UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

GENERAL LAND OFFICE OF THE STATE OF TEXAS, *Plaintiff*, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., *Federal Defendants*, and SAVE OUR SPRINGS ALLIANCE, *Defendant-Intervenor*.	)	No. 1:23-cv-00169-DAE

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The 2015 petition ("Petition") to remove the golden-cheeked warbler ("Warbler") from the list of endangered species failed to provide substantial information indicating that delisting may be warranted. In reviewing the Petition, the U.S. Fish and Wildlife Service ("Service") found that many of the studies cited in the Petition refuted the Petition's conclusion that the Warbler may no longer be endangered. The Service applied the proper standard in its review of the Petition and did not require the Petition to prove recovery of the Warbler or present new information not previously known to the Service. Relying on the studies cited in the Petition and information in its own files, the Service concluded in its negative 90-day finding ("2021 90-Day Finding") that the Petition failed to provide substantial information showing decreases in significant threats to the Warbler and, thus, did not present substantial information indicating that delisting may be warranted. The 2021 90-Day Finding was not arbitrary and capricious and should be upheld.

ARGUMENT

I. Federal Defendants Articulated the Correct Standard of Review in Their Opening Brief.

As an initial matter, Defendants correctly articulated the standard of review under the Administrative Procedure Act ("APA"). *See* ECF No. 56 at 15–16. Plaintiff's assertions to the contrary are misguided. *See* ECF No. 59 at 7–8. Defendants agree that the APA permits courts to "hold unlawful and set aside agency action . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [and] without observance of procedure required by law." 5 U.S.C. § 706(2)(C)-(D). But these provisions are inapplicable here.[1]

[1] Plaintiff does not challenge the procedures used in issuing the 2021 90-Day Finding, and its issuance was not in excess of statutory authority because a 90-day finding is required under Section 4 of the ESA. 16 U.S.C. § 1533(b)(3)(A).

The key question in this litigation is whether the Service's *determination* in the 90-Day Finding was reasonable. The standard of review in litigation challenging the Service's listing determination is well-settled. The Court must consider whether the Service's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *accord Gen. Land Off. v. U.S. Dep't of the Interior*, 947 F.3d 309, 320 (5th Cir. 2020). Moreover, the Fifth Circuit and the Supreme Court have rejected Plaintiff's contention that "courts 'apply de novo review'" in these circumstances. ECF No. 59 at 7 (quoting *United States v. Texas*, 143 S. Ct. 1964, 1982 (2023) (Gorsuch, J., concurring)). "Under well-established principles of administrative law, *de novo* review is not the standard. The courts are not empowered to substitute their judgment for that of the agency." *State of La., ex rel. Guste v. Verity*, 853 F.2d 322, 327 n.8 (5th Cir. 1988) (citing *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983)). Thus, the Court must "uphold" the 90-Day Finding if the Service's stated reasons "satisfy minimum standards of rationality." *Medina Cnty. Env't Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) (quoting *Pub. Citizen, Inc., v. EPA*, 343 F.3d 449, 455 (5th Cir. 2003)).

II. The Service Abided the Fifth Circuit's Instructions and Applied the Appropriate Legal Standard to the Petition.

The Parties appear to agree about the standard the Service was required to apply in rendering its 2021 90-Day Finding, notwithstanding Plaintiff's contentious language. *See* ECF No. 59 at 8–11. The Service was required to determine whether the Petition presented "substantial scientific or commercial information indicating that the petitioned action may be warranted." ECF No. 56 at 10 (quoting 16 U.S.C. § 1533(b)(3)(A)). "'Substantial information' is 'that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted.'" *Id.* at 11 (quoting 50 C.F.R. § 424.14(b)(1) (2014)). Plaintiff does not dispute that the Petitioner has the burden of providing substantial information and that the

Service is permitted to consider information in its own files when evaluating a Petition. ECF No. 59 at 9, 10. Moreover, Defendants agree that the Service may not require conclusive proof of recovery to proceed to the 12-month finding stage. Nor may the Service require a petition to present new information sufficient to refute past agency conclusions to move past the 90-day finding stage, under the regulations applicable when the Petition was submitted. The Service never faulted the Petition for failing to conclusively prove recovery or failing to provide new information. Instead, the Service found that the Petition failed to present substantial information indicating that delisting may be warranted. AR8106–07. Put another way, the Service did not deny the Petition for failing to meet an inappropriately high bar, it denied the Petition for failing to carry its relatively low burden. *See Moden v. U.S. Fish & Wildlife Serv.*, 281 F. Supp. 2d 1193, 1204 (D. Or. 2003) ("the standard for evaluating whether substantial information has been presented . . . is not overly-burdensome").

