

# The Federal Endangered Species Act: Is Judicial Review Available to Safeguard Against Agency Decisions Not to Enforce?

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## I. INTRODUCTION

A woman lies dying from ovarian cancer while the last Pacific yew, whose bark is discovered to hold new hope for a cure, is destroyed along with the rest of the Northwest's old-growth.<sup>1</sup> A boy diagnosed with leukemia will not be able to see his next birthday because, due to the rosey periwinkle's extinction, the treatment that is extracted from the flower can no longer be obtained as a result of the flower's extinction.<sup>2</sup> Americans are

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1. Peter Korn, *The Case for Preservation*, NATION, Mar. 30, 1992, at 414 (noting that the Pacific yew's bark may hold the key to curing ovarian cancer). See also Colman McCarthy, *War Against Nature Threatens Humankind*, NAT. CATH. REP., Jan. 22, 1993, at 19

An example of human dependency on plants is reported by the National Audubon Society in its 1992 book, *Rebirth of Nature*: It is increasingly clear that the (world's) rain forests are like huge medicine chests whose doors have hardly been opened. A single survey of 1,500 plants from the Costa Rican rain forest revealed that some 225 of them could potentially produce anti-cancer drugs. Researchers believe that as much as 10 percent of the 90,000 plant species thought to grow in Latin America will yield anticancer drugs.

Lynda G. Cook, Comment, *Lucas and Endangered Species Protection: When "Take" and "Takings" Collide*, 27 U.C. DAVIS L. REV. 185, 192 (1993) (noting that genetic material found in endangered plant and animal species may contain the cure for AIDS); *Tune-up for a Venerable Vehicle: At 20, Endangered Species Act May Get Some Improvements*, L.A. TIMES, Jan. 3, 1994, § Metro, at 6, B1 ("[S]cientists are finding medicinal worth in a growing number of natural compounds.").

2. Korn, *supra* note 1 (noting the healing value of this flower).

asked to send in their suggestions for a new national symbol because bald eagles no longer exist in America.

What will it take for people to realize that the loss of a plant or animal species affects everyone? While it is fortunate that the specific situations above have not yet occurred, this is largely due to the protected status of those plants and animals.<sup>3</sup> But with an estimated twenty percent of the earth's species, or approximately two million life forms, becoming extinct by the turn of the century, much more protection is needed.<sup>4</sup> Scientists have only begun to tap into the wealth of knowledge and material hidden within nature. There is a growing understanding that all life forms, including mankind, are part of one interdependent ecosystem, whereby harm to one species will have repercussions for all species.<sup>5</sup> As was once noted, "It is in the best interest of mankind to minimize the losses of genetic variations. The reason is simple: they are potential resources. They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask."<sup>6</sup> The cost of extinction not only includes the loss of aesthetic and material benefits, but also the loss of our humanity. It has been said that, "We aren't so poor that we have to drive species into extinction, nor are we so rich that we can afford to . . . ."<sup>7</sup>

The debate over protecting species diversity has been well documented and argued and cannot be adequately summarized within these pages. Proponents on both sides of the issue have

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3. The bald eagle, along with the alligator, brown pelican and peregrine falcon have all been at the brink of extinction, but they were able to recover after gaining protection from the Endangered Species Act (ESA). Other species such as the dusky seaside sparrow were not so lucky and have gone the way of the dodo bird. *Id.*

4. *Id.* (citing from the *Global 2000 Report* that was issued during the Carter Administration).

5. *Id.*; see also Cook, *supra* note 1 at 191 (recognizing that "as one species disappears, other species dependent on them for food or protection also disappear." An example is found in the early 1900s, when unregulated hunting was depleting the numbers of endangered California sea otters, leaving a sea urchin population to grow unchecked, which resulted in severe depletion of giant kelp production and damage to an entire community dependent on the kelp habitat).

6. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 178 (1978) (quoting the 1973 Report of the House Committee on Merchant Marine and Fisheries on H.R. 37); see also Korn, *supra* note 1 ("[B]y preserving the earth's genetic pool we keep open future options for nature and science to maintain a healthy environment.").

7. Korn, *supra* note 1 (quoting Andy Kerr of the Oregon Natural Resources Council).

made persuasive arguments that deserve consideration.<sup>8</sup> However, Congress clearly expressed the belief that the balancing of factors tip heavily in favor of species conservation when it passed the Endangered Species Act ("the ESA" or "the Act") in 1973.<sup>9</sup>

The purpose of this comment is not to rehash what Congress has already concluded, but rather, to explain the issue of whether an agency, charged by Congress to administer the ESA, can refuse to take necessary enforcement measures to protect endangered species without triggering judicial review for abuse of agency discretion. This issue is crucial to the integrity of the ESA. If agency enforcement decisions are immune from review, then agency neglect could frustrate both the protective purpose of the Act and the intent of Congress. The Supreme Court's decision in *Heckler v. Chaney*<sup>10</sup> left much in doubt as to the correct response to this question. By establishing a rebuttable presumption of non-review for agency enforcement decisions,<sup>11</sup> the *Chaney* court flipped prior legal precedents on their heads. This Comment argues that under post-*Chaney* law, the ESA does not give agencies uncensored freedom to choose whether or not to enforce the Act. At the same time, however, this Comment recognizes that there are arguments supporting the opposite conclusion.

Section II of the Comment offers an illustrative case of how the ESA can be made ineffectual when an agency decides to look the other way while a private lumber company violates the statute. Section III reviews the legal background that lead up to the *Chaney* decision. Section IV analyzes the holding of the *Chaney* decision. Section V examines how the ESA fits under *Chaney*'s legal scheme and argues that the ESA does not foreclose court review. Section VI suggests several ways in which the issues may be resolved. Finally, Section VII will conclude with a reminder

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8. See generally Cook, *supra* note 1 at 193, § I (finding that taxpayers and landowners are usually unwilling to make financial sacrifices in order to ensure species survival); see also John Daniel, *The Limits of Paradise*, SIERRA, Mar.-Apr., 1994, at 64 (recognizing that lumber workers are often the victims of unplanned clear-cutting. Whole towns become dependent upon the limited amount of federal old-growth trees. Then, when the last tree is cut, or the companies fail to follow the law and are bogged down by court injunctions, lumber companies such as Weyerhaeuser move on to Southeastern states and leave behind unemployed laborers).

9. Codified as 16 U.S.C. §§ 1531-1544 (1988 & Supp. IV 1992).

10. 470 U.S. 821 (1985); see *infra* § IV (discussing the holding of *Chaney*).

11. *Id.* at 831; see *infra* § V (discussing the rationales which justify the presumption).

of the importance of judicial review of agency decisions in regards to environmental protection.

## II.

### THE MARBLED MURRELET'S PLIGHT

Marbled murrelets (*Brachyramphus marmoratus*), a relative of the puffin, are chubby seafaring birds the size of robins. They fly along the Pacific coast and dive for small fish and zooplankton.<sup>12</sup> Although the existence of these birds was first discovered by Russian explorers in 1789, its nesting site remained an ornithological mystery until 1974. Surprisingly, the first nest was not located along the coast but rather was found five miles inland in California's Big Basin Redwoods State Park.<sup>13</sup>

Unlike most seabirds whose nests are on coastal islands or cliffs, "[e]very site where murrelet breeding behavior has been confirmed has been in old-growth [forests]."<sup>14</sup> It is ironic, however, that this unusual choice of habitat, which provides protection from the elements and predators with its dense canopy, is also the main reason why these birds are in danger of becoming extinct. The fact that coastal old-growth stands are a much sought-after commodity by the lumber industry has resulted in the wide destruction of these ancient groves for timber.<sup>15</sup> As a consequence, the number of murrelets has declined dramatically.<sup>16</sup>

On October 1, 1992,<sup>17</sup> after much delay, the Fish and Wildlife Service (FWS)<sup>18</sup> finally listed the marbled murrelet as a

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12. See Susan McCarthy, *A Seabird's Secret Life is Revealed - 50 Miles Inland*, SMITHSONIAN, Dec. 1993, at 70.

