A CRITICAL DISCUSSION OF CRITICAL HABITAT DESIGNATIONS: IS COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT REQUIRED?

BY

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Since 1996, the Ninth and Tenth Circuit Courts of Appeals have been split over whether critical habitat designations require National Environmental Policy Act (NEPA) compliance. Providing a fresh and objective perspective, this Comment argues that critical habitat designations should not require NEPA compliance because: 1) application of the functional equivalence exemption is appropriate, and 2) federal actions that do not alter the physical environment do not fall under the purview of NEPA. Although this Comment recommends that the U.S. Supreme Court resolve the split to enable the agencies that designate critical habitat to maximize their conservation of endangered and threatened species, it also recognizes that the Court may not accept certiorari on the issue in the near future, if ever, and thus encourages the agencies to jointly develop consistent national policies on NEPA compliance.

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I. INTRODUCTION

The following discussion of critical habitat designations stems from a story about two little fish and an owl that began over twenty years ago. The Endangered Species Act of 1973[1] (ESA) plays a key role in the story.

The ESA aims to conserve endangered and threatened species and protect the ecosystems on which such species depend.[2] To carry out this purpose, section 4 of the ESA requires that the Secretaries of the United States Department of the Interior and the United States Department of Commerce (Secretaries) list species that they determine are in need of the ESA's protections as "endangered" or "threatened,"[3] and, "to the maximum extent prudent and determinable,"[4] concurrently designate habitat that they find is "essential to the conservation"[5] of such species as "critical habitat."[6] The Secretary of the Department of the Interior implements the ESA through the United States Fish and Wildlife Service (FWS) and the Secretary of the Department of Commerce implements the ESA through the National Marine

[1] Endangered Species Act (ESA) of 1973, 16 U.S.C. §§ 1531–1544 (2006 & Supp. IV 2011).
[2] *Id.* § 1531(b).
[3] 16 U.S.C. § 1533(a)(1) (2006).
[4] *Id.* § 1533(a)(3)(A).
[5] *Id.* § 1532(5)(A)(ii).
[6] *Id.* § 1533(a)(3)(A)(i). The requirement that the Secretaries designate critical habitat "concurrently" with the determination to list a species was the result of the 1978 amendments to the ESA, and thus "does not apply to any species listed prior to November 10, 1978." Pac. Legal Found. v. Andrus, 657 F.2d 829, 835 (6th Cir. 1981) (citing 16 U.S.C. § 1533(a) (1981 Supp.)).

Fisheries Service (NMFS),[7] a sub-agency of the National Oceanic & Atmospheric Administration (NOAA).[8] Once a species is listed under section 4, it can receive the safeguards afforded by the most protective provisions of the ESA—section 7 and section 9.[9]

Section 9 of the ESA applies broadly to "any person"[10] and prohibits various actions that affect listed species,[11] including the significant modification or degradation of habitat.[12] Unlike section 9, "Section 7 applies only to federal agencies."[13] Among other things, section 7 requires that each federal agency consult with the agencies that implement the ESA to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to . . . result in the destruction or adverse modification of [a species' critical habitat]."[14]

Because compliance with section 7 limits the use of federal lands that are designated as critical habitat, plaintiffs whose livelihoods are intertwined with the use of such federal lands have litigated over the validity of critical habitat designations.[15] Such litigation has been most controversial when focused on the issue of whether critical habitat designations require compliance with the National Environmental Policy Act of 1969[16] (NEPA).[17]

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7 ROBIN KUNDIS CRAIG, ENVIRONMENTAL LAW IN CONTEXT CASES AND MATERIALS 324 (2d ed. 2008). In general, FWS has jurisdiction over terrestrial and freshwater species while NMFS has jurisdiction over marine species. Telephone Interview with Scott Farley, Attorney-Advisor, Nat'l Oceanic and Atmospheric Administration (NOAA), Office of General Counsel, Fisheries and Protected Resources Section (Feb. 22, 2012). FWS and NMFS, however, share jurisdiction over some species that utilize both terrestrial and marine environments, such as sea turtles. *Id.* In addition, NMFS has jurisdiction over most anadromous fish species, such as salmonids (i.e., salmon). NOAA Fisheries, Office of Protected Resources, Marine and Anadromous Fish, http://www.nmfs.noaa.gov/pr/species/fish/ (last visited Sept. 29, 2012).

8 NOAA Fisheries, *About National Marine Fisheries Service*, http://www.nmfs.noaa.gov/aboutus/aboutus.html (last visited Nov. 19, 2012).

9 CRAIG, *supra* note 7, at 367.

10 CRAIG, *supra* note 7, at 402 (referring to 16 U.S.C. § 1538 (2006)).

11 16 U.S.C. § 1538 (2006).

12 *See id.* § 1538(a)(1) (prohibiting "take"); *id.* § 1532(19) (defining "take" to include "harm"); 50 C.F.R. § 17.3 (2011) (defining "harm" as including "significant habitat modification or degradation that actually kills or injures wildlife."); Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or., 515 U.S. 687, 708 (1995) (upholding FWS's interpretation of "harm").

13 16 U.S.C. § 1536 (2006); CRAIG, *supra* note 7, at 367.

14 *Id.* § 1536(a)(2).

15 *See, e.g.*, Douglas Cnty. v. Babbitt (Douglas Cnty.), 48 F.3d 1495, 1500–01 (9th Cir. 1995) (alleging that National Environmental Policy Act (NEPA) compliance was necessary to explore the "range of alternatives and cumulative effects," and that the potential mismanagement of critical habitat threatened the County's proprietary interest in its adjacent land); Catron Cnty. Bd. of Comm'rs v. Babbitt (Catron Cnty.), 75 F.3d 1429, 1433 (10th Cir. 1996) (alleging that NEPA compliance was required because FWS's critical habitat designation would "prevent the diversion and impoundment of water by the County, thereby causing flood damage to county-owned property").

16 National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. §§ 4321–4370(f) (2006).

17 *See* Telephone Interview with Dinah Bear, Former General Counsel to the Council on Environmental Quality (CEQ) (Mar. 27, 2012) (calling the issue "an incredibly controversial topic").

This controversial issue is the focus of the sixteen-year-old circuit split that truly began over twenty years ago because of two little fish and an owl.[18]

At first, the two little fish[19] and the owl share similar stories. In 1986, FWS listed the spikedace (*Meda fulgida*) and the loach minnow (*Tiaroga cobitis*) as threatened pursuant to the ESA,[20] in part because human activities significantly decreased and degraded the habitat available to the two fish.[21] Similarly, FWS listed the Northern spotted owl (*Strix occidentalis caurina*) (spotted owl) as threatened in 1990,[22] in part because timber harvesting and natural catastrophes significantly decreased the amount of suitable habitat available to the species.[23]

The spikedace and loach minnow were historically found throughout the Gila River system—a river system that flows through Arizona and New Mexico in the United States, and the state of Sonora in Mexico.[24] Even though their ranges have been significantly reduced by both the loss and disturbance of habitat, and the spread of non-native species, these two little

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18 *Douglas Cnty.*, 48 F.3d at 1497, 1507; *Catron Cnty.*, 75 F.3d at 1429, 1432. The Ninth Circuit most recently affirmed its position in 2010. Home Builders Ass'n of N. Cal. v. FWS, 616 F.3d 983, 992 (9th Cir. 2010) (holding that a cumulative impacts analysis, which is required under NEPA, is not required for critical habitat designations made pursuant to the ESA because: 1) "the plain language of ESA directs the agency to consider only those impacts caused by the critical habitat designation itself," and 2) the ESA is different than NEPA because it addresses actions that protect the environment rather than actions that "might have negative consequences for the environment"). The Tenth Circuit most recently affirmed its position on whether NEPA applies to critical habitat designations in 2002. Middle Rio Grande Conservancy Dist. v. Norton, 294 F.3d 1220, 1228 n.6 (10th Cir. 2002) (holding that the ESA requirement to consider the economic impacts of critical habitat designations, 16 U.S.C. § 1533(b)(2) (2006), "is independent of, and in addition to, the analysis of other impacts as required by NEPA"); *see generally infra* Part II.C (discussing the circuit split over this issue).

19 The spikedace and the loach minnow grow to be less than three inches long. ARIZ. ECOLOGICAL FIELD OFFICE, U.S. FISH & WILDLIFE SERV., QUESTIONS AND ANSWERS: 2012 SPIKEDACE AND LOACH MINNOW CRITICAL HABITAT AND UPLISTING RULES 1 (2012) [hereinafter FWS 2012 SPIKEDACE & LOACH MINNOW Q&A], *available at* http://www.fws.gov/southwest/es/arizona/Documents/SpeciesDocs/SD_LM/2012fCH_fQnAs.pdf.

20 Determination of Threatened Status for the Spikedace, 51 Fed. Reg. 23,769 (July 1, 1986) (codified at 50 C.F.R. pt. 17); Determination of Threatened Status for the Loach Minnow, 51 Fed. Reg. 39,468 (Oct. 28, 1986) (codified at 50 C.F.R. pt. 17). Both species of fish "require perennial streams with substrates free of excessive fine sedimentation, and with moderate to swift currents. Recurrent natural flooding is important in maintaining their habitat and also helps them maintain a competitive edge over invading nonnative aquatic species." FWS 2012 SPIKEDACE & LOACH MINNOW Q&A, *supra* note 19.

21 FWS 2012 SPIKEDACE & LOACH MINNOW Q&A, *supra* note 19.

22 Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26,114 (June 26, 1990) (codified at 50 C.F.R. pt. 17).

23 Oregon Fish & Wildlife Office, U.S. Fish & Wildlife Serv., *Northern Spotted Owl Recovery Plan*, http://www.fws.gov/oregonfwo/Species/Data/NorthernSpottedOwl/Recovery/Plan/default.aspx#Background (last visited Nov. 19, 2012). The listing of the spotted owl "triggered intense debates about the sustainability of the social, economic, and conservation values of [old-growth forests in the Pacific Northwest]." Oregon Fish & Wildlife Office, U.S. Fish & Wildlife Serv., *Northern Spotted Owl Recovery Information*, http://www.fws.gov/oregonfwo/Species/Data/NorthernSpottedOwl/main.asp (last visited Nov. 19, 2012).

24 FWS 2012 SPIKEDACE & LOACH MINNOW Q&A, *supra* note 19, at 2.

fish can still be found in Arizona and New Mexico.[25] Similarly, the spotted owl, which was historically found in coniferous and mixed-conifer hardwood forests throughout the Pacific Northwest,[26] can still be found throughout its range, even though decades of intense timber harvesting significantly reduced and fragmented the owl's once-continuous forest habitat.[27]

In 1992, FWS designated nearly 6.9 million acres of federal land in California, Oregon, and Washington as spotted owl critical habitat.[28] Similarly, FWS designated critical habitat for the two fish in 1994—approximately 95 miles of river in New Mexico and Arizona for the spikedace,[29] and 159 miles of river in the same area for the loach minnow.[30] In accordance with its 1983 policy, which states that FWS need not comply with NEPA when adopting rules "pursuant to Section 4(a) of the [ESA]"[31] (e.g., critical habitat designations), FWS did not comply with NEPA for any of the three designations.[32] Two counties affected by the designations—Catron County, New Mexico, and Douglas County, Oregon—brought suit against FWS,[33] arguing that critical habitat designations are not exempt from

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[25] *Id.* ("The original range for both fish has diminished 85%–90% due to habitat disturbance and loss, and the introduction and spread of nonnative aquatic species that prey on and compete with them.").

[26] Determination of Critical Habitat for the Northern Spotted Owl, 57 Fed. Reg. 1,796 (Jan. 15, 1992) (codified at 50 C.F.R. pt. 17).

[27] *Id.* at 1,799. Spotted owl populations are currently "stable in a few areas and declining in most others. The two main threats to its survival are habitat loss and competition from the barred owl, a relative from eastern North America that has progressively encroached into the spotted owl's range." Oregon Fish & Wildlife Office, U.S. Fish & Wildlife Serv., *Northern Spotted Owl Recovery Information*, June 7, 2012, http://www.fws.gov/oregonfwo/Species/Data/NorthernSpottedOwl/main.asp (last visited Nov. 19, 2012).

[28] *Douglas Cnty.*, 48 F.3d at 1498; 57 Fed. Reg. at 1,809 (Jan. 15, 1992) (codified at 50 C.F.R. pt. 17).

[29] Designation of Critical Habitat for the Threatened Spikedace (*Meda fulgida*), 59 Fed. Reg. 10,906, 10,907 (Mar. 8, 1994) (codified at 50 C.F.R. pt. 17).

[30] Designation of Critical Habitat for the Threatened Loach Minnow (*Tiaroga cobitis*), 59 Fed. Reg. 10,898 (Mar. 8, 1994) (codified at 50 C.F.R. pt. 17).

[31] Preparation of Environmental Assessments for Listing Actions under the Endangered Species Act, 48 Fed. Reg. 49,244 (Oct. 25, 1983) (codified at 50 C.F.R. pt. 17). This notice explains that FWS's decision to make this "procedural change" was based on four reasons: 1) a letter from CEQ that advised FWS "that Section 4 listing actions are exempt from NEPA review 'as a matter of law'"; 2) none of the 130 EAs that FWS prepared during the 10 years prior to the notice required the preparation of an EIS; 3) Pac. Legal Found. v. Andrus, 657 F.2d 829, 835 (6th Cir. 1981), held that an EIS is not required for listings under the ESA and that "preparing EISs on listing actions does not further the goals of NEPA or ESA"; and 4) the ESA was amended in 1982 to require that listing decisions "be based solely upon biological grounds and not upon consideration of economic or socioeconomic factors." *Id.* at 49,244–45. The notice further explains that the change in policy "will allow better utilization of personnel and fiscal resources and will eliminate the preparation of documents that did not further the goals of either NEPA or ESA." *Id.* at 49,245.

[32] *Catron Cnty.*, 75 F.3d 1429, 1433 (10th Cir. 1996); *Douglas Cnty.*, 48 F.3d at 1498.

[33] *Catron Cnty.*, 75 F.3d at 1432–33; Douglas Cnty. v. Lujan, 810 F. Supp. 1470, 1472 (D. Or. Dec. 22, 1992), *aff'd in part, rev'd in part sub nom.* Douglas Cnty. v. Babbit, 48 F.3d 1495 (9th Cir. 1995). *Douglas County* was the first legal challenge to FWS's 1983 policy. *Douglas Cnty.*, 48 F.3d at 1501.

NEPA.[34] The counties prevailed in district court, and FWS appealed.[35] This is where the species' stories diverge.

