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Environmental Law - Can NEPA and the ESA Work Together - Designations of Critical Habitat for an Endangered Species Must Fulfill National Environmental Policy Act Requirements - Catron County Board of County Commissioners v. United States Fish and Wildlife Service

Jim Davis

Case Notes

ENVIRONMENTAL LAW—Can NEPA and the ESA Work Together? Designations of Critical Habitat for an Endangered Species Must Fulfill National Environmental Policy Act Requirements. *Catron County Board of County Commissioners v. United States Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996).

INTRODUCTION

In June of 1985, the Secretary of the Interior (Secretary) proposed listing the spikedace and loach minnow, two species of fish inhabiting stretches of the Gila River in New Mexico and Arizona, as "threatened"[1] under the Endangered Species Act (ESA).[2] As required by the ESA, the Secretary simultaneously identified geographical areas of critical habitat necessary to the survival of both species.[3] The Secretary included parts of

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1. Catron County Bd. of County Comm'rs v. United States Fish and Wildlife Service, 75 F.3d 1429, 1432 (10th Cir. 1996) (*Catron County*) (citing 50 Fed. Reg. 25,390-398 (1985), (spikedace); *id.* at 25,380-387 (loach minnow)).

2. 16 U.S.C. §§ 1531-44 (1994). A threatened species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20). An endangered species is any species threatened with extinction throughout all or a significant portion of its range. *Id.* § 1532(6). The Secretary is required to publish in the Federal Register a list of species determined to be threatened or endangered. *Id.* § 1533(c)(1).

3. *Catron County*, 75 F.3d at 1432. *See also* 50 Fed. Reg. 25,393-398 (codified at 50 C.F.R. § 17.95(e)(1995)) (spikedace); 50 Fed. Reg. 25,383-387 (codified at 50 C.F.R. § 17.95(e) (1995)) (loach minnow). "A final regulation designating critical habitat of an endangered species or a threatened species shall be published concurrently with the final regulation implementing the determination that such species is endangered or threatened . . . ." 16 U.S.C. § 1533(b)(6)(C). The Secretary may, however, delay designation of critical habitat if the habitat is not determinable or the designation would not be prudent. *Id.* at § 1533(a)(3). "Critical habitat" is defined as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species, and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species.

Id. § 1532(5)(A)(i)(ii).

the Gila River located in Catron County, New Mexico, within the critical habitat boundaries.[4]

Final regulations listing the two species as threatened appeared in the Federal Register in July and October of 1986.[5] Final critical habitat designations, published in March of 1994, included seventy-four miles of riverine habitat in Catron County.[6] After the Secretary's final critical habitat designations, the Catron County Board of Commissioners (County) sought a preliminary injunction in the United States District Court for the District of New Mexico to prevent the United States Fish and Wildlife Service (FWS) from implementing the critical habitat determinations.[7] Because the spikedace and loach minnow require flooding as a natural phenomenon in their life cycles,[8] the County claimed that the critical habitat designations would prevent the diversion and impoundment of water, resulting in flood damage to county-owned property.[9] The County argued

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4. *Catron County*, 75 F.3d at 1432 (citing 50 Fed. Reg. 25,380, 25,390 (codified at 50 C.F.R. § 17.95(e)).

5. *Id.* at 1432 (citing 51 Fed. Reg. 23,769-781 (1986)) (codified at 50 C.F.R. §§ 17.11(h), 17.44(p)) (spikedace); 51 Fed. Reg. 39,468-478 (1986) (codified at 50 C.F.R. §§ 17.11(h), 17.44(q)) (loach minnow).

6. *Catron County*, 75 F.3d at 1433 (citing 59 Fed. Reg. 10,898 (1994)) (codified at 50 C.F.R. § 17.95(e)) (loach minnow); 59 Fed. Reg. 10,906 (1994) (codified at 50 C.F.R. § 17.95(e)) (spikedace). In the final rules listing both species, the Secretary found critical habitat was not then determinable under ESA § 4(b)(6)(c), thus the delay in the final critical habitat designation. Board of County Comm'rs v. United States Fish and Wildlife Service, No. 93-730, slip op. at 2 (D.N.M. Oct. 13, 1994), *aff'd* Catron County Bd. of Comm'rs v. United States Fish and Wildlife Service, 75 F.3d 1429 (10th Cir. 1996). The Secretary published final critical habitat designations following a suit filed in October of 1993 by the Greater Gila Biodiversity Project alleging that the United States Fish and Wildlife Service (FWS) failed to perform its nondiscretionary duty to make such designations under ESA § 4(b)(6)(c)(ii). *Id.* at 1 (citing Greater Gila Biodiversity Project v. USFWS, No. 93-1913 (D. Ariz. 1993)).

7. *Board of County Comm'rs*, No. 93-730, slip op. at 1.

8. The final rule designating critical habitat for the loach minnow noted that, "[r]ecurrent flooding is very important to loach minnow survival" and "primary constituent elements include: . . . -A natural, unregulated hydrograph" 50 C.F.R. § 17.95(e). The spikedace requires the same elements. *Id.*

9. *Board of County Comm'rs*, No. 93-730, slip op. at 9. The County's list of injuries also included: flooding and erosion, changes in land use, inability to secure water rights, modification and destruction of the habitat of the endangered southwestern willow flycatcher, damage to roads, bridges, flood control structures and water diversion structures, decline in funding for essential services, loss of or restrictions on existing water rights, effect on fish hatchery and tourism, inability to secure 40 year water supply. *Id.* In addition to the potential damage to its property, the County claimed that the loss or restriction on water rights could directly affect wildlife habitat by drying irrigated hay meadows and existing water impoundments. Brief for Appellee at 5, Catron County Bd. of County Comm'rs v. United States Fish and Wildlife Service, 75 F.3d 1429 (10th Cir. 1992) (94-2280) (on file with the *Land and Water Law Review*). For a discussion of the impact of the ESA on river use, *see* Michael Moore et. al., *Water Allocation in the American West: Endangered Fish Versus Irrigated Agriculture*, 36 NAT. RESOURCES J. 319, 322 (1996) ("The impact of the ESA on river use continues to be one of the great uncertainties in western resource allocation.").

that the designation of critical habitat was a major federal action with significant effects on the human environment.[10] It was thus subject to environmental review under provisions of the National Environmental Policy Act (NEPA),[11] a process of review the FWS had not addressed. After hearing cross-motions for partial summary judgment from the County and the FWS on the issue of NEPA compliance,[12] the district court ruled in favor of the County.[13] The court issued a preliminary injunction preventing implementation of the critical habitat designation until the FWS complied with NEPA.[14]

In *Catron County Bd. of Comm'rs v. United States Fish and Wildlife Service*,[15] the United States Court of Appeals for the Tenth Circuit affirmed the district court's rulings.[16] In doing so, the Tenth Circuit expressly rejected a decision by the United States Court of Appeals for the Ninth Circuit on the issue of NEPA compliance, creating a split in the circuit courts. In 1995, in *Douglas County v. Babbitt*,[17] the United States Court of Appeals for the Ninth Circuit determined that NEPA did not apply to designations of critical habitat for the northern spotted owl. This case note discusses the Tenth Circuit's reasoning in *Catron County* and supports the conclusion that the Secretary must comply with NEPA when designating critical habitat for a threatened or endangered species.

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10. *Board of County Comm'rs*, No. 93-730, slip op. at 9.

