

CHAPTERS

REVITALIZING CRITICAL HABITAT: THE NINTH CIRCUIT'S PRO-EFFICIENCY APPROACH

BY

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The Ninth Circuit Court of Appeals' recent decisions in Bear Valley Mutual Water Co. v. Jewell and Building Industry Ass'n of the Bay Area v. U.S. Department of Commerce speak to the court's interest in promoting discretionary and efficient critical habitat designations under the Endangered Species Act. This Chapter explores how the Ninth Circuit permitted the United States Fish & Wildlife Service and National Marine Fisheries Service to efficiently designate critical habitat by refusing to impose a series of unnecessary and atextual procedural barriers on the designation process. This Chapter argues that, as a matter of both proper statutory interpretation and sound environmental policy, the Ninth Circuit should encourage the Services to designate critical habitat by ensuring that critical habitat designations are both efficient and affordable. Finally, this Chapter concludes that the courts should play a more meaningful role in promoting critical habitat designations, which are essential to the full recovery of threatened and endangered species.

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I. INTRODUCTION

The Endangered Species Act of 1973 (ESA)¹ passed into law in a time of sudden enlightenment. In the late 1960s and early 1970s, Americans awoke to the bleak reality of environmental devastation occurring across the country, the result of unchecked degradation of the air, land, and water spurred by the industrial boom of the previous several decades. Congress moved swiftly to combat this threat, passing within eleven years nearly all of the foundational environmental statutes that guide environmental decision making today.² While Congress primarily focused on protecting and restoring natural resources,³ it also recognized that plants and animals were disappearing at alarming rates, and that mass extinction loomed in the not-too-distant future.⁴ Congress realized that the damage done to these

¹ 16 U.S.C. §§ 1531–1544 (2012).

² Statutes passed or dramatically expanded throughout the decade included the National Environmental Policy Act of 1969 (NEPA) Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321–4370h (2012)); the Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401–7671q (2012)); the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1387 (2012)) (commonly known as the Clean Water Act); the Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901–6992k (2012)); and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601–9675 (2012)). Other more narrowly focused statutes were passed during the 1970s and early 1980s as well. *E.g.*, Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 447 (codified as amended at 30 U.S.C. §§ 1201–1328 (2012)).

³ Congress designed the majority of environmental statutes passed at this time to regulate and control particular resources such as air or water, or to regulate a particular industry such as surface mining or pesticide application. *See* statutes cited *supra* note 2.

⁴ 16 U.S.C. § 1531(a)(1)–(2) (2012) (“[Congress declares that] various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;” and

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imperiled species would be irreparable if left unchecked,⁵ and so the ESA was born. Frequently referred to as the “pit bull” of environmental law,⁶ the ESA not only protects endangered species from extinction, but also aims to pull those species back from the brink of extinction and to the point where they once again thrive.⁷ Most profoundly of all, the ESA mandates the preservation of endangered species no matter the cost.⁸ The threat of extinction has the potential to bring multimillion dollar projects to a grinding halt, render prime real estate undevelopable, and potentially elevate the life of the most humble and unassuming creatures above all other considerations.⁹

Protection under the ESA begins with a “listing” decision, which designates a species as either “threatened” or “endangered.”¹⁰ The United States Fish and Wildlife Service (FWS) and the National Marine Fishery Service (NMFS) (collectively, the Services) coadminister the ESA and make listing decisions for species placed under their respective jurisdictions.¹¹

“other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction.”).

⁵ See, e.g., H.R. REP. NO. 93-412, at 4 (1973) (“Our ability to destroy, or almost destroy, all intelligent life on the planet became apparent only in this generation. . . . [I]t appears that the pace of disappearance of species is accelerating. As we homogenize the habitats in which these plants and animals evolved. . . we threaten their—and our own—genetic heritage.”).

⁶ Amy Sinden, *The Economics of Endangered Species: Why Less is More in the Economic Analysis of Critical Habitat Designations*, 28 HARV. ENVTL. L. REV. 129, 139 (2004).

⁷ 16 U.S.C. § 1532(3) (2012) (explaining that the ESA intends relevant agencies to exercise “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.”).

⁸ See *Tenn. Valley Auth. v. Hill (TVA v. Hill)*, 437 U.S. 153, 184 (1978) (“The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.”). The so-called “God Squad,” established by the 1978 amendments to the ESA, can exempt agency action from ESA compliance. 16 U.S.C. §§ 1536(h)–(n) (2012). But in the nearly 40 years since its creation, the God Squad has so rarely employed its authority that the exemption has been deemed a “non-factor” for all intents and purposes. See J. Peter Byrne, *Precipice Regulations and Perverse Incentives: Comparing Historic Preservation Designation and Endangered Species Listing*, 27 GEO. INT’L ENVTL. L. REV. 343, 389–90 (2015).

⁹ The most famous, but by no means only, example is *TVA v. Hill*, in which the Supreme Court halted a \$100-million dam project to save the critical habitat of the snail darter, a critically endangered species of perch. 437 U.S. at 172. The project was well underway when the Court finally enjoined it. *Id.* at 157–58. For an in-depth discussion of the opinion, see Zygmunt J.B. Plater, *A Jeffersonian Challenge from Tennessee: The Notorious Case of the Endangered “Snail Darter” Versus TVA’s Tellico Dam—And Where was the Fourth Estate, the Press?*, 80 TENN. L. REV. 501 (2013). The so-called God Squad has the authority to allow such projects to go ahead despite obvious and irreversible harms to listed species, but God Squad exemptions are basically a nonfactor. See sources cited *supra* note 8.

¹⁰ 16 U.S.C. § 1533(a) (2012).

¹¹ For any federal action that may affect a threatened or endangered species (or its habitat), the agency contemplating the action (the action agency) must consult with FWS or NMFS. *Id.* at § 1536(a)(2). NMFS is the consulting agency for marine and anadromous species, while FWS is generally responsible for terrestrial and freshwater species. J.B. Ruhl, *The Battle Over Endangered Species Act Methodology*, 34 ENVTL. L. 555, 557 n.5 (2004). This Chapter discusses critical habitat designation in a broad sense, and so frequently refers to the Services

Once listed, species receive a host of protections, including for habitat.¹² In fact, the ESA places a premium on preserving habitat, such that the first stated “purpose” is to “provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved.”¹³ To that end, the ESA contemplates that listing will, with few exceptions, result in a concurrent designation of “critical habitat.”¹⁴ However, for many years, the critical habitat provision has been given short shrift, and many listed species have not received the extra protections provided by designation.¹⁵ That trend is starting to swing in the other direction,¹⁶ but comprehensive designation and protection of critical habitat remains elusive.¹⁷

With two back-to-back decisions issued in the summer of 2015, the United States Court of Appeals for the Ninth Circuit expanded the Services’ discretionary authority to designate critical habitat in an efficient and straightforward manner. In *Bear Valley Mutual Water Co. v. Jewell* (*Bear Valley*),¹⁸ the court upheld FWS’s decision to designate critical habitat for the Santa Ana Sucker, an endangered species of freshwater fish, in California’s Santa Ana River despite vociferous opposition from municipalities and water districts within the affected area.¹⁹ The appellants, local water management

collectively rather than discussing FWS and NMFS separately. The same arguments in favor of designating critical habitat discussed throughout this Chapter apply to both agencies. In addition, the Ninth Circuit decisions highlighted in this Chapter address the obligations under the ESA of both FWS and NMFS. However, this Chapter also highlights FWS at various points because historically FWS has been far more reluctant to designate critical habitat for listed species and thus has borne the brunt of litigation from environmental interest groups hoping to make the critical habitat provision a more potent tool in the fight to save endangered species. See Josh Thompson, Comment, *Critical Habitat Under the Endangered Species Act: Designation, Re-Designation, and Regulatory Duplication*, 58 ALA. L. REV. 885, 894 (2007) (discussing FWS’s general resistance to designating critical habitat).

¹² Listing ensures that federal projects will not “jeopardize” listed species, 16 U.S.C. § 1536(a)(2) (2012), and prevents both public and private entities or individuals from “taking” endangered species, *id.* § 1538(a)(1)(B). Listing also means that “adverse modification” of critical habitat is forbidden. *Id.* § 1536(a)(2). Adverse modification is discussed *infra* Part II.

¹³ 16 U.S.C. § 1531(b) (2012).

¹⁴ H.R. REP. NO. 95-1625, at 17 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 9453, 9467 (“The committee intends that in most situations the Secretary will, in fact, designate critical habitat at the same time that a species is listed as either endangered or threatened. It is only in rare circumstances where the specification of critical habitat concurrently with the listing would not be beneficial to the species.”).

¹⁵ Thomas F. Darin, Comment, *Designating Critical Habitat Under the Endangered Species Act: Habitat Protection Versus Agency Discretion*, 24 HARV. ENVTL. L. REV. 209, 223–24 (2000) (discussing the lack of critical habitat designations for listed species despite clear congressional recognition of the importance of designating habitat).

¹⁶ See Ctr. for Biological Diversity, *Protecting Critical Habitat*, http://www.biologicaldiversity.org/programs/biodiversity/endangered_species_act/protecting_critical_habitat/index.html (last visited July 16, 2016) [hereinafter Ctr. For Biological Diversity, *Protecting Critical Habitat*] (discussing actions the Center for Biological Diversity is taking to increase listing activity).

¹⁷ See Daniel J. Rohlf, *The Endangered Species Act at Forty: The Good, the Bad, and the Ugly*, 20 ANIMAL L. 251, 270–73 (2014) [hereinafter Rohlf, *The Good, the Bad and the Ugly*] (discussing the Services’ reticence to address issues associated with critical habitats).