Presented with similar facts, the Courts of Appeals reached different conclusions. In 1995 the Ninth Circuit, presiding over Douglas County's case, held that "NEPA does not apply to the designation of a critical habitat,"[36] and thus affirmed the validity of the spotted owl critical habitat designation. In 1996, the Tenth Circuit, presiding over Catron County's case, held that critical habitat designations do require NEPA compliance,[37] and thus set aside the spikedace and loach minnow critical habitat designations.[38] In 2012, after two other suits successfully challenged the validity of subsequent critical habitat designations for the two fish,[39] FWS designated 710 miles of river as critical habitat for the spikedace and loach minnow,[40] and changed the status of the species from threatened to endangered.[41] If the 2012 spikedace and loach minnow critical habitat designation is left undisturbed, the two little fish waited twenty-six years for critical habitat, while the spotted owl waited only five.

This Comment examines both sides of this controversy in an attempt to provide an objective and fresh perspective[42] on the issue of whether critical

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[34] *Catron Cnty.*, 75 F.3d at 1433; *Lujan*, 810 F. Supp. at 1474.

[35] *Catron Cnty.*, 75 F.3d at 1432; *Douglas Cnty.*, 48 F.3d at 1497.

[36] *Douglas Cnty.*, 48 F.3d at 1502.

[37] *Catron Cnty.*, 75 F.3d at 1439.

[38] Revocation of Critical Habitat for the Mexican Spotted Owl, Loach Minnow, and Spikedace, 63 Fed. Reg. 14,378 (Mar. 25, 1998) (codified at 50 C.F.R. pt. 17).

[39] FWS complied with NEPA and designated critical habitat for the two fish in 2000. Final Designation of Critical Habitat for the Spikedace and the Loach Minnow, 65 Fed. Reg. 24,328 (Apr. 25, 2000) (codified at 50 C.F.R. pt. 17). The 2000 designation was set aside in 2004. N.M. Cattle Growers Ass'n v. FWS, No. CIV 02-0199 JB/LCS, 2004 U.S. Dist. LEXIS 28293, at *8, *25 (D.N.M. Aug. 31, 2004). FWS designated critical habitat for the two fish again in 2007. Designation of Critical Habitat for the Spikedace (*Meda fulgida*) and the Loach Minnow (*Tiaroga cobitis*), 72 Fed. Reg. 13,356 (Mar. 21, 2007) (codified at 50 C.F.R. pt. 17). In 2009, after further litigation, FWS was granted a motion to voluntarily remand the 2007 designation. Coal. of Ariz./N.M. Cntys. for Stable Econ. Growth v. Salazar, No. 07-CV-00876 JEC /WPL, 2009 U.S. Dist. LEXIS 129808, at *14–15 (D.N.M. May 4, 2009); Endangered Status and Designation of Critical Habitat for Spikedace and Loach Minnow, 75 Fed. Reg. 66,482, 66,485 (Oct. 28, 2010) (codified at 50 C.F.R. pt. 17).

[40] Endangered Status and Designations of Critical Habitat for Spikedace and Loach Minnow, 77 Fed. Reg. 10,810 (Feb. 23, 2012) (codified at 50 C.F.R. pt. 17). FWS designated 529 river miles as critical habitat for both species, with an additional 100 river miles designated as critical habitat for the spikedace, and 81 for the loach minnow. *Id.*

[41] *Id.*; FWS 2012 SPIKEDACE & LOACH MINNOW Q&A, *supra* note 19, at 8 (explaining that FWS changed the status of the two fish from threatened to endangered because "prolonged drought, anticipated effects of climate change[,] and increasing abundance and the expanding range of competitive and predatory nonnative fishes have increased the threat of extinction for both species").

[42] This Comment builds on the scholarship that has developed since *Douglas County* on the issue of whether critical habitat designations require NEPA compliance. *See, e.g.*, Jonathan M. Cosco, Note, *NEPA for the Gander: NEPA's Application to Critical Habitat Designations and Other "Benevolent" Federal Action*, 8 DUKE ENVTL. L. & POL'Y F. 345 (1998); Jim Davis, Note, *Can NEPA and the ESA Work Together? Designations of Critical Habitat for an Endangered Species Must Fulfill National Environmental Policy Act Requirements* [*Pursuant to*] Catron County Board of County Commissioners v. United States Fish and Wildlife Service, *75 F.3d 1429 (10th*

habitat designations require NEPA compliance. Part II provides the necessary context for understanding this complex policy problem by summarizing: 1) NEPA, its relevant provisions and implementing regulations, and judicially-created exemptions; 2) the ESA and its relevant provisions and implementing regulations; and 3) the reasoning behind the Circuit split. Part III discusses how the Circuit split affects agency practice. Part IV critically analyzes the current judicial approaches taken by the Ninth and Tenth Circuits. Part V suggests that critical habitat designations should not require NEPA compliance because: 1) application of the functional equivalence exemption is appropriate, and 2) federal actions that do not alter the physical environment do not fall under the purview of NEPA. And finally, Part VI concludes that: 1) the agencies that designate critical habitat should adopt the legal arguments provided by this paper and jointly develop policies that improve their ability to maximize conservation while waiting for the judiciary to resolve the split; 2) the courts outside of the Ninth and Tenth Circuits, particularly those within the D.C. Circuit, should seriously consider the legal arguments presented by this paper; and 3) if presented with the opportunity, the United States Supreme Court should resolve this controversy to enable the agencies that designate critical habitat to develop consistent national policies on NEPA compliance and maximize their efforts to conserve endangered and threatened species.

II. BACKGROUND

The following background sections discuss what is essential about NEPA, the ESA, and the split between the Ninth and Tenth Circuits to understanding the complex policy problem of whether critical habitat designations require NEPA compliance.

A. The National Environmental Policy Act of 1969

NEPA, "the first major environmental law in the United States,"[43] was enacted by Congress in December 1969, and signed into law by President Richard Nixon on January 1, 1970.[44] Without much opposition,[45] NEPA

Cir. 1996), 32 LAND & WATER L. REV. 677 (1997); Jean M. Emery, Comment, *Environmental Impact Statements and Critical Habitat: Does NEPA Apply to the Designation of Critical Habitat Under the Endangered Species Act?*, 28 ARIZ. ST. L.J. 973 (1996); Katie Kendall, Note, *The Long and Winding "Road": How NEPA Noncompliance for Preservation Actions Protects the Environment*, 69 BROOK. L. REV. 663 (2004); Lori Hackleman Patterson, Comment, *NEPA's Stronghold: A Noose for the Endangered Species Act?*, 27 CUMB. L. REV. 753 (1997); Melaney Payne, Note, *Critically Acclaimed but Not Critically Followed—The Inapplicability of the National Environmental Policy Act to Federal Agency Actions:* Douglas County v. Babbitt, 7 VILL. ENVTL. L.J. 339 (1996); David G. Perillo, Note, *Designations of Critical Habitat Pursuant to the Endangered Species Act: Does NEPA Apply?*, 7 FORDHAM ENVTL. L.J. 397 (1996).

[43] COUNCIL ON ENVTL QUALITY, EXEC. OFFICE OF THE PRESIDENT, A CITIZEN'S GUIDE TO THE NEPA: HAVING YOUR VOICE HEARD 2 (2007), *available at* http://ceq.hss.doe.gov /nepa/Citizens_Guide_Dec07.pdf [hereinafter CITIZEN'S GUIDE TO NEPA].

[44] *Id.*

became the country's "basic national charter for protection of the environment"[46] by establishing environmental policies, setting goals, and providing means to carry out and achieve those policies and goals.[47]

1. Overview of NEPA

The stated purpose of NEPA is:

> To declare a national policy which will 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 and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.[48]

In practice, however, NEPA's broad purpose is referred to as having "twin aims" because "it 'places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action'" and "it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process."[49]

The stated policies of NEPA are "to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."[50] These aspirational policies are implemented through NEPA's procedural requirements.[51] For example, section 102(2)(C) of NEPA, "[t]he most important of these requirements,"[52] requires that:

> All agencies of the Federal Government *shall* . . . include in . . . *major Federal actions significantly affecting the quality of the human environment*, a detailed statement by the responsible official on—(i) the *environmental impact* of the proposed action, (ii) any *adverse environmental effects* which cannot be avoided should the proposal be implemented, (iii) *alternatives* to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity,

[45] A. Dan Tarlock, *The Story of* Calvert Cliffs*: A Court Construes the National Environmental Policy Act to Create a Powerful Cause of Action*, *in* ENVIRONMENTAL LAW STORIES 77, 83 (Richard J. Lazarus & Oliver A. Houck eds., 2005).

[46] 40 C.F.R. § 1500.1(a) (2011).

[47] *Id.*; CITIZEN'S GUIDE TO NEPA, *supra* note 43.

[48] 42 U.S.C. § 4321 (2006).

[49] Balt. Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 97 (1983) (citation omitted).

[50] 42 U.S.C. § 4331 (2006).

[51] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) (holding that NEPA "does not mandate particular results, but simply prescribes the necessary process"); CITIZEN'S GUIDE TO NEPA, *supra* note 43.

[52] CRAIG, *supra* note 7, at 229 (referring to 42 U.S.C. § 4332(2)(C)).

> and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[53]

Section 102(2)(C) is sometimes called one of NEPA's "action forcing"[54] provisions because it prescribes what is known as the "environmental impact assessment process"[55] and, under certain circumstances, requires the preparation of an Environmental Impact Statement (EIS).[56] Although NEPA itself does not clearly explain when compliance is required,[57] section 102(2)'s implementing regulations, which were promulgated by the Council on Environmental Quality (CEQ),[58] provide federal agencies with guidance on how to comply with NEPA.[59]

2. The Council on Environmental Quality's Implementing Regulations

The CEQ regulations implementing NEPA explain that there are several questions an agency must answer before it can determine how to comply with NEPA.[60] First, the agency must determine whether the proposed action requires the preparation of an environmental assessment (EA),[61] an EIS, or neither.[62] Neither document must be prepared if the proposed action qualifies as a "categorical exclusion."[63] An EA must be prepared if the action

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53 42 U.S.C. § 4332(2)(C) (2006) (emphasis added).

54 Kleppe v. Sierra Club, 427 U.S. 390, 409 (1976); 40 C.F.R. § 1500.1 (2011) ("Section 102(2) contains 'action-forcing provisions' to make sure that federal agencies act according to the letter and spirit of the Act."); Tarlock, *supra* note 45, at 86.

55 CITIZEN'S GUIDE TO NEPA, *supra* note 43.

56 CRAIG, *supra* note 7, at 229.

57 *Id.* (stating that CEQ regulations, which implement NEPA's general environmental review requirements, prescribe in detail what NEPA requires of federal agencies).

58 40 C.F.R. § 1500.3 (2011) (stating that the CEQ regulations implementing NEPA, which are found in C.F.R. pts. 1500–1508, are "binding on all Federal agencies implementing the procedural provisions of [NEPA]"). CEQ, the authority charged with overseeing NEPA implementation by federal agencies, also issues guidance documents that clarify the requirements and applicability of various NEPA provisions and CEQ regulations. Memorandum from Nancy H. Sutley, Chair, Council on Envtl. Quality, to the Heads of Fed. Dep'ts and Agencies 2 (Mar. 6, 2012), *available at* http://www.whitehouse.gov/sites/default/files/microsites/ceq/improving_nepa_efficiencies_06mar2012.pdf. CEQ's interpretations of NEPA are "entitled to substantial deference." Andrus v. Sierra Club, 442 U.S. 347, 358 (1979).

59 40 C.F.R. § 1500.1 (2011).

60 CRAIG, *supra* note 7, at 229.

61 An EA is "a concise public document . . . [that] provide[s] sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact" and briefly discusses "the need for the proposal, . . . alternatives . . . [and] the environmental impacts of the proposed action and alternatives." 40 C.F.R. § 1508.9 (2011). A finding of no significant impact (FONSI) is a concise document that presents "the reasons why an action, not otherwise excluded [via § 1508.4], will not have a significant effect on the human environment." *Id.* § 1508.13.

62 40 C.F.R. §§ 1501.3, 1501.4 (2011).

63 *Id.* § 1500.4(p) (stating that an action qualifies as a "categorical exemption" if an agency determines that the action does "not individually or cumulatively have a significant effect on the human environment"). Under "extraordinary circumstances," an action which is normally categorically excluded "may have a significant environmental effect" and thus require the preparation of an EIS. *Id.* § 1508.4.

is not categorically excluded and does not normally require an EIS.[64] In other words, the proposed action requires an EA if it may require an EIS, and the preparation of an EA is not necessary if the agency knows that an EIS is required.[65] And finally, an EIS is required for actions that fall under section 102(2)(C) of NEPA,[66] which covers "major Federal actions significantly affecting the quality of the human environment."[67] This key phrase of section 102(2)(C) is explained, almost word-by-word, by CEQ regulations.[68] Because the purpose of a critical habitat designation under the ESA is to protect the natural environment, CEQ's definition of "human environment" is significant to an analysis of whether critical habitat designations trigger NEPA compliance. The CEQ defines the "human environment" as:

> [T]he natural and physical environment and the relationship of people with that environment. . . . This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.[69]

After an agency determines that its proposed action requires the preparation of an EIS, the agency must diligently work to involve the public throughout the EIS process.[70] For example, an agency must publish a notice of intent to prepare an EIS in the *Federal Register*[71] that defines the scope of the proposed project[72] and solicits comments from all interested stakeholders.[73] When determining the scope of an EIS, agencies must consider: 1) connected actions, cumulative actions, and similar actions; 2) a "no action" alternative, "other reasonable courses of action," and "mitigation measures"; and 3) direct, indirect, and cumulative impacts. Moreover, to ensure that the public has an adequate opportunity to participate in the scoping process, the agency must invite all interested stakeholders to share their comments on the scope of the proposed EIS at public hearings or meetings.[74]

After determining the scope of the EIS, a draft EIS (DEIS) must be prepared and published in the *Federal Register*.[75] In addition to meeting NEPA's express requirements for an EIS,[76] the CEQ requires that both DEISs

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64 *Id.* §§ 1501.3(a), 1501.4.
65 *Id.* § 1501.3(a).
66 *Id.* § 1508.11.
67 42 U.S.C. § 4332(2)(C) (2011); 40 C.F.R. § 1508.11 (2011).
68 CRAIG, *supra* note 7, at 245.
69 40 C.F.R. § 1508.14 (2011) (emphasis added).
70 *Id.* § 1506.6(a).
71 *Id.* § 1501.7.
72 *Id.*
73 CRAIG, *supra* note 7, at 290.
74 40 C.F.R. § 1506.6(b) (2011).
75 *Id.* §§ 1502.9, 1502.19; CRAIG, *supra* note 7, at 291.
76 CRAIG, *supra* note 7, at 293 (referring to section 102(2)(C) of NEPA).

and final EISs (FEISs) contain, among other things, a description of alternatives and a statement of purpose and need.[77] The CEQ refers to the alternatives section as "the heart of the environmental impact statement"[78] and thus requires agencies to devote considerable effort to the development of this section.[79] Agencies must also use due diligence to thoroughly and yet concisely describe the affected environment and environmental consequences.[80]

After completing the DEIS, the agency must circulate it to and invite comments from: federal agencies with jurisdiction or "special expertise with respect to any environmental impact involved"; "appropriate Federal, State or local agenc[ies] authorized to develop and enforce environmental standards"; "[t]he applicant, if any"; and "[a]ny person, organization, or agency requesting the [EIS]."[81] The agency must also invite comments from the general public,[82] and also from Indian tribes if the proposed action may affect a reservation.[83] The DEIS comment period shall last no less than forty-five days.[84] The agency must consider and respond to the comments received.[85]

An agency's completed FEIS must be published in the *Federal Register* and circulated to the same entities that received the DEIS, as well as to "any person, organization, or agency which [sic] submitted substantive comments on the [DEIS]."[86] The FEIS comment period shall last no less than thirty days.[87] No earlier than ninety days after publishing notice of the DEIS,[88] the agency may complete the NEPA process by publishing a summary of the reasons for reaching its conclusion in a public document called the "record of decision."[89]

NEPA does not contain a citizen suit provision, thus the federal Administrative Procedure Act[90] (APA) is the only available avenue for those who wish to challenge the adequacy of an FEIS.[91] When reviewing the sufficiency of an FEIS under the APA, courts keep in mind that NEPA:

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[77] 40 C.F.R. § 1502.10 (2011). The regulations state that the CEQ's EIS format is "recommended," but in practice the CEQ recommendations are considered requirements. Bear, *supra* note 17.

