

# Flying in the Face of the Endangered Species Act? Delisting the West Virginia Northern Flying Squirrel

## INTRODUCTION

The West Virginia northern flying squirrel (*Glaucomys sabrinus fuscus*) is a small, nocturnal mammal that uses folds of skin stretching between its arms and legs to glide about its home in the southern Appalachian Mountains of West Virginia and Virginia.<sup>1</sup> Today, there are forty-three species of flying squirrel, but the northern flying squirrel is one of only two species found in North America.<sup>2</sup> In 1985, the Fish and Wildlife Service (FWS) listed the West Virginia northern flying squirrel as an endangered species under the Endangered Species Act (ESA)<sup>3</sup> when scientists documented only ten living squirrels.<sup>4</sup> However, in 2008, the FWS removed the squirrel from the endangered species list because it found that the squirrel was “persisting” throughout its range.<sup>5</sup>

In a recent court case, *Friends of Blackwater v. Salazar*, an environmental group challenged the squirrel’s delisting as a violation of the ESA.<sup>6</sup> Their main claims were that the squirrel should not have been delisted before its recovery plan<sup>7</sup> goals had been met and that the FWS’s use of “persistence” data—rather than population data—was an unacceptable measure of the squirrel’s status.<sup>8</sup> The D.C. district court found that the recovery plan goals did not need to be satisfied before delisting and that persistence data may be employed to delist the squirrel.<sup>9</sup> Thus, the court held that the FWS properly delisted the squirrel.<sup>10</sup>

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1. U.S. FISH AND WILDLIFE SERVICE, APPALACHIAN NORTHERN FLYING SQUIRRELS RECOVERY PLAN 1-3 (1990); *Friends of Blackwater v. Salazar*, 691 F.3d 428, 430 (D.C. Cir. 2012).

2. *Flying Squirrel*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/211703/flying-squirrel> (last visited Jan. 21, 2013).

3. Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006).

4. *Friends of Blackwater*, 691 F.3d at 430.

5. Endangered and Threatened Wildlife and Plants; Final Rule Removing the Virginia Northern Flying Squirrel (*Glaucomys sabrinus fuscus*) From the Federal List of Endangered and Threatened Wildlife, 73 Fed. Reg. 50,226, 50,227 (Aug. 26, 2008) [hereinafter *Delisting Rule*].

6. 691 F.3d 428 (D.C. Cir. 2012).

7. U.S. FISH AND WILDLIFE SERVICE, *supra* note 1, at 18. The recovery plan for the West Virginia northern flying squirrel enumerated four goals, one of which was to stabilize or expand the squirrel populations in a minimum of 80 percent of the designated recovery area. *Id.*

8. *Friends of Blackwater*, 691 F.3d at 432, 434.

9. *Id.* at 433, 435.

By allowing the use of persistence data, this decision may make it easier for the FWS to delist other species that similarly lack sufficient population data, and thereby weaken the protective power of the ESA.

## I. BACKGROUND

### A. *The Endangered Species Act*

The ESA stands as one of the strongest legal tools to protect species at risk of extinction.<sup>11</sup> The ESA was adopted in 1973 in order to “conserve to the extent practicable the various species of fish or wildlife and plants facing extinction.”<sup>12</sup> Because diverse species are of “esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people,” the ESA strives to promote biodiversity by protecting threatened and endangered species and their critical habitat.<sup>13</sup> The Secretary of the Interior decides whether to list a species as endangered or threatened by using the “best scientific data available” and determining whether the species is threatened “because of any of the following factors: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.”<sup>14</sup>

In addition to protecting species from extinction, a primary aim of the ESA is to “recover” species to the point where they are no longer threatened.<sup>15</sup> Toward this end, the ESA requires the Secretary to develop and implement “recovery plans” (RPs) for the “conservation and survival of endangered and threatened species.”<sup>16</sup> These RPs “shall” incorporate “objective, measurable criteria which, when met, would result in a determination . . . that the species be removed from the list.”<sup>17</sup> A species may be delisted only if removal is “supported by the best scientific and commercial data available to the Secretary” and “if such data substantiate that it is neither endangered nor threatened . . . .”<sup>18</sup> Furthermore, a delisting decision “shall be made in accordance” with the five statutory factors of section 4(a)(1).<sup>19</sup>

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10. *Id.* at 436.

11. J. Alan Clark et al., *Improving U.S. Endangered Species Act Recovery Plans: Key Findings and Recommendations of the SCB Recovery Plan Project*, 16 CONSERVATION BIOLOGY 1510, 1511 (2002).