¹⁸ 790 F.3d 977 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 799 (2016).

¹⁹ *Id.* at 981.

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authorities, charged that FWS failed to cooperate with state and local authorities regarding water resource concerns prior to designating the habitat, despite a “policy” within the ESA indicating a congressional preference for such cooperation.²⁰ The appellants also argued that FWS failed to comply with the National Environmental Policy Act (NEPA)²¹ by declining to prepare an Environmental Impact Statement (EIS) prior to designating habitat for the sucker.²² The Ninth Circuit rebuffed these complaints, holding that FWS had fully complied with its statutory responsibilities.²³ Then, in *Building Industry Ass’n of the Bay Area v. U.S. Department of Commerce (Building Industry)*,²⁴ the Ninth Circuit built off of the foundation laid in *Bear Valley* to further expand the Services’ discretionary authority to designate habitat.²⁵ In that case, several home-development industry groups sued NMFS for designating critical habitat for the green sturgeon within California’s Sacramento–San Joaquin Delta and the Sacramento River Basin without adequately weighing the adverse economic impacts of the designation against the benefits to species recovery.²⁶ The Ninth Circuit determined, however, that the ESA did not mandate a strict cost-benefit analysis (CBA), and held that NMFS had adequately considered cost prior to designating the habitat.²⁷

This Chapter explores three important holdings within those Ninth Circuit decisions. First, the Ninth Circuit reaffirmed *Douglas County v. Babbitt*,²⁸ in which the Ninth Circuit held that the Services do not need to comply with NEPA when designating critical habitat.²⁹ In *Douglas County*, the court explained that critical habitat designations do not impact the environment as understood under NEPA.³⁰ Despite a circuit split over the question,³¹ the Ninth Circuit in *Bear Valley* refused to overturn its earlier holding and continued to insulate critical habitat designations from the NEPA process.³² This holding will enable the Services to avoid the time and expense of adequate NEPA compliance, thus making critical habitat designations faster and more affordable.

Second, the Ninth Circuit determined that the Services have no independent substantive duty to “cooperate” with state and local authorities

²⁰ *Id.* at 987.

²¹ National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2012).

²² *Bear Valley*, 790 F.3d at 994.

²³ *Id.* at 981.

²⁴ 792 F.3d 1027 (9th Cir. 2015).

²⁵ *Id.* at 1029.

²⁶ *Id.* at 1028–29.

²⁷ *Id.* at 1029.

²⁸ 48 F.3d 1495, 1502 (9th Cir.1995).

²⁹ *Bear Valley*, 790 F.3d 977, 994 (9th Cir. 2015).

³⁰ *Douglas Cty.*, 48 F.3d at 1505.

³¹ *See* *Catron Cty. Bd. of Comm’rs v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1439 (10th Cir. 1996) (holding that Congress intended for the Services to prepare an Environmental Assessment (EA) pursuant to NEPA leading to a Finding of No Significant Impact (FONSI) or EIS whenever designating critical habitat).

³² *Bear Valley*, 790 F.3d at 994.

to resolve water resource concerns when designating critical habitat.³³ While the ESA includes a congressional policy that the Services should cooperate with local authorities to resolve water resource concerns,³⁴ the court concluded that the policy was inoperative because Congress chose not to supplement the policy with substantive mandates.³⁵ Instead, the court held that the Services acted in accordance with the policy by following the general procedures regarding notice to local authorities included elsewhere in the ESA.³⁶ This holding will allow the Services to exercise more discretion when designating habitat and will ensure that antagonistic local authorities cannot derail the designation process by arguing that the Services failed to cooperate sufficiently.

Finally, the Ninth Circuit rejected the argument that the Services must engage in strict CBA prior to designating critical habitat.³⁷ The court explained that the Services must look at cost as an element in their designation decisions, but are never legally required to exclude habitat from designation even when the economic impacts of designation may be high.³⁸ Strict CBA is an expensive and time-consuming endeavor, the results of which would almost certainly favor the quantifiable “cost” of designation over the more intangible “benefit” of protecting habitat. Unconstrained by strict CBA, the Services can take a fuller range of values and priorities into account when designating critical habitat.

In *Bear Valley* and *Building Industry* the Ninth Circuit provided the Services with meaningful leeway to more efficiently and affordably designate critical habitat. The two cases discussed in this Chapter should encourage the Services to proactively designate critical habitat in order to better effectuate the recovery of all listed species, and should allow the Services to fulfill their statutory obligations faster and more affordably than under the more onerous regulatory schemes advanced by designation opponents. By explicitly freeing the Services from various administrative constraints, the Ninth Circuit finessed a key component of the ESA into a more workable, and therefore more powerful, tool for species recovery.

Part II of this Chapter provides background on the application and importance of critical habitat designations under the ESA. Part III explores the Ninth Circuit’s holdings in *Building Industry* and *Bear Valley*, discussing how those decisions allow the Services to designate critical habitat in a more efficient and discretionary manner.

³³ *Id.* at 987–88.

³⁴ ESA, 16 U.S.C. § 1531(c)(2) (2012).

³⁵ *Bear Valley*, 790 F.3d at 987.

³⁶ *Id.* at 987–88. *See* 16 U.S.C. § 1533(b)(5)(A)(ii) (2012) (requiring the Services to provide notice to relevant local authorities prior to designating habitat, and allowing relevant local authorities to submit comments to the Services regarding the designation); *id.* § 1533(i) (requiring the Services to provide a “written justification” for designation decisions inconsistent with comments filed by relevant state agencies).

³⁷ *Building Industry*, 792 F.3d 1027, 1033 (9th Cir. 2015).

³⁸ *Id.*

II. CRITICAL HABITAT DESIGNATIONS: BACKGROUND AND IMPORTANCE

A. Statutory Mechanics: How the Services (Should) Designate Critical Habitat

The ESA is in no small part built upon a recognition that habitat destruction is one of the most significant causes of species extinction worldwide.³⁹ An emphasis on preserving habitat permeates the ESA, beginning with an explicit assertion that the ESA serves as an instrument by which “the ecosystems upon which endangered species and threatened species depend may be conserved.”⁴⁰ An essential tool in achieving that goal is the designation and conservation of critical habitat. The ESA defines critical habitat as “specific areas within the geographical area occupied by the species . . . 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.”⁴¹ Critical habitat is habitat that a species needs to both survive and to recover, which is the ESA’s ultimate goal.⁴² The ESA anticipates that, in nearly all cases, the Services will designate critical habitat at the same time a species is listed.⁴³ The Services should designate critical habitat “to the maximum extent prudent and determinable,”⁴⁴ and it is imprudent only if “[t]he species is threatened by taking or other human activity, and designation of critical habitat can be expected to increase the degree of such threat to the species, or . . . [s]uch designation of critical habitat would not be beneficial to the species.”⁴⁵ Designation should almost always be “prudent” as a designation will almost always be beneficial to the listed species in both direct and indirect ways.⁴⁶ Finally, a habitat must be designated as critical if failure to do so will result in extinction, regardless of how imprudent a designation would otherwise be.⁴⁷

Once the Services designate a critical habitat, federal agencies shall, through formal consultation with the Services under section 7 of the ESA,

³⁹ 119 CONG. REC. 30,166 (1973) (statement of Rep. Annunzio (D-Ill)) (explaining that the ESA is a response to endangerment and extinction caused by “man’s interference with natural habitats, . . . his greed, and because he fouls the air and the waters.”).

⁴⁰ 16 U.S.C. § 1531(b) (2012).

⁴¹ *Id.* § 1532(5)(A)(i).

⁴² *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004) (“[T]he ESA was enacted not merely to forestall the extinction of species . . . but to allow a species to recover to the point where it may be delisted. . . . [T]he purpose of establishing ‘critical habitat’ is for the government to carve out territory that is not only necessary for the species’ survival but also essential for the species’ recovery.”).

⁴³ H.R. REP. NO. 95-1625, at 17 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 9453, 9467 (explaining that, in most cases, “critical habitat [must be designated] at the same time that a species is listed” and that “it is only in rare circumstances where the specification of critical habitat concurrently with the listing would not be beneficial to the species.”).

⁴⁴ 16 U.S.C. § 1533(a)(3) (2012).

⁴⁵ 50 C.F.R. § 424.12(a)(1)(i)–(ii) (2015).

⁴⁶ *See infra* Part II.C.

⁴⁷ 16 U.S.C. § 1533(b)(2) (2012).

ensure that their actions will likely not “result in the destruction or adverse modification of [designated] habitat.”⁴⁸ “Destruction or adverse modification” may occur when a critical habitat is modified such that a species’ chances of recovery are threatened.⁴⁹ While critical habitat designations are primarily useful under section 7, which regulates federal action, there are overlaps with section 9 as well, which prohibits public and private entities on public and private land from “taking” a listed species.⁵⁰ Taking includes causing “harm” to members of a listed species through modifying or degrading habitat.⁵¹ Although a take can occur through the degradation of even undesignated habitat, actions that impact critical habitat deserve more scrutiny because harm to listed species is likely to result from those actions.⁵²

B. Legislative History

The ESA was a sweeping effort to curb the mass extinction of species worldwide.⁵³ The Act’s legislative history is replete with statements recognizing an “ethical and moral duty” to protect species,⁵⁴ and decrying endangerment caused by “man’s interference with natural habitats, . . . his greed, and because he fouls the air and the waters.”⁵⁵ Support for the ESA coalesced around an explicit recognition of man’s direct role in environmental devastation and habitat destruction, which in turn was a primary cause of species endangerment and extinction.⁵⁶ As one Representative explained with almost reproachful language, “[man’s]

⁴⁸ *Id.* § 1536(a)(2) (requiring that for any federal action that may affect a threatened or endangered species (or its habitat), the agency contemplating the action must consult with the Services).

