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Critically Acclaimed but Not Critically Followed - The Inapplicability of the National Environmental Policy Act to Federal Agency Actions: Douglas County v. Babbitt

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The National Environmental Policy Act (NEPA) imposes environmental responsibility on all federal agencies. One important NEPA provision requires preparation of environmental impact statements prior to implementing certain agency actions. Although the impact statement requirement pertains to many federal actions, courts have articulated instances where this procedure does not apply. As a result of judicially created exemptions from


2. See NEPA § 102, 42 U.S.C. § 4332. NEPA has three major purposes: first, it attempts to deter damage to the environment while "declar[ing] a national policy encouraging harmony between humans and the environment;" second, the statute attempts to improve "understanding of the ecological systems and national resources important to the Nation;" and third, NEPA establishes a Council on Environmental Quality (CEQ). Philip Michael Ferester, Article, Revitalizing the National Environmental Policy Act: Substantive Law Adaptations from NEPA's Progeny, 16 Harv. Envtl. L. Rev. 207, 207 n.6 (1992) (citing NEPA § 2, 42 U.S.C. § 4321). The CEQ was created to oversee actions taken to enhance the environment. H.R. Rep. No. 378, supra note 1 at 1, reprinted in 1969 U.S.C.C.A.N. at 2751.

3. See NEPA § 102(2) (C); 42 U.S.C. § 4332(2) (C). For a discussion of environmental impact statements, see infra notes 39-42 and accompanying text.

4. See Howard Geneslaw, Article, Cleanup of National Priorities List Sites, Functional Equivalence and the NEPA Environmental Impact Statement, 10 J. Land Use & Envtl. L. 127, 136-38 (1994). For example, NEPA provisions do not require impact statements for insignificant or non-major federal actions. See NEPA § 102(2) (C), 42 U.S.C. § 4332(2) (C) (stating impact statement is needed for "major [f]ederal actions significantly affecting the quality of the human environment"). For a further discussion of NEPA § 102(2) (C), 42 U.S.C. § 4332(2) (C), see infra note 34 and accompanying text.

Impact statements are not necessary when an agency's administrative statute has a "clear and fundamental conflict" with NEPA. See Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776, 791 (finding that timing requirements of agency's enabling statute may not allow for preparation of impact statements), reh'g denied, 429 U.S. 875 (1976). For a discussion of Flint Ridge, see infra notes 92-96 and accompanying text. Furthermore, an impact statement is not needed when such preparation would frustrate the purposes of both NEPA and the agency's

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NEPA, the question of NEPA's applicability to federal agency actions is a prevalent and problematic litigation issue. For instance, many courts have found that Environmental Protection Agency (EPA) actions need not comply with NEPA's impact statement standards because EPA goals necessarily focus upon environmental preservation.

The issue of NEPA compliance becomes more intriguing, however, when courts consider the extent of NEPA's applicability to other federal agencies that address environmental issues. This par


5. See Geneslaw, supra note 4, at 136-38. One commentator recognized that while NEPA does not contain any explicit exemptions, three types of exclusions have arisen. Id. at 134-39. The first exclusion arises when "provisions in other statutes expressly [exempt] certain activities from [requiring] preparation of an [impact statement]. . . ." Id. at 134. The second exemption stems from the "judicially created 'functional equivalence' doctrine, which provides an exemption for EPA if its review and comment procedures offer an effective substitute to an [impact statement]. . . ." Id. at 134-35. The third "exemption from [impact statement] preparation [has been recognized] . . . in 'emergency circumstances.'" Id. at 135. Another author addressed whether "environmental decision making [sic] is best made by agencies alone or by agencies in partnership with the courts." Linda M. Bolduan, Comment, The Hatfield Riders: Eliminating the Role of Courts in Environmental Decision Making, 20 ENVTL. L. 329, 332 (1990). Bolduan concluded that the nature of environmental issues commands interaction between agencies and the judiciary in environmental decisionmaking processes. Id. at 333, 375-76. But see Wyoming v. Hathaway, 525 F.2d 66, 73 (10th Cir. 1975) (Seth, J., dissenting) (dissenting judge would require strict adherence to NEPA for all federal agencies and would not allow judicially created exceptions to this rule), cert. denied, 426 U.S. 906 (1976).


7. See Portland Cement, 486 F.2d at 381. In a Senate debate regarding § 102 of NEPA, conferees stated that this particular section of NEPA should guarantee that federal agencies that do not normally consider environmental issues will evaluate these concerns. Id. (citing 115 CONG. REC. 40,418 (1969)). See e.g., Thomas v. Peterson, 589 F. Supp. 1139, 1141 (D. Idaho 1984) (involving action against Forest
ticular conflict was addressed in Douglas County v. Babbitt® (Douglas County II). In Douglas County II, the United States Court of Appeals for the Ninth Circuit evaluated the extent to which NEPA requirements should apply to the Department of the Interior’s (DOI) action under the Endangered Species Act (ESA).9 Specifically, the Ninth Circuit decided whether NEPA’s requirement that all federal agencies prepare an environmental impact statement for “every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment” applied to the Secretary of the Interior’s (Secretary) designation of a critical habitat under ESA.10 Interpreting both NEPA and ESA, the Ninth Circuit concluded that NEPA did not

Service for building road without preparing impact statement), aff’d in part, rev’d in part and remanded, 753 F.2d 754 (9th Cir. 1985), and appeal after remand, 841 F.2d 332 (9th Cir. 1988); National Org. for the Reform of Marijuana Laws (NORML) v. United States Dept. of State, 452 F. Supp. 1226, 1228 (D.D.C. 1978) (involving action against Department of State, Agency for International Development, and Drug Enforcement Agency for failing to furnish impact statement for United States participation in herbicide spraying program); City of Irving, Tex. v. FAA, 559 F. Supp. 17, 19 (N.D. Tex. 1981) (concerning action against Federal Aviation Administration for not preparing impact statement when temporarily testing runway).

It should be noted that NEPA does not contain any express exemption language for any agency. See NEPA § 102, 42 U.S.C. § 4332; H.R. Conf. Rep. No. 765, 91st Cong., 1st Sess. 9-10 (1969), reprinted in 1969 U.S.C.C.A.N. 2767, 2769-70. Due to the lack of an express exemption, questions have arisen regarding an implied exception from NEPA. See Portland Cement, 486 F.2d at 381 (suggesting that functional equivalence standard would afford some agencies leniency). Such an implication could arise when a court evaluates the type of agency action and the procedures in the agency’s administrative statute, and concludes either that adequate environmental concerns will be addressed without guidance from NEPA or that there should be a strict adherence to NEPA in all circumstances. Id. (citing Major Changes in S. 1075 as passed by Senate 115 Cong. Rec. 40,417-18 (1969)).

8. 48 F.3d 1495 (9th Cir. 1995), cert. denied, 116 S. Ct. 698 (1996). The district court decision was Douglas County v. Lujan (Douglas County I), 810 F. Supp. 1470 (D. Or. 1992), aff’d in part, rev’d in part, Douglas County v. Babbitt (Douglas County II), 48 F.3d 1498 (9th Cir. 1995), cert. denied, 116 S. Ct. 698 (1996). Between the time of the lower court decision and the Ninth Circuit appeal, a new Secretary of the Interior was appointed. Therefore, the new Secretary, Bruce Babbitt, replaced Manuel Lujan, Jr. as the defendant in the circuit court case. See Douglas County II, 48 F.3d at 1499 n.2.


10. Douglas County II, 48 F.3d at 1497 (quoting NEPA § 102(2)(C); 42 U.S.C. § 4332(2)(C)). The Secretary of the Interior has the authority to list endangered species and designate critical habitats under ESA. ESA § 4, 16 U.S.C. § 1535(15). See also Nancy K. Kubasek & M. Neil Browne, Article, The Endangered Species Act: An Evaluation of Alternative Approaches, 3 Dick. J. Env’tl. L. & Pol’y I, 2 (Spring 1994). The Secretary delegates this authority to the Fish and Wildlife Service. Kubasek, supra at 2. For purposes of this Note, the term “the Secretary” will refer to both the Secretary of the Interior and the Fish and Wildlife Service.
apply to the critical habitat designation.\textsuperscript{11} The court’s conclusion was based on three factors.\textsuperscript{12} First, Congress intended for ESA critical habitat provisions to supersede NEPA procedures.\textsuperscript{13} Second, NEPA only applies to alterations in the physical environment.\textsuperscript{14} Third, applying NEPA to critical habitat designations would frustrate purposes of both of the statutes.\textsuperscript{15}

This Note focuses on the applicability of NEPA to specific federal agency actions. It concentrates on an agency’s duty to comply with NEPA when its administrative statute already addresses environmental concerns. Section II presents the facts of \textit{Douglas County II}.\textsuperscript{16} Section III then examines the history and development of NEPA and ESA.\textsuperscript{17} Next, Section IV discusses the Ninth Circuit’s holding and reasoning in \textit{Douglas County II}.\textsuperscript{18} In addition, Section V critically analyzes an alternate rationale supporting the Ninth Circuit’s decision.\textsuperscript{19} Finally, Section VI concludes this note with an assessment of the impact of the Ninth Circuit’s holding on both government agencies and the public.\textsuperscript{20}

\textsuperscript{11} \textit{Douglas County II}, 48 F.3d at 1501-08. The court acknowledged the importance of protecting old growth forests from possible demise, and stated that it was reluctant “to make NEPA more of an ‘obstructionist tactic’ to prevent environmental protection that it may already have become.” \textit{Id.} at 1508. But see Catran County Board of Comm’r, New Mexico v. United States Fish and Wildlife Service, 75 F.3d 1429 (10th Cir. 1996) (holding Secretary of Interior must comply with NEPA when designated a critical habitat under ESA).

\textsuperscript{12} \textit{Id.} at 1507-08. The court engaged in an in-depth analysis of NEPA and ESA. First, the court concluded that ESA methods replaced NEPA procedures. \textit{Id.} at 1502-05. Next, the court acknowledged that regardless of ESA procedures an impact statement was not required because the critical habitat designation did not change the physical environment. \textit{Id.} at 1505-06. Finally, the court found that ESA supplements NEPA without requiring an impact statement. \textit{Id.} at 1506-07.

\textsuperscript{13} \textit{Id.} at 1502-05. The Ninth Circuit focused on the legislative history and the plain text of the two statutes to conclude that the critical habitat designation process was governed by ESA, and thus was not subject to NEPA procedures. \textit{Id.} For a discussion of critical habitats, see \textit{infra} notes 46-54 and accompanying text.


\textsuperscript{15} \textit{Douglas County II}, 48 F.3d at 1506-07.

\textsuperscript{16} For a discussion of the facts of \textit{Douglas County II}, see \textit{infra} notes 21-34 and accompanying text.

\textsuperscript{17} For a discussion of the legislative history of NEPA and ESA, see \textit{infra} notes 35-54 and accompanying text.

\textsuperscript{18} For a discussion of the Ninth Circuit’s holding in \textit{Douglas County II}, see \textit{infra} notes 109-32 and accompanying text.

\textsuperscript{19} For a discussion of the functional equivalence test, see \textit{infra} notes 143-57 and accompanying text.

\textsuperscript{20} For a discussion of the effect of the Ninth Circuit’s holding on the applicability of NEPA to federal agency actions, see \textit{infra} notes 158-72 and accompanying text.
II. FACTS

The Douglas County II litigation arose out of public interest in preserving the Northern Spotted Owl.21 In response to this widely held concern, the Secretary of the Interior listed the owl as an endangered species.22 The Secretary did not, however, designate a critical habitat for the owl, and environmentalists subsequently brought an action to compel the designation.23 Pursuant to a court

21. See Douglas County II, 48 F.3d at 1498 (citing Northern Spotted Owl v. Hodel, 716 F. Supp. 479 (W.D. Wash. 1988)). Since 1973, government officials have identified the Northern Spotted Owl as a "species in need of protection." John Lowe Weston, Comment, The Endangered Species Committee and the Northern Spotted Owl: Did the "God Squad" Play God?, 7 ADMIN. L.J. AM. U. 779, 794 (Fall 1993/Winter 1994). Additional scientific research has revealed a close relationship between the owl and old-growth forests because the Northern Spotted Owl's primary habitat is in the old-growth forests of the Pacific Northwest. Id.

