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Congress Should Exempt "Critical Habitat" Designation under the Endangered Species Act from Compliance with the National Environmental Policy Act

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CONGRESS SHOULD EXEMPT "CRITICAL HABITAT" DESIGNATION UNDER THE ENDANGERED SPECIES ACT FROM COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT

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I. INTRODUCTION.

"The last word in ignorance is the man who says of an animal or plant: 'What good is it?'"[1]

In passing the Endangered Species Act[2] [ESA], Congress recognized that plants and animals are of "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation."[3] Unrestricted economic growth and development had already caused the extinction of several plant and animal species and without protection, many more would face extinction.[4] The ESA enables the Secretary of the Interior [Secretary] to determine that a species is threatened or endangered.[5] Concurrent with this determination, the Secretary must also designate a "critical habitat" for the species.[6] A species' critical habitat is defined as the geographical areas "essential to the conservation of the species" and that may "require special management considerations or protection."[7]

The National Environmental Policy Act[8] (NEPA) declares a

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[1] ALDO LEOPOLD, A SAND COUNTY ALMANAC, 190 (1966).

[2] 16 U.S.C. §§ 1531-1544 (1994).

[3] 16 U.S.C. § 1531(a)(3) (1994).

[4] 16 U.S.C. § 1531(a)(1) & (2) (1994).

[5] 16 U.S.C. § 1533(a) (1994). The Secretary of Commerce may recommend the listing or de-listing of a species over which he has program responsibilities under Reorganization Plan 4 of 1970. 16 U.S.C. §1533(a)(2).

[6] 16 U.S.C. § 1533(a)(3)(A) (1994).

[7] 16 U.S.C. § 1532(5)(A) (1994). The geographical area may include areas within and outside those occupied by the species. *Id.*

[8] 42 U.S.C. §§ 4321-4370(d) (1994).

national environmental policy. NEPA's policy encourages man to live in harmony with his environment while promoting efforts to prevent or eliminate environmental damage, stimulate man's health and welfare, and improve his understanding of the nation's ecosystems and natural resources.[9] To further this goal, NEPA requires that, "to the fullest extent possible," federal agencies shall prepare an Environmental Impact Statement [EIS] for all "major Federal actions significantly affecting the quality of the human environment."[10] This raises an interesting question: Does Section 102 of NEPA[11] require the Secretary to prepare an EIS whenever he designates an area as critical habitat pursuant to Section 4(a) of the ESA Section4(a)?[12] The Ninth and Tenth U.S. Circuit Courts came to contrary conclusions when answering this question.

II. CROSSED CIRCUITS

> "A land-use decision 'is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise.'"[13]

A. Ninth Circuit: *Douglas County v. Babbitt.*[14]

1. Background

In response to litigation,[15] the Secretary listed the northern spotted owl as a threatened species[16] and designated its habitat as critical.[17] The Secretary also announced that he had concluded that he did not need to prepare an Environmental Assessment in conjunction

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[9] 42 U.S.C. § 4321 (1994).

[10] 42 U.S.C. § 4332(2) (1994).

[11] *Id.*

[12] 16 U.S.C. § 1533(a)(3) (1994).

[13] Roderick Frazier NASH, THE RIGHTS OF NATURE, A HISTORY OF ENVIRONMENTAL ETHICS 71 (1989) (quoting Aldo Leopold).

[14] 48 F.3d 1495 (9th Cir. 1995).

[15] Northern Spotted Owl v. Hodel, 716 F.Supp. 479 (W.D. Wash. 1988); Northern Spotted Owl v. Lujan, 758 F.Supp. 621 (W.D. Wash. 1991).

[16] 50 C.F.R. §17.11 (1996).

[17] 50 C.F.R. §17.95(b) (1992). (designating 6,887,000 acres, all of it federal property). An initial regulation proposing the designation of 11,639,195 acres of federal, state, and private lands as critical habitat was published on May 6, 1991. *Douglas County* at 1498. The Secretary announced that he would revise the initial proposal after receiving comments. 56 Fed. Reg. 20,816 (1991). Four public hearings, at which 364 people testified, were held. *Douglas County* at 1498. A revised proposed regulation was issued on Aug 13, 1991, reducing the critical habitat to 8,240,160 acres, and eliminating all privately owned and most state owned land from the area to be designated. 56 Fed. Reg. 40,002 (1991).

with the critical habitat designation, and that, therefore, no Environmental Impact Statement would be prepared in conjunction with the designation. In response to the Secretary's action, Douglas County, Oregon filed suit on Sep 25, 1991; its primary complaint being that the Secretary failed to comply with NEPA. The district court granted summary judgment on behalf of Douglas County, finding that NEPA did apply to Secretarial designations of critical habitat.[18]