Plaintiff attempts to overcome the shortfalls of the Petition by perverting the Service's statements with respect to two issues—recovery of the species and the scope of a specific report submitted with the Petition. First, the 2021 90-Day Finding did not improperly require proof of recovery. The Petition argued that recovery benchmarks from the Warbler's Recovery Plan had been met. AR0119-29. Because the Petition addressed recovery in the first instance, the Service considered this argument and determined that "recovery criteria have not been accomplished." AR8098. Indeed, this is the only mention of recovery criteria within the 2021 90-Day Finding. *See* AR8094–107. Accordingly, the Service did not base its denial of the Petition on a failure to provide substantial information indicating that recovery criteria had been achieved, but rather was due to strong evidence in the Petition and the Service's files of serious threats to the Warbler. The Service's summary of its rationale for denying the Petition is as follows:

> The petition provided information indicating that the warbler population is larger now than it was estimated at the time of listing and argues that threats considered at the time of listing no longer threaten the species. This argument is refuted by readily available information, in the Service's files, *including many studies cited in the petition itself*. The petition does not provide any scientific data or analysis of existing data showing that threats to the warbler are minimal enough that the petitioned action to delist the warbler may be warranted . . . [T]he warbler has very particular habitat needs and important threats, especially those associated with habitat destruction and habitat fragmentation, that are ongoing and expected to impact the continued existence of the warbler in the foreseeable future. Those threats are likely to be exacerbated by future human development and climate change[.]

AR8106–07 (emphasis added). The (non)achievement of recovery criteria was not the crux of, nor even a significant factor in, the Service's finding.[2]

Plaintiff similarly latches onto the Service's observation that newer modeling efforts yielding larger estimates of Warbler habitat and population "do not imply recovery" to suggest that the Service impermissibly required proof of recovery.[3] AR8097; ECF No. 59 at 11. Again, the Service's statement appropriately responds to the Petition's assertion that the higher estimates indicate that the Warbler has recovered and is no longer endangered. AR8097; AR0057. But the data in the Petition stems from modeling techniques that are not comparable to prior estimates.[4] AR0059 (Petition describing differences in survey technology). Because these methodologies cannot be compared, the Service explained that their yields cannot be interpreted to demonstrate

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[2] The Service may consider recovery criteria in its review of a petition, but the achievement of such criteria is not dispositive. *Cf. Friends of Blackwater v. Salazar*, 691 F.3d 428, 432–34 (D.C. Cir. 2012) (recovery criteria not binding in delisting determination).

[3] Plaintiff's accusation that the Service is rewriting the Endangered Species Act ("ESA") to put the word "imply" into the substantial information standard is baseless. ECF No. 59 at 11. Defendants' brief provided the definition of "imply" to refute Plaintiff's argument that the Service used "imply" to mean "conclusively prove." *See* ECF No. 56 at 17–18; ECF No. 55 at 26.

[4] Where it supports Plaintiff's narrative, Plaintiff acknowledges that these estimates do not necessarily indicate that the Warbler population has increased since the species' listing. *See* ECF No. 59 at 21.

increased population and habitat over time. AR8097. Because the Petition heavily relied upon these estimates to argue that the Warbler is no longer endangered due to recovery, AR0057–63, the Service appropriately addressed that information and explained why the proffered estimates failed to imply recovery. In other words, the Service was explaining that the estimates did not support the Petitioners' contention about recovery, not that recovery evidence was required. Cherry-picked, out-of-context references to "recovery" do not demonstrate that the Service applied an inappropriately heightened standard of review to the Petition.

