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NOTES


Rebellious environmental author Edward Abbey once wrote: "Original sin... is the blind destruction for the sake of greed of this natural paradise which lies all around us." Unlike many who would agree with the notion of protecting those creatures of intrinsic and aesthetic beauty, Mr. Abbey was not only advocating that the most eye-catching aspects of our environment warrant protection, but also creatures both unappealing and pestilent. While many of us may acquiesce in protecting a disagreeable species whose habitat is located on public land far from our homes, few of us are as tolerant as Mr. Abbey and would not likely welcome government condemnation of our own backyards because of a few unsightly insects. Yet that is exactly what the Endangered Species Act ("ESA" or "the Act") empowers the government to do, and it is for this reason that the Act itself is labeled endangered.

Despite the Act's application to private property, courts often

1. EDWARD ABBEY, DESERT SOLITAIRE 190 (1968).
2. See id. In his vision of paradise, Mr. Abbey includes "scorpions and tarantulas and flies, rattlesnakes and Gila monsters." Id.
3. The problem with protecting endangered species is that of the ten million species in the world, most are insects, plants, and fungi located in backyards and irrigation ditches. See Nature, Nurture and Property Rights, ECONOMIST, July 8, 1995, at 24, 24.
5. The Act was passed with virtually no opposition 20 years ago, but it is now "nearly as imperiled as the creatures it was designed to protect." Betsy Carpenter, Is He Worth Saving? The Potent New Campaign to Overturn the Endangered Species Act, U.S. NEWS & WORLD REP., July 10, 1995, at 43, 43. The Act is said to be "clearly in trouble." David Seligman, Keeping up: Our Spirited Republicans, Insects on the March, and Other Matters, FORTUNE, Dec. 25, 1995, at 231, 232.
6. The Supreme Court's holding in Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995), interpreted the Act's broad prohibitions against harming an endangered species to apply to private landowners. See id. at 692, 708; see also infra notes 154-59, 274-79 and accompanying text (discussing Sweet Home). The application of the ESA to private property is perhaps the most controversial aspect of the Act. See Frona M. Powell, Defining Harm Under the Endangered Species Act: Implications of Babbitt v. Sweet Home, 33 AM. BUS. L.J. 131, 149 (1995) ("To many, the most controversial aspect of the [ESA] is its power to take private property through
differed on whether landowners and other parties could assert economic-based interests under the ESA. Some courts decided that Congress had limited the class of plaintiffs who could bring challenges under the ESA to those falling within the zone of interests that the statute was intended to protect. As a result, these courts held that the plaintiffs’ economic-based claims were outside the zone of interests protected by the ESA because the plaintiffs did not have an interest in protecting endangered species. Other courts determined that the plaintiffs’ economic-based claims fell within the zone of interests protected by the Act and thus concluded that these plaintiffs had the requisite standing to bring their challenges. Still other courts refused to apply the zone of interests test to claims under the ESA, determining that plaintiffs need to meet only traditional Article III standing requirements. The courts’ conflicting decisions became a source of confusion for property owners and environmentalists alike.

Along with the uncertainty in the courts regarding judicial access for property interests was the increasing intensity of the cry to reform “America’s most controversial environmental law” so as to incorporate economic interests in ESA determinations. In spite of extensive regulation of land use.”).


9. See, e.g., Bennett v. Plenert, 63 F.3d 915, 919-20 (9th Cir. 1995) (determining that the plaintiffs were without standing to challenge an ESA decision because they asserted a purely economic interest), rev’d sub nom. Bennett v. Spear, 117 S. Ct. 1154 (1997).

10. See, e.g., Mountain States Legal Found. v. Glickman, 92 F.3d 1228, 1232-34 (D.C. Cir. 1996) (holding that the plaintiffs’ economic-based claims fell within the zone of interests that the ESA was intended to protect).


12. See William W. Buzbee, Expanding the Zone, Tilting the Field: The Zone of Interests and Article III Standing Analysis After Bennett v. Spear, 49 ADMIN. L. REV. 763, 777 (1997) (noting that prior to Bennett the prevailing sentiment surrounding the application of the zone of interests test was uncertainty).


14. See Betsy Carpenter, This Land Is My Land, U.S. NEWS & WORLD REP., Mar. 14, 1994, at 65, 65-69 (describing the new private property rights movement); Richard
vocal political support for reducing the effect of the ESA on property owners, proponent of the ESA have been unwilling to sacrifice their hard work on species conservation, and prior congressional attempts at ESA reform have proven unsuccessful without environmentalists’ support. On March 19, 1997, with a stalemate halting congressional reform efforts between environmentalists and property-interest proponents, a unanimous Supreme Court, led by Justice Scalia, handed down its most recent decision involving the Endangered Species Act.

In Bennett v. Spear, the Supreme Court resolved the long-standing debate regarding judicial access, holding that property owners asserting economic interests are not subject to the zone of interests test when determining standing under the citizen-suit provision of the ESA. In contrast, the Court determined that for purposes of standing under the Administrative Procedures Act ("APA"), parties asserting that they have suffered economically because of agency action are required to meet the zone of interests test. Thus, when asserting a claim under the APA, plaintiffs must show that their asserted interest falls within the zone of interests Congress contemplated when enacting the provision at issue in the underlying statute.

Miniter, You Just Can’t Take It Anymore: America’s Property Rights Revolt, POL’Y REV., Fall 1994, at 40, 40-46 (comparing the private property rights revolt to the tax revolt that resulted in tax cuts during the Reagan Administration in the 1980s); Robert H. Nelson, Shoot, Shovel & Shut up, FORBES, Dec. 4, 1995, at 82, 82 (stating that “growing agreement among many insiders [is] that the [ESA] must be revised by establishing strong positive, rather than negative, incentives . . . for landowners to protect endangered species habitat”); see also Stuart Hardy, The Endangered Species Act: On a Collision Course with Human Needs, 13 PUB. LAND L. REV. 87, 97 (1992) (asserting that for the ESA to survive it must be restructured to include “flexibility, balance and accommodation”); Michelle K. Walsh, Note, Achieving the Proper Balance Between the Public and Private Property Interests: Closely Tailored Legislation As a Remedy, 19 WM. & MARY ENVTL. L. & POL’Y REV. 317, 317 (1995) (proposing that ESA legislation should seek to include the interests of private property owners).

15. President Bush called the ESA a “broken” law that “must not stand.” Houck, supra note 13, at 278.
16. See T.H. Watkins, New Congress, Old Lesson, AUDUBON, Jan.-Feb. 1997, at 112, 112 (asserting that any ESA reform efforts must include environmentalists, given the re-energized environmental movement and the futile attempts of the 104th Congress to reform the ESA).
18. See id. at 1162-63; see also infra notes 56-61 and accompanying text (discussing the zone of interests test).
20. See 5 U.S.C. § 702 (1994); Bennett, 117 S. Ct. at 1167-68 (determining that petitioners’ claims brought pursuant to § 7 of the ESA fall within the zone of interests...
This Note first discusses the basic structure of the ESA, explaining briefly how a species is determined to be endangered and how its habitat is designated as critical.21 Next, the Note explains the threshold issue of standing, including both constitutional and prudential limitations.22 After reviewing the recent Supreme Court decision in Bennett v. Spear, highlighting the relevant facts and arguments,23 the Note then examines the statutory background of the ESA, including the policies and theories that were the impetus for its enactment and subsequent amendment.24 The Note next discusses how Bennett comports with modern endangered species litigation and how the Bennett decision will affect Congress’s legislative actions in reforming the ESA.25 This Note thereafter reviews the legal background leading up to the Bennett decision, focusing particularly on the history of prudential standing and the zone of interests test in the context of citizen suits brought under the ESA, and discusses how the Court’s decision clarifies ESA civil-suit standing requirements.26 Finally, the Note assesses how the Bennett decision will impact litigation involving the application of the National Environmental Policy Act27 (“NEPA”) to the ESA.28

A basic summary of the ESA29 and standing30 is helpful in understanding the significance of the Bennett decision in the jurisprudential landscape. Hailed as an “environmental jewel”31 and

that Congress intended to protect in enacting § 7). The APA provides a right of review “where there is no other adequate remedy in court.” 5 U.S.C. § 704. The plaintiff, however, must also demonstrate that she suffered a “legal wrong” or was “adversely affected or aggrieved by agency action within the meaning of a relevant statute.” Id. at § 702 (emphasis added).

21. See infra notes 29-44 and accompanying text.
22. See infra notes 45-61 and accompanying text.
23. See infra notes 62-142 and accompanying text.
24. See infra notes 143-87 and accompanying text.
25. See infra notes 188-235 and accompanying text.
26. See infra notes 236-88 and accompanying text.
28. See infra notes 289-321 and accompanying text.
31. Elizabeth A. Foley, The Tarnishing of an Environmental Jewel: The Endangered
the most powerful environmental statute in existence today, the ESA is triggered by the listing of a species as "endangered" or "threatened." The task of listing terrestrial species is granted to the Secretary of the Interior through the Fish and Wildlife Service ("FWS"), while the Secretary of Commerce, acting through the National Marine Fisheries Service ("NMFS"), is responsible for listing all marine species. Listing is carried out using only "the best scientific and commercial data available." After listing a species, the Act requires the Secretary to designate as "critical habitat" land or water areas that are essential to the listed species' existence. The critical habitat determination is based on "the best scientific data available" as well as the "economic impact, and any other relevant impact, of specifying any particular area as critical habitat." In addition to designating critical habitat, the Secretary must develop and implement recovery plans for the continued survival of the

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33. See 16 U.S.C. § 1533 (1994). A species is considered "endangered" if it is "in danger of extinction throughout all or a significant portion of its range." Id. § 1532(6) (excluding, however, certain insect species determined by the Secretary to be pests). A species is considered "threatened" if it is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." Id. § 1532(20). For the most part, the ESA does not distinguish between endangered and threatened species; however, the prohibitions are somewhat more lenient regarding private activities affecting a species that is merely threatened. See Barton H. Thompson, Jr., The Endangered Species Act: A Case Study in Takings and Incentives, 49 STAN. L. REV. 305, 312 (1997).

34. See 16 U.S.C. § 1533(a). A species becomes a candidate for listing either by initiation of the Secretary, by petition of an interested party such as an environmental organization, or by an emergency listing. See 50 C.F.R. §§ 424.10, 424.14, 424.20 (1996). Criteria used in deciding whether a species should be listed include: (1) the present state of the species' habitat and the potential for its destruction or modification; (2) the overuse of the species' habitat; (3) disease and predation; (4) the effectiveness of current regulation on the species' survival; and (5) any other natural or man-made factors affecting the species' continued existence. See 16 U.S.C. § 1533(a)(1).


37. Id. § 1533(b)(2).
Once a species is listed, section 9 of the ESA forbids the taking, possession, or sale of that species by any person. Federal agencies also must comply with section 7's consultation requirements to ensure that their actions do not "jeopardize the continued existence of any [listed] species" or adversely affect a species' critical habitat.

To fulfill section 7, when an agency proposes a project, it must consult with the FWS to see if any listed species are in the area where the proposed project will take place. If a listed species is found, the agency must prepare a biological assessment to determine if the listed species will be affected by the project. If the biological assessment determines that the species will be affected, formal consultation between the agency and the FWS must take place, and the FWS will then prepare a biological opinion using the "best scientific and commercial data available." The biological opinion will contain a "jeopardy" or "no jeopardy" determination for the listed species, but if the biological opinion concludes that the project is likely to jeopardize the species, the opinion must provide "reasonable and prudent alternatives" that would allow the project to proceed.

The ESA also contains a citizen-suit enforcement provision allowing aggrieved individuals to file civil suits. The citizen-suit provision of the ESA allows "any person" to enjoin an alleged violation of the Act, to compel the Secretary of the Interior to assert the prohibitions on takings, or to compel the Secretary to perform a duty that is not discretionary under section 4 of the ESA. Individuals bringing citizen suits must meet the requirements of

38. See id. § 1533(f)(1). A recovery plan must be implemented "unless [the Secretary] finds that such a plan will not promote conservation of the species." Id.
39. See id. § 1538(a)(1). Section 9's prohibition applies to both federal and nonfederal (i.e., private and state) actions. See id.
40. Id. § 1536(a)(2).
41. See id. § 1536(c)(1).
42. See id.
43. Id. § 1536(c)(1)-2.
44. Id. § 1536(b)(3)(A).
46. See 16 U.S.C. § 1540(g)(1). Section 4 of the ESA contains the provisions for the listing of endangered and threatened species. See id. § 1533.
The standing inquiry involves both constitutional and prudential limitations. Constitutional standing refers to the Article III requirement that judicial review be limited to "cases" and "controversies." The "irreducible constitutional minimum" requirements of standing are met when (1) the plaintiff suffers an "injury in fact" to a legally protected interest, (2) a "causal connection" between the injury and the conduct complained of exists, and (3) it is "likely," not "merely 'speculative,' " that the injury will be "redressed by a favorable decision." In addition to constitutional requirements for standing, courts have imposed prudential requirements that are rooted in policy concerns. Courts have discretion as to what prudential considerations to use, unless Congress has explicitly granted standing to the full limits of Article III. Because of the courts' broad discretionary power in this area, prudential standing requirements have been applied inconsistently. Controversy

47. See Kelly Murphy, Cutting Through the Forest of the Standing Doctrine: Challenging Resource Management Plans in the Eighth and Ninth Circuits, 18 U. ARK. LITTLE ROCK L.J. 223, 227 (1996) (explaining that a plaintiff must meet the requirement of standing to sue and "show that he or she has a legally recognized interest in the outcome of [an] action").


