

Designations of Critical Habitat Pursuant to
the Endangered Species Act: Does NEPA
Apply?

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NOTES

DESIGNATIONS OF CRITICAL HABITAT PURSUANT TO THE ENDANGERED SPECIES ACT: DOES NEPA APPLY?

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INTRODUCTION

Human beings have a disproportionate impact on the extinction rate of other species.¹ Habitat modification and destruction are the primary cause of such extinction.² Although man has acted unwittingly, the effects are "just as irrevocabl[e], as if he had hunted them down to the last individual."³ As of June 1992, twelve hundred and forty five animal and plant species were listed as threatened or endangered in the United States.⁴ Even more alarming, approximately one species is lost forever through extinction each day, and this number is expected to increase to one hundred species per day by the end of the decade.⁵

One positive effect of man's disregard for the environment is the enlightenment that has come with it. Mankind now realizes that it benefits in many ways from the existence of diverse species. They supply mankind with food sources, industrial inputs, medicinal sources, pollution indicators, and aesthetic resources.⁶

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1. John C. Kunich, *The Fallacy of Deathbed Conservation under the Endangered Species Act*, 24 ENVTL. L. 501, 503 (1994).

2. *Id.*

3. *Id.*

4. 139 CONG. REC. E1018 (daily ed. Apr. 23, 1993) (statement of Rep. Studds).

5. Nancy K. Kubasek & M. Neil Browne, *The Endangered Species Act: An Evaluation of Alternative Approaches*, 3 DICK. J. ENVTL. L. & POL'Y 1, 1 (1994).

6. Edwin M. Smith, *The Endangered Species Act and Biological Conservation*, 57 S. CAL. L. REV. 361, 374-76 (1984).

This realization has led to increased arguments for the preservation of the environment.⁷ An ethics-based argument for preserving wildlife is that humans have a moral duty to protect future generations as well as to conserve biological diversity.⁸ Other commentators argue that because humans are only part of a larger biological community, it is wrong to jeopardize the continued existence of species.⁹ One final argument is that it is immoral to inflict pain on living creatures.¹⁰

These ethical arguments have resulted in legislation in the United States to help preserve the environment. The National Environmental Policy Act¹¹ ("NEPA") and the Endangered Species Act¹² ("ESA") are two examples of environmental legislation enacted in response to increased public awareness and concern for the environment.¹³ Because of ambiguities in these statutes, however, there exists disagreement in the federal appellate courts as to how NEPA and ESA work in conjunction with one another.¹⁴

This Note analyzes NEPA and ESA, including pertinent legislative history, then looks to disparate circuit court interpretations for determining the necessity of NEPA compliance for a federal action pursuant to ESA. Part I briefly reviews NEPA's purpose and regulations. Part II discusses ESA, its focus, and procedures for listing endangered or threatened species, and designation of critical habitat to protect such species. Part III surveys the Ninth and Tenth Circuits' analyses in their evaluating whether NEPA must be complied with in designating critical habitat under ESA. Part IV argues

7. See Kunich, *supra* note 2, at 504 ("The notion that people should refrain from annihilating their fellow species gained prominence in the aftermath of well publicized extinctions.").

8. Smith, *supra* note 7, at 376.

9. *Id.* at 378.

10. *Id.* at 376-77.

11. 42 U.S.C. §§ 4321-4370 (1994).

12. 16 U.S.C §§ 1531-1544 (1994).

13. See 42 U.S.C. § 4331(a); 16 U.S.C § 1531(a).

14. See *infra* parts IV.A.2, IV.B.2. Specifically, the Ninth Circuit held that NEPA does not apply to critical habitat designations made pursuant to ESA. *Douglas County v. Babbitt*, 48 F.3d 1495, 1507 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 698 (1996). In contrast the Tenth Circuit held that NEPA does apply to critical habitat designations made under ESA. *Catron County Bd. of Comm'r v. United States Fish & Wildlife Serv.*, 75 F.3d 1429, 1439 (10th Cir. 1996).

that NEPA requirements must be fulfilled when designating critical habitat under ESA. Finally, this Note concludes that requiring preparation of an Environmental Impact Statement (“EIS”) pursuant to NEPA furthers the goals of ESA by scrutinizing the full extent of the impact of proposed federal actions, thus allowing a fully informed decision regarding designation of critical habitat.

I. NATIONAL ENVIRONMENTAL POLICY ACT

A. *Purpose and Requirements*

“NEPA was designed to promote human welfare by alerting governmental actors to the effect of their proposed actions on the physical environment.”¹⁵ Congress enacted NEPA to “reverse what seems to be a clear and intensifying trend towards environmental degradation.”¹⁶ The explicit congressional purpose of NEPA is four-fold: first, to encourage harmony between man and the environment; second, to promote efforts to eliminate damage to the environment while stimulating the health of man; third, to increase understanding of natural resources; and fourth to establish a Council on Environmental Quality (“CEQ”).¹⁷

NEPA explicitly imposes several on federal agencies.¹⁸ Federal agencies must, to the fullest extent possible, administer their laws in accordance with NEPA.¹⁹ NEPA requires that all federal agencies prepare a detailed statement, known as an Environmental Impact Statement (“EIS”), before engaging in “major Federal actions significantly affecting the quality of the human environment.”²⁰

15. *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983).

16. H.R. REP. NO. 378, 91st Cong., 1st Sess. 2 (1969), *reprinted in* 1969 U.S.C.C.A.N. 2751, 2753.

17. 42 U.S.C. § 4321. The CEQ studies environmental conditions and trends. 42 U.S.C. § 4344(5). The CEQ also promulgates regulations providing guidelines for the procedural provisions of NEPA. *See* 40 C.F.R. §§ 1500-1508 (1995).

18. 42 U.S.C. § 4332.

19. *Id.* In addition, “[a]ll agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures . . . and shall propose to the President . . . measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth” pursuant to NEPA.

Id. § 4333.

20. *Id.* at § 4332(C); *see also* 40 C.F.R. § 1508.14 (1995). For proposed ac-

The EIS must include the expected environmental impact of the proposed action,²¹ unavoidable adverse effects,²² alternatives to the proposed action,²³ the relationship between the short-term uses and long-term productivity of the affected area,²⁴ and any irreversible and irretrievable commitments of resources.²⁵

Any significant new information concerning the project's environmental impact that is learned subsequent to the preparation of the EIS, the agency is required to evaluate the new information.²⁶ If the agency concludes that the new information is "relevant to environmental concerns and bear[s] on the proposed action or its impacts," the agency must then prepare a Supplemental Environmental Impact Statement ("SEIS").²⁷ A SEIS is also required if the

tions with uncertain environmental effects, the federal agency must first prepare an Environmental Assessment ("EA") to determine if the environmental impact is significant enough to justify requiring the agency to file an EIS. *See* 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1508.9 (1995). What constitutes significant is not always easily discernible. "Significantly" is defined as requiring consideration of both the context of the action and the intensity of its impact. *Id.* § 1508.27. The regulations issued by the CEQ define "major federal action" as actions whose effects may be major and potentially subject to Federal control. *Id.* § 1508.18. Some other regulations also clarify when an EIS is required. *See, e.g., id.* § 1507.3(b)(2)(i)-(iii) (1995) (listing actions that almost always require an EIS); 40 C.F.R. § 1508.4 (1995) (furnishing categorical exclusions to the requirement of preparing an EIS).

21. 42 U.S.C. § 4332(2)(C)(i).

22. *Id.* § 4332(2)(C)(ii).

23. *Id.* § 4332(2)(C)(iii). Two decisions dominate the case law relative to the scope of alternatives considered in an EIS. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), *rev'd on other grounds*, 462 U.S. 87 (1983) (affirming the "rule of reason" approach and explaining that discussion of alternatives should be bounded by a notion of feasibility); *Natural Resources Defense Council, Inc., v. Morton*, 458 F.2d 827 (D.C. Cir. 1972) (requiring a more expansive discussion of alternatives, although adopting a "rule of reason" approach to limit discussion).

24. 42 U.S.C. § 4332(2)(C)(iv).

25. *Id.* § 4332(2)(C)(v).

26. 40 C.F.R. § 1502.9(c)(1)(ii) (1995); *see also Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989).

27. 40 C.F.R. 1502.9(c)(1)(ii) (1995); *Marsh*, 490 U.S. at 374. *Cf.* 42 U.S.C. § 4332(2)(C).

agency "makes substantial changes in the proposed action that are relevant to environmental concerns."²⁸

Thus, the requirements under NEPA are procedural rather than substantive.²⁹ These procedural requirements promote rational decision making by requiring federal agencies to consider the environmental consequences of their acts.³⁰ While merely procedural, the drafting of an EIS ensures that environmental considerations are included in federal agencies' decision-making processes.³¹ Additionally, the procedural requirement of an EIS provides information to the public about the environmental impact of agency acts.³²

B. *Exceptions to NEPA*

The procedural provisions of NEPA mandate strict compliance.³³

28. 40 C.F.R. § 1502.9(c)(1)(i) (1995). The SEIS requirement is not stated in NEPA. However, the NEPA regulations promulgated by the CEQ mandate the supplement. *Id.* § 1502.9(c)(ii) (1995). *See also Marsh*, 490 U.S. at 370-71.

29. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978), *rev'd on other grounds* 462 U.S. 87 (1983). The court stated that "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural." *Id.* *See also Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980) (stating that since NEPA only requires consideration of environmental consequences, the act is procedural in nature); *Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289, 319 (1975) ("NEPA does create a discrete procedural obligation on Government agencies to give written consideration of environmental issues in connection with certain major federal actions").

30. *See* 42 U.S.C. § 4332(2)(A).

31. *Id.*; *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 143 (1981) (requiring preparation of an EIS ensures that environmental considerations are injected into the federal agency's decision making process); *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (stating that the EIS ensures agencies take a "hard look" at the environmental consequences of their actions).

32. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). In fact, NEPA requires all federal agencies to make available "information useful in restoring, maintaining and enhancing the quality of the environment." 42 U.S.C. § 4332 (2)(G).

