Transnational Environmental Law, 7:3 (2018), pp. 491–513 © 2018 Cambridge University Press
doi:10.1017/S2047102518000109

ARTICLE

Adversarial Legalism and Biodiversity Protection in the United States and the European Union

Yaffa Epstein*

First published online 24 May 2018

Abstract
This article compares the use of litigation to enforce species protection law in the European Union (EU) with that of the United States (US). Recent legal disputes over wolf hunting on both continents offer useful case studies. Focusing on three aspects of litigation – namely, (i) against whom claims are brought, (ii) who can bring claims, and (iii) the types of claim that can be brought – the analysis contrasts US-style adversarial legalism with its European counterpart, or 'Eurolegalism', and assesses what each approach is able to deliver in terms of the legal protection of wolves. It is argued that Eurolegalism helps to explain the development of species protection law in the EU and its similarities to and differences from the American experience.

Keywords: EU Habitats Directive, US Endangered Species Act, Wolf, Federalism, Eurolegalism, Adversarial legalism

1. INTRODUCTION

In late 2009 and early 2010, amidst considerable legal and political controversy, licensed hunting of the gray wolf commenced in both the United States (US) and Sweden for the first time in many years.[1] This dubious milestone did not end the controversies over wolf hunting, but rather ignited further litigation and changes

* Uppsala University, Faculty of Law, Uppsala (Sweden).
Email: yaffa.epstein@jur.uu.se.
Thanks are owed to Jan Darpö, Anna Jonsson Cornell, Brad Karkkainen, Gabriel Michanek, Ylva Arvidsson, Sanja Bogojević, Melina Malafry, Dorota Leczykiewicz, Anna-Sara Lind, Agnes Hellner, Chris Hilson, Andreas Hofmann, and the participants in the Uppsala University American Studies Higher Research Seminar and the Uppsala University Environmental Law Higher Seminar, as well as two anonymous reviewers, for very helpful comments. This research was supported by the Swedish Environmental Protection Agency.

[1] H.M. Babcock, 'The Sad Story of the Northern Rocky Mountain Gray Wolf Reintroduction Program' (2013) 24(1) *Fordham Environmental Law Review*, pp. 25–62, at 48; Y. Epstein, 'Population-Based Species Management across Legal Boundaries: The Bern Convention, Habitats Directive, and the Gray Wolf in Scandinavia' (2013) 25 *Georgetown International Environmental Law Review*, pp. 549–87, at 577.

in policy.[2] As a result, the legal status of wolves continues to vacillate, and remains uncertain, to the present day.[3]

In this article, I use ongoing conflicts over the legal protection of wolves to compare some key aspects of laws governing species protection in the US and the European Union (EU) and, in particular, Sweden. Centralized authorities in both jurisdictions have tried to provide greater protection for wolves than some of their states have desired.[4] As a reflection of larger structural differences between the EU and US political systems, the EU Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora (Habitats Directive)[5] envisions a greater role for Member States in managing protected species than does the US Endangered Species Act (ESA).[6] That is, the US federal government maintains more control over species protection within its territories than the EU.[7] By expanding the availability of public interest litigation, however, the EU has also facilitated centralization of control in this area.

Though not without its flaws, the ESA is considered to be very successful in maintaining biodiversity and preventing extinctions.[8] Its strength comes not only from the strong centralized authority of the federal government, but also from the strong decentralized authority that empowers citizens and citizen groups to participate in its implementation, administration and enforcement.[9] As the EU gained more federation-like powers, it is perhaps not surprising that regulatory power has continued to shift to the central authority.[10] Yet, EU law also shifts significant

2 M. Williams, 'Lessons from the Wolf Wars: Recovery v. Delisting under the Endangered Species Act' (2015) 27(1) *Fordham Environmental Law Review*, pp. 106–56, at 131; Y. Epstein, 'Favourable Conservation Status for Species: Examining the Habitats Directive's Key Concept through a Case Study of the Swedish Wolf' (2016) 28(2) *Journal of Environmental Law*, pp. 221–44, at 223–5.

3 E.g., E.A. Fitzgerald, *Wolves, Courts & Public Policy: The Children of the Night Return to the Northern Rocky Mountains* (Lexington Books, 2015); Supreme Administrative Court of Finland, *Request for a Preliminary Ruling to the Court of Justice of the European Union*, HFD:2017:182 (seeking answers to questions on when wolves may be hunted under the Habitats Directive, n. 5 below).

4 E.g., *Sierra Club* v. *Clark*, 577 F. Supp. 783, 786 (1984) (involving a request from the Wisconsin Department of Natural Resources to allow a wolf hunting season with a bag limit of 50 wolves, which was rejected by federal officials); European Commission, Motiverat yttrande till följd av landets underlåtenhet att uppfylla sina skyldigheter enligt artiklarna 12 och 16 i direktiv 92/43/EEG om bevarande av livsmiljöer samt vilda djur och växter (Reasoned Opinion pertaining to the Country's Failure to Fulfil its Obligations according to Articles 12 and 16 of Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora) in Infringement Proceeding 2010/4200 (2011) (criticizing Sweden's policies on wolf hunting for violating EU law).

5 [1992] OJ L 206/7.

6 16 U.S.C. § 1531 et seq. (1973); Pub. L. 93-205 (28 Dec. 1973).

7 However, see D. Vogel, M. Toffel & D. Post, 'Environmental Federalism in the European Union and the United States', in F. Wijen, K. Zoeteman & J. Pieters (eds), *A Handbook of Globalisation and Environmental Policy: National Government Interventions in a Global Arena* (Edward Elgar, 2012), pp. 321–61. The proposition that the US maintains more centralized control than the EU has, counter-intuitively, been shown to be false in several areas of environmental law, in particular climate change and the regulation of waste packaging.

8 J.B. Ruhl, 'The ESA's Fall from Grace in the Supreme Court' (2012) 36(2) *Harvard Environmental Law Review*, pp. 487–532, at 496; M.W. Schwartz, 'The Performance of the Endangered Species Act' (2008) 39 *Annual Review of Ecology, Evolution, & Systematics*, pp. 279–99.

9 E.R. Glitzenstein, 'Citizen Suits', in D. Baur & Wm R. Irvin (eds), *Endangered Species Act: Law, Policy and Perspectives* (American Bar Association, 2010), pp. 260–91, at 276–7.

10 M.G. Faure & J.S. Johnston, 'The Law and Economics of Environmental Federalism: Europe and the United States Compared' (2009) 27(3) *Virginia Environmental Law Journal*, pp. 205–74, at 217.

power to non-state actors: as a party to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention),[11] the EU requires its Member States (which are also individually party to the Convention) to ensure public access to information, opportunities for public participation, and access to the courts when environmental interests are at stake. As in the US, the non-governmental litigant has become an important actor in driving environmental policy in the EU.

The American system of policy making and dispute resolution through litigation has been termed 'adversarial legalism' by Kagan. He distinguishes it from what he considers a more efficient 'bureaucratic legalism' prevalent in some European countries, such as Germany and France.[12] According to Kagan, adversarial legalism is 'a method of policymaking and dispute resolution' with two distinguishing characteristics:

> The first is formal legal contestation—competing interests and disputants readily invoke legal rights, duties, and procedural requirements, backed by recourse to formal law enforcement, strong legal penalties, litigation, and/or judicial review. The second is litigant activism—a style of legal contestation in which the assertion of claims, the search for controlling legal arguments, and the gathering and submission of evidence are dominated not by judges or government officials but by disputing parties or interests, acting primarily through lawyers.[13]

The benefits of this system are transparency along with devolving authority to individuals and other non-governmental actors to both affect and effect policy.[14] These benefits are most likely to be achieved, Kagan suggests, in circumstances where fundamental human rights are at stake, such as cases in which prisoners challenge abusive prison conditions.[15]

The downside of adversarial legalism, in the regulatory context, is that the ease and scope of litigation can lead to regulatory paralysis. In such cases, potentially endless litigation may accomplish little.[16] It can also inhibit non-litigious agreement between parties, particularly when further litigation with additional legal argument occurs or when additional parties join the action.[17] Another criticism levelled by Kagan is that legal uncertainty can arise when policy is contested in courts, where scientific questions are decided by judges based on conflicting scientific arguments introduced by litigants.[18] Kagan argues that litigious implementation of environmental protection laws has been particularly problematic in the US because American environmental law tends to be exceptionally complex and exceptionally vague, which in turn frequently leads to 'surprising' judgments.[19]

---

[11] Aarhus (Denmark), 25 June 1998, in force 30 Oct. 2001, available at: http://www.unece.org/env/pp/welcome.html.