51. See Flast v. Cohen, 392 U.S. 83, 97 (1968) (noting that the Court has rules limiting the cases it may hear that are based solely on policy grounds, rather than on constitutional considerations). Prudential concerns, like constitutional requirements of standing, also play a role in the separation of powers. See, e.g., David A. Logan, Standing to Sue: A Proposed Separation of Powers Analysis, 1984 Wis. L. Rev. 37, 46-48 (asserting that while prudential limitations are not imposed by Article III, the Court imposes prudential limitations to serve the policy of separation of powers).

52. See Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982) (determining that prudential standards do not constitute a "limitation on judicial power"); see also Preston v. Heckler, 734 F.2d 1359, 1365 (9th Cir. 1984) (establishing that courts are "free to weigh [prudential] principles").

53. See Warth, 422 U.S. at 501 (recognizing that "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules").

54. See Sanford A. Church, Note, A Defense of the "Zone of Interests" Standing Test, 1983 DUKE L.J. 447, 448 (arguing that "[c]ourts have blindly applied the test, confused
concerning their application has centered largely on whether Congress intended to override the prudential limitations in defining who may sue under the ESA's citizen-suit provision.\(^5\)

The prudential standing concern in *Bennett* involved the zone of interests test.\(^5\) The zone of interests test originated in specific language in the APA, stating that "[a] person . . . aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review."\(^7\) Despite its origin in the APA, lower courts increasingly have applied the zone of interests test in the context of non-APA environmental litigation to determine whether the plaintiff's injury is the kind Congress contemplated as worthy of protection under the environmental statute in question.\(^8\) This application has sparked a debate over whether the zone of interests test should apply to actions outside the APA.\(^9\) In *Bennett v. Plenert*,\(^6\) the Ninth Circuit held that

\(^{55}\) See Robert B. June, *The Structure of Standing Requirements for Citizen Suits and the Scope of Congressional Power*, 24 ENVT. L. 761, 794 (1994) (finding that "the central issue presented in many cases is whether Congress has displaced the prudential concerns with its grant of standing").

\(^{56}\) For a discussion of the history of prudential standing and the zone of interests test, see infra notes 239-79 and accompanying text. For a comprehensive review of the zone of interests test of prudential standing, see 13 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3531.7, at 506-26 (2d ed. 1984); Church, *supra* note 54, at 449-69.


the zone of interests test did apply to citizen-suit claims brought under the ESA. 61 This decision set the stage for the Supreme Court's reversal in Bennett v. Spear.

In 1992, in accordance with the consultation provisions of section 7 of the ESA, 62 the Bureau of Reclamation 63 (the "Bureau") notified the FWS that the Bureau's continuing Klamath Irrigation Project 64 might affect the Lost River Suckerfish and the Shortnose Suckerfish, both listed as endangered in 1988. 65 As a result of the consultation, the FWS issued a biological opinion 66 on the project which concluded that the Klamath Project was likely to jeopardize the fish. 67 Under the ESA, however, a project may continue if "reasonable and prudent alternatives" are provided that avoid putting a species in jeopardy. 68 The biological opinion of the FWS recommended several alternatives, including a proposal to maintain minimum water levels

61. See Bennett, 63 F.3d at 919.
62. See 16 U.S.C. § 1536(a)(2) (1994). Section 7 of the ESA mandates that each federal agency ensure that any action it authorizes, funds, or carries out "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." Id.
63. The Reclamation Act, passed by Congress in 1902 to aid small farmers in the arid western United States, led to the formation of the Bureau, which was to sell unused federal lands to raise funds to "reclaim" or irrigate small family plots to encourage land development. See Reclamation Act, ch. 1093, 32 Stat. 388 (1902) (codified as amended at 43 U.S.C. §§ 371-498 (1994)). The Secretary of the Interior initially created the Reclamation Service to administer the Reclamation Act; however, the service was later renamed the "Bureau of Reclamation." See Gregory Horwood, Forfeiture of Rights to Federal Reclamation Project Waters: A Threat to the Bureau of Reclamation, 29 IDAHO L. REV. 153, 154 n.4 (1992-93). The Secretary of the Interior is given general authority to do what is necessary to carry out the Reclamation Act. See 43 U.S.C. § 373.
64. The Klamath Project is "one of the oldest federal reclamation schemes [consisting] of a series of lakes, rivers, dams and irrigation canals in Northern California and Southern Oregon." Bennett, 117 S. Ct. at 1159. The project was undertaken by the Secretary of the Interior in 1905 and is administered by the Bureau of Reclamation. See id.
66. See supra notes 41-44 and accompanying text (discussing the steps an agency must follow prior to issuance of a biological opinion).
67. See Bennett, 117 S. Ct. at 1159 (" "[L]ong term operation of the Klamath Project was likely to jeopardize the continued existence of the Lost River and shortnose suckers." ") (quoting Appendix to Petition for Certiorari at 3, Bennett (No. 95-813) (quoting Biological Opinion of the Fish and Wildlife Service)).
68. See 16 U.S.C. § 1536(b)(3)(A) (1994). In addition to "reasonable and prudent alternatives," the biological opinion also must contain an "Incidental Take Permit," which enables the agency to avoid the "take" prohibitions of the ESA in operating its project provided that the taking is done in compliance with the terms and conditions of the alternatives set forth in the biological opinion. See id. § 1536(o)(2); infra notes 151-59 (discussing the definition of "take" under the ESA).
on Upper Klamath Lake and on Clear Lake and Gerber reservoirs. The Bureau decided that it would continue to operate the Klamath Project but would protect the suckerfish by using this alternative to maintain minimum water levels.

Subsequently, two Oregon irrigation districts that received water from the Klamath Project and two ranchers within those districts filed suit against the director and regional director of the FWS and the Secretary of the Interior. The petitioners claimed competing “recreational, aesthetic and commercial” interests in the water that the FWS biological opinion had determined was necessary to preserve the endangered fish. First, petitioners alleged that the FWS’s determination violated section 7 of the ESA because there was “no scientifically or commercially available evidence” supporting the FWS’s conclusion that without minimum water levels the Bureau’s Klamath Project would cause a decline in the endangered sucker population. In support of this argument, the petitioners noted that the Bureau’s procedures for storing and releasing water from the reservoirs were consistently maintained and followed throughout the twentieth century. The second claim also alleged a violation of section 7 of the ESA, averring that there was “no commercially or scientifically available evidence” indicating that minimum water levels would have a beneficial effect on the suckerfish population. Petitioners’ third claim asserted that a minimum water level requirement was equivalent to a determination

69. *See Bennett, 117 S. Ct. at 1159.* Petitioners received water from Clear Lake and Gerber reservoirs. *See id.*

70. *See id.* Theoretically, the Bureau may ignore the alternatives set forth in the biological opinion, but if it does not follow those alternatives, the Bureau is ineligible for an Incidental Take Permit. *See id.* at 1165. Without an Incidental Take Permit, the Bureau exposes itself to the ESA’s civil penalties of up to $25,000 per violation, criminal penalties of up to $50,000, and imprisonment for one year for “any person” who knowingly takes an endangered or threatened species. *See 16 U.S.C. § 1540(a), (b).*

71. *See Bennett, 117 S. Ct. at 1159.* The Bureau of Reclamation was not included in those named as defendants. *See id.*

72. *Id.* at 1160 (quoting Appendix to Petition for Certiorari at 34, *Bennett* (No. 95-813)). Specifically, the petitioners sought to challenge the reduction in their water supplies, the threats to their crops, and the subsequent devaluation of their land. *See Oral Argument for Petitioners (Nov. 13, 1996), Bennett (No. 93-813), available in WESTLAW, 1996 WL 668337, at *3.*

73. *Bennett, 117 S. Ct. at 1159-60* (quoting Appendix to Petition for Certiorari at 37, *Bennett* (No. 95-813)).

74. *See id.* (citing Appendix to Petition for Certiorari at 36, *Bennett* (No. 95-813)).

75. *Id.* at 1160 (quoting Appendix to Petition for Certiorari at 39, *Bennett* (No. 95-813)). Section 7 of the ESA requires that the FWS use the “best scientific and commercial data available” in determining the impact of an agency’s action on a listed species. *16 U.S.C. § 1536(a)(2).*
of critical habitat for the fish and thus violated section 4 of the ESA because it failed to take into consideration the economic impacts associated with such a designation. Each of the claims also stated that the relevant action violated the APA’s prohibition against agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

The district court dismissed the petitioners’ claims for lack of jurisdiction, concluding that the petitioners lacked standing because their “recreational, aesthetic, and commercial interests ... [did] not fall within the zone of interests sought to be protected by ESA.”

The Ninth Circuit Court of Appeals affirmed the district court, holding that the zone of interests test for standing applies to persons who are entitled to judicial review not only under the APA, but also under the citizen-suit provision of the ESA. Moreover, the court concluded that plaintiffs fall within the zone of interests for standing only when they allege an interest in the preservation of the endangered species.

The Ninth Circuit reached its decision by first noting that the issue was not whether constitutional standing had been met by the plaintiffs, but whether the plaintiffs’ action was allowed under the doctrine of prudential standing. Relying on precedent in which the zone of interests test was applied to claims brought under the ESA, the Ninth Circuit determined that the zone of interests test was applicable. The court identified species preservation as the ESA’s

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76. See Bennett, 117 S. Ct. at 1160. Section 4 requires the Secretary to designate critical habitats for listed species using the “best scientific data available and after taking into account the economic impact, and any other relevant impact, of specifying ... critical habitat.” 16 U.S.C. § 1533(b)(2).

77. 5 U.S.C. § 706(2)(A) (1994). Petitioners also raised a fourth claim: that the implicit designation of critical habitat violated NEPA because it was not preceded by the preparation of an environmental assessment. See Bennett, 117 S. Ct. at 1160 n.1. The claim, however, was dismissed by the Ninth Circuit and was not challenged on appeal to the Supreme Court. See id.; see also infra notes 289-321 and accompanying text (discussing the implications of applying NEPA to environmental determinations).


81. See Bennett, 63 F.3d at 919, 921-22.

82. See id. at 917.

83. See id. at 918 (citing Pacific Northwest Generating Coop. v. Brown, 38 F.3d 1058, 1065 (9th Cir. 1994); Mt. Graham Red Squirrel v. Espy, 986 F.2d 1568, 1581 & n.8 (9th
overall objective and noted that the congressional intent behind the Act's enactment was to halt species extinction "'whatever the cost.'"84 The court concluded that because the plaintiffs sought only economic and recreational benefits from the water, their interests were only "'marginally related' " to the purposes of the ESA and thus they lacked standing.85

On appeal to the Supreme Court, the petitioners' claims presented two issues. The first issue was whether the prudential standing zone of interests test applied to claims brought under the citizen-suit provision of the ESA, given the language of the citizen-suit provision that "any person" may file suit, which could be interpreted as negating all prudential standing limitations.86 If the prudential standing test applied, the second issue was whether the petitioners were within the requisite zone of interests, given that the petitioners' interests were primarily economic and that the petitioners were not concerned with the preservation of the endangered suckerfish or their habitat.87

The Supreme Court began its analysis by turning first to the claims under the ESA and the question of whether the prudential standing zone of interests test should apply to a citizen suit brought pursuant to section 11(g)88 of the ESA.89 The Court reviewed its
earlier decisions on standing and explained that the concept of standing involves both constitutional and prudential limitations. The Court emphasized that there is an "irreducible constitutional minimum" of standing under the Case and Controversy Clause of Article III, whereby the plaintiff must show: (1) that he has suffered "injury in fact"; (2) that there is a "causal connection" between the injury and the disputed conduct such that the injury is "fairly traceable" to the actions of the defendant; and (3) that the injury is likely to be redressed by a favorable decision. The Bennett Court further noted that in addition to this constitutional standing requirement, there are "judicially self-imposed limits on the exercise of federal jurisdiction" that are "founded in concern about the proper—and properly limited—role of the courts in a democratic society." Unlike constitutional standing requirements, the Court explained that a number of prudential standing requirements can be enhanced or reduced by Congress. The Court specified that the prudential requirement of particular concern in Bennett was that the plaintiffs' grievance fall within the zone of interests protected by the provision of the statute at issue in the suit.
With this background established, the Court compared the language of the ESA citizen-suit provision with statutes that were more explicit and restrictive in describing the class of people who could bring suit. Because Congress can overcome prudential standing requirements using statutory language, the Court concluded that the ESA's civil-suit provision was phrased broadly enough to reflect Congress's intention to negate any prudential standing requirements. The Court emphasized two factors in deciding that the term "any person" within the citizen-suit provision of the ESA was meant to bypass prudential limitations. First, the Court concluded that the overall subject matter of the ESA was the environment, in which it is customary to think that all persons have an interest. Second, the Court determined that the purpose of the citizen-suit provision was to encourage enforcement of the Act by "private attorneys general," given the lack of the usual amount-in-controversy and diversity-of-citizenship jurisdictional requirements, the potential for recovering litigation fees, and the government's right to refuse to pursue an action initially and intervene later.