33. NEPA states that federal agencies must give full "consideration" to the environmental impact as part of their decision making process. 42 U.S.C. § 4332(2)(B). In addition NEPA implicitly requires "consideration" in its substantive mandate. *Id.* § 4331. Thus, a purely mechanical compliance with the

Two exceptions, however, exist. First, there is a statutory exception that permits non-compliance with NEPA's requirements.³⁴ This exception applies when direct conflict arises between NEPA and either a federal agency regulation or another statute.³⁵ NEPA explicitly states that "[it] was not intended to repeal, by implication, any other regulation."³⁶ If such a conflict arises, then NEPA is deemed "supplemental" and the conflicting statute is enforced.³⁷ It is important to note, however, that each agency is still required to review its "present statutory authority, administrative regulations, and current policies and procedures," and do whatever is necessary to conform with the "intent, purpose and procedures" of NEPA.³⁸

The second exception to NEPA is known as the "functional equivalency exception."³⁹ Under this exception, when two statutes

procedural requirements of § 4332(2)(C) and (D), mandating preparation of EISs, would not satisfy NEPA because this would not amount to a good faith "consideration" of the environment. See *Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1112 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972); *Hanly v. Mitchell*, 460 F.2d 640, 648 (2d Cir. 1972) (giving "[p]reservation of the 'integrity' of the new [a]ct," as a reason for adopting the strict compliance interpretation). *But see California v. Block*, 690 F.2d 753 (9th Cir. 1982). The *Block* court held that courts must use a standard of "reasonableness" when reviewing an agency's compliance with NEPA. *Id.* at 761. The reasonableness standard requires determining whether the EIS's content and form foster informed decision-making and public participation. *Id.* But even this lesser standard still requires the federal agency to prepare an EIS. *Id.*

34. 42 U.S.C. § 4335.

35. *Id.* NEPA applies "unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible." H.R. CONG. REP. NO. 765, 91st Cong., 1st Sess. (1969), *reprinted in* 1969 U.S.C.C.A.N. 2767, 2770. For an example of direct conflict see *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776 (1976) (Department of Housing and Urban Development ("HUD") was not required to prepare an EIS before an interstate land disclosure statement since HUD required approval of the statement within 30 days, and this requirement conflicted with NEPA's EIS requirement).

36. 42 U.S.C. § 4335; *Merrell v. Thomas*, 807 F.2d 776, 779 (9th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) (quoting *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973)).

37. 42 U.S.C. § 4335.

38. *Id.* § 4333.

39. The functional equivalency exception is non-statutory. Courts have used the functional equivalency exception to exempt certain federal agency action from

serve the same function, the more specific statute governs.⁴⁰ For a court to apply the functional equivalency exception, the more specific statute must provide adequate standards to ensure sufficient consideration of all environmental issues.⁴¹ Courts have permitted the functional equivalency exception to NEPA in cases involving EPA actions under the Clean Air Act ("CAA"),⁴² the Resource Conservation and Recovery Act ("RCRA"),⁴³ the Federal Insecti-

NEPA's procedural requirements, when NEPA concerns are addressed through other regulations. *See infra* notes 44-47 and accompanying text.

40. *See generally* *Basic v. United States*, 446 U.S. 398, 406 (1980).

41. *See Alabama v. United States EPA*, 911 F.2d 499, 504-05 (11th Cir. 1990). Court holds that RCRA's substantive and procedural standards are intended to ensure that EPA fully considers, assisted by public comment, environmental effects involved in allowing hazardous waste management facility. *Id.* at 505. *See also* *Environmental Defense Fund v. United States EPA*, 489 F.2d 1247, 1256 (D.C. Cir. 1973) (excusing compliance with NEPA when registering pesticides under FIFRA since the statutes are functionally equivalent because "all of the five core NEPA issues were carefully considered"). However, in *Environmental Defense Fund*, the court construed the functional equivalency exception narrowly. *Id.* at 1257. Specifically the court stated that the exception is "a narrow exemption from the literal requirements for those actions which are undertaken pursuant to sufficient safeguards so that the purpose and policies behind NEPA will necessarily be fulfilled." *Id.*

42. *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 386-87 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974) (EPA did not have to prepare an EIS in connection with promulgation of new standards for emissions from cement plants pursuant to the CAA because the procedures of creating the new standards amounted to a functional equivalent of the NEPA process); *Getty Oil Co. v. Ruckelshaus*, 467 F.2d 349, 359 (3d Cir. 1972) (finding that the Clean Air Act procedure should be implemented instead of NEPA); *Warren County v. North Carolina*, 528 F. Supp. 276, 287 (E.D.N.C. 1981) (holding that plaintiff's claims that "no statement comparable to that required under the Clean Air Act has been filed by the EPA, nor was the single hearing at which citizen complaints were received . . . structured in such a way that the core NEPA issues were addressed," were without merit). The *Warren County* court stated that "the hearing adequately afforded the public . . . the opportunity to participate in the decision-making process and that the EPA fully considered all matters brought to its attention before making its final decision. This meets the test of functional equivalence." *Id.*

43. *Alabama v. United States EPA*, 911 F.2d 499, 504 (11th Cir. 1990) (compliance with requirements of RCRA in issuing a permit for hazardous waste disposal excused the agency from also having to comply with NEPA).

cide Fungicide and Rodenticide Act ("FIFRA"),⁴⁴ and the Safe Drinking Water Act ("SDWA").⁴⁵

The initial goal of NEPA was to create conditions where man and nature exist in harmony.⁴⁶ NEPA promotes this goal by requiring that an EIS be prepared before any federal agency action is begun that may significantly affect the quality of the environment.⁴⁷ The statutory exception and the functional equivalency exception may allow another statute to replace NEPA requirements in some cases. Even in cases where the conflicting statute is enforced instead of NEPA, however, there is a presumption that the statute does not conflict with the general goal of NEPA.⁴⁸

II. THE ENDANGERED SPECIES ACT

A. *Designations of Endangered and Threatened Species*

The environmental movement of the 1960s gave rise to an era of increased federal environmental protection. Both the Endangered Species Preservation Act of 1966⁴⁹ and the Endangered Species Conservation Act of 1969⁵⁰ bestowed some protection upon wildlife. Neither of these laws, however, prevented the taking of endangered species, nor required all federal agencies to sustain endan-

44. *Environmental Defense Fund*, 489 F.2d at 1256-57 (withdrawing DDT registrations pursuant to FIFRA regulations provide for all five core NEPA issues, thus the functional equivalent to NEPA was provided so no EIS is required); *Merrell v. Thomas*, 807 F.2d 776, 778 (9th Cir. 1986) (finding that when the EPA registered pesticides pursuant to FIFRA, then NEPA does not apply).

45. *Western Nebraska Resources Council v. United States EPA*, 943 F.2d 867, 871-72 (8th Cir. 1991). The "EPA does not need to comply with the formal requirements of NEPA in performing its environmental protection functions under 'organic legislation [that] mandates specific procedures for considering the environment that are functional equivalents of'" the EIS process. *Id.* at 871-72 (quoting *Alabama v. United States EPA*, 911 F.2d 499, 504 (11th Cir. 1990)). In addition, the Safe Drinking Water Act is such legislation as its procedures and analysis encompass core NEPA concerns. *Id.* at 872.

46. 42 U.S.C. § 4331(a).

47. *Id.* § 4332(c).

48. See text accompanying note 39.

49. Pub. L. No. 89-669, 80 Stat. 926 (1966), *repealed by* Endangered Species Act of 1973, Pub. L. No. 93-205 § 14, 87 Stat. 884, 903.

50. Pub. L. No. 91-135, 83 Stat. 275 (1969), *repealed by* Endangered Species Act of 1973, Pub. L. No. 93-205 § 14, 87 Stat. 884, 903.

gered species.⁵¹ Dissatisfaction with this ineffective protection sparked statutory reform.⁵²

The congressional solution for comprehensive species protection was the Endangered Species Act, enacted in 1973.⁵³ ESA was passed to preserve ecosystems upon which endangered and threatened species depend,⁵⁴ and was drafted in response to the general realization that untempered economic development had rendered various species of fish, wildlife, and plants extinct.⁵⁵ Congress felt compelled to protect those species that "maintain a 'balance of nature' within their environments," acknowledging that protecting endangered species surpasses mere aesthetic concerns.⁵⁶ Further, Congress realized that biological diversity is vital to continued scientific development.⁵⁷ The Supreme Court deemed ESA "[t]he

51. James Salzman, *Evolution and Application of Critical Habitat Under the Endangered Species Act*, 14 HARV. ENVTL. L. REV. 311, 312 (1990).

52. Congress acknowledged the need for statutory reform:

The development of the land . . . was slowly whittling down the nesting and breeding grounds on which many species depend. Environmental pollution was weakening the capacity of some species to generate their own kind. Commercial exploitation, whether through thoughtlessness, ignorance, or greed, was reducing certain animal populations to the danger level. Species which had survived for thousands and thousands of years were suddenly in danger.

Endangered Species Conservation Act of 1972: Hearings on S. 3818 Before the Subcomm. on the Env't of the Senate Comm. on Commerce, Science and Transportation, 92d Cong., 2d Sess. 1 (1972) (statement of Sen. William B. Spong, Jr.).

53. 16 U.S.C. §§ 1531-1544 (1994). See George Coggins, *Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973*, 51 N.D. L. REV. 315 (1974).

54. 16 U.S.C. § 1531(b) ("The purpose of [ESA] is to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved. . . ."). "Species" includes any subspecies of wildlife, fish or plants. *Id.* § 1532(16).

55. *Id.* § 1531(a)(1) ("[V]arious species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation.").

56. S. REP. NO. 307, 93d Cong., 1st Sess. (1973), reprinted in 1973 U.S.C.C.A.N. 2989, 2990.

57. *Id.*

most comprehensive legislation for the preservation of endangered species enacted by any nation."⁵⁸

ESA's main goal is to prevent species extinction caused by human influence on ecosystems.⁵⁹ To be included on ESA's list of endangered⁶⁰ and threatened⁶¹ species, a species must be nominated by either the Secretary of Interior or Secretary of Commerce.⁶² The decision to list a species must be based solely on "the best scientific and commercial data available."⁶³ The Secretary determines whether a species is endangered or threatened after considering each of the following five factors: (1) "the present or threatened destruction, modification, or curtailment of its habitat or range,"⁶⁴ (2) "over utilization for commercial, recreational, scientific, or educational purposes,"⁶⁵ (3) "disease or predation,"⁶⁶ (4) "inadequacy

58. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978) (affirming imposition of permanent injunction to prevent completion of dam that would eradicate the snail darter).

59. H.R. REP. NO. 1625, 95th Cong., 2d Sess. 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9455.

60. "Endangered species" is defined as "any species which is in danger of extinction throughout all or a significant portion of its range . . ." 16 U.S.C. § 1532(6) (1994).

61. "Threatened species" means "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).

