NEPA FOR THE GANDER: NEPA'S APPLICATION TO CRITICAL HABITAT DESIGNATIONS AND OTHER "BENEVOLENT" FEDERAL ACTION

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INTRODUCTION

In January, 1992, the United States Fish and Wildlife Service ("FWS") designated nearly 6.9 million acres of federal land in Washington, Oregon and northern California as "critical habitat"[1] for the northern spotted owl (*Strix occidentalis caurina* (Merriam)).[2] Acting under a court order, the Service had added the spotted owl to its list of threatened species almost two years earlier.[3] The listing had been applauded by environmentalists, but it sent waves of panic through timber-dependent communities in the Pacific northwest, which had already fallen upon hard times and which could ill afford further restrictions on logging in areas occupied by the spotted owl. To most observers, the interests of loggers and spotted owls appeared irreconcilable.[4]

The designation of critical habitat promised to add fuel to a situation that the Secretary of Interior would later call a "national train wreck."[5] When the Service initially refused to designate critical habitat for the owl,[6] environmentalists dragged it back to federal dis-

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1. The Endangered Species Act defines critical habitat as those areas with physical or biological features which are determined to be "(i) essential to the conservation of the species and (ii) which may require special management considerations or protection." 16 U.S.C. §1532(5)(A) (1994). For further discussion of critical habitat, see *infra* notes 111-127 and accompanying text.

2. Endangered and Threatened Wildlife and Plants; Determination of Critical Habitat for the Northern Spotted Owl, 57 Fed. Reg. 1796 (1992) (to be codified at 50 C.F.R. pt. 17).

3. Endangered and Threatened Wildlife and Plants; Finding on Northern Spotted Owl Petition, 52 Fed. Reg. 48, 552 (1987) (to be codified at 50 C.F.R. pt. 17); Northern Spotted Owl v. Hodel, 716 F. Supp. 479 (W.D. Wash. 1988) (finding the determination of the FWS to be arbitrary and capricious); Endangered and Threatened Wildlife and Plants; Proposed Threatened Status for the Northern Spotted Owl, 54 Fed. Reg. 26,666, 26,670 (1989) (to be codified at 50 C.F.R. pt. 17); Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26, 114 (1990) (to be codified at 50 C.F. R. pt. 17).

4. *See, e.g., Owls v. Man*, TIME, June 25, 1990, at 2, 56-63; Jorge Casuso, *Owl Decision Leaves Town in Anguish*, CHI. TRIB., June 24, 1990, at C1; Brad Knickerbocker, *Oregon's Other Threatened Species: The Timber Worker*, CHRIST. SCI. MON., Aug. 9, 1990, at 10; John Howard, *Closing of Its Timber Mill Drives a Stake Into the Heart of Hayfork*, L.A. TIMES, Jan. 5, 1992, at B3. This pessimistic view has been questioned more recently; *see, e.g.*, Timothy Egan, *Oregon, Foiling Forecasters, Thrives as It Protects Owls*, N.Y. TIMES, Oct. 11, 1994, at A1.

5. The phrase was used by Interior Secretary Bruce Babbitt and widely quoted in the media. *See, e.g.*, Eric Pryne, *An Ounce of Prevention: Restoration Touted as Way to Save Wildlife Before it is Endangered*, SEATTLE TIMES, Apr. 21, 1993, at A1.

6. When the FWS listed the spotted owl as threatened, it had stated that it could not determine its critical habitat without further study. *See* 55 Fed. Reg. 26,114, 26,124 (1990) (to be codified at 50 C.F.R. pt. 17).

trict court, where a judge ordered the agency to promptly make a designation.[7] Once compelled to act, the Service did not approach the critical habitat designation as a task to be undertaken lightly. The Service is required by statute to determine critical habitat "on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat."[8] To fulfill this mandate, the Service solicited data and comments from the public on all aspects of its proposal, from technical issues in conservation biology to the economic impact of the proposed habitat designation.[9] The final published rule was the outcome of an arduous nine month process, during which the Service held eight public hearings and responded to hundreds of written comments.[10]

Before publishing a final rule, the Service carefully considered the economic impact of its proposed action. Initially it had called for more than 11.6 million acres of federal, state and private land to be designated as critical habitat.[11] It later revised that proposal to include only 8.2 million acres,[12] and its final rule designated only 6.9 million acres, all of it managed by federal agencies.[13] The Service estimated that the final acreage reduction would save approximately 1,000 jobs and return 65 million board feet to the timber base annually.[14] Nevertheless, many residents and local government officials were unhappy with the final rule because of its projected impact on local economies.[15]

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7. *See* Northern Spotted Owl v. Lujan, 758 F. Supp. 621, 630 (W.D. Wash. 1991) (ordering the FWS to publish a final rule "at the earliest possible time permitted under the appropriate regulations").

8. 16 U.S.C. § 1533(b)(2) (1994).

9. *See id.* § 1533(b)(4)-(6). After issuing its proposed rule, the Service accepted public comments for 30 days. It then issued a revised proposed rule, on which it accepted comments for an additional 60 days.

10. Endangered and Threatened Wildlife and Plants; Proposed Determination of Critical Habitat for the Northern Spotted Owl, 56 Fed. Reg. 20, 816 (1991) (to be codified at 50 C.F.R. pt. 17); Endangered and Threatened Wildlife and Plants; Revised Proposed Determination of Critical Habitat for the Northern Spotted Owl, 56 Fed. Reg. 40,002 (1991)(to be codified at 50 C.F.R. pt. 17).

11. *See* 56 Fed. Reg. 20,816 (1991) (to be codified at 50 C.F.R. pt. 17).

12. *See* 56 Fed. Reg. 40,002 (1991) (to be codified at 50 C.F.R. pt. 17).

13. *See* 57 Fed. Reg. 1796, 1809 (1992) (to be codified at 50 C.F.R. pt. 17).

14. *See id.* at 1808.

15. To avoid imposing excessive economic hardship on individual counties, the Service excluded areas in which a designation of critical habitat would result in at least a 3 percent decline to the timber industry. In addition, it excluded areas where the designation would result in a projected loss to county budgets of 5 percent or more. *See id.* at 1807. Still, the overall

Spurred by local discontent, the commissioners of Douglas County, Oregon decided to challenge the critical habitat designation in federal court.[16] Ironically, the county commissioners did not complain about the impact the designation would have on local economies or otherwise challenge the substance of the critical habitat designation. Rather, the county claimed that the Fish and Wildlife Service had failed to comply with the procedural requirements of the National Environmental Policy Act (NEPA).[17] The county's argument was novel, and perhaps disingenuous—NEPA, after all, has most commonly been invoked to force agencies to examine the environmental impact of federal actions which physically add to, delete from, or otherwise modify the natural landscape.[18] Douglas County, in contrast, wanted the Fish and Wildlife Service to comply with NEPA before taking an action which was specifically intended to preserve a natural resource and thereby *enhance* environmental quality. For obvious reasons, Douglas County's argument appealed to persons who believe that environmental laws have unnecessarily stalled economic development, pinched industry profits, and infringed upon the autonomy of state and local governments.[19] If vali-

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regional impact of the designation was likely to be significant. The Service predicted that federal timber revenues would decline by $50 million, that county revenues from federal timber sales would decline by more than $18 million, and that some 1,400 timber-related jobs would be lost. *See id.* at 1816-18.

16. The commissioners' primary motivation for bringing the suit is of course a matter of speculation. It is clear, however, that Douglas County—which bills itself "the Timber Capital of the Nation"—had good reason to fear the economic consequences of the critical habitat designation. At the time of the designation, about two-thirds of the county's annual operating budget was derived from federal timber sale receipts and much of its property tax base was tied to the timber industry. Restrictions on timber harvesting in areas designated as critical habitat for the spotted owl would no doubt heighten the economic hardship in a county that had already seen nine lumber mills close since 1990. For stories describing the impact of owl preservation on Douglas County and the timber industry generally, see Kim Murphy, *Differing Values Cut Through Timber Debate*, L.A. TIMES, Apr. 15, 1996, at A1; Tom Kenworthy, *Timber Plan Brings Little Peace to Oregonians*, WASH. POST, July 4, 1993, at A8; Knickerbocker, *supra* note 4, at 10; Jorge Casuso, *Owl Decision Leaves Town in Anguish*, CHI. TRIB., June 24, 1990, at C1.

17. *See* 42 U.S.C. §§ 4321-4370d (1994).

18. Examples include construction projects with direct impacts on the environment, such as bridges, highways, dams and reservoirs. NEPA cases involving these types of projects are too legion to list here. For a discussion of such litigation and some case citations, see DANIEL R. MANDELKER, NEPA LAW AND LITIGATION §§10:29-10:32 (1984 & 1991 Supp.). NEPA may also apply to agency actions with intangible or indirect impacts, and even to an agency's failure to act. *See* MANDELKER, *supra*, §§ 10:36-37, 8:23.

19. The commissioners of Catron County, New Mexico liked the argument so much that they filed an identical suit challenging a designation of critical habitat in that county. *See infra* note 21 and accompanying text. In Idaho, the commissioners of Lemhi County considered filing a NEPA claim to challenge measures taken by the National Marine Fisheries Service to

dated by the courts, the argument could transform NEPA into a tool for delaying or even defeating critical habitat designations and other environmentally benevolent federal actions.

In December 1992, to the surprise and dismay of environmentalists, Douglas County won summary judgment and injunctive relief preventing the Secretary of Interior from enforcing the critical habitat designation for the northern spotted owl.[20] Soon thereafter, the Board of Commissioners of Catron County, New Mexico filed a similar suit in federal district court, alleging that the FWS had unlawfully failed to comply with NEPA when it listed the spikedace (*Meda fulgida* (Girard)) and loach minnow (*Rhinichthys cobitis* (Girard)) as threatened species and established critical habitats for them.[21] Environmentalists and administrators in the Interior Department collectively gasped when Catron County also won partial summary judgment and injunctive relief.[22]

The Secretary of Interior promptly appealed both decisions, with mixed results. In regard to the designation of critical habitat for the spotted owl, the Court of Appeals for the Ninth Circuit reversed the lower court, and held that NEPA's procedural requirements did not apply to the designation of critical habitat.[23] However, the Court of Appeals for the Tenth Circuit reached the opposite conclusion, ruling that the Service was obliged to comply with NEPA's procedural requirements before designating critical habitat in New Mexico for the

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protect endangered and threatened salmon species. *See* Candace Burns, *Lemhi County Squares Off With Agency Over Salmon*, IDAHO FALLS POST REG., Nov. 26, 1993, at B1. Farmers in California's Central Valley also invoked NEPA to try to stop water transfers designed to rehabilitate environmental and wildlife resources. *See* Westlands Water Dist. v. United States Dep't of Interior, 43 F.3d 457 (9th Cir. 1994); *see also* Todd Woody, *Industry Can't Turn Tables on Environmentalists*, THE RECORDER, Feb. 27, 1995, at 1.

20. *See* Douglas County v. Lujan, 810 F. Supp. 1470 (D. Or. 1992), *rev'd sub. nom.* Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995), *cert. denied* 516 U.S. 1042 (1996).

21. *See* Catron County Bd. of Comm'rs v. United States Fish and Wildlife Service, No. CIV-93-730-HB, slip op. (D. N.M. Oct. 13, 1994), *aff'd*, 75 F.3d 1429 (10th Cir. 1996). The county claimed that the critical habitat designation would prevent water diversion and impoundment, and thereby threaten flood damage to county property. *Id.* at 1433.

22. *See* Catron County Bd. of Comm'rs v. United States Fish and Wildlife Service, 75 F.3d 1429 (10th Cir. 1996). Unlike their counterparts in Oregon, the commissioners of Catron County were seemingly motivated more by political than economic concerns. Since 1989, when it adopted a series of ordinances asserting control over local land-use decisions, Catron County has been associated with the so-called "county movement," whose proponents believe that federal environmental laws infringe upon local autonomy and unduly burden western agricultural economies. *See generally* Mark Dowie, *With Liberty and Firepower for All*, 20 OUTSIDE 60 (Nov. 1995) .

23. Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995).

spikedace and loach minnow.[24] The conflicting rulings of the Ninth and Tenth circuits have confused an already unsettled question of law—whether NEPA's procedural requirements apply to federal actions expressly intended to protect or preserve natural resources.

This Note argues that NEPA should apply to such actions. It begins, in Part I, with a brief overview of the National Environmental Policy Act and the Endangered Species Act. Part II then analyzes the applicability of NEPA to listing decisions and designations of critical habitat under section 4 of the Endangered Species Act. This Part begins with a detailed discussion of an important precedent from the Sixth Circuit Court of Appeals before proceeding to the conflicting analyses set forth in the *Douglas County* and *Catron County* cases. Finally, Part III argues that NEPA should apply not only to designations of critical habitat, but to *all* federal actions which presumably "enhance" or "protect" the environment.

