Abandoning the APA's Scope of Review in ESA Citizen Suits

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Enacted in 1946, the Administrative Procedure Act (APA) is a cornerstone of administrative law. Described by courts and commentators as the "fundamental charter" for the administrative state (*Kisor v. Wilkie*, 588 U.S. 558, 580 (2019); Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 Ind. L.J. 1207, 1208 (2015)), the APA provides standards for judicial review of challenges to agency actions in federal court. 5 U.S.C. §§ 701–706.

One of those standards is the standard of review, which defines how much deference the reviewing court owes to the agency. When a court reviews an agency action, such as the agency issuing a permit for a project, the normal APA standard of review is the "arbitrary and capricious" standard. *Coliseum Square Ass'n v. Jackson*, 465 F.3d 215, 230 (5th Cir. 2006). Under this standard, a court should ordinarily uphold the agency action unless it is arbitrary, capricious, or an abuse of discretion.

Another standard set forth in the APA is the scope of review, which defines the type of evidence that the court may consider when reviewing claims against the agency. The normal APA scope of review is known as "record review." Under record review, a court is generally confined to considering just the evidence contained within the administrative record, which includes only those materials directly or indirectly considered by the agency. *Cherokee Nation v. U.S. DOI*, 531 F. Supp. 3d 87, 94 (D.D.C. 2021).

Traditionally, courts have abided by the APA when reviewing Endangered Species Act (ESA) citizen-suit claims against agencies. *See* 16 U.S.C. § 1540(g). Curiously, a trend is now developing where courts do something different: They adhere to the APA's standard of review but abandon the APA's scope of review. As a result, these courts purport to give the agency heightened deference but consider extra-record evidence that the agency did not consider. This article explores this trend and its implications. First, however, it provides necessary legal background on the APA, its standards, and its interplay with the ESA.

The APA and Its Interplay with the ESA

The APA is a procedural statute. It does not impose substantive requirements on agencies. To invoke the APA, a party must identify another "relevant statute" that the agency has transgressed. 5 U.S.C. § 702. There is "no right to sue for a violation of the APA in the absence of a 'relevant statute' whose violation forms the legal basis for the complaint." *El Rescate Legal Servs., Inc. v. Exec. Off. of Immigr. Rev.*, 959 F.2d 742, 753 (9th Cir. 1992) (cleaned up). Accordingly, the APA does not independently create causes of action against administrative agencies but rather provides the framework for judicial review of legal challenges to agency action taken under other statutes.

Section 706 of the APA sets forth the standard and the scope of review for courts to use when reviewing such legal challenges. As to the standard of review, section 706 directs that "[t]he reviewing court shall . . . set aside agency action" only when the court finds that the action is "arbitrary, capricious, [or] an abuse of discretion. . . ." 5 U.S.C. § 706(2)(A). The arbitrary and capricious standard is highly deferential. Under this standard, so long as the agency offers a reasonable explanation for its action, the court is typically obligated to side with the agency. *Baystate Franklin Med. Ctr. v. Azar*, 950 F.3d 84, 89 (D.C. Cir. 2020).

As to the scope of review, section 706 directs that the court's review is limited to the "whole record" provided to the court. 5 U.S.C. § 706. Courts have interpreted this provision as a limiting rule of evidence and discovery known as "record review." Under record review, absent narrow circumstances, the court's evidentiary review is confined to the evidence contained within

Published in *Natural Resources & Environment* Volume 39, Number 4, Spring 2025.

the administrative record. *Cherokee Nation*, 531 F. Supp. 3d at 94.

By confining the court's review, the record review rule is a dramatic departure from the Federal Rules of Evidence (FRE) and Federal Rules of Civil Procedure (FRCP) that ordinarily govern civil cases. While an expansive relevancy standard guides a court under the FRE and discovery is generously allowed under the FRCP, the record review rule ordinarily prohibits a court from considering even relevant extra-record evidence, and discovery is normally not allowed at all.