In Northern Spotted Owl v. Hodel, 716 F. Supp. at 480, a number of environmental groups brought an action challenging the Secretary's decision not to list the Northern Spotted Owl as an endangered species. Under ESA, an endangered species listing for the owl would also trigger a critical habitat designation within the old-growth forest area. See Northern Spotted Owl v. Lujan, 758 F. Supp. 621, 623-25 (W.D. Wash. 1991). Since loggers use these forests to gather high-quality lumber for their timber companies, heightened interest in the owl has placed the species "squarely in the center of an economic-benefit-of-preservation versus economic-cost-of-preservation controversy." Weston, supra at 794.

22. Douglas County II, 48 F.3d at 1498 (citing 55 Fed. Reg. 26,114 (1990)). The listing process under ESA has been recognized as a "truly remarkable effort" by the Department of the Interior because of the great amount of concern expressed for preservation of the Northern Spotted Owl. Northern Spotted Owl v. Lujan, 758 F. Supp. at 629. In April 1990, the Secretary began plans to list the owl as an endangered species. Weston, supra note 21, at 797. In June 1990, the Secretary published the final listing rule. See 55 Fed. Reg. 26,114 (1990).

23. See Douglas County II, 48 F.3d at 1498-99. In Northern Spotted Owl v. Lujan, environmentalists initiated an action to force the Secretary to designate a critical habitat for the owl. 758 F. Supp. at 622. These activists contended that the critical habitat was ascertainable and, therefore, the Secretary was obligated to designate that habitat. Id. at 623-24. The Secretary argued that the critical habitat was not discernable at the time of the listing. Id.

ESA requires the Secretary to designate a critical habitat concurrently with an endangered species listing. ESA § 4, 16 U.S.C. § 1533(a)(3). If, however, a critical habitat is unascertainable during the listing process, the Secretary must provide sufficient reasons for not designating a habitat at that time. See 50 C.F.R. § 424.12(a) (1994). See also James Salzman, Article, Evolution and Application of Critical Habitat Under the Endangered Species Act, 14 HARV. ENVTL. L. REV. 311, 331 (1990) (stating if species' critical habitat is "deemed imprudent or indeterminable" designations are not made). Further, under ESA the Secretary must use the "best scientific and commercial data available" when determining a critical habitat. See ESA § 4, 16 U.S.C. § 1533(b)(1)(A); 50 C.F.R. § 424.12(a). The Secretary stated that a critical habitat was not "determinable" at the time of the listing. Northern Spotted Owl v. Lujan, 758 F. Supp. at 623. Nonetheless, the district court characterized critical habitat designations as "central component[s] of the legal scheme developed by Congress to prevent the permanent loss of species." Id. at 629. Accordingly, the court ordered the Secretary to submit a written report and publish a proposed designation. Id. at 629-30.
order, the Secretary conducted several public hearings and developed a final designation of a critical habitat which consisted entirely of federal land. The Secretary concluded that, for this assignment, it was not necessary to prepare either an environmental assessment, or an environmental impact statement pursuant to NEPA.

In September 1991, Douglas County filed an action in the United States District Court for the District of Oregon. The County sought a declaratory judgment against the Secretary for violating NEPA and ESA requirements. Moreover, the County requested an injunction to prevent the Secretary from designating a critical habitat for the Northern Spotted Owl until either a NEPA environmental assessment or a NEPA environmental impact state-

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24. Douglas County II, 48 F.3d at 1498. The Secretary's initial proposal, published on May 6, 1991, was based on a preliminary economic analysis. Douglas County I, 810 F. Supp. at 1472. In this designation, the critical habitat consisted of federal, state, and privately owned land. See Douglas County II, 48 F.3d at 1498 (citing 56 Fed. Reg. 20,816 (1991)). After this proposal, the Secretary held four public meetings and elicited public response. Id. Subsequent to the comment period, the Secretary prepared another economic analysis that took into account employment and financial considerations in the timber industry of the local and state areas. Douglas County I, 810 F. Supp. at 1473. On August 13, 1991, the Secretary issued a revised designation of critical habitat eliminating all privately owned lands and a majority of state owned land. Id. (citing 56 Fed. Reg. 40,002 (1991)). On January 15, 1992, following a comment period and four more public hearings, the Secretary established a final rule of critical habitat for the Northern Spotted Owl. Douglas County II, 48 F.3d at 1498 (citing 57 Fed. Reg. 1,796 (1992)). This designation consisted of approximately 6.9 million acres of old-growth forest that eliminated all private, tribal, state, and non-federal land. Id.

25. Id. at 1498 (citing 56 Fed. Reg. 20,824 (1991)). The Secretary based his decision not to prepare an impact statement on Sixth Circuit precedent holding that endangered species listings under ESA are not subject to NEPA and a letter from the Council of Environmental Quality that "urged the Secretary to cease preparing EISs [sic] in conjunction with actions under § 4 of the ESA." Id. (citing 48 Fed. Reg. 49,244 (1983)). See also Pacific Legal Found. v. Andrus, 657 F.2d 829, 838 (6th Cir. 1981) (holding that because NEPA impact statement requirements conflict with ESA it is not necessary for endangered species listing); Andrus v. Sierra Club, 442 U.S. 347, 358 (1979) (concluding that Council on Environmental Quality's interpretation of NEPA is "entitled to substantial deference").

26. Douglas County I, 810 F. Supp. at 1472. A common complaint with respect to critical habitat designations is that these land distributions can obstruct local progress and development. See Salzman, supra note 23, at 335-39 (identifying "sources of opposition" to critical habitat designations); Weston, supra note 21, at 794-95 (discussing economic impacts on local loggers resulting from limited use of old-growth forests). Douglas County brought an action because the critical habitat designation would "profoundly affect the quality of life in Douglas County..." Douglas County I, 810 F. Supp. 1476. Therefore, the district court determined that Douglas County had standing to bring the claims. Id. at 1476-77. For a discussion of standing, see infra note 34 and accompanying text.
ment was prepared. In granting summary judgment in favor of Douglas County, the district court concluded that: (1) the Secretary did not violate ESA because the critical habitat designation adequately considered various impacts on the County and on other wildlife; (2) Douglas County had standing to bring NEPA claims against the Secretary; and (3) the Secretary violated NEPA by designating a critical habitat without preparing either an environmental assessment or an environmental impact statement.

The Secretary appealed to the Ninth Circuit arguing that Douglas County did not have standing to bring NEPA claims, and further, that ESA procedures override NEPA procedures. The Secretary, therefore, contended that an environmental impact statement need not be issued prior to specifying the critical habitat. The Court of Appeals affirmed in part, reversed in part, and remanded for further consideration. The court agreed with the Secretary's critical habitat argument, and found that the district

27. Douglas County I, 810 F. Supp. at 1474. Douglas County presented four claims which focused on the Secretary's failure to comply with NEPA when designating the critical habitat: (1) failure to develop a range of alternatives; (2) failure to identify and disclose a "cumulative impact" of the designation; (3) failure to examine effects of the designation on other wildlife; and (4) failure to consider social and economic impacts of the designation. Id. As a remedy, Douglas County sought an injunction preventing the critical habitat designation from going into effect until the Secretary prepared an environmental impact statement in compliance with NEPA. Id. at 1474. The parties filed cross-motions for summary judgment.

28. Id. at 1474-87. The district court strictly viewed NEPA as requiring all federal agencies to comply with the Act when considering implementation of major federal actions "unless there is a clear and unavoidable statutory conflict." Id. at 1484. Therefore, the court found that Douglas County's economic hardship invoked necessary compliance with NEPA. Id. at 1484. Accordingly, the court granted summary judgment for the County and provided injunctive relief by setting aside the critical habitat designation until the Secretary complied with NEPA. Id. at 1484. The district court later stayed the injunctive order pending appeal. Douglas County II, 48 F.3d at 1499. See, e.g., National Org. for the Reform of Marijuana Laws v. United States Dept. of State (NORML), 452 F. Supp. 1226, 1234 (D.D.C. 1978) (finding remedy "enjoining the proposed federal action and ordering the preparation of an adequate impact statement . . . is insufficient because, except by deterrence, it does nothing to further early consideration of environmental factors").

29. Douglas County II, 48 F.3d at 1499. The Secretary and Headwater, Inc. joined as appellants. Id. Douglas County was joined by Northwest Forest Resource Council, Douglas Timber Operators, Southern Forest Products Association, Southern Timber Purchasers Council, and American Forest & Paper Association as appellees. Id.

30. Id.

31. Id. at 1508. The Ninth Circuit affirmed the district court holding that Douglas County had standing to bring NEPA claims. Id. at 1501. However, the court reversed the lower court's decision and held that NEPA does not apply to critical habitat designations. Id. at 1507-08.
court erred by concluding that NEPA applied to the designation of a critical habitat. 32 Accordingly, the court reversed that portion of the district court's decision and held that: (1) ESA's critical habitat provisions superseded NEPA procedures; and (2) NEPA requirements do not apply to actions that do not modify the physical environment. 33 The Ninth Circuit did, however, affirm the district court's ruling that Douglas County had standing to bring NEPA claims against the Secretary.34

32. Id. at 1507.
33. Id. at 1507-08.
34. Douglas County II, 48 F.3d at 1501. The first issue the Ninth Circuit addressed in Douglas County II was whether Douglas County had standing to assert an action against the Secretary of the Interior. Id. at 1499. The United States Supreme Court has recognized three requirements for standing under Article III of the Constitution. Id. (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)); see also U.S. CONST. art. III, § 2, cl. 2. First, the plaintiff must suffer an "injury in fact." Id. (citing Defenders of Wildlife, 504 U.S. at 560). This includes a "concrete and particularized" or "actual or imminent" injury of a legally protected interest. Id. Next, "there must be a causal connection between the injury and the conduct complained of." Id. Finally, there must be a likelihood that "the injury will be 'redressed by favorable decision.'" Id. (citing Defenders of Wildlife, 504 U.S. at 561).

Once constitutional requirements for standing are met, a plaintiff challenging a statute, such as NEPA, must also satisfy the zone of interests test under the Administrative Procedure Act (APA) by showing "that the injury he or she has suffered falls within the 'zone of interests' that the statute was designed to protect." Douglas County II, 48 F.3d at 1499. See 5 U.S.C. § 551. See also Nevada Land Action Ass'n v. United States Forest Service, 8 F.3d 713, 716 (9th Cir. 1993) (finding claims to protect purely economic interests and lifestyle do not elicit standing under NEPA); Bennett v. Plenert, 63 F.3d 915, 921-22 (9th Cir. 1995) (concluding plaintiffs, asserting no interest in preserving endangered species, did not satisfy zone of interests test under APA).