⁴⁹ *Gifford Pinchot Task Force*, 378 F.3d 1059, 1070 (9th Cir.), amended by 387 F.3d 968 (9th Cir. 2004) (quoting 16 U.S.C. § 1536(a)(2) (2000)).

⁵⁰ 16 U.S.C. § 1538(a) (2012).

⁵¹ Katherine Simmons Yagerman, *Protecting Critical Habitat Under the Federal Endangered Species Act*, 20 ENVTL. L. 811, 845 (1990) (“[S]ection 9, like section 7, prohibits adverse modification of critical habitat.”).

⁵² James Salzman, *Evolution and Application of Critical Habitat Under the Endangered Species Act*, 14 HARV. ENVTL. L. REV. 311, 329 (1990) (“Takings analysis [pursuant to ESA section 9] has not become identical to adverse modification, but the similarity of the two standards . . . is striking. The strong influence of critical habitat analysis on takings analysis has broad-ranging implications. [Ninth Circuit case law] absorbs critical habitat’s adverse modification prohibition into section 9. This strengthens the prohibition by effectively applying section 7 through section 9 to non-federal actions in designated critical habitat.”).

⁵³ *TVA v. Hill*, 437 U.S. 153, 184 (1978) (“The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.”); See George Cameron Coggins, *An Ivory Tower Perspective on Endangered Species Law*, NAT. RESOURCES & ENV’T, Summer 1993, at 3 (1993) (“The legislature . . . intentionally phrase[d] the most important provisions of the ESA in sweeping and near-absolute terms.”).

⁵⁴ Sinden, *supra* note 6, at 142.

⁵⁵ 119 CONG. REC. 30,166 (1973) (statement of Rep. Annunzio (D-Ill.)).

⁵⁶ John Charles Kunich, *The Fallacy of Deathbed Conservation Under the Endangered Species Act*, 24 ENVTL. L. 501, 503–04 (1994).

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technologies and our blind desire for ‘progress’ enabled us to interrupt the rhythm of nature.”⁵⁷ In response to “[man’s] unnatural[] interfere[nce] in the natural process of evolution,”⁵⁸ the ESA was a “significant step toward righting a serious wrong. Simply stated: many of the thousands of animal species which have disappeared from the face of the Earth have gone because of the interference of mankind.”⁵⁹ And, as one House Report advocating for the ESA warns:

Our ability to destroy . . . all intelligent life on the planet has become apparent only in this generation. . . .

. . . . As we homogenize the habitats in which these plants and animals evolve, and as we increase the pressure for products that they are in a position to supply (usually unwillingly) we threaten their—and our own—genetic heritage.⁶⁰

The moral undertone of these admonitions is unmistakable and necessarily permeates the ESA.⁶¹ The Congressional Record is replete with indications that the Act’s supporters saw the ESA as reflecting a necessary change in the “philosophy . . . adopted to protect and perpetuate our natural heritage.”⁶² Wonton exploitation and destruction of habitat was a danger that Congress was thus eager to mitigate.

Despite Congress’s obvious interest in protecting the habitats of listed species, the 1973 version of the Act did not define critical habitat, or contain clear directions regarding critical habitat designations.⁶³ That changed in 1978 when Congress amended the ESA following the famous (and infamous) *Tennessee Valley Authority v. Hill (TVA v. Hill)*⁶⁴ decision, in which the Supreme Court read the ESA in the strictest possible terms to bring a multimillion dollar, near-complete dam project to a grinding halt because it seemed that the project would completely destroy the habitat of an endangered species of perch called the snail-darter.⁶⁵ Congress’s amendments in the wake of that decision fleshed out the ESA’s procedural

⁵⁷ 119 CONG. REC. 30,166 (1973) (statement of Rep. Annunzio).

⁵⁸ *Id.* (statement of Rep. Harrington (D-Mass.)).

⁵⁹ *Id.* (statement of Rep. Annunzio).

⁶⁰ H.R. REP. NO. 93-412, at 4 (1973).

⁶¹ *See TVA v. Hill*, 437 U.S. 153, 184 (1978) (“The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected . . . in literally every section of the statute.”); Kunich, *supra* note 56, at 528 (“Although most people accept the propriety of human use of other species, they would draw the line at exploiting these species into extinction. This moral duty may be seen as an obligation to refrain from ‘murdering’ another species, because that species has in some sense a right to exist.”); Sinden, *supra* note 6, at 142–43 (discussing Congress’s “high minded and idealistic” mood when passing the ESA).

⁶² 119 CONG. REC. 30,167 (1973) (statement of Rep. Clausen (R-Cal.)).

⁶³ Yagerman, *supra* note 51, at 828.

⁶⁴ 437 U.S. 153 (1978).

⁶⁵ *Id.* at 171–72.

requirements, including those related to critical habitat.⁶⁶ The Amendments made clear that the Services should designate habitat concurrently with listing a species whenever prudent, and that scientific factors and the economic impacts of designation were relevant in establishing the extent of a designation.⁶⁷ In addition, the Amendments clarified the requisite time frame for designating critical habitat, and in doing so, suggested that designations should be fairly efficient, timely, and unencumbered by procedures outside the Act itself.⁶⁸

The 1978 Amendments are extensive, but Congress still expected critical habitat designations to be the norm,⁶⁹ and still believed that protecting critical habitat was a crucial component of the ESA's overarching goals, emphasizing, much as it had in 1973, that "loss of habitat [is] the major cause for the extinction of species worldwide."⁷⁰ Congress did not intend to limit the Services' authority to designate critical habitat—although Congress did intend to cabin that ability to a certain extent with the imposition of more detailed procedures.⁷¹ In short, the 1978 amendments altered the procedures with which the Services designate critical habitat, but did not undermine the efficacy of critical habitat designations for pursuing species preservation and recovery.⁷²

C. Why Critical Habitat Designations Matter

Critical habitat designations are a key component of the ESA and ought to be treated as a necessary tool for effectuating the goal of reversing endangerment and extinction.⁷³ When meaningfully employed, designations provide several important protections to listed species, the absence of which make conservation and recovery efforts more challenging.⁷⁴ For example,

⁶⁶ Sinden, *supra* note 6, at 145–47.

⁶⁷ Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, sec. 11, § 7, 92 Stat. 3751, 3766 (codified as amended at 16 U.S.C. § 1533(b)(2) (2012)).

⁶⁸ Sinden, *supra* note 6, at 157–58.

⁶⁹ H.R. REP. No. 95-1625, at 17 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 9453, 9467 (explaining that, in most cases, "critical habitat [must be designated] at the same time that a species is listed" and that "it is only in rare circumstances where the specification of critical habitat concurrently with the listing would not be beneficial to the species."); *N. Spotted Owl v. Lujan*, 758 F. Supp. 621, 626 (W.D. Wash. 1991) ("[The ESA's] legislative history leaves little room for doubt regarding the intent of Congress: The designation of critical habitat is to coincide with the final listing decision absent extraordinary circumstances.").

⁷⁰ H.R. REP. No. 95-1625, at 5 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 9453, 9455.

⁷¹ Sinden, *supra* note 6, at 147–50.

⁷² *Id.*

⁷³ Oliver A. Houck, *The Endangered Species Act and its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277, 308–15 (1993) (discussing the designation of several critical habitats).

⁷⁴ *Id.*; Petition for Rulemakings from the Ctr. for Biological Diversity to the U.S. Dept. of Interior and the U.S. Fish & Wildlife Serv. (Jan. 22, 2015) [hereinafter Petition for Rulemakings], available at https://www.biologicaldiversity.org/campaigns/freshwater_mussels/pdfs/CBD_Critical_Habitat_petition_for_9_northeast_species.pdf ("[A]t its most basic, designating critical habitat does benefit the vast and overwhelming number of listed species beyond the Section 7

designations provide notice to government agencies and private actors of the existence and importance of the habitat.⁷⁵ With more parties on notice the more likely it is that habitat will receive the consideration and protection that it deserves. Investors may seek to develop projects in less legally problematic areas, government agencies will be sure to consult with the Services prior to committing resources to projects within the habitat, and agencies involved in restoration and conservation efforts will be more aware of areas worth their attention.⁷⁶

Designated critical habitat may also influence the section 7 consultation process in beneficial ways. First, the presence of designated habitat helps indicate when section 7 consultation is necessary because it highlights areas of concern for the Services.⁷⁷ In addition, designations on private land ensure that section 7 consultation occurs in the event of future federal projects on that land.⁷⁸ Second, the Services appear to recommend more environmental protections and more significant mitigation efforts during section 7 consultations when the proposed action impacts designated critical habitat than when the proposed action might “jeopardize” a listed species in nondesignated habitat.⁷⁹ Critical habitat, once designated, can therefore alter how the Services think about their responsibilities toward the species in question, which, in turn, can lead to greater protections and greater oversight over potentially harmful federal actions.

If the Services shirk their duty to protect listed species, designated habitat may provide a “legal foothold” for advocates seeking more thoughtful consideration of the needs of those species.⁸⁰ Once the Services designate habitat, courts are more likely to constrain incursions into those areas.⁸¹ By contrast, courts appear more permissive and less eager to issue injunctions when hearing challenges to projects that will undeniably have an adverse impact on a listed species’ habitat when there is no critical habitat

jeopardy prohibition. Even on private lands where they may not always be a Federal nexus triggering consultations, designating critical habitat provides several important benefits.”)