2. Analysis

"Preparation of an EIS ensures both that agencies give proper consideration to the environmental consequences of their actions ...and that 'relevant information will be made available to the larger audience that they may also play a role in . . . the decisionmaking process . . . .'"[19] Despite NEPA's strict language, courts have found exceptions to its requirements. For example, NEPA does not apply if existing law applicable to an agency prohibits or makes compliance impossible. "NEPA was not intended to repeal by implication any other statute."[20]

In *Merrill v. Thomas*,[21] the Ninth Circuit Court of Appeals held that NEPA did not apply to registering pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),[22] because the procedures required the EPA Administrator to follow a number of procedures which essentially duplicated the functions of NEPA.[23] The court reasoned that because Congress created a separate procedure in FIFRA, then declined to apply NEPA to FIFRA when it amended FIFRA, it intended for the FIFRA procedure to replace the requirements of NEPA for pesticide registration.[24] Analogously, the legislative history of the ESA follows a similar pattern. Congress amended the ESA in 1978, eight years after the passage of NEPA. These amendments, which created the procedure for designating critical habitat, allowed Congress to consider the economic impact of such a designation.[25] The House Committee Report shows that its members wanted to make the ESA's requirements flexible. Therefore, the legislation was aimed at improving

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[18] Douglas County v. Lujan, 810 F.Supp. 1470 (D.Or. 992).

[19] Douglas County v. Babbitt, 48 F.3d 1495, 1501 (9th Cir. 1995) (citations omitted).

[20] *Id.* at 1502 (citations omitted).

[21] Merrel v. Thomas, 807 F.2d 776 (9th Cir. 1986).

[22] 7 U.S.C. §§ 136-136y (1994).

[23] 807 F. Supp. 776, 781.

[24] *Id.* at 778-79. Congress amended FIFRA on three occasions after NEPA was passed, each time failing to alter the EPA's interpretation of FIFRA that compliance with NEPA was not required. *Douglas County* at 1502.

[25] 16 U.S.C. §1536(h)(1)(A) (1994).

the listing and public notice processes. A critical habitat may be designated only after the Secretary makes a "thorough survey of all the available data" and gives notice to the affected communities.[26] This procedure, chosen by Congress, makes applying NEPA's procedures "superfluous."[27] Before designating a critical habitat the Secretary must: (1) publish a notice and the text of the designation in the Federal Register; (2) give actual notice and a copy of the designation to each state affected by it; (3) give notice to appropriate scientific organizations; (4) publish a summary of the designation in local newspapers of potentially affected areas; and (5) hold a public hearing if one is requested.[28]

Through much debate and compromise, Congress crafted this specific process for the Secretary to follow when addressing the needs of endangered species. As the Ninth Circuit Court observed in *Douglas County*, "requiring the EPA to file an EIS would only hinder its efforts at attaining the goal of improving the environment."[29] Additionally, the ESA has a different mandate than NEPA. Regarding critical habitat, the Secretary may exclude any area, the exclusion of which would be more beneficial than harmful, but he must designate any area without which the species would become extinct.[30] This mandate conflicts with NEPA, because where extinction is an issue, "the Secretary has no discretion to consider the environmental impact of his actions."[31]

Congress implicitly decided not to interfere with the Secretary's policy not to prepare an EIS when designating critical habitats. If it had wanted, Congress could have addressed this issue when it amended the ESA in 1988. Though it addressed other parts of section 1533, Congress did not change the critical habitat provisions. This *inaction* is significant because the 1988 amendments came after the Sixth Circuit Court of Appeals' decision in *Pacific Legal Foundation v. Andrus*.[32] In *Pacific Legal Foundation*, the Sixth Circuit held that NEPA did not apply to the listing of endangered or threatened species, and suggested in dicta that

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[26] *Douglas County* at 1503 (citations omitted). The Report, reprinted in 1978 U.S.C.C.A.N. 9453, 9464, laid out extensive notice provisions ensuring that a species would not be listed or a critical habitat designated without considering the views of the affected public. *Id.*

[27] *Id.*

[28] 16 U.S.C. § 1533(b)(5) (1994).

[29] *Douglas County* at 1503. The court followed the same reasoning it used in *Merrell* when it stated that "applying NEPA to FIFRA's registration process would 'sabotage the delicate machinery that Congress designed to register new pesticides'" *Id.* (quoting *Merrel v. Thomas*, 807 F.2d 776 (9th Cir. 1986)).

[30] 16 U.S.C. § 1533(b)(2) (1994).