[78] 40 C.F.R. § 1502.14 (2011).

[79] *Id.*

[80] *Id.* §§ 1502.15, 1502.16; CRAIG, *supra* note 7, at 293–94.

[81] *Id.* § 1502.19(a)–(c).

[82] *Id.* § 1503.1(a)(4).

[83] *Id.* § 1503.1(a)(2)(ii).

[84] *Id.* § 1506.10(c).

[85] *Id.* § 1503.4(a).

[86] *Id.* § 1502.19; CRAIG, *supra* note 7, at 291.

[87] *Id.* § 1506.10(b)(2).

[88] *Id.* § 1506.10(b)(1).

[89] *Id.* § 1505.2.

[90] 5 U.S.C. §§ 551–559, 701–706 (2006). "The [APA] governs the process by which federal agencies develop and issue regulations." U.S. Envtl. Prot. Agency, *Summary of the Administrative Procedure Act*, http://www.epa.gov/lawsregs/laws/apa.html (last visited Nov. 19, 2012).

[91] CRAIG, *supra* note 7, at 281.

> [R]equire[s] only that the agency take a "hard look" at the environmental consequences before taking a major action. The role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.[92]

3. Clarifying the Boundaries of NEPA: Judicially Created Exemptions to NEPA

Although NEPA broadly states that it applies to all "major Federal actions significantly affecting the quality of the human environment,"[93] the judiciary has created two exemptions: the "irreconcilable conflict" exemption and the "functional equivalence" exemption.[94]

The irreconcilable conflict exemption applies if compliance with NEPA "would create an irreconcilable and fundamental conflict" with another statute.[95] This exemption derives from the portion of section 102(2)(C) of NEPA that states that all federal agencies must comply with NEPA's procedural requirements "to the fullest extent possible."[96] In other words, section 102(2)(C) recognizes "that where a clear and unavoidable conflict in statutory authority exists, NEPA must give way. . . . 'NEPA was not intended to repeal by implication any other statute.'"[97]

The functional equivalence exemption applies if a proposed action triggers laws other than NEPA that require the federal agency to produce the "functional equivalent of a NEPA impact statement."[98] As established by the 1973 D.C. Circuit case of *Portland Cement Ass'n v. Ruckelshaus*, this "narrow exemption from NEPA"[99] applies only to environmental agencies.[100] In *Portland Cement*, the plaintiffs brought suit against the Environmental Protection Agency (EPA) for not complying with NEPA when promulgating stationary source emission standards for cement plants pursuant to the Clean Air Act[101] (CAA).[102] The D.C. Circuit noted that an examination of the plain language, purpose, policies, and legislative history of NEPA was inconclusive as to whether a broad exemption to NEPA should apply to all

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92 Balt. Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 82, 97–98 (1983) (citation omitted).

93 42 U.S.C. § 4332(2)(C) (2006).

94 *See e.g.*, Cape Hatteras Access Pres. Alliance v. U.S. Dep't of the Interior, 344 F. Supp. 2d 108, 134 (D.D.C. 2004) (noting the existence of both the irreconcilable conflict and functional equivalence exemptions, but not addressing either because neither was raised by defendant FWS or the interveners); Patterson, *supra* note 42, at 760. Although Congress has exempted certain actions from NEPA, see, for example CITIZENS' GUIDE TO NEPA, *supra* note 43, at 10, such exemptions are not discussed in this Comment because they are not relevant to its proposed resolution.

95 Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla., 426 U.S. 776, 788 (1976).

96 42 U.S.C. § 4332(2)(C) (2006).

97 *Flint Ridge Dev. Co.*, 426 U.S. at 788 (quoting United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 694 (1973)).

98 Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 384 (D.C. Cir. 1973).

99 *Id.* at 375, 384, 387.

100 *Id.* at 387.

101 Clean Air Act, 42 U.S.C. §§ 7401–7671q (2006).

102 *Portland Cement*, 486 F.2d at 379.

actions carried out by all environmentally protective agencies.[103] The court, however, concluded that EPA's promulgation of rules under the circumstances was exempt because the CAA required a statement of reasons for the proposed standards that described all environmental impacts, and provided opportunity for public comment and judicial review.[104] In addition, the court found that under the circumstances, the exemption struck "a workable balance between some of the advantages and disadvantages of [the] full application of NEPA"[105] because the exemption allowed EPA to avoid the delay caused by NEPA compliance without sacrificing the channels of "informed decision-making."[106]

Shortly after deciding *Portland Cement*, the D.C. Circuit expanded the breadth of the functional equivalence exemption in *Environmental Defense Fund v. EPA*[107] when it exempted from NEPA compliance EPA's decision to cancel "almost all registrations for the use of DDT"[108] under the Federal Insecticide, Fungicide, and Rodenticide Act[109] (FIFRA). The court found that application of the exemption was appropriate because FIFRA required public participation and consideration of "all of the five core NEPA issues . . . the environmental impact of the action, possible adverse environmental effects, possible alternatives, the relationship between long- and short-term uses and goals, and any irreversible commitments of resources,"[110] and thus, that the decision-making process provided "the functional equivalent of a NEPA investigation."[111] The court further explained: "When it is clear that the NEPA objections are being raised by parties who have had ample opportunity to express their views, when there has been functional compliance, the . . . agency action should be exempted from the strict letter of NEPA requirements."[112] The D.C. Circuit reiterated its point by holding:

> [W]here an agency is engaged primarily in an examination of environmental questions, where substantive and procedural standards ensure full and adequate consideration of environmental issues, then formal compliance with NEPA is not necessary, but functional compliance is sufficient. We are not formulating a broad exemption from NEPA for all environmental agencies or even for all environmentally protective regulatory actions of such agencies. Instead, we delineate a narrow exemption from the literal requirements for those actions which are undertaken pursuant to sufficient safeguards so that the purpose and policies behind NEPA will necessarily be fulfilled.[113]

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103 *Id.* at 379–84.
104 *Id.* at 385–86.
105 *Id.* at 386.
106 *Id.*
107 489 F.2d 1247 (D.C. Cir. 1973).
108 *Envtl. Def. Fund*, 489 F.2d at 1249, 1257.
109 7 U.S.C. §§ 136–136y (2006 & Supp. II 2008).
110 *Id.* at 1256.
111 *Id.*
112 *Id.*
113 *Id.* at 1257.

In addition to the D.C. Circuit,[114] the Tenth,[115] Eleventh,[116] Eighth,[117] and Ninth Circuits[118] have applied the functional equivalence exemption. The common thread between these circuits is that the functional equivalence exemption applies if the federal action is taken pursuant to legislation that requires the consideration of environmental impacts and alternatives, and provides an opportunity for public comment and judicial review.[119] Interestingly, the functional equivalence exemption has been applied only to actions taken by the EPA.

B. The Endangered Species Act of 1973

Congress passed the ESA in 1973 in an attempt to drastically improve the nation's efforts to preserve endangered species.[120] The passage of the ESA "represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation,"[121] and reflected Congress's commitment to conserve endangered species at both the national and international level.[122]

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114 The D.C. Circuit applied the functional equivalence exemption again in 1974 and 1999. Am. Trucking Ass'n v. U.S. Envtl. Prot. Agency, 175 F.3d 1027, 1043 (D.C. Cir. 1999) (holding that EPA's promulgation of National Ambient Air Quality Standards under the CAA are exempt from NEPA because NEPA compliance would be redundant in light of CAA requirements); Amoco Oil Co. v. U.S. Envtl. Prot. Agency, 501 F.2d 722, 750 (D.C. Cir. 1974) (holding that EPA's fuel regulations under section 211(c) of the CAA, 42 U.S.C. § 7545(c) (2006), are exempt from NEPA because "EPA actions under the [CAA] are exempt from NEPA's requirement of an environmental impact statement" under the functional equivalence doctrine).

115 Wyoming v. Hathaway, 525 F.2d 66, 69 (10th Cir. 1975) (using the functional equivalence exemption to hold that the EPA's cancellation of poison registrations under FIFRA was exempt from NEPA).

116 Alabama v. U.S. Envtl. Prot. Agency, 911 F.2d 499, 505 (11th Cir. 1990) (using the functional equivalence exemption to hold that the EPA is exempt from NEPA for actions taken pursuant to the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6992k (2006) (amending Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992 (1965)).

117 W. Neb. Res. Council v. U.S. Envtl. Prot. Agency, 943 F.2d 867, 871–72 (8th Cir. 1991) (using the functional equivalence exemption to hold that EPA is exempt from NEPA when taking actions pursuant to the Safe Drinking Water Act, 42 U.S.C. §§ 300f–300j-26 (2006)).

118 Mun. of Anchorage v. United States, 980 F.2d 1320, 1329 (9th Cir. 1992) (using the functional equivalence exemption to hold that NEPA does not apply to a Memorandum of Agreement to promulgate dredge and fill permit guidelines pursuant to section 404(b)(1) of the Clean Water Act, 33 U.S.C. § 1344(b)(1), that was jointly adopted by the Army Corps of Engineers and EPA). The Ninth Circuit also noted "that NEPA applies with less force to EPA than to any other federal agency." *Id.*

119 *Portland Cement*, 486 F.2d 375, 384–87 (D.C. Cir. 1973); *Envtl. Def. Fund*, 489 F.2d 1247, 1256 (D.C. Cir. 1973); *Amoco Oil*, 501 F.2d at 750; Wyoming v. Hathaway, 525 F.2d at 69; *Mun. of Anchorage*, 980 F.2d at 1329; *Alabama*, 911 F.2d at 505; *W. Neb. Res. Council*, 943 F.2d at 871–72.

120 Tenn. Valley Auth. v. Hill, 437 U.S. 153, 174–75 (1978) (discussing the evolution of Congress's efforts to protect endangered species, including the enactment of the Endangered Species Act of 1966 and the Endangered Species Conservation Act of 1969, and the legislative proceedings that convinced Congress that drastic improvements were necessary to address the inadequacies of the existing legislation).

121 *Tenn. Valley Auth.*, 437 U.S. at 180.

122 16 U.S.C. § 1531(a)–(b) (2006); CRAIG, *supra* note 7, at 322.

1. Overview of the ESA

The stated purposes of the ESA:

> [A]re to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions [that the U.S. has pledged commitment to in the name of species conservation].[123]

In the seminal case of *Tennessee Valley Authority v. Hill*, the Court explained that the ESA aims "to halt and reverse the trend toward species extinction, whatever the cost."[124] Unlike NEPA, the ESA demands substantive rather than procedural results.[125] For example, the ESA requires federal agencies "to conserve endangered species and threatened species" whenever possible[126] and to use their powers in furtherance of the ESA's purposes.[127] To eliminate any confusion as to the statutory mandate,[128] the ESA defined "*conserve*, *conserving*, and *conservation*"[129] to "mean to use and 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 [the ESA] are no longer necessary."[130]

2. Section 4 of the ESA and Its Implementing Regulations

As discussed in Part I of this Comment, section 4 of the ESA addresses FWS's and NMFS's duty to list species as threatened or endangered and to designate critical habitat for such species.[131] Listing a species as threatened or endangered pursuant to section 4 of the ESA is arguably the most important action that FWS or NMFS can take to prevent a species' extinction.[132] FWS and NMFS consider five factors when determining whether or not to list a species,[133] and must make their decision "solely on the basis of the best scientific and commercial data available . . . after conducting a review of the status of the species and after taking into account [existing efforts to protect the species]."[134] Thus, listing decisions may not be influenced by socioeconomic considerations.[135]

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123 16 U.S.C. § 1531(b).
124 *Tenn. Valley Auth.*, 437 U.S. at 184.
125 Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 667 (2007).
126 16 U.S.C. § 1531(c)(1) (2006).
127 *Id.*
128 *Tenn. Valley Auth.*, 437 U.S. at 180.
129 16 U.S.C. § 1532(3)(2006) (emphasis added and internal quotations omitted).
130 *Id.* § 1532(3).
131 *Id.* § 1533; *see supra* notes 2–7 and accompanying text.
132 *See, e.g.*, CRAIG, *supra* note 7, at 342.
133 16 U.S.C. § 1533(a)(1) (2006).
134 *Id.* § 1533(b)(1)(A).
135 *See* CRAIG, *supra* note 7, at 343.

To further the ESA's goal of conserving threatened and endangered species,[136] the decision to list a species as threatened or endangered must be accompanied by a designation of that species' critical habitat, "to the maximum extent prudent and determinable."[137] A species' "critical habitat" comprises "specific areas . . . essential to the conservation of the species."[138] A critical habitat designation must be made:

> [O]n the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, *and any other relevant 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 area as part of the critical habitat, *unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.*[139]

In addition, critical habitat must be designated in accordance with the APA's rulemaking procedures.[140] Under the APA, agencies must notify the public of a proposed rule and provide the public with an opportunity to participate in the rulemaking process.[141] The APA provides for judicial review of an agency's rulemaking process and requires rules that are unlawfully promulgated to be set aside.[142]

C. Summary of the Circuit Split on NEPA's Application to Critical Habitat Designations

1. The Ninth Circuit's Approach

Douglas County v. Babbitt[143] arose out of a controversy concerning the effects of designating commercially valuable federal forests as spotted owl

136 *See* 16 U.S.C. § 1531(b) (2006) (stating the purposes of the ESA); CRAIG, *supra* note 7, at 360.