11. 42 U.S.C. §§ 4321-70 (1994). NEPA requires that:

> [A]ll agencies of the Federal government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on the environmental impact of the proposed action and alternatives to the proposed action.

Id. § 4332(2)(C)(i)(ii).

The FWS did not dispute that the designation of critical habitat in this case was a major federal action. *See* 40 C.F.R. §§ 1508.18, 1508.27 (1996) (explaining "major Federal action" and "significantly affecting" the environment). Major actions include "new or revised agency rules, regulations, plans, policies or procedures." Significant impacts "may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial." *Id.* §§ 1508.18, 1508.27(b)(1)); *see also id.* § 1508.8 (effects include direct and indirect effects. Indirect effects include those caused by the action but are later in time or further removed in distance yet still "reasonably foreseeable.").

12. *Board of County Comm'rs* v. United States Fish and Wildlife Service, No. 93-730, slip op. at 6.

13. *Id.* at 1.

14. *Id.*

15. 75 F.3d 1429 (10th Cir. 1996).

16. *Id.* at 1439.

17. 48 F.3d 1495, 1507 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 698 (1996), *leave to file for reh'g den. by* 116 S. Ct. 1292 (1996)(*Douglas County*).

BACKGROUND

I. National Environmental Policy Act

The National Environmental Policy Act's (NEPA or the Act) aim is to help public officials understand the environmental consequences of their decisions and assist them in taking actions which "preserve, protect and enhance the environment."[18] The Act's primary requirement mandates that any federal agency proposing a major federal action with significant effects on the human environment,[19] prepare an environmental impact statement (EIS).[20] An EIS injects "environmental considerations into the federal agency's decisionmaking process," and informs the public that the agency has incorporated such considerations into its review.[21]

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18. 40 C.F.R. 1500.1. The Act's purposes also include promoting "efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] enrich the understanding of the ecological systems and natural resources important to the nation." 42 U.S.C. § 4321. The Act also established the Council on Environmental Quality (CEQ), the federal agency charged with administration of NEPA. *Id.* NEPA anticipates "beneficial use" of, and "high standards of living" from the environment while enhancing the quality of renewable resources and approaching the "maximum attainable recycling of depletable resources." *Id.* § 4331(b).

19. *See* 40 C.F.R. 1508.14 ("The [h]uman [e]nvironment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment."). *See also* Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 772-73 (1983) (The human environment means the physical environment-the air, land and water.) "[A]lthough NEPA states it 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"). *Id. See supra* note 11 for an explanation of "effects."

20. 42 U.S.C. § 4332(C). The detailed statement should include information 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 enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id.

The United States Supreme Court emphasized NEPA's importance in Andrus v. Sierra Club, 442 U.S. 347, 350-51 (1979). "[E]nvironmental concerns [must] be integrated into the very process of agency decisionmaking. The "detailed statement . . . is the outward sign that environmental values and consequences have been considered during the planning stage of agency actions." *Id.* If an agency is unsure whether a proposed action will have significant effects on the environment, federal regulations require the agency to prepare an environmental assessment (EA) to determine whether a significant impact may result and whether an EIS, therefore, is necessary. 40 C.F.R. §§ 1501.4(b)-(c). If the EA determines that an action will have no significant environmental impact, the agency makes a "finding of no significant impact" (FONSI). *Id.* § 1501.4(e). If the EA identifies a significant environmental impact the agency must prepare an EIS. *Id.* § 1501.4(c). *See also* Oregon Natural Resource Council v. Lyng, 882 F.2d 1417, 1421-22 (9th Cir. 1989).

21. Weinberger v. Catholic Action of Hawaii, 454 U.S. 139, 143 (1981); *see also* Sierra Club v. Hodel, 848 F.2d 1068, 1088 (10th Cir. 1988). In *Robertson v. Methow Valley Citizens Council,*

The Act's fundamental purpose is to assist federal agencies in making better decisions by evaluating the proposed action as well as alternatives to the action.[22] The evaluation should analyze the proposal's environmental impacts and possible alternatives in comparative form, "thus sharply defining the issues and providing a clear basis for choice."[23] All reasonable alternatives should be "[r]igorously" explored and "objectively" evaluated.[24] Along with concerns for potential environmental degradation, agencies must also weigh economic, socioeconomic and technical considerations.[25]

The Act requires that agencies conform their policies, regulations and public laws "to the fullest extent possible" with NEPA's purposes.[26] However, while the Act mandates environmental review, it does not demand particular results. The Supreme Court has consistently construed NEPA as procedural rather than substantive.[27] So long as agencies follow the necessary process, NEPA does not require a particular substantive decision.[28]

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the United States Supreme Court outlined two of NEPA's major purposes by stating that an agency "in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; [NEPA] also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." 490 U.S. 332, 349 (1989).

22. 40 C.F.R. § 1500.1(c). The alternatives analysis is the "heart of the environmental impact statement." *Id.* § 1502.14.

23. *Id.* The analysis should examine the effect of the action itself, alternatives to the action, and an alternative of "no action." *Id.* Also, the analysis should include mitigation measures. *Id.* NEPA documents must concentrate on issues significant to the agency's proposed action "rather than amassing needless detail." *Id.* § 1500.1(b). The Act's intent "is not to generate paperwork — even excellent paperwork — but to foster excellent action." *Id.* § 1500.1(c). An EIS enables those outside an agency to critically evaluate the action. Catron County Board of Comm'rs v. United States Fish and Wildlife Service, 75 F.3d 1429, 1434 (10th Cir. 1996) (citing Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346, 351 (8th Cir. 1972)).

24. 40 C.F.R. § 1502.14.

25. 42 U.S.C. §§ 4332(A)-(B); 40 C.F.R. § 1508.8.

26. 42 U.S.C. § 4332; 40 C.F.R. § 1500.2. *See also* Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776, 787 (1976) (NEPA's requirement that agencies consider environmental effects of their actions in an environmental impact statement is a "deliberate command"); Forelaws on Board v. Johnson, 743 F.2d 677, 684-85 (9th Cir. 1984) (NEPA's "to the fullest extent possible" requirement is to be construed broadly in favor of requiring NEPA compliance).

27. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). *See also* Vermont Yankee Nuclear Power Corp. v. Natural Resource Defense Council, 435 U.S. 519, 548 (1978) ("NEPA does not repeal by implication any other statute." (quoting United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 694 (1973)).

28. *Robertson*, 490 U.S. at 350. NEPA "prescribes the necessary process" for an agency to follow and "prohibits uninformed — rather than unwise — agency action." *Id.* at 350-51.

II. Endangered Species Act

Congress passed the Endangered Species Act (ESA) in an effort to conserve species threatened with extinction.[29] The ESA "serves as a critical counterbalance to . . . threats against species," most importantly, environmental degradation and habitat destruction.[30] In achieving habitat protection, the ESA mandates that the FWS, acting for the Secretary of the Interior, and the National Marine Fisheries Service (NMFS), acting for the Secretary of Commerce, designate "critical habitat" essential to the conservation of a species either agency lists as threatened or endangered.[31] Critical habitat receives special management consideration and protection.[32] For example, federal agencies must insure that their actions are not likely to adversely modify critical habitat.[33] The ESA's protections are limited to species that are "listed"[34] and, generally, to critical habitat that is "designated"[35] in accordance with ESA rulemaking procedures.[36]

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29. 16 U.S.C. § 1531(a)(b); *see also* H.R. REP. NO. 95-1625, at 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9455.