13. *Id.*

14. S. Clare, *Birds of a Feather: A Fish-Eater Enters the Fray Over Pacific Northwest Old-Growth*, BACKPACKER, Mar., 1993, at 13.

15. More than 95 percent of the original coastal old-growth in Washington, Oregon, and California has been cut. *Id.*

16. *Id.* (noting that the healthiest murrelet population is found in Alaska because the old-growth stands have yet to be plundered by the lumber industry). See also McCarthy, *supra* note 12 (quoting Bill Ritchie of Washington's Dep't of Wildlife, "[The murrelets] are so close to extinction . . . that even the loss of individuals is important.>").

17. EPIC's Complaint for Declaratory and Injunctive Relief at 18 (filed Apr. 16, 1993) (on file with author).

18. Clare, *supra* note 14 (stating how ironic that the FWS used its own legal tactics to delay the listing); see also Korn, *supra* note 1 (recognizing that the tremendous "backlog" of candidates for listing and the federal agencies' reluctance to act without sufficient pressure from environmental lawsuits "indicates a political motivation" on the agencies' part).

"threatened species"<sup>19</sup> under the ESA. However, the struggle to conserve these birds is far from over. The lumber industry continues to threaten the species' existence by ignoring the significance of the listing.

#### A. *Facts of the Case*

The area in controversy is a 237-acre plot of timber land ("THP area", acronym for *Timber Harvest Plan*) in the Owl Creek forest in Humboldt County<sup>20</sup> owned by Pacific Lumber Company (PALCO).<sup>21</sup> In June of 1992, PALCO completely disregarded state law requirements and delivered an insufficient environmental impact report of marbled murrelet activities to the state agencies and commenced its logging activities that same afternoon, thus denying the agencies time to analyze the data.<sup>22</sup> Only after being threatened with a "stop work order" did PALCO desist, but not before it had downed and removed one to two million board feet of virgin redwood timber and fractured the forest area in five different places.<sup>23</sup>

After analyzing subsequent surveys of the affected area, the FWS noted that, "[r]ates of detection in the THP area were significantly different following the [June] harvest . . . . This indicates that the harvest may have altered murrelet behavior in the THP area . . . ." <sup>24</sup> Already the FWS recognized the damage wrought by PALCO's actions. Although the marbled murrelet was listed only by the California Endangered Species Act at that time, the FWS warned PALCO that upon its federal listing, "the prohibitions against 'take' listed in section 9 of the [ESA] . . . would be fully implemented, along with other appropriate provisions of the Act . . . ." <sup>25</sup> To remain within the confines of the law,

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19. ESA § 3(20) 16 U.S.C. § 1532(20) (1992) (defined as any species which is likely to become in danger of extinction within the foreseeable future through all or a significant portion of its range). It should be noted that the provisions of ESA give equal protection to "endangered species" and "threatened species" and often refers to both or uses the terms interchangeably.

20. Timber Harvest Plan (THP) No. 1-90-237 HUM.

21. PALCO is a unit of Houston based MAXXAM Inc. which is controlled by Texas financier Charles Hurwitz. Charles McCoy, *Protected Birds Prohibit Pacific Lumber From Logging In Its Grove, Judge Rules*, WALL ST. J., Feb. 28, 1995, at B6.

22. EPIC's Complaint, *supra* note 17, at 15.

23. *Id.*

24. Letter from FWS to Calif. Dep't of Forestry and Fire Protection (CDF) (Feb. 17, 1993) (on file with the author as exhibit F).

25. Letter from FWS to PALCO (Sept. 24, 1992) (on file with the author as exhibit I).

PALCO was advised by the FWS to modify the harvest plan or wait and apply for a federal permit.

