was designed to create an ongoing regulatory regime, with the goal of perpetuating the habitats and populations of threatened species. As the *Southern Appalachian* court pointed out, the one-year deadline was intended to ensure that critical habitat would actually be designated for endangered species—not as an easy way for the FWS to shirk its statutory responsibilities.<sup>42</sup> By enforcing a six-year statute of limitations, the *Hamilton* court has sanctioned agency inaction as an acceptable response to the FWS's conservation duties. The court seemed to prefer to permit further harm to an already threatened species rather

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38. *Id.* at 887.

39. *Id.*

40. *Ctr. for Biological Diversity v. Hamilton*, 385 F. Supp. 2d 1330, 1336 (N.D. Ga. 2005), *aff'd*, 453 F.3d 1331 (11th Cir. 2006).

41. 16 U.S.C. § 1531(b) (2006).

42. *See id.*

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than to insist that a government agency fulfill its mandatory responsibilities.

The Eleventh Circuit should have adopted the reasoning of Southern Appalachian. Congress designed the mechanism for critical habitat designation such that it must occur shortly after a species was labeled as endangered. The point of this one year deadline was not, despite what the *Hamilton* court seemed to suggest, to present a narrow temporal window in which the critical habitat might be designated. A failure to designate this critical habitat within the statutorily allotted time violates the clearly defined purpose of the Endangered Species Act, which is to conserve endangered species and their habitats before they dwindle to extinction. A suit based on a failure to designate critical habitat should be permitted, no matter how many years after the initial violation occurred. Anything else makes a mockery of a law that was intended to create a powerful system to protect the most threatened species in the United States.

2. *Hamilton Takes an Overly Optimistic View of the Role of Citizen Enforcement in ESA Litigation*

Perhaps even more disturbingly, the *Hamilton* court appears to assume that private citizens and advocacy groups should assume primary responsibility for Endangered Species Act enforcement. The Eleventh Circuit speaks repeatedly of the requirement that in order to use the continuing violation theory, a “reasonably prudent plaintiff” must be unable to determine that a violation had occurred.<sup>43</sup> This language is predicated on an assumption that groups like the CBD should be closely watching the activities of the Fish and Wildlife Service to ensure that the Endangered Species Act is carried out. In fact, the responsibility to implement and ensure the proper enforcement of the Endangered Species Act has been delegated by law to the Fish and Wildlife Service.<sup>44</sup> The Eleventh Circuit’s holding places the burden on citizen groups and private plaintiffs—who will likely be even more poorly funded than the FWS—to monitor and enforce the law. While governmental oversight by watchdog groups should be encouraged, the responsibility to enforce the law lies with the government, not with advocacy groups.

The Endangered Species Act does not appear to be designed with a citizen enforcement model in mind. The Secretary of the Interior and the FWS have “nondiscretionary” duties to designate critical habitat. If the government is able to legally neglect this responsibility, the law serves little purpose. What if the FWS takes the *Hamilton* decision at face value

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43. *Ctr. for Biological Diversity v. Hamilton*, 453 F.3d 1331, 1336 (11th Cir. 2006).

44. *See S. Appalachian Biodiversity Project v. U. S. Fish & Wildlife Servs.*, 181 F. Supp. 2d 883, 884–85 (E.D. Tenn. 2001).

and decides to abandon its responsibility to designate critical habit under the Endangered Species Act? Enforcement of the ESA's critical habitat provisions would be limited to the scarce time and resources of outsiders willing to litigate against the federal government. In reality, this is how much of the ESA is enforced today.<sup>45</sup> Unfortunately, the *Hamilton* decision seems to shift the legal burden of enforcement from the shoulders of appropriate government agencies, which is where Congress intended this burden to lie, into the hands of concerned outsiders, who will never have the resources to match those of the U.S. government.

The *Hamilton* court rightly pointed out that the plaintiffs retained the remedy of petitioning the Secretary of Interior to designate critical habitat for the two species.<sup>46</sup> However, this remedy only serves to postpone the problem: the FWS might very well continue to fail to designate critical habitat after such a petition, leaving threatened species in no better a situation than after the *Hamilton* case. Either way, the court's holding diverts responsibility for the ESA's enforcement into the hands of private parties, who should not have to bear this burden. If the U.S. government fails to enforce its own law, courts should require the government to act rather than punishing private parties like the plaintiffs in *Hamilton*, who merely want to protect the two species of minnows which are supposed to benefit from the ESA.

#### CONCLUSION

By precluding relief under a continuing violation theory, the Eleventh Circuit essentially held that the FWS can shirk its statutory responsibilities if it avoids public detection for long enough. The court lost sight of the ESA's overriding purpose of endangered species protection by placing the burden on a "reasonably prudent plaintiff" to detect violations of the act. If the *Hamilton* holding is adopted by other circuits, the public will lose a valuable tool for environmental statute enforcement. An even more worrisome specter would arise if courts expanded the *Hamilton* holding to statutes other than the ESA. Statutes that arguably have a greater impact on human health and welfare, like the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Clean Water Act, could see their regulatory power greatly curtailed if private plaintiffs do not remain constantly vigilant for violations. The authors of the Endangered Species Act and these other acts did not intend for them to be paper tigers. The purpose of these acts is to regulate and preserve the environment, with

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45. See *id.* at 886.

46. *Ctr. for Biological Diversity v. Hamilton*, 385 F. Supp. 2d 1330, 1337 (N.D. Ga. 2005), *aff'd*, 453 F.3d 1331 (11th Cir. 2006).

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long-term ecosystem conservation and restoration as the ultimate goal. The *Hamilton* decision ignores the purposes of the ESA in order to adhere to a narrow reading of the Federal Tort Claims Act; in doing so, it neglects to provide for the very species that the ESA was intended to protect.

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