[12] R. Kagan, *Adversarial Legalism: The American Way of Law* (Harvard University Press, 2001), pp. 3, 11.

[13] Ibid., p. 9.

[14] Ibid., p. 3.

[15] Ibid., pp. 19–25.

[16] Ibid.

[17] Ibid., p. 27.

[18] Ibid., p. 9.

[19] Ibid., p. 218.

In his book, *Eurolegalism*, Kelemen argues that a form of adversarial legalism has gained traction in the EU as a by-product of European integration.[20] There is a large and growing body of EU administrative law, including administrative law concerning the environment, much of which, comparable with its American counterpart, is complex and detailed, yet contains ambiguous terms and provisions. The EU predominantly relies on its Member States to administer and enforce these EU laws.[21] The EU's push for integration has led to the creation of legally enforceable rights that can be pursued by non-governmental actors through litigation. In one of Kelemen's examples, airline passengers have a right to compensation under an EU regulation if their flight is cancelled or their baggage is lost. By claiming compensation under this regulation, private actors thereby enforce EU policies through the legal systems of Member States.[22] The result, according to Kelemen, is a litigious European system of policy making and dispute resolution similar to that found in the US.

Kelemen acknowledges that the EU's dependence on private enforcement mechanisms to give effect to EU law could inhibit the diffusion of adversarial legalism into environmental law. In his earlier book, *The Rules of Federalism*, he argued that litigation initiated by the European Commission had been instrumental in limiting Member State discretion in environmental decision making and enforcing EU environmental law. However, he observed that standing restrictions prevented non-governmental plaintiffs from bringing large numbers of environmental claims. These limitations, therefore, slowed the 'judicialization' of environmental law.[23] Kelemen predicted, however, that the enactment of EU environmental legislation granting both substantive and procedural environmental rights would eventually cause non-governmental litigants to constrain Member State discretion over environmental policy. Eventually, he predicted, the influence of private litigants on environmental policy would eclipse even that of the European Commission.[24]

I use the contestation over wolf protection in the US and Sweden to illustrate the similarities and differences between American adversarial legalism and Eurolegalism. By analyzing three legal questions that are important for the functioning of the twin legalisms – against whom can claims be brought, who can bring a claim, and what types of claim can be brought – I demonstrate how these variants of legalism have an impact on species protection policy. It is acknowledged that wolves are not representative of all species, but they are a useful example. As a 'charismatic carnivore', the wolf has been the subject of extensive litigation. Much of this litigation has been groundbreaking and has affected the interpretation of species protection laws more generally. Similar considerations apply regarding the choice of jurisdiction. I focus on Sweden as a proxy for EU Member States, even if Sweden's experience is

[20] R.D. Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Harvard University Press, 2011).

[21] R.D. Kelemen, *The Rules of Federalism: Institutions and Regulatory Politics in the EU and Beyond* (Harvard University Press, 2004), pp. 1, 23.

[22] Kelemen, n. 20 above, pp. 1–4, 8.

[23] Kelemen, n. 21 above, p. 52.

[24] Ibid., p. 53.

not entirely representative. It has an unusually large amount of forest land and is home to several unique hunting, herding, and farming communities. Sweden may therefore have different environmental priorities from those of other Member States. It also has a legal culture that has been particularly reluctant to allow public interest environmental litigation. On the other hand, many Member States have experienced conflicts over wolf conservation.[25] Moreover, although deficiencies in public interest standing have been particularly acute in Sweden, litigants in many other Member States have encountered alternative barriers to access to justice, such as lack of effective remedies and excessive costs.[26] Some of these barriers have decreased, in Sweden as well as in other Member States, in part as a result of EU law and the public interest litigation that depends on it.[27]

2. AGAINST WHOM ARE CLAIMS BROUGHT?

An important preliminary question is against whom a claim can be brought for the enforcement of species protection legislation. The answer affects which type of claim is possible, and the remedies that might be obtained. Claims in the EU are brought primarily against Member States, while in the US claims may be brought against any person or entity, including federal actors.

According to the 'citizen suits' provision in the ESA, lawsuits alleging a violation of the ESA can be brought against any person, be they natural or legal, including government entities. Additionally, suits can be brought to compel the federal government (specifically, either the Secretary of the Interior or Secretary of Commerce) to apply the law.[28] In the US, governments enjoy sovereign immunity by default: no party may sue the government for any reason without its consent.[29] The federal government has, however, given statutory consent to be sued in many situations, such as when government officials negligently cause injury while acting within the scope of their employment,[30] or breach contractual terms.[31] Most key US environmental laws, including the ESA, specifically allow private persons – natural or legal – to sue both the government and other private persons for their enforcement.[32] While 'any person' can be sued, the 11th Amendment to the US Constitution limits lawsuits to the enforcement of federal legislation against the states.[33]

[25] A. Trouwborst, 'Living with Success – and with Wolves: Addressing the Legal Issues Raised by the Unexpected Homecoming of a Controversial Carnivore' (2014) 23(3) *European Energy & Environmental Law Review*, pp. 89–101, at 90.

[26] E.g., Italy, France and the United Kingdom (UK): see R.A. Chichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance* (Cambridge University Press, 2007), p. 121.

[27] E.g., Case C-530/11, *European Commission* v. *United Kingdom*, EU:C:2014:67.

[28] 16 U.S.C. § 1540(g)(1).

[29] *Price* v. *United States*, 174 U.S. 373, 375–76 (1899).

[30] Federal Tort Claims Act, 28 U.S.C. § 1346(b) (2013).

[31] Tucker Act, 28 U.S.C. § 1491 (2011).

[32] J.R. May, 'Now More Than Ever: Trends in Environmental Citizen Suits at 30' (2003) 33(9) *Widener Law Review*, pp. 1–48, at 2.

[33] US Constitution, Amend. XI; J.O. Melious, 'Enforcing the Endangered Species Act against the States' (2001) 25(3) *William & Mary Environmental Law & Policy Review*, pp. 605–74, at 673.

Therefore, public interest suits are typically directed against federal government entities, or smaller government entities such as municipalities.[34] States may also give their consent to be sued under state species protection laws, although many do not.[35]

The position in the EU is to the contrary. Member States have been sued for failing to implement or apply the provisions of the Habitats Directive, but the EU itself has thus far remained insulated from challenge. The EU and its Member States are party to the Aarhus Convention, which requires its parties to allow public challenge to the acts and omissions of regulatory authorities and private parties that are in contravention of environmental law. Regulation (EC) No. 1367/2006 on the Application of the Provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community Institutions and Bodies – which implements the Aarhus Convention at EU level – allows environmental non-governmental organizations (NGOs) to request internal review of certain administrative acts or omissions.[36] Nonetheless, most decisions made at the EU level that impact on the environment have been found not to be challengeable.[37] The Court of Justice of the EU (CJEU) has repeatedly held that national courts must interpret national law so as to give full effect to the Aarhus provisions.[38] However, the CJEU has not applied the same standard to itself. As such, NGOs have not successfully challenged the European Commission's application of EU environmental laws.[39] The EU's refusal to apply the Convention to its own institutions has been criticized by scholars,[40] as well as by the governing bodies of the Aarhus Convention.[41] Restrictions on who can defend a claim limit the type of claim that can be brought, as will be discussed in Section 4.

3. WHO CAN BRING A CLAIM?

The question of who can bring a claim is perhaps the most complex of the three questions raised in this article. Centralized authorities are important litigators in both systems. In the US, primary responsibility for enforcing the ESA lies with

[34] Melious, ibid.

[35] S. George & W.J. Snape III, 'State Endangered Species Acts', in Baur & Irvin, n. 9 above, pp. 344–59, at 351.

[36] [2006] OJ L 264/13.

[37] H. Schoukens, 'Balancing On or Over the Edge of Non-Compliance' (2016) 25(6) *European Energy and Environmental Law Review*, pp. 178–95.

[38] Case C-240/09, *Lesoochranárske zoskupenie* v. *Slovak Republic* [2011] ECR I-1285, EU:C:2011:125, para. 50.

[39] Cases C-404/12 and C-405/12, *Council and Commission* v. *Stichting Natuur en Milieu and Pesticide Action Network Europe* [2015] EU:C:2015:5; Cases C-401/12 P to C-403/12 P, *Council, Parliament and Commission* v. *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* [2015] EU:C:2015:4.

[40] L. Krämer. 'Access to Environmental Justice: The Double Standards of the ECJ' (2017) 14(2) *Journal of European Environmental & Planning Law*, pp. 159–85.