62. 42 U.S.C. § 1533(a)(2) (1988 & Supp V 1993). Under ESA, it is the Secretary who prepares and reviews the list of endangered species. *Id.* The Secretary of Commerce, acting under the National Marine Fisheries Service is empowered to designate the status of marine fish and some marine mammals. The Secretary of Interior, functioning through the United States Fish & Wildlife Service, is authorized to designate all other wildlife. Barbara Craig, *The Federal Endangered Species Act*, ADVOC., Oct. 1995, at 12. The Secretary of Commerce or the Secretary of Interior will be designated as "Secretary" for the purpose of this note. Also, for further clarity, the term "Service" will be used in reference to either the National Marine Fisheries Service or the United States Fish & Wildlife Service.

63. 42 U.S.C. § 1533(b)(1)(A) (1994).

64. *Id.* § 1533(a)(1)(A).

65. *Id.* § 1533(a)(1)(B).

66. *Id.* § 1533(a)(1)(C).

of existing regulatory mechanisms,"⁶⁷ and (5) "other natural or manmade factors affecting its continued existence."⁶⁸

ESA encourages the Secretary to spend no more than 90 days to determine if the data presents substantial evidence to warrant listing the species as endangered.⁶⁹ The Secretary may determine whether the nomination is warranted,⁷⁰ is not warranted⁷¹, or is warranted but precluded.⁷²

B. *Determining Critical Habitat*

Congress has identified habitat loss as the "major cause [of] the extinction of species worldwide."⁷³ Thus, when a species is listed as endangered or threatened, the Secretary, "to the maximum extent prudent and determinable," must simultaneously designate "critical habitat."⁷⁴

The initial determination of critical habitat is based on the "best scientific data available."⁷⁵ This requires determining geographic

67. *Id.* § 1533(a)(1)(D).

68. *Id.* § 1533(a)(1)(E).

69. *Id.* § 1533(b)(3)(A). This 90 day limit is softened with the language "to the maximum extent practicable . . ." *Id.* The Secretary may take no longer than 12 months. *Id.* § 1533(b)(3)(B).

70. *Id.* § 1533(b)(3)(B)(ii). If listing is warranted, the Secretary must publish "a general notice and the complete text of a proposed regulation to implement such action . . ." *Id.*

71. *Id.* § 1533(b)(3)(B)(i). If listing is unwarranted then the species is not listed. In this case the Secretary must publish this finding in the Federal Register. *Id.*

72. *Id.* § 1533(b)(3)(B)(iii). Nominations are precluded by "pending proposals to determine whether any species is" endangered or threatened. *Id.* § 1533(b)(3)(B)(iii)(I). Preclusion requires expeditious progress to list qualified species threatened or endangered, and to remove species that no longer require such protection. *Id.* § 1533(b)(3)(B)(iii)(II).

73. H.R. REP. NO. 1625, 95th Cong., 2d Sess. 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9455.

74. 16 U.S.C. § 1533(a)(3). "Critical habitat" is the geographical area "essential to the conservation of the species." *Id.* § 1532(5)(A).

75. *Id.* § 1533(b)(2). Thus, the Secretary has an affirmative duty to identify relevant biological and economic data necessary to make a designation of critical habitat prior to listing the species as endangered or threatened. *See id.* § 1531(a)(5); 50 C.F.R. § 424.12(a).

areas containing the biological features "essential to the conservation of [the] species."⁷⁶ The Secretary must also consider economic factors, as well as other relevant impacts of specifying an area as critical habitat.⁷⁷

While critical habitat designation generally must occur concurrently with the listing decision,⁷⁸ there is an exception when critical habitat is not "determinable" or when designation is not "prudent".⁷⁹ Critical habitat may not be "determinable" if there is "substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination."⁸⁰ If critical habitat is not "determinable," the Secretary has an additional twelve months to make the designation, based on available data.⁸¹ A critical habitat designation is not "prudent" if such designation is not beneficial to the species.⁸²

76. 50 C.F.R. § 424.12(b) (listing suggested criteria for critical habitat designation).

77. 16 U.S.C. § 1533(b)(2). Before issuing a critical habitat designation, the Secretary must (1) publish notice and the complete text of such designation in the Federal Register; (2) give notice to each state affected by the regulation; (3) give notice to appropriate professional scientific organizations; (4) publish a summary of such designation in newspapers of potentially affected areas; and (5) hold a public hearing if requested. *Id.* § 1533(b)(5)(A)-(E).

78. *Id.* § 1533(a)(3).

79. *Id.* § 1533(b)(6)(c)(ii).

80. *Id.* § 1533(b)(6)(B)(i).

81. *Id.* § 1533(b)(6)(C). The Secretary must state reasons for not designating critical habitat in the proposed and final listing. 50 C.F.R. § 424.12(a). The not "determinable" time extension was codified because Congress realized that "it may be difficult to determine the most appropriate critical habitat within the time" allowed by legislation. H.R. REP. NO. 567, 97th Cong., 2d Sess. 19 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2819.

82. 50 C.F.R. § 424.12(a)(1). The two instances when designation of critical habitat is not "prudent" are:

- (i) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species, or
- (ii) Such designation of critical habitat would not be beneficial to the species.

Id.

Designating an area as critical habitat prohibits subsequent federal or federally funded activity likely to disrupt this habitat.⁸³ ESA, however, allows the Secretary to exclude any area from critical habitat designation if the benefits of exclusion outweigh the benefits of designation.⁸⁴ The Secretary's discretion, however, is limited. An area must be designated as critical habitat if failure to do so would result in extinction of the species.⁸⁵

C. Exemption from ESA Requirements

A federal agency, or the governor of the state where such agency action is proposed, may apply to the Secretary for exemption from ESA requirements.⁸⁶ To apply for an exemption, the Secretary must have concluded that the proposed action would jeopardize the existence of a species or its critical habitat.⁸⁷ The Secretary must also make a recommendation concerning the application for exemption to the Endangered Species Committee.⁸⁸ The Committee has thirty days to determine whether an exemption has been granted,⁸⁹ based upon its examination of the Secretary's recommendation and factors mandated under ESA.⁹⁰ The Committee then determines

For example, the critical habitat was found not prudent in the protection of *Lysimachia asperulaefolia*, an herb with yellow flowers and potential horticultural uses. The Service justified its decision not to list the herb by stating that increased publicity and specific location information connected with critical habitat designation could have resulted in people collecting the species. 51 Fed. Reg. 12,451, 12,453 (1986).

83. 16 U.S.C. § 1536(a)(2). "The Secretary must consult with other federal agencies to ensure that governmental actions do not 'result in the destruction or adverse modification' of land designated as critical habitat." Northern Spotted Owl v. Lujan, 758 F. Supp. 621, 623 (W.D. Wash. 1991).

84. 16 U.S.C. § 1533(b)(2).

85. *See id.* § 1533(a),(d).

86. *Id.* § 1536(g)(1).

87. *Id.*

88. *Id.* § 1536(g). The Committee is comprised of at least seven members. The members are the Secretary of Agriculture, Secretary of the Army, Chairman of the Council of Economic Advisors, Administrator of the EPA, Secretary of the Interior, Administrator of the National Oceanic and Atmospheric Administration, and a representative from each affected state. *Id.* § 1536(e)(3).

89. *Id.* § 1536(h).

90. *Id.* § 1536(h)(1)(A). The factors to be considered are:

whether the exemption establishes reasonable mitigation and enhancement measures necessary to minimize adverse effects on the species or its critical habitat.⁹¹

ESA's aim is to ensure the federal agency conservation of endangered and threatened species.⁹² To accomplish this goal, ESA sets forth the procedures for listing species as threatened or endangered.⁹³ In addition, ESA also mandates with limited exceptions, that the habitat of a listed species be designated as "critical."⁹⁴ Such determinations protect the species from future harm.⁹⁵

III APPLICABILITY OF NEPA TO ESA

The fundamental purpose of both NEPA and ESA is to protect the environment. Presently, there is a dispute in the federal courts as to how these two statutes should operate within the context of designating critical habitat. While federal appellate courts have issued conflicting rulings, the Supreme Court has yet to resolve the disparity. Recently, the Ninth and Tenth Circuits addressed how NEPA and ESA should be interpreted when acting in conjunction with one another.

A. *Ninth Circuit's Analysis of NEPA's Role in Designating Critical Habitat under ESA*

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- (i) there are no reasonable and prudent alternatives to the agency action;
 - (ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;
 - (iii) the action is of regional or national significance; and
 - (iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section

Id. § 1536(h)(1)(A)(i)-(iv).

91. *Id.* § 1536(h)(1)(B).

92. *Id.* § 1531(b).

93. *Id.* § 1533.

94. *Id.* § 1533(a)(3).

95. *Id.* § 1536(a)(2).

1. District Court Ruling

The northern spotted owl inhabits old-growth forests in western Washington, Oregon, northwestern California, and southwestern British Columbia.⁹⁶ Old growth forests are comprised of conifers that are at least 200 years old, fallen branches, and standing dead trees that are capable of supporting plant and animal life.⁹⁷ Over the past decades, these forests have been significantly reduced by clearing for urban development and agriculture, fires, and, most significantly, by logging.⁹⁸ The northern spotted owl population has disappeared in certain areas and declined in others as a result of this habitat destruction.⁹⁹ Some scientists have called the federal management policy towards these owls “a prescription for the[ir] extinction.”¹⁰⁰

In 1973, an interagency committee concerned with a significant population reduction, suggested listing the Spotted Owl under ESA.¹⁰¹ In 1987, the United States Fish and Wildlife Service (“Service”) denied a petition to list the northern spotted owl as

96. See 55 Fed. Reg. 26,114 (1990).

97. See Jeb Boyt, Comment, *Struggling to Protect Ecosystems and Biodiversity Under NEPA and NFMA: The Ancient Forests of the Pacific Northwest and The Northern Spotted Owl*, 10 PACE ENVTL. L. REV. 1009, 1012-14 (1993).

98. Victor M. Sher, *Travels With Strix: The Spotted Owl's Journey Through the Federal Courts*, 14 PUB. LAND L. REV. 41 (1993). The United States Forest Service sold close to 71,000 acres of owl habitat every year during the late 1980s and the Bureau of Land Management has logged an additional 15,000 acres each year throughout the late 1980s. *Id.*

99. *Id.* Only ten percent of the United States forests contain old growth conifers. Michael C. Blumm, *Ancient Forests, Spotted Owls, and Modern Public Land Law*, 18 B.C. ENVTL. AFF. L. REV. 605, 607 (1991).

100. Old growth not set aside for protection will disappear within twenty to fifty years. See Catherine Caufield, *The Ancient Forest*, NEW YORKER, May 14, 1990, at 46.

101. Victor M. Sher & Andy Stahl, *Spotted Owls, Ancient Forests, Courts and Congress: An Overview of Citizens' Efforts to Protect Old-Growth Forests and the Species That Live in Them*, 6 NORTHWEST ENVTL. J. 361, 363 (1987).