Although the APA is a statute of broad applicability, its standards do not apply in every instance of review of an agency action. Namely, by its terms, the APA applies only when there is "no other adequate remedy in a court. . . ." 5 U.S.C. § 704. Interpreting this provision, courts have concluded that, when a statute offers its own private right of action under a citizen-suit provision, that precludes an additional suit under the APA. *Brem-Air Disposal v. Cohen*, 156 F.3d 1002, 1005 (9th Cir. 1998).

The distinction between ESA citizen-suit claims and ESA claims brought under the APA has traditionally not mattered in terms of record review.

Still, even where the APA does not control by its terms, courts treat the APA's standards as the "default" standards. *Al Otro Lado, Inc. v. Nielsen*, 327 F. Supp. 3d 1284, 1316 (S.D. Cal. 2018). Recognizing the APA's common-law roots and the importance of a uniform approach to judicial review of agency actions, courts use the APA's standards as gap fillers when the other relevant substantive statute does not provide those standards. *Chu v. U.S. CFTC*, 823 F.3d 1245, 1250 (9th Cir. 2016).

Enacted in 1973, the ESA is designed to protect endangered and threatened species and their ecosystems. 16 U.S.C. § 1531(b). The ESA's interplay with the APA is unique. The ESA contains a citizen-suit provision that offers third parties an express private right of action against the federal government to enforce its provisions. *Id*. § 1540(g)(1). However, the Supreme Court has held that not all of the ESA's provisions are enforceable by way of the citizen-suit provision. *Bennett v. Spear*, 520 U.S. 154, 173 (1997).

When the ESA citizen-suit provision does not authorize judicial review (such as for alleged violations of § 7 of the ESA), the Supreme Court has held that agency actions under those provisions are governed by the APA because there is no other adequate remedy. *Id*. at 175; *Defs. of Wildlife v. U.S. Forest Serv.*, 94 F.4th 1210, 1220 (10th Cir. 2024). As a result, depending on the exact ESA provision at issue, a party may bring an ESA claim either under the ESA citizen-suit provision or through the APA's judicial review provisions.

Notwithstanding the legal niceties, the distinction between ESA citizen-suit claims and ESA claims brought under the APA has traditionally not mattered in terms of record review. Irrespective of whether a claim was brought under the citizen-suit provision or the APA, courts applied the APA's standards. *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 981–82 (9th Cir. 1985); *Sw. Ctr. for Biological Diversity v. Babbitt*, 131 F. Supp. 2d 1, 5 (D.D.C. 2001) (reciting case law and explaining that "all courts restrict review in ESA citizen suits to the administrative record").

In many instances, courts have done so reflexively without analysis regarding the distinction between the two types of claims. *Jantzen*, 760 F.2d at 981–82. Even when courts have appreciated the distinction, however, they have borrowed the APA's standards for ESA citizen-suit claims based on the citizen-suit provision's lack of judicial standards and the default to the APA in such situations. *Newton Cty. Wildlife Ass'n v. Rogers*, 141 F.3d 803, 808 (8th Cir. 1998).

The Emerging Trend: Borrowing One Rule but Not the Other

The Ninth Circuit's decision in *Washington Toxics Coalition v. EPA*, 413 F.3d 1024 (9th Cir. 2005), marked the first major departure from this approach. There, appellants argued that the district court erred by "contraven[ing] APA standards" because it "conducted its review outside an administrative record" when reviewing ESA citizen-suit claims. *Id*. at 1030. In a single paragraph, the Ninth Circuit rejected those arguments, reasoning that "because [the ESA] independently authorizes a private right of action, the APA does not govern the plaintiffs' claims." *Id*. at 1034. Notably, the court did not address the longstanding case law holding that the APA's standards apply to all ESA claims.

After *Washington Toxics*, a few district courts in the Ninth Circuit started relying on that decision for the proposition that "claims arising under the ESA are not limited to the administrative record review restrictions of the APA." *Or. Nat. Desert Ass'n v. Kimbell*, 593 F. Supp. 2d 1217, 1220 (D. Or. 2009). Adopting the language in *Washington Toxics*, these courts eschewed record review, concluding that "because the ESA independently authorized a right of action," it "renders the APA limitations inapplicable." *Id*.