[41] Aarhus Convention Compliance Committee, Draft Findings and Recommendation of the Compliance Committee with regard to Communication ACCC/C/2008/32 (2017); Aarhus Convention Bureau, Draft Decision VI/8f concerning Compliance by the European Union with its Obligations under the Convention, ECE/MP.PP/2017/25 (2017).

federal authorities.[42] In the EU, Member States have primary responsibility for enforcing the Habitats Directive within their borders, but their failure to do so may result in infringement proceedings and eventual litigation by the European Commission.[43] Public interest litigation brought by non-governmental actors always has played a large role in enforcement of the ESA, and is increasingly important in enforcing the Habitats Directive. However, public interest standing requirements under the ESA and Habitats Directive are not easily comparable. ESA lawsuits generally occur in US federal courts and are therefore subject to a unified procedural system of law. In the EU, while some important species protection cases have been decided by the CJEU, most of the litigation under the Habitats Directive arises in Member State courts.[44] There is, therefore, greater diversity in public interest standing requirements, notwithstanding the convergent influence of EU membership.

With regard to citizen suits, the ESA allows 'any person' to bring a lawsuit.[45] While extremely broad, the scope of the provision is not unlimited: persons bringing lawsuits must have suffered some concrete and particularized harm.[46] Additionally, the harm must have been caused by the defendant's actions, and it must be likely that a favourable judicial decision would rectify the harm.[47] The requirement to have suffered particularized harm may seem like a demanding standard to meet when litigating for species protection, but is in fact interpreted so liberally as to present relatively little barrier to litigation. In the 2000 case *Friends of the Earth* v. *Laidlaw*, arising under the Clean Water Act (CWA),[48] the Supreme Court elaborated on the minimum standing requirements it had articulated in past decisions, and confirmed that a desire to observe a species in an area affected by the defendant's activities, coupled with a reasonable concern that those activities could be affected, could be sufficient to confer standing.[49] Another requirement of standing in the US is that in order to sue for a statutory violation, plaintiffs must be within the 'zone of interests' that the statute is trying to protect.[50] However, the Supreme Court has held that the zone-of-interest test does not apply to citizen suits under the ESA, enabling even plaintiffs wishing to reduce species protection to bring suits.[51]

---

42 16 U.S.C. § 1540(e)(1).

43 E.g., Case C-103/00, *Commission* v. *Greece* [2002] ECR I-04711, in which Greece prohibited disturbance to sea turtle habitat but did not adequately enforce its prohibitions.

44 The enforcement of EU law in general is achieved largely through private litigation in the national courts: M. Blauberger & R.D. Kelemen, 'Can Courts Rescue National Democracy? Judicial Safeguards against Democratic Backsliding in the EU' (2017) 24(3) *Journal of European Public Policy*, pp. 321–36, at 326–7.

45 16 U.S.C. § 1540.

46 *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

47 Ibid., p. 561.

48 Federal Water Pollution Control Amendments of 1972, Pub. L. 92-500 (18 Oct. 1972); 33 U.S.C. § 1251 et seq.

49 *Friends of the Earth* v. *Laidlaw*, 528 U.S. 167, 180–83 (2000).

50 W.W. Buzbee, 'Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis after Bennett *v*. Spear' (1997) 49(4) *Administrative Law Review*, pp. 763–824, at 778–9.

51 *Bennett* v. *Spear*, 520 U.S. 152, 158–59 (1997).

Most litigation under the ESA is brought by species protection organizations rather than by individuals. Organizations may in some circumstances sue in their own right, but when it comes to citizen suits, organizational standing is generally dependent on the standing of their members. The test in *Laidlaw* is:

> An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[52]

Thus the organization seeking standing must have a member who has suffered some concrete and particularized injury, which, as noted, rarely poses a significant hurdle for participation.[53] In *Humane Society* v. *Jewell*, for example, which concerned relisting wolves in the Endangered Species List for the Great Lakes Region, the court noted that the organizational plaintiffs 'easily' met the requirements for standing.[54] Four members of the plaintiff organizations – which included the Humane Society, Born Free USA, Help Our Wolves Live (Howl), and Friends of Animals and Their Environment (Fate) – had filed affidavits describing their injuries. Members of two of the organizations described having seen wolves on multiple occasions while hiking in the area, which would be affected by the court's decision, and stated that they would like to do so again.[55] The court noted that these individuals 'indisputably established … an aesthetic interest in the preservation of the gray wolf in the area affected'. Two other members averred additional harm: one heard less frequent wolf howling on her property following the delisting of wolves; the other had to plan his hiking trips to the area around hunting and trapping seasons.[56] They easily met the standing requirements.[57]

The question of standing in Europe is more complex as most court action takes place within the Member States, each of which has its own standing requirements. Unlike the ESA, the Habitats Directive contains no special provisions regarding standing, and the rules on standing in the various Member States have historically been widely divergent.[58] Some, such as Portugal, have a very open system when it comes to public interest environmental litigation. Portugal allows anyone to bring public interest environmental litigation against government actors under the doctrine of *actio popularis*.[59] Other states, such as Germany, traditionally have not allowed

---

52 *Friends of the Earth* v. *Laidlaw*, n. 49 above, p. 181.

53 But see C.R. Sunstein, 'Standing for Animals (with Notes on Animal Rights)' (2000) 47(5) *UCLA Law Review*, pp. 1333–68, at 1342–52 (arguing that basing standing on human injury makes protection of some species more difficult).

54 *Humane Society* v. *Jewell*, 76 F.Supp.3d 69, 105 (D.D.C., 2014). This case was partially overturned on other grounds in *Humane Society* v. *Zinke*, 865 F.3d 585 (D.C. Cir., 2017), discussed below.

55 *Humane Society* v. *Jewell*, ibid., pp. 105–6.

56 Ibid., p. 106.

57 Ibid.

58 J. Darpö, 'Effective Justice? Synthesis Report of the Study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union', European Commission, 2013-10-11/Final, available at: http://ec.europa.eu/environment/aarhus/pdf/synthesis%20report%20on%20access%20to%20justice.pdf.

59 Ibid., p. 12.

individuals to litigate in the environmental public interest. Under its rights-based *Schutznormtheorie*, individuals can challenge environmental acts or omissions only when intended to protect their personal rights, which excludes most nature protection litigation by individuals. However, a special regulation grants standing to environmental NGOs.[60] Most Member States have standing requirements that fall between *actio popularis* and *Schutznormtheorie*, but tend towards interest-based standing, which requires some degree of particularized interest in the proposed action.[61]

Procedural law falls within the purview of the Member States, at least in theory, but has nevertheless been profoundly affected by EU laws and principles, as well as by the Aarhus Convention. The Convention's access to justice provisions require that members of the public have standing to challenge certain acts or omissions that impact on the environment or violate environmental law.[62] NGOs that have an environmental purpose, and meet other national requirements, are deemed to have standing. In contrast to the US, an NGO's standing is not based on the standing of its members.[63] In the 2011 *Slovak Brown Bears* case the CJEU considered Member State obligations to grant standing to public interest litigants in light of EU and Member State participation in the Aarhus Convention.[64] It held that, while the access to justice provisions of the Convention were not sufficiently precise to be directly binding on national courts, they had to interpret national procedural laws 'to the fullest extent' possible to allow standing for environmental NGOs that allege violations of EU environmental laws.[65] In a subsequent ruling, *Slovak Brown Bears II*, the CJEU also confirmed that Member States must provide adequate and effective remedies – in matters concerning EU environmental law – under Article 47 of the Charter of Fundamental Rights,[66] in combination with the Aarhus Convention and other principles of EU law.[67]

Sweden is an example of a Member State with interest-based standing. In the next paragraphs, I explain how Swedish procedural law has been shaped through litigation to align with its obligations as a party to the Aarhus Convention and as an EU Member State. While the changes to Sweden's standing laws cannot be said to be identical to those experienced in other EU Member States, they are representative of the widening of access to justice required by the EU courts. Sweden does not have a history of public interest litigation. Traditionally, the role of defending the public interest in environmental matters belonged to administrative officials.[68] In response

[60] A. Schwerdtfeger, 'Schutznormtheorie and Aarhus Convention: Consequences for the German Law' (2007) 4(4) *Journal for European Environmental and Planning Law*, pp. 270–7, at 276; Environmental Remedies Act (*Umwelt-Rechtsbehelfsgesetz*).

[61] Darpö, n. 58 above, p. 13.

[62] Art. 9 Aarhus Convention.

[63] Art. 2(5) Aarhus Convention.

[64] Case C-240/09, *Lesoochranárske zoskupenie VLK* v. *Ministerstvo životného prostredia Slovenskej Republiky*, EU:C:2011:125.

[65] Ibid., para. 50.

[66] Charter of Fundamental Rights of the European Union [2012] C 326/391.

[67] Case C-243/15, *Lesoochranárske zoskupenie VLK* v. *Obvodný úrad Trenčín*, EU:C:2016:838.