According to Defenders of Wildlife, the plaintiff must show two elements to establish procedural standing. Id. First, the plaintiff must have a procedural right to protect a concrete interest. Id. Second, that concrete interest must be threatened. Id. (citing Defenders of Wildlife, 504 U.S. at 572-73 nn. 7-8). The Ninth Circuit first found that Douglas County exhibited a procedural right. Id. at 1501. NEPA allows local agencies to respond to proposed federal actions. Id. (citing NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C)). Douglas County is such an agency. Id. (citing OR. REV. STAT. § 197.175 (1993) (authorizing counties to "prepare, adopt, amend and revise" environmental standards within land management plans)). Next, the court concluded that the County had a concrete interest that could be harmed because its adjoining lands could be threatened by the government's critical habitat designation. Douglas County II, 48 F.3d at 1501. Therefore, the Ninth Circuit held that Douglas County met the constitutional requirements for procedural standing, satisfied the zone of interests test based on a procedural injury resulting from the "failure to prepare an environmental document that explores a range of alternatives and cumulative facts," and demonstrated a concrete interest that could be adversely affected by the critical habitat designation. Douglas County II, 48 F.3d at 1501. See also Linda M. Barone, Note, Loggers or Woodpeckers: Who's Endangered Now?: Region 8 Forest Service Timber Purchasers Council v. Alcock, 5 VILL. ENVTL. L.J. 529 (1994) (discussing whether timber companies have standing to bring claims against United States Forest Service); Martha Colhoun & Timothy S. Hamill, Comment, Environmental Standing in the Ninth Circuit: Wading Through the
III. BACKGROUND

A. Relevant Statutory Provisions

1. National Environmental Policy Act of 1969

NEPA provides the procedural framework that federal agencies must employ to assess the environmental consequences of certain actions. NEPA forces a government agency that initiates a federal action to develop and consider extensive information regarding environmental concerns. However, the statute does not require an agency to reach a particular substantive result for environmental protection. Initially, under NEPA, an agency that proposes either


35. NEPA §§ 2, 101-02, 42 U.S.C. §§ 4321, 4331-32. See also Bolduan, supra note 5, at 330. Section 102 of NEPA provides in pertinent part:

The Congress authorizes and directs that, to the fullest extent possible:

(1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the federal government shall-

(A) utilize a systematic, interdisciplinary approach ... in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, ... which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and any other major Federal actions significantly affecting the quality of the human environment, a detailed statement made 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, and

(v) any irreversible and irretrievable commitments of resources ... [if] the proposed action [is] implemented.

NEPA § 102, 42 U.S.C. § 4332.

This section further states that federal agencies must consult with one another and the public before finalizing a major project. Id. § 102(2)(C), 42 U.S.C. § 4332(2)(C).

36. Andrea L. Hungerford, Note, Changing the Management of Public Land Forests: The Role of Spotted Owl Injunctions, 24 ENVTL. L. 1395, 1401 (1994). In Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989), the Supreme Court found that while NEPA establishes "procedures [that] are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes a necessary process." Therefore, if an agency identifies and evaluates any possible consequences to the envi-
legislation or government action that may affect the environment must conduct an environmental assessment. Based upon the results of this assessment, the agency may make a finding of no significant impact and decide not to prepare an environmental impact statement. Alternatively, if the assessment reveals a significant effect on the environment, the federal agency must prepare an environmental impact statement.

The primary purposes of environmental impact statements are: (1) to detail possible economic and environmental effects of the proposed federal action on others; and (2) to afford sufficient environment that may be caused by the proposed action, "the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs," because NEPA prohibits uniformed as opposed to unwise agency actions. Id. at 350-51 (citations omitted).

37. Douglas County II, 48 F.3d at 1498 (citing NEPA § 102(2)(E), 42 U.S.C. § 4332(2)(E)). NEPA's process begins with a brief analysis to determine the need for an impact statement. See 40 C.F.R. § 1501.2. Regulations promulgated pursuant to NEPA define an environmental assessment as a "concise public document" where a federal agency "provide[s] sufficient evidence and analysis for determining whether to prepare an environmental impact statement or [make] a finding of no significant impact." Id. at § 1508.9(a)(1). Additionally, the assessment must discuss possible alternatives to the action. Id. at § 1508.9(b). The main purpose of an environmental assessment is to determine whether the proposed action will cause a significant impact on the environment. Id. at § 1501.3. Therefore, it helps federal agencies foresee the necessity for environmental impact statements and identify possible alternatives to the proposed action. See NEPA § 102(2)(E), 42 U.S.C. § 4332(2)(E); 40 C.F.R. §§ 1501.3, 1501.4.

38. 40 C.F.R. § 1508.13. An impact statement is not necessary for federal actions that do not create a significant impact on the environment. See Sabine River Auth. v. United States Dept. of Interior, 951 F.2d 669, 680 (5th Cir.), cert. denied, 506 U.S. 823 (1992). However, to justify reaching a finding of no significant impact the federal agency must provide reasons why the action will not have a serious effect on the environment and must refer to any documents used to support that conclusion. 40 C.F.R. § 1508.13. Once an agency makes a finding that the federal action will not have a significant impact on the environment it must also make that decision available to the public. Id. at § 1501.4(e)(1). Further, if the decision not to prepare an impact statement is without precedent or closely resembles an action that normally requires an impact statement, the decision must be made available for review and comment. Id. at 1501.4(e)(2).

39. See generally NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (statutory requirements for environmental impact statements); 40 C.F.R. § 1502 (detailing purposes and process for completing environmental impact statement). The environmental impact statement is a detailed document devised to "assure that agencies give proper consideration to the environmental consequences of their actions." Merrell v. Thomas, 807 F.2d 776, 777-78 (9th Cir. 1986), cert. denied, 484 U.S. 848 (1987) (citations omitted). Additionally, the statement alerts the public and other federal agencies of the proposed action, and allows them to be active in the decision making process. See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

40. See NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.1. The statement should recognize both direct and indirect effects. 40 C.F.R. § 1508.8. Regulations pursuant to NEPA define direct effects as those "caused by the action and occurring at the same time and place." Id. at § 1508.8(a). Indirect actions
channels for feedback between the federal agency and interested parties. Therefore, a properly designed environmental impact statement lists the alternatives to the proposed federal action, reveals potential effects on the surroundings by the action, and takes into account public response to the possible action.

2. Endangered Species Act of 1973

Congress enacted the Endangered Species Act of 1973 (ESA) to provide for the conservation of vanishing species of fish and wildlife. The primary goal of ESA is to accommodate listed species are explained as those that are a result of the action, but take place "later in time or [are] farther removed in distance, but are still reasonably foreseeable." Id. at 1508.8(b). Further, an impact statement should analyze beneficial effects as well as detrimental costs to the environment. Id. For a further discussion of beneficial environmental impacts, see infra notes 69-74 and accompanying text.

41. See 40 C.F.R. § 1502.19. Adequate feedback is accomplished by circulating the proposal and allowing substantive comments pertaining to the federal action. Id. All agencies are required to provide the entire impact statement to certain interested parties. Id. These groups include: federal agencies authorized to develop and maintain environmental standards, the applicant requesting the statement, any interested party requesting a copy of the statement, and organizations submitting substantive comments on the draft. Id. Before preparing the final draft of the impact statement, the agency should invite specific comments from federal, state, and local agencies and other interested parties regarding the proposed action. Id. at § 1503.1. These comments should be taken into account when the agency prepares the final draft of the federal project. Id. at § 1503.4.

42. See Hungerford, supra note 36, at 1400. The environmental impact statement serves the purpose of providing information to allow "agency officials make the best informed decisions based upon an understanding of the environmental consequences of their actions." Bolduan, supra note 5, at 331. When making a decision an agency must be able to weigh possible alternatives to the proposed action. 40 C.F.R. § 1502.14. The alternatives section of an impact statement is considered "the heart of the impact statement." Id. This component of the statement allows the agency to "rigorously explore and objectively evaluate all reasonable alternatives" to the action by extensively detailing each possibility and allowing for a comparative evaluation. Id. See generally Clay Hartmann, Comment, NEPA: Business as Usual: The Weaknesses of the National Environmental Policy Act, 59 J. Air L. & Com. 709 (Feb. 1994) (finding that case law demonstrates federal agencies have failed to treat alternatives section in impact statements with importance they demand).

Another important factor of an impact statement is public involvement. 40 C.F.R. § 1506.6. This aspect of the statement process entails providing affected parties with public notice of hearings, and allowing for public comments on the proposed action. Id. at § 1506.6(b).

until they are no longer in threat of extinction.\textsuperscript{44} To achieve this goal, resources necessary to prevent further diminution are devoted to a threatened species; thus, the imperiled class is given highest priority.\textsuperscript{45}

In addition to the ESA listing process, the statute mandates critical habitat designations for endangered species.\textsuperscript{46} Section 3 of ESA defines critical habitat as specific areas "essential to the conservation" of endangered species and regions "which may require special management considerations or protection."\textsuperscript{47} Under ESA, the


\textsuperscript{45} See H.R. REP. No. 1625, \textit{supra} note 43, at 10, \textit{reprinted in} 1978 U.S.C.C.A.N. at 9460. In Tennessee Valley Auth. v. Hill, the Supreme Court suspended the construction of the Tellico Dam because its continued erection would jeopardize the preservation of the snail darter. 437 U.S. 153, 172-74 (1978). The Court found that although stopping the construction would sacrifice millions of dollars in public funds, ESA clearly affords endangered species "the highest of priorities." \textit{Id.} at 174. Further, the Supreme Court concluded that its decision to terminate the dam construction was supported by congressional intent to "halt and reverse the trend toward species extinction, whatever the cost." \textit{Id.} at 184.

\textsuperscript{46} See ESA § 4, 16 U.S.C. § 1533.

\textsuperscript{47} ESA § 3, 16 U.S.C. § 1532(5)(A)(i). House Conference Report 1804 defined critical habitat to include certain areas \textit{within} the geographic region occupied by a listed species that are crucial to preserve the species and that necessitate special management considerations. H.R. CONF. REP. No. 1804, 95th Cong., 2d Sess. 17 (1978), \textit{reprinted in} 1978 U.S.C.C.A.N. 9484, 9485. This report further rec-
Secretary allocates land for critical habitats based on "the best scientific data available after taking into consideration the economic impact and any other relevant impact" on the environment. The general purpose of these designations is to ensure that a proposed federal action will neither imperil the existence of any remaining endangered species nor adversely alter the species' living environment.

Ironically, when it initially enacted ESA in 1973, Congress did not place particular importance on critical habitat designations. These land designations were viewed as only one of a number of ESA enforcement mechanisms. Five years later, Congress recommended that the Secretary be given power to designate critical habitats outside of the geographic area occupied by the species, if such regions are paramount to the species' conservation. Under a theory of "irresolvable conflict," the conferees proposed that the Secretary be given discretion for such designations when "an agency's action would jeopardize the continued existence of a threatened or endangered species or result in the adverse modification or destruction of a critical habitat." See also 50 C.F.R. § 424.02 (defining critical habitat); 50 C.F.R. § 424.12 (listing criteria to designate critical habitats).

48. ESA § 4, 16 U.S.C. § 1533(b)(2). Prior to the 1978 amendments of ESA, critical habitat determinations were based entirely on biological assessments. H.R. REP. No. 1625, supra note 43, at 17, reprinted in 1978 U.S.C.C.A.N. at 9467. House Report 1625 provides guidance for the Secretary to take economics and other impacts into account before designating a critical habitat. The conferees noted, however, that the final decision is purely within the Secretary's discretion.

49. ESA § 7, 16 U.S.C. § 1536(a)(2). In Douglas County II, the County raised concerns about its proprietary interest in lands adjacent to the critical habitat designation for the Northern Spotted Owl. See Douglas County II, 48 F.3d at 1501. The County's primary contention in Douglas County II, was that while a critical habitat was designated pursuant to ESA, an impact statement was not properly prepared in accordance with NEPA. Id. at 1501-05.