137 16 U.S.C. § 1533(a)(3)(A). A critical habitat designation is *not prudent* when either: 1) the species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species, or 2) such designation of critical habitat would not be beneficial to the species. 50 C.F.R. § 424.12(a) (2011). Critical habitat is *not determinable* when either: 1) information sufficient to perform required analyses of the impacts of the designation is lacking, or (2) the biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat. *Id.*

138 16 U.S.C. § 1532(5)(A) (2006).

139 *Id.* § 1533(b)(2) (emphasis added).

140 *Id.* § 1533(b)(4). The APA's rulemaking procedures are found in: Administrative Procedure Act, 5 U.S.C. § 553 (2006).

141 5 U.S.C. § 553.

142 Natural Res. Def. Council v. U.S. Dep't of the Interior, 113 F.3d 1121, 1123–24 (9th Cir. 1997) (reviewing FWS's determination that it was not prudent to designate critical habitat for the California gnatcatcher under the APA). For the APA's scope of judicial review provisions, see 5 U.S.C. § 706 (2006).

143 48 F.3d 1495 (9th Cir. 1995).

critical habitat.[144] The controversy began when FWS proposed to list the spotted owl as threatened because the decision's opponents recognized the listing would trigger section 7 of the ESA and thus significantly limit timber harvesting in the federally owned old-growth forests of the Pacific Northwest.[145] At the time, the timber industry in the Pacific Northwest was already suffering from the effects of advances in technology and the increased demand for timber imports.[146] Once the spotted owl was listed as threatened in 1990, much of the timber harvesting on federal land within its range came to a halt.[147] The public responded by exhibiting deeply hostile opposition to the listing decision throughout the Pacific Northwest; cars displayed bumper stickers that read "I like the spotted owl—FRIED,"[148] restaurants added "spotted owl soup" to their menus, and locals printed T-shirts with the slogan "Save a Logger, Eat an Owl."[149]

Douglas County, which largely consists of federally owned commercial forests and whose labor force is largely employed by the forest products industry,[150] submitted formal comments in response to FWS's proposed rule to designate the federal forests of Douglas County as spotted owl critical habitat in 1991.[151] The county alleged that the proposal to designate nearly 11.7 million "acres of federal, state, and private lands"[152] as critical habitat was invalid because it failed to comply with NEPA.[153] In consideration of the county's comments, FWS revised the proposed rule to eliminate all privately owned land as well as most of the state-owned land from the designation, which in effect reduced the proposed critical habitat to approximately 8.24 million acres.[154] The revised proposed rule, however, "affirmed the Secretary's decision that an EA was not necessary."[155] The final rule ultimately reduced the designation to just under 6.9 million acres, "all of which is federal land."[156]

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144 *See generally* Eric Wagner, *The Last Stand: Twenty Years Ago, an Extraordinary Effort by Environmentalists Saved the Northern Spotted Owl—Or Did It?*, EARTH ISLAND J., Summer 2011, http://www.earthisland.org/journal/index.php/eij/article/the_last_stand (last visited Nov. 19, 2012) (discussing old growth forests and critical habitats for spotted owls in Douglas County).

145 CRAIG, *supra* note 7, at 347.

146 Wagner, *supra* note 144.

147 CRAIG, *supra* note 7, at 347; Wagner, *supra* note 144; John Sowell, *Douglas County's Spotted Owl Saga—Still an Emotional Issue Twenty Years Later*, NEWS-REVIEW, Dec. 12, 2010, http://www.nrtoday.com/article/20101212/NEWS/101219966 (last visited Nov. 19, 2012).

148 CRAIG, *supra* note 7, at 347.

149 Sowell, *supra* note 147.

150 Douglas Cnty., *Facts About Douglas County*, http://www.co.douglas.or.us/overview.asp (last visited Nov. 19, 2012) (noting that in Douglas County, Oregon, about 86% of the total land area is commercial forest, over 50% of the land area is federally owned, and about 25% of the labor force is employed in the forest products industry).

151 *Douglas Cnty.*, 48 F.3d 1495, 1498 (9th Cir. 1995).

152 *Id.* (citing Proposed Determination of Critical Habitat for the Northern Spotted Owl, 56 Fed. Reg. 20,816 (May 6, 1991) (codified at 50 C.F.R. pt. 17)).

153 *Id.*

154 *Id.* (citing Revised Proposed Determination of Critical Habitat for the Northern Spotted Owl, 56 Fed. Reg. 40,002 (Aug. 13, 1991) (codified at 50 C.F.R. pt. 17)).

155 *Id.*

156 *Id.*

On September 25, 1991, Douglas County filed suit in the United States District Court for the District of Oregon, alleging "that the Secretary failed to comply with NEPA in designating a critical habitat."[157] The county argued that by not complying with NEPA, the critical habitat designation injured its proprietary interests, the quality of life of its citizens, wildlife, and resource management interests.[158] The district court held "that NEPA did apply to the Secretary's decision to designate a critical habitat."[159] The Secretary appealed, and on February 24, 1995, the Ninth Circuit held that "NEPA does not apply to the designation of critical habitat."[160] The *Douglas County* court provided three independent reasons for reaching its conclusion: 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 further the purposes of neither statute."[161]

The *Douglas County* court reached its displacement holding largely because it was persuaded by FWS's unprecedented "displacement" theory and found an earlier case, *Merrell v. Thomas*,[162] to be highly analogous.[163] Significantly, the *Merrell* court expressly "hesitate[d] to adopt the 'functional equivalence' rationale."[164] Rather, the *Merrell* court held that NEPA did not apply to the EPA's registration of herbicides under FIFRA because the procedural differences between FIFRA and NEPA "indicate that Congress did not intend that NEPA apply [to FIFRA]."[165] The court reached this conclusion in part because it found that a 1972 amendment to FIFRA pertaining to environmental considerations "would have been superfluous" if NEPA applied.[166] The *Merrell* court also pointed out that the amendments "limited opportunities for public notice and public participation" and required EPA to complete applications within three months, a timeframe that is not long enough for NEPA compliance.[167] Interestingly, the court did not conclude that this three-month timeframe created an irreconcilable conflict. The *Merrell* court also examined the post-1972 amendments and concluded that Congress did not intend NEPA to apply to FIFRA because: 1) Congress would have revised FIFRA if it did not agree with the EPA's interpretation, and 2) the 1978 amendments purposely reduced FIFRA's registration procedures and

157 *Id.* at 1499.

158 *Id.* at 1500.

159 *Id.* at 1499 (citing Douglas Cnty. v. Lujan, 810 F. Supp. 1470, 1484–85 (D. Or. 1992)).

160 *Id.* at 1502.

161 *Id.* at 1507–08. Headwaters, Inc. and the Umpqua Valley Audubon Society intervened and argued that NEPA did not apply because critical habitat designations do "not change the natural, physical environment, and . . . requiring an EIS would frustrate the purposes of both NEPA and the ESA." *Id.* at 1499.

162 807 F.2d 776 (9th Cir. 1986).

163 *Douglas Cnty.*, 48 F.3d at 1503; Patterson, *supra* note 42, at 772.

164 *Merrell*, 807 F.2d at 781.

165 *Id.* at 776–78.

166 *Id.* at 778, 780.

167 *Id.* at 778–79.

opportunities for public comment.[168] The court concluded that applying "NEPA to FIFRA's registration process would sabotage the delicate machinery that Congress designed to register new pesticides."[169]

Similarly, the *Douglas County* court examined the procedural differences between the ESA and NEPA, as well as ESA's legislative history, holding that "Congress intended that the ESA procedures for designating a critical habitat replace the NEPA requirements."[170] First, the *Douglas County* court supported its displacement holding by explaining that the ESA's statutory mandate under section 4(b)(2) to "designate [as critical habitat] any area without which the species would become extinct" conflicted with NEPA's requirement that agencies' actions be influenced by a consideration of environmental impacts.[171] Second, the court found that Congress intended the ESA procedures to displace NEPA because it acquiesced to FWS's 1983 policy—that critical habitat designations do not require NEPA compliance—when it failed to amend the critical habitat provisions of the ESA to require NEPA compliance during the 1988 amendments to the ESA.[172] Third, the *Douglas County* court noted that Douglas County's reliance on two excerpts of legislative history was misplaced,[173] and that its concern that FWS's critical habitat designations would occur with "unchecked discretion"[174] (i.e., without the safeguards of NEPA) was without merit in light of ESA's procedural requirements and the possibility of judicial review under the APA.[175] The court also noted that FWS's displacement argument is not the same as the functional equivalence test; FWS argued, and the court agreed, that Congress intended ESA's procedures to displace NEPA's procedures, not that the ESA procedures "require[] the same steps" as the NEPA procedures.[176]

The *Douglas County* court then held that even without the displacement argument, critical habitat designations do not require NEPA compliance as a matter of law because NEPA's purpose and "Supreme Court guidance on the scope of the statute" indicates that "federal actions that do nothing to alter the natural physical environment" do not require NEPA compliance.[177] The court noted that "[t]he purpose of NEPA is to 'provide a mechanism to enhance or improve the environment and prevent further irreparable damage.'"[178] The court's holding was heavily influenced by the Supreme

168 *Id.* at 779. The court explained that Congress's choice to make the opportunity for public participation under FIFRA less vigorous than that under NEPA must be respected. *Id.* at 782.

169 *Id.* at 779.

170 *Douglas Cnty.*, 48 F.3d 1495, 1503 (9th Cir. 1995).

171 *Id.*

172 *Id.* at 1504.

173 *Id.* (finding that the legislative history does not clearly indicate Congress's intent).

174 *Id.* at 1505.

175 *Id.*

176 *Id.* at 1504 n.10.

177 *Id.* at 1505.

178 *Id.* (quoting Pac. Legal Found. v. Andrus, 657 F.2d 829, 837 (6th Cir. 1981)).

Court's discussion of NEPA's requirements[179] in *Metropolitan Edison Co. v. People Against Nuclear Energy*.[180] The *Metropolitan Edison* Court interpreted the plain language of NEPA to require federal agencies to assess "only the impact or effect [of their actions] on the environment."[181] The Court explained that "Congress meant the *physical* environment—the air, land, and water. The Court concluded that 'although NEPA states its goals in sweeping terms of human health and welfare, these goals are *ends* that Congress has chosen to pursue by *means* of protecting the physical environment.'"[182] Finding *Metropolitan Edison* highly instructive, the Ninth Circuit reasoned,

> If the purpose of NEPA is to protect the *physical* environment, and the purpose of preparing an EIS is to alert agencies and the public to potential adverse consequences to the land, sea or air, then an EIS is unnecessary when the action at issue does not alter the natural, untouched physical environment at all.[183]

The court then pointed out that the Fifth and Eighth Circuits reached similar conclusions.[184] Moreover, the *Douglas County* court explained that it agreed with intervenor Headwaters "that when a federal agency takes an action that prevents human interference with the environment, it need not prepare an EIS. The environment, of its own accord, will shift, change, and evolve as it does naturally."[185] The *Douglas County* court also noted that in the Ninth Circuit, "actions that do not change the status quo do not require an EIS."[186]

Lastly, the *Douglas County* court concluded that critical habitat designations do not require NEPA compliance because they further the purpose of NEPA.[187] In reaching this conclusion, the court emphasized that "NEPA was designed to 'promote human welfare by alerting governmental actors to the effect of their proposed actions on the physical environment,'[188] and 'to provide a mechanism to enhance or improve the environment and prevent further irreparable damage.'"[189] The Ninth Circuit explained that because critical habitats are designated "to preserve the environment and

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179 *Id.* (discussing Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 772–73 (1983)).

180 460 U.S. 766 (1983).

181 *Id.* at 772.

182 *Douglas Cnty.*, 48 F.3d at 1505 (quoting *Metro. Edison*, 460 U.S. at 773 (alteration in original) (footnote omitted)).

183 *Id.* at 1505.

184 *Id.*; *see* Sabine River Auth. v. U.S. Dep't of Interior, 951 F.2d 669, 680 (5th Cir. 1992) (holding that "[t]he acquisition of a negative easement which prohibits development does not result in the requisite 'change' to the physical environment"), *cert. denied*, 506 U.S. 823 (1992); *see also* Nat'l Ass'n of Prop. Owners v. United States, 499 F. Supp. 1223, 1265 (D. Minn. 1980) (holding that NEPA compliance is not required "in order to leave nature alone"), *aff'd sub nom.* Minnesota v. Block, 660 F.2d 1240 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007.

185 *Douglas Cnty.*, 48 F.3d at 1506.

186 *Id.* at 1506 n.13 (citing Nat'l Wildlife Fed'n v. Espy, 45 F.3d 1337, 1343–44 (9th Cir. 1995)).

187 *Id.* at 1506.

188 *Id.* (quoting *Metro. Edison*, 460 U.S. at 772).

189 *Id.* (quoting Pac. Legal Found. v. Andrus, 657 F.2d 829, 837 (6th Cir. 1981)).

prevent the irretrievable loss of a natural resource,"[190] and because mandating NEPA compliance would only delay the attainment of these goals, there was no reason to require NEPA compliance.[191] In reaching these conclusions, the *Douglas County* court relied heavily on the Sixth Circuit's analysis in *Pacific Legal Foundation v. Andrus*.[192]

In *Pacific Legal Foundation*, the Sixth Circuit provided three reasons for why listing decisions do not require NEPA compliance: 1) an EIS "does not and cannot serve the purposes of the Endangered Species Act," 2) an EIS does not and cannot serve the purposes of NEPA under the circumstances because listing decisions must consider only the five ESA listing factors and be based solely on the best scientific and commercial data available, and 3) an EIS is unnecessary because the ESA listing procedures sufficiently further "the purposes of NEPA."[193] The court noted that "[a]s far as the determination to list a species is concerned, preparing an impact statement is a waste of time."[194] Interestingly, after discussing the 1978 amendments to the ESA, the Sixth Circuit noted "while [the] ESA may now provide the functional equivalent of an impact statement when a critical habitat is designated . . . [the] ESA did not provide a functional equivalent of an impact statement with respect to listing a species."[195]

Although *Douglas County* is still good law, the Ninth Circuit's approach to critical habitat designations may no longer involve the three-pronged reasoning provided in that case. The Ninth Circuit most recently addressed NEPA compliance in the context of critical habitat designations in 2010 in *Home Builders Ass'n of Northern California v. Norton* (*Home Builders*).[196] In *Home Builders*, industry groups challenged FWS's designation "of about 850,000 acres of land as critical habitat for fifteen endangered or threatened vernal pool species."[197] Specifically, *Home Builders* addressed whether FWS violated NEPA when it designated critical habitat without completing a cumulative impacts analysis.[198] Interestingly, neither FWS's appellate brief nor *Home Builders* cites *Douglas County*. Rather, FWS argued,[199] and *Home Builders* agreed, that a cumulative impacts analysis is not required for critical habitat designations made pursuant to the ESA because: 1) "the plain language of [the] ESA directs the agency to consider only those impacts caused by the critical habitat designation itself," and 2) the ESA is different than NEPA because it addresses actions that protect the environment rather than actions "that might have negative consequences for the environment."[200]

190 *Id.* (citing *Pac. Legal Found.*, 657 F.2d at 837).
191 *Id.* at 1507 (citing *Pac. Legal Found.*, 657 F.2d at 837).
192 657 F.2d 829 (6th Cir. 1981).
193 *Pac. Legal Found.*, 657 F.2d at 835–36.
194 *Id.* at 836.
195 *Id.* at 835.
196 616 F.3d 983 (9th Cir. 2010).
197 *Id.* at 985.
198 *Id.* at 992.
199 Answering Brief of Federal Defendants-Appellees U.S. Fish & Wildlife Service at 16–17, Home Builders Ass'n of N. California v. U.S. Fish & Wildlife Service, 616 F.3d 983, 992 (9th Cir. 2010).
200 *Home Builders*, 616 F.3d at 992.