[68] J. Darpö, 'Biological Diversity in the Public Interest', in M. Dahlberg (ed.), *De Lege* (Iustus Förlag, 2009), pp. 201–36, at 203.

to litigation Sweden has gradually allowed standing for environmental NGOs in species protection and other types of environmental claim.

In 1999, Sweden enacted an environmental code containing an 'access to justice' provision.[69] Standing was limited to organizations that had nature or environmental protection as their purpose, had been in existence for three years, and had at least 2,000 members.[70] Additionally, only decisions related to permits, approvals or exemptions made under the Environmental Code were contestable.[71] This excluded many types of environmental decision made under other laws, such as the decision to allow the hunting of protected species, such decisions being made under hunting laws. Moreover, only two environmental organizations in Sweden were large enough to meet the requirement of 2,000 members.[72] The CJEU found the membership requirement impermissible in the 2009 case of *Djurgården-Lilla Värtans*: domestic standing requirements must not be so restrictive as to render meaningless the provisions of EU law that grant standing to those who can allege a sufficient interest or impairment of a right.[73] Following this decision, the Environmental Code was amended to reduce the number of members necessary for NGO standing to 100.[74] Public interest standing nevertheless remained limited to those areas of environmental law that fell within the Environmental Code.[75] A series of NGO challenges and court decisions over the hunting of wolves has resulted in an expansion of public interest standing to situations covered by EU environmental law but not the Swedish Environmental Code, in this case hunting law.

The Swedish hunting regulations divide the hunting of wolves, and certain other protected carnivores, into two categories.[76] Protective hunting generally targets individual animals that have caused, or pose a threat of, serious damage to livestock.[77] Licensed hunting is not targeted at particular wolves, but is restricted to certain regions and dates.[78] Hunting provisions are not included in the Environmental Code, so NGOs did not have standing to appeal against the granting of hunting permits.[79] Only those who were denied a hunting permit had sufficient interest to appeal against decisions; no one had the right to appeal on behalf of protected species.

---

69 Ibid., p. 203.

70 J. Reichel, 'Judicial Control in a Globalised Legal Order: A One Way Track? An Analysis of the Case C-263/08 Djurgården-Lilla Värtan' (2010) 3(2) *Review of European Administrative Law*, pp. 69–87, at 69.

71 Environmental Code (1998:808), Ch. 16, s. 13.

72 Reichel, n. 70 above, p. 70.

73 Case C-263/08, *Djurgården-Lilla Värtans Miljöskyddsförening* v. *Stockholms Kommun* [2009] EU:C:2009:631, para. 45.

74 Y. Epstein & J. Darpö, 'The Wild Has No Words: Environmental NGOs Empowered to Speak for Protected Species as Swedish Courts Apply EU and International Environmental Law' (2013) 10(3) *Journal for European Environmental and Planning Law*, pp. 250–61, p. 256.

75 Ibid., p. 255.

76 Jaktförordning [Hunting Regulation] (1987:905), s. 23(a) and (c).

77 Ibid., s. 23(a).

78 Ibid., s. 23(c).

79 Epstein & Darpö, n. 74 above, p. 255.

In a series of decisions, Sweden's administrative courts applied EU and international law to allow legal challenges by NGOs to administrative decisions permitting the protective hunting and quota hunting of wolves. In the first major case, the *Kynna Wolf* case, the Swedish Society for Nature Conservation (SSNC), an environmental NGO, sued the Swedish Environmental Protection Agency to stop the culling of a wolf in southern Sweden in 2011.[80] This case was dismissed for lack of standing and the wolf was culled.[81] The decision was nevertheless appealed against to the Stockholm Administrative Court of Appeal, and eventually to the Supreme Administrative Court, which sent the case back to the appeal court to consider the issue of standing in light of the Aarhus Convention and the *Slovak Brown Bears* case.[82] The appeal court, interpreting Swedish law on standing to comply with its obligations under the Aarhus Convention and EU law, found that environmental NGOs that met the requirements of the Environmental Code had sufficient interest to meet the standing requirements in matters concerning EU environmental laws.[83]

Following this case, environmental NGOs successfully challenged hunting licences in 2013 and 2014.[84] In frustration, the government changed the hunting regulations to explicitly prohibit the appeal of hunting decisions in the courts.[85] Therefore, Swedish law could no longer be interpreted 'to the fullest extent possible' to allow NGOs as required by *Slovak Brown Bears*; standing for NGOs was now explicitly *contra legem*.[86] The SSNC joined another NGO, Nordulv, to appeal against the 2015 hunting decision in any event. After being dismissed at the lower levels, the Supreme Administrative Court agreed to hear their case.[87]

The Court examined the EU treaties and jurisprudence of the CJEU: in particular, the EU legal principle of *effet utile*, which requires that the procedural rules of Member States may not make impossible access to the courts to enforce rights granted under EU law.[88] As the Swedish ban on judicial appeals was incompatible with this requirement, it had to be disregarded.[89] Although the NGOs' standing rights were recognized by the court, they

---

80 *Svenska Naturskyddsföreningen* v. *Naturvårdsverket* [*Swedish Society for Nature Conservation* v. *Swedish Environmental Protection Agency*], Cases 23206-11 & 21255-11, Förvaltningsrätten i Stockholm [Stockholm Administrative Court] (2011).

81 J. Gustafsson, 'The Kynna Wolf', *The Anthropocene: A History of the World*, 24 Feb. 2015, available at: http://anthropocene.name/student-hub/artifacts/kynna_wolf.

82 *Svenska Naturskyddsföreningen* v. *Naturvårdsverket* [*Swedish Society for Nature Conservation* v. *Swedish Environmental Protection Agency*], Case 2687-12, Högsta Förvaltningsdomstol [Supreme Administrative Court] (2012).

83 Cases 4390-12 & 4396-12, Kammarrätten i Stockholm [Stockholm Administrative Court of Appeal] (2013).

84 J. Darpö & Y. Epstein, 'Thrown to the Wolves: Sweden Once Again Flouts EU Standards on Species Protection and Access to Justice' (2015) 1 *Nordic Environmental Law Journal*, pp. 7–20, at 8–9.

85 Ibid., p. 9.

86 Ibid. In accordance with the EU legal doctrine of indirect effect, broad and opaque national provisions should be interpreted harmoniously with corresponding EU legal provisions to the fullest extent possible, but national courts cannot be expected to effectively change the content of a national provision that explicitly contravenes EU law: see D. Chalmers, G. Davies & G. Monti, *European Union Law*, 3rd edn (Cambridge University Press, 2014), pp. 316–25.

87 Ref. 79, Högsta Förvaltningsdomstol [Supreme Administrative Court] (2015).

88 Ibid.

89 Ibid.

https://doi.org/10.1017/S2047102518000109 Published online by Cambridge University Press

had already lost their case: the 2015 hunt had long since been completed and 44 wolves had been killed.[90] The decision came in time, however, to litigate in respect of the 2016 licensed hunting season, and hunting decisions were overturned in three of the five counties in which hunts had been planned.[91] On appeal, however, the Supreme Administrative Court held that hunting was in accordance with EU law.[92] Hunting was again authorized for 2018, albeit with a smaller bag limit of 22 wolves.[93]

As a result of developments in EU law, the Swedish legal system has been forced to embrace an expanded role for the public, at least as represented by environmental NGOs, in enforcing species protection legislation. Standing for individuals in species protection cases remains quite restricted because of the difficulty of showing sufficient interest. What the public can litigate also remains more limited than it is in the US because action or inaction at the EU level – such as a failure to list or delist species – cannot be litigated. Although the EU has insisted that Member States relax standing requirements to challenge national decision making relating to EU environmental law, the EU has thus far declined to subject its own decision-making procedures to public challenge.[94]

4. WHAT TYPES OF CLAIM CAN BE BROUGHT?

As a result of greater limitations on who can bring claims, and against whom claims can be brought, public interest litigants can pursue a wider range of claims in the US than in the EU. In this section, I examine some types of claim that can be brought and the impact this litigation has on federal control over species protection. In the US the public can sue to enjoin any violation of the ESA.[95] Public interest litigants can also sue to require the federal authorities to carry out the requirements of the ESA, including adding or removing species from the list of protected species, creating and implementing plans to facilitate the recovery of protected species, designating protected habitats, and monitoring the species.[96] The scope of litigation in the EU is much narrower: the public can only challenge Member State implementation of the Directive.