⁷⁵ Amy Armstrong, *Critical Habitat Designations Under the Endangered Species Act: Giving Meaning to the Requirements for Habitat Protection*, 10 S.C. ENVTL. L.J. 53, 76 (2002); Petition for Rulemakings, *supra* note 74, at 7. According to FWS, critical habitat designations are useful because they provide “clear notification to Federal agencies and public of the existence and importance of critical habitat.” Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for the Pacific Coast Population of the Western Snowy Plover, 60 Fed. Reg. 11,768, 11,773 (proposed Mar. 2, 1995) (to be codified at 50 C.F.R. pt. 17). Similarly, NMFS has indicated that one of the purposes of a designation is to inform “agencies, private entities, and the public of . . . the boundaries of the habitat and protection provided by that habitat.” Endangered and Threatened Wildlife and Plants; Critical Habitat Determination for the Delta Smelt, 59 Fed. Reg. 65,256, 65,272 (Dec. 19, 1994) (codified at 50 C.F.R. pt. 17).

⁷⁶ Armstrong, *supra* note 75, at 76.

⁷⁷ See Steven G. Davison, *Federal Agency Action Subject to Section 7(a)(2) of the Endangered Species Act*, 14 MO. ENVTL. L. & POL’Y REV. 29, 35–36 (2006) (noting that the ESA defines “critical habitat” to mean specific areas essential to the conservation of a species).

⁷⁸ Petition for Rulemakings, *supra* note 74, at 7.

⁷⁹ Houck, *supra* note 73, at 311.

⁸⁰ Jack McDonald, Comment, *Critical Habitat Under the Endangered Species Act: A Road to Recovery?*, 28 ENVTL. L. 671, 688 (1998).

⁸¹ Houck, *supra* note 73, at 309.

designation.⁸² Environmental advocates can therefore point to compelling precedent when arguing that courts should require the Services to protect designated habitat more assiduously, but may have a harder time making the same case when nondesignated habitat is put at risk.⁸³

Finally, the ESA's prohibition against "adverse modification" only applies to designated habitat, and that standard may be easier to prove in court than the ESA's more nebulous prohibition against "jeopardizing" listed species.⁸⁴ Adverse modification, in contrast to jeopardy, will usually be physically apparent and may be easier for environmental advocates to quantifiably demonstrate in court when arguing for more substantial protections for listed species.⁸⁵ In addition, courts might be more willing to agree that a section 9 take has occurred, either on public or private land, if critical habitat is involved because courts can more easily presume that the loss of critical habitat will cause the requisite degree of harm needed to find a take.⁸⁶ Designations therefore have the potential to constrain even private actions.⁸⁷ Finally, the rhetorical power of the phrase critical habitat aids environmental groups when fundraising or engaging in public outreach.⁸⁸ At the end of the day, it boils down to this simple truism: "critical habitat is beneficial, and it *is* beneficial because it protects the potential for species *recovery*."⁸⁹

D. The Services Have Not Adequately Designated Critical Habitat

Despite the importance that Congress and the courts have placed on critical habitats, habitat designations have long proved contentious.⁹⁰ In part, this acrimony can be attributed to FWS and its long-standing tendency to find critical habitat designations "not prudent."⁹¹ FWS historically justified "imprudence findings" by insisting that critical habitat designations provided no benefit to listed species beyond what other provisions of the ESA already supplied.⁹² Instead, FWS deemed it prudent to designate habitat only when, in its determination, the habitat was necessary for both the recovery *and*

⁸² *Id.* at 309–10.

⁸³ *Id.* at 310.

⁸⁴ Armstrong, *supra* note 75, at 58–59.

⁸⁵ *Id.*

⁸⁶ The term "take" is defined to mean "to harass, harm, pursue, hunt, shoot, wound, kill, capture, or collect, or to attempt to engaged in any such conduct." ESA, 16 U.S.C. § 1532(19) (2012). The ESA prohibits the "taking" of endangered species. *Id.* § 1538. McDonald, *supra* note 80, at 690.

⁸⁷ Petition for Rulemaking, *supra* note 74, at 7.

⁸⁸ Salzman, *supra* note 52, at 330.

⁸⁹ Houck, *supra* note 73, at 315. See Ctr. For Biological Diversity, *The Endangered Species Act: A Wild Success*, http://www.biologicaldiversity.org/campaigns/esa_wild_success/ (last visited July 16, 2016) ("[I]mperiled species with federally protected protected [sic] critical habitat are twice as likely to be recovering as those without.").

⁹⁰ Salzman, *supra* note 52, at 335–38.

⁹¹ Darin, *supra* note 15, at 224.

⁹² Rohlf, *The Good, the Bad and the Ugly*, *supra* note 17, at 270–71.

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survival of the species.⁹³ FWS therefore found that, because most designations might be beneficial to a listed species' recovery but not essential to its survival, designations would not benefit the species in question.⁹⁴ That approach ensures that habitat is designated in only rare circumstances, because, in most cases, nondesignation will not inevitably lead to extinction.⁹⁵ Nonetheless, a decision not to designate habitat often will hinder recovery, and thus undermine the ESA's primary purpose.⁹⁶

Over time, environmental advocates have won various court victories and convinced FWS to enter into settlement agreements that have, in the aggregate, somewhat whittled away FWS's ability to abstain from critical habitat designations.⁹⁷ Critical habitat designations appear to be on the rise.⁹⁸ While less than half of listed species enjoy the added protections of a critical habitat designation,⁹⁹ it appears that the Services may designate habitat more proactively in the future.¹⁰⁰ Whether the Services will continue to designate habitat and take the necessary next steps to making those designations meaningful remains to be seen.

III. *BEAR VALLEY* AND *BUILDING INDUSTRY*: THE NINTH CIRCUIT'S AFFIRMATION OF DISCRETIONARY AND EFFICIENT CRITICAL HABITAT DESIGNATIONS.

As discussed in the preceding Part, the ESA expressly recognizes the need for meaningful habitat preservation, and critical habitat designations are an important tool in accomplishing that goal.¹⁰¹ In *Bear Valley* and *Building Industry*, the Ninth Circuit expanded the Services' discretion to designate critical habitat, and ensured that designations can occur more efficiently. Specifically, the court held that: A) NEPA does not apply to critical habitat designations; B) the ESA's policy of cooperation between the Services and state and local officials over water resource issues does not create an independent substantive mandate or cause of action; and C) the ESA does not mandate that the Services engage in strict CBA prior to designating critical habitat. These decisions collectively make critical habitat designations a more useful tool for aiding in the recovery of listed species.

⁹³ *Id.* at 271–72.

⁹⁴ *Id.*

⁹⁵ Darin, *supra* note 15, at 223–24.

⁹⁶ *See supra* Part II.C (discussing ways in which critical habitat designations aid species recovery).

⁹⁷ *See, e.g.*, Ctr. for Biological Diversity, *Landmark Agreement Moves 757 Species Toward Federal Protection*, http://www.biologicaldiversity.org/programs/biodiversity/species_agreement/ (last visited July 16, 2016).

⁹⁸ Ctr. for Biological Diversity, *Protecting Critical Habitat*, *supra* note 16.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *See supra* Part II.

A. National Environmental Policy Act

In *Bear Valley*, the Ninth Circuit refused the appellants' request to reconsider *Douglas County*, in which the Ninth Circuit determined that critical habitat designations do not require compliance with NEPA.¹⁰² The critical habitat provision is silent on whether NEPA applies, but, as the Ninth Circuit briefly but definitively reaffirmed in *Bear Valley*, that silence should not be construed as an implicit mandate to comply with NEPA's extensive and costly procedural requirements.¹⁰³

NEPA ensures that federal agencies consider the environmental impacts and consequences of federal actions prior to undertaking or approving those actions.¹⁰⁴ NEPA is unique because, unlike most environmental statutes, it contains no substantive requirements.¹⁰⁵ Instead, NEPA is procedural, designed only to ensure that agencies contemplating action take the environmental impacts of their proposed actions into account.¹⁰⁶ NEPA compliance begins when a federal agency considers an action that may significantly affect the "quality of the human environment."¹⁰⁷ First, the agency typically prepares an Environmental Assessment (EA) of its proposed project.¹⁰⁸ If the EA indicates that the proposed project will not have significant environmental impacts the agency will issue a Finding of No Significant Impact (FONSI) and then proceed with the project.¹⁰⁹ If, however, the EA suggests that the project may impact the quality of the environment, then the agency must prepare an EIS;¹¹⁰ alternatively, an agency may skip the EA and simply prepare an EIS.¹¹¹ The EIS consists of a detailed description of the need for and purpose of the proposed action, alternatives to the action—including a no-action alternative—the physical environment that will be impacted, and the likely environmental consequences of the action

¹⁰² See 790 F.3d 977, 994 (9th Cir. 2015) (stating that in the absence of intervening Supreme Court precedent the panel in *Bear Valley* cannot overrule the panel in *Douglas County*, 48 F.3d 1495, 1502 (9th Cir. 1995)).

¹⁰³ *Id.*

¹⁰⁴ See *Robertson v. Methow Valley Citizens Council (Methow Valley)*, 490 U.S. 332, 350 (1989) (stating that NEPA requires agencies to "take a 'hard look' at environmental consequences").

¹⁰⁵ *Id.* at 351 (footnote omitted) ("Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action.").

¹⁰⁶ *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 787 (1976) (explaining that NEPA ensures that environmental concerns do not get "shunted aside in the bureaucratic hustle").

¹⁰⁷ NEPA, 42 U.S.C. § 4332(2)(c) (2012).

¹⁰⁸ 40 C.F.R. § 1508.9 (2015). An agency's statutory responsibilities may require it to act regardless of environmental impacts, in which case the action would be categorically exempt from NEPA's procedures. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 770 (2004).