Following the federal listing of the murrelet on October 1, 1992, the FWS twice advised PALCO and the state agencies that the THP would be in violation of the ESA unless PALCO obtained federal approval.<sup>26</sup> On the eve of the Thanksgiving holiday, "[the FWS] warned PALCO that any operations without [a] permit would result in an illegal 'taking.'<sup>27</sup> Two days after PALCO expressly agreed to abate its activities<sup>28</sup>, PALCO re-enacted the June logging incident by simultaneously sending a report to the reviewing agency and rushing workers into the grove. Knowing that government employees would not analyze the information during the holiday, PALCO logged as much lumber as possible before the weekend's end.

After this holiday incident, the FWS again expressed to PALCO its conclusion that, ". . . implementation of the subject timber harvest is likely to cause take of marbled murrelets . . . [and] that implementation of this timber harvest may place [PALCO] and the permitting State agency . . . in violation of section 9 of the Act."<sup>29</sup> Aside from these hollow warnings, the FWS continued to disregard its own findings of unlawful taking by failing to prevent PALCO from further violating the Act.

Although the ESA is a valuable shield against species depletion, it must first be wielded before it can provide effective protection. The FWS, supposedly the main enforcer of the Act,<sup>30</sup> has refused to accept this task in this case. Instead, it has been

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26. EPIC's Complaint, *supra* note 17, at 18.

27. It is unlawful to commit a "taking" against a listed species. ESA § 9(a)(1), 16 U.S.C. § 1538(a)(1). "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." ESA § 3(19), 16 U.S.C. § 1532(19) (1992).

The FWS expanded the definition of "harm" in its implementing regulations to include "significant habitat modification or degradation which results in actual death or significant impairment of essential behavioral patterns. 50 C.F.R. § 17.3(c) (1994). Thus, if it can be shown that PALCO's logging of the birds habitat is causing significant disruption in behavior, then a prohibited take has resulted without proving actual death to ny member of the species.

28. See letter from FWS to Mark Harris, EPIC's attorney (Nov. 29, 1992) (recounting of events by FWS upon request of EPIC) (on file with the author as exhibit J).

29. *Id.*

30. See McCarthy, *supra* note 1 (recognizing that the FWS is "the main enforcer[ ] of the Act"). The Secretary of the Interior, through the FWS, administers the terrestrial plants and animal species. The Secretary of Commerce, through the National Marine Fisheries Service (NMFS), administers the marine species.

left to the Environmental Protection and Information Center ("EPIC") and the Sierra Club Legal Defense Fund ("SCLDF")<sup>31</sup> to raise the ESA shield in court.<sup>32</sup> This incident shows a need for a forum that can review the FWS's actions or inaction, and can grant relief where an abuse of discretion is found. Otherwise, the strength and integrity of the ESA will rest solely upon the whims of the agency charged with the task of implementing and enforcing the Act.<sup>33</sup> As the PALCO incident shows, judicial review is the most effective means available.

### III.

#### HISTORICAL BACKGROUND OF AGENCY DISCRETION

##### A. *Notion of Separation of Powers*

The concept of agency discretion might be understood within the context of our Nation's limited government and traditional

31. Both are non-profit, public interest organizations, with SCLDF being legal counselor for the plaintiff, EPIC.

32. *Marbled Murrelet v. Babbitt*, Case No. C-93-1400-FMS, *on appeal* Case No. 94-15194 (cases on file with the author). In February, 1995, U.S. District Judge Lewis Bechtle granted a permanent injunction against PALCO's logging activities. The judge criticized PALCO for misleading regulators about the presence of murrelets by adopting reporting procedures which were "either designed to fail or intended to grossly understate the birds' presence." The court also noted some deletions and alteration of the reports. Finally, the court refused to follow the controversial holding of *Sweet Home Chapter of Communities for a Greater Oregon v. Babbitt*, 17 F.3d 1463 (D.C. Cir. 1994), which rejected the FWS's inclusion of habitat modification in the definition of "harm" with respect to prohibited "takings." Judge Bechtle found *Sweet Home* to be inapplicable outside of the Washington Court's jurisdiction. Brad Knickerbocker, *Private Property vs. Protection of Species: Two Tales of 'Taking'*, CHRISTIAN SCI. MONITOR, Mar 7, 1995, at 11.