4.1. *Defining Success*

This section examines the substantive goals for species protection under the ESA and Habitats Directive, and how litigation has affected their interpretation. Whether the

[90] Swedish National Veterinary Institute, 'Licensjakt varg 2016' ['Licensed Hunting of Wolves 2016'], 12 Feb. 2016, available at: http://www.sva.se/djurhalsa/vilda-djur/stora-rovdjur/licensjakt-pa-varg/vargjakt-2016 (in Swedish).

[91] *Länsstyrelsen i Värmlands län* v. *Svenska Naturskyddsföreningen* [*Värmlands County Board* v. *Swedish Society for Nature Conservation*], Cases 2406-2408-16 and 2628-2630-16 (2016).

[92] Ref. 89, Högsta Förvaltningsdomstol [Supreme Administrative Court] (2016).

[93] Swedish National Veterinary Institute, 'Licensjakt på varg 2018' ['Licensed Hunting of Wolves 2018'], available at: http://www.sva.se/djurhalsa/vilda-djur/stora-rovdjur/licensjakt-pa-varg/licensjakt-pa-varg-2018 (in Swedish).

[94] Cases C-401/12 P to C-403/12 P, *Council, Parliament and Commission* v. *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, n. 39 above; Cases C-404 and 405/12, *Council and Commission* v. *Stichting Natuur en Milieu and Pesticide Action Network Europe*, n. 39 above.

[95] 16 U.S.C. § 1540(g)(1)(a).

[96] 16 U.S.C. § 1540(g)(1)(c); Glitzenstein, n. 9 above, p. 261.

goals of protective legislation have been met with regard to the wolf is vehemently disputed in both Sweden and the US. These disputes largely centre on how terms are defined or applied: both instruments use quasi-scientific terms that lack clear legal or scientific definitions to describe when their goals are met. When these terms are interpreted by courts in response to litigation, management discretion is more or less limited.

Both laws aim to protect species and their habitats. The stated overarching goal of the Habitats Directive is to ensure 'bio-diversity through the conservation of natural habitats and wild fauna and flora' in Europe,[97] while the ESA's goals are to conserve the ecosystems needed by endangered and threatened species, as well as to 'provide a program for the conservation' of these species.[98] The goals are met if a species has reached 'favourable conservation status' in the EU,[99] and if it has 'recovered' in the US.[100] Whether wolves have achieved 'favourable conservation status', or have 'recovered', has been central to controversies over their legal protection.[101]

Both goals essentially aspire towards a situation in which a species population is not at risk. Both terms are created by law, but neither can be understood without further interpretation and scientific determination. Questions such as at what scale populations should be defined; whether historical range should be considered; and whether only genetic factors (or also political boundaries) can be considered in determining whether a population is at risk, remained unclear.[102]

The conservation goals of the ESA are considered to have been met when a species no longer meets the definitions of 'endangered' (in danger of extinction throughout all or a significant portion of its range) or 'threatened' (likely to become endangered in the foreseeable future).[103] When protective measures are no longer deemed necessary the goal of recovery is considered to have been achieved, and the species is removed from federal protection.[104] The primary responsibility for achieving this, as applied to a particular species, lies with two federal government agencies: the Department of the Interior, and the Department of Commerce.[105] They may act in partnership with other federal government agencies; state, tribal and local governments; individuals, and NGOs. Provisions incentivize states to create their own plans to prevent species from becoming endangered, aid in the recovery of those that are, and maintain the conservation of species that have recovered.[106] The Department of the Interior – and specifically the US Fish and Wildlife Service within that department – implements the

[97] Art. 2(1) Habitats Directive.

[98] 16 U.S.C § 1531(b).

[99] Art. 2(2) Habitats Directive.

[100] D.D. Goble, 'The Endangered Species Act: What We Talk About When We Talk About Recovery' (2009) 49(1) *Natural Resources Journal*, pp. 1–44.

[101] Epstein, n. 2 above; Williams, n. 2 above.

[102] Epstein, n. 2 above; Williams, n. 2 above.

[103] 16 U.S.C § 1532(3). In other words, no longer endangered or threatened according the criteria set out in 16 U.S.C. § 1533(a)(1).

[104] Goble, n. 100 above, p. 3.

[105] 16 U.S.C. § 1532(15).

[106] 16 U.S.C. § 1535.

Act as it pertains to most species, other than saltwater fish and some other marine species.[107] These agencies also have responsibility for determining whether species have recovered, which they do with reference to public input, enumerated criteria, and the best available scientific and commercial data.[108]

While federal agencies determine whether a species has recovered, the concepts of recovery and which populations may be determined to have recovered have been profoundly shaped by federal courts in response to public interest litigation.[109] Even under the highly deferential 'arbitrary and capricious' standard afforded to agencies in administrative cases[110] courts have on multiple occasions found that the Fish and Wildlife Service has improperly determined that wolf populations had recovered, asserting in the 2014 case *Humane Society* v. *Jewell* that 'at times, a court must lean forward from the bench to let an agency know, in no uncertain terms, that enough is enough'.[111] The question as to what constitutes a recovered species, particularly, has been an ongoing source of controversy, including in the context of litigation over legal protection for wolves.[112]

For example, litigation has contested what constitutes a 'species', which is a prerequisite for determining whether a species has recovered. As defined in the ESA, the term 'species' includes 'species, subspecies and distinct population segments of any species'. This means that smaller categories than species can be found to be endangered, threatened or recovered.[113] Unlike the terms 'species' and 'subspecies', the term 'distinct population segment' exists only in the context of the ESA.[114] What is properly designated a 'distinct population segment' has been central to several cases involving wolf recovery.[115]

In the 2017 case *Humane Society* v. *Zinke*, for example, the Fish and Wildlife Service had designated wolves in Minnesota, Wisconsin, Michigan and parts of six other US states as the western Great Lakes distinct population segment, and had simultaneously determined that this new distinct population segment had recovered.[116] The lower court, ruling in the aforementioned *Jewell* case, rejected this determination, holding that the designation of distinct population segments could be used only to add protection for animals that were not already protected by means of listing as protected species or subspecies. The distinct population segment designation could not be used to remove protection by declaring an isolated group of

[107] D.C. Baur & Wm R. Irvin, 'Overview', in Baur & Irvin, n. 9 above, pp. 1–7.

[108] 16 U.S.C. § 1533.

[109] Goble, n. 100 above; J.T. Bruskotter et al., 'Removing Protections for Wolves and the Future of the U.S. Endangered Species Act (1973)' (2013) 7(4) *Conservation Letters*, pp. 401–7, at 402–3.

[110] Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

[111] *Humane Society* v. *Jewell*, n. 54 above, citing *Public Citizen Health Research Group* v. *Brock*, 823 F.2d 626.

[112] E.g., Williams, n. 2 above, pp. 147–8; Fitzgerald, n. 3 above, pp. 86–95.

[113] 16 U.S.C. § 1532(16).

[114] Policy regarding the Recognition of Distinct Vertebrate Population Segments under the Endangered Species Act, 61 Fed. Reg. 4722, 4722 (7 Feb. 1996).

[115] Fitzgerald, n. 3 above, pp. 86–100.

[116] *Humane Society* v. *Zinke*, n. 54 above; *Humane Society* v. *Jewell*, n. 54 above, p. 100.

members of a protected species to have recovered, the court argued, otherwise any isolated group of protected animals could be found to have recovered and therefore no longer be in need of protection.[117]

The *Zinke* court again moved the boundaries of agency discretion in defining distinct population segment. It reversed the lower court's determination that 'distinct population segment' could not mean a group of individual animals that was part of an already protected species population, but it added a new element to the definition: a 'distinct population segment' could not mean a group of individual animals that was part of an already protected species population if the remainder of the population could not also continue to meet the definition of 'species'.[118] In overturning the Fish and Wildlife Service's determination of recovery, the court – along with the public interest litigants who brought the case – helped to delimit how the terms 'distinct population segment', and therefore how 'species' and 'recovery', could be interpreted.

In the EU the primary responsibility for achieving the goals of the Habitats Directive lies with the Member States. They are directed to enact legislation and other measures to 'maintain or restore, at favourable conservation status' the species and habitats protected by the Directive.[119] How to determine this status has been controversial, as it affects how much discretion Member States have in managing a species population.[120] Swedish wolves again provide a good example of this controversy, as well as the impact of litigation on conservation policy.[121] The European Commission discussed what constitutes favourable conservation status in its 2011 Reasoned Opinion in infringement proceedings against Sweden, asserting that the conservation status of wolves could not be considered favourable because of the genetic isolation of the population.[122] At the time Sweden agreed, and a hunting season was not authorized for the following year.[123] Following political pressure, however, Sweden re-evaluated the conservation status of wolves in 2013.[124]

The determination had as much to do with politics as with biology. For most species, the natural scientists employed by the Swedish Species Information Centre assess conservation status. However, because of the 'political nature of the species', the number and connectivity of wolves required to constitute favourable conservation

117 *Humane Society* v. *Jewell*, n. 54 above, p. 110.