Second, the Service's consideration of a study heavily relied upon by the Petition (the "Texas A&M Report") is not evidence of the Service improperly requiring the Petition to present "new" information. *Contra* ECF No. 59 at 14–16. The Fifth Circuit faulted the Service's 2016 90-Day Finding for "requir[ing] the delisting petition to contain information that the Service had not considered in its five-year review that was sufficient to refute that review's conclusions." *Gen. Land Off.,* 947 F.3d at 321. The Service did not repeat that mistake here. The 2021 90-Day Finding mentions "new" data only once, in characterizing the Texas A&M Report. AR8097. The Service determined that the Report did not include "any new data or study results regarding the warbler," but instead was a summary of "readily available information about the warbler and its habitat." *Id.* The 2021 90-Day Finding further states that the Service treated the studies within the Texas A&M Report "as reliable for the purposes of evaluating whether the petition . . . presents substantial information that delisting may be warranted." *Id.* Clearly the Service's statements were a description of the contents of the Texas A&M Report and the Service's treatment of the studies summarized by the report as reliable. Plaintiff's perversion of this single observation to argue that the Service impermissibly required the Petition, and particularly the Texas A&M Report, to contain new information fails to hold water.

Plaintiff counters that the Service must have "discount[ed]" the Texas A&M Report and questions how "the most recent and comprehensive effort" that included higher estimates of the Warbler's population and range could fail to meet the substantial information standard. ECF No. 59 at 15. However, the Service did not discount the Texas A&M Report or the studies it summarized. Rather, the agency explicitly credited these studies, but still found the standard had not been met for two reasons. First, the modeling efforts yielding higher estimates "represent new estimates *rather than indicators of positive* trends in warbler habitat and population size," and could not be assumed to demonstrate population increase over time. AR8097 (emphasis added). Second, even though the Petition presented evidence that the Warbler's population and estimated potential range are currently understood to be larger than what was known at the time of listing, the Petition failed to include substantial information indicating that the size of the population is sufficiently large to withstand the significant threats the species faces. *See* AR8097–98; AR8106–07; *infra* 10–14 (discussing threats documented in the Petition). Similarly, Plaintiff argues that the Service failed to credit several studies demonstrating that the threats to the Warbler are no longer serious enough to warrant listing.[5] ECF No. 59 at 17. But the Service did credit those studies and, indeed, found that the Petition's allegations of lessened threats were "refuted by . . . many studies cited in the petition itself." AR8106.

This argument speaks to a larger flaw in Plaintiff's interpretation of the substantial information standard. Plaintiff recognizes that the Service may consider information in its own

[5] Plaintiff also takes issue with the use of the phrase "minimal enough" in the 2021 90-Day Finding and argues that this is further evidence that the Service failed to apply the substantial information standard. ECF No. 59 at 17. In the context of the Petition's argument that the Warbler's population and range have increased to a point sufficient to withstand the threats that the species faces, the Service interpreted the substantial information standard as requiring information showing that threats were "minimal enough" that delisting may be warranted. AR8106. This is not a deviation from the substantial information standard, but a reasonable application of that standard to the facts.

files when evaluating a petition. ECF No. 59 at 10 (citing *Ctr. for Biological Diversity v. Morgenweck*, 351 F. Supp. 2d 1137, 1142 (D. Colo. 2004)). Yet, Plaintiff wants the Service to take the conclusions offered in the Petition without any further analysis of whether all information available to the Service would lead a reasonable person to conclude that delisting may be warranted.[6] Where, like here, the Service finds information within the studies cited in the Petition and its own files that refutes the conclusions offered in the Petition, the Service must be able to draw its own conclusions and deny the petition for failure to meet the substantial information standard. Plaintiff's interpretation would undermine the threshold function of the 90-day finding by automatically advancing each petition to the 12-month finding stage without any analysis of whether the standard articulated by Congress has been met, contrary to the procedures set forth in 16 U.S.C. § 1533(b)(3)(B). "It is [the Court's] duty to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section, as [Plaintiff's] interpretation requires." *United States v. Menasche*, 348 U.S. 528, 539–40 (1955) (internal citation omitted).

III. The Service Reasonably Concluded that the Petition Did Not Present Substantial Information Indicating that Delisting May Be Warranted.