¹⁰⁹ 40 C.F.R. § 1508.13 (2015).

¹¹⁰ *Id.* §§ 1502.3, 1508.11.

¹¹¹ See 42 U.S.C. § 4332(2)(C) (2012) (mandating that agencies prepare an EIS for major federal action "significantly affecting the quality of the human environment," but not requiring an EA).

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and the available alternatives.¹¹² NEPA ultimately serves several larger purposes as well, including to “encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation.”¹¹³

Although NEPA does not expressly mandate environmentally sound decision making,¹¹⁴ NEPA is nonetheless designed to protect the environment.¹¹⁵ Moreover, “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.”¹¹⁶ NEPA is therefore premised on the idea that promoting environmental health is a means to many ends. Not only does protecting the natural environment have ecological and geophysical benefits, it is also a boon to human health and wellbeing.¹¹⁷ Choosing environmentally conscious alternatives can even have financial and economic benefits, as environmental harm can ultimately prove far costlier in the long run than cheaper, but more impactful, short-term approaches.¹¹⁸

¹¹² 40 CFR §§ 1502.13–1502.16 (2015).

¹¹³ 42 U.S.C. § 4321 (2012).

¹¹⁴ *Methow Valley*, 490 U.S. 332, 351 (1989) (“NEPA merely prohibits uninformed—rather than unwise—agency action.”).

¹¹⁵ See *id.* at 348 (“NEPA declares a broad national commitment to protecting and promoting environmental quality.”); *Nev. Land Action Ass’n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) (“The purpose of NEPA is to protect the environment, not . . . economic interests Therefore, a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA.”); *Latin Ams. for Soc. & Econ. Dev. v. Adm’r of the Fed. Highway Admin.*, 756 F.3d 447, 462 (6th Cir. 2014) (“NEPA was enacted to promote efforts by federal agencies to prevent damage to the environment and advance human health and welfare.”); *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1038 (8th Cir. 2002) (“The overriding purpose of NEPA is to prevent or eliminate damage to the environment.”); *Pac. Legal Found. v. Andrus*, 657 F.2d 829, 837 (6th Cir. 1981) (NEPA provides a “mechanism to enhance or improve the environment and prevent further irreparable [environmental] damage.”). NEPA is at times erroneously referred to as the National Environmental “Protection” Act. That title is an overstatement given that NEPA does not require that agencies pick the least environmentally damaging alternative to their proposed projects. *Methow Valley*, 490 U.S. at 351. Nonetheless, NEPA evinces a preference for environmental protection and is intended to diminish the harm that federal projects cause to the environment. Though agencies may fully comply with NEPA through mechanical application of its procedural mandates, agencies do a disservice to NEPA when they fail to consider less environmentally damaging alternatives and choose those alternatives whenever viable. See *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n (Calvert Cliffs)*, 449 F.2d 1109, 1115 (D.C. Cir. 1971) (explaining that pro forma compliance with NEPA’s will be insufficient if environmental considerations were undervalued or if the agency failed to perform a genuine good faith analysis of environmental impacts).

¹¹⁶ *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 773 (1983).

¹¹⁷ See, e.g., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY PART A: GLOBAL AND SECTORAL ASPECT 4–11 (2014), available at http://www.ipcc.ch/pdf/assessment-report/ar5/wg2/WGIIAR5-PartA_FINAL.pdf (describing the observed impacts of climate change on vulnerable populations).

¹¹⁸ Richard L. Revesz, *Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives*, 99 COLUM. L. REV. 941, 988–92. (1999).

NEPA compliance can be an expensive and laborious undertaking even if an EA results in a FONSI.¹¹⁹ If the agency must prepare an EIS, the time and expense can increase dramatically.¹²⁰ It is difficult to determine the average cost of preparing an EA or EIS because the complexity involved can vary considerably based on the proposed project, and because agencies track related costs differently. However, it is clear that many agencies spend millions of dollars every year in NEPA compliance, and that federal projects may be delayed for years while agencies explore likely environmental impacts.¹²¹

Generally speaking, action agencies cannot avoid NEPA by complaining that compliance would cost too much or take too much time.¹²² However, the Ninth Circuit determined that NEPA analysis is an unnecessary prerequisite for critical habitat designations in part because there is no impact on the environment when the Services set habitat aside for species conservation and recovery.¹²³ Absent the requirements of NEPA, the Services can designate critical habitat quicker and more affordably.

NEPA ensures that federal agencies consider the environmental impacts of their proposed actions, thus ensuring well informed (even if unwise) decision making.¹²⁴ NEPA procedures apply only when federal projects impact or alter the environment; conversely, NEPA procedures do not apply when federal projects do nothing to alter the physical environment.¹²⁵ As the *Douglas County* court explained: “If the . . . purpose of preparing an EIS is to alert agencies and the public to potential adverse [environmental] consequences . . . then an EIS is unnecessary when the action at issue does not alter the natural, untouched physical environment.”¹²⁶ With that straightforward policy in mind, there should be little doubt that NEPA analysis is unnecessary prior to designating critical habitat because, by definition, critical habitat designations are environmentally benign.¹²⁷ Rather than having any tangible impact on the

¹¹⁹ U.S. GOV'T. ACCOUNTABILITY OFFICE, GAO-14-369, NATIONAL ENVIRONMENTAL POLICY ACT: LITTLE INFORMATION EXISTS ON NEPA ANALYSES 12–15 (2014).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Calvert Cliffs*, 449 F.2d 1109, 1115 (D.C. Cir. 1971) (“[NEPA] must be complied with to the fullest extent, unless there is a clear conflict of statutory authority. Considerations of administrative difficulty, delay or economic cost will not suffice to strip [NEPA] of its fundamental importance.”).

¹²³ *Douglas Cty.*, 48 F.3d 1495, 1505 (9th Cir. 1995).

¹²⁴ *Methow Valley*, 490 U.S. 332, 351 (1989) (“NEPA merely prohibits uninformed—rather than unwise—agency action.”).

¹²⁵ *See, e.g., Sabine River Auth. v. U.S. Dep’t of the Interior*, 951 F.2d 669, 680 (5th Cir. 1992) (finding that an EIS was unnecessary even though the government’s negative easement would permanently foreclose the plaintiffs from constructing a reservoir by reasoning that “[t]he acquisition of a negative easement which prohibits development does not result in the requisite ‘change’ to the physical environment” necessary to trigger NEPA).

¹²⁶ *Douglas Cty.*, 48 F.3d at 1505.

¹²⁷ *Id.* at 1505–06 (“[A]n EIS is not required ‘[when federal projects] leave nature alone.’” (quoting Nat’l Ass’n of Prop. Owners v. United States, 499 F. Supp. 1223, 1265 (D. Minn. 1980), *aff’d sub nom.* Minnesota v. Block, 660 F.2d 1240 (8th Cir. 1981))). NEPA’s inapplicability to

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environment, critical habitat designations “maintain the environmental status quo” and therefore fail to pass NEPA’s requisite “potential impact” threshold.¹²⁸

Not only does the designation itself not affect the environment, once the Services have designated critical habitat they are not required to take any future action pursuant to that designation that will affect the environment.¹²⁹ NEPA is only triggered once there is a proposed federal action,¹³⁰ which “exists at that stage in the development of an action when an agency subject to [NEPA] has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated.”¹³¹ Potential actions do not trigger NEPA;¹³² therefore, agencies are not expected to predict hypothetical future actions, or attempt to analyze the impacts those imagined projects may have.¹³³ When the Services designate critical habitat, there is only the potential for the designation to result in environmental impacts, and even then the impacts will be indirect at best. A critical habitat designation *might* change the course of future federal projects in ways that impact the environment, but federal projects only trigger NEPA if and when they reach the proposal stage, and any requisite NEPA analysis at that point would be up to the agency.¹³⁴ In those instances, the Services would serve a primarily consultative role pursuant to the ESA.¹³⁵ To trigger NEPA at the time of designation would, therefore, allow for a degree of attenuation between agency action and potential environmental impacts that are outside NEPA’s scope. As the Supreme Court’s decision in *Kleppe v. Sierra Club*¹³⁶ makes clear, absent a specific and concrete proposal for federal action, “it is impossible to predict” future activity and “thus impossible to analyze the environmental consequences [of that activity].”¹³⁷ NEPA does not require the Services to foresee how other federal agencies might act, or what the environmental effects of other agency’s hypothetical future projects may be as a result of a critical habitat designation.

critical habitat designations is not only theoretical or academic. For example, all 130 EAs prepared by FWS pursuant to NEPA prior to designating habitat between 1973 and 1983 resulted in a FONSI, or a decision *not* to prepare an EIS. Endangered and Threatened Wildlife and Plants; Preparation of Environmental Assessments for Listing Actions under the Endangered Species Act, 48 Fed. Reg. 49,244, 49,244–45 (Oct. 25, 1983).

¹²⁸ *Douglas Cty.*, 48 F.3d at 1506.

¹²⁹ See 50 C.F.R. § 402.14(a) (2015) (requiring consultation with the Services to determine whether an action may affect a critical habitat).

¹³⁰ *Kleppe v. Sierra Club*, 427 U.S. 390, 401 (1976).

¹³¹ 40 C.F.R. § 1508.23 (2015).

¹³² *Kleppe*, 427 U.S. at 401.

¹³³ *Id.* at 402 (“Absent an overall plan for regional development, it is impossible to predict” the scope, nature, or even existence of future activity, and thus it is “impossible to analyze the environmental consequences.”).

¹³⁴ See NEPA, 42 U.S.C. § 4332 (2012).