118 *Humane Society* v. *Zinke*, n. 54 above, p. 600.

119 Art. 2(1) Habitats Directive.

120 A. Trouwborst, L. Boitani & J.D.C. Linnell, 'Interpreting "Favourable Conservation Status" for Large Carnivores in Europe: How Many are Needed and How Many are Wanted?' (2017) 26(1) *Biodiversity and Conservation*, pp. 37–61.

121 European Commission, Additional Reasoned Opinion in Infringement Proceeding 2010/4200 (Swedish), 19 June 2015, pp. 10–2; see, e.g., Överklagande av Länsstyrelsens i Gävleborgs län beslut om utökad tilldelning för licensjakt efter varg i Gävleborgs län 2016, länsstyrelsens dnr 218-743-16 [Appeal of the County Board in Gävleborg County's Decision on Increased Bag Limit for the Licensed Wolf Hunt in Gävleborg County 2016], 4 Feb. 2016, p. 2 (in Swedish) (describing the appellant's argument that wolves had not reached favourable conservation status), available at: http://www.naturvardsverket.se/upload/stod-i-miljoarbetet/rattsinformation/beslut/varg/2016-overprov-licens/beslut-inhibition-licenssjakt-gavleborg-20160204.pdf.

122 European Commission, n. 4 above, p. 8.

123 Epstein & Darpö, n. 74 above, p. 252.

124 Darpö & Epstein, n. 84 above, p. 11.

status has been decided by the Swedish government.[125] Despite a lack of improvement in the wolf population's isolation, the government decided that wolves had this status.[126] The European Commission disagreed that it had been established that wolves had reached favourable conservation status, noting in a supplemental Reasoned Opinion that Swedish wolves remained geographically isolated, immigration remained limited, and inbreeding continued to be a problem.[127] It further argued that the decision lacked sufficient scientific basis.[128] While these infringement proceedings remain open, the Commission has taken no action to bring the matter before the CJEU.

A decision by the Swedish Supreme Administrative Court in December 2016 confirmed the importance of genetics to determine conservation status. Oddly, the Court nonetheless accepted the argument of the Swedish Environmental Protection Agency that immigrant wolves that had not reproduced with Swedish wolves, and were unlikely to do so, still could be considered as contributing to the genetic health of the Swedish population.[129] The Swedish Court therefore accepted the claim that Swedish wolves enjoy 'favourable conservation status' despite the Commission's position to the contrary. Because killing strictly protected species (like wolves) can be allowed by Member States only if doing so will not be 'detrimental to the maintenance of favourable conservation status', together with other factors, the court found that the winter 2016–17 wolf hunting season could proceed.[130] Thus while increased litigation opportunities in Member State courts have facilitated the implementation of EU law, as Kelemen argued, they have not necessarily vindicated the interpretation of EU law promoted by EU actors. Sweden and the European Commission continue to disagree over how Swedish wolves should be managed, but enforcement action by the Commission on this point is thought to be unlikely.[131]

'Recovery' in the US context and 'favourable conservation status' in EU law are similar but different concepts, as are the consequences of achieving them. When a species has recovered, according to the ESA, it should be returned to state management.[132] Although the ESA is credited with preventing the extinction of many listed species, only about 50 have been ruled to be recovered and therefore no longer in need of federal protection.[133] One reason is that many species may be

[125] A.J. McConville & G.M. Tucker, 'Review of Favourable Conservation Status and Birds Directive: Article 2 Interpretation within the European Union', *Natural England Commissioned Reports*, NECR176, 17 Mar. 2015, p. 97; 'En hållbar rovdjurspolitik: Regeringens proposition' ['A Sustainable Carnivore Policy: Government's Proposition'] 2012/13:191 (2013), p. 36.

[126] En hållbar rovdjurspolitik: Regeringens proposition, ibid., p. 36.

[127] European Commission, n. 121 above, pp. 11–2.

[128] Ibid., p. 12.

[129] *Länsstyrelsen i Värmlands län* v. *Svenska Naturskyddsföreningen*, n. 91 above.

[130] Ibid., p. 49.

[131] J. Darpö, 'The Commission: A Sheep in Wolf's Clothing? On Infringement Proceedings as a Legal Device for the Enforcement of EU Law on the Environment, Using Swedish Wolf Management as an Example' (2016) 13(3–4) *Journal for European Environmental & Planning Law*, pp. 270–93.

[132] 16 U.S. Code § 1533 (c).

[133] US Fish and Wildlife Service, Delisting Report, available at: http://ecos.fws.gov/ecp0/reports/delisting-report.

'conservation reliant': able to flourish while active conservation measures are in place but likely to revert to endangered status if such measures are discontinued.[134] Species are not removed or downlisted from the Habitats Directive's annexes when they have achieved favourable conservation status; instead, Member States must continue to take measures to maintain their conservation status. While the annexes to the Directive are meant to be amended in response to 'technical and scientific progress', it is unclear whether this includes a change in conservation status.[135] Guidance from the European Commission suggests that species that are no longer at risk should be removed from protection.[136] Thus far, however, strictly protected species which are considered to have achieved favourable conservation status have remained strictly protected. While the two laws were designed differently in terms of what should happen if their goals are fulfilled, we see them operating somewhat similarly in that species tend to remain under federal protection in both systems. The next section focuses on changes to the protected status of species.

4.2. *Changing Species' Protected Status*

The Habitats Directive and ESA both recognize that effective environmental regulation must be flexible enough to adapt to changes in the natural world, and therefore have legal mechanisms for altering the protection status of species to respond to changing circumstances.[137] The list of species protected under the ESA is designed to be amended by the agencies rather than by the legislature.[138] The list is continually re-evaluated,[139] but changes can be slow.[140] Additional species, however, have been added nearly every year since 1973.[141] Anyone may petition the Fish and Wildlife Service to examine the need to list a species or make a change to the protection status of a species, or the agency may do so of its own accord.[142] Determinations may be made only on the basis of the best available science and commercial data; economic factors cannot be considered.[143]

The many lawsuits related to wolf recovery in the US were in response to decisions to delist or downlist wolves, and their legal status has fluctuated many times in the wake of both the agency decisions and subsequent litigation.[144] As the legal status

[134] J.M. Scott et al., 'Recovery of Imperiled Species under the ESA: The Need for a New Approach' (2005) 3(7) *Frontiers in Ecology & the Environment*, pp. 383–9.

[135] Art. 19 Habitats Directive.

[136] European Commission, Guidance Document on the Strict Protection of Animal Species of Community Interest under the Habitats Directive 92/43/EEC, Feb. 2007, pp. 14–5, available at: http://ec.europa.eu/environment/nature/conservation/species/guidance/pdf/guidance_en.pdf.

[137] 16 U.S.C. § 1533; Art. 19 Habitats Directive.

[138] 16 U.S.C. § 1533.

[139] 16 U.S.C. § 1533(c)(2)(A).

[140] J.B. Ruhl, 'Listing Endangered and Threatened Species', in Baur & Irvin, n. 9 above, pp. 16–39, at 27.

[141] Environmental Conservation Online System, 'U.S. Federal and Endangered and Threatened Species by Calendar Year', available at: https://ecos.fws.gov/ecp0/reports/species-listings-count-by-year-report.

[142] 16 U.S.C. § 1533(b)(3)(A).

[143] 16 U.S.C. § 1533(b)(1)(a).

[144] E.R. Olson et al., 'Pendulum Swings in Wolf Management Led to Conflict, Illegal Kills, and a Legislated Wolf Hunt' (2015) 8(5) *Conservation Letters*, pp. 351–60, at 352.

shifts, responsibility for wolf management alternates between the federal government and the states, leading to drastic changes in conservation and hunting policies.[145] The delisting of wolves began with a proposal from the Fish and Wildlife Service in 2000, when the numerical goals for recovery in the ESA were reached.[146] States were asked to develop plans for state management of wolves.[147] Wolves were downlisted from endangered to threatened in much of the US in 2003,[148] but relisted as endangered in 2005 following litigation in which two federal courts found that the Fish and Wildlife Service's interpretation of 'significant portion of its range' was arbitrary and capricious.[149]

In 2009 the Rocky Mountain distinct population segment was created and removed from federal protection. Most states in the region were allowed to manage wolves according to their plans,[150] with the exception of Wyoming because its plan was deemed inadequate.[151] Montana and Idaho licensed quota hunting. Over 250 wolves were killed during the 2009–10 hunting season.[152] Further legal challenges resulted in wolves being returned to the endangered species list in 2010.[153] The following year, during an intense debate on the federal budget, the legislature delisted the Rocky Mountain wolf population, again with the exception of Wyoming. It did so by attaching a rider to a bill that needed to be passed in order to prevent a government shutdown.[154] The public did not know about the rider until the next morning, so the legislature successfully avoided public debate on the topic.[155] The rider also contained a provision stating that the delisting decision cannot be litigated.[156] It was the first time a species has been delisted by congressional action rather than the ESA's administrative process.[157]

---

145 Ibid.

146 Proposal to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife in Portion of the Coterminous United States; Proposal to Establish Three Special Regulations for Threatened Gray Wolves, 65 Fed. Reg. 43450 (12 July 2000).