The Bennett Court likened Congress's decision to grant standing to the full limits of Article III to the Court's decision in Trafficante v. Metropolitan Life Insurance Co., a case involving the Civil Rights example of the statutory and legislative analysis courts should use). Parties within the zone of interests are the only ones with standing under this prudential requirement. See Lujan v. National Wildlife Fed'n, 497 U.S. 871, 882-83 (1990).


99. See Bennett, 117 S. Ct. at 1162-63; see also supra note 88 (quoting the citizen-suit provision of the ESA).

100. See Bennett, 117 S. Ct. at 1162.

101. See id.

102. "Private attorneys general" is a term often used to refer to citizens acting as plaintiffs to enforce statutory or administrative requirements. See, e.g., Sierra Club v. Morton, 405 U.S. 727, 737-38 (1972).

103. See Bennett, 117 S. Ct. at 1162.

104. 409 U.S. 205 (1972).
Act of 1968. At issue in *Trafficante* was a provision authorizing "[a]ny person... claiming... injury by a discriminatory housing practice" to sue under the Act. In *Trafficante*, the Court stated that the "any person" language in the Civil Rights Act provision reflected congressional intent to expand standing to the limits of Article III. Given the similarly broad statutory language of the ESA provision at issue, the *Bennett* Court held that Congress had intended to include economic interests in its grant of the right to file suit pursuant to the ESA citizen-suit provision and that standing is not restricted under the ESA to those asserting exclusively environmental concerns.

The ranchers' and irrigation districts' economic interests were sufficient under the statutory provisions of the ESA to confer standing to bring a citizen suit. However, even if the statute conveyed standing, the petitioners still were required to show that they met the constitutional requirements for standing. The government respondents had made no attempt to defend the Ninth Circuit's holding that the petitioners did not have the requisite standing under the ESA citizen-suit provision. Instead, the respondents offered three alternative grounds for affirming the Ninth Circuit decision.

First, the government contended that the petitioners failed to satisfy the constitutional standing requirements embodied in the case or controversy provision of Article III. The government asserted

107. *See id.* at 1162-63 (citing *Trafficante*, 409 U.S. at 210-11).
108. *See id.* at 1162. The Court stated that while interpreting the ESA citizen-suit provision to extend up to the limits of Article III may allow persons to assert over-enforcement, as well as under-enforcement, of the Act, "the citizen-suit provision does favor the environmentalists in that it covers all private violations of the Act but not all failures of the Secretary to meet his administrative responsibilities." *Id.* at 1163; *see also infra* notes 119-23 and accompanying text (explaining that a challenge may be brought against the Secretary only for failure to perform a non-discretionary duty).
109. *See Bennett*, 117 S. Ct. at 1163 (finding that the Ninth Circuit "erred in concluding that petitioners lacked standing under the zone-of-interests test").
110. *See id.* at 1164-67. Because the district court and the Ninth Circuit viewed the zone of interests ground as dispositive, these alternative grounds were not reached. The Court, perhaps in order to clarify its current view on standing, chose to address these alternative grounds as well, given "[a] respondent[']s... entitlement to... judgment on any ground supported by the record." *Id.* at 1163 (citing Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 379 n.5 (1996); *Ponte v. Real*, 471 U.S. 491, 500 (1985)).
111. *See id.* The "irreducible constitutional minimum" of Article III standing requires
that the petitioners had not shown "injury in fact" because the petitioners claimed only a reduction in the overall amount of water available, and did not provide an adequate evidentiary basis that they would actually receive less water. The Court disagreed, concluding that the plaintiffs' allegations regarding the reduced amount of water they would receive were sufficient at this stage of the case to justify a finding of "injury in fact."  

As part of their first argument, the government also asserted that the injury lacked a causal connection to the conduct complained of and was not "fairly traceable" to the actions of the defendants nor "redressable" by a favorable decision because the harm came not from the FWS biological opinion but from a decision that had not yet been made as to the amount of water the petitioners would be allocated. The Court also ruled against the government on this issue, pointing out that the government itself acknowledged that while the FWS's biological opinion theoretically may serve only as an "advisory function," in reality, the opinion has a coercive impact on the agency's decision to adopt the proposed alternatives. The Court stated that the FWS also was aware of the finality of its biological opinions. Because of the compelling practical effect of the biological opinion and the modest burden at this particular stage


112. See Bennett, 117 S. Ct. at 1163.

113. The Court noted that "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim."" Id. at 1164 (quoting Defenders of Wildlife, 504 U.S. at 561 (quoting Lujan v. National Wildlife Fed'n, 497 U.S. 871, 889 (1990))).

114. See id.

115. See id.

116. Id. (quoting Brief for Respondents at 22, Bennett (No. 95-813)).

117. See id. (quoting Interagency Cooperation—Endangered Species Act of 1973, As Amended; Final Rule, 51 Fed. Reg. 19,926, 19,928 (1986) [hereinafter Interagency Cooperation]). The government respondents acknowledged that a reviewing court gives considerable deference to the FWS's views, and any agency that chooses to disregard the alternatives proposed in the biological opinion must include reasons for disagreeing with the biological opinion in its administrative record. See Brief for Respondents at 20-21, Bennett (No. 95-813) (citing Interagency Cooperation, supra, 51 Fed. Reg. at 19,956). The coercive effect of the biological opinion also arises from the fact that by failing to follow the biological opinion's proposed alternatives, the Bureau may be subject to the civil and criminal penalties of the ESA. Penalties can include fines of $25,000 to $50,000 per violation and up to a year of imprisonment. See Bennett, 117 S. Ct. at 1165; see also supra note 70 (explaining that without an Incidental Take Permit, the Bureau may expose itself to civil and criminal penalties).

117. See Bennett, 117 S. Ct. at 1165 (noting that "[t]he Service itself is, to put it mildly, keenly aware of the virtually determinative effect of its biological opinions").
in the case, the Court determined that the plaintiffs had adequately alleged the elements of causality and redressability.\textsuperscript{118}

The government's second assertion was that the petitioners' claims were not reviewable under the ESA citizen-suit provision because the statute provides only for suits alleging a violation of the Act or suits against the Secretary for failure to perform a nondiscretionary duty under section 4 of the Act.\textsuperscript{119} The Court agreed that the ranchers' claims brought pursuant to section 7\textsuperscript{120} of the ESA clearly were not reviewable under subsection (C) of the ESA citizen-suit provision because that provision allows for civil suits against the Secretary only for alleged failure to perform a nondiscretionary duty under section 4 of the ESA.\textsuperscript{121} The Court concluded, however, that the ranchers' section 4 claim\textsuperscript{122} did fall under the purview of subsection (C) of the citizen-suit provision and was subject to judicial review because the biological opinion contained an implicit critical habitat designation without assessing, as required by section 4, the economic impact of that designation.\textsuperscript{123}

After concluding that the petitioners' section 7 claims were not reviewable under subsection (C) of the citizen-suit provision, the Court continued to analyze the strength of the government's second

\textsuperscript{118} See id. at 1164 (stating that the government "wrongly equates injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation").

\textsuperscript{119} See id. at 1165; see also supra note 88 (quoting the ESA's citizen-suit provision).

\textsuperscript{120} Petitioners alleged that the FWS's determination that the Klamath Project would result in jeopardy to the endangered suckerfish and the Bureau's consequential imposition of minimum water levels violated section 7 of the ESA, which requires that each agency "use the best scientific and commercial data available" in making these determinations. 16 U.S.C. § 1536(a)(2) (1994); see Bennett, 117 S. Ct. at 1160.

\textsuperscript{121} See 16 U.S.C. § 1540(g)(1)(C). The Court stated that subsection (C) is "clear and unambiguous" in dictating that it covers only violations of section 4 of the ESA. See Bennett, 117 S. Ct. at 1165. Petitioners' first and second claims, which asserted that the Secretary violated section 7, clearly were not reviewable under this provision. See id.

\textsuperscript{122} Petitioners alleged that imposing minimum water levels on the reservoirs was equivalent to a determination of critical habitat for the suckerfish, which violated section 4's mandate that the Secretary take into consideration economic and other relevant factors when making such a determination. See 16 U.S.C. § 1533(b)(2); Bennett, 117 S. Ct. at 1160.

\textsuperscript{123} See Bennett, 117 S. Ct. at 1166 ("[T]he fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical requirement that . . . he 'take[e] into consideration the economic impact, and any other relevant impact,' and use 'the best scientific data available.' " (quoting 16 U.S.C. § 1533 (b)(2))). Justice Scalia, writing for a unanimous Court, expressed his disapproval of the lower courts' decisions regarding this issue: "It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." Id. (citing SEC v. Chenery Corp., 318 U.S. 80, 94-95 (1943)).
assertion by addressing whether the same claims were reviewable under subsection (A), which permits private parties to bring injunction actions against alleged violators of ESA regulations. Analyzing the section 7 claims under subsection (A), the Court refused to read the "in violation of" provision as an alternative mechanism for obtaining judicial review of the Secretary's performance under the Act. The Court also noted that the term "violation" is used elsewhere in contexts that do not refer to a failure of the Secretary or other officer to perform their administrative duties under the Act. Thus, the Court determined that the reference to "violations" of the ESA in subsection (A) does not include the Secretary's "maladministration of the Act.

Because the statutory provisions of the ESA did not give the petitioners standing to bring their section 7 claims, the Court returned to the prudential zone of interests standing test to determine whether the plaintiffs could challenge the action under the APA. In applying the "zone of interests" test, whether a plaintiff's interest is protected by the statute is determined by looking at the particular provision upon which the plaintiff relies, not the overall purpose of the Act. The Court stated that the obvious purpose of

124. See id.
125. See supra note 88 (quoting the relevant portion of 16 U.S.C. § 1540(g)(1)(A)).
126. See Bennett, 117 S. Ct. at 1166. The Court explained that in its view, subsection (A) was a "means by which private parties may ... enforce the substantive provisions of the ESA against regulated parties—both private entities and Government agencies—but is not an alternative avenue for judicial review of the Secretary's implementation of the statute." Id.
127. See id. As an example, the Court cited § 1540(a), which enables the Secretary to impose civil penalties on "[a]ny person who knowingly violates ... any provision of [the ESA]." Id. (quoting 50 C.F.R. § 1540(a) (1994)).
128. Id. at 1167.
129. See supra note 120 (summarizing the petitioners' section 7 claims).
130. See Bennett, 117 S. Ct. at 1160. The APA allows courts to prohibit "agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " Id. (quoting 5 U.S.C. § 706(2)(A) (1994)). Petitioners can file suit to challenge administrative action under the APA, which provides for judicial review of final agency actions when "there is no other adequate remedy in a court." 5 U.S.C. § 704. However, the APA itself does not confer standing. Given that the petitioners' section 7-based claims were not within the statutory citizen-suit provisions of the ESA that conferred standing, there was no congressional conferral of standing. If Congress has not augmented standing through express statutory language, the prudential "zone of interest" standing requirements apply and petitioners must show they are within the zone of interests to be protected by the provision of the ESA at issue. See Gene R. Nichol, Jr., Rethinking Standing, 72 CAL. L. REV. 68, 91 (1984); see also supra note 87 (discussing the application of the zone of interests test under both the ESA and the APA).
131. See id. (citing Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970)).
the requirement that each agency use the "best scientific and commercial data available" is to "ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise." The Court determined that the provision's requirement was essential to avoid the economic disorder that may result from agency officials unwittingly pursuing environmental objectives with complete disregard for the commercial consequences. Thus, the Court concluded that the petitioners' claim that they had suffered from an "uneconomic (because erroneous) jeopardy determination" adequately met the zone of interests test for standing under section 7 of the ESA.

The Court then addressed the government's third and final contention that petitioners could not obtain judicial review under the APA because a biological opinion is not "final agency action" reviewable under the APA. The Court explained that two conditions must be met for agency action to be "final." First, the action must be the culmination of the agency's decisionmaking process. Second, the action must be one that determines rights or obligations, or one that creates legal consequences. It was uncontested that the first element of finality had been met, and the Court decided that the second requirement also was fulfilled.