¹³⁵ See 50 C.F.R. § 402.01 (2015) (where the consultative role of the Services is discussed).

¹³⁶ 427 U.S. 390 (1976).

¹³⁷ *Id.* at 402.

By allowing the Services to avoid NEPA when designating habitat, the Ninth Circuit in *Bear Valley* implicitly affirmed that critical habitat designations ought to be efficient and based on the discretion and expertise of the Services. NEPA compliance frequently yields positive results, including the adoption of more environmentally sound strategies and even the abandonment of extremely harmful proposals, either on the government's own initiative or as a result of enhanced public scrutiny.¹³⁸ But, as the Ninth Circuit recognized, those kinds of results are not at issue when the Services designate critical habitat because habitat designations leave the environment untouched rather than adversely impacting the environment.

B. Cooperation with State and Local Authorities

A surefire way to dramatically slow any regulatory process is to impose layers of consultative and cooperative requirements on the relevant agency. In *Bear Valley*, the appellants insisted that FWS failed to adequately cooperate with state and local authorities prior to designating critical habitat.¹³⁹ The appellants pointed to ESA section 2(c)(2), which states that “[i]t is . . . declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.”¹⁴⁰ The Ninth Circuit rejected that argument on the grounds that section 2(c)(2) expresses a policy preference, which, on its own, imposes no substantive requirements on the Services.¹⁴¹ The Ninth Circuit may not have been deliberately attempting to expedite critical habitat designations with this holding, but the court's decision to relieve the Services of an amorphous cooperation mandate means that designations can happen with less interference from local authorities opposed to potentially losing some control over water resources.

The Ninth Circuit's decision was sound because section 2(c)(2) does not convey substantive rights to local and state authorities beyond what exists elsewhere in the ESA.¹⁴² The *Bear Valley* appellants argued stridently that the ESA's policy of cooperation should be given substantive effect, pointing to the oft-cited *Citizens to Preserve Overton Park v. Volpe*,¹⁴³ in which the Supreme Court upheld a challenge to agency action based on

¹³⁸ See, e.g., ENVTL. LAW INST., NEPA SUCCESS STORIES: CELEBRATING 40 YEARS OF TRANSPARENCY AND OPEN GOVERNMENT (2010), available at https://ceq.doe.gov/nepa_information/NEPA_Success_Stories.pdf (presenting positive results flowing from NEPA implementation through the years); Jonathan Poisner, *A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation*, 26 ENVTL. L. 53, 54–55 (1996) (discussing positive impacts resulting from greater public participation in government decision-making under NEPA).

¹³⁹ 790 F.3d 977, 987 (9th Cir. 2015).

¹⁴⁰ *Id.*; ESA, 16 U.S.C. § 1531(c)(2) (2012).

¹⁴¹ *Bear Valley*, 790 F.3d at 987–88.

¹⁴² *Id.*

¹⁴³ 401 U.S. 402 (1971).

agency noncompliance with statutory statements of policy.¹⁴⁴ However, in *Volpe*, the statutes at issue, like section 2(c)(2) of the ESA, contained statements of policy followed by substantive standards and mandates that contextualized and concretized the policy's more general language.¹⁴⁵ It was those substantive requirements that the Supreme Court looked to when evaluating the challenges in that case.¹⁴⁶ *Volpe* does not, in other words, stand for the idea that generic introductory policy statements have some kind of inherent or implicit substance to them. While a statute's substantive provisions may concretize a general policy statement into something actionable, the policy on its own cannot provide a mandate, let alone a cause of action, not articulated elsewhere in the statute.¹⁴⁷ The Ninth Circuit adopted this view in *Bear Valley*, holding that, based on application of well-established principles, "[s]ection 2(c)(2) is a non-operative statement of policy that does not create an enforceable mandate for some additional procedural step [prior to designating critical habitat]."¹⁴⁸

Congress did not intend for its policy of cooperation to impede the Services,¹⁴⁹ and the Services act in accordance with that policy when they comply with the procedures for providing notice to, and receiving comment from, state and local authorities pursuant to section 4 of the ESA.¹⁵⁰ The ESA envisions, in other words, that the procedures it explicitly provides will ensure that local and state authorities have the opportunity to voice their concerns regarding water resources, among other issues, in the context of a critical habitat designation.¹⁵¹ The ESA also anticipates that the Services will be cognizant of those comments and will take them into account when making designation decisions.¹⁵² That is the full extent of required cooperation, and the ESA should not be read to constrain the Services beyond that point.¹⁵³ The ESA does not, for example, require the Services to

¹⁴⁴ Petition for Writ of Certiorari at 10, 27–28, 30–33, *Bear Valley*, 136 S. Ct. 799 (2016) (No. 15-367), 2015 WL 5626368 at *10, *27–28, *30–33; *Volpe*, 401 U.S. at 420.

¹⁴⁵ *Volpe*, 401 U.S. at 404–405 nn.2–3.

¹⁴⁶ *Id.* at 411.

¹⁴⁷ *District of Columbia v. Heller*, 554 U.S. 570, 577–78 (2008) (when interpreting a statute, “a prefatory clause [may] resolve an ambiguity in the operative clause. . . [But cannot] limit or expand the scope of the operative clause.”); *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 175 (2009) (second alteration in original) (“[W]here the text of a clause itself indicates that it does not have operative effect . . . a court has no license to make it do what it was not designed to do.” (quoting *Heller*, 554 U.S. at 578, n.3)).

¹⁴⁸ 790 F.3d 977, 987 (2015) (internal quotation marks omitted).

¹⁴⁹ S. REP. 97-418, at 25–26 (1982) (“[Section 2(c)(2) is] not intended to and does not change the substantive or procedural requirements of the Act.”).

¹⁵⁰ *Bear Valley*, 790 F.3d at 987 (“[T]he policy goals embodied in Section 2(c)(2) are implemented through the substantive and procedural requirements set forth in Section 4.”); ESA, 16 U.S.C. § 1533 (2012).

¹⁵¹ *Bear Valley*, 790 F.3d at 987.

¹⁵² See 16 U.S.C. § 1533(i) (2012) (requiring the Services to provide state agencies with “written justification for [their] failure to adopt regulations consistent with the [agencies’] comments or petition.”).

¹⁵³ *Bear Valley*, 790 F.3d at 988 (“[T]he procedures set forth in Section 4 outline the scope of ‘cooperation’ required between [the Services] and state and local agencies in designating critical habitat.”).

negotiate with state or local authorities or to necessarily reach a compromise that fully accounts for the concerns of state and local authorities regarding the scope of a critical habitat designation. After all, it would be inconsistent with the ESA's emphasis on species recovery if the Services were required to cooperate with antagonistic state and local authorities in a way that allowed those authorities to stymie designation efforts by proclaiming a competing interest in unfettered management over local resources. The Ninth Circuit wisely recognized this, at least implicitly, when it declined to read a cause of action into section 2(c)(2)'s general statement of policy.¹⁵⁴

C. Cost-Benefit Analysis

The Ninth Circuit further expanded the Services' ability to efficiently designate critical habitat by rejecting the strict CBA requirement advanced by the appellants in *Building Industry*.¹⁵⁵ Section 4(b)(2) of the ESA states that the Services:

Shall designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact . . . of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such an area as part of critical habitat.¹⁵⁶

According to the industry-group appellants, NMFS failed to adhere to section 4(b)(2) because, while NMFS commissioned and reviewed an economic impacts analysis of its proposed designations for the green sturgeon,¹⁵⁷ NMFS failed to properly balance the value of the designation against the costs reflected in its economic analysis.¹⁵⁸ The appellants' view is not entirely farfetched at first glance. After all, section 4(b)(2) does allow the Services to exclude areas from critical habitat if the benefits of exclusion "outweigh" the benefits of inclusion.¹⁵⁹ In addition, section 4(b)(2) was among the post-*TVA v. Hill* amendments added to the ESA in 1978, in which Congress moved to mitigate designations to a certain extent by providing that the Services should consider cost as a factor when designating habitat.¹⁶⁰ However, the *Building Industry* appellants' argument for strict CBA failed to convince the Ninth Circuit because, as the court recognized, considering cost among all other relevant factors is a far cry from weighing economic impacts and environmental benefits against one another and necessarily

¹⁵⁴ *Id.*

¹⁵⁵ 792 F.3d 1027, 1032–33 (2015).

¹⁵⁶ 16 U.S.C. § 1533(b)(2) (2012).

¹⁵⁷ *Building Industry*, 792 F.3d at 1030.

¹⁵⁸ *Id.* at 1032.

¹⁵⁹ 16 U.S.C. § 1533(b)(2) (2012).

¹⁶⁰ Shannon Petersen, Comment, *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act*, 29 ENVTL. L. 463, 484–85 (1999).