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

31. 16 U.S.C. § 1532(5)(A). The Secretary is to make critical habitat designations concurrently with listing a species as threatened or endangered. *Id.* § 1533(a)(3)(A). Critical habitat is designated "to the maximum extent prudent and determinable." *Id.* During the process of designating critical habitat, the ESA requires the Secretary to follow clear procedures aimed at providing for public notification and comment. *Id.* §§ 1533(b)(4)-(6); 50 C.F.R. § 424.15 (1995).

32. 16 U.S.C. § 1532(5)(A)(i).

33. Section 7 of the ESA restricts federal activities which jeopardize a species population or adversely modify the species' habitat. 16 U.S.C. § 1536(a)(2). Purely private activities are not restricted by critical habitat designations. 50 C.F.R. § 402.03.

34. Either the Secretary of the Interior, acting through the FWS, or the Secretary of Commerce, acting through the National Marine Fisheries Service (NMFS)(*see* 16 U.S.C. § 1532(15)), determines whether a species should be listed as endangered or threatened by evaluating the following five factors:

> (1) the present or threatened destruction, modification, or curtailment of its habitat or range; (2) over-utilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors affecting its continued existence.

16 U.S.C. § 1533(a)(1).

35. 16 U.S.C. § 1533(a)(b). *See also supra* notes 2 and 3 and accompanying text. The ESA's section 9 unauthorized takings provision can afford protection to a listed species' habitat even though the habitat is not designated as critical. *Id.* § 1538(a)(1)(B). For example, the final listing of the Stellar sea lion as threatened provided a three-mile no-approach buffer zone around key sea lion rookeries even though critical habitat had not been designated. 55 Fed. Reg. 49,204 (1990). A further rule created a ten-mile zone around key rookeries to prevent commercial fishing likely to jeopardize the species' continued existence. 57 Fed. Reg. 2,638 (1992). *See* Karl Gleaves and Katherine Wellman, *Economics and the Endangered Species Act*, 13 PUB. LAND L. REV. 149, 154 (1992).

36. 16 U.S.C. § 1533(b); 50 C.F.R. § 424. Listing species and designating critical habitat must comply with informal notice and comment rulemaking procedure required by the Administrative Procedure Act § 4, 5 U.S.C. § 553 (1994). *See* 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(d).

While protecting habitat is one of the ESA's primary purposes,[37] it creates a important distinction between factors the agencies must evaluate when determining whether a species should be listed, and those factors it must consider when designating a species' critical habitat.[38] The agencies list species using the best available scientific and commercial data without considering the listing's effect on economic activities.[39] However, decisions designating critical habitat result from evaluating the best available scientific data *and any economic or other relevant impact* that may result from the designation.[40] Economic and other relevant considerations may be used to modify a proposed habitat's boundaries if the economic costs of a designation outweigh its benefits, so long as the boundary modification does not lead to a species' extinction.[41] If extinction would result, the agencies can consider only the best available scientific data.[42]

III. NEPA's Application to ESA Decisions

In *Pacific Legal Foundation v. Andrus*,[43] the United States Court of Appeals for the Sixth Circuit determined that, because Congress expressly limited the FWS to an evaluation of specific biological factors when listing a species as threatened or endangered, NEPA's broad review of environmental impacts, including economic and socioeconomic considerations, would be "useless" to the agency.[44] NEPA applies to agency actions unless the existing law applicable to the agency's operations expressly prohibits or makes full compliance with one of NEPA's directives impossible.[45] The Sixth Circuit found an irreconcilable statutory conflict be-

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37. 16 U.S.C. § 1531(b).

38. *Id.* §§ 1533(b)(1)-(2).

39. *Id.* § 1533(a). The FWS recognizes that listing a species has economic effects. In determining the economic impact of critical habitat designations the agency subtracts the economic impact of listing a species. 56 Fed. Reg. 40,018 (1994).

40. 16 U.S.C. § 1533(b). The weight given to any particular impact is within the Secretary's discretion. *Id.* § 1533(b)(2).

41. *Id.* § 1533(b)(2). For an explanation of how an economic analysis proceeds, see Jon A. Souder, *Chasing Armadillos Down Yellow Lines: Economics in the Endangered Species Act*, 33 NAT. RESOURCES J. 1095, 1115-16 (1993).

42. 16 U.S.C. § 1533(b)(2).

43. 657 F.2d 829 (6th Cir. 1981)

44. *Id.* at 836-38 (citing 16 U.S.C.A. § 1533(a)(1) (1974)); *see also* 48 Fed. Reg. 49,244-45 (1982). *Pacific Legal Found.* arose out of the designation of seven mussels as endangered species. Dam construction was halted on the Duck River in Tennessee to prevent jeopardy to two of the species. Pacific Legal Foundation argued that listing the species without an impact statement violated NEPA. The court held that the Secretary's listing decisions are limited to assessing five specific factors. *Pacific Legal Found.*, 657 F.2d at 838; *see supra* note 34 and accompanying text.

45. *See* H.R. CONF. REP. NO. 91-765 (1969), *reprinted in* 1969 U.S.C.C.A.N. 2767, 2770. *See also* Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776 (1976), where the Supreme Court found "a clear and fundamental conflict of statutory duty" between the Department of Housing

tween NEPA and the ESA and therefore held that listings were exempt from NEPA as a matter of law.[46] In dicta, the court also noted that the ESA's procedures for designating critical habitat may be "functional[ly] equivalent" to NEPA's procedures.[47] Shortly after the Sixth Circuit's decision, the Secretary of the Interior published a notice in the Federal Register, citing *Pacific Legal Foundation*, and stating the department's intent not to prepare NEPA documents for listings.[48] Though the notice is

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and Urban Development's (HUD) statutory duty to respond within 30 days to statements by land developers disclosing the impact of their developments, and the extended time requirements for preparing an EIS. *Id.* at 788.

46. *Pacific Legal Found.*, 657 F.2d at 841.

47. Courts have recognized a "functional equivalence test" in allowing NEPA noncompliance in situations where one statute requires the same steps as another. Douglas County v. Babbitt, 48 F.3d 1495, 1504 (9th Cir. 1995) (citing Environmental Defense Fund v. EPA, 489 F.2d 1247, 1256 (D.C. Cir. 1973); Getty Oil Co. v. Ruckelshaus, 467 F.2d 349, 359 (3d Cir. 1972)). The functional equivalence test developed in cases where EPA environmental analysis followed the same basic environmental preservation steps required by NEPA. For example, in *Amoco Oil Co. v. EPA*, the United States Court of Appeals for the District of Columbia ruled that the EPA need not produce an impact statement when establishing fuel regulations under the Clean Air Act (CAA), because the CAA provides for "orderly consideration of diverse environmental factors" and therefore serves as a "functional equivalent" to NEPA requirements. 501 F.2d 722, 749 (D.C. Cir. 1974).

Various courts recognized the functional equivalence test in the years shortly after NEPA's enactment. *See* Warren County v. North Carolina, 528 F. Supp. 276, 286 (E.D.N.C. 1981); Environmental Defense Fund, Inc. v. Blum, 458 F. Supp. 650, 661 (D.D.C. 1978). However, the usefulness of the test is suspect. For example, NEPA does more than simply require the "orderly consideration of diverse environmental factors." In particular, it requires consideration of *alternatives* to a proposed action — the "heart of the EIS." 40 C.F.R. § 1502.14 (empahsis added). *See supra* note 22 and accompanying text.