A. The Petition Failed to Present Substantial Information that the Original Data Were "In Error" at the Time of Listing.

The ESA implementing regulations in effect at the time the Service received the Petition directed that the Service could delist a species *only* if the best scientific and commercial data indicated that the species was extinct or recovered or that the "[o]riginal data for classification

[6] Under a similar rationale, Plaintiff argues that the *Palouse Prairie Foundation v. Salazar* court relied upon an impermissible "balancing test" to uphold a negative 90-day finding. No. CV-08-032-FVS, 2009 WL 415596 (E.D. Wash. Feb. 12, 2009). But the *Palouse* court merely considered whether the Service's interpretation of the evidence presented in the petition was reasonable (i.e., whether the Service exercised its judgment in a reasonable manner). *Id.* at *6. Evaluation of the evidence presented in a petition to determine whether it supports affirmative statements therein does not go beyond the "substantial information" inquiry required at the 90-day finding stage.

[were] in error." 50 C.F.R. § 424.11(d)(1)-(3) (2014). The Service reasonably concluded that the Petition did not present substantial information indicating the original data for classification of the Warbler were in error.

Plaintiff argues that the term "classification" could refer to the determination that a species is threatened or endangered and not just the species' taxonomic classification. ECF No. 59 at 18–20. However, the Court need not resolve any ambiguity in this regulatory language, which incidentally was removed from the regulation in 2019 and replaced with clearer language. *See* 50 C.F.R. § 424.11(e)(1)-(3) (2019). Even if "classification" in 50 C.F.R. § 424.11(d)(3) (2014) refers to classification as an endangered or threatened species, the Petition still did not present substantial information that delisting may be warranted due to an error in the original data for classification. Plaintiff continues to promote a position that any scientific progress following the listing warrants delisting under the "in error" category.[7] Under this reading, any petitioner could reach the 12-month finding stage (and ultimately achieve delisting) by bringing forth any new data that improves upon the "data available when the species was listed." *Id.* § 424.11(d)(3) (2014). As science is continually changing, Plaintiff's reading of the "in error" provision would completely swallow the petition review process. This Court has already rejected this interpretation of the "in error" provision. *See Am. Stewards of Liberty v. Dep't of the Interior*, 370 F. Supp. 3d 711, 729–30 (W.D. Tex. 2019).[8] Future scientific developments, such as the discovery that the species'

[7] Plaintiff denies this characterization of its position but offers no limiting principle for its interpretation of the "in error" provision. ECF No. 59 at 20. Indeed, Plaintiff's example of why the Warbler listing data was "in error" is that the earlier studies used "now-primitive aerial imaging"—the type of technological progress that could call into question listings of numerous species under its interpretation of the regulations. *Id.*

[8] Defendants mistakenly stated that counsel for Plaintiff in this litigation also served as counsel for plaintiffs in *American Stewards of Liberty* and had raised the instant argument concerning the "in error" provision in that litigation. Plaintiff's counsel represented an intervenor in that case and, accordingly, should be familiar with this Court's rejection of the argument they advance here.

population is greater than estimated at the time of listing, do not mean that the best available data at the time of listing were in error or that the Service's interpretation of the data was in error. *Id.*

Moreover, regardless of which of the three specific circumstances for delisting apply, the Service must conclude that the species is "neither endangered nor threatened" based upon the five statutory factors. 50 C.F.R. § 424.11(d) (2014); *see* 16 U.S.C. § 1533(a)(1). As relevant here, the Petition needed to present substantial information indicating the species may not be endangered or threatened based on the five statutory factors, in addition to any information supporting the argument that the original data was "in error." As the Service thoroughly explained, the Petition to delist the Warbler did not carry this burden.