I. THE STATUTES AT ISSUE

To understand whether Congress intended NEPA to apply to designations of critical habitat, and to evaluate the policy implications of exempting critical habitat designations from NEPA's procedural requirements, it is necessary to briefly outline the relevant provisions and policies of each statute.

A. *The National Environmental Policy Act (NEPA)*

The National Environmental Policy Act of 1969[25] was the first in a series of major legislative initiatives which comprise existing federal environmental law. However, unlike most of the environmental statutes which followed it, NEPA does not establish detailed regulatory mechanisms to control the discharge of specific substances or to reduce ambient pollution levels in specific media.[26] Rather, NEPA imposes a broad mandate on federal agencies to incorporate environmental considerations into their decision-making processes. It is primarily a procedural, rather than a substantive, statute —that is, it requires only a particular *process*, and does not mandate specific out-

24. Catron County Bd. of Comm'rs v. U.S. Fish and Wildlife Service, 75 F.3d 1429 (10th Cir. 1996).

25. 42 U.S.C. §§ 4321-4370(d) (1994).

26. *Cf.* the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1994) (providing regulatory mechanisms "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters"); the Clean Air Act, 42 U.S.C. §§ 7401-7671(q) (1994) (providing regulatory mechanisms "to protect and enhance the quality of the Nation's air resources").

comes or results.[27] As the Supreme Court has stated, NEPA does not require agencies "to elevate environmental concerns over other appropriate considerations," it only requires agencies to "take a 'hard look' at the environmental consequences before taking a major action."[28]

1. *NEPA's Procedural Requirements.* NEPA requires all federal agencies to consider the environmental impact of "major federal actions significantly affecting the quality of the human environment."[29] When a federal agency proposes action which will have a "significant" effect on the environment, the agency must comply with NEPA by preparing a "detailed statement" describing the proposed action's probable impacts on the environment.[30] The Council on Environmental Quality (CEQ)[31] has promulgated regulations which describe the process and parameters of preparing such an environmental impact statement (EIS).[32]

The first step in the process is to determine whether or not the proposed action is "major" and will have a "significant" effect on the environment. Sometimes an agency will determine that its proposed

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27. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).

28. Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 462 U.S. 87, 97 (1983). A corollary of this interpretation is that the courts may not review an agency's substantive decision to proceed with a proposed action, even if that action will have significant environmental impacts. *See* Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976) (NEPA did not contemplate "that a court should substitute its judgment for that of the agency" or "interject itself within the area of discretion of the executive as to the choice of the action to be taken").

29. 42 U.S.C. § 4332 (1994).

30. Specifically, NEPA requires the preparation of a detailed statement by the responsible official on—

> (i) the environmental impact of the proposed action,
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> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
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> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id. § 4332(C)(i)-(v).

31. The CEQ was created by NEPA to, *inter alia*, "develop and recommend … national policies to foster and promote the improvement of environmental quality." *Id.* § 4332(4). CEQ was subsequently charged with "[i]ssuing regulations to Federal agencies for the implementation of [NEPA's] procedural provisions." Exec. Order No. 11,991, 3 C.F.R. § 124 (1978).

32. 40 C.F.R. §§ 1500-17 (1996). In addition, most federal agencies have issued regulations which clarify how it will comply with the CEQ requirements. *See, e.g.*, 40 C.F.R. §§ 6.100 - .1007 (governing the EPA's implementation of NEPA); 33 C.F.R. §§ 230.1-230.26 (1996) (governing NEPA implementation by the U.S. Army Corps of Engineers).

action does not meet this threshold requirement, in which case NEPA does not apply at all. When the environmental impacts of a proposed action are uncertain, the agency may first prepare an Environmental Assessment (EA).[33] The purpose of the EA is to determine whether a full EIS is necessary. Upon completion of the EA, the agency may make a "finding of no significant impact" and proceed with the proposed project. Alternatively, it may begin the preparation of a full-blown EIS.[34]

If and when an agency decides to prepare an EIS, it begins the process by publishing a Notice of Intent in the *Federal Register*. The agency must then invite representatives from affected local, state, and federal agencies, Indian tribes, and other stakeholders to help determine the scope of the study. Typically, the agency will publish a draft EIS and accept and respond to public comments before publishing its final EIS. If the project is substantially modified after the Final EIS has been completed, the agency may also have to prepare a Supplemental EIS. To complete the process, the agency issues a public Record of Decision (ROD), discussing alternatives to the proposed action, explaining why the proposed action was chosen, and describing the means by which environmental harm will be avoided or minimized.[35]

The EIS process can be expensive and it obviously delays proposed federal actions. Typically the most significant delays result from the time-consuming process of consultation, public comment, and, in many cases, litigation. NEPA regulations require the lead agency to consult with other federal and state agencies which have an interest in the proposed project.[36] The lead agency must also solicit and respond to public comment at the earliest stages of the process.[37] Most importantly, the agency must develop a record which can be reviewed by the courts.[38] The longest delays generally occur when litigants challenge the adequacy of the EIS in court.

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33. 40 C.F.R. §§ 1501.4(b), 1501.4(e), 1508.9, 1508.13 (1996).

34. *Id.* § 1508.9.

35. For a detailed description of the process of preparing an EIS, see generally JACOB I. BREGMAN & KENNETH M. MACKENTHUN, ENVIRONMENTAL IMPACT STATEMENTS (1992).

36. 40 C.F.R. § 1503.1 (1996).

37. *Id.* § 1501.7; *see also* Hanly v. Kleindienst, 471 F.2d 823, 836 (2d Cir. 1972) (explaining that "before a preliminary or threshold determination of significance is made the responsible agency must give notice to the public of the proposed major federal action and an opportunity to submit relevant facts which might bear upon the agency's threshold decision").

38. Although NEPA contains no provisions for enforcement or judicial review, the federal courts have allowed interested parties to challenge the adequacy of an agency's analysis under

The delay associated with preparing an EIS may frustrate both agency officials and the constituents who stand to benefit from proposed agency actions. However, in the eyes of Congress and the courts, the costs of delaying federal action are presumably outweighed by the benefits of preparing an EIS. In resolving NEPA disputes, the federal courts have emphasized two primary benefits which flow from the preparation of an EIS. First, preparation of the EIS "inject[s] environmental considerations into the federal agency's decisionmaking process."[39] Additionally, the EIS "inform[s] the public that the agency has considered environmental concerns in its decision-making process."[40] Congress considered these purposes so important that it explicitly declared that agencies are to comply with NEPA "to the fullest extent possible."[41] The federal courts have made it clear that this language is not hyperbole.[42]

2. *Exemptions from NEPA*. Although Congress intended for federal agencies to comply with NEPA "to the fullest extent possible," in certain circumstances agencies may be legally exempted from NEPA's procedural requirements. Occasionally Congress will exempt specific federal actions from NEPA by clearly indicating its intent to do so in a subsequently enacted statute. Congress has, for

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the Administrative Procedures Act (APA), 5 U.S.C. 551-559. *See, e.g.*, Hanley v. Kleindienst, 471 F.2d 823, 828-29 (2d Cir. 1972) (holding that agency determinations may properly be reviewed by federal courts to ensure they are not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

39. Weinberger v. Catholic Action of Hawaii, 454 U.S. 139, 143 (1981).

40. *Id*. *See also* Trout Unlimited v. Morton, 509 F.2d 1276, 1282 (9th Cir. 1974) ("[T]he impact statement should provide the public with information on the environmental impacts of a proposed project as well as encourage public participation in the development of that information."); Iowa Citizens for Envtl. Quality v. Volpe, 487 F.2d 849, 851 (8th Cir. 1973) (one purpose of an EIS "is to promote a basis for critical evaluation by those not associated with the agency"); Jones v. Lynn, 477 F.2d 885, 891 (1st Cir. 1973) (agencies prepare impact statements with "the goal of . . . informing the members of the community and the public what the environmental impact will be"); Natural Resources Defense Council v. Morton, 458 F.2d 827, 833 (D.C. Cir. 1972) ("Congress contemplated that the [EIS] would . . . [inform] the Congress as well as the Executive . . . and would be available to enhance the enlightenment of—and by—the public.").

41. 42 U.S.C. § 4332.

42. *See, e.g.*, Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109, 1114 (D.C. Cir. 1971) ("We must stress as forcefully as possible that this language does not provide an escape hatch for footdragging agencies; it does not make NEPA's procedural requirements somehow 'discretionary'."); Westlands Water Dist. v. Natural Resources Defense Council, 43 F.3d 457, 460 (9th Cir. 1994) ("We give NEPA the broadest possible interpretation."). NEPA presumptively applies even to those federal actions which advance the most compelling governmental interests, such as national security. *See* Romer v. Carlucci, 847 F.2d 445 (8th Cir. 1988) (NEPA applicable to development of the MX missile program).

example, explicitly exempted the Environmental Protection Agency (EPA) from the requirement of preparing an EIS for all actions the agency takes pursuant to the Clean Air Act and most actions that it takes pursuant to the Clean Water Act.[43] Congress has also on occasion exempted specific federal projects or programs from NEPA's requirements.[44]

Generally, the courts will not allow an agency to bypass NEPA unless Congress has very clearly expressed its intention to exempt it.[45] However, the courts have recognized some *implied* exceptions to NEPA. Perhaps the most widely recognized and widely applied category of implied exemption arises when NEPA conflicts with another statutory mandate, making it impossible for the action agency to comply with both statutes. The leading case describing the "statutory conflict" exemption is *Flint Ridge Development Co. v. Scenic Rivers Ass'n*.[46] The issue in that case was whether the Department of Housing and Urban Development (HUD) was required to comply with NEPA when performing its duties under the Interstate Land Sales Disclosure Act.[47] The Act required HUD to allow a statement of record filed by a real estate developer to become effective within thirty days of filing. The Supreme Court recognized that HUD could not comply with the statute's thirty day time constraint if it had to file an environmental impact statement, and determined that where "a clear and unavoidable conflict in statutory authority exists, NEPA must give way."[48]

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43. A provision in the Energy Supply and Environmental Coordination Act expressly exempts EPA from having to prepare an EIS when it acts pursuant to the Clean Air Act. *See* 15 U.S.C. § 793(c)(1) (1994) ("No action taken under the Clean Air Act shall be deemed a major federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act."). *See also* Federal Water Pollution Control Act, 33 U.S.C. § 1371(c)(1) (1994) (stating that environmental impact statements need not be prepared for actions proposed pursuant to that statute except in connection with grants for the construction of publicly owned waste treatment plants and in connection with issuance of discharge permits to new sources).

44. *See, e.g.*, Earth Resources of Alaska v. Federal Energy Regulatory Comm'n, 617 F.2d 775 (D.C. Cir. 1980) (applying congressional exemption for the Alaska pipeline system); San Antonio Conserv. Soc'y v. Texas Highway Dep't, 496 F.2d 1017 (5th Cir. 1974) (applying congressional exemption for the San Antonio highway).

45. *See, e.g.*, Chelsea Neighborhood Ass'n v. United States Postal Serv., 516 F.2d 378 (2d Cir. 1975) (holding that the Postal Service must comply with NEPA not withstanding a statute providing that "no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds . . . shall apply to the exercise of the powers of the Postal Service").

46. 426 U.S. 776 (1976).

47. 15 U.S.C. §§ 1701-1720 (1994).

48. *Flint Ridge*, 426 U.S. at 788. HUD also argued that it should be exempted from

Other courts have since adhered to *Flint Ridge* and excused agency compliance with NEPA when the agency was faced with immutable statutory time constraints or some other "clear and unavoidable" statutory conflict.[49] However, the CEQ has interpreted the *Flint Ridge* exemption narrowly,[50] and the case law supports this view.[51] Some courts have extended *Flint Ridge* by suggesting that an unavoidable statutory conflict arises when the action proposed by a federal agency is nondiscretionary. These courts have taken the view that when an agency is required to perform some statutory duty, consideration of environmental impacts is "irrelevant" because such consideration cannot abrogate the agency's statutory duty to act.[52] Other courts, however, have rejected this view.[53]

NEPA's requirements because it had no discretion under the Disclosure Act to consider environmental impacts. The Supreme Court did not reach this issue. *Id.*

49. *See, e.g.*, Consolidated Edison Co. v. Federal Power Comm'n, 512 F.2d 1332, 1346 (D.C. Cir. 1975); Amer. Smelting & Refining Co. v. Federal Power Comm'n, 494 F.2d 925, 948 (D.C. Cir. 1974); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 380 (D.C. Cir. 1973); Dry Color Manufac. Ass'n v. Department of Labor, 486 F.2d 98, 108 (3rd Cir. 1973); Gulf Oil Corp. v. Simon, 373 F. Supp. 1102, 1104-05 (D. D.C.), *aff'd* 502 F.2d 1154, 1156-57(Temporary Emergency Court of Appeals,1974). *But see* Jones v. Gordon, 792 F.2d 821, 826 (9th Cir. 1986) (refusing to find a "clear and unavoidable" conflict between NEPA and the Marine Mammal Protection Act because Congress intended that the agencies and reviewing courts "make as liberal interpretation as we can to accommodate the application of NEPA"); Forelaws on Board v. Johnson, 743 F.2d 677, 684 (9th Cir. 1984) (compelling agency to comply with NEPA because the time constraints faced by agency were not unavoidable, but rather, the result of an "excessively narrow construction" of its statutory mandate).