48. The Secretary's announcement was in response to a letter from the CEQ indicating that the Secretary need not comply with NEPA when listing a species. 48 Fed. Reg. 49,244-45 (1983). CEQ interpretations of NEPA are entitled to substantial deference. Andrus v. Sierra Club, 442 U.S. 347, 358 (1979); *see also* H.R. REP. NO. 91-378, at 1 (1969), *reprinted in* 1969 U.S.C.C.A.N. 2751. The Secretary argued in *Catron County Board of Comm'rs v. U.S. Fish and Wildlife Service*, and the Ninth Circuit found in *Douglas County v. Babbitt*, found that the announcement also allowed noncompliance with NEPA when designating critical habitat. Catron County Bd. of Comm'rs v. U.S. Fish and Wildlife Service, 75 F.3d 1429, 1437 (10th Cir. 1996); Douglas County v. Babbitt, 48 F.2d 1495, 1504 (9th Cir. 1995). *See also infra* note 72 and accompanying text. The notice's "Summary" notes that the Service "has determined that environmental assessments . . . need not be prepared in connection with regulations adopted pursuant to Section 4(a) of the Endangered Species Act of 1973, as amended." 48 Fed. Reg. at 49,244. The notice refers parenthetically to critical habitat designations as among those actions listed under section 4(a). *Id.* at 49,245. Actions under section 4(a) include listings, delistings, reclassifications and critical habitat designations. 16 U.S.C. 1533(a).

However, the notice is entitled *"Endangered and Threatened Wildlife and Plants; Preparation of Environmental Assessments for Listing Actions under the Endangered Species Act."* 48 Fed. Reg. at 49,244. The title refers specifically to listings. *Id.* The notice cites *Pacific Legal Found.* for the proposition that "as a matter of law" NEPA environmental review is not required for *listings* under the ESA. *Id.* The notice also says that "[t]he [United States Fish and Wildlife Service] has accepted Council on Environmental Quality's (CEQ) judgment that [ESA] Section 4 *listing* actions are exempt from NEPA review 'as a matter of law.'" *Id.* (emphasis added). *See also supra* note 43 and accompanying text.

specific in its reference to listings, the FWS currently applies the notice to critical habitat designations.[49]

Noncompliance for listing decisions generally has become well-settled. NEPA requires a multi-disciplinary analysis with broad goals, incorporating comments from various quarters with jurisdiction or special expertise regarding particular environmental impacts.[50] Eliminating non-biological considerations from listing decisions, frustrates NEPA's multi-disciplinary goal, and makes an exemption for listings appropriate. However, by adding economics and other relevant impacts to the critical habitat mix, Congress set the stage for a dispute over NEPA's application to critical habitat designations.

In 1978, Congress enacted amendments to the ESA to introduce flexibility into the Act's stringent requirements.[51] Congress noted that up until enactment of the amendments, determination of critical habitat had been a purely biological question.[52] The inability to consider a critical habitat's effect on economic concerns led to the Supreme Court's decision in *TVA v. Hill*,[53] where construction of the Tellico Dam in Tennessee was halted, even though the dam was virtually complete, at a cost of more than $103 million.[54] The addition of economic and other relevant considerations and a cost-benefit analysis requirement in the 1978 amendments gave critical habitat designation "significant added dimensions."[55] The House Report noted that now, "[f]actors of recognized or potential importance to human activities in an area will be considered by the Secretary in deciding whether or not all or part of that area should be included in the critical habitat."[56] Regulations implementing the amendments require "[t]he Secretary [to] . . . consider the probable economic and other impacts of the designation upon proposed or ongoing activities."[57] The added considerations are important in determining whether NEPA applies

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In addition, the notice cites 1982 congressional amendments to the ESA restricting listing decisions to biological criteria to support its argument that NEPA should not apply. 48 Fed. Reg. 49,244. Congress did not so restrict critical habitat designations. Rather, Congress expanded criteria to include economics and other relevant impacts. *See also supra* note 40 and accompanying text.

49. See 56 Fed. Reg. 20,816, 20,824 (1990), where the Secretary of the Interior concluded NEPA documents were unnecessary in designating critical habitat for the northern spotted owl.

50. 42 U.S.C. 4332(A).

51. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751, *reprinted in* 1978 U.S.C.C.A.N. 9453, 9464 (codified as amended at 16 U.S.C. §§ 1531-1543 (1994)).

52. H.R. REP. No. 95-1625, at 17 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9467.

53. 437 U.S. 153 (1978).

54. *Id.* at 172-73.

55. *Id.*

56. *Id.*

57. 50 C.F.R. § 424.19.

to critical habitat designations in those cases where boundary modification resulting from economic or other considerations does not result in species extinction.[58]

In *Douglas County v. Babbitt,* the Ninth Circuit ruled that the Secretary need *not* comply with NEPA when designating critical habitat.[59] In a key portion of its decision, the Ninth Circuit determined that the ESA's core purpose of preventing species extinction superseded NEPA's mandate for a broad analysis of a designation's effects on the human environment. In a narrow reading of legislative intent, the court determined that the congressional requirement to consider economic and other relevant impacts was limited to the extent such considerations related directly to the preservation of a species.[60] Economic impacts of a designation unrelated to species preservation were outside the Secretary's purview.[61] Thus, the Secretary could not "engage in the very broad analysis NEPA requires."[62] Because in preserving species, the ESA promotes an environmentally beneficial goal, the court determined that NEPA's further environmentally enhancing mechanisms were unnecessary.[63] The court held that the Secretary's action in designating critical habitat "furthers the purpose of NEPA."[64] Requiring an EIS would only hinder the goal of improving the environment.[65]

The court also found that the ESA's requirement for notice to people in areas affected by final critical habitat designations,[66] together with congressional acquiescence to judicial and executive announcements of NEPA noncompliance, meant that Congress had "displaced" NEPA's procedures with those of the ESA.[67] In *Merrill v. Thomas,* the Ninth

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58. *See supra* note 41 and accompanying text.

59. Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995). The Ninth Circuit provided three reasons for its decision: (1) Congress intended that the ESA critical habitat procedures displace the NEPA requirements, (2) NEPA does not apply to actions that do not change the physical environment, and (3) to apply NEPA to the ESA would not further the purposes of either statute. *Id.* at 1499.

60. *Id.* at 1503.

61. *Id.* (citing 16 U.S.C. § 1533(b)(2)).

62. *Id.*

63. *Id.* at 1506.

64. *Id.*

65. *Id.*

66. 16 U.S.C. §§ 1533(b)(4)-(6); 50 C.F.R. § 424.15. Before making final habitat designations 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.

16 U.S.C. § 1533(b)(5).

67. *Douglas County,* 75 F.3d at 1503. The court found that the amendments' "carefully crafted congressional mandate" displaced NEPA's environmental impact statement procedures. *Id.*

Circuit used a "displacement" theory to exempt the Environmental Protection Agency (EPA) from NEPA compliance in registering pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[68] The court's displacement approach allows an agency to avoid NEPA compliance by demonstrating that Congress intended to displace the NEPA process with the procedure established in some other legislation.[69] In *Merrell*, the Ninth Circuit found that the process established under FIFRA had rendered NEPA compliance superfluous.[70]

In *Douglas County*, the court held that the ESA's informational procedures, similar to NEPA's notice procedures accomplished through environmental impact statements, made the NEPA procedures "superfluous."[71] In addition, the court found that Congress's failure to revise or repeal the Sixth Circuit's decision in *Pacific Legal Foundation* — with its announcement that critical habitat designations may be the functional equivalent to NEPA, and, more importantly, the Secretary's later Federal Register notice announcing his decision not to prepare NEPA documents for listings under section 4(a) of the ESA — meant Congress had acquiesced in those decisions.[72] Like the FWS, the Ninth Circuit determined that the Secretary's notice applied to critical habitat designations as well as listings.[73] The court held that the similarities in informational procedures along with congressional acquiescence, suggested that NEPA had been displaced.[74] The Ninth Circuit also determined that critical habitat designations have no effect on the physical environment, further evidence that NEPA should not apply.[75]

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68. Merrell v. Thomas, 807 F.2d 776, 778 (9th Cir. 1986).