Similarly, in Seattle Audubon Society v. Moseley, 798 F. Supp. 1473, 1476 (W.D. Wash. 1992), aff'd in part, appeal dismissed in part sub nom., Seattle Audubon v. Epsy, 998 F.2d 699 (9th Cir. 1993), citizen action groups challenged the legality of an environmental impact statement prepared by the Forest Service regarding critical habitat of the Northern Spotted Owl. The Audubon Society specifically contested the deficiency of assessing the environmental repercussions on the owl if logging continued in the critical habitat area. The district court decided that once an impact statement is prepared, "logging may be allowed under ESA" if a timber company's program is consistent with the purpose of ESA § 7, and therefore, does not have negative effects on the designated critical habitat for the spotted owl. Id. at 1483.

50. See H.R. REP. No. 1625, supra note 43, at 7-8, reprinted in 1978 U.S.C.C.A.N. at 9458. Critical habitat designations were neither defined nor required under the original ESA legislation. The concept was, however, explained in the regulations pursuant to the Act as "[a]ir, land or water areas ... the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. ..." Id.

51. Salzman, supra note 23, at 311. Salzman notes that § 7 of ESA was not originally perceived as a central component of the 1973 version of ESA. Id. at 315. Only two sentences long, the provision required all federal agencies, in consultation with the Secretary of the Interior or of Commerce, to take
nized the loss of habitat as a common predicate to species extinction. Accordingly, in the 1978 amendments to ESA, Congress reevaluated the importance of critical habitat designations. As a result of the high priority Congress placed on the maintenance of endangered species' habitats, ESA now requires a critical living area to be designated at the same time as an endangered species listing.

'such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species or result in the destruction or modification of habitat of such species which is determined by the Secretary . . . to be critical.'

Id. (citing ESA § 7, 16 U.S.C. § 1536(a)(2)). The 1978 amendments reflect Congress's new view of the significance of critical habitat designations by describing § 7 as "one small section [that] has developed into one of the most significant portions of the entire statute." H.R. REP. No. 1625, supra note 43, at 7, reprinted in 1978 U.S.C.C.A.N. at 9457.

52. See Oliver A. Houck, Article, The Endangered Species Act and its Implementation by the U.S. Departments of Interior and Commerce, 64 U. COLO. L. REV. 277, 296 (1993) (discussing critical habitat designations). The importance of habitat for species' survival is undeniable. See H.R. REP. No. 1625, supra note 43, at 5, reprinted in 1978 U.S.C.C.A.N. at 9455 (discussing congressional concern for deteriorating species' habitats). In fact, loss of habitat has been infamously known as the prominent cause of vanishing species. Id. One commentator has noted, however, that while critical habitat designations are important, they have also been recognized as "the ESA's most controversial and influential enforcement tool." Salzman, supra note 23, at 311. Thus, critical habitat designations have been greatly criticized by "government officials, environmentalists, and local interests [because] . . . [d]epending upon one's perspective, critical habitat[s] either [do] not provide enough protection or [they go] too far in hindering local development and growth." Id. at 335.


54. ESA § 4, 16 U.S.C. § 1533(a)(3). The Secretary of the Interior has the important role of listing endangered species and designating critical habitats. Id. While there are instances where the Secretary does not designate a critical habitat concurrently with a listing, legislative history supports the contention that a critical habitat designation should coincide with an endangered species listing. See H.R. REP. No. 1625, supra note 43, at 16-17, reprinted in 1978 U.S.C.C.A.N. at 9466-67. Specifically, House Report 1625 notes that the phrase "to the maximum extent prudent" in § 1533 gives the Secretary discretion to delay designating a critical habitat at the same time as the listing in rare cases for the "best interests of the species." Id. at 9466. See also Northern Spotted Owl v. Lujan, 758 F. Supp. 621, 624-25 (W.D. Wash. 1991) (compelling Secretary of Interior to designate critical habitat after listing Northern Spotted Owl as endangered).
B. Preparation of an Environmental Impact Statement Under NEPA

As a general rule, federal agencies are required to follow NEPA's procedural provisions. An exception to this rule emerges, however, when there is an evident and unavoidable conflict between the agency's administrative statute and NEPA procedures. These statutory conflicts frequently arise either when an agency's enabling legislation provides adequate procedures to nullify NEPA requirements, or when the application of NEPA frustrates the general purposes of both statutes.

1. When is an Environmental Impact Statement Necessary?

Section 102(2)(C) of NEPA provides a guideline for federal agencies to use when determining whether an environmental impact statement is necessary. According to section 102(2)(C), an environmental impact statement is required for major federal projects "significantly affecting the quality of the human environ-

55. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C). NEPA's impact statement requirement applies to all federal agencies whether or not their administrative statute allows for environmental evaluations. Silvia M. Riechel, Note, Government Hypocrisy and the Extraterritorial Application of NEPA, 26 CASE W. RES. J. INT'L L. 115, 121 (Winter 1994) (quoting Daniel R. Mandelker, NEPA LAW AND LITIGATION: THE NATIONAL ENVIRONMENTAL POLICY ACT § 1:03 (1984)). This author further notes that "NEPA does not contain exemptions for any federal activities." Id. Moreover, the statute encourages the government to take any rational measures to preserve the environment. Id.


57. See Merrell v. Thomas, 807 F.2d 776, 779 (9th Cir. 1986) (addressing resolution of conflict between requirements of NEPA and FIFRA), cert. denied, 484 U.S. 332 (1989). For a further discussion of Merrell, see infra notes 76-83 and accompanying text.

58. See NEPA § 102(2)(C); 42 U.S.C. § 4332(2)(C).
ment." 59 In Natural Resources Defense Council, Inc. v. Vaughn, 60 the United States District Court for the District of Columbia analyzed NEPA’s environmental impact statement requirement. 61 In Vaughn, several interested parties sought an injunction against the Department of Energy to enjoin the restart of a nuclear reactor until an environmental impact statement was prepared. 62 The court determined that, on its face, the restart of a nuclear reactor would create direct effects on the environment significant enough to necessitate an impact statement analysis. 63 After evaluating the possibility of environmental consequences associated with the operation of a nuclear reactor, the district court ordered the Department of Energy to prepare and file an environmental impact statement. 64

  59. Id. This section of NEPA establishes the significant impact test that is traditionally used to determine whether a federal agency action gives rise to preparation of an environmental impact statement. See 40 C.F.R. § 1502.1 (describing purpose of impact statement includes “provid[ing] full and fair discussion of significant environmental impacts”). Under NEPA regulations, major federal actions are “new and continuing activities” that may have substantial environmental effects and “are potentially subject to Federal control and responsibility.” 40 C.F.R. § 1508.18. See also id. at § 1502.4 (listing types of activities falling within scope of major federal actions necessitating impact statements).

  For an action to invoke preparation of an impact statement, the activity must be considered significant with respect to its context and its intensity. 40 C.F.R. § 1508.27. This analysis initiates an examination of the action in the context of “society as a whole.... the affected region, the affected interests, and the locality.” Id. at § 1508.27(a). The severity of the impact must also be examined. Id. at § 1508.27(b). This investigation should look at the magnitude of various impacts on the designated area, surrounding areas, and other related issues. Id.


  61. Id. at 1474.

  62. Id. at 1473. Responding to an apparent demand for additional nuclear weapons material, the Department of Energy (DOE) began to reconstruct and upgrade a nuclear reactor. Id. The reactor commenced operation in July of 1954. Id. Fourteen years later, the reactor was shut down and placed on “stand-by status.” Id. at 1474. In October 1983, it was scheduled for the restart that triggered this suit. Id.

  63. Id. After conducting an environmental study, DOE indicated that the restart would discharge high temperatures of water into a creek, thus, eliminating about 1,000 acres of wetlands and destroying habitat for alligators, waterfowl, and fish spawning. Id. at 1474-75. Further, the Department concluded that substantial amounts of contaminants may penetrate into surface water systems, and the action could generate up to 607,000 gallons of liquid waste annually. Id. at 1474.

  64. Id. at 1475-76. DOE properly developed a study plan to assess anticipated consequences of the reactor’s operation on the environment. Id. at 1474. The problem enunciated in this case arose when DOE determined that there would be no significant impact resulting from the restart. Id. By reaching this conclusion, DOE in essence, eliminated the possibility of an environmental impact statement, and therefore, did not allow for comments from other federal agencies or from the public before the action to restart the reactor became final. Id. at 1474-75. But see Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983) (restart of nuclear reactor does not require impact statement to address psycholog-
Similarly, in *National Org. for the Reform of Marijuana Laws v. United States Dept. of State (NORML)*, the United States District Court for the District of Columbia applied NEPA's significant impact test, and concluded that the United States' participation in a Mexican herbicide spraying program required the preparation of an impact statement. In *NORML*, the court found that the Department of State was in "violation of NEPA for failing to prepare, circulate for comment, and consider a detailed environmental impact on the United States [regarding] effects of the spraying program." The court concluded that the parquet used in the spraying program contaminated the marijuana, and therefore, posed a potential health hazard that triggered NEPA considerations.

The Fourth Circuit adopted an alternative view of an impact statement's purpose when it determined that a statement should be prepared when the agency action could benefit the environment. For a discussion of *Metropolitan Edison*, see infra notes 98-103 and accompanying text. For a discussion of *Metropolitan Edison*, see infra notes 98-103 and accompanying text.

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66. *Id.* at 1233. NORML alleged that the Mexican herbicide spraying program "presents a serious health hazard to the marijuana user," and therefore, requires an impact statement. *Id.* at 1228. NORML further contended that compliance with NEPA meant postponing participation in the spraying program until the impact statement process was fulfilled. *Id.* at 1232. The Department of State conceded to the NEPA claims and agreed to prepare an impact statement, but did not intend to suspend the spraying program until the statement was completed. *Id.*

67. *Id.* at 1233. Although the district court found that the Department of State violated NEPA and required preparation of an impact statement, it did not grant an injunction to halt the spraying program. *Id.* at 1234. Balancing NEPA goals against foreign policy and criminal status of marijuana use, the court found an injunction was an unsatisfactory remedy. *Id.*

68. *Id.* at 1232. The court specifically recognized that the Department of Health and Welfare felt it had a responsibility to warn citizens of the health effects of the spraying program. *Id.*

69. Virginians For Dulles v. Volpe, 541 F.2d 442 (4th Cir. 1976). See also Joel A. Gallob, Article, In Search of Beneficial Environmental Impacts: Superconductive Magnetic Energy Storage, The National Environmental Policy Act and an Analysis of Environmental Benefits, 14 HARV. ENVTL. L. REV. 411 (1990). Typically environmental impact statements focus on adverse effects on the environment, as opposed to looking at the potential benefits of a federal action. *Id.* at 413. While evaluations can reveal that changes would enhance the environment, the traditional approach toward impact statements is to uncover environmental harms without attempting to identify the possible benefits. *Id.* at 442. Regulations promulgated pursuant to NEPA specifically denote considerations of both beneficial and detrimental effects on the environment. *Id.* at 443-44. See 40 C.F.R. § 1508.8. Although both positive and negative results should be evaluated, most courts do not give ample consideration to environmental benefits. See, Gallob, *supra* at 444-50 (analyzing cases where environmental benefits were recognized or addressed in impact statements).
In Virginians for Dulles v. Volpe, various groups brought an action against the Federal Aviation Administration (FAA) complaining of noise disturbances and air pollution at Washington National Airport. The petitioners alleged that an impact statement would show that changing the airport's hours of operation and directing some traffic to Dulles International Airport would benefit the environment. Relying on NEPA's legislative history, the Fourth Circuit concluded that the FAA activities were within the scope of NEPA, and that an impact statement would reveal some environmental benefits. The court, therefore, ordered the FAA to prepare an impact statement.