B. The 2021 90-Day Finding Was Reasonable and Well-Explained.

i. Factor A: Present or Threatened Habitat Destruction, Modification, or Curtailment

As a threshold matter, Plaintiff attempts to relitigate an argument that failed in their prior challenge. Plaintiff claims that the lack of designated critical habitat for the Warbler renders the 2021 90-Day Finding arbitrary and capricious. This Court has thoroughly considered and rejected this argument, finding that the "plain text of the ESA" sets different criteria and considerations for listing decisions as opposed to decisions to designate critical habitat. *Gen. Land Off. of Tex. v. U.S. Fish & Wildlife Serv.*, No. AU-17-CV-00538-SS, 2019 WL 1010688, at *10 (W.D. Tex. Feb. 6, 2019), *aff'd in part, rev'd in part sub nom. Gen. Land Off.*, 947 F.3d 309. "Critical habitat" is a term of art in the ESA. It is not simply a map of where the species is found; but rather, it is a designation conferring additional legal protections on specific areas found to meet the statutory definition, "taking into consideration the economic impact, the impact on national security, and any other relevant impact." 16 U.S.C. § 1533(b)(2); *see also id.* § 1532(5)(A) (defining "critical habitat"). Listing decisions, on the other hand, must be based solely on five statutory factors, and cannot consider economic impacts or other factors relevant to a critical habitat designation. *Id.* §

1533(a)(1); *Gen. Land Off.*, 2019 WL 1010688 at *10. This Court held previously that "the Service's failure to designate critical habitat did not render its 90-day finding arbitrary and capricious." *Gen. Land Off.*, 2019 WL 1010688, at *10. Plaintiff did not appeal this portion of the judgment, and it cannot relitigate it now.[9]

Moreover, the lack of designated critical habitat does not mean that the Service or regulated entities are "blindfolded" when assessing the species' habitat or the impact of habitat loss. *Contra* ECF No. 59 at 17. Here, record documents identify the location of the Warbler's range and discuss the amount of habitat loss that has occurred. *See* AR7041; AR2423. For example, a study cited in the Petition estimated a 29% reduction in total warbler breeding habitat between 1990-2001 and 2010-2011. AR1915; AR0056; AR0075. The Petition never argued that the lack of designated critical habitat impeded its habitat analysis or itself warranted delisting the Warbler. AR0044-85. For all these reasons, the Service need not consider the lack of designated critical habitat in its review of whether the Petition presented substantial information on the five listing factors.

Plaintiff repeatedly downplays the threats that habitat destruction, fragmentation, and degradation pose to the Warbler, going as far as to argue that habitat loss is not a sufficient basis to maintain an endangered listing. ECF No. 59 at 26. This, of course, is not true. Habitat loss is one of the explicit bases for listing under the ESA. *See* 16 U.S.C. § 1533(a)(1)(A). And studies cited in the Petition confirm that the Warbler is experiencing significant habitat loss.[10] *See* ECF

[9] Plaintiff did appeal the district court's determination that the statute of limitations barred Plaintiff from directly challenge the failure to designate critical habitat or the decision to list the species without designating critical habitat. *Gen. Land Off. of Tex. v. U.S. Fish & Wildlife Serv.*, No. AU-17-CV-00538-SS, 2017 WL 10741921 at *6 (W.D. Tex. Nov. 30, 2017). The Fifth Circuit affirmed this holding. *Gen. Land Off.*, 947 F.3d at 318.

[10] The Petition cited studies demonstrating significant loss of Warbler breeding habitat between the 1990s and early 2010s and suggesting that increasing habitat destruction and fragmentation negatively affect Warblers, particularly those in urban landscapes. AR8098–99 (describing

No. 56 at 23–25. The Warbler breeds and nests *exclusively* within Central Texas in dense-canopy, Ashe-juniper mixed-oak woodlands. AR6776. This is an inherently limited range that is shrinking due to development and the effects of climate change. AR6786, AR6782–83. Moreover, Warblers require tree stands that are, at minimum, 50 to 75 years old. AR0332–33; AR4231. Thus, it takes generations for Warbler habitat to regenerate in the wild.

Plaintiff relies heavily on the Mathewson et al. (2012) study estimating larger Warbler population and habitat than was known at the time of listing to argue that the Warbler's habitat is sufficient to support and sustain its population, either because the population has grown despite these threats or has always been large enough to withstand them.[11] ECF No. 59 at 23–25. But Mathewson concluded no such thing. That study "suggested that more warblers exist than previously estimated [] or that the carrying capacity of available habitat is greater," but did not conclude that the Warbler population had increased or recovered. AR3585. Two things can be true at once: the Warbler's population and habitat can be currently estimated as larger than they were at the time of listing, and there can be documented loss of Warbler habitat due to fragmentation and urbanization that is expected to continue to significantly threaten the species' future existence. Despite these higher habitat and population estimates, the Warbler population is still not large enough and its habitat not expansive enough to sustain the species in light of the threats it faces.[12]

Petition's reliance on Duarte et al. (2016), AR0326; Duarte et al. (2013), AR1915; Groce (2010), AR2406; Butcher et al. (2010), AR1143; Robinson (2013), AR5467).