In other words, *Home Builders* suggests that the Ninth Circuit adopted FWS's new approach, which appears to rely on the irreconcilable conflict exemption rather than the *Douglas County* rationale.

2. The Tenth Circuit's Approach

The background section of *Catron County Board of Commissioners v. Babbitt*[201] fails to include a few interesting facts that shed light on Catron County's motivation for challenging FWS's designation of federal lands as critical habitat for the spikedace and loach minnow. First, approximately 63% of the land in Catron County is federally owned.[202] Second, for generations, the people of Catron County have generally been opposed to federal regulation of County land, minerals, plants, and wildlife.[203] Third, as of 1989, the county's top two industries relied on the use of federal lands; its timber industry harvested in federal forests and its beef industry raised cattle on federal ranchlands.[204]

After the United States Forest Service implemented guidelines to protect habitat for the Mexican spotted owl (*Strix occidentalis lucida*)[205] in 1989, Catron County's timber production decreased by 50% and unemployment rose by 25%.[206] Rather than accept further federal regulation, the county decided to pass ordinances and develop a land-use plan to support its argument that the federal government's regulation of its land was unauthorized.[207] In general, the ordinances "require federal agencies to consult and coordinate with the county before taking any action that would affect public lands,"[208] and the land-use and policy plan requires the federal agencies to abide by the New Mexico constitution and NEPA.[209] These efforts caused the county to become known as the founder of the Wise-Use Movement—an anti-environmental movement aimed at protecting property rights that was in full swing by 1993.[210]

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201 *Catron Cnty.*, 75 F.3d 1429, 1432–33 (10th Cir. 1996).

202 *See* Catron Cnty., *Catron Country News Homepage*, http://catroncountynews.com/ (last visited Nov. 19, 2012).

203 *Id.* For example, Catron County is currently opposed to the federal regulation of wolves. *Id.*

204 D'Lyn Ford, *The Catron Way*, N.M. RESOURCES, Fall 1995, *available at* http://aces.nmsu.edu/pubs/resourcesmag/fall95/catron.html; N.M. State Univ., Coll. of Agric. Consumer and Envtl. Sci., *Agriculture and Horticulture*, http://catronextension.nmsu.edu/agandhort.html (last visited Nov. 19, 2012).

205 The Mexican spotted owl was listed as threatened in 1993. Final Rule To List the Mexican Spotted Owl as a Threatened Species, 58 Fed. Reg. 14,248, 14,271 (Mar. 16, 1993) (codified at 50 C.F.R. § 17.11 (2011)).

206 Ford, *supra* note 204.

207 *See id.*; Patterson, *supra* note 42, at 777.

208 Ford, *supra* note 204.

209 *See id.*

210 Patterson, *supra* note 42, at 777; *see also* J. Todd Foster, *Founder of Wise Use Movement to Speak on Private Property Rights*, SPOKESMAN-REVIEW, Idaho Edition, June 10, 1993, at B4, *available at* http://news.google.com/newspapers?nid=0klj8wIChNAC&dat=19930610&printsec=frontpage&hl=en; Tony Davis, *Healing the Gila*, HIGH COUNTRY NEWS, Oct. 22, 2001, http://www.hcn.org/issues/213/10791 (last visited Nov. 19, 2012).

Although the final designation of critical habitat for the spikedace and loach minnow had not yet been promulgated in 1993,[211] Catron County filed suit alleging, among other things, that FWS's proposed designation failed to comply with NEPA.[212] The county argued that the critical habitat "designation [would] prevent continued governmental flood control efforts, thereby significantly affecting nearby farms and ranches, other privately owned land, local economies and public roadways and bridges."[213] About seven months after FWS published its final critical habitat designation for the spikedace and loach minnow,[214] the district court agreed with Catron County that critical habitat designations require NEPA compliance.[215] Relying on *Douglas County*, the Secretary appealed, but on February 2, 1996, the Tenth Circuit affirmed the district court's preliminary injunction in favor of the County.[216]

The Tenth Circuit reached its conclusion because: 1) the court completely disagreed with *Douglas County*,[217] and 2) it found two excerpts of legislative history indicative of Congress's intent to require NEPA compliance.[218] While criticizing the *Douglas County* rationale, the Tenth Circuit explained that the ESA procedures did not displace NEPA because the two statutes have different goals—the ESA aims to protect species and their habitats, and NEPA aims promote public participation and informed decision making.[219] The court explained that NEPA compliance is beneficial because a "designation of critical habitat effectively prohibits all subsequent federal or federally funded or directed actions likely to affect the habitat,"[220] and a close analysis of a critical habitat designation could reveal that it is "environmentally harmful."[221] The Tenth Circuit also found pertinent the ESA's "rather cursory directive"[222] that the Secretaries consider "economic and other relevant impacts" when designating critical habitat.[223] The Tenth Circuit then criticized the *Douglas County* court's holding that actions that do not alter the natural environment do not require NEPA compliance, finding that Catron

211 *Catron Cnty.*, 75 F.3d at 1432 (citing Determination of Threatened Status for the Spikedace, 51 Fed. Reg. 23,769 (July 1, 1986) (codified at 50 C.F.R. pt. 17); Determination of Threatened Status for the Loach Minnow, 51 Fed. Reg. 39,468 (Oct. 28, 1986) (codified at 50 C.F.R. pt. 17)).

212 *Id.* at 1432–33.

213 *Id.* at 1437–38.

214 *Id.* at 1433 (citing Designation of Critical Habitat for the Threatened Loach Minnow (*Tiaroga cobitis*), 59 Fed. Reg. 10,898 (Mar. 8, 1994) (codified at 50 C.F.R. pt. 17); Designation of Critical Habitat for the Threatened Spikedace (*Meda fulgida*), 59 Fed. Reg. 10,906 (Mar. 8, 1994) (codified at 50 C.F.R. pt. 17)).

215 *Id.* at 1433.

216 *Id.* at 1440.

217 *Id.* at 1436–39; Patterson, *supra* note 42, at 778.

218 *Catron Cnty.*, 75 F.3d at 1439; Patterson, *supra* note 42, at 779–80.

219 *Catron Cnty.*, 75 F.3d at 1437.

220 *Id.*

221 *Id.*

222 *Id.* at 1436.

223 *Id.* (referring to 16 U.S.C. § 1533(b)(2) (2003)).

County's claims of flood damage to county property, "if proved, constitute[d] a significant effect on the environment [under NEPA]."[224]

In addition, the Tenth Circuit disagreed with the Ninth Circuit's finding that Congress's silence during its 1988 amendments to the ESA constituted acceptance of FWS's 1983 policy.[225] The *Catron County* court attempted to bolster its argument by discussing the comments of a Senator during a 1978 congressional debate over a rejected amendment to the ESA that would have required NEPA compliance when critical habitat designations significantly affect the environment, as well as an excerpt from a House Conference Report that explains how each EA or EIS prepared for a critical habitat designation must be disseminated to the appropriate government officials.[226] And despite the fact that FWS did not argue that either the irreconcilable conflict exemption or functional equivalence exemption applied, the Tenth Circuit held—without explaining its reasoning—that neither exemption applied because the ESA did not duplicate or conflict with NEPA procedures.[227]

The Tenth Circuit most recently affirmed its reliance on *Catron County* in 2002 in *Middle Rio Grande Conservancy District v. Norton* (*Middle Rio Grande*).[228] The plaintiffs in *Middle Rio Grande* alleged that FWS violated NEPA when it determined that its critical habitat designation for the endangered Rio Grande silvery minnow (*Hybognathus amarus*) resulted in a FONSI and thus did not require the preparation of an EIS.[229] The Tenth Circuit found that the critical habitat designation would have a significant impact on the human environment because it would reduce the acreage of irrigated agriculture and increase the risk of flooding,[230] and thus FWS's conclusion that an EA was sufficient was arbitrary and capricious.[231]

III. HOW THE CIRCUIT SPLIT AFFECTS AGENCY PRACTICE[232]

Almost a year after *Catron County* established the circuit split, FWS announced that it was maintaining its 1983 policy "that [critical habitat] designations are exempt from NEPA and therefore, do not require the

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224 *Id.* at 1438.

225 *Catron Cnty.*, 75 F.3d at 1438.

226 *Id.* at 1439 (discussing the statements of Senators Wallop and McClure during floor debate, 124 CONG. REC. S11, 143–45 (daily ed. July 19, 1978) (124 CONG. REC. 21588–90 (1978)) and an excerpt from a House Conference Report, H.R. REP. NO. 95-1804, at 27 (1978), *reprinted in* 1978 U.S.C.C.A.N 9484, 9494).

227 *Id.* at 1436.

228 Middle Rio Grande Conservancy Dist. v. Norton, 294 F.3d 1220, 1230 (10th Cir. 2002) (citing *Catron County*, 75 F.3d at 1436) (explaining that in the context of critical habitat designations, NEPA compliance *does* further the purposes of the ESA).

229 *Id.* at 1225.

230 *Id.* at 1227.

231 *See id.* at 1231 (affirming the district court's finding).

232 Although based on various interviews conducted by the author, see, for example Bear, *supra* note 17; Farley, *supra* note 7; Krofta, *infra* note 251; Speights, *infra* note 239; and Shultz, *infra* note 246, Part III of this Comment reflects *the author's views* of how the circuit split affects agency practice, *not* the official views of FWS, NMFS, or CEQ.

preparation of an EA or EIS in conjunction with regulations adopted pursuant to section 4(a) of the ESA, as amended."[233] In this announcement, however, FWS recognized that it could not implement its policy in the Tenth Circuit in light of *Catron County*.[234] To reconcile this problem, FWS stated that until the circuit split is resolved, it would continue to not comply with NEPA in the Ninth Circuit "or in other parts of the United States . . . but [would] prepare EAs for any designations proposed in areas subject to the 10th Circuit."[235] FWS then stated that its "admittedly inconsistent approach to the application of NEPA for the designation of critical habitat will likely continue until resolved by the Courts."[236]

On June 14, 1999, FWS announced that it was determining whether or not it was necessary for the agency to develop a new policy or revise its regulations pertaining to critical habitat designations and NEPA compliance.[237] On July 6, 1999, FWS published its first final critical habitat designation that included the agency's current policy—it complies with NEPA when designating critical habitat only "when the range of the species includes States within the Tenth Circuit."[238] In practice, however, "a FWS Regional Office that is responsible for species inside and outside of the Tenth Circuit will sometimes play it safe and comply with NEPA for a particular critical habitat designation even if the species' range does not fall within the Tenth Circuit."[239] In other words, if there is a chance that FWS's failure to comply with NEPA could be successfully challenged in the Tenth Circuit, FWS will comply with NEPA to avoid the cost of litigation.[240] However, fairly recent litigation in the U.S. District Court for the District of Columbia has caused FWS to consider whether it should adjust its current policy.[241]

Although the D.C. District Court is the only district court outside of the Ninth or Tenth Circuit that has addressed the issue of whether NEPA applies to critical habitat designations,[242] it expressly sided with the Tenth Circuit in

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[233] National Environmental Policy Act Revised Implementing Procedures, 62 Fed. Reg. 2,375, 2,379 (Jan. 16, 1997); Patterson, *supra* note 42, at 782–83.

[234] 62 Fed. Reg. at 2379–80; Patterson, *supra* note 42, at 782–83.

[235] 62 Fed. Reg. at 2379–80; Patterson, *supra* note 42, at 782–83.

[236] 62 Fed. Reg. at 2380; Patterson, *supra* note 42, at 782–83.

[237] Notice of Intent to Clarify Role of Habitat in Endangered Species Conservation, 64 Fed. Reg. 31,871, 31,873 (June 14, 1999) (finding NEPA compliance "a costly consequence (both in terms of staff time and funding) of designating critical habitat").

[238] Final Designation of Critical Habitat for the Rio Grande Silvery Minnow, 64 Fed. Reg. 36,274, 36,287 (July 6, 1999); Designation of Revised Critical Habitat for the Tide Water Goby, 76 Fed. Reg. 64,996, 65,035 (Oct. 19, 2011) ("It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to [NEPA] in connection with designating critical habitat under the [ESA].").

[239] Telephone Interview with Helen Speights, Litigation Coordinator, Office of ESA Litigation, U.S. Fish & Wildlife Serv. (Feb. 8, 2012).

[240] *Id.*

[241] *Id.*

[242] At least one other district court outside of the Ninth and Tenth Circuits had the opportunity to address the issue but declined to do so. *See In re* Operation of the Mo. River Sys., 363 F. Supp. 2d 1145, 1172 (D. Minn. 2004) (declining to evaluate whether FWS must comply with NEPA when making critical habitat designations because FWS complied with NEPA).