2. When is an Environmental Impact Statement Not Necessary?

While the significant impact test is routinely applied to federal agency actions, several courts have specified criteria for determining when an environmental impact statement is not necessary. In

70. 541 F.2d 442 (4th Cir. 1976).
71. Id. at 443. The Secretary of Transportation, the Director of Airport Services, and eleven major airlines were also named as defendants. Id. The complaint alleged that the noise and air pollution from airplanes were a nuisance, and that the FAA violated NEPA by failing to file an impact statement regarding the operation of Washington National and Dulles International airports. Id.
72. Id. at 445. Three factors that exacerbated the nuisance problem were: (1) an increase in the surrounding population; (2) an expansion of aircraft operations; and (3) a boost in the number of passengers. Id. Thus, the petitioners contended that changing the two airports' operations could have immediate beneficial environmental effects, and that these benefits would outweigh their costs. Id.
73. Id. at 445-46. The court specifically relied upon a Senate Report that included "expansion or revision of ongoing problems" as a major action affecting the environment under NEPA Section 102(2)(C). Id. at 446. See S. REP. NO. 296, 91st Cong., 1st Sess. 20 (1969). The court proceeded with a cost-benefit analysis and acknowledged that the expense of completely abandoning the airport would outweigh any environmental benefits. Volpe, 541 F.2d at 445. The petitioners did not argue to close the airport. Id. Rather, they contended that changing the operation hours and redirecting traffic would favor the environment. Id. The Fourth Circuit found that the changed circumstances due to the increase in population surrounding the airport, and the more frequent use of the airport, elicited an evaluation of environmental concerns, and therefore, required an impact statement. Id.
75. See, e.g., Thomas v. Peterson, 589 F. Supp. 1139, 1145 (D. Idaho 1984) (holding that Forest Service's decision to build road in forest without first preparing impact statement did not violate NEPA), aff'd in part, rev'd in part and remanded by, 753 F.2d 754 (9th Cir. 1985), and appeal after remand, 841 F.2d 332 (9th Cir. 1988); Sabine River Auth. v. United States Dept. of Interior, 951 F.2d 669, 679 (5th Cir.) (finding non-development negative easement prohibiting change in status quo did not require preparation of environmental impact statement), cert. denied,
the Ninth Circuit decided that EPA was not required to prepare an impact statement to register pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). To reach its determination, the court focused upon the legislative history of FIFRA. In its evaluation, the Ninth Circuit recognized that Congress could have drafted FIFRA to conform with NEPA, but the legislature did not mandate this requirement. Accordingly, FIFRA’s amendments do not include a stipulation to prepare an environmental impact statement. Therefore, the Ninth Circuit determined that, by declining to modify FIFRA, Congress impliedly accepted the original version of the statute that excluded necessary compliance with NEPA procedures. Moreover, the court found that because FIFRA adequately protected environmental concerns, FIFRA’s provisions superseded NEPA procedures. Ultimately, the Ninth Circuit commented that applying NEPA to EPA actions under FIFRA is inconsistent with congressional intent and would “sabotage the delicate machinery that Congress designed to register new pesticides.”

506 U.S. 823 (1992); National Ass’n of Prop. Owners v. United States, 499 F. Supp. 1223, 1263-64 (D. Minn. 1980) (concluding NEPA did not require Secretary of Agriculture to prepare environmental impact statement before implementing Boundary Waters Canoe Area Wilderness Act (BWCAW) because two statutes conflicted with one another and BWCAW would prevail), aff’d sub. nom. State of Minn. by Alexander v. Block, 660 F.2d 1240 (8th Cir. 1981), and cert. denied, 455 U.S. 1007 (1982).

76. 807 F.2d 776 (9th Cir. 1986), cert. denied, 484 U.S. 848 (1987).
77. Id. at 780-81.
78. Id. at 778-80.
79. Id. at 778. The court noted that Congress did not demonstrate that NEPA should apply because the process it created in FIFRA allowed for environmental considerations that “made NEPA superfluous.”
80. Id. The 1972 amendments to FIFRA did not modify the statute to require impact statements for agency actions under the legislation. Id.
81. Merrell, 807 F.2d at 778-79. The Ninth Circuit reasoned that these “differences between FIFRA’s registration procedure and NEPA’s requirements indicate that Congress did not intend that NEPA apply [to agency action under FIFRA].”
82. Id. The FIFRA registration process deviates from NEPA procedures. FIFRA does not require the Administrator to publish the notice regarding all applications and, when notice under FIFRA is necessary, it does not require the same information as an impact statement. Id. Although the processes under FIFRA and NEPA were different, the court concluded that the FIFRA registration procedure reflected a balance of “the environmental harm of using a pesticide against its economic, social, and environmental benefits.”
83. Id. at 779. The court stated that applying NEPA requirements to an agency action under FIFRA would “increase a regulatory burden that Congress intentionally lightened in 1978 and create new opportunities for litigation where litigation was recently quelled.”
The Sixth Circuit addressed a similar issue in *Pacific Legal Found. v. Andrus.* 84 The Foundation brought an action against the Secretary of the Interior for violating NEPA by not filing an impact statement before listing seven mussels as endangered species. 85 Although the listings were considered "major federal actions," the Sixth Circuit held that NEPA did not apply for four reasons. 86 First, the court concluded that filing an environmental impact statement for an endangered species listing did not "serve the purpose of [ESA]" because before promulgating a listing under ESA, the Secretary must consider several factors that do not allow for NEPA considerations. 87 Second, the court found that because ESA and NEPA were in direct conflict with one another, ESA prevailed. 88 Third, the court deduced that ESA furthers the purposes of NEPA even when no impact statement is filed because endangered species listings "promote harmony between man and environment." 89 Finally,

84. 657 F.2d 829 (6th Cir. 1981).

85. Id. at 831. This case arose in 1971, out of a contract for the construction of two dams in the Duck River. Id. Once ESA was enacted, the Secretary of the Interior listed mussels living in the river as endangered. Id. The builders had to stop the construction of the dam because "the completion of the . . . project would jeopardize the existence of two of the mussel species." Id.

86. Id. at 835.

87. Id. See ESA § 4, 16 U.S.C. § 1533(a)(1). Relying upon Supreme Court precedent in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, the Sixth Circuit found that NEPA was not designed to contradict an agency's enabling statute. *Pacific Legal*, 657 F.2d at 829 (citing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 548 (1978)). Therefore, the circuit court concluded that ESA replaced NEPA. Id. at 836. See also *Vermont Yankee Nuclear Power Corp.*, 435 U.S. at 548. (holding that NEPA was not devised to "repeal by implication" any other statute).

88. *Pacific Legal*, 657 F.2d at 836. NEPA requires agencies to consider environmental impacts. Id. Under ESA, the Secretary is limited to using scientific and commercial data to determine an endangered species listing. Id. Therefore, the Sixth Circuit concluded that since the "statutory mandate of ESA prevents the Secretary from considering the environmental impact when listing a[n endangered species]," NEPA is inapplicable. Id.

89. Id. at 837. The Sixth Circuit compared the obligations of federal agencies under NEPA to the Secretary's duties under ESA and stated that, under ESA, federal agencies have a duty to:

serve as trustees of the environment for the next generation; to assure a safe, healthful, productive environment; to attain the widest range of beneficial uses without degradation of risk to health or safety; to preserve natural aspects of our national heritage; to achieve a balance between population and resource use; and to enhance the quality of renewable resources and recycle depletable resources.

*Id.* (citing NEPA § 101(b), 42 U.S.C. § 4331(b)).

Under ESA, the Secretary must attempt to conserve the environment by "prevent[ing] the irretrievable loss of a natural resource." Id. Therefore, in the endangered species listing process, the Secretary acts as a "trustee of the environment" by preserving the environment and protecting species. *Id.*
the court concluded that the respective legislative history of ESA and NEPA confirmed congressional intent that an impact statement was not required for an endangered species listing.\(^9\) 0

NEPA impact statements are also not required when an agency's enabling statute imposes either time restraints or a need for immediate action on the federal agency.\(^9\) 1 In *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*,\(^9\) 2 the United States Supreme Court addressed the issue of whether the Department of Housing and Urban Development (HUD) must devise an environmental impact statement before allowing a disclosure statement filed under the Interstate Land Sales Full Disclosure Act (Disclosure Act) to become effective.\(^9\) 3 The Disclosure Act requires HUD to respond to a diclosure statement within 30 days.\(^9\) 4 A well drafted environmental impact statement can take over three months to complete.\(^9\) 5 Since the preparation time of the impact statement created a "clear and fundamental conflict" with HUD's mandatory duties under the Disclosure Act, HUD was not required to draft the document.\(^9\) 6

90. *Id.* at 838-39. The Sixth Circuit first recognized that neither NEPA nor its requirements were mentioned in ESA. *Id.* at 838-39 & 839 n.12. The court further noted that in process of implementing the 1978 amendments to ESA witnesses testified at the congressional hearings and contended that endangered species listings should be conditional upon impact statement preparation. *Id.* at 839. Nonetheless, Congress never enacted this request as a statutory provision. *Id.* Viewing legislative history of NEPA and ESA as a whole, the Sixth Circuit found that "Congress did not intend to require the Secretary to file an environmental impact statement before listing a species as endangered or threatened under ESA." *Id.* at 840.


93. *Id.* at 778.

94. *Id.* at 781. Under the Disclosure Act, a statement of record automatically becomes effective 30 days after the filing unless HUD suspends it for inadequate disclosure during that time. *Id.*

95. *Id.* at 788-89 & 789 n.10. An impact statement must be "drafted, circulated, commented upon, and then reviewed and revised in light of the comments." *Id.* at 789. Typically, the text of final drafts of impact statements ranges from 150-300 pages. 40 C.F.R. § 1502.7.

96. *Flint Ridge*, 426 U.S. at 791. The Court stated that the Disclosure Act mandates HUD to act within the 30 day period; therefore, it does not allow suspension of that deadline to prepare an impact statement. *Id.* at 789-90. Proper timing is a
The preparation of environmental impact statements is further restricted because NEPA only applies to actions that will potentially affect the physical environment. 97 In Metropolitan Edison Co. v. People Against Nuclear Energy, 98 the United States Supreme Court addressed whether the Nuclear Regulatory Commission satisfied NEPA terms when it decided whether to allow a nuclear power plant to resume operation. 99 Adopting a narrow interpretation of section 102(C) of NEPA, the Court found that this language limits NEPA’s application to agency actions that impact the physical environment. 100 To reach this determination the Court relied on the statute’s language and its pertinent legislative history which demonstrated that NEPA was designed to address land, water, and air environments. 101 Moreover, the Court found that NEPA is triggered when there is a “reasonably close causal relationship between a change in the physical environment and the effect at issue.”

principal focus in NEPA. Save the Yaak Comm. v. Block, 840 F.2d 714, 718 (9th Cir. 1988). An environmental impact statement is only effective if it is prepared with enough time to allow contribution “to the decisionmaking process and will not be used to rationalize or justify decisions already made.” Id. (citations omitted). See also Amoco Oil Co v. EPA, 501 F.2d 722, 750 (D.C. Cir. 1974) (finding that “extraordinary expeditious decision-making” is factor to exempt agencies from completing impact statements).


99. Id. at 768. The petitioners, Metropolitan Edison Company, owned two nuclear reactors that were licensed for operation after the company prepared environmental impact statements. Id. After operating for some time, one reactor was shut down and the other suffered damage resulting from an accident. Id. When one of the reactors was scheduled for restart, Metropolitan Edison Company invited comments from interested parties regarding the reactor’s restoration. Id. at 769. People Against Nuclear Energy commented that the nuclear reactor’s operation “would cause both severe psychological health damage to persons living in the vicinity, and serious damage to the stability, cohesiveness, and well-being of the neighboring communities.” Id.