[31] *Douglas County* at 1503.

[32] Pacific Legal Foundation v. Andrus, 657 F.2d 829 (6th Cir. 1981).

the process of designating a critical habitat might provide the "functional equivalent" of an EIS.[33] The amendments also postdated the Secretary's 1983 decision, published in the Federal Register, not to prepare an environmental assessment (EA) (and by implication, an EIS) before making a critical habitat designation.[34]

The *Douglas County* court found that the ESA's procedural requirements for making a critical habitat designation, in addition to the availability of judicial review under the Administrative Procedures Act (APA),[35] provide adequate safeguards against unchecked Secretarial discretion.[36] Furthermore, NEPA applies only to actions that alter the physical environment.[37] Finally, the court found that the ESA furthers the goals of NEPA without demanding an EIS. The designation of critical habitats preserves the environment and prevents the irretrievable loss of natural resources. The action of the Secretary in designating a critical habitat furthers the purpose of NEPA. Requiring the Secretary to file an EIS would do nothing but hinder these efforts.[38]

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[33] *Id.* at 835 (stating that the "ESA may now provide the functional equivalent of an impact statement when a critical habitat is designated"). *See* Environmental Defense Fund Inc. v. EPA, 489 F.2d 1247, 1256 (D.C. Cir. 1973) (FIFRA); Getty Oil Co. v. Ruckelshaus, 467 F.2d 349, 359 (3rd Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

[34] *Douglas County* at 1503. The court stated further that: "[W]hen Congress revisits a statute giving rise to a longstanding administrative 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.'" *Id.* at 1504. The district court based much of its decision that Congress intended NEPA to apply to critical habitat designations on the Senate debate over the 1978 amendments. All the debate showed is that the Senate considered adding specific language to the ESA requiring NEPA compliance, but chose not to. *Id.*

[35] 5 U.S.C. §§551-706 (1994).

[36] *Douglas County* at 1505.

[37] *Id.* The Supreme Court stated that, in the context of NEPA, when talking of the "environment," Congress meant the physical environment of air, water, and land . The Supreme Court concluded 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." Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 772-73 (1983). The Minnesota district court stated that an EIS was not required "in order to leave nature alone." National Ass'n of Property Owners v. U.S., 499 F.Supp. 1223, 1265 (D.Minn 1980), *aff'd sub nom*, State of Minnesota v. Block, 660 F.2d 1240 (8th Cir. 1981). *See also*, Sabine River Auth. v. U.S. Dept. of Interior, 951 F.2d 669 (5th Cir. 1992), *cert. denied sub nom*, Texas Water Conservation Ass'n v. Dept. of the Interior, 121 L.Ed. 2d 40 (1992).

[38] *Douglas County* at 1506.

B. Tenth Circuit: *Catron County v. U.S. Fish & Wildlife Service*[39]

1. Background

In 1985, the Secretary proposed listing the spikedace and loach minnow as threatened species and establishing a critical habitat for them. The Secretary also stated that he was not required to comply with NEPA, claiming that actions under section 1533 of the ESA were exempt.[40] The notice provided for a sixty-day comment period and scheduled three public meetings to gather additional information and comments.[41] In 1986, final regulations were adopted listing the species as threatened.[42] Catron County filed suit in June 1993 alleging in part that the Secretary failed to comply with the ESA and NEPA.[43] Final designation of the critical habitat became effective on Apr 7, 1994.[44] The County filed for injunctive relief, seeking to prevent implementation and enforcement of the critical habitat designation.[45] The district court found for the County and granted injunctive relief.[46]

2. Analysis

The court found that the focus of the ESA's critical habitat designation did not duplicate the NEPA inquiry; nor were the statutes mutually exclusive.[47] The court reviewed the Ninth Circuit's decision in *Douglas County* and declined to adopt its findings.[48] The court believed that compliance with the requirements of NEPA would further the ESA's goals.[49] They did not find that the ESA procedures displaced the NEPA requirements or that critical habitat designations caused no impacts. Instead, they found that the impact of a critical habitat designation "will

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[39] Catron County Board of Comm'rs, N. M. v. United States Fish and Wildlife Serv., 75 F.3d 1429 (10th Cir. 1996).

[40] Loach Minnow, 50 Fed. Reg. 25,380 (1985); Spikedace, 25,390 (1985). The proposal included 74 miles of river habitat within Catron County. *Catron County* at 1432.

[41] 50 Fed. Reg. 37,703-704 (1985) The comment period was extended several weeks, *Catron County* at 1432.

[42] Spikedace, 51 Fed. Reg. 23,769 (1986), Loach Minnow, 51 Fed.Reg.39,468 (1986) (extending the deadline for designating their critical habitats).