“endangered.”¹⁰² The Service, however, did not refute scientific evidence indicating that the species was endangered.¹⁰³

The Service’s refusal to protect the owl led to an immediate challenge by environmental groups.¹⁰⁴ In 1988, the District Court for the Western District of Washington determined that the Service had “disregarded all the expert opinion on population viability, including that of its own expert, that the owl is facing extinction, and instead merely asserted its expertise in support of its conclusions.”¹⁰⁵ The court stated that the Service had failed to provide any analysis supporting its decision not to list the owl, and that “[s]uch analysis is necessary to establish a rational connection between the evidence presented and the Service’s decision.”¹⁰⁶ The court thus found that the Service’s decision not to list the owl was “arbitrary and capricious.”¹⁰⁷

In response to the district court’s ruling, the Secretary listed the northern spotted owl as a “threatened” species under ESA, effective July 23, 1990.¹⁰⁸ In this listing, however, the Secretary deferred the designation of critical habitat on the grounds of insufficient information.¹⁰⁹ In *Spotted Owl v. Lujan*,¹¹⁰ environmentalists

102. 52 Fed. Reg. 48,552 (1987). Plaintiff Greenworld had petitioned the Service to list the owl as endangered pursuant to 16 U.S.C. § 1533(b)(3). *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479, 480 (W.D. Wash. 1988).

103. *Hodel*, 716 F. Supp. at 481. In fact, the Service’s own staff expert on population viability concluded that “the most reasonable interpretation of current data and knowledge indicate continued old growth harvesting is likely to lead to the extinction of the subspecies in the foreseeable future which argues strongly for listing the subspecies as threatened or endangered at this time.” *Id.*

104. *See e.g., id.* at 479-80. The Sierra Club Legal Defense Fund brought suit on behalf of 23 conservation organizations that challenged the Service’s decision not to list the northern spotted owl as “threatened.” 55 Fed. Reg. 26,114, 26,118 (1990). *See Hodel*, 716 F. Supp. at 480. The court remanded the matter to the Service after ruling that the decision had been arbitrary and capricious. *Id.* at 483.

105. *Hodel*, 716 F. Supp. at 483.

106. *Id.*

107. *Id.*

108. 55 Fed. Reg. 26,114 (1990). The Service had proposed the listing in June of 1989. 54 Fed. Reg. 26,666 (1989).

109. 55 Fed. Reg. 26,114, 26,192 (1990).

110. 758 F. Supp. 621 (W.D. Wash. 1991).

brought suit seeking injunctive relief compelling critical habitat designation.

In *Lujan*, the Secretary claimed that critical habitat was “not determinable” when it issued its final listing.¹¹¹ The court, however, found that the Service had abused its discretion by failing to designate a critical habitat for the northern spotted owl.¹¹² In its ruling, the court stressed the importance of such a designation, stating that the “designation of critical habitat is a central component of the legal scheme developed by Congress to prevent the permanent loss of species.”¹¹³ The court stated that the Secretary neglected to justify his failure to designate critical habitat, as required under ESA.¹¹⁴ The court found a lack of effort by the Secretary to determine critical habitat, or to explain why critical habitat was not determinable.¹¹⁵ The court ordered the Secretary to publish its final critical habitat plan “at the earliest time” permitted under appropriate regulations.¹¹⁶

Consequently, on May 6, 1991, the Secretary proposed designating 11,638,195 acres of land as critical habitat.¹¹⁷ The Secretary did not, however, prepare an EIS in connection with this designation.¹¹⁸ The Secretary relied on a 1983 agency policy advising that the Service would no longer prepare Environmental Assessments (“EA’s”) in connection with regulations adopted pursuant to

111. *Id.* at 624.

112. *Id.* at 629.

113. *Id.*

114. *Id.* at 628.

115. *Id.* Evidence actually indicates that the Service was well aware of the owl’s critical habitat. *See* 55 Fed. Reg. 26,114, 26,175 (1990). The Service admitted in June 1990 that the northern spotted owl is “overwhelmingly associated” with old-growth forests. *Id.* After this admission, the Service conceded “that much of the remaining unprotected spotted owl habitat could disappear within 20 to 30 years, and on [sic] some forests, the unprotected habitat could disappear within 10 years.” *Id.*

116. *Lujan*, 758 F. Supp. at 630. The Service was ordered to submit to the court, by March 15, 1991, a plan for determining critical habitat for the owl. *Id.* at 629.

117. 56 Fed. Reg. 20,816, 20,820 (1991). This land included 190 critical habitat areas in California, Oregon and Washington. *Id.* The Secretary also planned four public hearings to receive comments. *Id.* at 20,823-824.

118. *Id.* at 20,824. Not preparing an EA precludes issuing an EIS. *Id.*

ESA.¹¹⁹ The Secretary revised the proposed critical habitat designation on August 13, 1991.¹²⁰ Then, on January 15th, 1992, the Secretary issued the final critical habitat designation without filing either an EA or EIS.¹²¹

An Oregon municipality, Douglas County, filed suit on September 25, 1991, in federal district court, seeking a declaratory judgment that the Secretary had violated ESA and NEPA, and injunctive relief prohibiting the Secretary from designating critical habitat for the northern spotted owl until an EA or EIS was prepared.¹²²

119. *Id. See* 48 Fed. Reg. 49,244 (1983). This policy became effective September 21, 1983. *Id.* . The policy was based on four considerations. *Id.* First, the Council on Environmental Quality ("CEQ") recommended this procedural change. *Id.* The CEQ's "interpretation of NEPA is entitled to substantial deference." *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979). Second, in the decade preceding this procedural change, the Service approved approximately 130 EAs pursuant to § 4(a) of ESA, "none of which resulted in a decision to prepare an . . . [EIS]." 48 Fed. Reg. 49,244 (1983). Third, the Sixth Circuit Court of Appeals had found that an EIS was not required for listing endangered species under ESA. *Id.* at 49,244-245 (citing *Pacific Legal Found. v. Andrus*, 657 F.2d 829, 835 (6th Cir. 1981)). Specifically, the court in *Pacific Legal Foundation* held that compliance with NEPA requirements when listing a species under ESA "does not and cannot serve the purpose" of ESA. *Pacific Legal Found. v. Andrus*, 657 F.2d 829, 835 (6th Cir. 1981). Finally, the Service established this new policy in light of the fact that listing species under ESA are to be determined without regard to economic or socioeconomic factors. 48 Fed. Reg. 49,245 (1983).

120. 56 Fed. Reg. 40,002 (1991). This revision reduced the critical habitat to approximately 8,200,000 acres. *Id.* at 40,011. Another four public hearings were held. *Id.* at 40,002. The Secretary made two designation proposals to promote additional consideration of the economic effect of critical habitat designation and allow opportunity for public comment. *Id.* Prior to this, on May 30, 1991, Douglas County submitted comments with the Secretary claiming that the Secretary had failed to comply with NEPA. *Douglas County v. Babbitt*, 48 F.3d 1495, 1498 (9th Cir. 1995).

121. 57 Fed. Reg. 1,796 (1992). This designation reduced the critical habitat to approximately 6,887,000 acres, comprised solely of federal land in California, Oregon, and Washington. *Id.* at 1,809.

122. *Douglas County v. Lujan*, 810 F. Supp. 1470 (D. Or. 1992). The County's fundamental claim was that the Secretary failed to comply with NEPA when designating the critical habitat. *Id.* at 1474. Some of the county's specific claims were: that the Service violated NEPA by failing to develop alternatives to the final critical habitat designation; that the Service violated NEPA and ESA by failing to consider the "social and economic impacts of designating a particular area

The court first determined that the action was governed by NEPA regulations since the activity qualified as “major federal action” affecting the “quality of the human environment.”¹²³ The Secretary’s main argument was that, following the Sixth Circuit’s holding in *Pacific Legal Foundation v. Andrus*, the Secretary was exempt from NEPA when making critical habitat designations.¹²⁴ The court rejected this argument, stating that the statutory requirement for filing an EIS when “listing” species may be distinguished from the requirement that an EIS be prepared when designating “critical habitat.”¹²⁵ The court held that NEPA applies to the Secretary’s designation, and granted an injunction until compliance with NEPA was satisfied.¹²⁶ The court reasoned that since an EIS must be prepared whenever the proposed activity has “a significant impact on the quality of the human environment,” the applicability of NEPA could not be determined without first preparing an EA or EIS.¹²⁷ The district court concluded that “it is only through the analysis mandated by NEPA that the true impacts of an agency action can be identified and evaluated.”¹²⁸

2. Ninth Circuit

Whether NEPA applies to the Secretary’s designation of critical habitat under ESA was an issue of first impression for the Ninth Circuit. In *Douglas County v. Babbitt*,¹²⁹ the Secretary¹³⁰ argued

as critical habitat;” and that the Service violated NEPA and ESA by failing take into account other impacts of the designation. *Id.*

123. *Id.* at 1478. The court stated that the designation constituted major federal action since it affected approximately 6.9 million acres of land. *Id.* Additionally, the court found that because the designation would “impact the economy, employment, public health, and social services” in the area, the action “affects the ‘quality of the human environment.’” *Id.*

124. *Id.* at 1477; see *Pacific Legal Found. v. Andrus*, 657 F.2d 829 (6th Cir. 1981) (holding that the Secretary is legally exempt from NEPA when listing species as threatened or endangered under ESA).

125. *Douglas County*, 810 F. Supp. at 1479.

126. *Id.* at 1484-85.

127. *Id.* at 1482.

128. *Id.*

129. *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 698 (1996).

130. Bruce Babbitt, the Secretary of Interior, replaced Manuel Lujan as a de-

that NEPA did not apply to critical habitat designations under ESA.¹³¹ The Ninth Circuit agreed, holding “that NEPA does not apply to the designation of a critical habitat” under ESA.¹³² The court’s reasoning was three-fold. First, the court determined that ESA procedures have displaced NEPA’s requirements.¹³³ Second, the court stated that an EIS is not required for actions preserving the physical environment.¹³⁴ Lastly, the court held that Congress intended ESA to supplant NEPA’s procedural requirements when making critical habitat determinations.¹³⁵ Thus, the Service was not required to prepare an EA or EIS before taking measures to protect the physical environment.¹³⁶

In summary, the federal district court held that the Secretary had to designate a critical habitat when listing the northern spotted owl as a threatened species.¹³⁷ Accordingly, the Secretary designated critical habitat for the owl, but refused to file an EIS.¹³⁸ Subsequently, the district court enjoined the Secretary from designating critical habitat until it complied with NEPA.¹³⁹ On appeal, the Ninth Circuit reversed this decision, ruling that NEPA does not apply to critical habitat designations under ESA.¹⁴⁰

B. *Tenth Circuit’s Interpretation of NEPA’s Role in Designating Critical Habitat under ESA*

1. Lower Court Ruling

pendant. *Id.* at 1499 n.2.