Not all Ninth Circuit district courts were convinced. In particular, Arizona and Montana district courts rejected that reading of *Washington Toxics*, treating the language in the case instead as an anomaly. As the Arizona District Court explained when dismissing the argument that a "claim brought under the ESA citizen suit provision is not subject to this APA record review limitation," there are "numerous Ninth Circuit cases holding that APA review applies in ESA cases" and the "one paragraph to the subject of APA review" in *Washington Toxics* does not overrule that case law. *Grand Canyon Tr. v. U.S. Bureau of Reclamation*, 2008 U.S. Dist. LEXIS 83853, at *20 (D. Ariz. Sept. 26, 2008).

Nevertheless, in *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472 (9th Cir. 2011), the Ninth Circuit again concluded that the APA's scope of review does not apply to ESA citizensuit claims. Following the reasoning in *Washington Toxics*, the court explained that the "APA applies only where there is no other adequate remedy" and "because the ESA provides a citizen suit remedy—the APA does not apply in such actions." *Id*. at 497. The court thus held that "under *Washington Toxics Coalition*, [it] may consider evidence outside the administrative record" when reviewing ESA citizen-suit claims. *Id*.

Yet, unlike in *Washington Toxics*, the court stated in its opinion that the APA's standard of review applies to *all* ESA claims. "Irrespective of whether an ESA claim is brought under the APA or the citizen-suit provision, the APA's 'arbitrary and capricious' standard applies." *Id*. at 481. The court reasoned that "[b]ecause ESA contains no internal standard of review," the default rule is to adopt the APA's standard of review. *Id*. at 496. The court did not explain why the same default rule would not apply to the APA's scope of review.

After *Kraayenbrink*, the dam broke and a flood of Ninth Circuit district courts began disregarding the APA's scope of review. *See*, *e.g.*, *Friends of the Clearwater v. Higgins*, 523 F. Supp. 3d 1213 (D. Idaho 2021); *Ctr. for Biological Diversity v. Bernhardt*, 595 F. Supp. 3d 890 (D. Ariz. 2022); *Riverkeeper v. Nat'l Marine Fisheries Serv*., 2023 U.S. Dist. LEXIS 109532 (D. Or. June 26, 2023); *Oceans v. U.S. Army Corps of Eng'rs*, 2023 U.S. Dist. LEXIS 189183 (W.D. Wash. Oct. 20, 2023). In light of *Kraayenbrink* applying the standard, but not the scope, of review, these courts concluded that only the APA's standard of review applies to ESA citizen-suit claims.

To be sure, not every court has followed suit. For example, district courts within the Tenth Circuit and D.C. Circuit, relying on earlier precedent, have squarely rejected this approach and continue to treat the APA's scope of review as the default. *See San Diego Cattlemen's Coop. Ass'n v. Vilsack*, 2015 U.S. Dist. LEXIS 189692 (D.N.M. Apr. 20, 2015); *Ctr. for Biological Diversity v. Ross*, 349 F. Supp. 3d 38 (D.D.C. 2018). Likewise, where the scope of review is not squarely raised as an issue, courts often may reflexively apply the APA's record review rule. Nevertheless, considering the volume of ESA cases filed in the Ninth Circuit and the spread of the precedent to other circuits, there is now a trend to discard record review for claims brought under the ESA citizen-suit provision.

Implications of Extra-Record Review

This developing trend has significant implications for how ESA citizen suits are litigated and decided.

First, the rejection of record review undoes agency deference. The underlying premise of applying the APA's standard of review, but not its scope of review, is that the two are "divisible"—in other words, that it is possible for a court to afford the agency heightened deference under the arbitrary and capricious standard while accepting new extra-record evidence that the agency itself did not review.