[43] *Catron County* at 1432-33.

[44] Loach Minnow, 59 Fed. Reg. 10,898 (1994); Spikedace, 10,906 (1994).

[45] *Catron County* at 1433.

[46] *Id.*

[47] *Id.* at 1437.

[48] *Id.* at 1436.

[49] *Id.*

be immediate and the consequences could be disastrous."[50]

The court found that the ESA's procedures only partially fulfilled NEPA's requirements. NEPA clearly requires that, "to the fullest extent possible," federal agencies are to comply with the Act and prepare an EIS for all major federal actions significantly affecting the environment. NEPA is process driven, not result oriented. It is intended to ensure that federal agencies make informed decisions when taking actions that affect the environment. It also enables the dissemination of relevant information to persons potentially affected by the agency's decision.[51]

In contrast, the ESA's primary purpose is to prevent the extinction of species by preserving and protecting the habitat upon which their survival depends. Although this may be an environmentally beneficial goal, the court stated that, "secretarial action under ESA is not inevitably beneficial or immune to improvement by compliance with the NEPA procedure."[52] The court stated further that the government may be unaware of what the long- and short-term effects of the proposed action will be.[53] Initially they may be thought to be beneficial, but on further analysis, found to be detrimental to the environment. The court concluded "[that] the Secretary believes the effects of a particular designation to be beneficial is equally immaterial to his responsibility to comply with NEPA."[54] NEPA's requirements are designed to notify other federal agencies, the public and relevant government officials of the environmental consequences of the Secretary's actions. The *Catron* court stated that, "a federal agency could not know the potential alternatives to a proposed federal action until it complies with NEPA and prepares at least an EA."[55]

The *Catron* court did not believe that Congress' failure to revise or repeal the EPA's interpretation of ESA Section1533(a) in its 1988 amendments held any persuasive value. In examining the *Douglas County* decision, the *Catron* court found that the Ninth Circuit had failed to consider that, "the failure to revise, unaccompanied by any evidence

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[50] *Id.* at 1436. The court did not state with specificity to whom it was referring when it stated that the "consequences could be disastrous." However, it can be reasonably inferred that the court was referring to the economic interests of Catron County and not to the survival interests of the threatened species.

[51] *Catron County* at 1437.

[52] *Id.*

[53] *Id.*

[54] *Id. See* 40 C.F.R. § 1508.27(b)(1) (1996). Even if a federal agency believes its actions to be beneficial, it must still comply with CEQ regulations requiring the preparation of an EIS. *See also* Environmental Defense Fund v. Marsh, 651 F.2d 983, 993 (5th Cir. 1981).

[55] *Catron County* at 1437.

of congressional awareness of the interpretation, is not persuasive evidence."[56] The court stated that, when postulating congressional acquiescence, the proponent bears the burden of showing "'abundant evidence that Congress both contemplated and authorized' the previous noncongressional interpretation in which it now acquiesces."[57] The court found no proof that Congress contemplated or was even aware of the Sixth Circuit's opinion in *Pacific Legal Foundation* or the Secretary's announcement.[58] They also point out that congressional acquiescence only applies where Congress revisits the language subject to the interpretation in question. Neither Congress, when it amended other parts of section 1533, or the Sixth Circuit or the Secretary substantively addresses the critical habitat designation provisions of the ESA. In light of this, the court found the congressional silence unpersuasive.[59]

III. STATUTORY PURPOSE.

A. National Environmental Policy Act.

NEPA Section 102(2)(C) requires that "to the fullest extent possible . . . all agencies of the Federal Government" shall:

> (C) include in every recommendation or report on proposal for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on –
> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the proposed action,
> (iv) the relationship between local short-term uses of man's environment and the maintenance and

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[56] *Id.* at 1438, ("[I]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law."(citing Girouard v. United States, 328 U.S. 61 (1974)); *see also* Brown v. Gardner, 513 U.S. 115 (1994) and Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-81 (1969).

[57] *Catron County* at 1438, (quoting Commodity Futures Trading Comm'n v.Schor, 478 U.S. 833, 847 (1986)).

[58] *Catron County* at 1438.

[59] *Id.* at 1438-39. The court goes on to discuss a proposed amendment by Senator McClure that would have defined critical habitat designation as a major federal action for NEPA purposes. *Id.* Though Congress considered it, Senator McClure's amendment was not adopted. 124 Cong.Rec. 21588 (1978).