133. Bennett, 117 S. Ct. at 1168.
134. See id.
135. Id. The Court determined that the zone of interests test was required for the action under the APA, but was not required for the citizen-suit provision. See Bennett, 117 S. Ct. at 1163, 1167; see also supra note 87 (explaining the effect of Bennett on the zone of interests test in civil suits under the ESA and APA). At least one commentator believes that in addition to abolishing the zone of interests requirement in ESA cases, the Bennett decision "may also foreshadow the complete demise of the test." Brennan Cain, Note, Bennett v. Spear: Did Congress Intend for the Endangered Species Act's Citizen-Suit Provision to Be One Size Fits All?, 20 ENVIRONS ENVTL. L. & POL'Y J. 2, 16 (1997).
137. See Bennett, 117 S. Ct. at 1168.
138. See id. (citing Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948)). The Court stated that the agency action "must not be of a merely tentative or interlocutory nature." Id.
139. See id. (citing Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970)).
140. See id. at 1168-69 (noting that "the Biological Opinion and accompanying Incidental Take Statement [would] alter the legal regime to which the action agency is subject" and would have "direct and appreciable legal consequences").
Hence, the Supreme Court concluded that the Ninth Circuit had erred in affirming the district court’s dismissal of petitioners’ claims141 and remanded the case for review of petitioners’ section 4 claim under the ESA citizen-suit provision and the petitioners’ remaining section 7 claims under the APA.142

The policies and theories that led to the enactment and subsequent amendment of the ESA significantly influenced the outcome in Bennett and therefore warrant discussion. Passed with overwhelming congressional support in 1973,143 the ESA represented an effort to conserve plants and animals that were threatened with extinction.144 The ESA, informally called “Mother Nature’s 911,”145

assessed the finality of the Biological Opinion by comparing the effect of the Opinion to other events the Court had previously found too tentative to constitute final agency action. See id. at 1168 (citing Dalton v. Specter, 511 U.S. 462, 470 (1994) (holding that the submission of base closure recommendations to the President by the Secretary of Defense and corresponding committee did not constitute final agency action because the recommendations had to be approved by the President, who also had complete discretion to reject them); Franklin v. Massachusetts, 505 U.S. 788, 796 (1992) (explaining that the Secretary of Commerce’s presentation of a decennial census report to the President did not constitute final agency action because the preliminary nature of the census had no direct legal consequences)).

141. The Court noted that “petitioners’ complaint allege[d] facts sufficient to meet the requirements of Article III standing, and none of their ESA claims [were] precluded by the zone-of-interests test.” Id. at 1169.

142. See id.


144. See Pub. L. No. 93-205, § 2, 87 Stat. 884, 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-1544 (1994)) (providing congressional findings for enacting the ESA, including that various fish, wildlife, and plants have become extinct as a result of economic growth and development); H.R. REP. No. 95-1625, at 4-5 (1978), reprinted in 1978 U.S.C.C.A.N. 9453, 9455 (stating that Congress’s impetus for the Act was concern about rapid deterioration of environmental resources and an increasing number of species threatened with extinction). A species is considered “endangered” if it “is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined ... to constitute a pest.” 16 U.S.C. § 1532(6). A species is considered “threatened” if it “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” Id. § 1532(20).

was intended to counteract the greatest threats facing endangered species: environmental degradation, habitat destruction, and collection.\footnote{146} The ESA has been credited with creating “a new era in species conservation”\footnote{147} in which the goal is to “halt and reverse the trend toward species extinction, whatever the cost.”\footnote{148}

Regulation under the ESA is broad and extensive.\footnote{149} The Act has been interpreted to apply to the actions of private citizens on private land.\footnote{150} The ESA makes it unlawful for any person “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect [a member of an endangered species], or to attempt to engage in any such conduct.”\footnote{151} The Secretary of the Interior has interpreted the term “harm” as “an act which actually kills or injures wildlife.”\footnote{152} The Secretary later broadened this definition by specifying that “harm” also includes habitat modification significant enough to actually kill or injure wildlife by impairing behavioral patterns such as “breeding, feeding or sheltering.”\footnote{153} This interpretation of the term “harm” was upheld in \textit{Babbitt v. Sweet Home Chapter of Communities for a Great Oregon},\footnote{154} the most recent Supreme Court decision dealing with the ESA prior to \textit{Bennett}. \textit{Sweet Home} also found the regulation applicable to the actions of landowners on

\begin{quote}
\footnote{146} See James Salzman, \textit{Evolution and Application of Critical Habitat Under the Endangered Species Act}, 14 HARV. ENVTL. L. REV. 311, 311 (1990). In addition to the ESA’s prohibitions on injuring threatened or endangered wildlife and their habitat, section 9 of the ESA also makes it unlawful for any person to sell, deliver, receive, carry, transport, or ship any such species, by any means, in interstate or foreign commerce. See 16 U.S.C. § 1538(a)(1)(D)-(F).


\footnote{150} See 16 U.S.C. § 1538(a) (making it unlawful for “any person subject to the jurisdiction of the United States” to take an endangered species). Section 7 of the ESA applies to federal agencies acting in reference to public land. See id. § 1536(a)(2) (mandating the application of section 7 to “Interagency Cooperation” and stating that “[e]ach federal agency” shall not take an endangered species).

\footnote{151} Id. § 1532(19) (defining the term “take”).

\footnote{152} 50 C.F.R. § 17.3 (1997).

\footnote{153} Id.; see also THOMAS J. SCHOENBAUM & RONALD H. ROSENBERG, \textit{ENVIRONMENTAL POLICY LAW} 568 (3d ed. 1996) (stating that “because the Secretary was concerned that the old definition of ‘harm’ could be read to mean habitat modification alone, the Secretary inserted the phrase ‘actually kills or injures wildlife’ to preclude claims that only involve habitat modification without any attendant requirement of death or injury to protected wildlife”).

\footnote{154} 515 U.S. 687 (1995). The \textit{Sweet Home} Court held that the section 9 prohibition on “taking” a listed species applies to significant habitat modification on non-federal land. See id. at 708.
\end{quote}
private land.\textsuperscript{155} The \textit{Sweet Home} decision incited criticism\textsuperscript{156} that restricting development on private land constitutes a taking without just compensation under the Fifth Amendment to the Constitution,\textsuperscript{157} and debate continues as to whether Congress intended the ESA to apply to development on private land.\textsuperscript{158} Additionally, ambiguity remains regarding how close to death or injury wildlife must be before a violation of the Act occurs.\textsuperscript{159}

\textsuperscript{155} See id. at 697-98.

\textsuperscript{156} See Richard A. Epstein, \textit{Babbitt v. Sweet Home Chapters of Oregon: The Law and Economics of Habitat Preservation}, 5 \textit{SUP. CT. ECON. REV.} 1, 5-26, 49-57 (1997) (asserting that the Court upheld the Secretary's definition without an adequate understanding of the ESA's policies and without respect for the Constitution); Beth S. Ginsberg, \textit{Babbitt v. Sweet Home Chapter of Communities for a Great Oregon: A Clarion Call for Property Rights Advocates}, 25 \textit{ENVT. L. REP.} 10,478, 10,484 (1995) (asserting that the \textit{Sweet Home} decision provided fodder for the property rights movement); Deborah Meigs Bibbins, Note, \textit{The Goal of Imperfection: Babbitt v. Sweet Home and the Necessity of Imperfect Property Rights}, 29 \textit{CONN. L. REV.} 919, 931 (1997) (determining the \textit{Sweet Home} Court's interpretation of "harm" to be partly responsible for creating tension between property law and environmental law).


\textsuperscript{158} Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, argued in dissent in \textit{Sweet Home} that the majority had misinterpreted Congress's intent because no reasonable interpretation of the ESA would apply strict liability penalties to people's daily activities. See \textit{Sweet Home}, 515 U.S. at 721-22 (Scalia, J., dissenting); see also Christopher F. Tate, Note, \textit{Getting out of "Harm's" Way: Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 5 GEO. MASON L. REV. 101, 135-36 (1996) (concluding that the Court in \textit{Sweet Home} misinterpreted Congress's intent and asserting that future litigants face uncertainty as to what behavior will be found to violate the ESA).

\textsuperscript{159} In her concurring opinion, Justice O'Connor argued that the Secretary's regulation is limited to significant habitat modification causing actual, not merely
Despite the severity of the ESA's prohibitions and penalties, the statute does offer some flexibility. First, the Secretary is required to consider economic impacts in designating critical habitat. The parameters of a critical habitat proposal may be modified if the economic costs of a designation outweigh its benefits, so long as the alteration does not lead to the extinction of a species. If extinction might result, the agencies are not permitted to consider economic costs.

The ESA also provides an exemption process for economic interests. In *Tennessee Valley Authority v. Hill*, the Supreme Court enjoined the construction of the nearly completed Tellico Dam because of a three-inch endangered fish called the snail darter. The Snail Darter fed exclusively on snails that in turn required gravel cleaned by a constant flow of water in order to survive. The Court concluded that despite more than $103 million expended by Congress in building the dam, the relatively small number of snail darters should receive priority because of what the Court perceived as congressional intent to "halt and reverse the trend toward species extinction, whatever the cost." In response to the *Tennessee Valley Authority* decision, Congress amended the ESA to reduce the statute's rigidity. The ESA Amendments created an "Endangered Species Committee," which is popularly referred to as the "God

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162. *See id.* § 1533(b)(2).


164. *See id.* at 195.

165. *See id.* at 162.

166. *Id.* at 184.


168. *See id.* § 7(e), 92 Stat. at 3753.
Squad because, in essence, it plays God and makes a determination affecting the survival of a species. Under the amendments, the Committee is entitled to grant exemptions from the ESA if: (1) the proposed action is of national or regional public interest; (2) no feasible alternative exists; and (3) the benefits of the action outweigh the benefits of conservation. The exemption process is limited, however, in that it is unavailable to private property owners. Furthermore, exemptions are politically controversial and extremely rare.

One way state and private interests can avoid the prohibitions of section 9 of the ESA is to apply for an Incidental Take Permit. An Incidental Take Permit is granted if the taking will be incidental to otherwise lawful activity by the party, and if the party has devised an appropriate conservation plan (Habitat Conservation Plan, or “HCP”) that minimizes the impact of the taking on the endangered species and ensures the species' survival and recovery. While most property owners have applied for Incidental Take Permits on an individual basis in conjunction with a specific project, there is a growing trend toward the creation of regional HCPs, incorporating

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169. The source of the nickname is unknown, but it is used frequently. See 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, 780 n.1 (1993).


172. See id. § 1536(g).

173. The Endangered Species Committee has granted only two exemptions. See Tanya L. Godfrey, Note, The Reauthorization of the Endangered Species Act: A Hotly Contested Debate, 98 W. VA. L. REV. 979, 989 (1996). One exemption allowed the construction of the Tellico Dam despite the presence of the snail darter. See id. A second exemption was granted in 1992 to allow logging in a habitat occupied by the northern spotted owl in Oregon. See id.

174. See supra notes 39-44 and accompanying text (discussing section 9 of the ESA).

175. See Endangered Species Act Amendments of 1982, Pub. L. No. 100-478, 102 Stat. 2305 (codified as amended at 16 U.S.C. §§ 1531-1543 (1994)). The Incidental Take Permit provision was part of the 1982 Amendments to the ESA. See H.R. REP. NO. 97-835, at 29 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2870. If a development project requires any federal involvement, section 7 would supersede section 9, thereby avoiding section 9's restrictions. Developers prefer this option because section 7 consultations have fixed time limits and requirements that are usually lower than those faced when applying for a section 10 Incidental Take Permit. See Thompson, supra note 33, at 315 n.59.

176. See 16 U.S.C. § 1539 (a)(1)(b)-(2)(A). An Incidental Take Permit also may be granted “for scientific purposes or to enhance the propagation or survival of the affected species,” but this is usually not applicable to private developmental interests. Id. § 1539(a)(1)(A).
multiple property owners and sometimes multiple endangered species.\textsuperscript{177} Given that over ninety percent of threatened and endangered species rely on state and private land for part of their habitat, and over sixty percent rely on these segments for a majority of their habitat,\textsuperscript{178} HCPs may be an effective way for private landowners to meet the ESA's demands with only limited restrictions on the use of the land.\textsuperscript{179} Yet limiting land use, even marginally, still leaves the residual problem of unconstitutional takings under the Fifth Amendment.

To address the takings problem, the FWS and NMFS have proposed administrative reforms.\textsuperscript{180} Proposed reforms include special permits for landowners conducting activities that have a low effect on an endangered species.\textsuperscript{181} Also proposed is a "no surprises" policy to exempt landowners with an appropriate HCP from having to pay additional money for unforeseen circumstances that arise after an HCP is approved, as well as a "safe harbor" provision providing immunity from further ESA liability for landowners who improve a species' habitat on private land.\textsuperscript{182} Finally, another proposal is a "candidate conservation agreement," making landowners eligible for a permit for the incidental taking of a species that is not yet listed but may be proposed for listing.\textsuperscript{183}

\textsuperscript{177} See Thompson, supra note 33, at 318-21 (noting the increase in proposed regional HCPs and addressing some of the unique issues involved in a regional HCP).

\textsuperscript{178} See U.S. GEN. ACCOUNTING OFFICE, ENDANGERED SPECIES ACT: INFORMATION ON SPECIES PROTECTION ON NONFEDERAL LANDS 1 (1994).

\textsuperscript{179} As many as 400 HCPs, covering approximately 18 million acres of private and state property, are either completed or on the way to completion. See B.J. Bergman, A Plan to Die for: With Friends Like These, Wild Creatures Don't Need Enemies, SIERRA, Nov. 21, 1997, at 32, 34; see also George Frampton, Ecosystem Management in the Clinton Administration, 7 DUKE ENVT'L. L. \\& POL. F. 39, 40-42 (1996) (demonstrating the Clinton Administration's preference for HCPs as exemplified by the Administration's increased use of them); Donald L. Soderberg \\& Paul E. Larsen, Triggering Section 7: Federal Land Sales and "Incidental Take" Permits, 6 J. LAND USE \\& ENVTL. L. 169, 177-78 (1991) (stating that many commentators suggest that an Incidental Take Permit may be the only way to develop private property comprising an endangered species' critical habitat). But see John Kostyack, Reshaping Habitat Conservation Plans for Species Recovery, 27 ENVT'L. L. 755, 757-64 (1997) (criticizing the current HCP requirements for species conservation and proposing remedies).