69. *Id.*

70. *Id.* Under FIFRA, the EPA must weigh the benefits of using a pesticide against the pesticide's environmental impacts, encompassing a full and public review. *Id.* at 780 (citing 7 U.S.C. § 136(bb)). The court reasoned that congressional failure to apply NEPA to FIFRA in subsequent FIFRA amendments meant Congress did not intend NEPA compliance. *Id.* at 789.

71. *Douglas County*, 75 F.3d at 1503.

72. *Id.* at 1504. *See also supra* note 48 and accompanying text. Both the Secretary and the Ninth Circuit reasoned that congressional failure to revise ESA's critical habitat designation procedures in the 1988 amendments was an implicit choice to accept both *Pacific Legal Found.* and the Secretary's announcement. *Catron County*, 75 F.3d at 1437; *Douglas County*, 48 F.3d at 1504 (citing Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 846 (1986)) ("[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").

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

74. *Id.* at 1503. The Ninth Circuit discussed the difference between a "displacement" theory and a functional equivalence test. "The 'displacement' argument asserts that Congress intended to displace one procedure with another. The 'functional equivalence' argument is that one process requires the same steps as another." *Id.* at 1504.

75. *Id.* at 1505. Agency actions which individually or cumulatively have no significant effect on the human environment are categorically excluded from complying with NEPA procedures. 40 C.F.R. § 1508.4. *See also* Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S.

PRINCIPAL CASE

The Tenth Circuit in *Catron County,* ruled that the Secretary must comply with NEPA when designating critical habitat under the ESA.[76] In doing so, it dismissed the Secretary's argument that the procedural similarities between NEPA and the ESA, along with Congress' silence regarding judicial and executive endorsements of NEPA noncompliance, evidenced Congress's intent that the ESA "displaces" NEPA.[77] The Tenth Circuit determined that, given the focus of the ESA together with the Act's directive to consider economic and other relevant impacts, the ESA did not displace NEPA.[78]

The Tenth Circuit first recognized that the ESA's requirements for public notice and environmental considerations "to some extent parallel and perhaps overlap the requirements imposed by NEPA."[79] However, the court held that partial fulfillment of NEPA's goals is

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766. *Metropolitan Edison* arose out of a conflict over restarting a damaged nuclear energy reactor. *Id.* at 774. The Court held that NEPA did not apply to such actions unless there was a "reasonably close causal relationship" to a change in the physical environment. *Id.* Courts have categorically excluded such actions as federal acquisition of a negative easement prohibiting development. Sabine River Auth. v. United States Dep't of the Interior, 951 F.2d 669 (5th Cir. 1992). *But see* County of Josephine v. Watt, 539 F. Supp. 696 (N.D. Cal. 1982) (EIS prepared for the designation of a Wild and Scenic River); Hogan v. Brown, 507 F. Supp. 191 (W.D. Ark. 1980) (EIS prepared for acquisition of land for a wildlife refuge).

76. *Catron County,* 75 F.3d at 1436. The court initially held that the County had standing to bring the suit. *Id.* at 1432. The court followed the Supreme Court's articulation of Article III standing requirements announced in *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992);*see* U.S. CONST. art. 3, § 2, clause 1. Under *Lujan,* a plaintiff must have suffered an "injury in fact," which is "concrete and particularized and . . . actual or imminent, not 'conjectural or hypothetical.'" *Lujan,* 504 U.S. at 560. Also, the injury must be "fairly trace[able] to the challenged action of the defendant." *Id.* In addition, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Id.* The County's claim of flood damage to its property was found to be an "imminent injury to a concrete and particularized legally protected interest." *Catron County,* 75 F.3d at 1433. The court determined that the injury could be redressed by following NEPA. *Id.*

The court also found that the County had standing under provisions of the Administrative Procedure Act (APA), under which the County initially brought the suit. *Id.* at 1434 (citing 5 U.S.C §§ 551-559, 701-706 (1994)). The APA provides a private right of action where NEPA does not. In a case brought under the APA the plaintiff must 1) identify a final agency action; and 2) show that its claims are within the "zone of interests" sought to be protected by the statute which forms the basis of its claims. Lujan v. National Wildlife Federation, 497 U.S. 871, 882 (1990). The court determined that the failure to comply with NEPA was a final agency action and that the County's claims fell within the zone of interests protected by NEPA. *Catron County,* 75 F.3d at 1434.

77. *Catron County,* 75 F.3d at 1436. Because the Secretary relied on the Ninth Circuit's reasoning in *Douglas County* for its argument, the Tenth Circuit also expressly disagreed with the Ninth Circuit on the issue. *Id.*

78. *Id.*

79. *Id.* at 1437.

not enough.[80] The court noted that NEPA's fundamental purpose is to ensure that federal agencies whose proposals for action may impact the environment, make informed, carefully calculated decisions and report alternatives to affected parties before implementing the proposals.[81] By contrast, the ESA's core purpose is to "prevent the extinction of species by preserving and protecting the habitat upon which they depend from the intrusive activities of humans."[82] The court found that while the ESA's more narrow focus promotes an environmentally beneficial goal, it is not "inevitably beneficial or immune to improvement by compliance with NEPA procedure."[83]

Importantly, the court disagreed with the Ninth Circuit's narrow interpretation of how to incorporate economic and other impacts into a critical habitat designation. The Tenth Circuit found that the economic impact language in the statute was "cursory," and did not allow for an interpretation that would so limit such considerations to the extent they related to the preservation of a species, thereby negating NEPA's broader goals.[84] The court held that without NEPA's decisionmaking framework, the full realm of environmental effects issuing from critical habitat designations, as well as possible alternatives to the designations, might remain unknown.[85]

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80. *Id.* (citing 42 U.S.C. § 4332(C)).

81. *Id.*

82. *Id.* (citing 16 U.S.C. § 1531(b)).

83. *Id.* The court noted that the effects of some governmental action initially thought to be beneficial have, upon closer analysis, been determined to be environmentally harmful. *Id.* "'Even if the federal agency believes that on balance the effect [of the action] will be beneficial,' regulations promulgated by the Council on Environmental Quality (CEQ) nonetheless require an impact statement." *Id.* (citing 40 C.F.R. § 1508.27(b)(1)); *see also* Environmental Defense Fund v. Marsh, 651 F.2d 983, 993 (5th Cir. 1981).

One commentator has suggested that the FWS contention that designations of critical habitat are exempt from NEPA review is "disingenuous." Souder, *supra* note 41, at 1138.

> The [FWS] has been very disingenuous in stating that listing, designation of critical habitat, and the preparation of recovery plans in the endangered species program do not have major effects on the natural and human environment. While they may not in every-or even most-cases, the mechanisms under the NEPA process are set up to deal with the issue.

Id.