131. *Id.* at 1499.

132. *Douglas County*, 48 F.3d at 1502-05.

133. *Id.*

134. *Id.* at 1505.

135. *Id.* at 1507.

136. *See infra* part IV.B. for a complete discussion of arguments that support this view.

137. *See discussion supra* notes 114-117 and accompanying text.

138. *See discussion supra* notes 118-119 and accompanying text.

139. *See discussion supra* notes 123-129 and accompanying text.

140. *Douglas County v. Babbitt*, 48 F.3d 1495, 1502 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 698 (1996).

On July 1, 1986, the Service listed a freshwater fish, "spikedace," as a threatened species under ESA.¹⁴¹ The spikedace inhabits moderate to large streams and is indigenous to the entire Gila River stream system upstream of Phoenix, Arizona, but was found to exist only in small portions of this riparian area.¹⁴² Habitat destruction caused by damming, channel alteration, channel downcutting, riparian destruction and groundwater pumping severely reduced the spikedace population.¹⁴³

On October 28, 1986, the Service also listed the "loach minnow" as an endangered species.¹⁴⁴ Of approximately square 2,600 kilometers of Arizona and New Mexico stream habitat historically occupied by the loach minnow, only 360 kilometers still support this species.¹⁴⁵ Destruction of habitat by impoundment, channel downcutting, substrate sedimentation, groundwater pumping, water diversion, and the introduction of exotic competitive fish species significantly reduced the loach minnow population.¹⁴⁶

In March 1994, the Secretary issued "notice of final designation of critical habitat" for the two species pursuant to ESA, effective April 7, 1994.¹⁴⁷ As in the case of the northern spotted owl, the

141. 51 Fed. Reg. 23,769 (1986).

142. *Id.* The historic extent of the spikedace's habitat may have included parts of Mexico but this habitat has been destroyed by de-watering of the river. *Id.* Only approximately six percent of the historic range now supports the spikedace. *Id.*

143. *Id.*

144. 51 Fed. Reg. 39,468 (1986).

145. *Id.*

146. *Id.* The species continues to be threatened primarily by a proposed dam construction, habitat alteration, and exotic species. *Id.*

147. 59 Fed. Reg. 10,898 (1994) (loach minnow); 59 Fed. Reg. 10,906 (1994) (spikedace). The Secretary had also made an initial proposal for the loach minnow, 50 Fed. Reg. 25,380 (1985), and for the spikedace, 50 Fed. Reg. 25,390 (1985). The Secretary provided a comment period and scheduled three public meetings concerning the proposed actions. 50 Fed. Reg. 37,703-704 (1985).

The designated critical habitat for the loach minnow included approximately 257 kilometers of sections of the Gila River in Grant and Catron counties, New Mexico; the San Francisco and Tularosa rivers and Dry Blue Creek, Catron County, New Mexico; the San Francisco and Blue rivers and Campbell Blue Creek, Greenlee County, Arizona; and Aravaipa Creek in Graham and Pinal counties, Arizona. 59 Fed. Reg. 10,898 (1994).

Secretary concluded that making a critical habitat designation did not require NEPA compliance.¹⁴⁸ In opposition to the final designation of critical habitat, Catron County, in New Mexico, demanded that an EIS be prepared pursuant to NEPA.¹⁴⁹

Specifically, Catron County sued for injunctive relief on the grounds that the Secretary failed to comply with NEPA.¹⁵⁰ The County sought an injunction that would prohibit the Secretary from implementing the critical habitat designation. The district court held that the Secretary failed to comply with NEPA when designating the critical habitat and granted the injunction, prohibiting the Secretary from listing the loach minnow and spikedace as threatened or endangered until an EIS was filed.¹⁵¹ The Service appealed to the Tenth Circuit.

2. Tenth Circuit

In *Catron County Board of Commissioners v. United States Fish & Wildlife Service*,¹⁵² the Tenth Circuit, for the first time, faced the issue of whether the Secretary must comply with NEPA before designating critical habitat under ESA.¹⁵³ The court stated that compliance with NEPA is excused only in two instances.¹⁵⁴ First, NEPA compliance is excused when there is a statutory conflict with the federal agency's "authorizing legislation [or regulations]

A

The Secretary designated a total of approximately 154 kilometers of land as critical habitat for the spikedace. This land included sections of the Gila River in Grant and Catron counties, New Mexico; the Verde River in Yavapai County, Arizona; and the Aravaipa Creek in Pinal and Graham counties, Arizona. 59 Fed. Reg. 10,906 (1994).

148. 50 Fed. Reg. 25,385 (1985) (loach minnow); 50 Fed. Reg. 25,395 (1985) (spikedace). The Secretary claimed that secretarial actions under ESA do not have to comply with NEPA, 50 Fed. Reg. 25,385; 50 Fed. Reg. 25,395 (1985) (citing 48 Fed. Reg. 49,244 as authority).

149. See *Catron County Bd. of Comm'rs v. United States Fish & Wildlife Serv.*, 75 F.3d 1429, 1433 (10th Cir. 1996).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Catron County*, 75 F.3d at 1435.

that prohibits or renders compliance impossible.”¹⁵⁵ Second, NEPA compliance is excused under the “functional equivalency” test.¹⁵⁶ The Tenth Circuit found that neither exception to NEPA applied when designating critical habitat pursuant to ESA.¹⁵⁷

Accordingly, the Tenth Circuit held that the Secretary must comply with NEPA before designating critical habitat under ESA.¹⁵⁸ Unlike NEPA, the court reasoned that ESA does not take into account the affects that a critical habitat designation has on the human environment.¹⁵⁹ Additionally, the federal government has little recourse after designation to correct mistakes.¹⁶⁰ Therefore, to ensure that all environmental consequences are assessed before designating critical habitat, the Tenth Circuit held that an EA, and possibly an EIS, must be prepared under NEPA.¹⁶¹

IV. CONFLICTING INTERPRETATIONS: ANALYSIS NINTH AND TENTH CIRCUIT DECISIONS

In light of the prevalent impact of ESA regulations in the United States, either the courts or Congress must resolve the issue of whether NEPA applies to a Secretary’s decision to designate critical habitat pursuant to ESA.¹⁶² An ordered and reliable system of environmental regulation demands the resolution of this ambiguity. Although the Ninth and Tenth Circuits have both presented persuasive arguments, the Supreme Court has yet to address this question.¹⁶³ A structured analysis of both interpretations may shed useful light on a proper resolution of the judicial dispute.

155. *Id.*

156. *Id.* The *Catron County* court defines functional equivalency as being “subject to rules and regulations that essentially duplicate the NEPA inquiry.” *Id.*

157. *Id.* at 1439.

158. *Id.*

159. *Id.* at 1434.

160. *Id.*

161. *Id.* at 1439.

162. See JOHN DAVIDSON & ORLANDO E. DELOGU, 2 FEDERAL ENVIRONMENTAL REGULATION 15-1 (1994) (ESA “has a substantive impact on virtually all facets of federal decision making”).

163. Recently, the Supreme Court chose not to resolve this Circuit split. *Douglas County v. Babbitt*, 116 S. Ct. 698 (1996) (denying *certiorari* to *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995)).

A. NEPA Requirements Govern the Secretary's Designation of
Critical Habitat

1. NEPA and ESA: Neither Functionally Equivalent Nor in Direct
Conflict.

Non-compliance with NEPA is only permitted when there is a direct statutory conflict, rendering compliance with both statutes impossible, or when "duplicative procedural requirements" between the statutes "constitute[] 'functional [equivalency]' rendering compliance with both superfluous."¹⁶⁴ In *Catron County*, the Secretary relied on the functionally equivalent exception.¹⁶⁵ This exception is inapplicable to NEPA and ESA regarding critical habitat designations because their respective functions are far from equivalent.

First, NEPA and ESA have different purposes. NEPA examines a proposed action's affect on the human environment.¹⁶⁶ It ensures that federal agencies make informed decisions when their actions affect that environment,¹⁶⁷ and permits dissemination of relevant information to outside parties potentially affected by such actions.¹⁶⁸ In contrast, ESA's primary purpose is to prevent the extinction of species by protecting their habitat from human activity.¹⁶⁹ Although ESA's protection of species and habitat is per se an environmentally beneficial objective, the effects of a critical habitat designation pursuant to ESA is not duplicated by NEPA, but rather, bolstered.¹⁷⁰

164. *Catron County*, 75 F.3d at 1435. See *supra* part I.B.

165. *Catron County*, 75 F.3d at 1436. The court noted that the Secretary did not allege that a statutory conflict existed rendering compliance impossible. *Id.* In *Flint Ridge Development Co. v. Scenic Rivers Ass'n of Okla.*, time constraints under the Interstate Land Sales Full Disclosure Act necessarily prevented filing of an EIS. 426 U.S. 776 (1976).

166. 42 U.S.C. § 4332(2)(C) (1994). Specifically, NEPA was enacted "to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." *Id.* § 4331(a).

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

168. *Id.* (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)). This informs the public that environmental impacts of the action were considered. *Id.*

169. *Id.*

170. *Id.* ("Secretarial action under ESA is not inevitably beneficial or immune

Second, NEPA and ESA are not procedurally functionally equivalent. Although, under ESA, the Secretary must follow procedural notice requirements that are similar to NEPA requirements,¹⁷¹ NEPA additionally mandates that alternatives to proposed actions be considered.¹⁷² ESA has no similar requirement. Thus, ESA regulations governing critical habitat designations are procedurally distinct from NEPA requirements.

The court in *Douglas County* argued that any procedural distinction is harmless because critical habitat designations are preserving of the status quo and therefore do not negatively impact the environment.¹⁷³ A critical habitat designation, however, can cause negative impacts.¹⁷⁴ For example, in *Catron County*, designation of critical habitat prevented the county from diverting and impounding water within the designated area.¹⁷⁵ The designation had the potential of resulting in the flooding of fairgrounds, roads, and bridges.¹⁷⁶ Thus, the designation of a critical habitat can have a direct impact on the human environment because ESA does not specifically require the Secretary to take the human environment into account.¹⁷⁷ This impact may remain unknown without preparation of an EIS pursuant to NEPA. ESA suggests that the Secretary take "any other relevant impact" into account,¹⁷⁸ but this suggestion is insufficient because it does not explicitly require the Secretary to consider impacts on the human environment. Thus, NEPA regulations should be followed to ensure that all the effects on the physical environment are factored into the equation of determining critical habitat.

to improvement by compliance with NEPA procedure.").