33. Surprisingly, while there are numerous ESA cases dealing with agency actions which failed to adequately prepare biological assessment reports or to establish critical habitat or recovery plans, the ESA case law seems to be devoid of claims dealing with an agency's refusal to take enforcement action against a non-governmental entity. It is unclear whether plaintiffs are unwilling to challenge agency enforcement discretion or courts are unwilling to publish such cases.

This need for a judicial check upon agency enforcement discretion is not limited to ESA issue, but rather, is applicable to all areas of environmental law. For example, public health is jeopardized when the Environmental Protection Agency ("EPA") refuses to initiate withdrawal proceedings after having determined that a state no longer was in compliance with the Safe Drinking Water Act. *See National Wildlife Fed'n v. EPA*, 980 F.2d 765 (D.C. Cir. 1992). Health is also threatened when the same agency fails to take investigatory and enforcement actions against a state that was allegedly violating the Federal Water Pollution Control Act. *See Dubois v. Thomas*, 820 F.2d 943 (8th Cir. 1987). Also our natural resources are being squandered when the Forest Service ignores the flagrant timber thefts perpetrated by the lumber industries. *See infra* note 179.

belief in the separation of powers.<sup>34</sup> The origin of agency discretion dates back to the nineteenth century, when it was "assum[ed] that judicial intrusion into any administration would be unfortunate."<sup>35</sup> This assumption was voiced by the Supreme Court in 1840, when it stated that, "The interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief."<sup>36</sup>

Since that time courts have discovered that, in reality, a judicial helps to ensure better administration and a higher level of justice by preventing or correcting abuse of discretion by the agencies in the performance of their ordinary executive duties.<sup>37</sup> Judicial review is essential to vindicate the rights of those who are affected by an agency's abuse of authority. Justice Douglas poignantly remarked, "[o]ne needs no reminder that government too can be lawless, that government cannot lead the way in law and order when it is the great malefactor."<sup>38</sup> A notion exists in the area of environmental protection that, over time, enforcers and polluters who interact with one another on a regular basis may begin to side with each other on matters that may be contradictory to the spirit of the environmental law in question.<sup>39</sup> If allowed to go unchecked, these abuses would undermine legislative intent and incapacitate the law. Indeed, since *Marbury v. Madison*, "the traditional role of the courts . . . [has been] to maintain minimum standards in the Executive Department to assure that the wishes of Congress are not frustrated."<sup>40</sup>

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34. See Patricia M. Wald, *The Role of the Judiciary in Environmental Protection*, 19 B.C. ENVTL. AFF. L. REV. 519, (1992). See also KENNETH C. DAVIS, *ADMINISTRATIVE LAW TEXT*, § 28:06 at 522 (3d ed. 1972) (recognizing that if separation of powers prevents review, then a hundred past Supreme Court decisions must be found contrary to the Constitution).

35. DAVIS, *supra* note 34. See also *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) ("It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecution.").

36. *Decatur v. Paulding*, 39 U.S. 497, 516 (1840).

37. DAVIS, *supra* note 34, § 28:06 at 523, § 28:1-5 at 499 (listing seven reasons for review when no law applies).

38. *Bland v. United States*, 472 F.2d 1329 (D.C. Cir. 1973), *cert. denied*, 412 U.S. 909, 912 (1973) (Douglas, J., dissenting opinion).

39. Wald, *supra* note 34, § I.

40. *DeVito v. Schultz*, 300 F. Supp. 381, 383 (D.D.C. 1969).