\textsuperscript{181} See id.


\textsuperscript{183} See Gallagher, supra note 180, at B10. For further discussion of the candidate conservation agreements, see generally Martha F. Phelps, Comment, Candidate Conservation Agreements Under the Endangered Species Act: Prospects and Perils of an
A strict interpretation of the ESA provides for little consideration of economic impacts because the Secretary and FWS are given considerable discretion. Nevertheless, the agencies sometimes consider economic consequences in administering the Act because they often face political opposition and threats of litigation. Ultimately, economic interests are not without power to influence the administration of the ESA. Although the ESA initially was applied stringently to halt development projects that had even minimal adverse effects on endangered species, the Act has been amended subsequently and interpreted to provide greater leverage for property owners. Thus, while the Court in Tennessee Valley Authority was willing to protect a listed species "whatever the cost," the current trend is towards greater involvement of all.


184. See Lifting of the Moratorium on ESA Listings: Hearing Before the Comm. on Resources, 104th Cong. 75 (1996) (prepared statement of John G. Rogers, Acting Director, U.S. Fish and Wildlife Service) (stating that the FWS is "currently faced with several hundred Notices of Intent to Sue, as well as 159 lawsuits against the Service on endangered species issues") available in WESTLAW, 1996 WL 345821, at *2; Ray Vaughan, State of Extinction: The Case of the Alabama Surgeon and Ways Opponents of the Endangered Species Act Thwart Protection for Rare Species, 46 ALA. L. REV. 569, 584-90 (1995) (highlighting attacks on the ESA by business and industry groups). The ten amicus briefs filed by governmental and developmental interests, in addition to the absence of any amicus briefs filed by environmental groups, confirms the immense pressure of development interests in the Bennett litigation. See Brief for American Forest & Paper Ass'n, American Petroleum Inst., Northwest Forest Resource Council, and Southern Timber Purchasers Council, Bennett (No. 95-813); Brief for the National Ass'n of Home Builders of the United States, the California Bldg. Indus. Ass'n, the Building Indus. Legal Defense Found., the National Multi-Housing Council, the National Apartment Ass'n, and the National Ass'n of Indus. and Office Properties, Bennett (No. 95-813); Brief for American Homeowners Found., American Land Rights Alliance as Amici Curiae, Bennett (No. 95-813); Brief for the Washington Legal Found., U.S. Senator Dirk Kempthorne, U.S. Representatives Bill Baker, Helen Chenoweth, Gerald B. Solomon, and Richard W. Pombo, Bennett (No. 95-813); Brief for the Allied Educ. Found., and Fairness to Land Owners Comm., Bennett (No. 95-813); Brief for the State of Texas, Bennett (No. 95-813); Brief for the Association of Cal. Water Agencies, the State Water Contractors, and the Central Valley Project Water Ass'n, Bennett (No. 95-813); Brief for the American Farm Bureau Fed'n, California Farm Bureau, Idaho Farm Bureau, Texas Farm Bureau, and Oregon Farm Bureau, Bennett (No. 95-813); Brief for the States of California, Alaska, Arizona, Arkansas, Colorado, Hawaii, Idaho, Kansas, Missouri, Montana, Nebraska, Ohio, Utah, and West Virginia, Bennett (No. 95-813); Brief for the Pacific Legal Found., California Cattlemen's Ass'n, National Cattlemen's Beef Ass'n, the CATL Fund, and POSSEE, Bennett (No. 95-813).


The Bennett decision appears to comport with the trend in ESA legislation and jurisprudence toward incorporating economic and developmental interests in the major decisions involving endangered species. The Sweet Home Court's decision to apply the broad prohibitions of the ESA to private parties created a disparity in favor of environmental interests. The result was to create greater instability in an already weak Act, with fears among ESA proponents that the statute would be dismembered by Congress. By giving landowners and developers equal footing to challenge erroneous ESA decisions, the Bennett decision creates a more equal balance between environmentalists and property owners.

While species advocates assert that the ESA has been under-regulated, private landowners argue that there has been too much regulation. Predictions prior to Bennett were that the Act would not survive if the public outcry over private property rights continued. Opposition to the ESA grew as people lost their jobs.

187. See supra notes 180-83 (explaining the development of incentives for landowners to minimize the impact of habitat modification).


192. See Patterson, supra note 149, at 759-60. The broad interpretation of the ESA's
and property, not just to owls and grizzly bears with notable appeal, but to the smallest species of insects and plants. Particularly controversial incidents, in which multi-million dollar ventures were halted because of the existence of a seemingly insignificant number of minute species, brought the issue to the media forefront in 1997, demanding attention. The Bennett decision at least gives those parties who are affected directly an opportunity to ensure that the Secretary has not abused his discretion in deciding that land use must be limited.

While property owners may have difficulty meeting the abuse of discretion threshold, the potential for a legal challenge will nonetheless compel federal agencies to use sound scientific data in making critical habitat designations and in issuing biological provisions to include prohibitions on takings by private citizens has created public controversy. See id. Reform of the ESA has become a top priority among grassroots organizations. See id. at 759 n.36.

193. See WILLIAM PERRY PENDLEY, WAR ON THE WEST 89 (1995). Pendley notes that the ESA implementation costs have been estimated to be several billion dollars and asserts that “Westerners know all too well what the ESA is costing in terms of lost jobs, lost wages, lost revenues, lost projects, and lost land uses.” Id. at 97.

194. One of the most unsettling events involving the ESA in 1997 concerned the endangered Delhi Sands flower-loving fly. To avoid prosecution under the ESA for the taking of eight Delhi Sands flies, a California county was compelled to relocate the construction of a hospital and set aside acreage for the preservation of the flies. See National Ass’n of Home Builders v. Babbitt, 130 F.3d 1041, 1043 (D.C. Cir. 1997). Additionally, the county had to fund research on the flies. See Forum: Issues Affecting the Environment in 1997, METRO. CORP. COUNSEL, Apr. 1997, at 56, available in LEXIS, Legnew Library, Allnws File. The total cost of the relocation, the land preserve, and the research funding was $4.5 billion. See id.

195. Judicial review of agency action requires a court to determine if the action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A) (1994). In the context of administrative law, “arbitrary and capricious” is defined as “willful and unreasonable action without consideration or in disregard of facts or law or without determining principle.” BLACK'S LAW DICTIONARY 105 (6th ed. 1991). Abuse of discretion is characterized by “[a] judgment or decision ... which has no foundation in fact or law.” Id. at 6. Section 706(2)(A)'s standard of review has been interpreted to mean that the reviewing court should consider whether relevant factors were weighed and whether there was a “clear error of judgment.” See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). The Supreme Court determined that while the reviewing court's examination of the facts should be “searching and careful, the ultimate standard of review is a narrow one.” Id.

Given the uphill battle plaintiffs face in challenging agency action under the abuse of discretion standard, they rarely succeed in overturning agency decisions. See Cain, supra note 135, at 15. Aware of this outcome, many environmentalists do not expect the Bennett decision to affect ESA decisions. See id. But see Lynwood P. Evans, Note, Bennett v. Spear: A New Interpretation of the Citizen Suit Provision, 20 CAMPBELL L. REV. 173, 191 (1997) (stating that while the Bennett decision alone will not lead to environmental destruction, it will give property interests greater leverage to increase pressure on the environment overall).
opinions. Decisions rendered under the ESA have been criticized for their lack of scientific support.\textsuperscript{196} The National Biological Survey ("NBS") was created in response to this problem; its principal mission is to gather accurate information about endangered and threatened species.\textsuperscript{197} Yet despite the hopes of the NBS's creators, private landowners opposed research conducted by the NBS on their property.\textsuperscript{198} This opposition was not surprising given that, prior to \textit{Bennett}, landowners would not have the opportunity to challenge any decisions made concerning their land. While the \textit{Bennett} decision may not affect the final outcome in an ESA determination, perhaps it will alleviate fears among private landowners who may now challenge these determinations concerning their land, and consequently improve the scientific quality of the determination.\textsuperscript{199} On the other hand, \textit{Bennett} may perpetuate the exclusion of government scientists from private land because an incentive remains to deprive ESA decisionmakers of the data required to make accurate scientific decisions.\textsuperscript{200} The final outcome remains to be seen, but the prevailing sentiment among commentators is that the outcome will improve the

\textsuperscript{196} See Beth Baker, \textit{Endangered Species Legislation}, BIOSCIENCE, Dec. 1, 1997, at 731, 733 ("The Act too often lists species without a sound scientific basis." (quoting the testimony of W. Henson Moore, head of the American Forest and Paper Association, before the Senate and Environmental Works Committee hearing on a Senate bill to reauthorize the ESA)); see also Michael C. Blumm et al., \textit{Beyond the Parity Promise: Struggling to Save Columbia Basin Salmon in the Mid-1990s}, 27 ENVTL. L. 21, 111-19 (1997) (stating that there are widespread complaints that recovery efforts for endangered salmon lack scientific justification and offering solutions); Nelson, supra note 14, at 82 (asserting that the one area of ESA reform that legislators must improve upon is science). One commentator notes that the Forest Service imposed restrictions on boating in the Sawtooth Recreation Area in 1996 to protect the listed Chinook Salmon, despite the Service's admitted lack of scientific evidence that the boating would have any effect on the fish. See Murray D. Feldman, Bennett v. Spear: \textit{Supreme Court Confirms Standing to Challenge Excessive Government Regulation Under the Endangered Species Act}, 40 ADVOC. 20, 23 (1997).


\textsuperscript{198} See Royal C. Gardner, \textit{Taking the Principle of Just Compensation Abroad: Private Property Rights, National Sovereignty, and the Cost of Environmental Protection}, 65 U. CIN. L. REV. 539, 565-66 (1997). The solution to the problem presented by this opposition was to require NBS personnel to seek consent from the owner before entering private property. See id. at 566.

\textsuperscript{199} See Emily E. Granzotto, \textit{Extending Standing Under the Endangered Species Act to Include Non-Environmentally Interested Parties}, 6 S.C. ENVTL. L.J. 240, 244 (1997) (predicting that the \textit{Bennett} decision will add to the scientific caliber of ESA decisions).

\textsuperscript{200} The NBS has been portrayed as a "guerrilla army that [sneaks] uninvited on to private property in search of rare creatures in whose name to block development." \textit{Biodivisiveness}, ECONOMIST, Feb. 25, 1995, at 85, 85.
science used in ESA determinations.201

The popular response to the flood of problems surrounding the ESA has been a movement among both land use proponents and endangered species advocates towards reforming the ESA.202 When the ESA was enacted in 1973, Congress included a sunset provision that would require periodic reauthorization of the statute.203 The statute was reauthorized accordingly during the Carter Administration in 1978204 and during the Reagan Administration in 1982205 and 1988.206 While the statute officially expired in 1992,

201. See Feldman, supra note 196, at 22 (asserting that Bennett sends an important signal to agencies involved in ESA determinations that they will be held accountable for the scientific adequacy and support of these decisions); Granzotto, supra note 199, at 244 (claiming that the Bennett decision will “force[] federal agencies to establish sound factual data before interrupting the lives of persons affected by the policies”); Cain, supra note 135, at 15 (stating that the Bennett decision will require the FWS to make sure that their section 7 biological opinions are “scientifically defensible”).

202. The ESA has been “maligned by biodiversity conservation proponents and opponents alike, either as not doing enough or as running ramshackle over private property rights.” J.B. Ruhl, Biodiversity Conservation and the Ever-Expanding Web of Federal Laws Regulating Nonfederal Lands: Time for Something Completely Different?, 66 U. COLO. L. REV. 555, 579 (1995). ESA proponents want to improve the statute’s protection of biodiversity and to reduce the recurring conflict between environmental and developmental interests. See Federico Cheever, The Road to Recovery: A New Way of Thinking About the Endangered Species Act, 23 ECOLOGY L.Q. 1, 1-33 (1996) (addressing the ESA’s failures in addressing biological diversity and suggesting reforms); Stuart L. Somach, What Outrages Me About the Endangered Species Act, 24 ENVTL. L. 801, 801-13 (1994) (examining the conflicts between endangered species advocates and land use interests, and proposing solutions); James Drozdowski, Note, Saving an Endangered Act: The Case for a Biodiversity Approach to ESA Conservation Efforts, 45 CASE W. RES. L. REV. 553, 600-02 (1995) (concluding that the ESA has failed to address biodiversity and proposing that this failure will result in irreversible loss of diversity). Property owners want the Act to address the issue of unconstitutional takings under the Fifth Amendment, and they want to be more directly involved in the recovery efforts. See Bipartisan ESA Reform Moves in Senate; Bill Features Breaks for Landowners, REAL EST./ENVTL. LIABILITY NEWS, Oct. 17, 1997, available in LEXIS, Legnew, Allnews File [hereinafter Bipartisan ESA Reform] (stating that landowners want to be more involved in the recovery planning process of endangered species and want incentives for creating HCPs); see also supra notes 180-83 and accompanying text (mentioning proposed incentives to remedy the takings problem for landowners who participate in habitat conservation efforts).