That premise is unsound. To begin with, the APA's language contemplates that the two standards are tethered together. Both are, after all, found in the same section of the APA—section 706. In that section, the APA directs that, in making the arbitrary and capricious determination, the court do so based on the record:

> [STANDARD OF REVIEW:] The reviewing court shall . . . set aside agency action . . . found to be . . . arbitrary, capricious, [or] an abuse of discretion. . . .
>
> [SCOPE OF REVIEW:] *In making the foregoing determinations*, the court *shall review* the whole *record* or those parts of it cited by a party. . . .

5 U.S.C. § 706 (emphasis added). Given the statutory language, section 706 plainly anticipates that the reviewing court will determine whether the agency's action is arbitrary or capricious (standard of review) by looking to the record (scope of review).

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Further, in practice, a court cannot fairly apply the arbitrary and capricious standard without cabining its review to existing evidence considered by the agency. The APA's arbitrary and capricious standard is designed to ensure that a court does not "substitute its judgment for that of the agency." *California v. Azar*, 927 F.3d 1068, 1079 (9th Cir. 2019). Consistent with the APA's text, the record review rule ensures that courts honor their commitment to deference in practice. The purpose of limiting review to the record is to prevent courts from "using new evidence to convert the 'arbitrary and capricious' standard into effectively de novo review," under which no deference is given to the agency. *Butte Cty. v. Chaudhuri*, 197 F. Supp. 3d 82, 91 (D.D.C. 2016) (cleaned up). Indeed, when a court is freely accepting new evidence, the court is necessarily reviewing evidence that the agency did not and using it to question the agency's decision. By doing so, a court undercuts agency deference and, in reality, conducts a de novo review.

This exact point is frequently championed, ironically, by the Ninth Circuit in support of record review: "When a reviewing court considers evidence that was not before the agency, it *inevitably* leads the reviewing court to substitute its judgment for that of the agency." *San Luis & Delta-Mendota Water Auth.*

v. Locke, 776 F.3d 971, 992 (9th Cir. 2014) (emphasis added). By accepting new extra-record evidence, as the Ninth Circuit has explained, "the reviewing court effectively conducts a de novo review of the agency's action rather than limiting itself to the deferential procedural review that the APA's arbitrary or capricious standard permits." *Id*.

Although courts following this emerging trend have implicitly determined that the standard and scope of review are divisible, they have done so without thoughtful analysis grappling with this issue. Nor could they reasonably undertake such analysis and reach their same conclusion. The APA's standard and scope of review are part and parcel of the APA's same words of deference. When courts abandon record review, they abandon deference, whether they admit it or not.

Second, this trending case law sets up a proverbial trap for the unwary defendant. Given the long line of case law reflecting that the APA's standards control—and the oddity of applying the APA's standard, but not its scope, of review—it is easy for defendants to overlook this new case law. Already, environmental plaintiffs have used it to their advantage. To date, only environmental plaintiffs appear to have advanced this developing case law in support of their lawsuits.

Allowing plaintiffs to submit extra-record evidence in support of ESA citizen-suit claims incentivizes plaintiffs to bring such claims.

A common developing fact pattern begins with agency and industry defendants approaching ESA litigation as typical record review litigation, in which the defendants enter into a scheduling order that requires the agency to lodge an administrative record and that does not contemplate discovery. Later in the litigation, plaintiffs assert that their ESA citizen-suit claim is not confined to the record. In the worst-case example, plaintiffs submit extra-record evidence during the summary judgment phase of the litigation. Frequently, defendants move to strike the extra-record material, but when the court denies the motion, defendants are left in a difficult position of responding to new material late in the litigation.

For example, in *Friends of the Clearwater v. Probert*, plaintiff introduced an expert declaration in support of its summary judgment motion on its ESA citizen-suit claim that sought to overturn the Forest Service's approval of two major timber projects. The declaration contained new expert opinions purporting to challenge the Forest Service's conclusion that the projects would have "no effect" on grizzly bears. Defendants moved to strike the extra-record material, but the court denied the motion, forcing the defendants to respond to the declaration based only on evidence in the existing record. *Friends of the Clearwater v. Probert*, 2022 U.S. Dist. LEXIS 113538 (D. Idaho June 24, 2022).