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

85. *Id.* at 1436. Managing habitat for the requirements of the spikedace and loach minnow could lead to habitat decline for the endangered southwestern willow flycatcher, a bird occupying areas of the same New Mexico habitat. 60 Fed. Reg. 10,694, 10,703 (1995) (codified at 50 C.F.R. § 17.11(h) (listings); to be codified at 50 C.F.R. § 17.95(b) (designations)); *see also* 58 Fed. Reg. 39,501 (1993). The periodic flooding required for preservation of the spikedace and loach minnow can threaten flycatcher nests, which are generally built along stream banks. 60 Fed. Reg. 10,703. If the species were not endangered and its habitat were not degraded, flooding would not be a problem. *Id.* The flycatcher was proposed for listing in 1993. 58 Fed. Reg. 39,495 (1993). No mention was made of the flycatcher in final rules designating habitat for the spikedace and loach minnow in 1994. 59 Fed. Reg. 10,898; 59 Fed. Reg. 10,906 (1994) (codified at 50 C.F.R. § 17.95(e)).

Additionally, the court responded to the Secretary's argument that no impact to the physical environment could result from a designation of critical habitat.[86] The court held that the needs of the spikedace and loach minnow for recurrent flooding could prevent government funded flood control projects and cause flood damage to County property.[87] The court suggested that following NEPA procedures would enable the parties to determine the scope of any impact.[88] The court held that eliminating NEPA compliance from actions the Secretary believes to be beneficial would leave NEPA investigating only detrimental impacts — a result unanticipated by Congress.[89]

Finally, the court rejected the Secretary's claim that congressional acquiescence to NEPA noncompliance demonstrated Congress's intent to displace NEPA with the ESA.[90] The Tenth Circuit found that both *Pacific Legal Foundation* and the Secretary's announcement in the Federal Register applied only to listings, and that Congress did not approve NEPA displacement for designations of critical habitat.[91] The court concluded

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86. *Catron County*, 75 F.3d at 1438-39. NEPA regulations note that "impacts," synonomous with "effects," of agency action include direct and indirect effects. 40 C.F.R. § 1508.8. Indirect effects are those "caused by the action and are later in time or farther removed in distance, but still reasonably foreseeable." *Id.* "Effects include ecological, . . . aesthetic, historic, cultural, econmomic, social, or health, whether direct, indirect, or cumulative." *Id.*

87. *Catron County*, 75 F.3d at 1438-39.

88. *Id.* at 1436-37.

89. *Id.* at 1437.

90. *Id.*

91. *Id.* at 1438-39. The court noted that congressional failure to "revise, unaccompanied by any evidence of congressional awareness of the interpretation, is not persuasive evidence." *Id.* at 1438 (citing Girouard v. United States, 328 U.S. 61, 69 (1946)); *see also* Thompson v. Clifford, 408 F.2d 154, 164 (D.C. Cir. 1968) ("Legislative silence cannot mean ratification unless as a minimum, the existence of the administrative practice is brought home to the legislature.") The legislative history to the ESA amendments mentions neither the *Pacific Legal Found.* ruling nor the Secretary's announcement. *See* H.R. REP. NO. 100-467, at 1-32 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2700-50.

Both the Ninth Circuit in *Douglas County* and the Tenth Circuit in *Catron County* cited a statement in the Conference Committee Report for the 1978 ESA amendments noting that actual notice of the critical habitat designation "and *any environmental assessment or environmental impact statement prepared on it* is required to be given to all local governments." H.R. CONF. REP. NO. 95-1804, at 27 (1978), *reprinted in* U.S.C.C.A.N. 9484, 9494 (emphasis added). The Ninth Circuit found the statement unclear as well as unpersuasive because it did not become part of the final statute. *Douglas County*, 48 F.3d at 1504. The Tenth Circuit found the statement persuasive in combination with other sections of the amendments' legislative history. *Catron County*, 75 F.3d at 1439.

The Tenth Circuit specifically noted a conversation between Senator McClure and Senator Wallop in the Senate debates. Senator McClure proposed an amendment that would have defined a designation of critical habitat as a major federal action. Senator Wallop opposed the amendment because not all such designations would likely be major federal actions. In withdrawing the amendment, Senator McClure emphasized his desire that the record "not indicate that, in the absence of the amendment [requiring an impact statement], there is no possibility that an EIS is required." *Catron County*, 75 F.3d at 1438 (citing 124 CONG. REC. S11,143-45 (daily ed. July 19, 1978) (Statement of Sen. McClure)). In the same conversation, Senator Wallop noted that the ESA was silent as to excep-

that Congress intended preparation of an EIS when critical habitat designations constituted major federal actions.[92] When environmental ramifications of designations are unknown, the court held that Congress intended preparation of an Environmental Assessment.[93]

ANALYSIS

The Tenth Circuit's decision requiring NEPA review for critical habitat designations preserves NEPA's integrity. It builds upon the Act's well-established framework for balancing Congress's goals of protecting critical habitat while balancing economic interests and argues persuasively that Congress intended that NEPA apply to critical habitat designations.[94] While complying with NEPA may delay habitat protection, enforcement of the ESA's other species protection provisions, including possible emergency regulations, may ameliorate adverse effects.

I. Economics and NEPA Application

By allowing an analysis of economic factors when designating critical habitat, Congress provided a proper approach for injecting NEPA's procedural safeguards into the critical habitat decisionmaking process. When deciding whether to list a species as threatened or endangered, the FWS may consider specific scientific factors and no more. Critical habitat designations are different.

The ESA's original intent was that species conservation would occur, in large part, through habitat protection.[95] As a result, the ESA requires that the designation of critical habitat occur simultaneously with the listing of a threatened or endangered species.[96] However, providing absolute protection for habitat can create serious land-use conflicts.[97] Congress recognized the potential for controversy by amending the ESA to require

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tions from NEPA for the critical habitat process. But that silence "does not prohibit suits to compel that environmental impact statements be filed under the provisions of NEPA if the action is determined to be a major Federal action." 124 CONG. REC. 21,588-89 (1978) (statement of Sen. Wallop).

92. *Catron County*, 75 F.3d at 1439. *See also supra* note 11.

93. *Id. See also supra* note 20 and accompanying text.

94. *Id.*

95. 16 U.S.C. § 1531(b).

96. *Id.* § 1533(a)(3)(A). *See also supra* note 3 (describing the limited circumstances under which concurrent designations of habitat is not required); *see also* 124 CONG. REC. 21,575 (1978) ("[T]he designation of critical habitat is more important than the designation of an endangered species itself") (statement by Sen. Jake Garn).