> enhancement of long-term productivity, and
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[60]

The language "to the fullest extent possible" does not create a loophole for agencies. Unless there is a statutory conflict with the agency's authorizing legislation that prohibits compliance, or makes it impossible, each agency is expected to comply with NEPA.[61] Courts have also found a "functional equivalent" exception; this applies when an agency's procedures duplicate NEPA's requirements.[62] NEPA was enacted a year before the Environmental Protection Agency (EPA) was created. The EPA was created to bring under one roof all the major environmental programs that were scattered throughout different federal agencies. One of NEPA's primary purposes, therefore, was "to coordinate disparate environmental policies of different federal agencies,"[63] by requiring an impact statement for any major federal action significantly affecting the human environment.

There is no clear evidence that Congress intended NEPA to apply to federal environmental agencies.[64] The Act contains no express exemption to this effect. However, such an exemption is discussed in a document entitled "Major Changes in S. 1075 as passed by the Senate" [hereinafter Document], which was introduced into the Congressional Record by Senator Jackson during the NEPA conference report debate.[65] The Document analyzed the changes in Senate Bill 1075 (NEPA) as passed by the Senate. The general discussion of Section 102 states: "Many existing agencies . . . already have important responsibilities in the area of environmental control. The provisions of Section 102 (as well as 103) are not designed to result in any change in the manner in which they carry out their environmental protection authority."[66] The Document stated further that, "this provision is, however, clearly designed to assure consideration of environmental matters by all agencies in their planning and decision making—especially those agencies who now have little or no legislative authority to take environmental

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[60] 42 U.S.C. § 4332 (1994).

[61] Pacific Legal Foundation v. Andrus, 657 F.2d 829, 833 (6th Cir. 1981) (citing Flint Ridge Development Co. v. Scenic Rivers Ass'n of Oklahoma, 426 U.S. 776, 787-88 (1976)).

[62] *Pacific Legal Foundation* at 834.

[63] Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 380 (D.C. Cir. 1973).

[64] *Id.*

[65] 115 Cong. Rec. 40,417 (1969).

[66] *Id.* at 40,418.

considerations into account."[67]

This point is further clarified by Senator Muskie's comments:

> It is clear then, and this is the clear understanding of the Senator from Washington and his colleagues, and of those of us who serve on the Public Works Committee, that the agencies having authority in the environmental improvement field will continue to operate under their legislative mandates as previously established, and that those legislative mandates are not changed in any way by section 102-5.[68]

Unfortunately, this understanding was not formalized in the Conference Report or in the section-by-section analysis of the bill as reported by the Conference Committee. However, the statements of Senators Muskie and Jackson should be given a certain degree of weight in ascertaining the legislative intent of NEPA, as they were among those most active in securing passage of NEPA.[69] House action on the Conference Report was equally ambiguous. In fact, in response to a question by Representative Fallon as to the effect of NEPA on the Federal Water Pollution Control Agency, Representative Dingell quoted the language of the Document cited above.[70]

NEPA was designed to develop a consciousness of environmental consequences in governmental agencies whose actions impact the physical environment in a detrimental manner. "The impact statement is merely an implement devised by Congress to require government agencies to think about and weigh environmental factors before acting."[71] Agencies (such as the EPA), whose regulatory activities are directed toward benefitting the environment do not need to interrupt their work in order to issue an impact statement just for the sake of issuing one. As a federal agency's resources are necessarily finite, this superfluous action would decrease environmental protection rather than increase it.[72] The argument that environmental agencies are just as likely as non-environmental agencies to injure the environment through

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[67] *Id.*
[68] *Id.* at 40,423 (statement of Senator Muskie to Senator Jackson).
[69] *Portland Cement* at 381-82.
[70] 115 Cong.Rec. 40,925 (quoting Document, *see supra*, text accompanying notes 65-68).
[71] State of Wyoming v. Hathaway, 525 F.2d 66, 71 (10th Cir. 1975).
[72] *Id.* at 72.

their environmentally protective actions is spurious at best. If an agency's actions fail to adequately consider environmental consequences, those actions can be corrected through judicial review.[73]

In its holding in *Metro Edison Co. v. People Against Nuclear Energy*,[74] the Supreme Court stated that the theme of NEPA is found in the meaning of, "environmental." Agencies do not have to assess every impact or effect of their proposed actions, "but only the impact or effect on the environment."[75] The Court stated further that, taken out of context, and in its broadest possible meaning, "adverse environmental effects" could cover any action someone believed to be "adverse."[76] Rather, the Court stated that the context of the statute shows that Congress meant the physical environment.[77] "NEPA was designed to promote human welfare by alerting governmental actors to the effect of their proposed actions on the physical environment."[78] The comments of Representative Dingell support this view: "[W]e can now move forward to preserve and enhance our air, aquatic, and terrestrial environments . . . to carry out the policies and goals set forth in the bill and to provide each citizen of this great country a healthful environment."[79]

These sentiments were echoed by Senator Jackson, who stated:

> What is involved [in NEPA] is a congressional declaration that we do not intend, as a government or as a people, to initiate actions which endanger the continued existence or the health of mankind: That we will not intentionally initiate actions which do irreparable damage to the air, land and water which support life on earth.[80]

Although NEPA's goals are stated in terms of human health and welfare, the Supreme Court found that these are the ends Congress chose to achieve, "by means of protecting the physical environment."[81]

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[73] *Id.* at 71-72.