Similarly, in *White v. U.S. Army Corps of Engineers*, during the summary judgment phase, plaintiff introduced new evidence of water samples purporting to show that turbidity caused by the operation of a dam injured protected species of salmonids, and the existing administrative record seemingly did not have meaningful contrary evidence on this issue. After the court denied defendants' motion to strike, the court relied extensively upon the extra-record evidence to grant judgment in favor of plaintiff. *White v. U.S. Army Corps of Eng'rs*, 2024 U.S. Dist. LEXIS 111259 (N.D. Cal. May 6, 2024).

A less pernicious variation of this fact pattern occurs where plaintiffs propound discovery requests on defendants after the scheduling order is entered but before summary judgment. In these cases, defendants usually file a motion to limit the case to the record, but when the court denies the motion, they also are left in a difficult position of having advanced in the litigation without assuming discovery.

For example, in *Riverkeeper v. National Marine Fisheries Service*, several months after the parties entered into a scheduling order that did not set discovery deadlines, plaintiffs sent discovery requests to defendants. Defendants filed a motion to limit the case to the record, but the court denied it. Plaintiffs then used the discovery responses to support their summary judgment motion that defendants violated the ESA, and, in part, the court sided with plaintiffs. *Riverkeeper v. Nat'l Marine Fisheries Serv*., 2025 U.S. Dist. LEXIS 10175 (D. Or. Jan. 21, 2025).

Third, allowing plaintiffs to submit extra-record evidence in support of ESA citizen-suit claims incentivizes plaintiffs to bring such claims. When environmental groups challenge agency actions, they often do so under multiple causes of action, all of which are often confined to the administrative record.

By adding an ESA citizen-suit claim, however, plaintiffs are able to present evidence to the court that they normally could not offer under the other causes of action. Even if the court cannot technically consider the extra-record evidence under the other claims, the court must still review and address it when deciding the ESA citizen-suit claim. Plaintiffs are thus allowed the opportunity to submit additional evidence to the court—including declarations from their experts and new substantive evidence purporting to show injury to species from projects—that they would otherwise not be able to under record review, which provides more reason for them to bring ESA citizen-suit claims.

Lastly, the rejection of record review has the potential to dramatically alter the nature of ESA litigation. Record review cases are litigated much differently than cases governed by the FRE and FRCP. Because record review cases are decided based on the administrative record without discovery, they proceed in an expedited fashion and are ordinarily decided on summary judgment.

In contrast, cases governed under the FRE and FRCP can last years with extensive discovery, including written discovery, expert reports, and depositions. Because the standard for summary judgment is difficult to satisfy under the FRCP, cases may

advance to trial on the merits. Thus, abandoning record review in favor of litigating under the FRE and FRCP has the potential to intensely reshape the entire litigation.

A Few Final Practice Points for Defense Counsel

This trend presents obvious issues for defense counsel in cases involving ESA citizen-suit claims. To attempt to combat these issues, defense counsel should strive to establish certainty on the scope of review as early as possible in the litigation. Several procedural vehicles exist to gain this certainty.

First, defense counsel should consider squarely addressing the issue in the scheduling order. Defense counsel may consider proposing in the scheduling order that the parties stipulate that the case is bound by the administrative record and that the court address any extra-record evidence issues before summary judgment deadlines.

Second, if the issue is not addressed in the scheduling order, counsel should consider filing a motion to limit the case to the administrative record early in the litigation to receive guidance from the court before the summary judgment phase.

Lastly, in multiclaim cases where the other claims are bound by the administrative record, defense counsel should consider filing an early motion to dismiss the ESA citizen-suit claim. If the motion is successful, it will allow the case to continue on a record review trajectory for the other claims and prevent plaintiffs from submitting significant extra-record evidence later in the case. Even if the motion to dismiss is unsuccessful, the court is likely to issue a ruling on the scope of review as part of the motion to dismiss and counsel can plan accordingly.

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