50. *See* 40 C.F.R. § 1500.3 (1996) (agencies shall comply with NEPA "except where compliance would be inconsistent with other statutory requirements.").

51. These courts have prevented the exemption from swallowing the rule by skeptically examining whether an alleged statutory conflict may fairly be characterized as "clear and unavoidable." *See, e.g.*, Jones v. Gordon, 792 F.2d 821, 826 (9th Cir. 1986) (refusing to find a "clear and unavoidable" conflict between NEPA and the Marine Mammal Protection Act because Congress intended that the agencies and reviewing courts "make as liberal interpretation as we can to accommodate the application of NEPA"); Forelaws on Board v. Johnson, 743 F.2d 677, 684 (9th Cir. 1984) (compelling agency to comply with NEPA because the time constraints faced by agency were not unavoidable but rather the result of an "excessively narrow construction" of its statutory mandate).

52. *See, e.g.*, Milo Community Hosp. v. Weinberger, 525 F.2d 144, 147-48 (1st Cir. 1975) (preparation of EIS unnecessary because environmental considerations were "irrelevant" to agency's nondiscretionary decision to terminate hospital's federally-assisted status); South Dakota v. Andrus, 614 F.2d 1190, 1194 (8th Cir. 1980) ("it is at least doubtful that the Secretary's nondiscretionary approval of a mineral patent" is subject to NEPA); Natural Resources Defense Council v. Berklund, 609 F.2d 553, 558 (D.C. Cir. 1980) (Secretary not required to prepare an EIS when he has no discretion to deny coal lease and when he has "introduc[ed] environmental analysis at crucial points in the leasing process"); Pacific Legal Found. v. Andrus, 657 F.2d 829 (6th Cir. 1981) (discussed in detail at *infra* notes 131-163 and accompanying text). *See also* Westlands Water Dist. v. Natural Resources Defense Council, 43 F.3d 457, 460 (9th Cir. 1994) (finding NEPA inapplicable to water transfers under the Central Valley Project Improvement Act because "Congress did not give the Secretary discretion over when he may

Another widely-recognized category of exemption applies when an agency's decision-making process duplicates or provides the "functional equivalence" of NEPA's procedural requirements. The D.C. Circuit's opinion in *Portland Cement Ass'n v. Ruckelshaus*[54] provides the most complete analysis of the "functional equivalence" exemption. The issue in *Portland Cement* was whether the EPA was obligated to prepare an impact statement before adopting a New Source Performance Standard pursuant to the Clean Air Act.[55] The D.C. Circuit determined that the provisions which authorized the EPA to adopt such standards also required the agency to consider the "counter-productive" environmental effects of its rule and to analyze a wide array of "environmental considerations, pro and con."[56] Even though the EPA's rule-making process would not provide all the advantages of a "structured" NEPA analysis, the court concluded that the process would "strike a workable balance between some of the advantages and disadvantages of full application of NEPA."[57] In particular, the statutory procedures allowed other agencies to comment on the proposed rules, thus providing "a channel for informed decision-making."[58] The proposed rule also provided notice "to the public and the Congress."[59] Finally, the proposed rule would be subject to judicial review, thereby ensuring that the agency would not arbitrarily "disregard . . . environmental factors." On this basis, the court held that EPA did not need to prepare a formal EIS.[60] Other courts came to similar conclusions when reviewing EPA actions under different provisions in the Clean Air Act.[61] The courts have also ex-

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carry out [those] duties"). The issue of nondiscretionary duties was raised in *Flint Ridge*, but the Supreme Court had no occasion to reach it. *See supra* note 48.

53. *See, e.g.*, NAACP v. Medical Center, Inc., 584 F.2d 619, 634 (3d Cir. 1978) ("[e]ven in a case where the agency has no discretion," the agency must comply with NEPA if it initiates or "substantially assists" a program which will have a significant impact on the environment); Scenic Rivers Ass'n v. Lynn, 520 F.2d 240, 245 (10th Cir. 1975) (NEPA requires agencies to consider environmental problems "regardless of whether the agency has authority to do anything about [them]"), *rev'd on other grounds sub. nom.* Flint Ridge Development Co. v. Scenic Rivers Ass'n, 426 U.S. 776 (1976).

54. 486 F.2d 375 (D.C. Cir. 1973).

55. The Clean Air Act directs the EPA Administrator to categorize all stationary sources of air pollution and to promulgate "standards of performance" applicable to all new sources of air pollution within those categories. *See* 42 U.S.C. § 7411(b) (1994).

56. Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 385 (D.C. Cir. 1973).

57. *Id.* at 386.

58. *Id.*

59. *Id.*

60. *Id.* at 387.

61. *See, e.g.*, Environmental Defense Fund v. EPA, 489 F.2d 1247, 1256-57 (D.C. Cir. 1973); Essex Chem. Corp. v. Ruckelshaus, 486 F.2d 427, 431 (D.C. Cir. 1973). Several federal

tended the "functional equivalence" exemption to actions taken by EPA pursuant to other statutes.[62]

Despite the abundance of case law on functional equivalence, the precise parameters of this exemption remain ambiguous. Some courts have suggested that the functional equivalence exemption applies broadly to any action proposed by the EPA. In one early case, for example, the D.C. Circuit opined, "we see little need in requiring a NEPA statement from an agency whose *raison d'être* is the protection of the environment."[63] Such broad language suggests that the functional equivalence exemption could be applied not only to the EPA, but to *any* agency which is perceived as a guardian of the environment or a steward of the nation's natural resources.[64] However, the D.C. Circuit quickly emphasized that it was "*not* formulating a broad exemption from NEPA for all environmental agencies or even for all environmentally protective regulatory actions of such agencies."[65] An agency would only be exempted from NEPA when "substantive and procedural standards ensure full and adequate con-

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Courts of Appeal had actually ruled that the EPA was exempt from NEPA prior to *Portland Cement*. *See, e.g.*, Anaconda Co. v. Ruckelshaus, 482 F.2d 1301, 1305-06 (10th Cir. 1973); Buckeye Power v. EPA, 481 F.2d 162, 174 (6th Cir. 1973); Duquesne Light Co. v. EPA, 481 F.2d 1, 9 (3d Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 650 n.130 (-D.C. Cir. 1973); Appalachian Power Co. v. EPA, 477 F.2d 495, 508 (4th Cir. 1973); Getty Oil v. Ruckelshaus, 467 F.2d 349, 359 (3d Cir. 1972). Congress later exempted EPA actions pursuant to the Clean Air Act. *See supra* note 43.

62. *See, e.g.*, State of Alabama ex. rel. Siegelman v. EPA, 911 F.2d 499 (11th Cir. 1990) (applying the functional equivalence doctrine to EPA's procedure for permitting hazardous waste landfills under the Resource Conservation and Recovery Act); Wyoming v. Hathaway, 525 F.2d 66 (10th Cir. 1975) (EPA need not comply with NEPA before suspending registrations for three toxins pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act); Environmental Defense Fund v. EPA, 489 F.2d 1247 (D.C. Cir. 1973) (EPA need not comply with NEPA before suspending registrations for three toxins pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act); Twitty v. North Carolina, 527 F. Supp. 778 (E.D.N.C. 1981) (EPA need not comply with NEPA before approving a landfill site for PCBs under the Toxic Substances Control Act).

63. International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 650 n.130 (D.C. Cir. 1973); *accord* Wyoming v. Hathaway, 525 F.2d 66, 71-72 (10th Cir. 1975) ("[A]n organization like EPA whose regulatory activities are necessarily concerned with environmental consequences need not stop in the middle of its proceedings in order to issue a separate and distinct impact statement just to be issuing it.").

64. Interestingly, despite the judicial consensus that the EPA need not prepare an EIS when acting to protect the environment, Congress nevertheless urged the EPA to prepare impact statements. H.R. REP. NO. 93-520, 18-19 (1973). The Agency agreed that "preparation of environmental statements will have beneficial effects for certain of its major regulatory actions." EPA Statement of Policy and Procedures for Preparation of Environmental Impact Statements, 39 Fed. Reg. 16,186 (May 7, 1974).

65. Envtl. Defense Fund v. EPA, 489 F.2d 1247, 1257 (D.C. Cir. 1973) (emphasis added) (holding that the EPA need not comply with NEPA when acting pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act).

sideration of environmental issues."[66] The court excused the EPA from complying with NEPA when it canceled registrations for the use of DDT, but only after finding that the agency's rule-making procedures provided the "functional equivalent of a NEPA investigation … for *all* of the five core NEPA issues."[67] Other courts have substantially agreed with this position.[68] The majority approach constructs "functional equivalence" as a "narrow exemption" which applies only when "the purposes and policies behind NEPA will necessarily be fulfilled" by otherwise required agency procedures.[69]

A third type of exemption, recognized by the Ninth Circuit, is sometimes categorized as a "functional equivalence" exemption,[70] even though its analytical foundations are diametrically opposed to the reasoning set forth in *Portland Cement* and its progeny. The exception created in *Merrell v. Thomas*[71] is better described as a "displacement" exemption. In *Merrell*, the Ninth Circuit considered whether the EPA was obliged to prepare NEPA documents before registering seven herbicides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[72] The court articulated two independent grounds for holding that NEPA did not apply to the EPA's registration decision. First, the statutory time constraint exemption set forth in *Flint Ridge*[73] provided a well-recognized ground for the court's holding. FIFRA requires the EPA to act "as expeditiously as possible," and the court recognized that this "time frame is incom-

66. *Id*. at 1257.

67. *Id*. at 1256 (emphasis added). The court listed these five issues as: "the environmental impact of the action, possible adverse environmental effects, possible alternatives, the relationship between long- and short-term uses and goals, and any irretrievable commitments of resources." *Id*.

68. *See, e.g.*, Jones v. Gordon, 621 F. Supp. 7, 13 (D. Alaska 1985) ("[t]he mere fact an agency has been given the role of implementing an environmental statute is insufficient to invoke the 'functional equivalent' exception"), *aff'd on other grounds*, 792 F.2d 821 (9th Cir. 1986) (affirmed in part, reversed in part).

69. Environmental Defense Fund v. EPA, 489 F.2d at 1257. *Accord* Wyoming v. Hathaway, 525 F.2d 66, 71-72 (10th Cir. 1975) (EPA need not prepare an EIS before canceling or suspending registrations of three coyote poisons).

70. *See, e.g.*, MANDELKER, *supra* note 18, at 66 (listing *Merrell v. Thomas*, discussed *infra*, under the heading "Functional Equivalence").

71. 807 F.2d 776 (9th Cir. 1986).

72. 7 U.S.C. §§ 136-136(y) (1994). Unlike the agency proposal in *Portland Cement*, the registration of herbicides was not environmentally "benevolent." Plaintiff was joined by the Natural Resources Defense Council, whereas EPA as defendant was joined by five large chemical companies and the National Agricultural Chemicals Association. *See* 807 F.2d at 776.

73. Flint Ridge Development Co. v. Scenic Rivers Ass'n, 426 U.S. 776 (1976). For a detailed discussion of this case, see *supra* notes 46-53 and accompanying text.

patible with the lengthy research and hearings that are ordinarily part of preparing an EIS."[74]

However, the bulk of the court's decision in *Merrell* deals with a second, novel ground for its holding–-that "[t]he *differences* between FIFRA's registration procedure and NEPA's requirements indicate that Congress did not intend that NEPA apply."[75] The court acknowledged that FIFRA was similar in some ways to NEPA,[76] but felt that the statutes' differences were more relevant in determining Congressional intent. The court first recognized that FIFRA's limited provision for public notice "obviously falls short of an EIS requirement, both because [EPA] will not have to publish the notice with respect to many applications, and because the notice does not contain the information contained in an EIS."[77] It then noted that FIFRA restricts the types of information which the EPA may make available to the public and pointed out that "NEPA does not contain equivalent restrictions."[78] In other words, FIFRA plainly "designed a registration procedure with public notice and public participation provisions that materially differ from those that NEPA would require."[79]

Clearly, the Ninth Circuit did not consider NEPA and FIFRA to be equivalent. In contrast to the functional equivalence exemption, the exemption in *Merrell* was constructed around the substantive *differences*—rather than the substantive similarities—between NEPA's procedural requirements and FIFRA's statutory requirements. The court considered FIFRA to be a wholly new set of procedures for dealing with all aspects of pesticide registrations, including the environmental impacts of such registrations. In the court's view, these procedures effectively *displaced* NEPA. Noting that these new registration procedures represented "a compromise between environmentalists, farmers, and manufacturers,"[80] the court concluded that it

74. *See* 807 F.2d at 778. *But Cf.* Jones v. Gordon, 792 F.2d 821, 826-27 (9th Cir. 1986) (requirement that agency publish notice "as soon as practicable" after application is deemed sufficient does not excuse agency from complying with NEPA).