[74] Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 772 (1983).

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.* at 773, (quoting Rep. Dingell, 115 Cong.Rec. 40924 (1969)) (emphasis added by S.Ct.).

[80] *Metro Edison Co.* at 766 (quoting Senator Jackson, 115 Cong.Rec. 40416 (1969)).

[81] *Metro Edison Co.* at 766.

B. Endangered Species Act.

The Endangered Species Act of 1966[82] and the Endangered Species Conservation Act of 1969[83] were, at the time, the most comprehensive legislation of their type in any nation. In 1973 Congress held hearings on what would become the Endangered Species Act of 1973. Congress was informed that, despite the aforementioned laws, species were still disappearing at the rate of about one per year and the pace seemed to be accelerating. Congress was also told that the disappearance was not due to natural selection.[84]

> [M]an and his technology has [sic] continued at an ever-increasing rate to disrupt the natural ecosystem. This has resulted in a dramatic rise in the number and severity of the threats faced by the world's wildlife. The truth in this is apparent when one realizes that half of the recorded extinctions of mammals over the past 2000 years have occurred in the most recent 50-year period.[85]

Congress reacted strongly to this news. One commentator stressed that the dominant theme at the hearings was "the overriding need to devote whatever effort and resources were necessary to avoid further diminution of national and worldwide wildlife resources."[86] Hunting and loss of habitat were cited as two major causes of extinction. Several bills were introduced, all incorporating language similar to that found in the present Section 7 of the ESA.

In the words of an administration witness, the provisions were designed "for the first time [to] prohibit [a] federal agency from taking

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[82] 80 Stat. 926, repealed by 87 Stat. 903.

[83] 83 Stat. 275, repealed by 87 Stat. 903.

[84] TVA v. Hill, 437 U.S. 153, 176 (1978).

[85] *Id.* (quoting *Endangered Species Act of 1973: Hearings on Endangered Species before the Subcomm. of the House Comm. on Merchant Marine and Fisheries*, 93rd Cong., 1st Sess., 202 (1973)).

[86] 437 U.S. 153, 177 (1978) (citation omitted). The legislative proceedings were full of concern over the risk posed by the continued loss of species. These sentiments were typified by the House Committee on Merchant Marine and Fisheries' explanation of the need for legislation. They feared that species loss was threatening the genetic heritage of the nation. "From the most narrow possible point of view, *it is in the best interests of mankind to minimize the losses of genetic variations.* The reasons being simple: they are potential resources. They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask." *Id.* at 178-79 (quoting H.R. Rep. No 93-412, 4-5 (1973)).

action which does jeopardize the status of endangered species."[87] The House Committee Report explains the expected impact of the provision on federal agencies:

> This subsection requires the Secretary and the heads of all other Federal departments and agencies to use their authorities in order to carry out programs for the protection of endangered species, and it further requires that those agencies take the necessary action that will not jeopardize the continuing existence of endangered species or result in the destruction of critical habitat of those species.[88]

Though the Supreme Court's review focused on Section 7 of the ESA, it gives a clear indication of Congressional intent. The Court stated that, "examination of the language, history, and structure of the legislation under review here indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities."[89] The 1978 Amendments bear this out. They indicate that Congress believed that the ESA of 1973 created a mandatory duty to list endangered species. Congress also thought that more flexibility was needed; thus, it created a committee[90] to consider exemptions and required the Secretary to consider economic and other factors when designating a critical habitat.[91]

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[87] 437 U.S. 153, 179 (quoting *Endangered Species Act of 1973: Hearings on Endangered Species before the Subcomm. of the House Comm. on Merchant Marine and Fisheries*, 93rd Cong., 1st Sess., 202 (1973)).

[88] 437 U.S. at 182-183 (quoting H.R. Rep. No. 93-412, at 14 (1973).

[89] *Id.* at 174.

[90] The Endangered Species Committee, 16 U.S.C. § 1536(e) (1994). The Committee reviews applications for exemptions from the requirements of subsection (a)(2), the "jeopardy clause." "Each Federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical. . . In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2) (1994).