203. See Eva Tompkins, Comment, Reauthorization of the Endangered Species Act—A Comparison of Two Bills That Seek to Reform the Endangered Species Act: Senate Bill 768 and House Bill 2275, 6 DICK. J. ENVTL. L. & POL’Y 119, 121 (1997). Sunset provisions are common in public interest statutes like the ESA. See Plater, supra note 191, at 876 n.3.


Congress has continued to appropriate funds annually for enforcement of the Act without reauthorizing the statute.\textsuperscript{207} A rider attached to a Defense Department supplemental appropriations bill in 1995 put a one-year moratorium on funding for new listings of and critical habitat designations for endangered species,\textsuperscript{208} but Congress decided not to enact a similar provision in 1996, and listing has since resumed.\textsuperscript{209} Listings, critical habitat designations, and proposed recovery plans for endangered species have become significantly backlogged.\textsuperscript{210} Agencies complain that a lack of financial resources has affected their ability to implement the Act effectively.\textsuperscript{211} Because


\textsuperscript{207} See Tompkins, supra note 203, at 121.

\textsuperscript{208} See Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104-6, tit. II, ch. 4, 109 Stat. 73, 86. The FWS claimed that the urgent need for defense appropriations was fabricated. See John F. Turner & Jason C. Rylander, Conserving Endangered Species on Private Lands, 32 LAND & WATER L. REV. 571, 590 (1997). The effect of the moratorium on FWS was twofold. First, the rider kept the agency from listing endangered species or designating critical habitats. See Jason Coatney, The Council on Environmental Cooperation: Redaction of “Effective Enforcement” Within the North American Agreement on Environmental Cooperation, 32 TULSA L.J. 823, 832-33 (1997). Second, the rider reduced the FWS budget for implementing the ESA by $1.5 million and prohibited offsetting the loss from other programs. See id. at 833. For a discussion of the destructive effect riders may have on environmental regulations, see generally Sandra Beth Zellmer, Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis, 21 HARV. ENVT'L. L. REV. 457 (1997).


\textsuperscript{210} Currently, 1686 species are listed as threatened or endangered. See Division of Endangered Species, U.S. Fish & Wildlife Serv., Box Score: Listing and Recovery Plans as of January 31, 1998 (visited Feb. 24, 1998) <http:lwww.fws.gov/-r9endspp/boxscore.html>. Recovery plans have been prepared for only 744 of the 1686 listed species. See id. Harvard biologist Edward O. Wilson estimates that 27,000 species of flora and fauna disappear each year at a rate of approximately 74 per day, or three per hour. See Copley News Service, scene1, COLEY NEWS SERV., Nov. 3, 1997, available in LEXIS, News Library, Curnws File.

\textsuperscript{211} Environmentalists are "yelling for more money," which, they say, is necessary to alleviate problems with the Act and for the successful implementation of the Act. Laura Spitzberg, The Reauthorization of the Endangered Species Act, 13 TEMP. ENVT'L. L. & TECH. J. 193, 233 (1994); see also Testimony of Jamie Rappaport Clark, Director of U.S. FWS Before the Senate Committee on Environment and Public Works, M2 PRESSWIRE, Sept. 26, 1997, available in WESTLAW, 1997 WL 14464191, at *10 [hereinafter Testimony of Jamie Rappaport Clark] (asserting that lack of adequate funding will result in "significant litigation backlogs"; moreover, actions by federal agencies will be delayed, and the agencies will be unable to meet the burden of their increased responsibilities under the Act). In response to Senator Thomas's (R-Wyo.) question regarding why recovery plans have not been implemented for all listed species, Ms. Clark referred to a lack of sufficient funds and resources. See Testimony of Jamie Rappaport Clark, supra, at
Congress controls the appropriations for the ESA on an annual basis, listing activities remain at risk.\textsuperscript{212} The overall consensus among agencies involved in implementing the ESA, property rights advocates, and environmentalists is that the ESA needs reauthorization and reform.\textsuperscript{213} With Bennett creating a more level playing field for property rights interests, reauthorization and reform may proceed with both parties making greater efforts to compromise.\textsuperscript{214}

Both houses of Congress are currently considering ESA bills.\textsuperscript{215} On September 16, 1997, Senator Dirk Kempthorne (R-Idaho), joined by Senators John Chafee (R-Rhode Island), Max Baucus (D-Montana), and Harry Reid (D-Nevada), introduced Senate Bill 1180 to reauthorize the ESA.\textsuperscript{216} The bill was sent to the Senate Environment and Public Works Committee by a vote of fifteen to three and was placed on the Senate legislative agenda under general

\textsuperscript{212} See Richard Littell, \textit{The Endangered Species Act: Not Just for Environmentalists Anymore}, LEGAL TIMES, Apr. 14, 1997, at 34, 36 (stating that since the ESA expired in 1992, the FWS has had to depend on “year-to-year grants of funds” and “cutbacks in the agency’s programs”).

\textsuperscript{213} See Bruce Babbitt, \textit{The Endangered Species Act and “Takings”: A Call for Innovation Within the Terms of the Act}, 24 ENVTL. L. 355 (1994) (suggesting reform measures to continue effective environmental policy under the ESA); Bill Thompson, \textit{Externalization of Federal Public Policy Costs: The Endangered Species Act}, 8 FORDHAM ENVTL. L.J. 171, 171-74 (1996) (asserting that ESA reform is a “good place to begin” to find ways to meet the needs of our economy and environment); Michael Vivoli, Note, “Harm”ing Individual Liberty: Assessing the U.S. Supreme Court’s Decision in Babbitt v. Sweet Home, 32 CAL. W. L. REV. 275, 329 (1996) (concluding that the ESA is flawed and suggesting repeal).

\textsuperscript{214} One commentator has suggested that because the “strongest property rights arguments” have been resolved by Bennett, “Congress can now get down to the business of reauthorizing the [ESA] … with a calm, rational deliberation, rather than by [the] heated, rhetorically charged, partisan fighting” that characterized prior reform efforts. Nix, \textit{supra} note 190, at 780. \textit{But see} Daniel A. Farber, \textit{Is the Supreme Court Irrelevant? Reflections on the Judicial Role in Environmental Law}, 81 MINN. L. REV. 547, 547 (1997) (asserting that the Supreme Court has not had much impact on environmental regulations).


\textsuperscript{216} \textit{See} S. 1180, 105th Cong. (1997).
orders. The bipartisan bill appears to have the support of property and development interests. The bill stresses species recovery over maintenance of species on the brink of extinction, requiring the FWS or the NMFS to develop recovery plans for all listed species within a five-year period. The bill seeks to improve the quality of the ESA's scientific findings by requiring "peer review" of listing and delisting decisions by scientists nominated by the National Academy of Sciences and appointed by the Secretary. The bill also stresses greater public and state participation in managing listed species. The bill provides incentives for landowners to protect a species' habitat by issuing "low effect" permits, installing "no surprises" and "safe harbor" policies, and creating a "candidate conservation agreement" provision. Finally, the bill authorizes a generous increase in expected funding. The Senate is expected to take action on the bill in 1998. Senators opposed to the bill are preparing to introduce amendments to improve its species recovery provisions when it is brought to the Senate floor.

On July 31, 1997, Representative George Miller (D-California), along with fifty-three other Democrat and Republican representatives, introduced House of Representatives Bill 2351. After introduction, the bill was referred to the Committee on Resources and to the Committee on Ways and Means for a period to be determined by the Speaker. Deemed "an environmentalists'
the House bill also seeks to promote species recovery and create balanced incentives for engaging landowners in species conservation, but without the Senate bill’s proposed peer review and with a more limited spectrum of incentives for landowners. Supported primarily by environmentalists, the bill’s future is uncertain.

Common to both bills is the recognition that an accord must be struck between environmentalists and property rights advocates if there is to be species recovery. Ultimately, the success of any reform effort depends on a proposed bill’s ability to balance economic and environmental interests. The Bennett decision affirmed property owners’ rights to be involved in ESA determinations. Similarly, Congress also should acknowledge such interests in ESA reform.

Regardless of the Bennett decision’s influence on ESA reauthorization and reform, the decision is notable in that it has cleared up the confusion among the circuit courts regarding the application of the zone of interests test of prudential standing. Prior to Bennett, the circuit courts were in significant discord regarding both the applicability of the zone of interests test to actions outside of the APA and whether or not economic concerns alone would be adequate to bring a plaintiff within the zone of interests protected by environmental statutes.

The zone of interests test of prudential standing made its first


232. See Baker, supra note 196, at 733.

233. For updates on the status of both the Senate and House ESA reform bills, see Thomas Legislative Information on the Internet (updated daily) <http://thomas.loc.gov/>.

234. See Baker, supra note 196, at 733.

235. See Bennett, 117 S. Ct. at 1169.

236. See supra notes 7-11 and accompanying text (discussing further the disagreement among the circuit courts).

237. See supra note 7 (citing and comparing the circuit court cases that address whether the zone of interests test applies to civil suits under the ESA).

238. Compare Mountain States Legal Found. v. Glickman, 92 F.3d 1228, 1237 (D.C. Cir. 1996) (holding that protection of economic interests is consistent with the statutory purpose of the ESA), with Nevada Land Action Ass’n v. United States Forest Serv., 8 F.3d 713, 716 (9th Cir. 1993) (concluding that “[t]he purpose of [the statute] is to protect the environment, not the economic interests of those adversely affected by agency decisions”), and Dan Caputo v. Russian River County Sanitation Dist., 749 F.2d 571, 575 (9th Cir. 1984) (holding that plaintiffs did not have standing under the civil-suit provision of the ESA because their claims arose out of economic, and not environmental, concerns).
appearance in *Association of Data Processing Service Organizations, Inc. v. Camp.* In that case, the plaintiffs, who sold data processing services to other companies, challenged a ruling of the Comptroller of the Currency allowing banks to provide data processing services directly to other banks and to bank customers. The Supreme Court held, pursuant to section 702 of the APA, that in addition to the case or controversy requirement of Article III, a plaintiff seeking judicial review under the APA must also show that his interests are "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." The Court analyzed the legislative history of the Banking Service Corporation Act of 1962 and, finding no congressional intent to preclude review of the plaintiffs' action, recognized that the plaintiffs were within the zone of interests protected by the statute.

After the *Association of Data Processing* decision, the Court began applying the zone of interests test as a prudential standing limitation, although its use was limited. Subsequently, in *Clarke v. Security Industry Ass'n,* the Court revisited the zone of interests test in another case involving an APA claim. In *Clarke,* the Supreme Court broadened the requirements of the zone of interests test by

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240. See id. at 151.
241. Id. at 153. Congress can use its legislative authority to grant standing to citizens as long as the constitutional requirements of Article III are met. See *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 578 (1992); see also *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 100 (1979) (holding that Congress can increase standing to the limits of Article III). If Congress has not granted standing, the courts will apply the zone of interests test. See *Nichol,* supra note 130, at 91. In determining the zone of interests, courts look to the structure of the statute and its legislative history to reveal congressional intent. See *Clarke v. Securities Indus. Ass'n,* 479 U.S. 388, 399-400 (1987). The interests of a plaintiff that the statute protects may be "aesthetic, conservational, and recreational" values, as well as economic values. *Association of Data Processing,* 397 U.S. at 154.
243. See *Association of Data Processing,* 397 U.S. at 155-56. The Court pointed out that Congress could eliminate prudential standing questions by authorizing standing up to the limits of Article III. See id. at 156.
245. The Court has rarely used the zone of interests test outside of the APA, although it has been applied in constitutional cases and in private rights of action. See, e.g., *Wyoming v. Oklahoma,* 502 U.S. 437, 469 (1992) (Scalia, J., dissenting) (stating that the zone of interests test applies to the Constitution generally); *Air Courier Conference of Am. v. American Postal Workers Union,* 498 U.S. 517, 530 (1991) (holding that the Postal Reorganization Act does not give postal service workers a right to sue the United States Postal Service for employing private couriers to deliver mail abroad).
holding that judicial review will be denied only when "the plaintiff's interests are ... marginally related to or inconsistent with the purposes implicit in the statute." The Court asserted that the zone of interests test was "not meant to be especially demanding." The Court in Clarke did not limit its inquiry to the specific provision of the statute challenged by the plaintiffs, but decided that it could look at any provision bearing on the overall purpose of the act. The Court also stated that the zone of interests test was not universally applicable to questions of prudential standing involving claims other than those brought under the APA. The Court did not specify, however, what tests would apply to plaintiffs seeking judicial review under statutes other than the APA.

The Supreme Court later narrowed the interpretation of the zone of interests test in Air Courier Conference of America v. American Postal Workers Union. Unlike the Clarke court, the Court in Air Courier refused to accept that the overall purpose of the act in question might support the plaintiffs' claims in deciding whether their interest fell within the requisite zone of interests. The Court asserted that applying such a "level of generality ... could deprive the zone-of-interests test of virtually all meaning." Thus, according to the Court, to meet the zone of interests test, the plaintiff's interest must be consistent with the provision of the act at issue, not merely the overall purpose of the act.