75. *See* Merrell v. Thomas, 807 F.2d 776, 778 (9th Cir. 1986) (emphasis added).

76. *See id.* at 778 (noting that the registration procedure in FIFRA was designed "to ensure consideration of [the] environmental impact[s]" of herbicide spraying).

77. *Id*.

78. *Id*.

79. *Id*.

80. *Id.*

would be inappropriate to "sabotage the delicate machinery that Congress designed to register new pesticides."[81]

Although now firmly entrenched in the case law, the exemptions set forth in *Flint Ridge*, *Portland Cement*, and *Merrell* have by no means swallowed the directive that agencies must comply with NEPA "to the fullest extent possible." The "displacement" exemption set forth in *Merrell* has not been widely adopted in other circuits, nor has it been applied often by the Ninth Circuit.[82] Although widely recognized, the functional equivalence exemption has been limited to the EPA. The statutory conflict exemption first recognized in *Flint Ridge* has also been applied sparingly.[83] A federal agency proposing an action with significant environmental impacts therefore risks expensive and time-consuming litigation if it chooses to ignore NEPA's procedural mandates.

B. *The Endangered Species Act (ESA)*

The Endangered Species Act of 1973[84] has been called "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."[85] Like NEPA, the ESA has very ambitious goals; yet unlike NEPA, it is not a very long or complicated statute.[86]

1. *The Listing Process and Protections for Listed Species.* The listing process has been referred to as the "keystone of the Endangered Species Act,"[87] because only species which have been listed receive protection under the Act.[88] Section 4 of the ESA

81. *Id.* at 779.

82. The displacement exemption was most notably dusted off and applied in Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995). *See infra* notes 170-184 and accompanying text.

83. *See supra* note 51.

84. Codified as amended at 16 U.S.C. §§ 1531-1544 (1994).

85. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 180 (1978).

86. The provisions of the Endangered Species Act which govern federal actions are directed at "the Secretary" of the Interior and Commerce Departments. In practice, the Secretaries delegate their statutory responsibilities to the FWS and the National Marine Fisheries Service (NMFS), respectively. The FWS maintains jurisdiction over terrestrial wildlife and freshwater fish, while the NMFS deals with threatened and endangered marine organisms, including marine mammals. For convenience, this Note will refer to the implementing agency as "the Secretary," "the FWS" or "the Service."

87. H.R. REP. NO. 97-567, 2d Sess., at 10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2810.

88. The Secretary is not authorized to intervene on behalf of any species which has not been listed, even if that species is in imminent danger of extinction. *See, e.g.*, Wilson v. Block,

stipulates that species are to be listed as endangered[89] or threatened[90] "solely on the basis of the best scientific and commercial data available."[91] Species may be proposed for listing by the Secretary or by any interested person who submits a petition to the Secretary.[92] In 1982, Congress made listing a mandatory duty and incorporated tight deadlines into the listing process. Currently, the Secretary has 90 days to determine whether petitions to list or delist a species present "substantial . . . information indicating that the potential action may be warranted."[93] For a petition which passes this threshold inquiry, the Secretary must complete a status review for the proposed species and find that the listing is warranted, not warranted, or "warranted but precluded" by other pending listing proposals.[94] When listing is warranted, the Secretary must publish a proposed regulation in the Federal Register and adopt or withdraw a final regulation within one year.[95]

Once a species has been listed as endangered or threatened, it falls under the Act's protective umbrella. The substance of this legal protection is primarily defined in Sections 7 and 9 of the ESA. Section 9 makes it unlawful for any person[96] subject to the jurisdiction of the United States to commercially exploit or "take" individual members of any species which has been listed as endangered.[97] The Act defines "take" broadly in order to prohibit almost any activity which

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708 F.2d 735 (D.C. Cir. 1983) (refusing to enjoin construction of a ski resort which would allegedly eradicate an alpine plant because the plant was not listed under Section 4); Fund for Animals v. Florida Game & Fresh Water Fish Comm'n, 550 F. Supp. 1206 (S.D. Fla. 1982) (refusing to enjoin a state sponsored deer hunt because the white-tailed deer was not listed and did not breed with any listed deer species).

89. An endangered species is any species, other than certain species of insects, "which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6) (1994).

90. A threatened species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id*. § 1532(20).

91. *Id*. § 1533(b)(1)(A).

92. *See id*. §§ 1533(a)(1), 1533(b)(3).

93. *Id*. § 1533(b)(3)(A). This duty must be carried out "to the maximum extent practicable." *Id.*

94. *Id*. §§ 1533(b)(3)(B)(i)-(iii). A decision that listing is not warranted or warranted but precluded can be challenged in court. *Id*. § 1533(b)(3)(C)(ii).

95. *Id*. § 1533(b)(6)(A). The Secretary may delay final action for another six months if there is substantial disagreement about the sufficiency or accuracy of the data upon which the listing decision is to be made.

96. The ESA defines "person" broadly to include individuals, business organizations, and government employees and instrumentalities. *See id*. § 1532(13) (1994).

97. *Id*. § 1538(a)(1).

would hinder the recovery of an endangered species.[98] Unauthorized takings give rise to both civil and criminal liability.[99]

Federal and state agencies are considered "persons" subject to the prohibitions in Section 9.[100] Therefore, these agencies must ensure that no endangered species will be "taken" by actions which they initiate, fund, permit, or otherwise endorse. Section 9 is especially relevant to agencies which manage public lands because the courts have recognized that destruction or degradation of critical habitat may constitute an illegal taking under Section 9.[101] In practice, however, the importance of Section 9 has been eclipsed by the consultation provisions in Section 7 which are directed explicitly at federal agencies.

Section 7 directs that "[e]ach federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species."[102] The procedure for Section 7 consultations has been outlined in detail in joint regulations promulgated by the FWS and the National Marine Fisheries Service ("NMFS").[103] Most Section 7 consultations involve only informal

98. "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19). Actions which modify or degrade the habitat of a listed species may constitute an illegal taking. *See* 50 C.F.R. § 17.3 (defining "harm" to include habitat modifications that kill or injure wildlife); *see also* Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, 515 U.S. 687 (1995) (upholding the Secretary's regulation).

99. Penalties and enforcement provisions are set forth in section 11 of the ESA (codified at 16 U.S.C. § 1540). The ESA allows the Secretary to permit takings which are "incidental to . . . the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B). However, permission for incidental takings may only be granted if the applicant has prepared a conservation plan which describes the activity's impact on the affected species and the steps the applicant will implement to minimize and mitigate those impacts. *See id.* § 1539(2)(A)(i) - (ii).

100. *See* 16 U.S.C. § 1532(13); *see also* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184-85 (1978).

101. *See, e.g.*, *Babbitt*, 515 U.S. at 687; Palila v. Hawaii Dep't of Land and Natural Resources, 852 F.2d 1106 (9th Cir. 1988) (Palila II); Palila v. Hawaii Dep't of Land and Natural Resources, 471 F. Supp. 985 (D. Hawaii 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981) ("Palila I") (holding that Section 9 made it unlawful for the State of Hawaii to graze sheep and goats in the critical habitat of an endangered bird); Sierra Club v. Lyng, 694 F. Supp. 1260 (E.D. Tex. 1988) (holding that the U.S. Forest Service committed a taking under Section 9 when it allowed clear-cutting of old-growth pine trees in close proximity to colonies of endangered woodpeckers), *rev'd on other grounds sub nom.* Sierra Club v. Yeutter, 926 F.2d 429 (5th Cir. 1991).

102. 16 U.S.C. § 1536(a)(2).

103. *See* 50 C.F.R. §§ 402.10-402.15 (1996).

communications between FWS and the action agency to determine whether listed species are in the project area and whether the project is likely to adversely affect such species or their critical habitat.[104] If it appears that the proposed action may affect a listed species or its critical habitat, then the agency must begin a more formal consultation process, the culmination of which is the issuance of a "biological opinion" finding that the proposed action is either likely to jeopardize a listed species or degrade its critical habitat, or presents no jeopardy.[105] If it receives a "no jeopardy" opinion, the action agency is generally free to proceed with its proposed action.[106] The consequence of a "jeopardy" opinion is more uncertain. Although the Supreme Court has stated that the ESA's admonition to ensure that listed species are not jeopardized is an "affirmative command" that "admits of no exception,"[107] several subsequent court decisions suggest that the action agency is free to proceed with its proposed action, as long as it has actually gone through the consultation process and has some reasonable basis for disputing the Service's final opinion.[108] The Ninth Circuit, for example, has held that the FWS cannot "order other agencies to comply with its requests or . . . veto their decisions."[109] The Supreme Court has also backed away from its early

104. Regulations for "informal consultation" are set forth at 50 C.F.R. § 402.13 (1996). Approximately 90 percent of all consultations are concluded informally. *See* U.S. GENERAL ACCOUNTING OFFICE, ENDANGERED SPECIES ACT: TYPES AND NUMBER OF IMPLEMENTING ACTIONS (1992).

105. 50 C.F.R. § 402.14(g)-(h) (1996).

106. Although the action agency "may not rely solely upon . . . a biological opinion to establish conclusively its compliance with its substantive obligations under section 7(a)(2)," the courts will only inquire whether the agency's reliance on a biological opinion was "arbitrary or capricious." Pyramid Lake Paiute Tribe v. United States Dep't of Navy, 898 F.2d 1410, 1415 (9th Cir. 1990) (refusing to enjoin a federal lease of water rights which might imperil an endangered fish because the Service had determined that the proposed reallocation of water would not jeopardize the existence of the species). In addition, if the Service issues a "no jeopardy" opinion, the action agency cannot be held liable for a taking under Section 9. *Id.*

107. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 173 (1978).

108. *See, e.g.*, Sierra Club v. Froehlke, 534 F.2d 1289, 1303 (8th Cir. 1976) ("Consultation under Section 7 does not require acquiescence. Should a difference of opinion arise as to a given project, the responsibility for decision after consultation is not vested in the Secretary but in the agency involved."); Nat'l Wildlife Fed'n v. Coleman, 529 F.2d 359, 371 (5th Cir. 1976) ("[Once] an agency has had meaningful consultation with the Secretary . . . the final decision of whether or not to proceed with the action lies with the agency itself."); Pyramid Lake Paiute Tribe v. United States Dep't of Navy, 898 F.2d 1410, 1415 (9th Cir. 1990) (holding that an action agency may proceed even where it's evidence that there is no likelihood of jeopardy is "admittedly weak"). *But see* Roosevelt Campobello Internat'l Park v. EPA, 684 F.2d 1041, 1055 (1st Cir. 1982) (holding that an action agency which receives a jeopardy opinion cannot proceed unless it has completed all "practicable" scientific studies).

109. Sierra Club v. Marsh, 816 F.2d 1376, 1386 (9th Cir. 1987). *See also* Tribal Village of

dictum suggesting that agencies must comply with a biological opinion.[110]

2. *Critical Habitat Designations.* Once a species has been listed as endangered or threatened, the FWS has the obligation to designate "critical habitat" for that species. Critical habitat is defined by the statute as "the specific areas within the geographical area occupied by the species . . . on which are found those biological features (i) essential to the conservation of the species and (ii) which may require special management considerations or protection," as well as "specific areas outside the geographical area occupied by the species . . . [if] such areas are essential for the conservation of the species."[111] Unlike the listing decision, the designation of critical habitat is *not* based exclusively on scientific data. The FWS must consider "the economic impact, and any other relevant impact, of specifying any particular area as critical habitat."[112] The FWS has the discretion to "exclude any area from critical habitat if . . . the benefits of such exclusion outweigh the benefits of specifying such area as critical habitat."[113] Barring unusual circumstances, listings and critical habitat designations are required to occur "concurrently."[114]

Critical habitat has been perhaps the most controversial aspect of the ESA.[115] The language of the ESA prohibits actions that modify

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Akutan v. Hodel, 869 F.2d 1185 (9th Cir. 1988) (holding that the FWS cannot compel an action agency to implement conservation recommendations attached to its biological opinion).

110. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 568 (1992) (noting that whether funding agencies are bound by the consultation process "is very much an open question").

111. *Id.* § 1532(5)(A). Joint regulations promulgated by the Interior and Commerce Departments provide examples of physical and biological features which may be considered essential to the conservation of a species, such areas important for population growth, food and water resources, shelter, breeding and rearing sites, and habitats that are representative of the historic distribution of the species. *See* 50 C.F.R. § 424.12(b)(1)-(5) (1996).

112. 16 U.S.C. § 1533(b)(2).