[91] *Pacific Legal Foundation* at 839. Though urged to require an impact statement before listing, Congress did not adopt this recommendation. *Id.* Additionally, the Senate Report on the hearings for the proposed bill contained no provision for considering economic consequences of designating a critical habitat. The committee Congress created would balance the other factors when it considered applications for exceptions. *Id.* at 840 n 13.

IV. DISCUSSION

Does it make sense for NEPA to apply to the designation of critical habitats under the ESA or will requiring adherence to NEPA hinder these goals? The statutes were enacted for different reasons and to accomplish different purposes. NEPA was passed to require government agencies, particularly those without an environmental mandate,[92] to consider the environmental consequences of their actions. These consequences are assessed in an EA or an EIS. NEPA is concerned with protecting the quality of the physical environment for man's health and welfare, whereas the ESA was passed to stem the tide of species loss due to man's unfettered economic development.[93] The ESA is concerned with preventing species' extinction. The primary focus of the two statues is diametrically different. NEPA focuses on environmental protection for man's benefit while the ESA's focus is on protecting the environmental resources required to prevent the extinction of nonhuman species.

Requiring an EIS prior to designating a critical habitat simply does not make sense. First, it will hinder efforts at achieving the ESA's continuing obligation on all federal agencies to protect flora, fauna, and their essential habitat. The Supreme Court has stated that "endangered species are to be afforded the highest of priorities."[94] The additional time and resources necessary to comply with NEPA will only impair efforts at protecting species and their critical habitats.[95]

Second, the ESA requires that a species be listed if it is determined that it is threatened or endangered due to any of a number of factors.[96] When a species is listed as endangered, its critical habitat must also be designated--unless it cannot be determined at that time--in which case it must be designated within one year.[97] Listing is based solely on "the best scientific and commercial data available."[98] Listing and

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[92] *See supra* Part III.A.

[93] *See supra.* Part III.B.

[94] U.S. Fish and Wildlife Service, Division of Endangered Species. <http://www.fws.gov/~r9endspp/esastats.html> (visited May 31, 1997) (Explaining that of the 529 plant species and 432 animal species listed (961 species), only 123 (13%) have had a critical habitat designated; 8 more have been proposed).

[95] *Id.*

[96] These factors include: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. 16 U.S.C. § 1533(1) (1994).

[97] 16 U.S.C. § 1533(a)(3)(A) and (b)(6)(C)(ii) (1994).

[98] 16 U.S.C. § 1533(b)(1)(A) (1994).

designating a critical habitat are part of a single process; it does not make sense to require an EIS for one half of the process.[99] This may in fact raise a contradiction, because one of the factors that requires listing is the "present or threatened destruction, modification, or curtailment" of the species' habitat.[100]

Third, the procedures required for designating critical habitat fulfill the intent behind NEPA's requirements. This was stated most persuasively by the Ninth Circuit in *Douglas County*. In its holding, the court stated that, "by designating critical habitats for endangered or threatened species, the Secretary is working to preserve the environment and prevent the irretrievable loss of a natural resource. Thus the action of the Secretary in designating a critical habitat furthers the purpose of NEPA."[101]

Contrary to the Ninth Circuit's holding, the Tenth Circuit felt that the ESA's procedures only partially fulfilled NEPA's requirements.[102] However, as they recognized, NEPA only requires that an agency comply "to the fullest extent possible."[103] To the extent allowed by the procedures Congress developed for designating a critical habitat, the ESA does comply "to the fullest extent possible" with NEPA's requirements. Therefore, it is clear that the Tenth Circuit approached this issue from the wrong perspective. It viewed the issue from the perspective of NEPA: To protect the environment while at the same time trying to minimize the impact on human economic development. However, to apply the Supreme Court's standard of affording endangered species "the highest of priorities," the issue must be viewed from the perspective of the ESA and the approach taken by the Ninth Circuit.

Fourth, the Council on Environmental Quality [CEQ] has stated that NEPA does not require collecting needless information. The most important aspect of NEPA documents is that they "concentrate on the issues that are truly significant to the action in question."[104] In designating a critical habitat, the truly significant action is determining the proper geographic area to protect to ensure a species' survival, not

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[99] The listing of a species was determined to be exempt from NEPA requirements in Pacific Legal Foundation v. Andrus, 657 F.2d 829 (6th Cir. 1981); *see supra* note 32 and accompanying text.

[100] *See supra* Part II.B.2. Depending on the circumstances, this could be all or merely part of the species' critical habitat.

[101] 48 F.3d at 1506 (internal quotation marks omitted) (citation omitted).