Prior to the Bennett decision, circuit courts did not agree on whether the zone of interests test applied to actions brought pursuant to the citizen-suit provision of the ESA. In Defenders of Wildlife v. Hodel, the Eighth Circuit held that a plaintiff must meet only Article III constitutional standing requirements to attain proper

247. Id. at 399.
248. Id.
249. See id. at 401.
250. See id. at 400 n.16.
251. See id. at 400.
252. 498 U.S. 517 (1991). In Air Courier, postal workers brought suit to challenge a United States Postal Service decision that allowed private mail couriers to deliver mail abroad under certain conditions. See id. at 519.
253. See id. at 529-30 (concluding that the overall policies of the Postal Reorganization Act ("PRA") did not bring the plaintiffs' claims within the zone of interests of the PRA's Private Express Statutes provisions).
254. Id.
255. See id. at 530.
256. See supra notes 7-11 and accompanying text.
standing under the ESA citizen-suit provision.\textsuperscript{258} The court’s position was that the zone of interests test should not be applied because the “any person” language in the ESA citizen-suit provision reflected the intent of Congress to bypass the zone of interests test.\textsuperscript{259} Conversely, the D.C. Circuit applied the zone of interests test in \textit{Idaho Public Utilities Commission v. Interstate Commerce Commission},\textsuperscript{260} a suit brought under the ESA citizen-suit provision. The D.C. Circuit cited \textit{Clarke} in emphasizing that the threshold question for the zone of interests test is whether Congress intended to permit a particular class of plaintiffs to challenge agency violations of the statute in question.\textsuperscript{261} Because the state of Idaho, as plaintiff, asserted an interest in wildlife protection, the Court concluded that Idaho was within the zone of interests protected by the ESA.\textsuperscript{262}

Similarly, in \textit{Pacific Northwest Generating Cooperative v. Brown},\textsuperscript{263} the Ninth Circuit applied the zone of interests test brought under the ESA's civil-suit provision by hydropower producers and consumers of endangered salmon.\textsuperscript{264} The court noted that it was still an “open question” whether the zone of interests test should be

\begin{footnotes}
\item[258] See id. at 1038 (citing Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979)). The Supreme Court reversed the Eighth Circuit in \textit{Defenders of Wildlife} because the plaintiffs failed to meet the constitutional standing requirements of injury-in-fact and redressability, but the Court never addressed the circuit court’s conclusion that the citizen-suit provision of the ESA removed prudential standing limitations. See \textit{Defenders of Wildlife}, 504 U.S. at 562-71. More recently, the Eighth Circuit did not apply the zone of interests test to an ESA citizen suit in \textit{Mausolf v. Babbitt}, 125 F.3d 661 (8th Cir. 1997), a case that arose when snowmobilers challenged the National Park Service’s closure of areas in Voyageurs National Park because of the presence of endangered species. See \textit{Mausolf v. Babbitt}, 913 F. Supp. 1334 (D. Minn. 1996), rev’d on other grounds, 125 F.3d 661 (8th Cir. 1997). At the district court level, the court applied the zone of interests test to plaintiffs’ claims brought under the APA, but not to a claim filed under the ESA civil-suit provision. See id. at 1341-42. The Park Service and intervening conservation groups appealed to the Eighth Circuit, but the circuit court did not address the district court’s conclusion regarding the snowmobilers’ standing under the ESA. See \textit{Mausolf}, 125 F.3d at 667.

\item[259] See \textit{Defenders of Wildlife}, 851 F.2d at 1039 (citing 16 U.S.C. §§ 1540(g), 1532(13)).

\item[260] 35 F.3d 585 (D.C. Cir. 1994). In \textit{Idaho v. Public Utilities Commission}, the state of Idaho and three mining companies filed suit against the Interstate Commerce Commission for failure to prepare a biological assessment within the 180-day limit mandated by the ESA. See id. at 597.

\item[261] See id. at 590-91. The D.C. Circuit has also applied the zone of interests test to claims brought under other environmental statutes. See \textit{Hazardous Waste Treatment Council v. Thomas}, 885 F.2d 918, 921-27 (D.C. Cir. 1989) (applying the zone of interests test applied in the citizen-suit context to limit actions to those who are directly regulated or benefited by the Resource Conservation and Recovery Act).


\item[263] 38 F.3d 1058 (9th Cir. 1994).

\item[264] See id. at 1065.
\end{footnotes}
applied to parties asserting solely economic harm, but a
determination on such grounds was unnecessary because the
plaintiffs also asserted an interest in the preservation of the salmon in
question, and thus their environmental interests alone met the
standing requirement. However, prior to Supreme Court review,
the Ninth Circuit subsequently resolved the "open question" in
Bennett v. Plenert, in which it held that the zone of interests test
applied to citizen suits brought under the ESA and that petitioners
asserting solely economic interests were barred from filing suit for
failure to satisfy the test.

Circuit courts applying the zone of interests test of prudential
standing to suits brought under the ESA's citizen-suit provision still
had to determine whether each plaintiff's particular harm fell within
the zone of interests protected by the statute. For example, even
though the D.C. Circuit applied the zone of interests test in Mountain
States Legal Foundation v. Glickman, the court concluded that the
plaintiffs' economic interests alone were sufficient to satisfy the zone
of interests test of prudential standing for suits brought pursuant to
the ESA citizen-suit provision. In that case, non-profit
corporations, municipalities, and logging companies sued to
challenge the government's choice of alternatives for the method of

265. See id. (noting that the Eighth Circuit had decided to dispense with the zone of
interests requirement for citizen suits under the ESA).
266. See id. at 1065.
267. 63 F.3d 915 (9th Cir. 1995), rev'd sub nom. Bennett v. Spear, 117 S. Ct. 1154
(1997).
268. See id. at 918-19. For further discussion of the Ninth Circuit decision in Bennett v.
Plenert, see supra notes 79-85 and accompanying text. The Ninth Circuit has also
determined that non-environmental concerns do not satisfy the prudential standing
requirements for other environmental statutes. In Nevada Land Action Ass'n v. United
States Forest Service, 8 F.3d 713 (9th Cir. 1993), the Ninth Circuit applied the zone of
interests test to a citizen suit under NEPA and decided that the plaintiffs' solely economic
interests were not within the zone of interests Congress intended to protect by statute.
See id. at 716. Similarly, in Dan Caputo Co. v. Russian River County Sanitation District,
749 F.2d 571 (9th Cir. 1984), the Ninth Circuit denied plaintiffs' standing under the Clean
(codified as amended at 33 U.S.C. § 1365 (1994)), because the plaintiffs' injury did not
arise out of an environmental interest. See Dan Caputo Co., 749 F.2d at 575.
269. Even though some circuit courts applied the zone of interests test, at least one
commentator notes that they sometimes applied it incorrectly. See Kathleen C. Becker,
Bennett v. Plenert: Environmental Citizen Suits and the Zone of Interest Test, 26 ENVTL.
L. 1071, 1081-85 (1996) (addressing misapplication of the zone of interests prudential
standing test in circuit courts). The author suggests that the language "'any person' [in
the ESA citizen-suit provision] does not grant all conceivable persons a cause of action"
and asserts that such an interpretation is supported by policy reasons. Id. at 1088.
270. 92 F.3d 1228 (D.C. Cir. 1996).
271. See id. at 1237.
timber harvesting in a national forest. The court determined that Congress had intended to subject agencies to both environmental and economic challenges, and granted standing to the plaintiffs.

The issue of whether prudential standing applied to actions brought pursuant to the citizen-suit provision of the ESA was nearly resolved in 1995 in Babbitt v. Sweet Home Chapter of Communities for a Great Oregon. Landowners, logging companies, and families dependent on the forest product industries brought the case against the Secretary of the Interior and the Director of the FWS under the citizen-suit provision of the ESA. Plaintiffs alleged that the application of the "harm" regulation to the red-cockaded woodpecker and northern spotted owl had injured the plaintiffs economically. The Supreme Court granted certiorari, but the question of the plaintiffs' standing was not raised despite the plaintiffs' assertion of solely economic interests in challenging the Secretary's regulation regarding habitat modification. Because the issue of standing was not raised, the Supreme Court deferred answering the question regarding the applicability of the zone of interests test to citizen suits under the ESA until the Bennett decision.

Bennett clears up the confusion among the circuit courts regarding the applicability of the zone of interests test to suits brought under the ESA's citizen-suit provision. The Bennett Court held that "any person" may bring suit, expanding standing to the limits of Article III and displacing prudential standing requirements.

272. See id. at 1231. The plaintiffs' first claim asserted an interest in observing grizzly bears in the wild. See id. at 1236. The court dismissed this claim, stating that the plaintiffs did not have a real interest in such protection. See id. at 1236-37.

273. See id. at 1236-38. Also at issue in Mountain States Legal Foundation was the question of whether the plaintiffs' interests fell within the zone of interests protected by NEPA to grant them standing under their NEPA claim. See id. at 1235-36; see also infra notes 292-302 and accompanying text (discussing the procedural requirements imposed by NEPA on federal agencies). For a more comprehensive analysis of the Mountain States Legal Foundation opinion, see generally Robert I. Levy, Note, Mountain States Legal Foundation v. Glickman: Environmental Standing Continues Its Trek As a Moving Target, 10 Tul. Envtl. L.J. 123 (1997), and Elizabeth Monohan & Brian Wright, Comment, Mountain States Legal Foundation v. Glickman: Disputes over Timber Removal from National Forests, 12 J. Nat. Resources & Envtl. L. 189 (1996-97).


275. See id. at 692.

276. See supra notes 141-55 and accompanying text (discussing the Secretary's definition of the term "harm").

277. See Sweet Home, 515 U.S. at 692.

278. See id.

279. See Bennett, 117 S. Ct. at 1163.
for claims brought under the citizen-suit provision.\textsuperscript{280} Plaintiffs bringing claims pursuant to the APA, however, must still meet the prudential standing zone of interests requirements.\textsuperscript{281} Whether a plaintiff's claim lies within the zone of interests is determined by reference to the particular provision of law upon which the plaintiff relies, not the overall purpose of the act, a determination the Court believed had been established by precedent.\textsuperscript{282} The petitioners in \textit{Bennett} brought claims pursuant to section 7 of the ESA,\textsuperscript{283} which required the Secretary to use economic considerations in making critical habitat designations.\textsuperscript{284} Because Congress contemplated that the Secretary would consider economic factors, the Court determined that the petitioners' economic interests were among those protected by the provision of the statute on which the petitioners relied and, therefore, the petitioner's met the zone of interests test necessary to pursue their claim.\textsuperscript{285}

The inclusion of economic interests within the zone of interests for claims brought under the APA may have implications for other cases brought pursuant to environmental statutes. Provided that economic interests are contemplated within the statutory provision on which a plaintiff relies, it is likely that economic interests will now be found within the zone of interests protected by other environmental statutes. Cases like \textit{Dan Caputo Co. v. Russian River County Sanitation Distric}t\textsuperscript{286} and \textit{Nevada Land Action Ass'n v. United States Forest Service,}\textsuperscript{287} denying standing to plaintiffs with completely economic interests, appear to have been decided wrongly in light of \textit{Bennett}.\textsuperscript{288}

\textsuperscript{280} See \textit{id.} at 1167.

\textsuperscript{281} See \textit{id.}; see also \textit{supra} note 20 (discussing a plaintiff's right to judicial review under the APA).

\textsuperscript{282} See \textit{Bennett}, 117 S. Ct. at 1167 (citing Air Courier Conference of Am. v. American Postal Workers Union, 498 U.S. 517 (1991); Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990); Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970)). Justice Scalia, writing the opinion of the Court, expressed frustration at the Ninth Circuit's denial of standing, stating that it was "difficult to understand how the Ninth Circuit could have failed to see . . . from our cases" that the plaintiff's economic interests should be consistent with the particular provision of the ESA at issue. \textit{Id.}

\textsuperscript{283} See \textit{id.} at 1168.

\textsuperscript{284} See \textit{id.}

\textsuperscript{285} See \textit{id.}

\textsuperscript{286} 749 F.2d 571 (9th Cir. 1984); see also \textit{supra} note 268 (discussing \textit{Dan Caputo Co.}).

\textsuperscript{287} 8 F.3d 713 (9th Cir. 1993); see also \textit{supra} note 268 (discussing \textit{Nevada Land Action Ass'n}).

\textsuperscript{288} Other environmental statutes using the "any person" language, like the NEPA and the Clean Water Act, will most likely be found to negate the zone of interests requirement. Absent such language, the zone of interests test may still apply; however,
While the Supreme Court did not address the issue directly, the *Bennett* decision could affect standing determinations for parties with development interests desiring to bring a claim against the Secretary making an ESA determination.\(^2\) Controversy exists among the circuit courts as to whether the Secretary of the Interior or the Secretary of Commerce should be exempt from complying with NEPA when taking action under the ESA and declaring critical habitat for species listed as endangered or threatened.\(^2\) Using NEPA to delay government action is a tactic generally favored by environmentalists,\(^2\) but this tactic becomes problematic when it threatens environmental interests.