171. The requirements for ESA are contained in 16 U.S.C. § 1533(b)(5) (1994).

172. 42 U.S.C. § 4332 (2)(C)(iii).

173. *Douglas County v. Babbitt*, 48 F.3d 1495, 1505 (9th Cir. 1995) (finding that "NEPA procedures do not apply to federal actions that do nothing to alter the natural physical environment").

174. *Catron County Bd. of Comm'rs v. United States Fish & Wildlife Serv.*, 75 F.3d 1429, 1436-37 (10th Cir. 1996).

175. *Id.* at 1433.

176. *Id.*

177. *See* 16 U.S.C. § 1533(b)(2).

178. *Id.*

Finally, to hold that ESA is “functionally equivalent” to NEPA when determining critical habitat, and that, therefore, NEPA is superfluous and does not apply, would limit the scope of NEPA to only mandating assessment of negative impacts on the environment.¹⁷⁹ In other words, since critical habitat designations can be seen as having no impact or as even benefiting the non-human environment, to not apply NEPA would imply a negative impact limitation. Such a narrow interpretation would considerably diminish NEPA’s primary purpose, which is to help federal agencies make decisions based upon environmental considerations “and take actions that protect, restore, and enhance the environment,”¹⁸⁰ including, specifically, the human environment. Since, NEPA and ESA regulations are not functionally equivalent with respect to critical habitat designations, the Secretary must comply with NEPA when making such determinations.

2. Necessary Compliance with NEPA’s “Fullest Possible Extent” Requirement

Partial compliance with NEPA’s requirements is insufficient. The unambiguous language of NEPA makes it clear that federal agencies must comply with NEPA, “to the fullest extent possible.”¹⁸¹ Moreover, NEPA mandates preparation of an EIS for any “major Federal actions significantly affecting the quality of the human environment.”¹⁸²

There exists no method of completely determining the effect of activity on the environment without preparing an EIS. Although ESA directs the Secretary to take into account economic and other relevant impacts,¹⁸³ this is merely a “cursory directive” that does not displace NEPA requirements.¹⁸⁴ The full range of effects of

179. NEPA requires EISs to include social, economic, and other non-physical impacts. 42 U.S.C. § 4331(a). NEPA seeks to “assure for all Americans safe, beautiful, [and] productive . . . surroundings.” *Id.* § 4331(b)(2). In addition, NEPA aims to “permit high standards of living.” *Id.* § 4331(b)(5).

180. *Catron County*, 75 F.3d at 1437 (quoting 40 C.F.R. § 1500.1(c) (1994)).

181. 42 U.S.C. § 4332.

182. *Id.* § 4332(2)(C).

183. 16 U.S.C. § 1533(b)(2).

184. *Catron County Bd. of Comm’rs v. United States Fish & Wildlife Serv.*, 75 F.3d 1429, 1436 (10th Cir. 1996).

proposed governmental actions are often unknown.¹⁸⁵ For example, the potential flooding in Catron County caused by designation of critical habitat would not be considered pursuant to ESA because ESA only requires the Secretary to consider the impact on the endangered species' environment in order to prevent its extinction.¹⁸⁶

Consequently, ESA's notice requirements and environmental considerations, which do not include the preparation of an EIS only partially satisfy NEPA's purposes. Yet anything less than preparing an EIS would be a violation of Congress' mandate that federal agencies must comply with NEPA "to the fullest extent possible."¹⁸⁷

3. The Need for Comprehensive Assessment

Apart from the "fullest extent possible" language, the text of ESA itself implies the necessity of an EIS in order to make fully informed decisions concerning critical habitat designations. The Secretary can only make a critical habitat designation "after a thorough survey of all of the available data."¹⁸⁸ ESA calls for a full investigation into a critical habitat designation.¹⁸⁹ The preparation of an EA enables all parties involved to comprehensively assess the effect of a particular activity on the environment.¹⁹⁰ Thus, an investigation cannot be complete without preparation of an EA or EIS.¹⁹¹

185. *Id.* at 1437. Specifically, the court stated that government action is often, "initially thought to be beneficial, but after closer analysis determined to be environmentally harmful." *Id.*

186. *See* 16 U.S.C. § 1533(b)(2) (although the statute mentions human considerations such as "economic" and "any other relevant impact," it specifically mandates that a critical habitat be designated if failure to do so would "result in the extinction of the species concerned.").

187. 42 U.S.C. § 4332.

188. H.R. REP. NO. 1625, 95th Cong., 2d Sess. 14 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9464.

189. 16 U.S.C. § 1533(b)(2). "The Secretary shall designate critical habitat . . . on the basis of the best scientific data available." *Id.*

190. *Catron County Bd. of Comm'rs v. United States Fish & Wildlife Serv.*, 75 F.3d 1429, 1436 (10th Cir. 1996).

191. Federal agencies would not know potential effects of and alternatives to

B. *Inapplicability of NEPA to Designation of Critical Habitat under ESA.*

1. Congressional Waiver

When an administrative agency interprets a statute and Congress does not subsequently revise the statute, the administrative interpretation is deemed valid because Congress has waived its opportunity to change the administrative interpretation.¹⁹² The Ninth Circuit relied on the congressional waiver argument in a prior case analogous to the NEPA and ESA critical habitat designation cases.

In *Merrell v. Thomas*,¹⁹³ the Ninth Circuit held that NEPA does not apply when EPA registers pesticides pursuant to FIFRA.¹⁹⁴ The court based its holding on the legislative history of FIFRA, which illustrates that Congress created separate registration mechanisms in FIFRA and NEPA.¹⁹⁵ In addition, the court stated that Congress had declined the opportunity to apply NEPA to actions pursuant to FIFRA.¹⁹⁶ Congress created FIFRA after NEPA's enactment without referring to NEPA.¹⁹⁷ Specifically, "Congress created a registration procedure . . . that apparently made NEPA [registration] superfluous."¹⁹⁸ Additionally, Congress subsequently amended FIFRA in 1975, 1978 and 1984,¹⁹⁹ each time neglecting to modify EPA's earlier interpretation that federal actions pursuant to FIFRA did not have to comply with NEPA. Thus, the court concluded, in light of Congress' inaction, that Congress "did not

proposed federal activity until they comply with NEPA and prepare an EA. *Id.* at 1437.

192. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986).

193. 807 F.2d 776 (9th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

194. *Id.* at 778.

195. H.R. REP. NO. 511, 92d Cong., 1st Sess. 4 (1971). In 1972, Congress amended FIFRA "in part in response to 'increasing public concern over the uses and application of pesticides [reflecting] expanded interest in environmental protection by many citizens.'" *Id.*

196. *Merrell*, 807 F.2d at 778 (citing H.R. REP. NO. 511, 92d Cong., 1st Sess. 4 (1971)).

197. *Id.*

198. *Id.*

199. *Id.* at 779.

intend for NEPA to apply to FIFRA,"²⁰⁰ and the administrative interpretation was valid.

An analysis of ESA's legislative history reveals similar congressional inaction. The legislative history of ESA is compelling evidence that Congress "intended . . . ESA procedure for designating a critical habitat [to] displace the NEPA requirements."²⁰¹ In 1978, eight years after NEPA's enactment, Congress amended ESA.²⁰² These amendments furnished a procedure for critical habitat designations and permitted Congress to consider the economic impact of such designations.²⁰³ A congressional committee's report stated that "the legislation aims to improve the listing and the public notice process" to ensure that the Secretary considers all available information.²⁰⁴ "This carefully crafted congressional mandate for public participation in the designation process, like the FIFRA procedures reviewed in *Merrell*, displaces NEPA's procedural and informational requirements."²⁰⁵

In *Merrell*, the Ninth Circuit stated that applying NEPA to FIFRA's pesticide registration process would "sabotage the delicate machinery that Congress designed to register new pesticides."²⁰⁶ Similarly, the Ninth Circuit in *Douglas County*,²⁰⁷ stated that Congress adopted "a specific process for the Secretary to follow when addressing the needs of endangered species."²⁰⁸ Therefore, requiring the Secretary to prepare an EIS would hamper ESA's goal of improving the environment.²⁰⁹

200. *Id.* at 781.

201. *Douglas County v. Babbitt*, 48 F.3d 1495, 1505 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 698 (1996).

202. Pub. L. No. 95-632, 92 Stat. 3751 (1978).

203. *Id.*

204. *Douglas County*, 48 F.3d at 1503 (quoting H.R. REP. NO. 1625, 95th Cong., 2d Sess. 14 (1978), *reprinted in*, U.S.C.C.A.N. 9453, 9464).

205. *Id.* Moreover, the critical habitat designation regulations are a "compromise between disparate points of view." H.R. REP. NO. 1625, 95th Cong., 2d Sess., at 13-14 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9463, 9464. This compromise "leaves little room for impos[ing] . . . NEPA requirements." *Douglas County*, 48 F.3d at 1503.

206. *Merrell v. Thomas*, 807 F.2d 776, 779 (9th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

207. 48 F.3d 1495 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 698 (1996).

208. *Id.* at 1503.

209. *Id.* (quoting *Pacific Legal Found. v. Andrus*, 657 F.2d 829, 837 (6th Cir.

Douglas County argued, to the contrary, that the legislative history of ESA is not analogous to the legislative history of FIFRA.²¹⁰ To support this contention, the County cited a 1978 Conference Committee Report on the ESA amendments²¹¹ which stated that the amendments require that notice of a critical habitat designation and any EA or EIS be supplied to potentially affected local governments.²¹² This report implied that ESA must adhere to NEPA's requirements. This comment, however, is "far from a clear, considered indication of congressional intent."²¹³ It does not specifically require that the Secretary prepare an EA or EIS, but rather that the Secretary should provide one to local governments in the event that one has been prepared.²¹⁴ The fact that the committee's language did not become part of ESA²¹⁵ further supports the proposition that this statement is unpersuasive.

Additionally, and more closely related to critical habitat determinations under ESA, in 1981, the Sixth Circuit held that when the Secretary listed a species as endangered or threatened, NEPA did not apply.²¹⁶ Consequently, in 1983, the Secretary failed to prepare an EA.²¹⁷ Nonetheless, when Congress amended ESA again in 1988 it did not modify the procedural critical habitat provisions.²¹⁸

In *Douglas County*, therefore, the Ninth Circuit stated that "when Congress revisits a statute giving rise to a long standing administra-

1981)).