### B. Deference to Agency Expertise

Courts may shy away from reviewing agency actions on the grounds that administrators are specialists and their discretionary decisions are based on numerous and complex factors.<sup>41</sup> Judges may not be trained experts in the fields they review, but they are well versed in determining rationality and the intent of the law. Thus, while a court should not substitute an agency's determination of the facts with its own, it can evaluate the process by which the agency reached its determination for "pure" discretion abuses. Such abuses include claims that "an agency misunderstood the facts, that it departed from its precedents without a good reason, that it did not reason in a minimally plausible fashion, or that it made an unconscionable value judgment."<sup>42</sup> As observed by one court, "[t]o rule otherwise would enable [an agency] to frustrate the will of Congress; it would leave [an agency]'s conduct immune from scrutiny in matters where [it] is charged with significant responsibilities that must be carried out if the sweeping congressional directive . . . is to be implemented."<sup>43</sup>

### C. Review For Rationality

Courts traditionally do not hesitate to review agency decisions for rationality or proper consideration of relevant factors. They find support for such review in the Administrative Procedure Act (APA),<sup>44</sup> which requires that "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be *arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law*."<sup>45</sup>

In the early case of *Burlington Truck Lines, Inc. v. United States*,<sup>46</sup> the Supreme Court held that the Interstate Commerce Commission's ("ICC") decision to certify an additional carrier

41. See *infra* part V.B.

42. Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689 (1990). See also Wald, *supra* note 34, § I ("There must be a neutral forum in which to decide disputes over whether the executive branch is carrying out the will of Congress as set out in the laws, whether it is exercising authority it was never given, whether it is declining to follow mandates it was given, and whether it is making unreasonable decisions when it has rulemaking discretion.").

43. *DeVito*, 300 F. Supp. at 382.

44. See generally 5 U.S.C. §§ 701-706 (governing judicial review of agency actions).

45. 5 U.S.C. § 706 (1988) (emphasis added).

46. 371 U.S. 156 (1962).

was not rational because it did not adequately consider the importance of protecting the existing carriers' revenue interests against dilution.<sup>47</sup> It was "unmistakably clear" that the disruption in service could just as easily have been remedied by a cease-and-desist order.<sup>48</sup> Even though the ICC had the discretion to grant either remedy, the Court required such discretion to be "based upon a conscious choice."<sup>49</sup> The Court noted that the ICC's choice was not based upon any actual findings nor any expressed reasons why the facts supported the decision.<sup>50</sup> As the Court commented: "[e]xpert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, expertise . . . can become a monster which rules with no practical limits on its discretion.'"<sup>51</sup>

Later, in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*,<sup>52</sup> the Supreme Court reviewed the National Highway Traffic Safety Administration's decision to revoke a safety standard that required all new vehicles after 1982 to be equipped with passive restraints. In light of the fact that the agency already "acknowledged the life-saving potential of the airbag"<sup>53</sup> and that "every indication in the record" points to the effectiveness of the continuous passive belt,<sup>54</sup> the Court held that "the agency ha[d] failed to supply the requisite 'reasoned analysis' "<sup>55</sup> when it revoked the standard. According to the Court, although the "scope of review under the 'arbitrary and capricious' standard is narrow . . . [n]evertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action."<sup>56</sup>

Lower courts likewise demanded that agency actions be rationally supported by actual facts. For example, in *Defenders of*

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47. *See id.* at 167.

48. Evidence showed that the illegal and discriminatory actions by the unionized carriers which was causing the disruption in service was being induced solely by union pressures; therefore, a cease-and-desist order would have quickly ended the boycott and service would have been adequately served by existing carriers. *See id.* at 165-66.

49. *Id.*

50. *Id.* at 168.

51. *Id.* at 167 (cite omitted).

52. 463 U.S. 29 (1983).

53. *Id.* at 47.

54. *Id.* at 56.

55. *Id.* at 57.

56. *Id.* at 43.