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choosing the one that outweighs the other¹⁶¹ as a strict approach to CBA requires.¹⁶² While the Services are free to conclude that, in certain cases, the adverse economic impacts of designation would be significant enough to warrant a nondesignation decision, nothing in the statute can be construed to legally compel non-designation due to cost.¹⁶³

Rather than viewing section 4(b)(2) as commanding the Services to engage in rigorous CBAs, which allow for designation only if the environmental benefits outweigh the economic disincentives,¹⁶⁴ the Ninth Circuit found that the Services were only obligated to consider economic impacts in some fashion of their own devising.¹⁶⁵ The court found that section 4(b)(2) contained two independent clauses rather than one nondiscretionary mandate.¹⁶⁶ Through the use of the word “shall” at the start of the section, the ESA compels the services to, as a preliminary matter, consider the economic impacts of designating critical habitat.¹⁶⁷ That much was obvious already, as the United States Supreme Court reached the same conclusion nearly ten years prior in *Bennett v. Spear*.¹⁶⁸ The section’s

¹⁶¹ *Building Industry*, 792 F.3d at 1033. Environmental law is replete with examples of this distinction. Many statutes call upon the relevant federal agency to examine the economic impacts of an environmental regulatory decision, but few require a strict balancing test. The Clean Water Act, for example, requires EPA to consider economic cost and environmental benefit, among other factors, when setting technological discharge standards for new point sources. Federal Water Pollution Control Act, 33 U.S.C. § 1311(b)(2) (2012). The Clean Air Act defines “standard of performance” for new stationary sources as that which “tak[es] into account the cost of achieving such reduction [of emissions] and any nonair quality health and environmental impact and energy requirements.” 42 U.S.C. § 7411(a)(1) (2012). In addition, NEPA ensures that government entities examine the environmental impacts of their decision making and requires that agencies consider economic impacts and environmental factors, both quantifiable and nonquantifiable, but makes no reference to strict balancing tests. 42 U.S.C. § 4332 (2012). In each of these instances, there is an implicit recognition that cost is, and indeed should be, relevant to some extent. But at the same time there is an implicit rejection of the notion that cost consideration should necessarily defeat positive environmental regulations. See also Sinden, *supra* note 6, at 186 (discussing Congress’s tendency to eschew formal economic CBA in environmental statute based in part on a pragmatic determination that such analysis is both impracticable and incapable of accounting for all relevant factors).

¹⁶² See W. Kip Viscusi, *Regulating the Regulators*, 63 U. CHI. L. REV. 1423, 1436 (1996) (explaining that formal CBA is premised on the idea that “government agencies should adopt regulatory policies that best advance society’s interests, or those that provide the greatest amount of benefits, less costs. In addition, no regulatory policy should be pursued unless the benefits exceed the costs.”).

¹⁶³ But see *supra* notes 8–9 and accompanying text, (discussing the potential “God Squad” exemption, which in theory, although not really in practice, can determine that cost is dispositive).

¹⁶⁴ Viscusi, *supra* note 162, at 1436.

¹⁶⁵ *Building Industry*, 792 F.3d at 1033.

¹⁶⁶ *Id.* (“[W]e read the statute to provide that, after the agency considers economic impact, the entire exclusionary process is discretionary and there is no particular methodology that the agency must follow.”).

¹⁶⁷ *Id.*

¹⁶⁸ 520 U.S. 154, 172 (1997) (stating that “the fact that the Secretary’s ultimate decision is reviewable only for abuse of discretion does not alter the categorical requirement that, in arriving at his decision, he ‘tak[e] into consideration the economic impact’” of that decision (quoting ESA, 16 U.S.C. § 1533(b)(2) (1994)).

mandatory language does not extend, however, to the following sentence where the decision to exclude a critical habitat based on the weight of those economic impacts is prefaced with the word “may.”¹⁶⁹ While a purely cursory glance at economic impacts may fall short of the ESA’s command to consider cost,¹⁷⁰ the Services are nonetheless permitted to designate critical habitat even when the economic impacts of doing so would be significant, and at no stage are the Services required to actually balance economic and environmental interests against one another in order to justify a critical habitat designation.¹⁷¹

The Ninth Circuit’s reading of section 4(b)(2) is consistent with the legislative history behind both that section’s adoption and the ESA generally. The ESA’s legislative history is replete with examples of Congress denouncing mankind’s role in the mass extinction and endangerment of thousands of species and specifically highlighting the adverse impacts of man’s greed and exploitation of plants and animals for financial gain.¹⁷² For Congress it seemed that, in the face of mass extinction, more was at stake than profit margins and financial gains.¹⁷³ Congress’s purpose in passing the ESA is implicitly at odds with strict CBA because strict CBA presupposes that economic costs should necessarily trump environmental benefits whenever the former is weightier than the latter.¹⁷⁴

Other concerns militate against requiring the Services to engage in strict CBA before designating critical habitat as well. First, strict CBA is itself a costly and time-consuming endeavor,¹⁷⁵ which seems contrary to the efficient designation process imagined by the ESA.¹⁷⁶ In fact, strict CBA’s laborious and cost-intensive analyses may ultimately discourage designations that the Services would otherwise deem prudent, thus

¹⁶⁹ *Building Industry*, 792 F.3d at 1033 (internal quotation marks and citation omitted) (“[T]he second sentence uses the discretionary ‘may’ to convey that an agency has the discretion to exclude any area from critical habitat . . . [But section 4(b)(2)] does not require the agency to weigh the economic benefits of exclusion against the conservation benefits of inclusion at the first step of the analysis.”).

¹⁷⁰ A designation made following only superficial or perfunctory economic analysis may well be deemed “arbitrary and capricious” per the Administrative Procedure Act, 5 U.S.C. § 706 (2012). Courts are likely to remand such designations because the Services are unlikely to have “articulated a rational connection between the facts found [through economic analysis] and the conclusion[] [that it is appropriate to designate habitat]” when the economic analysis is severely lacking. *Pac. Coast Fed’n of Fishermen’s Ass’ns v. Bureau of Reclamation*, 426 F.3d 1082, 1090 (9th Cir. 2005). Of course, the outcome of that more probing investigation may not be determinative of whether the Services ultimately designate the same habitat.

¹⁷¹ *Building Industry*, 792 F.3d at 1033.

¹⁷² See *supra* Part II.B (discussing the legislative history of the ESA).

¹⁷³ *Id.*

¹⁷⁴ See Viscusi, *supra* note 162, at 1436.

¹⁷⁵ Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137, 1145 (2001) (“When an agency conducts a cost-benefit analysis, it may spend thousands or millions of dollars collecting and analyzing data.”).

¹⁷⁶ Sinden, *supra* note 6, at 194 (“Congress clearly wanted critical habitat to be designated at the time of listing and was concerned that it not be delayed much beyond that . . . This indicates that Congress did not anticipate that the economic analysis would be an elaborate or time-consuming process.”).

undermining species recovery efforts.¹⁷⁷ Second, strict CBA is also a flawed approach to designating critical habitat because the kinds of competing values implicated by habitat designations are what scholars who study CBA would call “incommensurable.”¹⁷⁸ Weighing the costs and benefits of preserving habitat against those of a housing development or shopping mall entails a comparison that fits only crudely at best into any kind of meaningful balancing formula.¹⁷⁹ The incongruous and makeshift calculus that goes into such an endeavor means that the results will never be sufficiently comprehensive and will ultimately fail to fully encompass the range of values and interests—including economic, social, political, and moral—that are bound up in the balancing.¹⁸⁰ Rather than forcing the Services to grapple with strict CBA, courts should follow the Ninth Circuit’s lead in *Building Industry* and grant the Services leeway to consider cost without finding high costs necessarily dispositive. The Services can thereby consider the actual consequences of the choice before them and ensure that the unquantifiable values protected under the ESA receive the weight that they deserve.¹⁸¹

Designating critical habitat undoubtedly carries a high cost in many situations.¹⁸² Habitat, once protected by the ESA, may be rendered largely

¹⁷⁷ See, e.g., Thomas O. McGarity, *Professor Sunstein’s Fuzzy Math*, 90 GEO. L.J. 2341, 2343 (2002) (noting that, pursuant to a strict CBA mandate in the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136d(b) (2012), and the Toxic Substances Control Act of 1976, 15 U.S.C. § 2605(a) (2012), “[t]he process of gathering health, environmental, and cost data, dealing with large uncertainties in the data and associated models, quantifying and monetizing benefits, comparing costs and benefits of realistic alternatives, and providing support for the agency’s conclusions in an administrative record has thoroughly stymied government action under both of [those] statutes.”).

¹⁷⁸ Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 796, 841–43 (1994) (emphasis removed) (defining incommensurability as what occurs when “relevant goods cannot be aligned along a single metric without doing violence to our considered judgments about how these goods are best characterized.”); Ronny Millen & Christopher L. Burdett, Note, *Critical Habitat in the Balance: Science, Economics, and Other Relevant Factors*, 7 MINN. J.L. SCI. & TECH. 227, 275 (2005) (noting that while Professor “Sunstein generally advocates the use of formal cost-benefit analysis in regulatory decisionmaking, he makes an exception for endangered species.”); Amy Sinden, *Formality and Informality in Cost-Benefit Analysis*, 2015 UTAH L. REV. 93, 127 (2015) (noting that one of the “hallmarks” of strict CBA is when analysts “quantify costs and benefits and translate them into a monetary metric.”).

¹⁷⁹ See Sinden, *supra* note 178, at 126–29 (discussing critiques of strict or “formal” CBA).

¹⁸⁰ See Sunstein, *supra* note 178, at 841–43 (footnotes omitted) (“CBA is obtuse because it tries to measure diverse social goods along the same metric. . . . [I]f goods are diverse and valued in different ways, there will be considerable crudeness in [applying CBA] to regulation.”); Kunich, *supra* note 56, at 527 (“Although less practical, and less susceptible to being reduced to monetary worth, there is real wealth in living things.”); Edwin M. Smith, *The Endangered Species Act and Biological Conservation*, 57 S. CAL. L. REV. 361, 376–82 (1984) (exploring ethical responsibilities implicit in the ESA’s efforts to conserve endangered species).

¹⁸¹ See Sunstein, *supra* note 178 at 843 (“We should therefore have a presumption in favor of a much more disaggregated accounting of the effects of regulation, one that exposes to public view the full set of effects.”).