147 E.g., Minnesota Department of Natural Resources, 'Minnesota Wolf Management Plan', Feb. 2001, available at: https://www.fws.gov/midwest/wolf/stateplans/pdf/mn-wolf-plan-01.pdf.

148 Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States; Establishment of Two Special Regulations for Threatened Gray Wolves, 68 Fed. Reg. 15804 (1 Apr. 2003).

149 *Defenders of Wildlife* v. *US Department of the Interior*, 354 F.Supp.2d 1156 (D.Or., 2005); *National Wildlife Federation* v. *Norton*, 386 F.Supp.2d 553 (D.Vt., 2005).

150 Final Rule to Identify the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and to Revise the List of Endangered and Threatened Wildlife, 74 Fed. Reg. 15123 (2 Apr. 2009).

151 Williams, n. 2 above, pp. 138–9.

152 Montana Fish, Wildlife and Parks, 'The 2009 Montana Wolf Hunting Season', 29 Dec. 2009, available at: http://fwp.mt.gov/fwpDoc.html?id=41454; Idaho Fish and Game, 'Wolf Management/Status Timeline', available at: http://fishandgame.idaho.gov/public/wildlife/wolves/?getPage=161.

153 *Defenders of Wildlife* v. *Salazar*, 729 F.Supp.2d 1207 (D.Mont., 2010).

154 Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, s. 1713, 125 Stat. 38 (2011).

155 S. Perry, 'The Gray Wolf Delisting Rider and State Management under the Endangered Species Act' (2012) 39(2) *Ecology Law Quarterly*, pp. 439–73, at 452.

156 Department of Defense and Full-Year Continuing Appropriations Act, 2011, n. 154 above. The provision was upheld in *Alliance for the Wild Rockies* v. *Salazar*, 672 F.3d 1170 (9th Cir., 2012).

157 P. Taylor, 'Wolf Delisting Survives Budget Fight as Settlement Crumbles', *The New York Times*, 11 Apr. 2011, available at: https://archive.nytimes.com/www.nytimes.com/gwire/2011/04/11/11greenwire-wolf-delisting-survives-budget-fight-as-settle-61474.html?emc=eta1&pagewanted=print.

Wyoming's wolves were also delisted in 2012, through the usual administrative process.[158] Subsequent litigation returned the wolves to federal protection,[159] and back to state management following an appeal.[160] The congressional delisting in Montana and Idaho cannot be challenged in court, and therefore states have retained management authority.[161] Both states have permitted the hunting of large proportions of their wolf populations. For example, 256 wolves were legally hunted in Idaho in 2015, and an estimated 786 remained alive at the end of the year.[162] The legal status of wolves has similarly fluctuated during the same period in other parts of the country, particularly in the Great Lakes region.[163]

The annexes to the Habitats Directive are also intended to be amended as necessary to adapt them to 'technical and scientific progress'.[164] However, when it comes to changing the protected status of species, the Directive has proved to be far more rigid than the ESA. The EU maintains control over the process: amendments must be proposed by the European Commission and adopted by the Council.[165] The Habitats Directive has been amended only once on the grounds of technical or scientific progress, despite criticism from the scientific community that the lists of protected species are out of date.[166] Three additional amendments were made following the enlargement of the EU, adding about 200 species.[167] Obviously, enlargement is an exceptional event and not a reliable way to update the lists of protected species in the future.

While amending the ESA has also been problematic, it has been less so than the Habitats Directive. Nearly 1,500 species have been added to the endangered species list since its inception,[168] and about 80 have been removed.[169] However, the time from listing proposal to decision has averaged over a decade, with some listings taking considerably longer.[170] Not surprisingly, some species in peril have become

[158] Endangered and Threatened Wildlife and Plants; Removal of the Gray Wolf in Wyoming from the Federal List of Threatened and Endangered Wildlife and Removal of the Wyoming Wolf Population's Status as an Experimental Population, 77 Fed. Reg. 55530 (10 Sept. 2012).

[159] *Defenders of Wildlife* v. *Jewell*, 68 F.Supp.3d 193 (D.D.C., 2014).

[160] *Defenders of Wildlife* v. *Zinke*, No. 14-5300 (DC.Cir., 2017).

[161] Perry, n. 155 above.

[162] J. Hayden, '2015 Idaho Wolf Monitoring Progress Report', Idaho Department of Fish and Game, Mar. 2016, available at: https://idfg.idaho.gov/sites/default/files/idaho-wolf-monitoring-progress-report-2015.pdf.

[163] Olson et al., n. 144 above, p. 352.

[164] Art. 19 Habitats Directive.

[165] Ibid.

[166] A. Hochkirch et al., 'Europe Needs a New Vision for a Natura 2020 Network' (2013) 6(6) *Conservation Letters*, pp. 462–7, at 463; A. Pillai & D. Heptinstall, 'Twenty Years of the Habitats Directive: A Case Study on Species Reintroduction, Protection and Management' (2013) 15(1) *Environmental Law Review*, pp. 27–46, at 42–3; P. Cardoso, 'Habitats Directive Species Lists: Urgent Need of Revision' (2011) 5 *Insect Conservation & Diversity*, pp. 169–74.

[167] European Commission, 'Enlargement and Nature Law', 6 Oct. 2016, available at: http://ec.europa.eu/environment/nature/legislation/enlargement/index_en.htm.

[168] Environmental Conservation Online System, n. 141 above.

[169] Environmental Conservation Online System, 'Delisted Species', available at: http://ecos.fws.gov/tess_public/pub/delistingReport.jsp.

[170] D.N. Greenwald, K.F. Suckling & M. Taylor, 'The Listing Record', in D.D. Goble, J.M. Scott & F.W. Davis (eds), *The Endangered Species Act at Thirty: Vol. 1 – Renewing the Conservation Promise* (Island Press, 2006), pp. 51–67; M. Wines, 'Endangered or Not, but at Least No Longer Waiting',

extinct while waiting for a listing decision.[171] Moreover, citizen litigation may unreasonably delay the listing or delisting of species. The status of the gray wolf continues to be contested more than 16 years after many leading conservation biologists considered that recovery goals had been met.[172] Therefore, while the law is intended to be responsive to scientific knowledge, political reality often stands in the way of this.

The presence of public interest litigation has, however, generally benefited the adaptability of the ESA. Most changes to the ESA protected species list are initiated by public petition, backed up by litigation if the petition fails.[173] While the EU insists that Member State implementation of the Habitats Directive is reviewable in the national courts – which may eventually result in a reference for a preliminary ruling being addressed to the CJEU – there is no opportunity for members of the public to challenge the listing or delisting of species from protection. Further, there is no legal recourse if Member State courts decline to give effect to EU law or seek a preliminary ruling.

5. ADVERSARIAL LEGALISM AND EUROLEGALISM

Both the ESA and the Habitats Directive are enforced by regulatory agency action. They are enforced secondarily through litigation (and the threat of litigation), which can be initiated by a variety of actors, including federal authorities and members of the public. NGOs have been essential for the effective administration and enforcement of species protection legislation in both the US and the EU. Although American adversarial legalism has been criticized as a particularly uncertain and inefficient way of resolving environmental problems,[174] public interest litigation by NGOs has driven the enforcement of the ESA against the federal government and private parties.[175] Citizen suits have successfully compelled the continued federal protection of wolves and challenged decisions to allow wolf killing in many instances, although their impact has been curtailed through congressional action in Montana and Idaho.[176] The success of this so-called congressional delisting has led to further attempts to rein in NGOs through legislative action.[177] Frequent litigation over listing species and designating habitats has been costly and sometimes slow, but ultimately, and in spite of the setbacks, it constitutes a vital part of ensuring species protection in

The New York Times, 6 Mar. 2013, available at: https://www.nytimes.com/2013/03/07/science/earth/long-delayed-rulings-on-endangered-species-are-coming.html (noting several species had been candidates for protection for 20 to nearly 40 years).