100. Id. at 772. While the parties acknowledged that psychological health effects may be cognizable under NEPA, the Supreme Court recognized that an agency action triggers the terms set forth in NEPA when the “relationship between the change in the environment and the ‘effect’ at issue” is not too remote. Id. Further, the Court stated that NEPA “does not require the agency to assess every impact or effect of its proposed action, but only the impact or effect on the environment.” Id.

101. Id. at 773. The Court accepted a confined interpretation of environment and concluded that when Congress enacted NEPA it was “talking about the physical environment.” Id. at 772. See H.R. Rep. No. 975, supra note 1, at 3, reprinted in 1969 U.S.C.C.A.N. at 2753 (providing background and purpose of NEPA legislation).

102. Metropolitan Edison, 460 U.S. at 774. The Court found that a harm “too remote” from the physical environment does not justify an assessment. Id.
Supreme Court ultimately ruled that NEPA only requires considerations of the direct effects of present physical actions and the ramifications of possible future outcomes on the environment.\textsuperscript{103}

Courts have also developed the functional equivalence doctrine as an exception to NEPA.\textsuperscript{104} In *Amoco Oil Co. v. EPA*,\textsuperscript{105} the United States Court of Appeals for the District of Columbia ruled that an impact statement was not necessary to establish fuel regulations under the Clean Air Act (CAA).\textsuperscript{106} The court concluded that EPA actions under CAA operated as a "functional equivalent" to NEPA because CAA procedures allow for a systematic evaluation of various environmental factors.\textsuperscript{107} The circuit court noted that environmental issues are considered in the general application of CAA, and further, that "the Act's rule-making procedures 'strike a workable balance between some of the advantages and disadvantages of full application of NEPA.' "\textsuperscript{108}

103. *Id.* at 779. The Court noted that NEPA was enacted to "assess the future effects of future actions," and therefore, the statute does not "create a remedial scheme" to assess previous federal actions. *Id.* Accordingly, NEPA's scope should not be implicated " 'in the wake of' any kind of accident." *Id.*


105. 501 F.2d 722 (D.C. Cir. 1974).

106. *Id.* at 749. The court saw no need to require an impact statement from an agency that deals directly with environmental protection issues as part of its general duties. *Id.*

107. *Id.* at 749-50. One author has recognized that while courts generally apply the functional equivalence test to EPA actions, there is no bright line rule describing the precise components of "equivalence." Montrose, *supra* note 104, at 875. The general consensus reached by courts is that "substantial compliance by EPA with NEPA's requirements is an effective substitute for preparation of an [impact statement]." *Id.*

108. *Amoco Oil*, 501 F.2d at 750 (citation omitted). Section 111 of CAA is a proper substitute for impact statements because it generates the same environmental inquiries as NEPA. Montrose, *supra* note 104, at 876. Particularly, the statute, provides ample opportunity for public comment with respect to EPA actions. *Id.* In fact, Montrose states that approximately 200 interested parties responded to EPA procedures used to specify emissions standards under CAA. *Id.*
IV. NARRATIVE ANALYSIS

In Douglas County II, the Ninth Circuit reviewed the district court’s decision to grant summary judgment against the Secretary of the Interior for violating NEPA by failing to complete an environmental impact statement. The Douglas County II court concluded that NEPA does not apply to critical habitat designations under ESA.

The court began its analysis of NEPA by reviewing both the plain language and the legislative history of the statute. To determine whether NEPA was applicable, the court specifically addressed the meaning of the phrase “to the fullest extent possible” in section 102(2)(C). The Ninth Circuit recognized that courts have construed this phrase to place a general duty on federal agencies to follow NEPA procedures except when compliance with NEPA is unreasonable under the agency’s enabling statute. Further, Congress recognized that an agency’s enabling statute should prevail when that statute either directly conflicts with, or expressly prohibits compliance with NEPA procedures. However, in NEPA legislative history, Congress indicated that while the “to the fullest...
extent possible" language in section 102 of NEPA can allow for NEPA exemptions under certain circumstances, attempts by federal agencies to escape NEPA requirements based upon this language should rarely occur.\footnote{115}{See H.R. Conf. Rep. No. 765, supra note 7, at 9-10 reprinted in 1969 U.S.C.C.A.N. at 2770. Congress specifically stated that the provision shall not be used "as a means of avoiding directives set out in section 102." \textit{Id.} at 10, reprinted in U.S.C.C.A.N. at 2770. Further, the language is intended to assure that "all agencies \ldots \text{shall} comply with the directives" in section 102 and "no agency \text{shall} utilize an excessively narrow construction of its existing authorizations to avoid compliance." \textit{Id.} (emphasis added).}

In \textit{Douglas County II}, the Ninth Circuit followed its analysis previously set forth in \textit{Merrell}.\footnote{116}{Merrell v. Thomas, 807 F.2d 776 (9th Cir. 1986), \textit{cert. denied}, 484 U.S. 848 (1987). For a discussion of \textit{Merrell}, see supra notes 76-83 and accompanying text.} Thus, the \textit{Douglas County II} court compared NEPA procedures to ESA procedures, and concluded that ESA effectively supersedes NEPA.\footnote{117}{\textit{Douglas County II}, 48 F.3d at 1503. The court based its analysis on a similar situation where EPA was not required to prepare an environmental impact statement to register pesticides under FIFRA. \textit{Id.} See \textit{Merrell}, 807 F.2d at 779.} To reach this determination the Ninth Circuit liberally construed congressional intent.\footnote{118}{\textit{Douglas County II}, 48 F.3d at 1504. Specifically the Ninth Circuit looked to the 1978 amendments of the ESA regarding critical habitat designations. See ESA § 4, as amended by Act of 1978, 16 U.S.C. § 1533. The main purpose of these amendments was to improve the listing and notice processes. H.R. Rep. No. 1625, supra note 7, at 14, reprinted in 1978 U.S.C.C.A.N. at 9464. In this report, Congress found that the "extensive notice provisions" will insure that the Secretary is not "designating critical habitat without consulting the views of the people of the affected area." \textit{Id.} at 16, reprinted in 1978 U.S.C.C.A.N. at 9466.} Since the Secretary's conduct under ESA conforms to NEPA demands, the \textit{Douglas County II} court found that ESA's "carefully crafted congressional mandate for public participation," used when designating critical habitats, successfully displaces NEPA's procedural and informational requirements.\footnote{119}{\textit{Douglas County II}, 48 F.3d at 1503. \textit{[T]hrough debate and compromise} Congress developed an explicit process "for the Secretary to follow when address-}
In addition, the Ninth Circuit found that ESA is distinguishable from NEPA. The court noted that while NEPA provides the opportunity to evaluate environmental concerns, ESA's critical habitat designation process places specific mandates on the Secretary. The court particularly addressed section 4 of ESA which provides that the Secretary "must designate any area without which the species would become extinct." The Ninth Circuit found that this requirement directly conflicted with NEPA because, under certain circumstances, the Secretary has "no discretion to consider the environmental impact of his or her actions" when designating critical habitats.

Furthermore, the Ninth Circuit relied on Metropolitan Edison Co. to conclude that even if Congress intended for NEPA to apply to ESA, an impact statement was not required in this case because the critical habitat designation did not "alter the natural untouched physical environment." This view is derived from the purpose of NEPA "to provide a mechanism to enhance or improve the environment and prevent further irreparable damage." A

120. Id.

121. Id. The Secretary "may exclude from the critical habitat any area, the exclusion of which, would be more beneficial than harmful..." Id. The designation must, however, include necessary habitat for species survival. Id. See ESA § 4(b)(2), 16 U.S.C. § 1533(b)(2).

122. Douglas County II, 48 F.3d at 1503 (citing 16 U.S.C. § 1533(b)(2)) (emphasis added). Under this section the Secretary does not have discretion when designating critical habitats. Id. Congress set forth limits on the Secretary to only consider environmental components directly related to species' conservation. Id. Consequently, under NEPA, in cases where extinction is at issue, the Secretary cannot take part in a broad environmental analysis when designating critical habitats. Id.

123. Id. Before establishing a critical habitat designation under § 4 of ESA, the Secretary must: (1) "publish a general notice and the complete text of the proposed regulation in the Federal Register," and "give actual notice" to state or foreign agencies and counties that may be affected by the proposed action; (2) notify appropriate "professional scientific organizations;" (3) provide general public notice by publishing a summary of the proposed determination in a widely circulated newspaper; and (4) "promptly hold one public hearing on the proposed regulation if any person files a request for such a hearing within 45 days after the date of publication of general notice." ESA § 4, 16 U.S.C. § 1533(5)(A).


125. Douglas County II, 48 F.3d at 1505. For a discussion of Metropolitan Edison, see supra notes 98-103 and accompanying text.

126. Id. (quoting Pacific Legal Found. v. Andrus, 657 F.2d 829, 837 (6th Cir. 1981)). Generally, NEPA purports to state a national policy in order to "encourage productive and enjoyable harmony between man and his environment."
critical habitat designation sets aside land as an endangered species living area. Such designations do not alter physical conditions, instead, they conserve the environment. Therefore, an environmental impact statement is not necessary because the outcome of critical habitat designations essentially keeps the environment in its present state. Furthermore, the Ninth Circuit concluded that

Pacific Legal, 657 F.2d at 837 (citations omitted). Hence, the Ninth Circuit developed a general rule regarding the preparation of an impact statement:

[i]f 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.

Douglas County II, 48 F.3d at 1505 (emphasis in original). See also Sabine River Auth. v. United States Dept. of Interior, 951 F.2d 669 (5th Cir.) (finding that impact statements are not required for actions maintaining environment conditions), cert. denied, 506 U.S. 823 (1992). For a further discussion of Sabine River Auth., see infra note 129.

127. ESA § 3, 16 U.S.C. § 1532(5). Critical habitat designations have mistakenly been viewed as physical alterations. Salzman, supra note 23, at 336. Consequently, the choosing of a critical habitat designation has been perceived as a political process. Id. This contention is supported by the 1978 House debate where the Fish and Wildlife Service argued that:

[T]he designation of [c]ritical [h]abitat does not have any direct impact upon the environment. The designation of [c]ritical [h]abitat, in and of itself, prevents nothing, stops nothing, discourages nothing, and controls nothing. It simply designates an area that is necessary to the continued existence and possibly to the recovery of an [e]ndangered or [t]hreatened species. It is a biological designation.

Id. at 336 & n.104 (citing Endangered Species Authorization: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the Comm. on Merchant and Fisheries, 95th Cong., 2d Sess. 1155 (1978)).

128. Douglas County II, 48 F.3d at 1505. Under Metropolitan Edison, "NEPA does not require the agency to assess every impact or effect of its proposed action, but only the impact or effect on the environment." Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 772 (1983) (emphasis in original).


In Sabine River Auth., 951 F.2d at 679, the petitioners appealed the district court’s decision dismissing their claims that the Fish and Wildlife Service violated NEPA when it did not prepare an impact statement when it gained possession of a non-developmental easement essential to waterfowl survival. Id. at 679. Prior to accepting the easement, the Fish and Wildlife Service prepared an environment assessment and made a finding of no significant impact. Id. The Fifth Circuit found that the Fish and Wildlife Service action was consistent with NEPA because its acceptance of the easement “[d]id not cause any change in the physical environment.” Id. Since the purpose of the easement was to foreclose any alterations in the physical environment of the wetland area and NEPA does not require preparation of an impact statement “to leave nature alone,” the Fish and Wildlife decision not to prepare the statement was correct. Id. (citations omitted). See also National Wildlife Fed’n v. Epsy, 45 F.3d 1337, 1343-44 (9th Cir. 1995); Burbank v. Anti-Noise Group v. Goldschmidt, 625 F.2d 115, 116 (9th Cir. 1980), cert. denied,
ESA "furthers the goals of NEPA without demanding an [impact statement]." The court specifically noticed that both NEPA and ESA serve the same purpose to promote human welfare while enhancing the environment. Ultimately, the Douglas County II court concluded that, in accordance with NEPA goals, the Secretary preserves the environment during critical habitat designations.