210. *Douglas County*, 48 F.3d at 1504.

211. *Id.*

212. *Id.* (quoting H. CONF. REP. NO. 1804, 95th Cong., 2d. Sess. 27 (1978), reprinted in 1978 U.S.C.C.A.N. 9484, 9494).

213. *Id.*

214. *Id.*

215. *Id.* Because ESA does not include this statement, this supports the argument that an EIS does apply to critical habitat designations.

216. *Pacific Legal Found. v. Andrus*, 657 F.2d 829, 831 (6th Cir. 1981). The court in *Pacific Legal Foundation* also suggested that the process of designating critical habitat might be the functional equivalent of preparing an EIS. *See id.* at 835. In *Douglas County*, the court remarked that "[t]he defendants here do not advance the functional equivalent argument, so we do not address it." *Douglas County*, 48 F.3d at 1504 n.10.

217. *Douglas County*, 48 F.3d at 1504; 48 Fed. Reg. 49,244 (1983).

218. *Douglas County*, 48 F.3d at 1504.

tive interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'"²¹⁹ Congress' inaction, in light of the judicial interpretations in *Merrell* and *Pacific Legal Foundation* that exempted NEPA, indicates that "Congress . . . made an implicit choice to accept the Secretary's policy not to prepare EISs when designating critical habitats."²²⁰ Thus congressional acquiescence to these judicial interpretations of ESA reveals that Congress did not intend for NEPA to apply to critical habitat designations under ESA.

2. Direct Conflict between NEPA and ESA: ESA Applies to Designations of Critical Habitat

ESA's mandate conflicts with NEPA's.²²¹ Pursuant to ESA the Secretary must designate as critical any area that, if destroyed, would render the species extinct.²²² This lack of discretion is in direct conflict with NEPA's requirement that the Secretary consider the environmental impact of such designation.²²³ Therefore, since NEPA directly conflicts with ESA's narrower mandate, only ESA procedures must be followed.²²⁴

219. *Id.* (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986)); *see also Merrell v. Thomas*, 807 F.2d 776, 779 (9th Cir. 1986).

220. *Douglas County*, 48 F.3d at 1504.

221. *Id.* at 1503.

222. 16 U.S.C. § 1533(b)(2) (1994).

223. *Douglas County*, 48 F.3d at 1503. *See also Davis v. Morton*, 469 F.2d 593, 595 (10th Cir. 1972) (illustrating two statutes with different purposes that were held as not conflicting). In *Davis*, the Tenth Circuit found that NEPA and 25 U.S.C. § 415, which regulates Secretarial approval of leases which are on Indian lands did not conflict. Section 415 requires the Secretary to ensure that sufficient consideration is given to the effect that a lease has "on the environment of the uses to which the leased lands will be subject" before approving such leases. 25 U.S.C. § 415. The government argued that NEPA conflicted with, and thus did not apply under, § 415 actions, since § 415 required the Bureau of Indian affairs to consider the environmental ramifications before authorizing leases. *Davis*, 469 F.2d at 595. Stating that § 415 did not require as in-depth of an analysis of environmental effects as NEPA does, the court rejected the argument. *Id.* at 598. Additionally, the court stated that § 415 only considered a more focused analysis of issues regarding authorizing leases on Indian land. *Id.*

224. *See supra* text accompanying notes 36-39.

3. NEPA's EIS Requirement: Unnecessary in Preserving the Physical Environment

NEPA "provide[s] a mechanism [the EIS,] to enhance or improve the environment and prevent further irreparable damage."²²⁵ The Supreme Court has stated 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*."²²⁶ In clarification, the Court stated that the "context of the statute shows that Congress was talking about the physical environment. . . ." ²²⁷ The Supreme Court concluded its discussion by stating that "although NEPA states its goals in sweeping terms of human health and welfare, these goals are ends that Congress has chosen to pursue by means of protecting the physical environment."²²⁸

In light of the Supreme Court's guidance, the Ninth Circuit reasoned that, if NEPA's goal is to protect the physical environment and an EIS informs agencies and the public of negative consequences to the "land, sea, or air, then an EIS is unnecessary" if the proposed activity does not alter the physical environment.²²⁹ Accordingly, a federal agency acting to prevent human interference

225. *Douglas County*, 48 F.3d at 1505 (quoting *Pacific Legal Found. v. Andrus*, 657 F.2d 829, 837 (6th Cir. 1981)).

226. *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983) (emphasis added).

227. *Id.* In *Douglas County*, the Ninth Circuit further clarified by stating that the physical environment refers to "air, land and water." *Douglas County*, 48 F.3d at 1505.

228. *Metropolitan Edison*, 460 U.S. at 773.

229. *Douglas County*, 48 F.3d at 1505. The Ninth Circuit cited several cases in support of this premise. *Id.* In *Sabine River Auth. v. United States Dept. of Interior*, 951 F.2d 669 (5th Cir.), *cert. denied sub nom.*, *Texas Water Conservation Ass'n v. Department of Interior*, 113 S. Ct. 75 (1992), the Fifth Circuit determined that an EIS was not required when the federal government procured a negative easement prohibiting the commercial development of certain Texas wetlands. "[A] negative easement which prohibits development does not result in the requisite 'change' to the physical environment." *Id.* at 680. An EIS is not necessary "to leave nature alone." *Douglas County*, 48 F.3d at 1505 (quoting *National Ass'n of Property Owners v. United States*, 499 F. Supp. 1223, 1265 (D. Minn. 1980), *aff'd sub nom.*, *Minnesota v. Block*, 660 F.2d 1240 (8th Cir. 1981)).

with the environment does not need to prepare an EIS pursuant to NEPA.²³⁰

4. NEPA's EIS Requirement for Designating Critical Habitat Hinders Purpose of ESA

NEPA was created for "promot[ing] human welfare by alerting governmental actors to the effect of their proposed actions on the physical environment."²³¹ In contrast, ESA's objective is to prevent species extinction.²³² The Ninth Circuit held that the Secretary's designation of critical habitat necessarily furthers NEPA's purpose, and that the requirement of preparing an EIS would hinder the Secretary's attempt to improve the environment.²³³ This argument was based on the Sixth Circuit case, *Pacific Legal Foundation v Andrus*.²³⁴

In *Pacific Legal Foundation*, the Tennessee Valley Authority contracted to construct two dams on the Duck River to control flooding, to provide electricity, and to create recreational areas.²³⁵ At around the same time, pursuant to ESA, the Secretary listed one-hundred fifty-nine different endangered species.²³⁶ Among these species were seven different mussels, two of which would be adversely affected by the construction of the dam.²³⁷ This designation prevented construction of the dam.²³⁸ The Pacific Legal Foundation and several Tennessee residents sued for an injunction to remove the listing of the seven species as endangered, and argued that the Secretary violated NEPA by not filing an EIS prior to listing the mussels.²³⁹

The Sixth Circuit stated several reasons why NEPA should not apply to a Secretary's decision to list a species as threatened or

230. *Douglas County*, 48 F.3d at 1506.

231. *Id.* (quoting *Metropolitan Edison*, 460 U.S. at 772).

232. *Id.*

233. *Id.* (citing *Pacific Legal Found. v. Andrus*, 657 F.2d 829, 837 (6th Cir. 1981)).

234. *Pacific Legal Found.*, 657 F.2d at 831.

235. *Id.* at 831.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

endangered.²⁴⁰ First, the Sixth Circuit argued that ESA's substantive regulations mandate that the Secretary may only consider "economic and any other relevant impact" in designating critical habitat.²⁴¹ The court held that this limited the factors that the Secretary could consider to economic ones directly related to the preservation of the species.²⁴² Second, the Sixth Circuit stated that because the Secretary may only consider the factors set out in ESA when designating critical habitat, it would not further NEPA's purpose to apply NEPA to ESA, since ESA's concern is limited to designating critical habitat.²⁴³ Alternatively, the court felt that the decision to list "a species as endangered or threatened necessarily furthers the purpose of NEPA even though no" EIS is required.²⁴⁴ The *Douglas County* court clarified the Sixth Circuit's reasoning by stating that designating critical habitat specifically protects the environment from the human impact that NEPA seeks to prevent.²⁴⁵

This Note has outlined the arguments for and against requiring compliance with NEPA when designating critical habitat under ESA. The arguments for requiring compliance are that: (1) NEPA and ESA are not functionally equivalent, (2) ESA must follow NEPA procedures because NEPA requires compliance "to the fullest extent possible," and (3) ESA itself demonstrates that NEPA should apply to critical habitat designations. The arguments against requiring NEPA compliance for critical habitat designations are that: (1) Congress accepted administrative decisions not to comply with NEPA when acting pursuant to ESA, (2) NEPA and ESA are directly conflicting, thus only ESA must be followed, (3) NEPA requirements do not require preparation of EIS's since ESA acts only to preserve the physical environment, and (4) critical habitat designations further NEPA's purpose, thus requiring NEPA compliance would only interfere with ESA's objectives.

240. *Id.* at 835-40. The fourth reason was based on the legislative history. *Id.* For a discussion about this type of argument see *supra* part IV.B.1.

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

242. *See id.* at 835.

243. *Id.* at 836.

244. *Id.* at 837.

245. *Douglas County v. Babbitt*, 48 F.3d 1495, 1507 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 698 (1996).

C. NEPA Compliance: Resolving the Judicial Conflict

The Tenth Circuit applied the correct interpretation of the law, holding that the Secretary must comply with NEPA when designating critical habitat under ESA. Case law, legislative history, and the statutes themselves all mandate this interpretation. The Ninth Circuit's rationale for deciding does not survive the weight of authority supplied by the Tenth Circuit. In addition, there are three reasons why the Tenth Circuit's ruling is superior to the Ninth Circuit's reasoning.

First, preparation of an EIS permits critical evaluation of an agency's proposed action by parties outside that agency.²⁴⁶ In contrast, ESA protects species from extinction caused by human activity by protecting the habitat that a species depends on.²⁴⁷ Thus, ESA's focus is on species and their habitat, whereas NEPA's focus is on all effects of an activity on the environment. In light of ESA's purpose and its cursory directive that the Secretary must consider "economic and other relevant impact," the NEPA inquiry has not been duplicated because there is nothing that requires the Secretary to consider the factors encompassed under an EIS.

Although, when designating critical habitat, the Secretary must follow procedures that do "to some extent parallel and perhaps overlap" NEPA requirements,²⁴⁸ the ESA notice requirements only partially fulfill NEPA's primary purpose which is to "inject environmental consideration into the federal agency's decision making," and "inform the public that the agency" has considered the impact on the environment.²⁴⁹ In contrast, ESA's goal is to prevent the extinction of species by protecting their habitat.²⁵⁰ NEPA specifi-

246. *Environmental Defense Fund, Inc. v. Froehlke*, 473 F.2d 346, 351 (8th Cir. 1972).