97. *See* Katherine Simmons Yagerman, *Protecting Critical Habitat Under the Federal Endangered Species Act*, 20 ENVTL. L. 811, 830 (1990).

the Secretary to consider economic and other relevant impacts of designating critical habitat.[98]

These amendments weakened the Act's substantive command for protecting habitat. Absent a threat of species extinction, the Secretary, in establishing critical habitat boundaries must balance factors important to human activities against the needs of a species. In expressing concerns with the amendments' effect, some members of the House, in an addendum to the House Report on the amendments, noted that "the critical habitat provision is a startling section . . . wholly inconsistent with the rest of the legislation."[99] This inconsistency opened the door for NEPA. In requiring consideration of economic and other impacts when designating critical habitat, Congress seemed motivated by a goal similar to that of NEPA — creating and maintaining "conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations."[100] However, the language failed to include an appropriate framework for analyzing the new factors to be considered when designating critical habitat. In *Catron County*, the court properly found that NEPA's procedural framework for environmental analysis, with its all-important alternatives analysis, could help meet the Secretary's responsibilities under the ESA.[101]

NEPA's fundamental purpose is to "foster excellent action" by agency decisionmakers.[102] The Act promotes that goal by requiring that agencies "rigorously explore and objectively evaluate all reasonable alternatives."[103] The ESA's focus on biological considerations in listing threatened or endangered species directly conflicts with NEPA's broad-based approach to understanding a decisions' environmental consequences.[104] In

98. 16 U.S.C. 1533(b)(2); *see also* S. REP. NO. 95-874, at 10 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9484. The Senate Report distinguishes between "areas [necessary] to extend the range of an endangered species [and] areas which are truly critical to the continued existence of a species. . . . " *Id.* Critical habitat was defined in part as that habitat in need of special management and protection, a less strict approach to protection than the FWS and the NMFS had previously been using. Before the amendments, the agencies defined critical habitat as that habitat where "any constituent element is necessary to the normal needs or survival of that species" and where reasonable expansion and recovery could occur. 41 Fed. Reg. 17,764-65 (1975).

99. H.R. REP. NO. 95-1625, at 69 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9483-84 (views of Gerry E. Studs, Norman D'Amours, Don Bonker, Joel Pritchard, David E. Bonior and Barbara Mikulski, members of the House of Representatives Merchant Marine & Fisheries Committee).

100. 42 U.S.C. § 4331(a).

101. *Catron County*, 75 F.3d at 1436.

102. 40 C.F.R. § 1500.1(c). *See also supra* notes 18-25 and accompanying text.

103. *Id.* at 1502.1.

104. 16 U.S.C. § 1533(a)(1). *See also supra* note 25 and accompanying text.

designating critical habitat, however, NEPA can supplement the ESA.[105] NEPA documents can incorporate the economic impact analysis and describe alternatives for critical habitat boundaries which include those impacts, thus providing the Secretary with a basis for choosing how to proceed. If different alternatives can work equally well to conserve a species, but one has fewer overall adverse consequences, then NEPA serves its own purpose as well as that of the ESA.

In *Catron County*, the NEPA process could help the Secretary find an alternative critical habitat designation which would conserve the spikedace and loach minnow at the lowest cost to County interests and, possibly, to the health of other species.[106] The ESA cannot "displace" NEPA, as the Ninth Circuit contended, or be the "functional equivalent" to NEPA as it concerns critical habitat designations unless it provides for a proper alternatives analysis, "the heart" of an EIS. Without NEPA, the ESA lacks the necessary framework for balancing the benefits of critical habitat to the species, against the costs of designation to economic and other interests. Without such guidance, the focus of an economic analysis is unclear.[107]

II. Congressional Intent

It also seems likely that Congress expected that NEPA would apply to critical habitat designations. The ESA's legislative history indicates that where these designations were deemed to be major federal actions, NEPA would apply.[108] The Ninth Circuit's argument that Congress acquiesced in the FWS's policy of not preparing NEPA documents for critical habitat designations is unpersuasive because it relies on authority relating to listing decisions.[109] The first such authority is *Pacific Legal Foundation*, a case dealing specifically with listings.[110] The second authority is an ambiguous

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

106. *See* 40 C.F.R. §§ 1502.16(e), 1508.20. An alternative could protect the habitat of the endangered southwestern willow flycatcher, a species sharing habitat with the spikedace and loach minnow. *See also supra* note 85.

107. For an explanation on how unclear standards led to an unclear economic analysis in the case of the northern spotted owl, see Souder, *supra* note 41 at 1120-39.

108. *See supra* note 91 and accompanying text. The ESA's legislative history, discussing the requirements for notice of critical habitat designations to people of the affected area, shows Congress's intention that in addition to giving notice of the designation itself, the FWS should also give notice of *any environmental assessment or environmental impact statement prepared on the designation.* H.R. CONF. REP. NO. 95-1804, at 27 (1978), *reprinted in* U.S.C.C.A.N. 9484, 9494 (emphasis added). The language can be interpreted to mean that Congress recognized that some critical habitat designations would require NEPA documentation, namely those determined to be major federal actions.

109. Douglas County v. Babbitt, 48 F.3d 1495, 1504 (9th Cir. 1995).

110. *Id.*

entry in the Federal Register announcing the Secretary's policy not to prepare NEPA documents for listings.[111] This entry relies in part on 1982 ESA amendments clarifying that listing decisions are restricted to purely biological criteria.[112] The focus of the entry's discussion on biological criteria relevant to listings argues against expanding the entry to encompass critical habitat designations because of their required consideration of economic impacts.[113] The Tenth Circuit assessment that both announcements of noncompliance deal only with listings, and therefore have no impact on critical habitat is a rational reading of authority.[114] The court subsequently determined that Congress did not acquiesce in any assertion that the announcements applied to critical habitat, particularly because the Secretary could not show that Congress was even aware of the announcements.[115]

In addition, the 1978 ESA amendments dealt, in large part, with a new exemption process which allowed an agency action to continue even though it would jeopardize or adversely modify the habitat of a threatened or endangered species.[116] Such an action could only be exempted following strict compliance with a number of substantive standards and procedural safeguards including contemplation of "reasonable and prudent alternatives" to the action.[117] Some House members properly pointed out that the economic analysis required for critical habitat designations was in contrast to the "laboriously constructed exemption process, with its clear standards and procedural safeguards." In the amendments, Congress specifically excluded the exemption process from NEPA compliance so long as an EIS accompanied the underlying action.[118] The latter language suggests congressional hesitancy to exempt ESA processes from NEPA compliance even when such actions implement "clear standards and procedural safeguards."

Finally, the Ninth Circuit argued that similarities between the ESA's informational notice and comment procedures, meant to inform people in areas affected by critical habitat designations of the impending action, and NEPA's EIS informational procedures, indicate that the ESA displaces NEPA.[119] This argument fails as well. If the procedures were duplicative,

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111. 48 Fed. Reg. 49,244. *See also supra* note 49 and accompanying text.

112. 48 Fed. Reg. 49,245.

113. *Catron County*, 75 F.3d at 1439.

114. *Id.*

115. *Id.* (citing H.R. REP. NO. 100-467, 1-32 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2700-50).

116. 16 U.S.C. §§ 1536(g)-(h).

117. *Id.* § 1536(h)(1).

118. *Id.* § 1536(k).

119. Douglas County v. Babbitt, 48 F.3d 1495, 1503 (9th Cir. 1995). *See also supra* note 74 and accompanying text.

any agency action requiring notice and comment rulemaking would also have a claim to NEPA exemption.

III. NEPA Compliance May Delay Habitat Protection

While the Tenth Circuit's reasoning that NEPA should apply to critical habitat designations is reasonable, requiring NEPA review for critical habitat will likely slow the designation process. The FWS is already hesitant to designate habitat.[120] The burden of producing economic analyses has, in part, stalled many designations.[121] A broader NEPA requirement, while incorporating the economic analysis, could exacerbate the problem. In addition, requiring NEPA review of economic factors at the critical habitat stage, and then possibly again upon implementation of a recovery plan[122] for a species, may be a poor utilization of personnel and fiscal resources.