[11] Plaintiff also incorrectly states that 3,000 breeding pairs will sustain the Warbler population for 100 years. ECF No. 59 at 25. The cited assessment found that such a population would likely be necessary in *each* of the Warbler's eight recovery regions. *See* AR0954 ("A carrying capacity of 3,000 breeding pairs of golden-cheeked warblers *for each population* was tentatively recommended ….") (emphasis added).

[12] Even species with much larger ranges and populations than the Warbler may remain susceptible to devastating threats. *See e.g.*, *Alaska v. NMFS*, No. 3:22-cv-00249-JMK, 2024 WL 1199714, at *7 (D. Alaska Mar. 20, 2024) (upholding a negative 90-day finding where the Arctic Ringed Seal

AR8097–98. Even if the Court "might find contrary views more persuasive," in light of the "agency's particular technical expertise," the Court should defer to the Service's reasoned finding that the Petition failed to present substantial information indicating delisting may be warranted based on lack of present or threated destruction of habitat. *Medina Cnty.*, 602 F.3d at 699.

ii. Factor C: Disease or Predation

The Petition failed to present substantial information regarding predation indicating that delisting the Warbler may be warranted. The Service did not "ignore" or "discount" the data provided in the Petition regarding predation in favor of the Service's Five-Year Review. *Contra* ECF No. 59 at 27. To the contrary, the Service relied on studies *cited within the Petition* demonstrating that predation is still a threat to the Warbler. *See* ECF No. 56 at 27–28; AR8101. One study cited in the Petition reported that snakes depredated 15% of nesting females and that nesting females failed to evade capture 75% of the times a snake depredated their nest at night. AR0065 (citing Reidy et al. 2009a); AR4483. Another study cited in the Petition found that various predators depredated 22% of eggs and 24% of nestlings in the studied populations. AR0065 (citing Stake et al. 2004); AR5828. Yet another study cited in the Petition found that cowbird parasitism of Warbler nests alone ranges from 8.3 to 57.6% per year. AR0065 (citing Groce et al. 2010); AR2465. Plaintiff relies on Mathewson et al. (2012) to suggest that the Warbler population is large enough to withstand the predation pressure. ECF No. 59 at 28. But population size is not a trump card in the ESA listing five-factor analysis. Regardless of the size of the Warbler's population, studies cited in the Petition and within the Service's files indicate that predation of Warblers continues to occur and will be exacerbated by ongoing habitat fragmentation. AR8101. In light of

population remains in the millions, but expected future habitat modification meant that the petition did not provide substantial information indicating that delisting may be warranted).

this evidence, the Service rationally concluded that the Petition failed to present substantial information indicating that delisting may be warranted.

iii. Factor D: Adequacy of Existing Regulatory Mechanisms

The Petition failed to present substantial information indicating that existing regulatory mechanisms may be adequate such that delisting the Warbler may be warranted. The Service accurately recognized that neither of the laws identified in the Petition would protect the Warbler against its most imminent threat: habitat destruction. AR8102; *see also* 16 U.S.C. § 703(a); Tex. Parks & Wild. Code Ann. § 68.015. The Service also reasonably found that the existence of several land-protection programs was not sufficient. A study cited by the Petition found that approximately 29% of existing Warbler breeding habitat was lost over a ten-year period, despite these land protections. AR0056 (citing Duarte et al. 2013); AR1921. The Petition, thus, failed to provide sufficient information indicating that delisting the Warbler may be warranted.

iv. Factor E: Other Natural or Manmade Factors

Finally, the Petition failed to present substantial information indicating that factors such as oak wilt, fire, land management, climate change, and recreation may not be threats to the Warbler. The Petition itself acknowledged the existence of several of these threats but ignored others (i.e., climate change and recreation).[13] AR0070–72. The Petition highlighted that Warbler pairing success decreased by 27% in areas affected by oak wilt and that the amount of affected Warbler