¹⁸² See, e.g., Dan Joling, *Appeals Court Upholds Designation of Polar Bear Habitat*, ASSOCIATED PRESS, Feb. 29 2016, <http://bigstory.ap.org/article/e273792530d440c58d6bdc>

undevelopable.¹⁸³ But economic impacts should serve only as a potential rebuttal to presumptive designations rather than defeating designations outright. If one of the greatest threats to endangered species is habitat destruction,¹⁸⁴ and the ESA's emphatic purpose is to curtail and reverse threats to such species,¹⁸⁵ stemming habitat destruction is necessarily an essential component of fully reifying the Act's ambitious objectives. To require that the Services ignore the link between designated habitat and species recovery whenever an opposing party demonstrates a compelling financial interest in rendering habitat uninhabitable would be incongruous and serve to frustrate the ESA's primary purpose. In *Building Industry*, the Ninth Circuit read section 4(b)(2) as broadly as the text allowed, and helped ensure that critical habitat designations have at least the potential to function as intended.¹⁸⁶

IV. CONCLUSION

While courts like the Ninth Circuit in *Bear Valley* and *Building Industry* have evinced a preference for critical habitat designation much remains to be done both in terms of designating habitat for all listed species, and giving those designations meaning. For example, FWS is not wholly opposed to designating habitat,¹⁸⁷ but remains generally reluctant to designate.¹⁸⁸ Critical

f8793f0a21/appeals-court-upholds-designation-polar-bear-habitat (last visited July 16, 2016) (reporting on FWS's decision to designate 187,000 square miles of Alaska marine waters as critical polar bear habitat, a move criticized by oil and gas groups because it would dramatically increase the costs of existing extraction projects and likely threaten the viability of future projects).

¹⁸³ See, e.g., *TVA v. Hill*, 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.").

¹⁸⁴ World Wildlife Fund, *Impact of Habitat Loss on Species*, http://wwf.panda.org/about_our_earth/species/problems/habitat_loss_degradation/ (last visited July 16, 2016).

¹⁸⁵ *Gifford Pinchot Task Force*, 378 F.3d 1059, 1070 (9th Cir. 2004) ("[T]he ESA was enacted not merely to forestall the extinction of species . . . but to allow a species to recover to the point where it may be delisted.").

¹⁸⁶ *Building Industry*, 792 F.3d 1027, 1033 (9th Cir. 2015).

¹⁸⁷ FWS has designated habitat somewhat more proactively in recent years. Ctr. for Biological Diversity, *Protecting Critical Habitat*, *supra* note 16 (commenting that under the Obama administration, FWS has redone, or agreed to redo critical habitat designations for 40 species). In part, FWS is probably designating more habitat to avoid costly settlements proceedings, litigation, and censure by the courts. See Daniel J. Rohlf, *Section 4 of the Endangered Species Act: Top Ten Issues for the Next Thirty Years*, 34 ENVTL. L. 483, 526–27 (noting that environmental advocates filed many lawsuits after sweeping away FWS's legal rationale for refusing to designate critical habitat). Nonetheless, the percentage of listed species for which habitat has been designated remains far too small, Ctr. for Biological Diversity, *Protecting Critical Habitat*, *supra* note 16, and the Services continue to resist designating habitat on the misguided presumption that designations do little to help species recover. Rohlf, *The Good, the Bad and the Ugly*, *supra* note 17, at 270–72.

¹⁸⁸ Rohlf, *The Good, the Bad and the Ugly*, *supra* note 17, at 270–71. NMFS is generally less reluctant to designate habitat. See Patrick Parenteau, *An Empirical Assessment of the Impact of Critical Habitat Litigation on the Administration of the Endangered Species Act* 2 n.7 (2005) (on file with Vermont Law School), available at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1000&context=vermontlaw_fp (noting that between 1990 and 2005 NMFS designated habitat for 30

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habitat's potential role in reversing the trend toward mass endangerment and extinction is too great to leave solely in the hands of intransigent agencies. Therefore, careful judicial scrutiny should guard against agency discretion exercised in ways inconsistent with clear statutory goals.¹⁸⁹ Courts have criticized FWS for its failure to designate habitat, and in doing so have demonstrated an interest in ensuring that critical habitat designations are among the bundle of protections afforded to listed species.¹⁹⁰ The flipside of that trend, seen in cases like *Bear Valley* and *Building Industry*, is that decisions by the Services to designate habitat receive deference from the courts. The combination of these two trends—rebuking unsupported nondesignation decisions on the one hand while facilitating designations on the other—must continue if critical habitat designations are to provide meaningful protections to listed species.

Courts can facilitate the Services' full compliance with the ESA (both in terms of literal compliance with textual mandates and in terms of pursuing the ESA's larger and more ambitious objectives) by ensuring that critical habitat designations are as efficient and affordable as the ESA allows. There are, of course, specific procedural requirements for designating habitat,¹⁹¹ but all too often groups opposed to habitat designations insist that other and more onerous requirements ought to apply.¹⁹² The Ninth Circuit rebuked claims of that nature in *Bear Valley* and *Building Industry*, and other courts have, and should continue, to do the same.¹⁹³ An efficient and affordable

species, 23 voluntarily and 7 following litigation; in comparison, FWS designated habitat 357 times and 350 of those were forced by litigation). Thus while NMFS contributes to the problem of under-designation to some extent, the real issue lies with FWS.

¹⁸⁹ See *Bear Valley*, 790 F.3d 977, 989–90 (9th Cir. 2015) (“FWS is obligated to take an action under Section 4(b)(2), *i.e.*, designate essential habitat as critical. The decision to exclude otherwise essential habitat is thus properly reviewable because it is equivalent to a decision not to designate habitat.”).

¹⁹⁰ See, *e.g.*, *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 445 (5th Cir. 2001); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1193 (10th Cir. 1999); *Nat. Res. Def. Council v. U.S. Dep't of the Interior*, 113 F.3d 1121, 1127 (9th Cir. 1997); *Ctr. for Biological Diversity v. Kempthorne*, 607 F. Supp. 2d 1078, 1091, 1094–95 (D. Ariz. 2009); *Schoeffler v. Kempthorne*, 493 F. Supp. 2d 805, 823–24 (W.D. La. 2007); *Kern Cty. Farm Bureau v. Badgley*, No. CV F 02–5376 AWI DLB, 2004 WL 5363604, at *18–19 (E.D. Cal. Jan. 12, 2004); *Jumping Frog Research Inst. v. Babbitt*, No. C 99–01461 WHA, 1999 WL 1244149, *1–2 (N.D. Cal. Dec. 15, 1999).

¹⁹¹ *E.g.*, ESA, 16 U.S.C. § 1533(b)(5)(A)(ii) (2012) (requiring that the Services to provide notice to relevant local authorities prior to designating habitat, and allowing relevant local authorities to submit comments to the Services regarding the designation); *id.* § 1533(i) (requiring the Services to provide a “written justification” for designation decisions inconsistent with state and local commentary).

¹⁹² *E.g.*, *Bear Valley*, 790 F.3d at 987–88; *Building Industry*, 792 F.3d 1027, 1032–33 (9th Cir. 2015).

¹⁹³ In many cases courts consider arguments that the Services should have done more prior to designating habitat. If the Services plainly shirked a statutory command prior to designation, then the court may remand the designation decision back to the Services for more consideration. See, *e.g.*, *Otay Mesa Prop., L.P. v. U.S. Dep't of the Interior*, 646 F.3d 914, 915 (D.C. Cir. 2011) (remanding to FWS for more thorough consideration of a designation for the San Diego fairy shrimp based on insufficient evidentiary showing by the agency). Often, however, the court concludes that the Services did plenty, reached a reasonable conclusion, and that more procedure is therefore unnecessary. See, *e.g.*, *Alaska Oil & Gas Ass'n v. Jewell*,

designation process unconstrained by atextual procedural mandates, like the use of strict CBA, substantive cooperation with state and local authorities over water resource concerns, and NEPA compliance, should encourage the Services to designate habitat more proactively. Equally important, a streamlined designation process may make it more difficult for the Services to argue that reasons of administrative inconvenience, cost, and even imperfect data preclude designation when nondesignations are challenged by environmental advocates in court. Finally, well-established precedent limiting the requisite predesignation procedures to those plainly enumerated by the ESA should encourage courts to reject pleas from states, localities, and industry groups that more cumbersome and costly procedures must precede critical habitat designations.

When courts review challenges to critical habitat designations, whether from industry groups, states, or environmentalists, they should be mindful of the ESA's primary goal: survival and recovery of listed species.¹⁹⁴ To that end, courts should defer when the Services exercise their discretion to designate habitat in a manner consistent with those goals; however, courts should also scrutinize the Services' decisions more carefully when the Services choose to deprive listed species of the benefits of designated habitat. Courts should follow the Ninth Circuit's lead, as exemplified by the holdings in *Bear Valley* and *Building Industry*, in encouraging critical habitat designations by refusing to impose unnecessary procedural impediments in the way of designation. Unless and until courts accept that timely and efficient habitat designations are necessary to fully realizing the ESA's goals, endangered species will receive less than the full complement of protections they so badly need and which the ESA plainly intends for them to have.

815 F.3d 544, 565 (9th Cir. 2016) ("FWS's decision not to include those costs deemed too uncertain or speculative in the total potential incremental cost of the designation was within its discretion. FWS's economic impact assessment therefore, was not arbitrary and capricious."); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601–02 (9th Cir. 2014) (explaining that while the Services must consider the best scientific data available prior to designation that does not mean the best scientific data *possibly* available), *cert. denied sub nom. Steward & Jasper Orchards v. Jewell*, 135 S. Ct. 948 (2015), and *cert. denied sub nom. State Water Contractors v. Jewell*, 135 S. Ct. 950 (2015).

¹⁹⁴ *TVA v. Hill*, 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but literally every section of the statute.")