V. CRITICAL ANALYSIS

A. The Ninth Circuit Properly Created an Exemption from NEPA for Critical Habitat Designations

Traditionally, the Ninth Circuit has attributed a broad meaning to NEPA by "mak[ing] as liberal an interpretation as [possible] . . . to accommodate the application of [the statute]." However, the facts of Douglas County II present an appropriate situation for the Ninth Circuit to create an exemption from NEPA for critical habitat designations. This conclusion is based on two reasons. First, under NEPA, a federal agency has the responsibility of making the threshold decision of whether an environmental impact statement is necessary for a proposed action. Consequently, the

450 U.S. 965 (1981) (stating environmental impact statements are not needed "when . . . proposed action will effect no change in the status quo"); Upper Snake River v. Hodel, 921 F.2d 232, 235 (9th Cir. 1980) (noting environmental impact statements "need not discuss the environmental effects of continuing to use land in the manner in which it is presently being used").

130. Douglas County II, 48 F.3d at 1506-07.

131. Id. at 1506. NEPA is "a mechanism to enhance or improve the environment and prevent further irreparable damage." Id. (citations omitted). Similarly, ESA was designed to "halt and reverse the trend toward species extinction, whatever the cost." Id. (citing Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184 (1978)). The Ninth Circuit concluded that "[a]s with the decision to list a species under ESA, the decision to preserve critical habitat for a species protects the environment from exactly the kind of human impacts that NEPA is designed to foreclose." Id. at 1507.

132. Id. at 1506. By designating critical habitats, the Secretary is "working to preserve the environment and prevent the irretrievable loss of a natural resource." Id. (citation omitted).

133. Bart Brush, 1991 Ninth Circuit Environmental Review National Environmental Policy Act, 22 Envtl. L. 1163, 1164 (1992) (citations omitted). While NEPA provides an avenue for agencies to collect information about the possible environmental effects of a proposed action, "the ultimate choice as to how and whether to proceed is left up to agency discretion, so long as the agency complies with the NEPA process." Id. at 1167.

134. Peshlakai v. Duncan, 476 F. Supp. 1247, 1251 (D.D.C. 1979). See also Metlakta Indian Community v. Adams, 427 F. Supp. 871, 874 (D.D.C. 1974); Hanly v. Mitchell, 460 F.2d 640, 645 (2d Cir. 1972). The role of the reviewing court is to determine "that the agency has taken a 'hard look' at environmental consequences" and reasonably conclude that there will not be an eminent effect on the environment. Peshlakai, 476 F. Supp. at 1252. (citations omitted). See also Save the Yaak Comm. v. Block, 840 F.2d 714, 717 (9th Cir. 1988). If the agency has
plaintiff has the burden of showing that a determination not to prepare an impact statement violated NEPA.\textsuperscript{135} In \textit{Douglas County II}, the County did not meet that burden.\textsuperscript{136}

Second, although NEPA contains language that requires federal agencies to strictly adhere to the statute's provisions, courts have declined to subject some agency actions to NEPA requirements.\textsuperscript{137} In \textit{Douglas County II}, the Ninth Circuit carved out another exemption from NEPA's general rule of applicability by holding that this legislation does not apply to critical habitat designations.\textsuperscript{138} Nonetheless, this exception is narrow.\textsuperscript{139} The limitation of the Ninth Circuit's decision is evidenced by the fact that the court declined to address any other provisions of ESA in its analysis.\textsuperscript{140} Additionally, the Ninth Circuit's decision is not all inclusive because it does not apply to every action initiated by the Department of the Interior.\textsuperscript{141} Further, when observing the congressional purpose behind critical habitat designations, it becomes clear that followed this rule, the agency's determination may be overturned only if it is arbitrary and capricious. \textit{Id.}

\textsuperscript{135} \textit{Peshlakai}, 476 F. Supp. at 1252. \textit{See also} Sierra Club v. Lynn, 502 F.2d 43, 52 (5th Cir. 1974); Hiram Clarke Civics Club, Inc. v. Lynn, 476 F.2d 421, 426 (5th Cir. 1973). A plaintiff's burden is met by showing that an action may have a significant effect on the environment. \textit{Peshlakai}, 476 F. Supp. at 1252. This burden does not require a demonstration that the action will "necessarily affect the human environment to a significant extent." \textit{Id.} If the plaintiff successfully meets this standard, the burden shifts to the government "to demonstrate that any environmental impacts are not significant." \textit{Id.} (citations omitted).

\textsuperscript{136} \textit{See Douglas County II}, 48 F.3d at 1507. Referring to the Sixth Circuit's analysis in \textit{Pacific Legal}, the \textit{Douglas County II} court reached the final conclusion that an impact statement was not necessary. \textit{Id.}

\textsuperscript{137} \textit{See} NEPA § 102, 42 U.S.C. § 4332; Merrell v. Thomas, 807 F.2d 776, 779 (9th Cir. 1986), cert. denied, 484 U.S. 848 (1987) (declining to require impact statement for EPA action under FIFRA). The decision to limit NEPA's reach is supported by NEPA conferees who stated that NEPA is applicable unless "the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible." H.R. CONF. REP. NO. 765, supra note 7, at 9-10, reprinted in 1969 U.S.C.C.A.N. at 2770.

\textsuperscript{138} \textit{Douglas County II}, 48 F.3d at 1502. For a discussion of the Ninth Circuit's reasoning on this issue, see supra notes 109-32 and accompanying text.

\textsuperscript{139} \textit{Douglas County II}, 48 F.3d at 1507. This rule specifically addresses critical habitat designations. The Ninth Circuit did not embrace a rule generally applicable either to ESA or to the Department of the Interior. \textit{Id.}

\textsuperscript{140} \textit{Douglas County II}, 48 F.3d at 1501. The court noted that the issue of NEPA applicability to critical habitat designations was one of "first impression." \textit{Id.} Further, although the court relied on the Sixth Circuit's analysis in \textit{Pacific Legal} v. Andrus, 657 F.2d 829 (6th Cir. 1981), which held that the Secretary need not consider the environmental impact when listing an endangered species, the Ninth Circuit in \textit{Douglas County II} did not delineate a similar rule for endangered species listings. \textit{Douglas County II}, 48 F.3d at 1506-07. For a further discussion of \textit{Pacific Legal}, see supra notes 83-89.

\textsuperscript{141} \textit{Id.} at 1507.
Congress instilled duties in the Secretary of the Interior that specifically apply to section 4 of ESA.142

B. The Functional Equivalence Test as an Alternative Analysis

The functional equivalence test is a judicial doctrine that recognizes that "where a federal agency is engaged primarily in an examination of environmental questions, and where substantive and procedural standards ensure full and adequate consideration of environmental issues, then formal compliance with NEPA is not necessary, [and] functional compliance [is] sufficient."143 The functional equivalence test was initially justified by allowing EPA discretion in preparing impact statements because the agency's "sole purpose is protection of the environment."144 The application of this test is premised upon the extent of the agency's involvement in environmental issues.145 Accordingly, the test has been successfully applied to EPA.146

143. Warren County v. North Carolina, 528 F. Supp 276, 286 (E.D.N.C. 1981). To be effective, the functionally equivalent process must show that the five core issues of NEPA were observed. Environmental Defense Fund, Inc. v. Blum, 458 F. Supp. 650, 661 (D.D.C. 1978). The issues are "the environmental impact of the action, possible adverse environmental effects, possible alternatives, the relationship between long-[term] and short-term uses and goals and any irreversible commitments of resources..." Id. (quoting Environmental Defense Fund, Inc. v. EPA, 489 F.2d 1247, 1256 (D.C. Cir. 1973)).
144. Geneslaw, supra note 4, at 136. For a list of cases applying the functional equivalence test to EPA actions, see supra note 6.
145. Warren County, 528 F. Supp. at 287 (citing Environmental Defense Fund v. Blum, 458 F. Supp. at 661 n.5). The functional equivalence test was not designed to develop a broad exemption for all environmental agencies, instead, it protects those processes that fulfill the goals of NEPA. Environmental Defense Fund v. EPA, 489 F.2d at 1257.
146. See Amoco Oil Co. v. EPA, 501 F.2d 722, 749 (D.C. Cir. 1974). The functional equivalence doctrine originally recognized that a federal agency may inherently conform to NEPA. Geneslaw, supra note 4, at 128. Essentially, this doctrine allows EPA to avoid preparing an impact statement under NEPA as long as it considered elements essential to NEPA's environmental preservation principles. Id. Accordingly, courts have concluded that if the functional equivalence test is to have any effect, EPA should not have to follow NEPA procedures. Environmental Defense Fund v. Blum, 458 F. Supp. at 662 n.6.

Subsequently, courts have found that a statute can provide a functionally equivalent process to NEPA. Amoco Oil, 501 F.2d at 750. For instance, courts have recognized that the Clean Air Act, "provides for [an] orderly consideration of diverse environmental factors." Pacific Legal Found. v. Andrus, 657 F.2d 829, 834 (9th Cir. 1981) (citation omitted). The application of the functional equivalence test has been justified upon the principal that it is unnecessary to demand an impact statement from an agency whose decision to proceed with an action is "infused with... environmental considerations" in its administrative statute. Amoco Oil, 501 F.2d at 749-50. Indeed, to require an environmental impact statement
While the functional equivalence test has been primarily applied to EPA actions, this concept can effectively be extended to other federal agencies that are authorized to analyze environmental impacts.\textsuperscript{147} Thus, the Ninth Circuit could have applied the functional equivalence test in \textit{Douglas County II}.\textsuperscript{148} Generally, an agency's administrative statute meets the functional equivalence test "[when it shows that] the agency . . . (1) balanced environmental costs and benefits; (2) fairly provided for public participation at a meaningful time in the decision making process; and (3) considered any substantive comments elicited."\textsuperscript{149} To effectively implement this doctrine the court would have had to find that critical habitat designations under ESA conform to the same criteria as NEPA.\textsuperscript{150}

and a "decision setting forth the same considerations" would be redundant and unnecessary. \textit{Id.}

\textsuperscript{147}. \textit{Warren County}, 528 F. Supp at 287. The application of the functional equivalence doctrine is based upon the concept that it is unnecessary to complete an impact statement under NEPA when there is an "equivalent action through consideration of environmental concerns under the [other] statutes." \textit{Id.} Moreover, the United States Court of Appeals for the District of Columbia recognized that requiring an impact statement in addition to an agency decision that makes the same environmental evaluations "would be legalism carried to the extreme." \textit{Amoco Oil Co.}, 501 F.2d at 750.

\textsuperscript{148}. \textit{Douglas County II}, 48 F.3d at 1504. Although the Ninth Circuit recognized that the functional equivalence test is being used by other courts, because the parties did not raise it as an argument, the court declined to address it. \textit{Id.} at 1504 n.10.

\textsuperscript{149}. \textit{Montrose}, supra note 104, at 882. Montrose describes the functional equivalence test as a two-tiered analysis. \textit{Id.} at 869. "First, the court considers the urgency of the situation the agency is addressing, and the extent to which its enabling statute and the accompanying regulations . . . require consideration of NEPA's core concerns." \textit{Id.} Next, the court looks to the facts of the case to discern whether "there was sufficient opportunity for the public and affected parties to comment, and whether that information was considered by the agency." \textit{Id.} See also \textit{Weyerhauser Co. v. Costle}, 590 F.2d 1011, 1029 (D.C. Cir. 1978).