113. *Id.* Such discretion is removed if the best scientific and commercial data available suggests that "the failure to designate such area as critical habitat will result in the extinction of the species concerned." *Id.*

114. *Id.* § 1533(b)(6)(C). In practice, however, critical habitat has rarely been designated at the time of listing. Critical habitat was designated for less than 20 percent of the species listed as threatened or endangered between 1973 and 1990. *See* MICHAEL BEAN ET AL., RECONCILING CONFLICTS UNDER THE ENDANGERED SPECIES ACT 3 (World Wildlife Fund: Washington 1991). Currently the ESA requires only that critical habitat designations be made "to the maximum extent prudent and determinable." 16 U.S.C. § 1533(a)(3). The statute explicitly provides that designations of critical habitat can be delayed for up to two years after listing "[if] the Secretary deems that (i) it is essential to the conservation of such species that the regulation implementing such [listing] determination be promptly published; or (ii) critical habitat of such species is not then determinable." *Id.* §§ 1533(b)(6)(C)(i)-(ii).

115. *See, e.g.*, Oliver A. Houck, *The Endangered Species Act and Its Implementation by the*

or destroy a species' critical habitat.[116] However, commentators appear to agree that the Department of Interior has promulgated regulations which effectively "took the prohibition on destruction or modification of critical habitat and defined it in a way that removed it . . . from the Act."[117] Under current regulations, "destruction or adverse modification" of critical habitat is recognized only when such alteration "appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species."[118] As Professor Houck has noted, "[t]his definition is exactly the same as that provided for 'jeopardy' to the species itself . . . With this sleight of hand, Interior has equated the modification of critical habitat with jeopardy. No separate protection is provided for critical habitat."[119]

Even though a designation of critical habitat does not appear to provide a listed species with any legal protection above and beyond that provided by the section 7 consultation process, some commentators nevertheless believe that "where designated, critical habitat accomplishes a great deal."[120] Professor Houck, for example, has noted that courts rarely, if ever, approve federal intrusions into designated critical habitat.[121] At the same time, he argues, courts have been reluctant to enjoin federal actions when critical habitat has *not* been designated.[122] In Houck's view, "the ESA's prohibition on modifica-

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U.S. Departments of Interior and Commerce, 64 COLO. L. REV. 277, 297 (1993) (noting that "[t]he concept of protecting critical habitat has turned out to be an agony of the ESA").

116. 16 U.S.C. § 1536(a)(2).

117. Houck, *supra* note 115, at 299. Professor Houck, for instance, has argued:

> Interior has undertaken to define critical habitat in a way that greatly minimizes its importance. It has moreover, for the great majority of species, simply refused to designate critical habitat at all. The effect of these actions is to eliminate the most objective and powerful requirement of the statute--that critical habitat not be modified--and allow Interior to administer the Act on the more uncertain and discretionary terrain of jeopardy.

Id. at 297. *See also* Katherine Simmons Yagerman, *Protecting Critical Habitat Under the Federal Endangered Species Act*, 20 ENVTL. L. 811, 827-45 (1990) (describing the fusion of critical habitat with jeopardy); James C. Kilbourne, *The Endangered Species Act Under the Microscope: A Closeup Look From a Litigator's Perspective*, 21 ENVTL. L. 499, 507 n.29 (1991) (tying the prohibition on destroying or modifying critical habitat to "the concomitant consultation requirement").

118. 50 C.F.R. § 402.02(d) (1996).

119. Houck, *supra* note 115, at 299. *Accord* Yagerman, *supra* note 117, at 828 (noting that despite the ESA's "clear creation of a habitat protection mechanism … habitat protection is [arguably] no longer a part of the statutory scheme"); Kilbourne, *supra* note 117, at 541 ("under this definition, a substantial amount of habitat modification could occur" without violating the Act).

120. Houck, *supra* note 115, at 308.

121. *Id.* at 308-09 (discussing cases decided by the Supreme Court, the Fifth Circuit Court of Appeals, and the federal district court for the district of Nebraska).

122. *Id.* at 309-10.

tion of critical habitat is interpreted by courts as strong and unyielding [whereas] the prohibition on jeopardy is viewed as discretionary and flexible."[123]

The Interior Department might argue that such a designation—by itself—does not restrict any particular land use or management activity and therefore does not constitute a "major Federal action" for purposes of NEPA.[124] While not inherently indefensible, such a position does conflict curiously with Interior regulations which implicitly recognize that a critical habitat designation may impact (or prohibit) proposed or ongoing activities in designated areas.[125] Indeed, the FWS could not possibly comply with its statutory duty of considering the "economic impact" of a critical habitat designation[126] unless that designation had some practical, foreseeable effect on commercial land uses.[127]

II. RECONCILING THE ENDANGERED SPECIES ACT WITH NEPA

Because NEPA imposes procedural requirements on federal agencies whenever such agencies propose action "significantly affecting the quality of the human environment,"[128] NEPA clearly has much broader application than the ESA. However, in the context of agency actions which may imperil threatened and endangered species, the two statutes overlap substantially. Both statutes impose procedural requirements which, in theory, affect the decisions that federal agencies make regarding threatened or endangered species and their critical habitat. In addition, both statutes may be invoked to delay or prevent proposed agency actions which would have a detrimental effect on such species or habitat.[129]

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123. *Id.* at 310.

124. Whether a critical habitat designation itself restricts particular land uses or merely foreshadows such restrictions is relevant to the issue of NEPA's applicability. *See* Kleppe v. Sierra Club, 427 U.S. 390, 404 (1976) (holding that "the mere 'contemplation' of certain action is not sufficient to require an impact statement").

125. *See, e.g.*, 50 C.F.R. § 424.19 (1996) (requiring the Secretary to "consider the probable economic and other impacts of the designation *upon proposed or ongoing activities*") (emphasis added).

126. *See supra* notes 8, 15 and accompanying text.

127. Recall that the FWS determined that the critical habitat designation for the northern spotted owl would cost some $68 million in timber harvesting restrictions. *See supra* note 15.

128. 42 U.S.C. § 4332(C).

129. For example, both NEPA and the ESA were invoked by environmentalists to challenge federal actions which would have an impact on the spotted owl and its habitat. The National Forest Management Act provided a third cause of action. For a discussion of this litigation, see Jeb Boyt, *Struggling to Protect Ecosystems and Biodiversity Under NEPA and NFMA:*

Although it is clear that NEPA and the ESA apply *independently* to federal actions which might affect listed species or their critical habitat, Congress has never stated how it intended the two statutes to relate to each other. The ESA was in existence for nine years before any court was asked to decide whether NEPA applies to the FWS when it proposes action pursuant to the ESA.[130] The Court of Appeals for the Sixth Circuit was the first court to make a definitive statement on this issue.

A. *NEPA's Application to Listing Decisions:* Pacific Legal Foundation v. Andrus

In *Pacific Legal Foundation v. Andrus*,[131] the Court of Appeals for the Sixth Circuit considered whether NEPA required the FWS to prepare an EIS before listing seven species of mollusks as endangered, or whether decisions to list species under Section 4 of the ESA were exempt from NEPA's procedural requirements.[132] The court began its analysis by noting that NEPA was intended to apply broadly, and that it could excuse the FWS from NEPA's requirements only if it found "a statutory conflict . . . that expressly prohibits or makes full compliance impossible."[133] There was, of course, no express statutory exemption in the Endangered Species Act. Nor, in the court's opinion, was there any statutory conflict "due to time constraints and the necessity of acting expeditiously."[134] The court also found the functional equivalence doctrine inapplicable. Citing to *Portland Cement* and its progeny, the court acknowledged that federal actions may be appropriately exempted from NEPA when the statute being implemented by the action agency "serves the purposes

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The Ancient Forests of the Pacific Northwest and the Northern Spotted Owl, 10 PACE ENVTL. L. REV. 1009, 1024-39 (1993).

130. For many years, the Service proceeded as if NEPA's procedural requirements did in fact apply to these actions. See *infra* note 146 and accompanying text.

131. 657 F.2d 829 (6th Cir. 1981).

132. *Id*. at 831. Six mussel species were listed as endangered in 1976, 41 Fed. Reg. 24,062 (June 14, 1976), and the seventh species was listed in 1977, 42 Fed. Reg. 42,351 (Aug. 23, 1977). These listings were not challenged until the FWS stated that completion of the Columbia Dam on Tennessee's Duck River would jeopardize the existence of two of the mussel species. At that time, the Pacific Legal Foundation and several residents of Tennessee filed suit to force the FWS to remove the mussels from the endangered species list, to prevent the FWS from enforcing the ESA, and to prevent the FWS from listing any other species found in the Duck River until it had complied with NEPA. *Pacific Legal Found.*, 657 F.2d at 831.

133. *Pacific Legal Found.*, 657 F.2d at 833.

134. *Id*. at 834. For a discussion of cases in which NEPA was held to be inapplicable because of time constraints, see *supra* notes 46-53 and accompanying text.

of NEPA."[135] The court noted that, like NEPA, section 4 of the ESA "provides for notice of proposed rulemaking . . . and provides opportunity for public comment."[136] However, it concluded that the listing provisions in section 4 do not completely overlap NEPA's procedural requirements. Most importantly, the court noted that "at the time the seven mussels were listed, the [ESA] did not provide for consideration of environmental, economic, or other consequences of the listing."[137] Because an agency must consider environmental consequences when preparing an EIS, it was clear that in this case the listing process did not completely "serve the purposes" of NEPA. Accordingly, the court found that the functional equivalence exception inapplicable to the FWS's listing decision.[138]

After rejecting the functional equivalence exemption, the court nevertheless determined that NEPA's procedural requirements impliedly conflict with the substantive mandate of the ESA. The court identified three alternative bases for this conflict. First, it found that "filing an impact statement does not and cannot serve the purposes of the Endangered Species Act."[139] Second, it found that "filing an impact statement in the present case would not serve the purposes for filing such a statement."[140] Third, it found that "listing species as endangered or threatened furthers the purposes of NEPA even though no impact statement is filed."[141] Based on these three types of implied statutory conflict, the Sixth Circuit concluded that the FWS has no duty to prepare an EIS before listing a species as endangered or threatened.[142]

The Sixth Circuit's decision in *Pacific Legal Foundation* has strongly influenced other courts which have subsequently examined the relationship between NEPA and the ESA.[143] It also prompted the Department of Interior to stop complying with NEPA when it made listing determinations and critical habitat designations under section 4 of the ESA. Before *Pacific Legal Foundation*, the FWS often prepared NEPA documentation before taking such actions. However, in 1983, the Department of Interior abruptly changed its policy, and jus-

135. *Pacific Legal Found.*, 657 F.2d at 834.
136. *Id.* at 835.
137. *Id.*
138. *See Id.*
139. *Id.*
140. *Id.* at 836.
141. *Id.* at 837.
142. *Id.* at 841.
143. *See infra* notes 168-169 and accompanying text.

tified its action in part by citing *Pacific Legal Foundation*.[144] Because *Pacific Legal Foundation* has been so influential both judicially and administratively, its reasoning warrants careful scrutiny.

The first stated basis for the Sixth Circuit's holding was that "filing an impact statement does not and cannot serve the purposes of the Endangered Species Act."[145] The court correctly noted that the purpose of the ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved."[146] However, the court did not then explain why an EIS would not or could not contribute to the goals of species and habitat conservation. Because the ESA states that listing decisions must be based exclusively on the species viability, it was reasonable for the Sixth Circuit to conclude that an examination of extraneous environmental factors would not influence the FWS's decision-making process.[147] But the fact that the FWS must base its listing decisions on a limited set of considerations does not, by itself, mean that the preparation of an EIS does not and cannot serve the purposes of the ESA. It has been firmly established that the preparation of an EIS serves two distinct functions—ensuring that an agency considers environmental impacts in its internal decision-making processes, and informing the public and other units of government about proposed federal actions which will have significant environmental impacts.[148] The court did not bother to inquire if an EIS would advance the ESA's goal of species conservation by educating the public and state and local governments about the FWS's decision to list the mussels. It essentially overlooked the fact that the preparation of an EIS provides an opportunity for agencies to publicly legitimize a proposed action, and that such efforts may be crucial to the successful implementation of a conservation proposal.

The second basis for the Sixth Circuit's holding was that "filing an impact statement . . . would not serve the purposes for filing such a statement."[149] One of the purposes of preparing an EIS is to inform

144. *See* 48 Fed. Reg. 49,244 (Oct. 25, 1983). Interior also cited a letter from the Council on Environmental Quality urging the Service to cease preparing NEPA documents in conjunction with actions under section 4 of the ESA. *Id.*

145. *Pacific Legal Found.*, 657 F.2d at 835.

146. *Id.*

147. *See id.* at 835 (the FWS "is required to list [species] … based on the five factors provided in the ESA. [It] does not have the discretion to consider the five factors required to be considered in filing an impact statement").

148. *See supra* note 40 and accompanying text.