171 J.B.C. Harris et al., 'Conserving Imperiled Species: A Comparison of the IUCN Red List and U.S. Endangered Species Act' (2012) 5(1) *Conservation Letters*, pp. 64–72, at 65; Wines, n. 170 above.

172 Endangered and Threatened Wildlife and Plants; Proposal to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife in Portions of the Coterminous United States; Proposal to Establish Three Special Regulations for Threatened Gray Wolves, 65 Fed. Reg. 43457 (13 July 2000); Perry, n. 155 above, pp. 449–50.

173 L.E. Baier, *Inside the Equal Access to Justice Act* (Rowman and Littlefield, 2015), pp. 178, 277–8.

174 Kagan, n. 12, pp. 207–28.

175 K. Nathanson, T.R. Lundquist & S. Bordelon, 'Developments in ESA Citizen Suits and Citizen Enforcement of Wildlife Laws' (2015) 29(3) *Natural Resources & Environment*, pp. 15–18.

176 Department of Defense and Full-Year Continuing Appropriations Act, 2011, n. 154 above.

177 Z. Bray, 'The Hidden Rise of "Efficient" (De)listing' (2014) 73(2) *Maryland Law Review*, pp. 389–457.

the US. This added 'layer' of non-governmental actor responsibility for species protection helps to ensure that legal protection for species is enforced.

Public interest litigation traditionally has played a lesser role in the enforcement of the Habitats Directive and other EU environmental legislation, but it is gaining in importance.[178] The Member States have primary responsibility for carrying out protection measures, but conservation policy and many of the decisions necessary to give it effect are determined at least in part at the EU level. While some observers have expressed concern that the EU's competence to protect species means ceding local control, the ability of public actors to influence species protection in the Member States through public interest lawsuits has been bolstered by EU legislation.

In the EU, policy setting at the Union level and implementation at the state level results in two levels of oversight for species protection. Kelemen highlights the growing importance of a third level of oversight in the non-governmental actor. He argues that the fragmentation of political power within EU institutions and across its Member States encourages individuals and interest groups to take part in enforcing EU law.[179] Developments in Sweden corroborate Kelemen's prediction that adversarial legalism will continue to expand and shape the European legal terrain, as well as that of the US.[180] The Swedish examples indicate that entrenched legal institutions such as limitations on standing and legal cultures resistant to litigation, which may have slowed the reception of adversarial legalism, are giving way. As the cases and controversies over wolves' favourable conservation status, protection, and killing in Sweden illustrate, the enforcement of EU law has been in part decentralized to interest groups who help to expand the Union's reach through litigation. In doing so, these actors play a role in delimiting the competence of Member States to manage the wildlife within their borders. When courts interpret unclear terms – like favourable conservation status – in an expansive or stringent way, they limit Member States' discretion. This limitation of interpretive discretion can occur through litigation in the EU courts or in Member State courts. In this way, control over species protection is centralized at the EU level through decentralized enforcement.

Litigation to enforce Union law has led to greater protection of wolves in the EU, as well as in the US. However, more litigation does not always result in more environmental protection, as some recent court decisions in the US and EU illustrate. Indeed, one drawback of adversarial legalism is that it can exacerbate uncertainty in regulatory decision making. Moreover, Ruhl has drawn attention to the danger of limiting the role of states in species protection in a litigious system.[181] As US states have relatively little control over species protection, they tend to have weak state laws

[178] J. Verschuuren, 'Effectiveness of Nature Protection Legislation in the European Union and the United States: The Habitats Directive and the Endangered Species Act', in M. Dieterich & J. van der Straaten (eds), *Cultural Landscapes and Land Use: The Nature Conservation: Society Interface* (Springer, 2004), pp. 39–67, at 65.

[179] Kelemen, n. 20 above, p. 24.

[180] Ibid., p. 92.

[181] J.B. Ruhl, 'Cooperative Federalism and the Endangered Species Act: A Comparative Assessment and Call for Change', in K. Arha & B.H. Thompson, Jr. (eds), *The Endangered Species Act and Federalism: Effective Conservation through Greater State Commitment* (RFF Press, 2011), pp. 35–54.

governing such protection.[182] This may seem a minor issue when there is strong federal protection; however, federal protection can be undone by a court, or by Congress. Because the states' role is limited, there may be little law left in place to protect species if federal protection is reduced.[183] Further, according to Ruhl, conflict between federal and state governments over species protection has led to resentment towards species protection in general and attacks on the federal law.[184] These concerns are equally relevant for the EU.[185]

Recent events challenge the idea that Eurolegalism would facilitate an 'ever closer union',[186] or greater enforcement of EU environmental law. Gravey has found that, while the EU continues to expand in some environmental policy areas, EU environmental policy is being dismantled in others.[187] Although a formal attempt to 'overhaul' and, arguably, weaken the nature protection directives by the Juncker administration has failed,[188] the European Commission continues to refrain from action to enforce its interpretation of EU environmental law in the Swedish wolf matter.[189] This is part of a larger trend of Commission inaction, as it increasingly relies on interest groups to enforce EU law in Member State courts.[190] Meanwhile, the Swedish Supreme Administrative Court has interpreted EU law to allow the hunting of wolves in Sweden, a position contrary to that of the European Commission. Without the threat of enforcement of EU law by EU actors, Eurolegalism may result in more litigation, but not more stringent environmental protection.

Kagan has argued that adversarial legalism is at its best when fundamental rights are at stake. A recent article by Hilson supports the idea that Eurolegalism may also function best when substantive, and not just procedural, rights can be called upon.[191]

---

[182] Ibid., pp. 44–5.

[183] Ibid., p. 45.

[184] Ibid., pp. 45–6.

[185] C. Hilson, 'The Impact of Brexit on the Environment: Exploring the Dynamics of a Complex Relationship' (2018) 7(1) *Transnational Environmental Law*, pp. 89–113, at 96, 102–3 (in which Hilson argues that while immediate large-scale post-Brexit change in environmental policy is unlikely, the loss of EU enforcement and accountability mechanisms may lead to a reduction in environmental protection).

[186] Art. 1, Treaty on European Union (TEU), Lisbon (Portugal), 13 Dec. 2007, in force 1 Dec. 2009 [2010] OJ C 83/13, available at: http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A12012M%2FTXT.

[187] V. Gravey, *Does the European Union Have a Reverse Gear? Environmental Policy Dismantling: 1992–2014* (PhD dissertation, University of East Anglia, 2016), available at: https://ueaeprints.uea.ac.uk/59419; V. Gravey & A. Jordan, 'Does the European Union Have a Reverse Gear? Policy Dismantling in a Hyperconsensual Polity' (2016) 23(8) *Journal of European Public Policy*, pp. 1180–98.

[188] A. Trouwborst et al., 'Europe's Biodiversity Avoids Fatal Setback' (2017) 355(6321) *Science*, p. 140.

[189] Darpö, n. 131 above.

[190] A. Hofmann, 'Left to Interest Groups? On the Prospects for Enforcing Environmental Law in the European Union', conference paper, 'The Future of Environmental Policy in the European Union' workshop, 19–20 Jan. 2017, University of Gothenburg (Sweden), available at: https://www.researchgate.net/publication/312951147_Left_to_interest_groups_On_the_prospects_for_enforcing_environmental_law_in_the_European_Union.

[191] C. Hilson, 'The Visibility of Environmental Rights in the EU Legal Order: Eurolegalism in Action?' (2018, forthcoming) *Journal of European Public Policy*, available at: https://doi.org/10.1080/13501763.2017.1329335.

Hilson demonstrates that while litigation by non-governmental actors in the Member State courts has played an important role in effectuating EU environmental policy, this type of litigation is rarely formulated in terms of vindicating substantive environmental rights, such as rights to particular levels of environmental quality.[192] However, as Hilson explains, procedural environmental rights – particularly the rights in the Aarhus Convention to information, participation, and access to justice in environmental matters – have increasingly been invoked in EU environmental legislation and litigation. He concludes that while this increase in the use of procedural environmental rights indicates some level of Eurolegalism in the environmental arena, procedural rights make for a 'less powerful Eurolegalism' than substantive rights.[193]

In the area of biodiversity protection, non-governmental litigants are particularly dependent on procedural rather than environmental rights, because forms of legal protection are directed at nature and species instead of at human health. The wolf cases demonstrate that procedural rights nevertheless have profound impacts on both the substantive application of biodiversity protection law in the Member States as well as on the legal systems of the Member States and the EU. Without substantive individual rights, however, European adversarial legalism may exhibit more negative attributes, akin to those faced by American adversarial legalism. When it comes to species and nature protection, substantive rights for nature may facilitate the potential of adversarial legalism to protect those least able to protect themselves.

[192] Ibid., p. 16.
[193] Ibid., p. 18.