[13] Plaintiff takes issue with the Service's consideration of its Five-Year Review in evaluating whether climate change and recreation also threaten the Warbler. ECF No. 59 at 30. First, by Plaintiff's own admission, it is "obvious" and "uncontroversial" that the Service may consider information in its own files when evaluating a petition. *Id.* at 10. Second, by considering existence of these threats, of which there is evidence in the agency's own files, the Service did not impermissibly require the Petition to include *new* information not included in the Five-Year Review. The agency permissibly considered available information about these threats, which were uncontested by the Petition, in evaluating whether Petition presented substantial information for each listing factor indicating that delisting may be warranted. AR8106–07.

habitat was predicted to double by 2018. AR0071. The cited study went on to predict that the greatest increases in oak wilt would occur in areas with the highest probability of Warbler occupancy. AR5849. Moreover, the Service never stated that the existence of oak wilt alone justified the negative 90-day finding. But, cumulatively, oak wilt, fire, and land management further exacerbate the loss of breeding habitat that threatens the Warbler, and the Petition failed to account for that. *See* AR8104–05. The fact that Warbler population and habitat are estimated as larger now than at the time of listing does not negate these ongoing, documented threats to the Warbler's habitat.

IV. Plaintiff's Requested Remedy Is Excessive and Unprecedented.

The record before the Court clearly demonstrates that the Service complied with the Fifth Circuit's remand instructions. The Fifth Circuit ordered the Service to reconsider the Petition without requiring the Petition to include new information, not previously presented to the Service, to meet the substantial information standard. *Gen. Land. Off.*, 947 F.3d at 321. The Service complied: nowhere in the 2021 90-Day Finding does the Service fault the Petition for failure to provide new information not previously considered by the agency. *See* AR8094–8107. If, upon review, this Court were to find the 2021 90-Day Finding to be deficient, it would have to be for a reason other than the one narrow basis the Service has already addressed. Ordering the Service to proceed to the 12-month finding stage without permitting the Service the opportunity to address any newly identified issues would violate fundamental principles of administrative law. *See Smith v. Berryhill*, 139 S. Ct. 1765, 1779 (2019) ("[A] federal court generally goes astray if it decides a question that has been delegated to an agency if that agency has not first had a chance to address the question."). Moreover, the application of the ESA listing factors to the body of scientific information presented in the Petition and the Service's files is precisely the type of complex factual

matter where the Service's "particular technical expertise is involved" and the Court is at its "most deferential." *Medina Cnty.*, 602 F.3d at 699.

Plaintiff cites no law that *actually* supports its request for the Court to make this determination in the agency's stead. Although Plaintiff claims "that *SEC v. Chenery Corp.* does not apply when an agency flouts a court's decision specifying the criteria an agency must consider before taking action," ECF No. 59 at 32 (citing *Morgan Stanley Cap. Gr. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 544–45 (2008)), the Service did not flout the Fifth Circuit's instructions to apply the correct standard to the Petition. *See supra* 2–7. Moreover, *Chenery* stands for the proposition that "a judicial judgment cannot be made to do service for an administrative judgment," *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943), which *Morgan Stanley* does not refute. 554 U.S. at 544–45. Finally, although Plaintiff claims that *Vermont Yankee* does not apply because Plaintiff is not seeking detailed injunctive relief, ECF No. 59 at 32, clearly Plaintiff's request for the Court to order the Service to issue a positive 90-day finding on the Petition is injunctive relief. ECF No. 55 at 35; ECF No. 1 at 23. If the Court finds the 2021 90-Day Finding deficient, the only appropriate remedy is to remand to the Service for further consideration. *See e.g., Gen. Land Off.*, 947 F.3d at 321 (remanding the 2016 90-Day Finding).

CONCLUSION

For the foregoing reasons, Plaintiff's motion for summary judgment, ECF No. 55, should be denied and Federal Defendants' cross-motion for summary judgment, ECF No. 56, should be granted.

Dated: May 3, 2024

Respectfully submitted,

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