In 1995, the Clinton Administration proposed a different use of money and manpower by combining critical habitat designations with approval of recovery plans for species.[123] Though combining these two

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120. As of 1991, of the 651 species listed as threatened or endangered, critical habitat had not been designated for 546 of the species. *See* GENERAL ACCOUNTING OFFICE, ENDANGERED SPECIES ACT: TYPES AND NUMBERS OF IMPLEMENTING ACTIONS 8 (1992). Illegal collecting, vandalism and tourism account for some of the Secretary's ambivalence in designating habitat. Salzman, *supra* note 30, at 335. However, criticism of designations from various quarters, governmental, environmental and business, is probably stalling most of the work. *Id.* "[C]ritical habitat can lead to serious problems with local people and creates a very hostile opposition to the species." *Id.* at 336.

121. *See supra* note 3; *see also* Salzman, *supra* note 30, at 333-37. FWS officials have testified that the necessary economic analyses have forced delays and missed deadlines. *Id.* at 337. Government officials resent the added burden of performing the economic analysis. *Id.* at 335. "A finding that designation would not be 'prudent' avoids the economic analysis requirements and associated delays, as well as heated public opposition." *Id.* at 337.

122. 16 U.S.C. § 1533(f)(1). Recovery plans are to include "site-specific management actions" and "estimates of the time and costs required to carry out those measures needed to achieve the plan's goals." *Id. See also* Gleaves and Wellman, *supra* note 35, at 160 ("[C]onsideration of economics and other factors may be most important and relevant during the recovery planning process when specific management and conservation measures are being implemented").

The FWS considers recovery plans as merely advisory documents which outline goals, objectives and recommendations for research and management and are thus categorically excluded from compliance with NEPA. *See* Jason M. Patlis, *Recovery, Conservation, and Survival Under the Endangered Species Act: Recovering Species, Conserving Resources, and Saving the Law*, 17 PUB. LAND & RESOURCES L. REV. 55, 75 (1996) (citing U.S. FISH AND WILDLIFE SERV., U.S. DEP'T OF INTERIOR, POLICY AND GUIDELINES FOR PLANNING AND COORDINATING RECOVERY OF ENDANGERED AND THREATENED SPECIES at 1-2 (1990)). The USFWS considers management actions that implement or follow from recovery plans as independent actions. *Id.* These independent actions are considered subject to NEPA review. *See* DEPARTMENT OF THE INTERIOR RECOVERY PLAN FOR THE NORTHERN SPOTTED OWL, DRAFT TITLE PAGE (April 1992).

123. PROTECTING AMERICA'S LIVING HERITAGE: A FAIR, COOPERATIVE AND SCIENTIFICALLY SOUND APPROACH TO IMPROVING THE ENDANGERED SPECIES ACT 11 (1995) [hereinafter CLINTON PLAN] (on file with the *Land and Water Law Review*).

steps would not likely speed habitat designation, it would reduce decisions on measures needed for recovery to a single process.[124] So long as economics are a part of a critical habitat designation, it seems logical to disassociate critical habitat designations from listings and combine them with recovery plans where economic factors are also considered.[125] Caution should accompany such a plan in order to protect the integrity of Congress's desire to seriously balance economic interests in the designation process.

Delay in producing documents, of course, can leave habitat and species exposed to irreversible adverse activity. While agencies prepare documents, some species protection will come from the United States Supreme Court's recent interpretation of "harm" to a species for purposes of determining unlawful species takings under section 9 of the ESA.[126] In *Babbitt v. Sweet Home Chapter of Communities for a Better Oregon*, the Court defined harm to include habitat modification on public and private land, regardless of whether the land falls under a critical habitat designation.[127] Section 7 of the ESA may also provide habitat protection where federal activities which jeopardize a species' continued existence are a result of habitat modification even though critical habitat has not been designated or is legally irrelevant for lack of federal presence in the area.[128] Also, in appropriate situations, the ESA's emergency rulemaking procedures may assist a species.[129] The Secretary can use emergency rules

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124. *Statement of Secretary of the Interior Bruce Babbitt Subcommittee on Drinking Water, Fisheries and Wildlife of the Senate Committee on Environment and Public Works on S. 191 10* (1995) (on file with the *Land and Water Law Review*).

125. 16 U.S.C. § 1533(f)(1)(B).

126. Babbitt v. Sweet Home Chapter of Communities for a Better Oregon, 115 S. Ct. 2407 (1995). *See also* Seattle Audubon Soc'y v. Moseley, 80 F.3d 1401, 1405 (9th Cir. 1996); Palila v. Hawaii Dept. of Land & Natural Resources, 639 F.2d 495 (9th Cir. 1981) (where the state of Hawaii was ordered to remove feral goats and sheep from a game management area when their overgrazing led to habitat destruction for the palila, an endangered bird; critical habitat had been designated but was irrelevant for a lack of federal lands, funds or participation in ongoing activities within the designated habitat); *see also* Mountain States Legal Found. v. Hodel, 799 F.2d 1423, 1427-28 (10th Cir. 1986).

127. *Id.* at 2418.

128. MICHAEL J. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW 335, 339 (1983) ("[A]dverse modification of any area that is in fact essential to the conservation of a listed species (whether it has been designated critical habitat or not) will also necessarily jeopardize the continued existence of the species"). *See supra* note 33 for an explanation of section 7. Section 7's no-jeopardy mandate and section 9's takings prohibition have together halted the decline of 41% of listed species by reducing threats to the species. U.S. FISH AND WILDLIFE SERV., U.S. DEP'T OF INTERIOR, REPORT TO CONGRESS: ENDANGERED AND THREATENED SPECIES RECOVERY PROGRAM 32 (1994).

129. 50 C.F.R. § 424.20. Publication in the Federal Register of such an emergency rule shall provide detailed reasons why the rule is necessary. *See* City of Las Vegas v. Lujan, 891 F.2d 927 (D.C. Cir. 1989) (emergency regulations implemented to list the Mojave Desert population of the desert tortoise.). *See also* 47 Fed. Reg. 19,995-999 (1982) (codified at 50 C.F.R. § 17.11(h)) (emer-

by defining a "significant risk to the well-being of a species of fish, wildlife, or plant."[130] Under the rules, an "emergency" critical habitat designation would become effective upon publication in the Federal Register.[131]

This combination of protections could adequately protect species while the agency prepares NEPA documents. Nonetheless, the FWS should be diligent in fulfilling its NEPA requirements as quickly as possible. Early identification of critical habitat not only serves species, but also aids landowners and other interest groups by informing them as quickly as possible of the areas in which their activities may be restricted.[132]

CONCLUSION

NEPA mandates procedures for agencies to use in examining the environmental consequences of their actions. The Act requires agencies to consider alternatives to their actions and helps agencies make better decisions.[133] In setting the limits of critical habitat for threatened and endangered species under the ESA, the Secretary is required to consider the economic and any other relevant impact of its habitat designations.[134] NEPA can help agencies develop alternatives which protect species while still allowing for consideration of economic and other impacts.

However, requiring NEPA compliance may delay such designations. The FWS should therefore be diligent in performing their NEPA responsibilities. In the meantime, active enforcement of other sections of the ESA can work to prevent adverse habitat modification. In some cases, emergency regulations may be necessary to preserve necessary habitat.

JIM DAVIS

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gency determinations of endangered status for Ash Meadows speckled dace and Ash Meadows Amargosa pupfish, where imminent land development threatened integrity of the species' habitat).

130. 50 C.F.R. § 424.20.

131. *Id.*

132. *See supra* note 33. Only federal activities or private activities with a federal nexus are restricted within critical habitat boundaries. 50 C.F.R. § 402.03.

133. *See supra* note 22 and accompanying text.

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