NEPA contains procedural requirements that federal agencies must follow to assess the consequences of certain actions.\(^2\) When an agency proposes an action that may have consequences for the environment, the agency first must conduct an environmental assessment.\(^2\) The environmental assessment is a preliminary analysis of the agency's action and the effects it will have on the physical and economic environment.\(^2\) The environmental assessment concludes with a finding of no significant impact or with a determination that the effects will be significant on the environment.\(^2\) If the effects of the action are predicted to be significant, the federal agency must prepare an environmental impact statement ("EIS").\(^2\) To fulfill the EIS requirement, the agency must prepare a finding of all possible effects of a proposed action,\(^2\) list all reasonable alternatives to the action,\(^2\) and solicit comments from
federal and state agencies and other interested parties. Not surprisingly, the NEPA process is often the source of endless delays in agency actions and is sometimes the cause of a project's complete injunction. If the NEPA process were made applicable to ESA actions, this "could create a situation in which anyone could use NEPA as an obstructionist tactic to impede the protection of an endangered species." Allowing NEPA challenges to ESA actions might create situations in which the time required to comply with the NEPA mandates or to defend a NEPA challenge would result in the loss of an endangered species or a species' critical habitat.

Despite the possibility of abuse, at least one circuit court has determined that NEPA does apply to ESA actions. In Catron County Board of Commissioners v. United States Fish and Wildlife Service, the Tenth Circuit held that the Secretary of the Interior must comply with NEPA guidelines when making critical habitat designations. The court rejected the Secretary's argument that the similarities in procedure between NEPA and the ESA, along with congressional silence as to judicial and executive noncompliance with the NEPA mandates, was evidence that the ESA displaced NEPA. The Tenth Circuit explicitly rejected the assertion that no impact to the physical environment would occur from a designation of critical habitat. The court concluded that when the environmental effects of an action are unknown, Congress intended that an environmental assessment be prepared in accordance with NEPA guidelines.

In contrast, the Court of Appeals for the Ninth Circuit held in

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300. See Patterson, supra note 149, at 757-58.
301. Id. at 784.
302. See id.
303. See Catron County Bd. of Comm'rs v. United States Fish & Wildlife Serv., 75 F.3d 1429, 1432 (10th Cir. 1996).
304. 75 F.3d 1429 (10th Cir. 1996).
305. See id. at 1436.
306. See id. The Secretary claimed that the ESA requirements were duplicative of the NEPA requirements. See id. A federal agency may be excused from NEPA requirements if (1) "by complying [with NEPA] the agency would ... violate its own enabling statute," or (2) if the action the agency is planning requires the agency to make assessments that are "functionally equivalent" to NEPA's requirements. Richard W. Bertelson, III, Note, Danger for the Endangered Species Act?: Catron County Board of Commissioners, New Mexico v. United States Fish and Wildlife Service, 12 J. NAT. RESOURCES & ENVTL. L. 167, 176, 178 (1996-97) (addressing the functional equivalence doctrine).
307. See Catron County, 75 F.3d at 1436.
308. See id. at 1436-39.
309. See id. at 1439.
Douglas County v. Babbit\textsuperscript{310} that NEPA did not apply to designations of critical habitat for the northern spotted owl.\textsuperscript{311} The Ninth Circuit determined that the ESA’s primary purpose of preventing species extinction superseded the NEPA mandate of a comprehensive analysis of a designation’s effects on the human environment.\textsuperscript{312} The court interpreted the legislative intent narrowly in determining that the congressional requirement to consider economic and other relevant impacts was restricted to actions that change the physical environment.\textsuperscript{313} Finally, the Ninth Circuit concluded that applying NEPA to the ESA would not further the purposes of either statute.\textsuperscript{314}

The conflict between the circuit courts regarding the applicability of NEPA to the ESA was not directly resolved in \textit{Bennett}. Perhaps the Supreme Court’s decision not to address the Ninth Circuit’s dismissal of the petitioners’ NEPA claim exemplifies its agreement with the Ninth Circuit’s holding in \textit{Douglas County} that the ESA is not subject to NEPA mandates. It has been suggested that because the Supreme Court, through \textit{Bennett}, “has ... allowed challenges to federal actions taken pursuant to the ESA based solely on economic injury, no need exists to use NEPA for [such a] purpose.”\textsuperscript{315} If the Court were to determine that NEPA is intended to apply to the ESA, this determination could significantly affect the strength of the ESA through substantial delays in agency action and additional challenges to agency determinations.\textsuperscript{316} However, the Court may be unwilling to pull all of the teeth from the ESA, one of the few environmental statutes that is considered to have any bite.\textsuperscript{317}

\begin{footnotesize}

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  \item \textsuperscript{310} 48 F.3d 1495 (9th Cir. 1995).
  \item \textsuperscript{311} See id. at 1507.
  \item \textsuperscript{312} See id. at 1503.
  \item \textsuperscript{313} See id.
  \item \textsuperscript{314} See id. at 1506. For further discussion on the \textit{Douglas County} decision, see generally Melaney Payne, Note, \textit{Critically Acclaimed but Not Critically Followed—The Inapplicability of the National Environmental Policy Act to Federal Agency Actions: Douglas County v. Babbitt, 7 VILL. ENVTL. L.J. 339 (1996)}.
  \item \textsuperscript{315} Patterson, \textit{supra} note 149, at 790.
  \item \textsuperscript{316} See Johnson, \textit{supra} note 291, at 579 (stating that NEPA is time-consuming and that citizens can force further delays through litigation if the government does not comply fully with NEPA’s mandates).
  \item \textsuperscript{317} Unlike some other environmental statutes, the ESA contains stringent enforcement provisions, including civil and criminal penalties. See 16 U.S.C. § 1540(2)(b) (1994); Jean M. Emery, \textit{Environmental Impact Statements and Critical Habitat: Does NEPA Apply to the Designation of Critical Habitat Under the Endangered Species Act?}, 28 ARIZ. ST. L.J. 973, 975 (1996); Kevin D. Batt, Comment, \textit{Above All, Do No Harm: Sweet Home and Section Nine of the Endangered Species Act}, 75 B.U. L. REV. 1177, 1191 n.67 (1995) (asserting that it is the civil and criminal penalties of section 11 that give the Act
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Given the detrimental effect that NEPA challenges could present, it seems unlikely that the Court would allow them, particularly now that plaintiffs can bring facial challenges to the ESA when they believe the Secretary has failed to consider the importance of economic interests. Despite the potential delays NEPA could create in ESA determinations, NEPA supporters believe broad application of the NEPA procedural requirements will preserve the ESA’s integrity for balancing economics against the environment.\textsuperscript{318} Mechanisms like the ESA emergency listing provision\textsuperscript{319} and NEPA’s “functional equivalence” doctrine may reduce the negative effects on the species involved.\textsuperscript{320} While the intense scrutiny that the NEPA procedures require may be valuable in improving the scientific basis of a federal agency’s decision, ultimately the Bennett decision has made NEPA unnecessary by providing adequate incentive for agencies to use diligence in making listing and critical habitat decisions.\textsuperscript{321}

Armed with the Bennett decision, parties with property interests are asserting their newly recognized right to challenge agency determinations under the ESA;\textsuperscript{322} and it is likely that more challenges will follow.\textsuperscript{323} This increased litigation may create even greater financial demands on already underfunded agencies,\textsuperscript{324} further


\textsuperscript{319} One commentator suggests that the ESA’s emergency regulations will alleviate the risk of potential extinction of species and permanent loss of habitat for species awaiting critical habitat designations. See id. at 696-97.

\textsuperscript{320} See Payne, supra note 314, at 373.

\textsuperscript{321} See Cain, supra note 135, at 15 (recognizing that while the Bennett decision might increase the time and effort the FWS puts into a section 7 determination, it is nevertheless desirable because it ensures valid data).


\textsuperscript{323} Ten amicus briefs were filed in Bennett on behalf of developmental organizations and other property interests. See supra note 184. Vermont Law School’s Environmental Law Center Director, Patrick Parenteau, believes the Bennett decision will lead to “a surge of litigation under the [ESA].” See Littell, supra note 212, at 34 (quoting Patrick Parenteau).

\textsuperscript{324} See Testimony of Jamie Rappaport Clark, supra note 211, at *10 (addressing the lack of sufficient agency funding). Providing compensation for landowners who are
decreasing their ability to conduct listing determinations, establish critical habitats, and prepare recovery plans. The ESA reauthorization movement should address the potential strain on agency financial resources if the ESA is to continue to function properly.

Despite the current consensus that ESA reform should include greater consideration of parties with property interests, reform provisions should not compromise the preservation of our endangered species. Although many species may appear unimportant or unattractive, we cannot lose sight of the larger picture. Ultimately, all species, including the human species, are interconnected and reliant on one another for a healthful existence. To remove even a seemingly insignificant number of minute organisms from an ecosystem is to disrupt a delicate balance with repercussions on a larger scale.

The potential benefits of even microscopic species also should not be overlooked. In enacting the ESA, Congress appreciated required to surrender their property because of the presence of an endangered species is often very expensive. For example, the federal government paid $250 million dollars to a Texas man and $130 million to the state of California in order to save from logging and development 7000 acres of prime redwoods, the home of the Marbled Murrelet bird. See Michael Satchell, To Save the Sequoias: A Dollars for Trees Deal Ends a Fight in an Ancient Forest, U.S. NEWS & WORLD REP., Oct. 7, 1996, at 42, 42.

325. In addition to the significant time factor associated with making listing and critical habitat determinations, the analysis can be expensive. See Cain, supra note 135, at 15-16. With heightened scrutiny applied to their decisions, the agencies responsible for implementing the ESA may be hesitant to make decisions that are not economically beneficial to the parties involved. See id.


327. In determining the fate of the Delhi Sands flower-loving fly, Judge Wald gave credence to the interconnectedness of nature, using biologist Edward Wilson's words:

"Every species is part of an ecosystem, an expert specialist of its kind, tested relentlessly as it spreads its influence through the food web. To remove it is to entrain changes in other species, raising the populations of some, reducing or even extinguishing others, risking a downward spiral of the larger assemblage."


328. While human science has been able to fully explore the largest of the Earth's species, there are perhaps thousands of microscopic species that have not yet been studied. See EDWARD O. WILSON, NATURALIST 364 (1994) (asserting that "[m]icrowildernesses exist in a handful of soil" and that "[t]en million bacteria live in a gram of ordinary soil," which "represent thousands of species, almost none of which are known to science").
what miracle cures the Earth's creatures might hold, stating that the
"value of this genetic heritage is, quite literally, incalculable."329
While all creatures may not hold intrinsic value,330 the fact that
organisms may contain medicinal value necessitates careful
deliberation before decisions are made that could deprive mankind,
as well as the creature in question, of a fighting chance of survival.331
In addition to medicinal value, learning more about endangered
species can help to develop new agricultural products and lead to the
discovery of cleaner, renewable sources of energy.332 While no one
knows for certain the future of the ESA, in the wake of Bennett, it
appears that property owners will play an integral role. But the
presence of property owners at the endangered species roundtable
does not have to be a threatening event for environmentalists. The

330. Some species have been found to have medical uses; for example, the Pacific Yew
tree contains a substance called taxol that may cure cancer, but the vast majority of
species do not. See Plater, supra note 191, at 852-53. However, Senator Chafee (R-RI),
sponsor of the most recent Senate ESA Reauthorization bill, Senate Bill 1180, noted that
when Noah filled his ark, God told him to include all species, "'clean and unclean, of
birds and everything that crawls on the ground'" and did not limit the passengers to "only
the most beautiful animals or those plants that might have some particular use to
mankind and perhaps to help him cure cancer." 142 CONG. REC. 1842 (daily ed. Mar. 12,
1996) (statement of Sen. Chafee (quoting Genesis 7:8)). Recently, otherwise conservative
Evangelical Christians have begun a movement to support a stronger ESA. See Peter Steinfels,
Evangelical Group Defends Laws Protecting Endangered Species As a Modern
asserted in 1996, when urging Congress not to weaken the ESA, that "[o]nly the Creator
has the right to destroy His creation." Eugene Linden, What Have We Wrought? Our
Descendants in the Next Century May Find Themselves Paying Dearly for the Material
WL 13376245, at *9 (internal quotation marks omitted).
(1972), recognized the importance of all organisms and the limitations courts face in
making decisions regarding endangered species:
"A teaspoon of living earth contains 5 million bacteria, 20 million fungi,
one million protozoa, and 200,000 algae. No living human can predict what vital
miracles may be locked in this dab of life, this stupendous reservoir of genetic
materials that have evolved continuously since the dawn of the earth."
See id. at 750-51 n.8 (Douglas, J., dissenting) (quoting an environmental publication).
Justice Douglas noted that penicillin, tetracycline, and other antibiotics were created from
"'lowly molds'" and now rank among the "'most powerful and effective medicines ever
discovered by man.'" Id. (Douglas, J., dissenting) (quoting an environmental
publication). He continued by stating, "'Medical scientists still wince at the thought that
we might have inadvertently wiped out the rhesus monkey, medically, the most important
research animal on earth.'" Id. (Douglas, J., dissenting) (quoting an environmental
publication).
332. See Kelly A. Keenan, Note, They Paved Paradise and Put up a Parking Lot:
Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 60 ALB. L. REV.
1483, 1506-07 (1997).
ESA process actually may function better if property owners understand its components and become stakeholders with a vested interest in the process. The time is ripe to realize that without the enlistment of property owners, the Act itself may become extinct.

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333. See Institute for Environment & Natural Resources Board Principles, 32 LAND & WATER L. REV. 623, 623 (1997) (suggesting that the ESA will work better if landowners are involved and that they may be able to propose solutions to improve ESA implementation and generate greater public support).