149. *Pacific Legal Found.*, 657 F.2d at 836.

an agency's decision-making process. The Sixth Circuit correctly noted that "[t]he statutory mandate of ESA prevents the Secretary from considering the environmental impact when listing a species as endangered or threatened."[150] The court reasoned that if the EIS is intended to "insure the agency . . . considered environmental factors," when making its decisions, then the impact statement must be superfluous "where the agency has no authority to consider environmental factors."[151] The court essentially took the position that NEPA does not apply to nondiscretionary agency actions, a question which had been left open by the Supreme Court's decision in *Flint Ridge*.[152] But the court's reasoning on this point assumes that the one and *only* purpose of an EIS is to inform agency decision-making; the court again overlooked the fact that the information in an EIS may be of interest to non-federal entities.[153] If preparation of an impact statement would help landowners, businesses, and state and local governments understand the rationale for and the foreseeable consequences of the listing decision, then the preparation of an EIS before a listing could indeed "serve the purposes for filing such a statement."

The third and perhaps most objectionable basis for the Sixth Circuit's holding was that "the Secretary's action in listing species . . . furthers the purposes of NEPA even though no impact statement is filed."[154] The court described NEPA's purposes broadly: "to promote prevention or elimination of damage to the environment . . . ; [and] to enrich the understanding of ecological systems and natural resources."[155] It then reasoned that the decision to list a species must necessarily advance NEPA's goal of preventing environmental damage because the agency making that decision "is charged solely with protecting the environment."[156] The court's reasoning is again defec-

150. *Id*.

151. *Id*.

152. *See supra* note 48 and accompanying text.

153. *Pacific Legal Found.*, 657 F.2d at 838 (stating that although some courts have recognized that NEPA serves an informational purpose, "this purpose does not exist independent of the primary purpose to insure an informed decision by the [action] agency").

154. *Id*. at 837.

155. *Id*.

156. *Id*. This language apparently represents the Courts' interpretation on the FWS' mandate as articulated by the Endangered Species Act and other statutes. It is not clear that this interpretation is correct. The FWS clearly has a statutory duty to consider economic impacts when designating critical habitat. The Supreme Court has likewise ruled that economic interests fall within the "zone of interests" which the ESA was designed to protect. *See* Bennett v. Spears, 117 S. Ct. 1154 (1996) (allowing ranchers and irrigation districts to challenge a jeopardy opinion under the ESA's citizen suit provision).

tive in several respects. First, the court presumes that FWS will infallibly protect the environment merely because it is charged to do so. Such a presumption fails to recognize that actions intended to preserve a single species—one constituent element in a larger ecosystem—may have detrimental impacts upon other constituent elements of that ecosystem or upon the ecosystem as a whole.[157] It also fails to recognize that regulatory agencies may bow under the pressure of the regulated community and propose actions which are not truly within their statutory mandate.[158] A second flaw in the court's reasoning is that it fails to explain how a listing decision furthers the second of NEPA's purposes—"enrich[ing] the understanding" of ecosystems. As the court itself emphasized earlier in its opinion, the FWS does not look at ecosystems when it is making a listing decision;[159] rather, the FWS is required to make listing decisions *solely* on the basis of scientific data related to the population size and viability of the species under consideration. In fact, as the court recognized, the FWS is *expressly prohibited* from including ecosystem considerations in its listing decision.[160] If that is indeed the case, then there is a real danger that, absent an EIS, larger ecosystem concerns will be overlooked, and an important goal of NEPA will go unserved.

Pacific Legal Foundation could have been decided on the narrow ground that nondiscretionary actions are not subject to NEPA, a principle which is not glaringly unreasonable and which had been recognized in other circuits.[161] Instead, the Sixth Circuit carved out an unprecedented, broad and poorly reasoned exception to NEPA for agencies charged with protecting the environment, and in so doing, it ventured into a legal and logical morass which most other courts had wisely avoided. To the extent that the Sixth Circuit too hastily dismissed the informational value of the EIS, and applied different standards to environmentally "beneficial" actions without explaining how to distinguish a "beneficial" action from a harmful action, it undercut the persuasiveness of its own decision.

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157. *See infra* Part III.C.

158. *See id*.

159. *Pacific Legal Found*., 657 F.2d at 835.

160. *See id*. Listing decisions must be made on the narrow scientific ground of species vitality. *See supra* note 87-92 and accompanying text

161. *See* South Dakota v. Andrus, 614 F.2d 1190, 1193 (8th Cir. 1980) (holding that nondiscretionary actions are not subject to NEPA); Natural Resources Defense Council v. Berklund, 609 F.2d 553, 558 (D.C. Cir. 1979) (NEPA not applicable when Secretary has no discretion as to coal leases).

B. *NEPA's Application to Designations of Critical Habitat*

Shortly after the Sixth Circuit's decision in *Pacific Legal Foundation v. Andrus*, the Department of Interior declared that it would not prepare NEPA documentation when designating critical habitat for listed species.[162] Although the Interior relied on *Pacific Legal Foundation* in declaring this new policy,[163] its reliance was misplaced. Properly construed, the Sixth Circuit's holding only provided authority on the issue of species listings. The Sixth Circuit had not directly addressed designations of critical habitat,[164] which are governed by a different set of statutory criteria.[165]

The question of NEPA's applicability to designations of critical habitat was not squarely presented to a federal court until 1992, when the commissioners of Douglas County, Oregon sued the Fish and Wildlife Service for failing to comply with NEPA before designating critical habitat for the northern spotted owl. In *Douglas County v. Lujan*,[166] the government defended its failure to prepare an EIS for the northern spotted owl critical habitat designation by arguing that the action was analogous to a listing decision and should, therefore, be covered under the same exemption set forth in *Pacific Legal Foundation*. The district court accepted the government's framing of the issue, and proceeded to inquire "whether the reasoning in *Pacific Legal Foundation v. Andrus* regarding listing decisions can be extended and applied to decisions to designate critical habitat."[167] The court concluded it could not.[168] The government promptly appealed

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162. *See supra* notes 145 and accompanying text.

163. *See id*.

164. Interestingly, the Sixth Circuit speculated upon NEPA's application to designations of critical habitat in dicta, and suggested that such designations might be exempt from NEPA under the doctrine of functional equivalence. *See Pacific Legal Found.*, 657 F.2d at 835 ("the ESA may now provide the functional equivalent of an impact statement when a critical habitat is designated . . . [even though it] did not provide a functional equivalent of an impact statement with respect to listing a species at the time the seven mussels involved here were listed."). Surprisingly, this argument has not been expressly considered by any subsequent court. *See* Babbitt, 48 F.3d at 1504 n.10 (9th Cir. 1995) (declining to address the functional equivalence argument because it was not advanced by the litigants).

165. *See supra* notes 112-13 and accompanying text.

166. 810 F. Supp. 1470 (D. Or. 1992), *rev'd sub nom*., Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995), *cert. denied*, 516 U.S. 1042 (1996).

167. *Id.* at 1478.

168. *Id*. at 1483 ("The reasoning in [*Pacific Legal Found.*] does not lead to the conclusion that FWS is exempt from NEPA requirements when designating critical habitat [because] . . . listing decisions . . . are statutorily distinguishable from the critical habitat designation process.").

the district court's ruling to the Ninth Circuit, which heard the case under the name *Douglas County v. Babbitt*.

1. *Douglas County v. Babbitt.* In deciding whether NEPA applies to critical habitat designations, the Ninth Circuit constructed a three-part analysis which incorporated, but also added to, the three-part analysis in *Pacific Legal Foundation*. The court first declared that the procedures for designating critical habitat had "displaced" NEPA requirements.[169] Second, it declared that an EIS is not required for proposed federal actions "that do nothing to alter the natural physical environment."[170] Third, echoing the Sixth Circuit, the court found that the "ESA furthers the goals of NEPA without demanding an EIS."[171]

The "displacement" rationale had antecedents in the Ninth Circuit's 1986 decision *Merrell v. Thomas*.[172] The Ninth Circuit first recognized some similarities between NEPA and the designation procedures set forth in §4 of the ESA. The court noted that the ESA's critical habitat provisions provide for public notice and incorporate a "carefully crafted congressional mandate for public participation."[173] They also require the FWS to consider the "best scientific data available," including data on the type of environmental "impacts that concern NEPA."[174] As in *Merrell*, however, the Ninth Circuit emphasized the differences between NEPA procedures and the rulemaking procedures set forth in the agency's authorizing statute.[175] The Ninth Circuit noted that the ESA's critical habitat provisions were not designed haphazardly, but rather represent a carefully tailored "compromise between disparate points of view"[176] that rendered NEPA "superfluous."[177] In essence, the court's refusal to apply NEPA stemmed from its reluctance to "sabotage the delicate ma-

169. *Babbitt*, 48 F.3d 1495, 1502 (9th Cir. 1995), *cert. denied*, 516 U.S. 1042 (1996).

170. *Id*. at 1505.

171. *Id*. at 1506.

172. 807 F.2d 776 (9th Cir. 1986). For discussion of the holding in this case, see *supra* notes 70-80 and accompanying text.

173. *Id*. (quoting 16 U.S.C. § 1533 (b)(2)).

174. *Id*.

175. In *Merrell*, the agency was the EPA and the authorizing statute was the Federal Insecticide, Fungicide and Rodenticide Act. *See supra* notes 71-72 and accompanying text.

176. *Douglas County*, 48 F.3d at 1503 (quoting H.R. Rep. No. 1625 at 13-14, 1978 U.S.C.C.A.N. 9463, 9464).

177. *Id.*

chinery that Congress designed to . . .[address the needs of endangered species]."[178]

The second rationale for the Ninth Circuit's decision was its conclusion that NEPA does not apply to "federal actions that conserve the environment." To support this conclusion, the court cited a Supreme Court case holding that "NEPA does not require the agency to assess every impact or effect of its proposed action, but only the impact or effect on the environment."[179] It followed that if a proposed action would not physically "impact or affect" the environment, then there was no need to comply with NEPA. To the Ninth Circuit, it was manifestly apparent that "critical habitat designation does not threaten" the kind of "environmental damage" which NEPA seeks to avoid.[180] The critical habitat designation would simply "prevent human interference with the environment" and allow the spotted owls' forested habitat to "shift, change, and evolve as it does naturally."[181]

The court's third and final rationale—that "ESA furthers the goals of NEPA without demanding an EIS"—was nothing more than a recitation of the Sixth Circuit's analysis and conclusions in *Pacific Legal Foundation*. In fact, the Ninth Circuit used this opportunity to cite extensively from the Sixth Circuit's opinion and remark, "[w]e think the analysis [in *Pacific Legal Foundation*] applies directly to the facts of the case before us."[182] The court quickly summarized and approved of each element in the Sixth Circuit's decision and concluded that, taken together, the several parts of the Sixth Circuit's analysis indicated that "to apply NEPA to the ESA would further the purposes of neither."[183]

2. *Catron County v. U.S. Fish & Wildlife Service*. Less than one year after the Ninth Circuit ruled that NEPA does not apply to designations of critical habitat, the Court of Appeals for the Tenth Circuit reached the opposite conclusion in a case presenting the identical issue. The litigants in *Board of Commissioners of Catron County v. FWS*[184] disagreed about NEPA's applicability to a

178. *Id.* (quoting *Merrell*, 807 F.2d at 779).

179. *Id.* at 1505 (quoting Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 772 (1983)).

180. *Id.* at 1506 n.13.

181. *Id.* at 1506.

182. *Id*.

183. *Id.* at 1507.

184. 75 F.3d 1429 (10th Cir. 1996).

designation of critical habitat for two species of threatened fish.[185] The government, seeking to defend its critical habitat designation, argued that the displacement rationale set forth in *Douglas County* should be adopted as law in the Tenth Circuit.[186]

The Tenth Circuit did not agree. The court acknowledged that the ESA's critical habitat provisions "to some extent parallel and perhaps overlap the requirements imposed by NEPA."[187] The court further conceded that "the ESA requirements for notice and environmental consideration partially fulfill the primary purposes of NEPA."[188] However, the court flatly declared that "[p]artial fulfillment of NEPA's requirements . . . is not enough" to justify an exemption from NEPA, because the "plain language" of that statute makes it clear that agencies must comply with its procedural requirements "to the fullest extent possible."[189]

The Tenth Circuit based its holding on policy concerns as well as rules of statutory interpretation. The court thought it significant that the purposes of NEPA are distinguishable from the goals of the ESA. While the former statute is intended to "inform the Secretary of the environmental consequences of his action" and "informs the public that the acting agency has considered those consequences,"[190] the latter strives to "prevent the extinction of species."[191] Although the protection of endangered species and their habitat is generally considered to be beneficial to the environment, the court stressed that "[agency] action under ESA is not *inevitably* beneficial or immune to

185. In its original listing and designation proposal, the FWS had determined that it was not required to comply with NEPA as a matter of law. *See* 50 Fed. Reg. 25,385, 25,395 (1985). At the time, *Pacific Legal Foundation* was still the primary authority on this question. However, the final critical habitat designation was delayed until April, 1994. *See* 59 Fed. Reg. 10,898 (loach minnow), *id.* at 10,906 (spikedace) (1994). The County filed its petition for injunctive relief at that time—after *Douglas County v. Lujan* had been decided, but before it had been reversed by the Ninth Circuit. For a discussion of the Douglas County cases, see *supra* notes 165-182 and accompanying text.