\textsuperscript{150}. \textit{Id.} at 1504. A functional equivalent argument contends that "one process requires the same steps as another." \textit{Id.} at 1504 n.10. This theory is distinguishable from a displacement argument that would assert that "Congress intended to displace one procedure with another." \textit{Id.} In \textit{Douglas County II}, the general contention of functional equivalence would be that a critical habitat designation under ESA, by itself, provides sufficient consideration of environmental factors. \textit{See id.}

In \textit{Pacific Legal}, the Sixth Circuit suggested that a critical habitat designation may be the functional equivalent of an impact statement under NEPA. \textit{Pacific Legal}, 657 F.2d at 835. The court reached this conclusion even though it found that listing endangered species under ESA did not meet the functional equivalence test. \textit{Id.} The court found that after the 1978 amendments to ESA, critical habitat designations fulfilled NEPA criteria by requiring the Secretary to evaluate the economic effects of his action and to publish all issues and concerns raised by the designation. \textit{Id.} By providing these evaluations and notifications, the Secretary fundamentally accomplishes NEPA's goals. \textit{Id.} For a further discussion of \textit{Pacific Legal}, see supra notes 84-90 and accompanying text.
Critical habitat designations under ESA provide appropriate environmental considerations to fulfill functional equivalence requirements. Before Designating a critical habitat, ESA requires the Secretary to publish the content of the designation in the Federal Register, to give adequate notice of the action to all interested parties, and to explore the relevant consequences and alternatives to this action. Furthermore, the Secretary must provide an opportunity for comment on the action.

Under NEPA, federal agencies must detail the environmental effects of their actions and "consult with and obtain comments" from other agencies. Although NEPA requires more precise information regarding environmental effects than ESA, it is clear that when completing critical habitat designations, the Secretary will consider the positive impacts the designation will have on the endangered species, and the consequences it will have on others affected by the designation. Here, the functional equivalence test could have been applied because the statutes' processes are similar and the overall objectives of NEPA are achieved when ESA requirements are followed. Hence, NEPA and ESA share a common goal. Moreover, the application of the functional equivalence doc-


152. See ESA § 4, 16 U.S.C. § 1533. See also Douglas County II, 48 F.3d at 1503. The Douglas County II court referred to its analysis in Merrell, and stated that the procedure that Congress chose for the Secretary to follow when designating a critical habitat made NEPA "superfluous." Id. See also Merrell v. Thomas, 807 F.2d 776, 778 (9th Cir. 1986), cert. denied, 484 U.S. 848 (1987). For a discussion of Merrell, see supra notes 76-83 and accompanying text.

153. See ESA § 4(b), 16 U.S.C. § 1533(5). The Douglas County II court looked specifically at critical habitat designation under ESA, and noted that "[t]his carefully crafted congressional mandate for public participation in the designation process, like the FIFRA procedures reviewed in Merrell, displaces NEPA's procedural and informational requirements." Douglas County II, 48 F.3d at 1503.


155. See Douglas County II, 48 F.3d at 1504. The 1978 amendments to ESA require actual notice of the critical habitat to affected local communities. See H.R. Conf. Rep. No. 1804, supra note 47, at 27, reprinted in 1978 U.S.C.C.A.N. at 9494. Therefore, these amendments allow for adequate communication and feedback between the Secretary and the public. Id. This aspect of the critical habitat designation process parallels NEPA objectives. See Douglas County II, 48 F.3d at 1504; NEPA § 102(C), 42 U.S.C. § 4332(C).

156. See Environmental Defense Fund v. EPA, 489 F.2d 1247, 1257 (D.C. Cir. 1973). Moreover, the functional equivalence test does not mandate that the agency "go through all the motions [in creating] an impact statement," it simply requires that an agency have a substantive and procedural process to fulfill the goals of NEPA. Amoco Oil Co. v. EPA, 501 F.2d 722, 750 (D.C. Cir. 1974).
trine eliminates the expenditure of unnecessary time and energy into two procedures that will eventually reach the same result.157

VI. IMPACT

*Douglas County II* stands for the principle that strict adherence to NEPA procedures is not necessary when an agency's administrative statute provides for ample consideration of environmental effects.158 Courts have recognized this proposition, noting that NEPA was "clearly designed to assure consideration of environmental matters by all agencies in their planning and decision making—[sic] especially those agencies who now have little or no legislative authority to take environmental considerations into account."159 The question then arises of whether NEPA serves a useful purpose when an agency has parallel environmental recognition requirements.160 In cases where the agency's implementing legislation provides for consideration of environmental concerns, NEPA's application is not practical.161 Preparing impact statements under NEPA can

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158. See *Douglas County II*, 48 F.3d at 1507. Although NEPA does not apply in all instances, it is clear that the statute plays an essential role in environmental conservation. Hartmann, *supra* note 42, at 744. Without this broad legislative overlay, federal agencies would have a lower responsibility for environmental deterioration caused by government actions. *Id.*

159. Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 381 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974), *appeal after remand*, 513 F.2d 506 (D.C. Cir.), *cert. denied*, 435 U.S. 1025 (1975), and *reh'g denied*, 423 U.S. 1092 (1976). A Senate committee report further detailed that "agencies having authority in the environmental improvement field will continue to operate under their legislative mandates as previously established, and that those legislative mandates are not changed in any way by [NEPA]." *Id.* (citing “Major Changes in S. 1075” as passed by the Senate, 115 CONG. REc. 40417, 40423 (1969)).

160. Riechel, *supra* note 55, at 116. NEPA has been "a successful vehicle" used to influence government participation in environmental preservation. *Id.* Although NEPA's basic concept for environmental protection is admirable, a major complaint of the statute is that it is strictly procedural and does not place substantive requirements on federal agencies. See Robertson v. Methow Valley Citizens Council, 490 U.S. 392, 350 (1989). One commentator identified NEPA as a "checklist that federal agencies must glance at before making significant decisions." Hartmann, *supra* note 42, at 720. NEPA guarantees that the government will evaluate environmental effects as a component of its operations; but, the legislation does not direct agencies to reach a particular conclusion. Brush, *supra* note 135, at 1165. Consequently, an agency's administrative statute may place more substantive requirements and enforcement mechanisms regarding an agency action to satisfy NEPA and proceed beyond NEPA's reach. Hartmann, *supra* note 42, at 720.

161. Brush, *supra* note 135, at 1167. While compliance with NEPA is necessary for certain endeavors, strict compliance to the statute may not be an appropriate test. See *id.* NEPA should be approached liberally when applying it to actions
cause substantial delays for many federal projects when an agency has already observed environmental issues. This dilemma may lead federal agencies to either ignore terms under NEPA or refrain from initiating numerous federal projects. While this hesitation can cause federal agencies to abandon environmentally controversial projects or modify actions that may have severe environmental impacts, it may also deter the government from considering certain actions solely to avoid possible NEPA litigation. Therefore, when an agency follows an administrative statute that provides ample NEPA compliance, a strict application of NEPA is unnecessary.

A consistent, yet narrow, procedure for federal agencies to consider and for courts to follow in the environmental context is the functional equivalence test. This test is an appropriate substitute giving little or no attention to environmental repercussions. Id. at 1164. In instances where a statute requires federal agencies to address environmental issues before an action is commenced, discretion should be given to an agency and its administrative statute, as long as that enabling legislation generally complies with NEPA procedures. Id. See also Riechel, supra note 55, at 120 (acknowledging that federal agencies "[can skew] scientific data in the EIS to meet their political agendas").

162. Riechel, supra note 55, at 119. Compliance with NEPA means investing a substantial amount of time in drafting an environmental impact statement. Id. Typically, an agency completes several drafts that are revised after each comment period. Id. Thus, final drafts of impact statements that consider all environmental consequences can be over one hundred pages long. Id. See also 40 C.F.R. § 1502.7 (establishing page limits for environmental impact statements).

163. See Ferester, supra note 2, at 225. Regardless of NEPA mandates, many federal agencies do not implement the environmental impact statement process into their normal practice. Id. at 225-26. In fact, it has been suggested that long term trends imply "that agencies believe that they need not follow NEPA's [environmental impact statement] procedures as closely as they once did." Id. at 226.

164. See Riechel, supra note 55, at 119-20. NEPA and environmental impact statement procedures have notoriously raised an abundance of litigation issues. Id. In fact, many experts contend that "more litigation has occurred under NEPA than any other environmental law." Ferester, supra note 2, at 227. Thus, federal agencies can lessen litigation time and costs by halting "environmentally destructive proposals at the agency level." Riechel, supra note 55, at 120.

165. See generally Ferester, supra note 2, at 209-10 (discussing state statutes with similar procedures as NEPA). Even if alternative statutes are used in place of NEPA, courts will still need to enforce NEPA procedures if specific agency statutes or administrative processes do not adequately effectuate NEPA's purposes. Id. at 210. The courts' active role would be to compel federal agencies to prepare impact statements and to review the statements to ensure that the agency made a viable effort to consider environmental effects. Id. Idealistically, a statute could be totally effective and unambiguous regarding the application of NEPA, if Congress drafts exceptions directly into the legislation indicating when NEPA procedures are unnecessary. See Amoco Oil Co. v. EPA, 501 F.2d 722, 750 (D.C. Cir. 1974) (recognizing that individual statutes, such as Clean Air Act, can provide satisfactory environmental evaluations).

166. Environmental Defense Fund, Inc. v. EPA, 489 F.2d 1247, 1257 (D.C. Cir. 1973). The United States Court of Appeals for the District of Columbia noted that in creating the functional equivalence test it was not creating a broad exemp-
for NEPA for a variety of reasons. First, the application of the test is limited to environmental agencies or other federal agencies acting under legislation that addresses environmental questions.\textsuperscript{167} Second, when a statute has a functionally equivalent process, applying both NEPA procedures and agency's statutory procedures would be time consuming and redundant.\textsuperscript{168} Third, the functional equivalence test provides a consistent operating mechanism for courts reviewing NEPA applicability.\textsuperscript{169} \textit{Douglas County II} advances a narrow exemption from NEPA requirements that specifically applies to critical habitat designations.\textsuperscript{170} Uniform application of the functional equivalence test to critical habitat designations under ESA would satisfy environmental demands, while curbing the tendency for recurring disputes regarding application of NEPA to such designations.\textsuperscript{171} As a result, NEPA's ultimate goal of fostering harmony

\begin{quote}
from NEPA "for all environmental agencies or even for all environmentally protective regulatory actions." \textit{Id.} Instead, the Circuit Court was establishing a limited exclusion for "actions which are undertaken pursuant to sufficient safeguards so that the purpose and policies behind NEPA will necessarily be fulfilled." \textit{Id.}
\end{quote}


\textsuperscript{169} \textit{See} Bolduan, \textit{supra} note 5, at 392. "Judicial review has always been an integral part of the environmental decision making process." \textit{Id.} Therefore, courts will continue to have a major role in determining whether NEPA should be applicable to specific sections of a statute. \textit{Id.} The ultimate goal should be to reach a uniform consensus of when NEPA applies to avoid excess and redundant litigation. \textit{Id.}

\textsuperscript{170} \textit{Douglas County II}, 48 F.3d at 1507-08.

\textsuperscript{171} \textit{See} Warren County, 528 F. Supp. at 286 (citations omitted). While uniformity would be an optimum result, the application of the functional equivalence test can vary "depending upon the facts and circumstances of each case." Montrose, \textit{supra} note 104, at 875. Courts can, however, attempt to maintain a sense of consistency by looking at two components of the agency's record: "first, whether the agency has fulfilled its substantive NEPA duty of balancing environmental costs against benefits; and, second, whether the agency has employed public participa-
between humans and the environment can be achieved when "the
government, the judiciary, and individuals . . . each do their part to
ensure that environmental concerns are addressed with the atten-
tion they deserve."172

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tion procedures [to] commensurate with the complexity of its proposed action
and within the time available for planning. Id. (citation omitted).
172. Hartmann, supra note 42, at 710.