[102] *See supra* Part II.B.2.

[103] 42 U.S.C. § 4332 (1994).

[104] 40 CFR § 1500.1(a) (1996).

the potential impacts on economic development.

Fifth, procedures for designating critical habitat provide adequate safeguards against abuse. The listing process[105] includes requirements for notice in the Federal Register; publication of summaries in a newspaper of general circulation in each area affected; and, if requested, a public hearing on the issue.[106] It also requires consideration of economic and other relevant impacts and allows excluding areas, based on these considerations, if they will not lead to the extinction of the species.[107] Even after designating a critical habitat, when appropriate, the Secretary is authorized to revise the designation.[108]

Sixth, although listed species receive the additional protections of Section 7, prohibiting agencies from taking any action that may jeopardize the species' continued existence,[109] affected parties can apply to the Endangered Species Committee for an exemption from Section 7's requirements.[110] The Secretary is also to cooperate with the States in carrying out the provisions of the ESA.[111] Finally, affected parties can challenge the Secretary's rulemaking under the Administrative Procedures Act[112] or seek damages under the U.S. Constitution's Fifth Amendment "Takings" provision.[113]

V. CONCLUSION

The environment of the United States faces numerous threats, and Congress has responded to those threats with a number of environmental laws aimed at protecting and preserving what remains of our natural heritage. The Tenth Circuit's decision in *Catron* places a great obstacle in the path of both the Endangered Species Act and the National Environmental Policy Act. The goal of NEPA is to encourage federal agencies to work toward maintaining a healthful environment for mankind. The ESA, on the other hand, was specifically enacted to prevent the further loss of endangered plants and animals and the habitats in which they live. Congress included specific procedures

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[105] This process includes the determination, designation, or revision of a species' listing or critical habitat.

[106] 16 U.S.C. § 1533(b)(5) and (8) (1994).

[107] 16 U.S.C. § 1533(b)(2) (1994).

[108] 16 U.S.C. § 1533(a)(3)(B) (1994).

[109] *See supra* Part III.B.

[110] 16 U.S.C. § 1536(e)(2) (1994).

[111] 16 U.S.C. § 1535 (1994).

[112] *See supra* Part II.A.2.

[113] "No person shall...be deprived of...property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

within the ESA to achieve these goals. Unfortunately, Congress did not specifically exempt the ESA from NEPA, specifically section 102(C). The Ninth and Tenth U.S. Circuit Courts have recently addressed this issue and answered it differently. The Ninth Circuit found that the designation of critical habitat under ESA Section 4 does not require compliance with NEPA Section 102(C); the Tenth Circuit found that NEPA does apply to such actions by the Secretary of the Interior. Congress should act immediately and decisively by amending the ESA to exempt actions under ESA Section 4 from the unnecessary impediments caused by compliance with NEPA Section 102(C). This amendment will help save our most critically endangered species, because their survival depends upon our ability to respond quickly to conditions that threaten their habitats.[114] Man's rapid encroachment on the few remaining undeveloped natural areas threatens more than just the diversity of species that inhabit those areas; it threatens the very fabric of our existence. Chief Seattle understood that the wildness of nature around us enhances our lives; without it, we are merely surviving.

> This we know: the earth does not belong to man, man belongs to the earth. All things are connected like the blood that unites us all. Man did not weave the web of life, he is merely a strand in it. Whatever he does to the web he does to himself. One thing we know: our god is also your god. The earth is precious to him and to harm the earth is to heap contempt on its creator. Your destiny is a mystery to us. What will happen when the buffalo are all slaughtered? The wild horses all tamed? What will happen when the secret corners of the forest are heavy with the scent of many men and the view of the ripe hills is blotted by talking wires? Where will the thicket be? Gone! And what is it to say goodbye to the swift pony and the hunt? The end of living and the beginning of survival.[115]

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[114] Proposed Statutory Revision – To prevent further litigation and to ensure the original intent of the Endanger Species Act is maintained, Congress should amend the Act to exempt Section 4 from NEPA. A proposed new section containing the exemption follows: § 1545. Construction with National Environmental Policy Act of 1969 [ESA § 19] Section 4 of this Chapter [16 U.S.C. § 1533], "Determination of endangered species and threatened species [ESA § 4]," in its entirety, shall be exempt from the requirements of the National Environmental Policy Act [NEPA] § 102(C)[42 U.S.C. § 4332(C)].

[115] JOSEPH CAMPBELL, THE POWER OF THE MYTH, 34 (1988) (quoting Chief Seattle's letter to President Cleveland responding to the federal government's offer to purchase his tribe's land).