"Agency expertise" is a familiar phrase to anyone who has had any significant experience in environmental law. Courts defer to agencies in part because of the perception that agencies have more expertise in technical matters than the courts or the plaintiffs who might be challenging agency decisions. One of the criticisms of various forms of public participation in regulatory process – such as citizen suits or petition provisions that allow the public to request that an agency initiate a rulemaking proceeding – is that they can divert agencies from the regulatory priorities that the technical experts within the agency would otherwise pursue. Commentators such as Justice Breyer have argued that significant irrationality in environmental risk regulation occurs in part because of the significant pressure the public can place on regulatory agencies. Advocates of public participation tools such as citizen suits do not usually directly respond to these critiques, but usually point to other benefits that public participation can bring, such as resisting capture of an agency by regulated industry.

Berry Brosi (at Emory University) and I have taken advantage of data from the listing program of the Endangered Species Act to take a closer look at the question of agency expertise. (The listing program is the process by which species are identified as warranting protection under the ESA.) Species can be listed at the initiative of Fish and Wildlife Service (which implements the ESA for terrestrial species), or at the initiative of a petition from a group or individual. Likewise, some listed species are listed after having been the subject of litigation under the ESA's citizen suit provision, and others are not. Because FWS collects data on species once they are listed – such as the degree of threat that they face – we are able to compare petitioned and non-petitioned species, and litigated and non-litigated species, to see if there really is any significant difference between the agenda of FWS and the agenda of outside groups. What we found was surprising, and indeed turns the standard critiques on their head.

There really isn't any difference between the groups, by and large. In fact, arguably outside groups do a better job than FWS of identifying species that are at risk, though any differences are not statistically significant. The largest (and only statistically significant) difference we found was that species that were the subject of litigation were much more likely to pose potential conflicts with development projects than species that had never been the subject of litigation, providing some support for the notion that public participation through citizen suits might offset pressure on regulatory agencies to avoid politically sensitive topics.

Why are outside groups as good as FWS in terms of identifying species at risk? One possibility that we explore in the paper is that information about endangered species is highly dispersed – there are lots of species that are at risk, spread all over the country, and very few people know much about any individual species at risk. So it might be very hard for a single agency such as FWS to identify all of them on its own. Instead, the petition and litigation process may be tools by which this kind of information can be gathered and brought to the agency's attention.

Dispersed information is not unique to endangered species. All sorts of other environmental issues – such as whether individual waterways are polluted, or whether (and where) off-road vehicles are causing significant environmental impacts on public lands – depend on the collection of information that is highly dispersed geographically. Petitions and citizen suits might be usefully applied in a wider range of environmental law areas to help collect this kind of information for agency decisionmakers.

Our take-home conclusion is that, whatever the benefits of public participation in a wide range of other areas (such as offsetting agency capture or providing the chance for the agency to obtain greater public support for its final decision), those benefits need not come at the cost of technical expertise in agency agenda-setting and decisionmaking. Indeed, they might help agencies make better decisions in the end.