12. 16 U.S.C. § 1531(a)(4) (2006).

13. 16 U.S.C. § 1531(a)(3), (b).

14. 16 U.S.C. § 1533(a)(1), (b)(1)(A).

15. *See Friends of Blackwater v. Salazar*, 691 F.3d 428, 436 (D.C. Cir. 2012).

16. 16 U.S.C. § 1533(f)(1).

17. 16 U.S.C. § 1533(f)(1)(B)(ii).

18. 50 C.F.R. § 424.11(d)(2) (1984).

19. 16 U.S.C. § 1533(a)(1), (c).

## B. Case Summary

At issue in the recent case *Friends of Blackwater v. Salazar* is whether the FWS complied with the ESA in its decision to delist the West Virginia northern flying squirrel. In particular, the court decided: 1) whether the ESA requires that RP criteria be met before a species may be delisted; and 2) whether using data on the squirrel's persistence rather than data on its population violated the statutory requirement that the FWS use the "best scientific data available" to make delisting decisions.<sup>20</sup>

### 1. Recovery Plans are Non-binding

The court held that the ESA does not require that RPs be met before a species can be delisted.<sup>21</sup> The court reviewed the Secretary's interpretation that the RP is a non-mandatory guideline under the two-step framework from *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>22</sup> In step one, a court determines whether a statute is ambiguous; if it is, then under step two, a court defers to agency interpretation so long as it is a "permissible construction" of the statute.<sup>23</sup> Here, under step one, the court concluded that the plain language of the statute is ambiguous about whether RP criteria must be met before delisting.<sup>24</sup> The section 4(f) language that the Secretary "shall develop and implement" an RP can be interpreted to mean that RPs place a binding constraint on the Secretary's delisting analysis.<sup>25</sup> On the other hand, the section 4(c) language that a decision to delist "shall be made in accordance" with the five statutory factors of section 4(a)(1) can be interpreted to mean that the RP goals do not need to be met in order to delist so long as the five statutory factors are fulfilled.<sup>26</sup> Just because the Secretary "shall" develop and implement an RP, does not mean that that Secretary "shall" consult the RP in making a delisting decision.<sup>27</sup> Furthermore, although meeting the RP criteria "would result in a determination . . . that the species be removed from the list," it does not follow that a species cannot achieve recovery without meeting the specific goals of the RP.<sup>28</sup> Under step two, the court determined that the Secretary's interpretation of a non-binding RP was "permissible" because the FWS "fairly analogize[d] a recovery plan to a map or set of directions that provides objective and measurable steps to guide a traveler to his

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20. *Friends of Blackwater*, 691 F.3d at 433, 435.

21. *Id.* at 433–34; *see Fund for Animals v. Rice*, 85 F.3d 535, 547–48 (11th Cir. 1996) (maintaining that "the Recovery Plan is not a document with the force of law" and is "for guidance purposes only").

22. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

23. *Friends of Blackwater*, 691 F.3d at 432; *Chevron*, 467 U.S. at 843.

24. *Friends of Blackwater*, 691 F.3d at 428, 433.

25. *Id.* at 432–34.

26. *Id.*

27. *Id.* at 432–33.

28. *Id.* at 433.

destination.”<sup>29</sup>

2. “Persistence” Data May Qualify as the “Best Scientific Data Available”

The court next established that persistence data could qualify as the “best scientific data available” in determining whether a species should be delisted.<sup>30</sup> The FWS defined “persistence” as “continuing captures of [a species or subspecies] over multiple generations at previously documented sites throughout the historical range.”<sup>31</sup> To collect the persistence data, the FWS periodically recorded the presence or absence of squirrels at 107 nest box capture sites placed throughout the squirrel’s range.<sup>32</sup> The FWS reasoned that the persistence of squirrels at a single monitoring site over five years indicated successful reproduction since the squirrels have an average lifespan of three years.<sup>33</sup> Typically population data is used to determine whether a species is threatened or endangered, but the court concluded, in accordance with *Southwest Center for Biological Diversity v. Babbitt*,<sup>34</sup> that when there is no population data, “the Secretary has no obligation to conduct independent studies” and is “entitled to rely upon the best data available to it.”<sup>35</sup> In this case, the best data available concerned the persistence of the species, so the Secretary was entitled to use it.<sup>36</sup> The data on persistence showed that the squirrel “persist[ed] throughout its historic range” and thus the FWS “could reasonably find the species’ survival was no longer threatened by loss of habitat.”<sup>37</sup>

The court concluded that because the Secretary “reasonably interpreted” the RP as non-binding and because persistence data constituted the “best scientific data available,” the FWS did not violate the ESA in delisting the West Virginia northern flying squirrel.