186. *See Catron County*, 75 F.3d at 1437 (citing Appellant's Brief).

187. *Id.*

188. *Id.*

189. *Id.* (citing 42 U.S.C. § 4332(C)). The Tenth Circuit was not persuaded that "congressional failure to reverse or revise prior judicial and [executive] announcements of NEPA noncompliance evidences congressional endorsement of such noncompliance," because there was no evidence that Congress contemplated, or was even aware, of the Interior Department's policy of noncompliance. *See id.* at 1438. Moreover, the theory that Congress had silently acquiesced to Interior Department regulations was undercut by the fact that Congress had not revisited the statutory provisions subjected to the administrative interpretation. *See id.*

190. *Catron County*, 75 F.3d at 1437.

191. *Id.*

improvement by compliance with NEPA procedure."[192] Compliance with NEPA, the court felt, would in some cases help the FWS protect endangered species and ensure that its actions would not have unintended environmental consequences.

III. ANALYSIS

In the past twenty years, Congress has amended the Endangered Species Act four times.[193] In no instance has it explicitly stated whether NEPA applies to listing decisions or critical habitat designations under section 4 of the ESA.[194] Nor has Congress ever stated whether it intended NEPA to apply to other detailed statutory provisions which could fairly be characterized as protecting or enhancing the environment. Because Congress has not chosen to make such a statement, and because NEPA's legislative history is so ambiguous, the courts have had to divine congressional intent from the underlying policies of both NEPA and other substantive environmental statutes.[195] The courts, in effect, have had to weigh competing policy objectives and try to decide "what answer the legislature would have made as to a problem that was neither discussed nor contemplated."[196]

Given the inherent subjectivity of this judicial task, it should not be surprising that the courts have failed to achieve consensus on the question of whether NEPA applies to federal actions taken pursuant to section 4 of the Endangered Species Act. However, the question of NEPA's relation to the ESA will almost certainly confront other federal courts in the future. The courts may also be called upon to consider NEPA's relation to other federal actions which can be characterized as "protecting" or "enhancing" the environment. It is worthwhile, therefore, to analyze the conflicting authority which will be presented to those courts and to determine if some policy concerns are more valid than others. In the following analysis, I argue that the Ninth Circuit's holding in *Douglas County* is based on an un-

192. *Id.* (emphasis added).

193. *See* Pub. L. No. 95-632, 92 Stat. 3751 (1978); Pub. L. No. 97-304, 96 Stat. 1411 (1982); Pub. L. No. 99-659, 100 Stat. 3706 (1986); Pub. L. No. 100-478, 102 Stat. 2306 (1988).

194. In contrast, Congress did explicitly state that NEPA would not apply to exemptions granted by the Endangered Species Committee. *See* 16 U.S.C. § 1536(k) ("An exemption decision by the Committee under this section shall not be a major Federal action for purposes of the National Environmental Policy Act of 1969.").

195. *See* United States v. Sisson, 399 U.S. 267, 297-98 (1970) ("[C]ourts should endeavor to give statutory language that meaning that nurtures the policies underlying the legislation.").

196. *Id.* at 380.

convincing analysis. In so doing, I implicitly endorse the Tenth Circuit's holding in *Catron County*.

A. *The NEPA Exemption for Nondiscretionary Agency Actions*

The Sixth Circuit's decision in *Pacific Legal Foundation* and the Ninth Circuit's decision in *Douglas County* were both premised to some extent on the idea that NEPA does not apply to nondiscretionary duties imposed on an agency by statute.[197] To the extent that NEPA is intended to inform an agency's decision-making process, such a rule is appropriate because it eliminates an administrative burden which could by law have no effect on the agency's decision. The trouble with a broad exemption for nondiscretionary actions is that it is constructed on the dubious premise that an EIS serves *only* to inform the discretion of the action agency. This premise ignores the informational value of the EIS to other government officials and to stakeholders affected by agency action; and in so doing, it conflicts with established NEPA case law.[198]

Even if one were to accept a broad NEPA exemption for nondiscretionary agency action as a general matter,[199] the Ninth Circuit should not have found such an exemption to apply to critical habitat designations. Unlike a listing decision, critical habitat designations always involve a large measure of agency discretion. The ESA requires that the Fish and Wildlife Service determine the extent of a species' critical habitat by balancing the needs of the species with "economic and other relevant factors."[200] Agency discretion is further amplified by provisions which state that critical habitat must be designated only "to the extent prudent and determinable."[201] It would be difficult to imagine a situation in which an agency has more discretion. Considering that the courts have been skeptical of agencies which claim to be exempt from NEPA because of statutory restrictions on their discretion and have typically construed agency

197. *See Babbitt*, 48 F.3d 1495, 1507 (9th Cir. 1995) (noting that "Congress has not given the Secretary the discretion to consider environmental factors, other than those directly related to the preservation of the species"), *cert. denied*, 516 U.S. 1042 (1996); Pacific Legal Found. v. Andrus, 657 F.2d 829, 835 (6th Cir. 1981) (emphasizing that "[t]he Secretary does not have the discretion to consider the five factors required to be considered in filing an impact statement").

198. *See supra* note 40 and accompanying text. *But cf. supra* note 156 and accompanying text.

199. *See supra* note 52 and accompanying text. Such an exemption now appears to be firmly entrenched in the case law.

200. 16 U.S.C. § 1533(b)(2) (1994).

201. *Id.* § 1533(a)(3).

enabling statutes to avoid such conflicts,[202] it would be an unwarranted departure from legal precedent to find that the Fish and Wildlife Service has so little discretion in making critical habitat designations that it need not comply with NEPA.

B. *The Flaw in the Ninth Circuit's "Displacement" Rationale*

In holding that NEPA does not apply to critical habitat designations, the Ninth Circuit did not rely solely, or even primarily, on the exemption for nondiscretionary agency actions. Instead, the court decided that the statutory provisions which govern critical habitat designations had displaced NEPA altogether.[203] There is no doubt that Congress can modify the procedures by which an agency promulgates regulations if it wishes to do so. Likewise, it can exempt an agency from procedures imposed by an earlier Congress. The important question in *Douglas County*, however, was whether the Congress which adopted revisions to the ESA in 1978 *actually* intended to make NEPA inapplicable to critical habitat designations.

The Ninth Circuit's argument that Congress intended the critical habitat provisions to "displace" NEPA is not convincing. The court cited scant legislative history to support this view, noting only that House committee members wished to introduce some "flexibility" into the critical habitat designation process:

> The [committee] report states that "the legislation aims to improve the listing process and the public notice process" ensuring that the Secretary only makes a critical habitat designation "after a thorough survey of all the available data" and after notice to the affected communities.[204]

The fact that the critical habitat revisions were meant to "improve" the listing process hardly suggests that Congress intended NEPA to be inapplicable. In fact, the committee's express desire to have critical habitat designations based on "all available data"—including, presumably, data on possible environmental impacts—suggests exactly the opposite. Other statements in the legislative history, glibly

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202. The Ninth Circuit, for example, rejected the Bonneville Power Administration's argument that it could offer long term power contracts without complying with NEPA because it had no discretion with respect to contract terms. *See* Forelaws on Board v. Johnson, 743 F.2d 677, 681 (9th Cir. 1984) (noting that contrary to agency assertions, "[t]he content of these contract provisions is not mandated but is clearly discretionary").

203. *See supra* notes 169-71 and accompanying text.

204. Douglas County v. Babbitt, 48 F.3d 1495, 1503 (9th Cir. 1995) (quoting H.R. Rep. No. 1625, 95th Cong., 2d Sess. 14) (1978).

dismissed by the Ninth Circuit, likewise suggest that Congress did not intend to make NEPA inapplicable to critical habitat designations.[205]

Not surprisingly, then, the Ninth Circuit's displacement rationale seems to rely less on particular statements in the legislative history than on the court's feeling that the overall structure of the ESA's critical habitat designation procedures renders NEPA "superfluous."[206] Indeed, the court went to great lengths to point out that the critical habitat designation procedures serve many of NEPA's functions and goals.[207] However, such overlap, while relevant to a functional equivalence analysis, is not an adequate basis for a displacement exemption.[208] As the Ninth Circuit explained in *Merrell*, the displacement rationale is constructed upon differences—not similarities—between an enabling act and NEPA.[209] The practical effect of the displacement rationale as it is laid out in *Douglas County* is essentially to replace functional equivalence analysis with a much less demanding legal rule that recognizes a NEPA exemption whenever an agency's enabling statute replicates some (but not necessarily all) of NEPA's functions.

Such a rule is not only undesirable, it is unworkable, because it has no logical boundaries. The ESA's critical habitat provisions certainly can't be set apart from other environmental statutes on the basis that they incorporate "disparate points of view," or that they seek to achieve their policy objectives through the use of "delicate machinery." Every environmental statute is forged through political debate and tempered with compromise. To recognize a NEPA exemption for an agency whose enabling legislation was created through "compromise" would be to effectively exempt *all* agency action. The effect of the displacement rationale would be to destroy the presumption that NEPA's procedures apply to all major federal actions and replace it with a presumption that agencies are to consider environmental factors in a manner prescribed ad-hoc by each separate piece

205. *See, e.g.*, H. Conf. Rep. No. 1804, 95th Cong., 2d Sess., 27 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9484, 9494 (requiring that affected local governments receive actual notice of the critical habitat designation and "any environmental assessment or environmental impact statement"); Douglas County v. Lujan, 810 F. Supp. 1470, 1483 (D. Or. 1992) (relying on Senate debate on the 1978 amendments as evidence of Congress's intent to require NEPA compliance).

206. Babbitt, 48 F.3d at 1503.

207. *See id.* at 1503-04.

208. *See supra* notes 55-69 and accompanying text. The Ninth Circuit expressly disavowed any functional equivalence analysis. *See* Douglas County v. Babbitt, 48 F.3d at 1504 n.10.

209. *See supra* notes 71-81 and accompanying text.

of enabling legislation. Of course, the Ninth Circuit might try to avoid absurd results through a judicious and sparing application of its rule. But unless the court devised some reasoned method to distinguish "normal" enabling statutes from their more "delicate" counterparts, its rule would draw arbitrary distinctions between federal agencies .

C. *A NEPA Exemption for Environmentally "Benevolent" Agency Actions?*

The Ninth Circuit's decision in *Douglas County* also followed the Sixth Circuit's suggestion that NEPA should not apply to "federal actions that conserve the environment."[210] The problem with creating a broad exemption for "benevolent" federal action is that there is no way to determine, absent a thorough examination of a proposed action's environmental impacts, to what extent that action would in fact "conserve" the environment, and to what extent it might harm the environment.

The first and most obvious difficulty with a broad NEPA exemption for "benevolent" federal actions is that such an exemption would invite agencies to disingenuously characterize their actions as "benevolent" in order to avoid the administrative burdens of complying with NEPA. The D.C. Circuit recognized long ago that a broad NEPA exemption for agencies charged with protecting the environment "embrace[s] the endemic question of 'Who shall police the police'?"[211] Even NEPA's original sponsors were skeptical about proceeding on the assumption that EPA "will always be the good guy."[212] Such concern has at times seemed well founded.[213] That as-

210. Douglas County v. Babbitt, 48 F.3d 1495, 1505 (9th Cir. 1995); *accord* Pacific Legal Found. v. Andrus, 657 F.2d 829, 837 (6th Cir. 1981) (stating that NEPA is inapplicable to agencies "charged solely with protecting the environment").

211. Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973).

212. *Id*. at 384 (quoting Senator Jackson 118 Cong. Rec. 16878 (daily ed., Oct. 4, 1972)). Senator Jackson went on to note, "Since EPA was formed, they have done an admirable job and they are continuing to do so, at least for present. However, it cannot be forgotten that EPA is a regulatory agency and in the past in Washington almost all regulatory agencies have eventually come under the control of those that they are charged with regulating." *Id*. (quoting Sen. Jackson 118 Cong. Rec. at 16887).

213. For example, the term served by EPA Administrator Anne Gorsuch Burford. *See* Norman J. Vig, *Presidential Leadership and the Environment: From Reagan and Bush to Clinton*, *in* ENVIRONMENTAL POLICY IN THE 1990S: TOWARD A NEW AGENDA 71, 77 (Norman J. Vig & Michael E. Kraft eds. 1994) (noting that Burford was one of several "ideological conservatives" appointed by President Reagan, and that "[v]irtually all of these appointees came from the business corporations to be regulated or from the legal foundations or firms that had fought environmental regulations for years;"); Riley E. Dunlap & Angela G. Mertig, *The Evolution of*

sumption is equally suspect for other agencies charged with protecting the environment.