2004[243] and implicitly reaffirmed its position in 2011.[244] Because the D.C. District Court litigation may be the beginning of a trend that could lead to forum shopping by plaintiffs who seek to delay critical habitat designations,[245] the issue of whether critical habitat designations should require NEPA compliance has become an important topic of discussion at FWS Headquarters in Arlington, Virginia.[246] After all, if the agency needed to avoid litigation in not only the Tenth Circuit but also the D.C. Circuit, it would have to comply with NEPA nationwide.[247] And if critical habitat designations suddenly required NEPA compliance nationwide, FWS would have to devote a large portion of the limited funding allocated by Congress for section 4 actions to NEPA compliance, thus diverting the agency's scarce resources from higher priority conservation actions, such as listing species.[248] Even though FWS considers listing species to be among its top conservation priorities, the agency's heavy section 4 workload, combined with the requirement that it comply with court-ordered deadlines, makes some listing determinations take longer than FWS would prefer.[249] In other words, a ruling requiring NEPA compliance nationwide would further delay the listing of species that are in need of the ESA's protections and thus would likely: 1) decrease the ability of such imperiled species to avoid extinction, and 2) prevent FWS from fulfilling its duty to maximize its conservation efforts.[250]

A ruling mandating nationwide NEPA compliance in the context of critical habitat designations would delay FWS listing decisions for two reasons. First, NEPA documents are relatively costly to prepare; on average, FWS spends anywhere from $10,000 to $50,000 on each EA pertaining to a

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243 Cape Hatteras Access Pres. Alliance v. U.S. Dep't of the Interior, 344 F. Supp. 2d 108, 134 (D.D.C. 2004) ("Given the different purposes and requirements of [the ESA and NEPA] this Court follows the Tenth Circuit's well-reasoned opinion that NEPA applies to [critical habitat] designations.").

244 *In re* Polar Bear Endangered Species Act Listing and § 4(d) Rule Litig., 818 F. Supp. 2d 214, 236 (D.D.C. 2011) (citing *Cape Hatteras*, 344 F. Supp. 2d at 134) (holding that section 4(d) rules, like critical habitat designations, cannot be exempt from NEPA simply "because they are 'triggered' by a listing decision").

245 Forum shopping could result because plaintiffs can bring suit against FWS or NMFS for violating NEPA in either D.C. District Court or the district court where the proposed critical habitat is found. *See* 28 U.S.C. § 1331 (2006) ("[Federal] district courts . . . have original jurisdiction of all civil actions arising under [federal law]."); 28 U.S.C. § 1391 (2011) (stating that a federal district court is an appropriate venue to sue a federal agency).

246 Telephone Interview with Gina Shultz, Chief, Office of ESA Litigation, U.S. Fish & Wildlife Serv. (Feb. 8, 2012) (Mrs. Shultz is currently the Chief of NMFS's ESA Interagency Cooperation Division).

247 *Id.*

248 *Id.* Mrs. Shultz further explained that FWS has a very heavy section 4 workload, and most of its work plan is based on complying with court-ordered deadlines. Although compliance with court-ordered deadlines is FWS's top priority, the agency considers listing species to be among its actions that achieve the highest level of conservation. *Id.*

249 *Id.*

250 *Id.*

critical habitat designation, while a complicated EIS can cost up to $550,000.[251] Second, FWS's scarce resources would be better spent on listing determinations because NEPA compliance has proven to have "very little, if any, bearing on the agency's final critical habitat designation."[252] In essence, NEPA procedures are "strongly redundant"[253] in the context of critical habitat designations because FWS and NMFS must follow similar procedures under the ESA, the APA, and the Regulatory Flexibility Act[254] (RFA).[255]

Recognizing that it is likely to achieve more conservation if it takes a proactive rather than reactive approach, FWS Headquarters is evaluating whether or not the agency should address the NEPA compliance issue internally.[256] FWS also recognizes that it has an implicit duty to address the issue, rather than wait indefinitely for the Court to accept certiorari;[257] Executive Order 13563, issued by President Barack Obama in 2011, directs federal agencies to reduce costs by simplifying and reducing regulatory requirements that are "redundant, inconsistent, or overlapping."[258] FWS will probably address the NEPA compliance issue in one of two ways.[259] First, FWS is seriously considering developing a programmatic EA that would apply to the majority of critical habitat designations and thus streamline NEPA procedures and reduce the overall cost of compliance.[260] To a lesser extent, FWS is also considering addressing the issue by working with CEQ to determine if critical habitat designations could qualify as categorical exclusions under NEPA.[261] The agency is very unlikely to address the issue

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251 Telephone Interview with Douglas Krofta, Chief, ESA Listing Program, U.S. Fish & Wildlife Serv. (Feb. 8, 2012).

252 *Id.* (In addition, Dr. Krofta noted that he is generally a strong advocate of NEPA.).

253 *Id.*

254 Regulatory Flexibility Act, 5 U.S.C. §§ 601–612 (2006). The RFA, which was enacted in 1980 and amended in 1996, "requires federal agencies to review regulations for their impact on small businesses and consider less burdensome alternatives." U.S. Small Business Administration, *Regulatory Flexibility Act*, http://www.sba.gov/advocacy/823 (last visited Nov. 19, 2012).

255 Krofta, *supra* note 251; Farley, *supra* note 7 (calling NEPA compliance in the context of critical habitat designations "superfluous" because NMFS already complies with the procedural requirements of the ESA, APA, and RFA).

256 Shultz, *supra* note 246.

257 *Id.* Moreover, it could be many years before the Supreme Court has the opportunity to address this issue because FWS is unlikely to file an appeal to the Court due to the risks involved. *Id.*

258 *Id.* (discussing Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011)).

259 *Id.*

260 *Id.* Mrs. Shultz explained that a critical habitat designation almost always results in a FONSI. *Id.* According to Dr. Krofta, a programmatic EA would cost only about $100,000 up front to develop, and, once in place, the majority of future NEPA compliance would cost nothing. Krofta, *supra* note 251.

261 Shultz, *supra* note 246. Categorical exclusions (Cat-Exs) are agency-defined actions that "do not individually or cumulatively have a significant effect on the human environment and which are therefore exempt from [the EIS process]." 40 C.F.R. § 1500.4(p) (2011). FWS is considering Cat-Exs to a lesser extent because: 1) the overall process to establish critical habitat designations as Cat-Exs would likely take longer than development of a programmatic EA, and 2) there are exceptions to Cat-Exs, so some critical habitat designations might still require NEPA compliance. Shultz, *supra* note 246.

through the proposal of a legislative amendment to either the ESA or NEPA because such a strategy would probably take longer, be more complicated, and leave FWS with less control than the other two options.[262] Before addressing the NEPA compliance issue internally, however, FWS plans to meet and discuss strategies with NMFS.[263]

In practice, the circuit split does not affect NMFS in the same manner as FWS because NMFS lacks jurisdiction over any species within the Tenth Circuit and thus has not had to adhere to the holdings of *Catron County*.[264] Nevertheless, since 1997, NMFS has consistently cited *Douglas County* in support of its policy that critical habitat designations do not require NEPA compliance.[265] In essence, NMFS's current policy on the issue is that "critical habitat designations do not require NEPA compliance as a matter of law."[266] Although NMFS's current policy is under revision and thus is not available to the public,[267] it could reasonably rely on the functional equivalence exemption because similar to FWS, "NEPA compliance would add little to nothing to NMFS's critical habitat designations because the agency's compliance with the ESA, APA, and RFA already result in robust public participation and an in-depth consideration of alternatives."[268] NMFS's policy could also reasonably rely on the CEQ regulation which provides that NEPA does not apply to actions that cause only socioeconomic effects.[269]

Despite NMFS's policy that critical habitat designations do not require NEPA compliance as a matter of law, it is unlikely that the circuit split is an important topic of discussion at the agency's headquarters; in contrast to FWS's situation, nationwide NEPA compliance would not likely result in a significant drain on NMFS's resources because "NMFS has a much lighter critical habitat workload than FWS and thus would find it less challenging to manage NEPA compliance nationwide."[270] NMFS is likely very open to working with FWS to resolve the issue internally, however, not only because NMFS recognizes that the Court may never resolve the circuit split, but also

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262 Shultz, *supra* note 246.

263 *Id.* (anticipating that the agencies will coordinate and develop consistent policies).

264 Farley, *supra* note 7.

265 *See, e.g.*, Designated Critical Habitat; Umpqua River Cutthroat Trout, 62 Fed. Reg. 40,786, 40,789 (July 30, 1997) (citing *Douglas Cnty.* to support the determination that critical habitat designations do not require EAs); Final Rulemaking to Designate Critical Habitat for Black Abalone, 76 Fed. Reg. 66,806, 66,841 (Oct. 27, 2011) (citing *Douglas Cnty.* to support the determination that critical habitat designations do not require EAs).

266 Farley, *supra* note 7 (Part III of this Comment incorporates Mr. Farley's personal views of NMFS's current policy and position; Mr. Farley's personal views do not necessarily reflect the official positions of NMFS or NOAA.). NMFS's current policy, which was established in 2003, is not yet formalized. NMFS is currently revising its internal NEPA procedures to reflect the agency's view that NEPA does not apply as a matter of law. Prior to 2003, NMFS based its policy on the conclusion that critical habitat designations qualified as categorical exclusions to NEPA. *Id.*

267 Farley, *supra* note 7.

268 *Id.* (In addition, Mr. Farley noted that he is generally a strong advocate of NEPA.).

269 *See id.* (explaining that under the CEQ regulation, the socioeconomic effects of an action must be evaluated only when an EIS is already being prepared for that action *and* when such effects are interrelated with other effects on the natural and physical environment).

270 Farley, *supra* note 7.

because the two agencies sometimes have overlapping jurisdiction and aim to have consistent policies regarding section 4 of the ESA.[271]

Although NMFS and FWS agree that they should not have to comply with NEPA when designating critical habitat, it is likely that the CEQ, if asked to make a formal statement, would conclude otherwise.[272] Looking to the plain language of section 4 of the ESA, the CEQ would probably conclude that "[c]ritical habitat designations *do* require NEPA compliance."[273] In particular, the CEQ would likely contend that "the ESA's directive to consider 'any other relevant impact' is precisely what NEPA requires."[274] Moreover, if asked whether such a conclusion is consistent with its 1983 letter to FWS, CEQ would likely respond in the affirmative, explaining that the letter "discussed listing decisions, not critical habitat designations."[275]

CEQ's recently published NEPA guidance further indicates that CEQ would conclude that critical habitat designations do not require NEPA compliance.[276] The NEPA guidance explains that agencies do not have to publish their NEPA compliance documents separately from their other compliance documents; as a result, agencies may be able to expedite their compliance by "folding" all of their other statutory requirements into their NEPA document.[277] This CEQ guidance suggests that CEQ, if consulted, would advise FWS and NMFS to jointly develop methods of "resource efficient NEPA compliance," rather than continue basing their compliance decisions on a circuit split that could survive indefinitely.[278]

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271 *Id.* For example, FWS has jurisdiction over sea turtles on land, while NMFS has jurisdiction over sea turtles when they are in the ocean. Memorandum of Understanding Between the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, Defining the Roles of FWS and NMFS in Joint Administration of the Endangered Species Act of 1973 as to Marine Turtles 1–2 (July 18, 1977), *available at* www.nmfs.noaa.gov/pr/pdfs/species/turtle_mou.pdf.

272 Bear, *supra* note 17. Mrs. Bear is an attorney in the private sector who served as General Counsel to CEQ for twenty-five years and authored the 1983 letter that FWS uses to support its policy that critical habitat designations do not require NEPA compliance. While discussing the circuit split, Mrs. Bear expressed her personal view that NEPA is "designed to ensure all members of the public have an opportunity to participate in the decision-making process, regardless of whether they are advocates for protecting the natural environment." Mrs. Bear also noted that "NEPA does apply to critical habitat designations because ecosystems are complex—protecting habitat for one species may adversely affect another protected species."

273 *Id.* (explaining that "[t]he Tenth Circuit got it right, [and] the Ninth Circuit got it wrong").

274 *Id.* (referring to 16 U.S.C. § 1533(b)(2) (2006)).

275 *Id.; see also* Preparation of Environmental Assessments for Listing Actions Under the Endangered Species Act, 48 Fed. Reg. 49,244 (Oct. 25, 1983) (discussing that, in light of CEQ's recommendations, "Section 4 listing actions are exempt from NEPA review 'as a matter of law'").

276 Bear, *supra* note 17.

277 *Id.*

278 *Id.*

IV. A CRITICAL ANALYSIS OF THE CURRENT JUDICIAL APPROACHES

A. The Ninth Circuit Should Not Rely on Douglas County *'s "Displacement" Exemption*

Because *Home Builders* suggests that FWS is adjusting its legal argument as to why critical habitat designations do not require NEPA compliance,[279] it is necessary to clearly identify the weaknesses of the *Douglas County* rationale. Of the three arguments made by the Ninth Circuit in *Douglas County*, its displacement exemption argument is the least persuasive.[280] Rather than analyze whether the irreconcilable conflict exemption or the functional equivalence exemption applies, the Ninth Circuit adopted FWS's unprecedented displacement theory.[281] As discussed in Part II.C.1, the *Douglas County* court justified its holding that Congress intended the ESA's procedures to displace NEPA compliance primarily because it found *Merrell* to be highly instructive.[282] An analysis of *Merrell*, however, reveals that the court's reliance was misplaced.

Although the *Merrell* court held that both the procedural differences between FIFRA and NEPA,[283] and Congress's failure to address NEPA compliance in its amendments to FIFRA[284] indicate that Congress did not intend EPA to comply with NEPA when it registers pesticides under FIFRA,[285] *Merrell* did not establish a displacement exemption to NEPA. Rather, the *Merrell* court implicitly applied the irreconcilable conflict exemption. The *Merrell* court concluded that: 1) the application of NEPA would require public notice and comment that is significantly more robust than the minimal public notice requirement that Congress expressly added to FIFRA in 1972;[286] 2) the time frame for compliance required by FIFRA's 1972 amendments "is incompatible with the lengthy . . . EIS [procedures];"[287] and 3) the application of NEPA "would increase [the] regulatory burden that Congress intentionally lightened in 1978."[288] In failing to recognize that *Merrell*'s holding relies on the application of the irreconcilable conflict exemption, the *Douglas County* court accepted the *Merrell* holding at face

279 *Home Builders*, 616 F.3d 983, 992 (9th Cir. 2010).

280 Patterson, *supra* note 42, at 787; Cosco, *supra* note 42, at 378.

281 *Douglas Cnty.*, 48 F.3d 1495, 1502–05 (9th Cir. 1995). Because FWS did not argue that the functional equivalence exemption applied, the court did not address it. *Id.* at 1504 n.10.

282 *Id.* at 1502–04.

283 *Merrell*, 807 F.2d 776, 779 (9th Cir. 1986) (finding that the public notice and participation procedures required for registration of pesticides under FIFRA "differ materially from those that NEPA would require").

284 *Id.* at 778–79 (discussing Congress's failure to address NEPA in both its 1972 amendments to NEPA and its post-1972 amendments to NEPA).

285 *Id.*

286 *Id.* at 778 (recognizing that FIFRA's public notice procedures "obviously fall[] short of an EIS requirement").

287 *Id.* (finding that the 1972 FIFRA amendments require EPA to process registration applications "'as expeditiously as possible' . . . [and] reach a decision within three months of receiving an application,") (citations omitted).