## II. ANALYSIS

Although the court reached a convincing conclusion in regards to the recovery plan issue, the holding that persistence data may be used in the delisting decision is problematic because it potentially weakens the protective

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29. *Id.* at 434.

30. *Id.* at 435.

31. *Id.* at 431; Delisting Rule, 73 Fed. Reg. 50,226, 50,227 (Aug. 26, 2008).

32. Delisting Rule, 73 Fed. Reg. at 50,227; Endangered and Threatened Wildlife and Plants; Proposed Rule to Remove the Virginia Northern Flying Squirrel (*Glaucomys sabrinus fuscus*) From the Federal List of Endangered and Threatened Wildlife, 71 Fed. Reg. 75,924, 75,926 (proposed Dec. 19, 2006).

33. Delisting Rule, 73 Fed. Reg. at 50,227.

34. *Sw. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 60–61 (D.C. Cir. 2000).

35. *Friends of Blackwater*, 691 F.3d at 434–35.

36. *Id.* at 435.

37. *Id.*

power of the ESA. Furthermore, even though the ESA does not unambiguously require that RPs be met before delisting, this decision raises the question of whether the statute ought to make RPs mandatory.

#### A. *Mandatory Recovery Plans Might Strengthen the ESA*

The ESA does not mandate that RPs be satisfied before a species is delisted, but should it? Some organizations have suggested that the ESA could be strengthened if RPs were made mandatory.<sup>38</sup> RPs play an important and beneficial role. Research indicates that species with RPs are more likely to improve than those without.<sup>39</sup> RPs are typically developed by scientists and the goals they enumerate are supposed to be goals that, when met, indicate that a species has been recovered.<sup>40</sup> Thus, mandatory RPs might better ensure that delisting is not arbitrary or an abuse of discretion.

On the other hand, “given the uncertainties . . . inherent in conservation biology, recovery plans are also necessarily tentative.”<sup>41</sup> It does not make sense to mandate an RP that ultimately does not relate to a species’ recovery, even if originally it was so designed. A species might recover in a way not contemplated by the recovery plan, or conversely, meeting all the recovery plan goals might fail to recover a species. Because there are many unforeseen variables to species recovery, it is understandable that courts are reluctant to require RP compliance.<sup>42</sup>

However, RPs could be both flexible and mandatory. An agency could be required to meet RP goals, but these goals could be adaptable. The ESA has mechanisms built into it that allow an RP to be revised as needed.<sup>43</sup> If RP goals are inadequate, they can be changed to more appropriately reflect the recovery needs of the species.<sup>44</sup> This process might be more cumbersome for the agency, but it may be the best way to balance the needs of flexibility and guided decision making. A mandatory but flexible RP would ensure that an agency

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38. See CTR. FOR BIOLOGICAL DIVERSITY, A FUTURE FOR ALL: A BLUEPRINT FOR STRENGTHENING THE ENDANGERED SPECIES ACT, 7-8 (2011), available at <https://www.biologicaldiversity.org/campaigns/esa/pdfs/A-Future-for-All.pdf>.

39. See *id.* at 7 (citing Martin F. J. Taylor et al., *The Effectiveness of the Endangered Species Act: A Quantitative Analysis*, 55 BIOSCIENCE 360 (2005)).

40. 16 U.S.C. § 1533(f)(1)(B)(ii) (2006).

41. Paul Weiland, *D.C. Circuit Holds that Recovery Plan Objectives are Not Binding on the Services*, ENDANGERED SPECIES LAW & POL’Y (Sept. 2, 2012), <http://www.endangeredspecieslawandpolicy.com/2012/09/articles/court-decisions/dc-circuit-holds-that-recovery-plan-objectives-are-not-binding-on-the-services/> (citing Dale D. Goble, *Recovery*, in ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES 90 (Donald C. Baur & William Robert Irvin eds., 2010)).

42. See *id.*

43. 16 U.S.C. § 1533(f)(4); See Erik Harvey et al., *Recovery Plan Revisions: Progress or Due Process?*, 12 ECOLOGICAL APPLICATIONS 682, 682 (2002) (“The Endangered Species Act, ESA (16 U.S.C. 1531 et seq.), provides for flexibility and responsiveness in the recovery planning process by authorizing revision of recovery plans when new information arises or when the status of the species changes.”).