247. 16 U.S.C. § 1531(b) (1994).

248. *Catron County Bd. of Comm'rs v. United States Fish & Wildlife Serv.*, 75 F.3d 1429, 1437 (10th Cir. 1996).

249. *Id.* (quoting *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 143 (1981)).

250. 16 U.S.C. § 1531(b). *See also id.* § 1531(a)(4) (ESA's goal is to "conserve to the fullest extent practicable the various species of fish or wildlife and plants facing extinction."). ESA aims to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" to safeguard the fish, wildlife and plants. *Id.* § 1531(b).

cally states that federal agencies must comply “to the fullest extent possible,”²⁵¹ and through requiring the preparation of an EA or EIS, NEPA ensures that a federal agency makes informed, carefully calculated decisions when acting in a way as to affect the environment.²⁵² Critical habitat designation decisions pursuant to ESA are improved when implemented in conjunction with NEPA regulations, because compliance with NEPA will provide a more thorough analysis of *all* the factors concerning critical habitat designations. Thus, interpreting NEPA as merely requiring assessment of detrimental impacts on the environment would considerably diminish NEPA’s primary purpose, which is “to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore and enhance the environment.”²⁵³

Second, NEPA requires that alternatives to proposed action be considered, while ESA does not. As seen in *Catron County*, a critical habitat designation can significantly threaten people’s safety and damage their property.²⁵⁴ Thus, while the consequences of a designation may constitute significant effects on the human environment, the impact and alternatives to such proposed activity were not adequately addressed by ESA.²⁵⁵ In such cases “[p]otential alternatives to a proposed federal action” would be unknown until the acting federal agency “complie[d] with NEPA and prepare[d] at least an EA.”²⁵⁶ Moreover, the designation of an area as critical habitat effectively prohibits the federal government from engaging in any activity in that area likely to harm an endangered or threatened species.²⁵⁷ Thus, ESA’s narrower analysis of species extinction, does not comply to the fullest extent possible with NEPA’s broader purpose.

Third, a reexamination of the “congressional waiver” argument counters the Ninth Circuit’s rationale. The core of the congressional waiver argument is that congressional failure to modify previous

251. 42 U.S.C. § 4332.

252. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

253. 40 C.F.R. § 1500.1(c) (1995).

254. *Catron County*, 75 F.3d at 1437-38.

255. See *supra* text accompanying notes 171-172.

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

257. 16 U.S.C. § 1536(a)(2) (1994).

administrative and judicial decisions involving NEPA noncompliance is evidence that Congress endorsed such noncompliance.²⁵⁸ The Ninth Circuit relied on the Supreme Court's statement that congressional failure to revise a statute that has been interpreted by an administrative agency is persuasive evidence that Congress intended the statute to be interpreted this way.²⁵⁹ While this is true, the Ninth Circuit failed to note the Supreme Court's further statement that "failure to revise, unaccompanied by any evidence of congressional awareness of the interpretation, is not persuasive evidence."²⁶⁰ Stated another way, "[s]omething more than [congressional] passivity is required."²⁶¹ The Secretary provided no evidence that Congress contemplated or was even aware of the Sixth Circuit's ruling in *Pacific Legal Foundation*,²⁶² or of the EPA's published policy.²⁶³ In addition, there is no mention of either of these interpretations in the legislative history of the 1988 ESA amendments.²⁶⁴

Moreover, contrary to the Ninth Circuit's statements, the "congressional waiver" theory only applies in cases where Congress revisits the actual "language subject to the administrative interpretation."²⁶⁵ The Secretary conceded in *Catron County* that although

258. *Catron County*, 75 F.3d at 1438 (citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986)).

259. *See supra* part IV.B.3.

260. *Catron County*, 75 F.3d at 1438 (citing *Girouard v. United States*, 328 U.S. 61, 69 (1946)) ("It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law."); *see also* *Brown v. Gardner*, 115 S. Ct. 552, 557 (1994) (finding congressional silence lacks persuasive significance).

261. *Catron County*, 75 F.3d at 1438 (citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986)). It is the proponent of congressional acquiescence who bears the "burden of showing 'abundant evidence that Congress both contemplated and authorized' the previous non-congressional interpretation." *Id.* (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 847 (1986)).

262. 657 F.2d 829 (6th Cir. 1981).

263. *Catron County*, 75 F.3d at 1438; *Douglas County v. Lujan*, 810 F. Supp. 1470, 1484-85 (D. Or. 1992), *rev'd sub nom.*, *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 698 (1996).

264. *See* H.R. REP. NO. 467, 100th Cong., 2d. Sess. 111-32 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2700, 2700-50.

265. *Catron County*, 75 F.3d at 1438-39 (citing *Central Bank of Denver v.*

Congress did amend parts of ESA, which govern the designation of critical habitat, it did not specifically consider the critical habitat provisions of ESA.²⁶⁶ The ESA amendments and corresponding legislative history further substantiate that critical habitat designations were not addressed by Congress during the amendment process.²⁶⁷ During the 1978 amendments to ESA, Senator McClure proposed defining critical habitat designations as "major federal action[s] for purposes of NEPA."²⁶⁸ Senator McClure withdrew the amendment, but only after asking that the record not reflect "that, in the absence of the amendment [requiring an impact statement], there is no possibility that an EIS is required."²⁶⁹ Accordingly, the legislative history of ESA does provide some evidence that "Congress . . . intended secretarial compliance with NEPA when designating habitat under ESA."²⁷⁰ Thus, the Tenth circuit was correct when it stated that "congressional silence in this case [is] unpersuasive"²⁷¹ and that the legislative history "indicates that Congress intended that the Secretary comply with NEPA when designating critical habitat under ESA. . . ." ²⁷²

The Ninth Circuit's argument that NEPA does not mandate an EIS for proposed activity that preserves the physical environment is not compelling. The inherent weakness in this argument is that an EIS is required to determine the impact of any action, even if ap-

First Interstate Bank of Denver, 114 S.Ct. 1439, 1453 (1994).

266. *Id.*

267. *Id.* (citing H.R. REP. NO. 467, 100th Cong., 2d. Sess. 111-22 (1988), reprinted in U.S.C.C.A.N. 2700, 2700-50).

268. *Catron County*, 75 F.3d at 1439 (citing 124 CONG. REC. S11,143-145 (daily ed. July 19, 1978) (statements of Sens. Wallop and McClure)). Senator Wallop opposed this amendment because he thought that an EIS would be required for designations that were not major federal actions. *Id.*

269. *Id.* (quoting 124 CONG. REC. S11,143-145 (daily ed. July 19, 1978) (statement of Sen. Wallop)).

270. *Id.* It is important to note that interpretive analysis of legislative history must be conducted cautiously. *Blanchard v. Bergeron*, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring). With this in mind, it is intriguing that Congress intended that the Secretary prepare an EIS when designating critical habitat, only in some cases. *Catron County*, 75 F.3d at 1439.

271. *Catron County*, 75 F.3d at 1438.

272. *Id.* at 1439.

parently beneficial, to determine whether the human environment will be adversely affected.

NEPA's requirements are not functionally equivalent to ESA's requirements concerning designation of critical habitat. Under NEPA, an EIS examines the affect that an activity has on the human environment.²⁷³ In contrast, ESA's primary directive is the preservation of species.²⁷⁴ NEPA's directives expand the impact study, requiring that alternatives to proposed actions also be considered.²⁷⁵ In light of NEPA's added considerations before allowing federal activity, NEPA is not functionally equivalent to ESA.

Filing an EIS does not frustrate ESA's operation. It is reasonable to interpret the ESA phrase "any other relevant impact" as permitting a "wide range of impacts . . . to be analyzed."²⁷⁶ Nonetheless, the Ninth Circuit embraces a much narrower reading of ESA, concluding that "the Secretary cannot engage in the very broad analysis NEPA requires when designating a critical habitat under the ESA."²⁷⁷ The Ninth Circuit, however, justified this narrow interpretation only by following the Sixth Circuit's reasoning that "relevant impact" was to be read within the bounds of ESA factors which are limited to impacts on species. The plain meaning of the words, "any other relevant impact,"²⁷⁸ gives the Secretary the discretion to consider alternative impacts on the environment, including impacts on the human environment. The language of ESA thus suggests that the Secretary take into account factors similar to the considerations covered in an EIS and the filing of an EIS therefore does not frustrate ESA's operation.

The decision to list a species as endangered or threatened does not further the purpose of NEPA regardless of an EIS requirement.²⁷⁹ The Ninth Circuit correctly states that designating critical habitat protects the environment from the human impact that NEPA

273. 42 U.S.C. § 4321 (1988). One primary purpose of NEPA is to "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." *Id.* (emphasis added).

274. 16 U.S.C. § 1531(b) (1994).

275. 42 U.S.C. § 4332(C)(iii) (1988).

276. *Douglas County v. Lujan*, 810 F. Supp. 1470, 1479 (D. Or. 1992).

277. *Douglas County v. Babbitt*, 48 F.3d 1495, 1507 (9th Cir. 1995).

278. 16 U.S.C. § 1533(b)(2) (1994).

279. *Pacific Legal Found. v. Andrus*, 657 F.2d 829, 837 (6th Cir. 1981).

seeks to prevent.²⁸⁰ However, ESA only prohibits and prevents human impacts on the environment.²⁸¹ In contrast, NEPA considers any proposed activity's effects on the human environment. Without preparing an EIS, the critical habitat designation's impact on man will remain uncertain because ESA does not necessarily consider such human concerns.²⁸² Thus, ESA does not further NEPA's goals, contrary to the suggestion of the Ninth Circuit.

CONCLUSION

There are only two exceptions to NEPA requirements. The ESA mandate does not directly conflict with NEPA, nor are the two acts functionally equivalent. In addition, NEPA furthers the goals of ESA since it is impossible to make a fully informed decision without preparing an EIS as required under NEPA. On the contrary, not requiring the filing of an EIS would limit NEPA's primary purpose of ensuring that officials act to protect, restore, and enhance the environment, in light of heightened environmental awareness. Therefore, the Secretary must comply with NEPA when designating critical habitat pursuant to ESA.

280. *Douglas County*, 48 F.3d at 1507.

281. *Catron County Bd. of Comm'rs v. United States Fish & Wildlife Serv.*, 75 F.3d 1429, 1437 (10th Cir. 1996).

282. *See* 16 U.S.C. § 1533(b)(2) (1994).