288 *Id.* at 779.

value, and in essence concluded that, according to that decision, Congress's intent to displace NEPA can be inferred from its failure to explain why the procedures of another statute differ or overlap.[289]

When discussing procedures that overlap, the *Douglas County* court further analogized to *Merrell* by concluding that the public notice and comment procedures established by the 1978 amendments to the ESA made "the NEPA procedure seem 'superfluous.'"[290] The *Merrell* court held that Congress's 1972 amendments to FIFRA "apparently made NEPA superfluous" because the amendments required the EPA to consider the environmental impacts of its registration of pesticides.[291] Neither the *Douglas County* court nor the *Merrell* court, however, adequately supported its "superfluous" conclusion. *Douglas County*'s reasoning was inadequate because the ESA's public participation procedures, alone, do not make NEPA superfluous; the heart of NEPA is its requirement that agencies consider alternative actions,[292] and public participation does not guarantee an agency will consider alternatives. Similarly, the court's reasoning in *Merrell* was inadequate because FIFRA's requirement that the EPA consider environmental impacts does not guarantee that the EPA will promote public participation or consider alternatives, and thus the 1972 amendment to FIFRA did not make NEPA superfluous.

The *Douglas County* court also analogized to *Merrell* when it supported its displacement exemption on Congress's failure to respond to FWS's 1983 policy.[293] Once again, the *Douglas County* court's logic is fatally flawed.[294] It is "well established that when 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.'"[295] As the Tenth Circuit noted in *Catron County*, however, "the failure to revise, unaccompanied by any evidence of congressional awareness of the [longstanding administrative] interpretation, is not

[289] *Douglas Cnty.*, 48 F.3d 1495, 1502 (9th Cir. 1995) (*Merrell* "concluded that because Congress created two different mechanisms in FIFRA and NEPA, and because Congress declined the opportunity to apply NEPA to FIFRA . . . it intended that FIFRA procedures replace NEPA for pesticide registration."). Although the *Douglas County* court recognized a conflict between the ESA and NEPA (*i.e.*, that NEPA's requirement to consider the environmental impacts of a proposed action may undermine ESA's requirement that an area be designated critical habitat if failure to do so would lead to the species' extinction) it did not use this conflict to support its displacement holding. *Id.* at 1503.

[290] *Id.* at 1503.

[291] *Merrell*, 807 F.2d 776, 778 (9th Cir. 1986).

[292] 40 C.F.R. § 1502.14 (2010).

[293] *Douglas Cnty.*, 48 F.3d at 1504.

[294] Patterson, *supra* note 42, at 776 (finding that the displacement exemption "could weaken NEPA to the point of nonexistence"). In addition, this author's search of various legal databases indicates that the Ninth Circuit has not used the "displacement exemption" since *Douglas County*.

[295] Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 846 (1986) (citation omitted).

persuasive evidence."[296] Although the *Douglas County* court concluded that Congress's silence in its 1988 amendments to the ESA indicate that Congress implicitly accepted FWS's 1983 policy,[297] it failed to establish that Congress was even aware of FWS's 1983 policy when it amended the ESA in 1988.[298] Moreover, whether a five-year-old policy qualifies as "longstanding" is questionable; the EPA's interpretation of FIFRA, on the other hand, was fourteen years old when Congress amended FIFRA without addressing NEPA.[299]

B. The Tenth Circuit Should Re-Examine the Catron County *Rationale*

Rather than continue to base its conclusion that critical habitat designations require NEPA compliance solely on *Catron County*, the Tenth Circuit should re-examine the *Catron County* rationale and recognize that the court made several incorrect conclusions.[300] First, the *Catron County* court incorrectly concluded that a "designation of critical habitat effectively prohibits all subsequent federal or federally funded or directed actions likely to affect the habitat,"[301] and that close analysis of a critical habitat designation could reveal that it is "environmentally harmful."[302] The court's statements are truly disturbing. Critical habitat designations do not effectively prohibit all federal actions likely to affect critical habitat; section 7 of the ESA prohibits only federal actions that are "likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat."[303] While it is true that critical habitat designations for species that depend on natural flood cycles for their continued existence—such as the spikedace and loach minnow—may prevent federal flood control and harm property interests, this is not the type of environmental impact that triggers NEPA compliance; NEPA applies only to actions that alter the physical environment.[304] Not only did the *Catron County* court fail to acknowledge the case law on this issue, it also failed to discuss the CEQ regulations which

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296 *Catron Cnty.*, 75 F.3d 1429, 1438 (10th Cir. 1996) (citing Girouard v. United States, 328 U.S. 61, 69 (1946) (holding that congressional silence alone is not enough to adopt "a controlling rule of law")).

297 *Douglas Cnty.*, 48 F.3d at 1504.

298 *Catron Cnty.*, 75 F.3d at 1438.

299 *Merrell*, 807 F.2d 776, 779 (9th Cir. 1986).

300 Patterson, *supra* note 42, at 780; Kendall *supra* note 42, at 679. *But see* Davis, *supra* note 42, at 691 (finding *Catron Cnty.* highly persuasive); Cosco, *supra* note 42, at 376–77 (implicitly endorsing *Catron Cnty.*).

301 *Catron Cnty.*, 75 F.3d at 1437 (citing Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(2) (2006)).

302 *Id.*

303 16 U.S.C. § 1536(a)(2) (2006).

304 Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 774 (1983); Sabine River Auth. v. U.S. Dep't of Interior, 951 F.2d 669, 679 (5th Cir. 1992) (citing Sabine River Auth. v. U.S. Dept. of Interior, 745 F. Supp. 388, 394 (E.D. Tex. 1990), *cert. denied*, 506 U.S. 823 (1992)); Patterson, *supra* note 42, at 786.

clearly state that actions resulting in only socioeconomic effects do not require NEPA compliance.[305]

Second, the *Catron County* court incorrectly concluded that two excerpts of legislative history are sufficient to infer Congress's intent to require NEPA compliance.[306] When Congress debates an issue and then chooses not to address it in subsequent amendments, congressional intent should not be inferred from a comment by a Senator during a debate or a line from a House Conference Report.[307] If anything, the fact that one Senator withdrew his proposed amendment to require NEPA compliance after another Senator opposed the amendment suggests that Congress was not in agreement over whether NEPA applied.[308] Similarly, a line in a House Conference Report that explains what procedure an agency should follow after complying with NEPA should not be interpreted to reveal Congress's intent to require NEPA compliance. Rather, the report reveals that the House contemplated that agencies *may* comply with NEPA when designating critical habitat.[309] In other words, it is too much of a stretch to conclude that this one line reveals Congress as a whole intended compliance to be mandatory.

Finally, the *Catron County* court incorrectly concluded that the functional equivalence exemption requires the duplication of NEPA's procedures.[310] The functional equivalence exemption does not require the finding that an environmental agency action is subject to procedures that are identical to what NEPA requires.[311] Instead, the functional equivalence exemption applies when: 1) an environmental agency action is taken pursuant to procedures that fulfill the purpose and policies of NEPA,[312] and 2) requiring NEPA compliance would delay an agency action that protects the environment.[313] The *Catron County* court should have asked whether critical habitat designations require the consideration of environmental

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305 40 C.F.R. § 1508.14 (2011).

306 Patterson, *supra* note 42, at 780 (citing *Catron Cnty.*, 75 F.3d at 1438).

307 *See Douglas Cnty.*, 48 F.3d 1495, 1504 (9th Cir. 1995) (finding Congress's decision not to address NEPA compliance in its 1978 ESA amendments more significant than the comments made by Senators during a congressional debate or in a House Conference Report); Patterson, *supra* note 42, at 789.

308 *See Douglas Cnty.*, 48 F.3d at 1504; Patterson, *supra* note 42, at 780 (citing *Catron County*, 75 F.3d at 1438) (finding that the legislative history relied on by *Catron Cnty.* does not prove that Congress intended NEPA to apply). In the same debate, Senator Garn commented that an EIS might occasionally be required. 124 CONG. REC. 21,573 (1978); Emery, *supra* note 42, at 991.

309 Patterson, *supra* note 42, at 780 (citing *Catron Cnty.*, 75 F.3d at 1438); Emery, *supra* note 42, at 999–1000 (citing *Douglas Cnty.*, 48 F.3d at 1504). "The statement [from the Conference Report] is far from a clear, considered indication of congressional intent. [It] does not direct the Secretary to prepare an EA or an EIS, it just states that if one is available, it should be forwarded." *Douglas Cnty.*, 48 F.3d at 1504.

310 *Catron Cnty.*, 75 F.3d 1435.

311 Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 386 (D.C. Cir. 1973).

312 Envtl. Def. Fund, Inc. v. U.S. Envtl. Prot. Agency, 489 F.2d 1247, 1257 (D.C. Cir. 1973).

313 *Portland Cement*, 486 F.2d at 386.

impacts and alternatives, and whether such designations provide an adequate opportunity for public comment and judicial review.[314]

If the Tenth Circuit thoroughly analyzes whether critical habitat designations require NEPA compliance, rather than simply relying on *Catron County*'s conclusory holdings, it will likely find departure from *Catron County* appropriate.

V. A FRESH PERSPECTIVE ON HOW TO RESOLVE THE CIRCUIT SPLIT

This Part explains why critical habitat designations should not require NEPA compliance for two independent reasons: 1) application of the functional equivalence exemption is appropriate, and 2) federal actions that do not alter the physical environment do not fall under the purview of NEPA.

A. The Functional Equivalence Exemption Should Apply to Critical Habitat Designations

Critical habitat designations should be exempt from NEPA under the functional equivalence exemption[315] because the applicable procedures under the ESA, the APA, and the RFA produce the functional equivalent of the procedures required by NEPA.[316] In other words, the procedures carried out pursuant to the ESA, APA, and RFA more than fulfill the purpose and policies of NEPA; as such, requiring NEPA compliance would only serve to unduly delay critical habitat designations.[317]

Critical habitat designations are preceded by an analysis of impacts and alternatives that make the similar considerations under NEPA unnecessary.[318] As discussed in Part II.B.2, the ESA requires that critical habitat designations be decided "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat."[319] The ESA also requires the consideration of alternative designations in order to minimize the adverse effects of a species' critical habitat designation, but an alternative may only be considered if it protects all areas necessary to avoid extinction.[320] Moreover,

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314 *Id.* at 385–86; *Envtl. Def. Fund*, 489 F.2d at 1256; Amoco Oil v. U.S. Envtl. Prot. Agency, 501 F.2d 722, 750 (D.C. Cir. 1974); Wyoming v. Hathaway, 525 F.2d 66, 69 (10th Cir. 1975); Mun. of Anchorage v. United States, 980 F.2d 1320, 1329 (9th Cir. 1992); Alabama v. U.S. Envtl. Prot. Agency, 911 F.2d 499, 505 (11th Cir. 1990); W. Neb. Res. Council v. U.S. Envtl. Prot. Agency, 943 F.2d 867, 871–72 (8th Cir. 1991).

315 Emery, *supra* note 42, at 1003–05; Payne, *supra* note 42, at 369–71. *Contra* Davis, *supra* note 42, at 693; Perillo, *supra* note 42, at 420–22.

316 Krofta, *supra* note 251; Farley, *supra* note 7.

317 *See* Payne, *supra* note 42, at 370–71 (finding that exempting critical habitat designations from NEPA will eliminate "the expenditure of unnecessary time and energy").

318 Krofta, *supra* note 251.

319 Endangered Species Act of 1973 16 U.S.C. § 1533(b)(2) (2006 & Supp. IV 2011).

320 *Id.*

"any person may commence a civil suit"[321] challenging the validity of a critical habitat designation if it suspects that such designation is not based on an adequate compliance with the ESA.[322]

Critical habitat designations are also preceded by a consideration of impacts and alternatives pursuant to the RFA.[323] To ensure agencies develop regulations in a manner that minimizes adverse impacts to the economy and small businesses in particular,[324] the RFA requires agencies publishing rules subject to the APA "to solicit and consider flexible regulatory proposals and to explain the rationale for their actions in order to assure that such proposals are given serious consideration."[325] Under the RFA, FWS and NMFS must prepare an initial regulatory flexibility analysis (IRFA)[326] and a final regulatory flexibility analysis (FRFA).[327] The IRFA must describe the impact of the critical habitat designation on small entities,[328] such as enterprises engaged in "agricultural related industries."[329] Among other things, the IRFA must describe the reasons for the rule, the objectives of the rule, the small entities that will be affected by the rule, and any significant alternatives to the proposed rule.[330] The FRFA must describe "the steps the agency has taken to minimize the significant economic impact on small entities . . . [and state the] reasons for selecting the alternative adopted . . . and why each one of the other significant alternatives . . . was rejected."[331]

Critical habitat designations must also comply with the public notice and comment procedures set forth by the RFA,[332] unless the head of FWS or NMFS certifies that the designation will not "have a significant economic impact on a substantial number of small entities."[333] Under the RFA, agencies must publish in the *Federal Register*: 1) a regulatory flexibility agenda once each year,[334] 2) an IRFA or summary thereof when it publishes a general notice for a proposed rule,[335] and 3) a FRFA or summary thereof.[336] The RFA also requires that the agencies solicit the Chief Counsel for Advocacy of the Small Business Administration (Chief) for comments on the regulatory

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321 *Id.* § 1540(g)(1).

322 *Id.* § 1540(g)(1)(C) (2006).

323 Krofta, *supra* note 251; Farley, *supra* note 7.

324 Regulatory Flexibility Act, Pub. L. No. 96-354, § 2(a), 94 Stat. 1164 (1980) (codified at 5 U.S.C. § 601); Shultz, *supra* note 246; Farley, *supra* note 7.

325 Regulatory Flexibility Act § 2(b), 94 Stat. at 1165 (1980).

326 Regulatory Flexibility Act, 5 U.S.C. § 603 (2006 & Supp. V 2011).

327 *Id.* § 604.

328 *Id.* § 603(a) (2006). "Small entities" are "independently owned and operated" businesses that are "not dominant in [their] field of operation" and have "annual receipts not in excess of $750,000." *Id.* § 601(6) (2006); Small Business Act, 15 U.S.C. § 632(a)(1) (2006).

329 15 U.S.C. § 632(a)(1) (2006).

330 5 U.S.C. § 603(b)–(c) (2006).

331 *Id.* § 604(a)(6) (Supp. V 2011).

332 *Id.* § 603 (2006 & Supp. V 2011) (requiring rules subject to the APA to comply with the RFA).

333 *Id.* § 605 (2006).

334 *Id.* § 602(a). Among other things, a regulatory flexibility agenda briefly describes the subject area and nature of a rule that an agency expects to propose.

335 *Id.* § 603(a).