44. See Harvey et al., *supra* note 43, at 682.

could not arbitrarily ignore the carefully considered factors that are intended to result in recovery.

*B. Persistence Data Should Be Used Cautiously*

The dissent in this case presented a convincing argument that the FWS improperly relied on persistence data for its “best available data.” Although there are no clear-cut rules for what qualifies under the “best available data” requirement,<sup>45</sup> the dissent argued that using the squirrel’s “mere presence” is akin to delisting the squirrel on the basis of “no data.”<sup>46</sup> Whereas “‘population’ is a measure of quantity, ‘persistence’ is a measure of mere survival, or existence, of the species.”<sup>47</sup> As public comments to the delisting rule pointed out, the FWS did not clearly define “persistence” and this imprecise measure might have overestimated squirrel numbers by counting immigrating squirrels from separate populations.<sup>48</sup> The FWS dismissed this concern and simply stated that “[t]he Service considers persistence to be the best indicator of successfully reproducing populations for this subspecies, given its poor detectability, its life history characteristics, and the 20+ years of data from presence/absence surveys.”<sup>49</sup> The majority deferred to the FWS, finding persistence to be an adequate measure because “it is relevant to a determination whether a species is endangered.”<sup>50</sup> However, without any data on population trends, it is difficult to ascertain whether a species is actually recovered to the point that it can be delisted. A species may be “persisting” but actually decreasing in population, depending on how persistence data is collected. Thus, persistence data may be an impermissible substitute for population data.

The court’s ruling that the FWS does not have to conduct any surveys and can rely on uncertain data such as persistence may have dire implications for other listed species that lack population data. Such a ruling may create a perverse incentive for the FWS to delist a species when it does not have the resources to adequately determine the species’ population. Furthermore, where does one draw the line for the best available data? This decision seems to expand the possibilities to *any* scientific data, so long as it is the best or only data. It also reinforces the rule that the FWS does not need to take any steps toward gathering better data when the only available data is deficient.

There is a natural conflict between preserving limited agency resources and making accurate listing and delisting decisions.<sup>51</sup> It is understandable that

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45. Holly Doremus, *The Purposes, Effects, and Future of the Endangered Species Act’s Best Available Science Mandate*, 34 ENVTL. L. 397, 417 (2004) (“So far . . . detailed evaluation of [the best available science mandate’s] goals and functions has been conspicuously lacking.”).

46. *Id.* at 450–51.

47. *Id.* at 451.

48. Delisting Rule, 73 Fed. Reg. 50,226 5, 50,227 (Aug. 26, 2008).

49. *Id.*

50. *Friends of Blackwater v. Salazar*, 691 F.3d 428, 439 (D.C. Cir. 2012).

51. *See* Doremus, *supra* note 45, at 445–46.

the FWS would want flexibility in its delisting decision given its limited resources. If the squirrel really is recovered and this can be discerned through less costly measures such as persistence, it makes sense that the FWS would forgo collecting more accurate population data. That money might be better spent protecting other species. However, given all the resources already spent on listing and recovering the squirrel, it also is necessary to be certain that the squirrel is ready to be delisted before delisting it. Standards for delisting should be high to avoid the wasteful process of re-listing the squirrel.

One potential solution to this balancing problem is to maintain high delisting standards but allow those interested in delisting the squirrel (i.e., logging companies) to finance population surveys that the FWS could then rely on. The FWS would still be responsible for the delisting decision, but interested parties could speed up the process by collecting the necessary data much sooner than the FWS might be able to conduct population surveys. Bias in favor of business is a concern, but this could be addressed by giving the FWS the discretion to only accept high-quality data from third-party sources.

The FWS may have a valid claim that collecting population data would be too difficult or costly in this situation,<sup>52</sup> but because persistence data is not as indicative of a species' status, persistence data should be used cautiously and interpreted conservatively in order to ensure that species are receiving full protection as envisioned by the ESA.

#### IV. CONCLUSION

Although the ESA does not require that RP criteria be met before a species is delisted, the FWS nonetheless may have improperly delisted the West Virginia northern flying squirrel by relying on squirrel "persistence" data rather than more accurate alternatives. Congress intended the ESA to be a powerful tool to protect species from extinction. In light of the purpose of the ESA, the FWS should have erred on the side of protecting the squirrel. Instead, this recent court decision weakened the power of the ESA and imperiled listed species that do not have adequate population data.

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52. Delisting Rule, 73 Fed. Reg. at 50,227 (The squirrels were found to be "elusive and hard to capture.").