The argument against a broad NEPA exemption for "benevolent" federal actions does not rest solely on the assumption that an agency may disingenuously stray from its statutory mandate. In fact, the greater concern is the well-intentioned agency which too hastily characterizes an action as "benevolent" without considering the action's full range of environmental impacts. This concern is especially relevant for land management agencies such as the Bureau of Land Management and the Forest Service, which must administer multi-use statutes. The Forest Service, for example, might consider a timber sale to be "benevolent" if it was conducted to protect healthy trees from diseased ones.[214] But as the Tenth Circuit bluntly noted, "[m]erely because the Secretary says does not make it so."[215] The action cannot be *fairly* characterized as benevolent until all of its environmental impacts have been documented.

Admittedly, many problems could be avoided by limiting the NEPA exemption to those actions which are intended to improve environmental quality *and* which entail no direct, physical modification of the environment. Even under such a rule, however, it is not clear that a critical habitat designation should be exempted from NEPA, because a critical habitat designation arguably prohibits or restricts actual land uses, and has actual impact on management regimes.[216] In the case of critical habitat designations, compliance with NEPA can potentially improve agency decision-making by ensuring that the agency action does not create unintended environmental damage. NEPA compliance may also improve implementation by informing stakeholders of an action's full range of environmental impacts.

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the U.S. Environmental Movement from 1970 to 1990: An Overview, *in* AMERICAN ENVIRONMENTALISM: THE U.S. ENVIRONMENTAL MOVEMENT, 1970-1990 at 1, 4 (Riley E. Dunlap & Angela G. Mertig eds., 1992) (noting that the "anti-environmental orientation of [the Reagan] administration . . . [was] highlighted by Department of Interior Secretary [James] Watt and Environmental Protection Agency Director Gorsuch").

214. *See* Oregon Natural Resources Council v. Lyng, 882 F.2d 1417 (9th Cir. 1989). The plaintiffs in that case challenged the adequacy of an EA that the Forest Service prepared prior to selling 6 million board feet of beetle-infested timber. The sale was spurred by an infestation of bark beetles which killed some twenty million board feet of timber in a mixed-use area of the Hells Canyon National Recreation Area. The court did not question NEPA's obvious applicability to the timber sale. *See id.* at 1421-22. Under a broad exemption for "benevolent" federal action, the court would presumably have to consider that threshold issue.

215. Catron County Board of Comm'rs v. United States Fish and Wildlife Serv., 75 F.3d 1429, 1436 (10th Cir. 1996).

216. *See supra* notes 126-29 and accompanying text.

More generally, actions intended to benefit the environment may have undesirable secondary effects—effects that might go unnoticed without the benefit of NEPA compliance. As one court has acknowledged, an agency charged with protecting the environment "might wear blinders when promulgating standards protecting one resource as to the effects on other resources."[217] Efforts to control air pollution, for example, might increase water pollution.[218] Other commentators have pointed out that "some of the most well-intentioned efforts to reduce identified risks can turn out to increase other risks," and have urged federal regulatory agencies to systematically consider these types of "risk-risk tradeoffs."[219]

An example might illustrate the point. Consider a designation of critical habitat for the red-cockaded woodpecker (*Picoides borealis* (Veiellot)). This bird nests and breeds only in old growth pine trees, in several habitat types including one known as longleaf pine savanna.[220] This critically endangered ecosystem type[221] is dependent on fire, and left unmanaged, it burns regularly. A recovery plan intended to "conserve" nesting and breeding grounds for the woodpecker might prevent human management, including fire suppression, in designated critical habitat areas. As a result, naturally occurring fires would be allowed to burn. These fires might help restore the longleaf pine savanna, and therefore benefit the red-cockaded woodpecker. But the fires might also have a detrimental effect on other natural resources, especially if fire suppression has been a part of the area's management regime for a significant period of time. For instance, the fire might destroy valuable timber stands and adversely impact other wildlife resources. To be sure, the benefits of preserving the woodpecker and its habitat might outweigh these secondary costs. But that does not mean that the federal

217. Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 384 (3d Cir. 1973).

218. *See Portland Cement*, 486 F. 2d at 384 (making such a claim).

219. *See generally* John D. Graham and Jonathan Baert Wiener, *Confronting Risk Tradeoffs*, in RISK VERSUS RISK: TRADEOFFS IN PROTECTING HEALTH AND THE ENVIRONMENT 1, 1 (John D. Graham and Jonathan Baert Wiener eds., 1995).

220. For a description of the nesting and breeding habits of the red-cockaded woodpecker, see RED-COCKADED WOODPECKER: RECOVERY, ECOLOGY, AND MANAGEMENT (David L. Kulhavy, et. al. eds., 1995); *see also* Chuck D. Barlow, *The Proposed Management of the Red-Cockaded Woodpecker in the Southern National Forests: Analysis and Suggestions*, 17 U. ARK. LITTLE ROCK L.J. 727 (1995).

221. *See* Norman L. Christensen et. al., *Report of the Ecological Society of America Committee on the Scientific Basis for Ecosystem Management*, 6 ECOL. APPLICATIONS 665, 690 (1996) (defining as critically endangered those ecosystem types which have declined more than 98% since European settlement).

agency proposing an environmentally "benevolent" action should necessarily be excused from recognizing and documenting those secondary effects, and perhaps taking steps to ameliorate them. And it is at least imaginable that there will be some instances where the costs of the secondary effects outweigh the benefits of the proposed action.

The Ninth Circuit has itself acknowledged that "[a]n agency cannot … avoid its statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment."[222] An agency should likewise not be able to avoid its NEPA responsibilities merely by characterizing its proposed action as environmentally benevolent. After all, such an assertion cannot be forthrightly made (or judicially evaluated) until the agency makes a detailed description of the proposed action's likely environmental impacts.

IV. CONCLUSION

Some courts and commentators have worried that NEPA compliance might unduly delay or hinder federal efforts to protect the environment.[223] Although this concern is not frivolous, especially in the context of critical habitat designations, neither is it an adequate justification to exempt presumably benevolent federal actions from NEPA's requirements.

There *is* good reason to worry about increasing the time and cost of designating critical habitat under the Endangered Species Act. Even without the burden of complying with NEPA, the FWS has had trouble fulfilling its duties under section 4 of the ESA.[224] In light of

222. Jones v. Gordon, 792 F.2d 821, 828 (9th Cir. 1986) (quoting Steamboaters v. FERC, 759 F.2d 1382, 1393 (9th Cir. 1985)).

223. *See, e.g.*, Pacific Legal Found. v. Andrus, 657 F.2d 829, 838 (6th Cir. 1981) ("This court is reluctant to make NEPA more of an obstructionist tactic to prevent environment-enhancing action than it may already have become."); Douglas County v. Babbitt, 48 F.3d 1495, 1508 (9th Cir. 1995) (quoting same); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 384 (D.C. Cir. 1973) (noting that "[t]he need . . . for unusually expeditious decision would be thwarted by a NEPA impact statement requirement" and that "opponents of environmental protection would use the issue of [NEPA] compliance . . . as a tactic of litigation and delay"). *See also* Woody, *supra* note 19, at 1 (noting that industry proponents have attempted to invoke NEPA "to undermine environmental protection").

224. Although the FWS has listed several hundred species under the ESA, thousands more await listing and protection. A number of species have gone extinct while waiting to be listed. *See* Houck, *supra* note 115, at 286 (citing Nature Conservancy Study). The FWS has been even more recalcitrant in designating critical habitat. *See* U.S. GENERAL ACCOUNTING OFFICE, *supra* note 104, at 26 (finding that the FWS had neither designated nor proposed critical habitat for 546 of 651 listed species).

the Service's past performance, one might rightfully pause before imposing further administrative burdens on the habitat designation process. When a species is threatened with imminent extinction, it is imperative that the FWS implement protective measures promptly. Failure to do so may result in the irreversible loss of the species.

As a legal matter, however, it is clear that that NEPA's potential to delay federal action is not an adequate basis for an exemption. The earliest case law states unequivocally that "considerations of administrative difficulty, delay, or economic cost will not suffice" to excuse an agency from NEPA's requirements.[225] After all, the very purpose of NEPA is to delay action until the environmental impacts of that action have been thoroughly examined.

From a policy standpoint, there is little reason to believe that the delay and expense of NEPA compliance will bring critical habitat designations or other benevolent federal actions to a grinding halt. First, it is far from clear that FWS has failed to designate critical habitats due to a lack of resources.[226] Second, in those cases where agency officials and stakeholders do not identify secondary environmental impacts, FWS should be able to satisfy NEPA's requirements by preparing an EA rather than a full-blown EIS.[227] Third, standing requirements will help ensure that NEPA is not abused by industry proponents.[228] Finally, if FWS needed to designate critical habitat for

225. Calvert Cliffs Coordinating Comm'n v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

226. *See* Houck, *supra* note 115, at 302-07 (arguing that FWS has for political reasons overrelied on the "prudency" exemption to designating critical habitat).

227. *See supra* notes 33-34 and accompanying text.

228. Litigants cannot gain standing unless their claim falls within the "zone of interests" NEPA was intended to protect. Because NEPA's purpose is to protect the environment, economic arguments will presumably not confer standing. *See* Nevada Land Action Ass'n v. U.S Forest Service, 8 F 3d. 713 (9th Cir. 1993) (holding that plaintiffs do not have standing under NEPA to protect purely economic interests). Of course, a litigant could allege environmental injuries and invoke NEPA to delay an agency rulemaking, even though its *primary* motivation is economic rather than ecological. *See supra* note 16 and accompanying text.

The Supreme Court most recently elaborated on the zone of interests test in Bennett v. Spear, 117 S. Ct. 1154 (1996) (holding that two irrigation districts and two ranch operators have standing under the Endangered Species Act to challenge the validity of a jeopardy opinion issued by the FWS). It is not clear what effect *Bennett* will have on the zone of interests test in the context of NEPA litigation. Whether or not a particular plaintiff will have standing will depend upon how formally the courts construe NEPA's zone of interests. *Bennett* makes clear that standing hinges on the "particular provision of law upon which the plaintiff relies." The substantive portion at issue in *Bennett* was section 7 of the ESA, which contains language which the Court interpreted to protect interests beyond preservation of species. Because NEPA contains no directly comparable language, *Bennett* does not necessarily extend NEPA's zone of interests to encompass party economic interests.

a species in immediate danger of extinction, it could presumably qualify for an emergency exemption to NEPA.[229]

In short, the costs of NEPA compliance are not insurmountable. The benefits of NEPA compliance, on the other hand, may be significant. In the context of critical habitat designations, the benefit is that the FWS will consider the secondary environmental impacts of any anticipated changes in land management in the designated areas. In so doing, the FWS will move closer to the ideal of ecosystem management.[230] In the context of other "benevolent" federal actions, the benefit is assurance that federal resource agencies will comply with Congress' command to consider all of the environmental impacts of their actions "to the fullest extent possible," and make risk tradeoffs accordingly. NEPA compliance may promote ecosystem management by providing an opportunity for the FWS to consider complexity, connectedness, and context during the critical habitat designation process.

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229. *See* 40 C.F.R. § 1506.11 (allowing noncompliance "[w]here emergency circumstances make it necessary").

230. Ecosystem management is "management driven by explicit goals . . . and made adaptable by monitoring and research based on our best understanding of the ecological interactions and processes necessary to sustain ecosystem composition, structure and function." Christensen et. al., *supra* note 222, at 665. One important principle of ecosystem management is the "importance of ecosystem complexity and the vast array of interconnections that underlie ecosystem function." *Id.* at 669. Another is recognition that ecosystems and their constituent components are "very much affected by the status and behavior of the systems or landscape that surrounds them." *Id.*

It is increasingly apparent that ecosystem management is not a passing fad. No fewer than 18 federal agencies currently aspire to integrate the principles of ecosystem management into their policymaking and implementation activities. *See* i*d.* at 668. The FWS has been among the most active proponents of the concept. *See* U.S. FISH & WILDLIFE SERVICE, AN ECOSYSTEM APPROACH TO FISH AND WILDLIFE CONSERVATION: AN APPROACH TO MORE EFFICIENTLY CONSERVE THE NATION'S BIODIVERSITY (1994). The law reviews are also full of articles encouraging this approach to resource management. *See, e.g.*, Oliver A. Houck, *On the Law of Biodiversity and Ecosystem Management*, 81 MINN. L. REV. 869 (1997); George Frampton, *Environmental Law Faces the New Ecology: Ecosystem Management in the Clinton Administration*, 7 DUKE ENVTL. L. & POL'Y F. 39 (1997); Robert B. Keiter, *Beyond the Boundary Line: Constructing a Law of Ecosystem Management*, 65 U. COLO. L. REV. 293 (1994).

Current proposals to overhaul the critical habitat designation process would similarly enhance the FWS's ability to consider ecosystem-wide concerns. *See, e.g.*, S. 1180, 105th Cong. (1997) (repealing the requirement that the Secretary designate critical habitat at the time of listing, and allowing the Secretary to determine critical habitat during the development of a final recovery plan).