336 *Id.* § 604(b).

flexibility agenda and the IRFA.[337] Agencies must also solicit comments on the regulatory flexibility agenda from small entities.[338] Among other things, the FRFA must address the significant issues raised by public comments, respond to comments filed by the Chief, and explain the differences between the proposed and final rules, if any.[339]

Under the ESA, the Secretaries must publish in the *Federal Register* a general notice of a proposed critical habitat designation that includes the complete text of the proposed rule,[340] "publish a summary of the proposed [designation] in a newspaper of general circulation in each area of the United States in which the species is believed to occur,"[341] and solicit comments from numerous stakeholders, including domestic and foreign government agencies and professional scientific organizations.[342] To the "maximum extent practicable," the notice for the proposed rule must "include a brief description and evaluation of those activities (whether public or private) that, in the opinion of the Secretary, if undertaken, may adversely modify [the critical] habitat, or may be affected by such designation."[343] In addition, "[a]ny proposed rule to designate or revise critical habitat shall contain a map of such habitat."[344] The Secretaries must also hold a public hearing if one is requested.[345] Within one year of publishing a general notice, the Secretaries shall publish in the *Federal Register* a final designation or their reasons for not completing the designation within the year.[346] Furthermore, the ESA prohibits the publication of the final designation until at least ninety days after publication of the general notice.[347] And, as briefly discussed in Part II.B.2, a critical habitat designation that is not preceded by adequate public notice and comment procedures can be set aside as unlawful for not complying with the rulemaking procedures specified in the APA.[348]

Thus, critical habitat designations should be exempt from NEPA under the functional equivalence doctrine because they are preceded by an in-depth consideration of impacts and alternatives, involve public notice and comment periods that are at least as robust as the NEPA process, and are

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337 *Id.* §§ 602(b), 603(a).

338 *Id.* § 602(c).

339 *Id.* § 604(a) (Supp. V 2011).

340 Endangered Species Act of 1973, 16 U.S.C. § 1533(b)(5)(A)(i) (2006); 50 C.F.R. § 424.16(c) (2011).

341 16 U.S.C. § 1533(b)(5)(D).

342 *Id.* § 1533(b)(5).

343 50 C.F.R. § 424.16(b) (2011).

344 *Id.*

345 16 U.S.C. § 1533(b)(5)(E).

346 *Id.* § 1533(b)(6)(A).

347 *Id.* § 1533(b)(5)(A). Similarly, NEPA requires ninety days to pass after the publication of a DEIS notice and thirty days to pass after the publication of an FEIS notice. 40 C.F.R. § 1506.10(b) (2011).

348 16 U.S.C. § 1533(b)(4) (requiring rules promulgated pursuant to the ESA to comply with 5 U.S.C. § 553, and thus subjecting critical habitat designations to judicial review under the APA, 5 U.S.C. §§ 701–706).

subject to judicial review.[349] It is true that the critical habitat designation procedures do not completely overlap with NEPA procedures, but that is not what the functional equivalence exemption requires.[350] As explained in *Portland Cement*, application of the functional equivalence exemption is appropriate if it "strike[s] a workable balance between some of the advantages and disadvantages of [the] full application of NEPA."[351] In the case of critical habitat designations, use of the exemption will allow FWS and NMFS to avoid the delay caused by NEPA compliance without sacrificing prescribed channels of "informed decision-making."[352]

The critical question, however, is not whether the functional equivalence exemption applies, because it clearly does, but whether the Supreme Court will apply the exemption to critical habitat designations if given the opportunity. The Court has never applied the functional equivalence exemption to NEPA. It is likely that plaintiffs who want to delay critical habitat designations would argue that rather than adopt the functional equivalence test, the Court should find that the CEQ regulations require agencies to "integrate, to the fullest extent possible, their [NEPA documents with the documents] required by other statutes or Executive Orders."[353] CEQ guidance explains that the regulations aim "to reduce duplication and paperwork"[354] by allowing agencies "to conduct concurrent rather than sequential processes,"[355] and suggests that agencies achieve this goal by "combining scoping, requests for public comment, and the subsequent preparation and display of responses to public comments."[356] The Supreme Court will not likely be persuaded by this argument, however, because the Court's failure to adopt the functional equivalence exemption—assuming FWS argues that the exemption applies on appeal—would call into question the validity of the numerous exemptions that have been granted to the EPA by various appellate courts under the doctrine. However, even if the Supreme Court does not adopt the functional equivalence exemption, it should find that NEPA does not apply to critical habitat designations because such designations do not alter the physical environment.[357]

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349 Farley, *supra* note 7.

350 Payne, *supra* note 42, at 370.

351 Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 386 (D.C. Cir. 1973).

352 *Id.*

353 Memorandum from Nancy H. Sutley, Chair, Council on Envtl. Quality, to the Heads of Fed. Dep'ts and Agencies 11 (Mar. 6, 2012) (citing 40 C.F.R. § 1502.25(a) (2011)), *available at* http://www.whitehouse.gov/sites/default/files/microsites/ceq/improving_nepa_efficiencies_06mar2012.pdf.

354 *Id.* at 12 (citing 40 C.F.R. §§ 1506.4, 1500.4(k), 1500.4(n) (2011)).

355 *Id.*

356 *Id.* at 11.

357 *Douglas Cnty.*, 48 F.3d 1495, 1505–06 (9th Cir. 1995); Emery, *supra* note 42, at 1005–06.

B. Federal Actions That Do Not Alter the Physical Environment Do Not Trigger NEPA

As discussed in Part IV.A, *Douglas County* correctly held that "NEPA procedures do not apply to federal actions that do nothing to alter the natural physical environment. . . . [In other words, NEPA compliance] is not necessary for federal actions that conserve the environment."[358] The *Douglas County* court based its holding on *Metropolitan Edison Co. v. People Against Nuclear Energy*,[359] the only controlling case that addresses the issue of whether NEPA applies to federal actions that do not change the physical environment.

The plaintiffs in *Metropolitan Edison* argued that an EIS was inadequate because it did not address the risk posed to the psychological health and well being of a community living near a nuclear power plant.[360] The plaintiffs argued that NEPA required the EIS to address the anxiety, stress, and fear that the community would suffer as long as the risk of an accident at the power plant existed.[361] The Supreme Court unanimously disagreed.[362] The Court began its analysis by concluding that NEPA's use of "environmental" meant the statute "does not require [an] agency to assess *every* impact or effect of its proposed action, but only the impact or effect on the environment."[363] If NEPA is interpreted too broadly, the Court explained, it would apply to "virtually any consequence of a governmental action that some one thought 'adverse.'"[364] Such broad application, the Court reasoned, would cause the agencies' resources to "be spread so thin" that they could not adequately fulfill their statutorily mandated duties to protect natural resources.[365] Thus, the Court concluded that Congress intended NEPA to apply only to federal actions that affect the physical environment.[366]

As discussed in Part II.C.1 of this paper, *Metropolitan Edison* supported its holding by pointing out that NEPA's legislative history discusses preventing actions that "*damage [our nation's] air, land and water*."[367] The Court explained that "although NEPA states its goals in sweeping terms of human health and welfare, these goals are *ends* that Congress has chosen to pursue by *means* of protecting the physical environment."[368] Thus, an effect of that action at issue must "have a sufficiently close connection to the

358 *Douglas Cnty.*, 48 F.3d at 1505.

359 460 U.S. 766 (1983).

360 *Id.* at 769.

361 *Id.* at 769 n.2.

362 *Id.* at 768. Although all the Justices joined Justice Rehnquist's opinion, Justice Brennan wrote a concurrence, clarifying that NEPA compliance *would* be required if the alleged psychological injury was caused by an actual change in the physical environment, rather than the perceived risk that the environment could be changed. *Id.* at 779.

363 *Id.* at 772.

364 *Id.*

365 *Metro. Edison*, 460 460 U.S. 776, 776 (1983).

366 *Id.* at 772.

367 *Id.* at 773 (quoting 115 CONG. REC. 40,416 (1969) (remarks of Senator Jackson)) (alteration in original).

368 *Id.*

physical environment" for NEPA to apply.[369] As a result, the challenged EIS was held to be adequate, because any health damage posed by operation of the power plant "would not be proximately related to a change in the physical environment."[370] While the Court agreed that renewed operation of the power plant might "cause psychological health problems,"[371] such effects were "simply too remote from the physical environment to justify requiring [NEPA compliance]."[372] In addition, the Court cited a policy rationale, arguing that "[i]t would be extraordinarily difficult for agencies to differentiate between 'genuine' claims of psychological health damage and claims that are grounded solely in disagreement with a democratically adopted policy."[373] The Court recommended that plaintiffs use the political process, not NEPA, to air their policy objections.[374]

A court would be mistaken to hold that *Metropolitan Edison* does not apply to critical habitat designations; *Metropolitan Edison* is clearly analogous.[375] Like psychological harm, economic harm does not fall under the purview of NEPA unless it is caused by a federal action that changes the physical environment.[376] Critical habitat designations do not change the physical environment. It is true that a critical habitat designation could prevent the use of certain types of land management methods which could lead to changes in the ecosystem that might affect neighboring land, but such impacts are too attenuated to trigger NEPA compliance.[377] Furthermore, such impacts are too speculative; many factors affect ecosystems, and it would be unreasonable to require agencies to determine how a critical habitat designation might cause a change in an ecosystem. As the *Douglas County* court explained, NEPA applies when humans change the physical environment, not when humans protect the physical environment and nature subsequently evolves.[378] As *Douglas County* correctly noted,[379] the Fifth Circuit reached the same conclusion in *Sabine River Authority v. U.S. Department of Interior*:[380]

The plaintiffs in *Sabine River Authority*, basing their NEPA claim on alleged economic injury,[381] argued that FWS violated NEPA when it failed to conduct an EIS in connection with its acquisition of a negative easement

369 *Id.*

370 *Id.* at 774.

371 *Id.*

372 *Id.*

373 *Id.* at 778.

374 *Id.* at 777.

375 *See Douglas Cnty.*, 48 F.3d 1495, 1505–06 (9th Cir. 1995); Emery, *supra* note 42, at 1006; Kendall *supra* note 42, at 678–79, 687.

376 *See Douglas Cnty.*, 48 F.3d at 1505.

377 *Metro. Edison*, 460 U.S. at 774.

378 *Douglas Cnty.*, 48 F.3d at 1506.

379 *Id.* at 1505.

380 Sabine River Auth. v. U.S. Dep't of Interior, 951 F.2d 669, 680 (5th Cir. 1992), *cert. denied*, 506 U.S. 823 (1992)). Sierra Club, an intervenor environmental group in *Sabine River Authority*, advocated against the need for NEPA compliance. *Id.* at 680 n.4.

381 *Id.* at 673–74 (alleging that a negative easement prevented plaintiffs from building a reservoir on the land).

prohibiting the development of wetlands used by migratory birds.[382] The Fifth Circuit, relying on *Metropolitan Edison*, found that FWS's acquisition of the negative easement was "tantamount to 'inaction'" and thus did not trigger NEPA compliance.[383] The court further explained: "NEPA does not require a federal agency to prepare an EIS in order 'to leave nature alone.'"[384]

Moreover, a CEQ regulation interpreting NEPA supports the conclusion that critical habitat designations do not require NEPA compliance.[385] As discussed in Part II.A.2, the regulation states that "economic or social effects are not intended by themselves to require [NEPA compliance]."[386] Relying on this regulation, the Eighth Circuit concluded that "when the threshold requirement of a primary impact on the physical environment is missing, socio-economic effects are insufficient to trigger [NEPA compliance]."[387] A critical habitat designation may prevent human activities on the land that in turn cause socioeconomic effects, but these effects, alone, do not trigger NEPA.[388]

VI. CONCLUSION

Although the spikedace, loach minnow, and spotted owl shared similar stories at first, the story of the two little fish diverged from that of the owl when the Ninth and Tenth Circuits split over whether critical habitat designations require NEPA compliance; the two little fish waited twenty-six years for critical habitat while the owl waited only five.[389] In essence, the debate over the circuit split has led to two distinct arguments: 1) the agencies that designate critical habitat should adjust their policies to include nationwide NEPA compliance, even if compliance reduces overall conservation, because NEPA guarantees all members of the public the right to participate in the decision-making process;[390] and 2) NEPA compliance prevents the agencies that designate critical habitat from maximizing their conservation efforts, and is not justified because critical habitat designations do not require NEPA compliance as a matter of law.[391] Based on a sincere attempt to thoroughly and objectively analyze the pertinent law pertaining to the issue of whether critical habitat designations should require NEPA compliance, this Comment agrees with the latter argument.

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382 *Id.* at 673.

383 *Id.* at 680 (internal quotations omitted); Emery, *supra* note 42, at 1005–06.

384 *Id.* at 679 (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)).

385 Farley, *supra* note 7.

386 40 C.F.R. § 1508.14 (2011).

387 Como-Falcon Cmty. Coal., Inc. v. U.S. Dep't of Labor, 609 F.2d 342, 345 (8th Cir. 1979) (quoting Image of Greater San Antonio, Tex. v. Brown, 570 F.2d 517, 522 (5th Cir. 1978)).

388 *Id.*

389 *See* discussion *supra* Part I.

390 *See* discussion *supra* Part II.C.2.

391 *See* discussion *supra* Part II.C.1.

Even though *Douglas County* reached the correct conclusion, its analysis is almost as flawed as that of *Catron County*.[392] If presented with the opportunity to defend their current NEPA policies in court, FWS and NMFS should completely abandon *Douglas County*'s displacement argument, and instead argue that critical habitat designations should not require NEPA compliance for two independent reasons. First, the ESA, APA, and RFA procedures that FWS and NMFS must follow when designating critical habitat produce the functional equivalent of NEPA compliance.[393] Second, critical habitat designations do not alter the physical environment and thus do not fall under the purview of NEPA.[394] In addition, FWS and NMFS should make the cooperative development of a new policy that enables maximum conservation efforts a top priority, because the judiciary may not choose to resolve the circuit split in the near future, if ever. This Comment suggests that the agencies achieve this goal by continuing to comply with NEPA when designating critical habitat only when a designation poses a litigation risk in the Tenth Circuit, and reducing the cost of such compliance by jointly developing a programmatic EA for critical habitat designations that folds their several statutory duties into one NEPA document.

Lastly, the courts that are not bound by the Ninth or Tenth Circuits, particularly the courts of the D.C. Circuit, should consider adopting the analysis provided by this Comment—even if the agencies that designate critical habitat fail to raise the arguments—because the analysis reveals that critical habitat designations do not require NEPA compliance as a matter of law.[395] And if given the opportunity, the U.S. Supreme Court should accept certiorari and resolve the circuit split to enable FWS and NMFS to develop consistent national policies on NEPA compliance and maximize their efforts to conserve endangered and threatened species.

392 *See* discussion *supra* Part IV.A.
393 *See* discussion *supra* Part V.A.
394 *See* discussion *supra* Part V.B.
395 *See* discussion *supra* Part V.