*Wildlife, Inc. v. Endangered Species Scientific Authority*,<sup>57</sup> the appellate court questioned an agency's decision to allow the exportation of bobcats: "We do not see how, without adequate information on total bobcat population and the number to be killed in a particular season, the Scientific Authority can make a valid determination of 'no detriment.'"<sup>58</sup> Thus, the Court held that, "If [the information] is not presently available, the [defendant] must await its development before it authorizes the export of bobcats."<sup>59</sup>

### 1. Requiring Expressed Reasons

The Supreme Court has warned that in reviewing the rationality of an agency action, a court "may not supply a reasoned basis for the agency's action that the agency itself has not given."<sup>60</sup> In other words, it is the agency's, rather than the court's, burden to supply an adequate rationale for its action.

For example, in *DeVito v. Schultz*,<sup>61</sup> the Court's review upon a letter sent by the Secretary of Labor which denied a request to initiate proceedings to set aside the result of an improper union election, even though the letter admits that significant irregularities existed. The court concluded that "[t]he letter . . . contains nothing from which the Court may, upon the face of the letter, determine how the subordinates involved reached the conclusion they did . . . ;"<sup>62</sup> therefore, "the Court is . . . of the opinion that the Secretary must provide . . . an adequate written statement of his reasons for non-intervention."<sup>63</sup> Likewise, in *Dunlops v. Bachowski*,<sup>64</sup> the Supreme Court contended that "to enable the reviewing court to intelligently review the Secretary's determination, the Secretary must provide the court and the complaining witness with copies of a statement of reasons supporting his determination."<sup>65</sup> Hence, a court that has no expertise in the field it is reviewing can rely on the agency's own expert knowledge in order to arrive at a meaningful review.

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57. 659 F.2d 168 (D.C. Cir. 1981).

58. *Id.* at 177.

59. *Id.* at 178.

60. *Id.* (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

61. 300 F. Supp. 381 (1969).

62. *Id.* at 383.

63. *Id.* at 384.

64. 421 U.S. 560 (1975).

65. *Id.* at 571 (citing to *DeVito* as support).

#### D. *Review for Consideration of Improper Factors*

In addition to reviewing for rationality, courts were also concerned with agencies abusing their discretion by considering improper factors. The Supreme Court in *Marshall v. Jerrico*<sup>66</sup> recognized that traditions of prosecutorial discretion do not immunize enforcement decisions that are motivated by improper factors from judicial scrutiny.<sup>67</sup> The subsequent Court ruling in *State Farm* restated the standard of review as follows:

[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>68</sup>

Following the Supreme Court's lead, the District of Columbia Circuit, in *Lead Industries Ass'n v. EPA*,<sup>69</sup> denied a petitioner's request that the EPA be required to consider economic and technological feasibility when promulgating ambient air quality standards. As the opinion stated, "[w]hen Congress directs an agency to consider only certain factors in reaching an administrative decision, the agency is not free to trespass beyond the bounds of its statutory authority by taking other factors into account."<sup>70</sup> Thus, there are limits to agency discretion, as a court is not powerless to circumscribe an agency decision that is motivated by improper factors.

#### E. *Applying Traditional Notions of Agency Discretion to the Marbled Murret Case*

Clearly, the pre-*Chaney* courts looked favorably upon judicial review as a safeguard against irrational and improperly considered agency decisions. Taking into consideration the concerns voiced by these cases, the FWS's decision to not take enforcement actions against PALCO should be reviewed by a court.

The present situation of the marbled murrelet is similar to that which was found in *State Farm* and *DeVito*. Where the evidence clearly does not support an agency's choice of action, such deci-

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66. 446 U.S. 238 (1980).

67. *Id.* at 249.

68. *State Farm*, 463 U.S. at 43.

69. 647 F.2d 1130 (D.C. Cir. 1980).

70. *Id.* at 1150.

sions should be held irrational and an abuse of discretion.<sup>71</sup> Although a reviewing court should defer to the expertise of the FWS in determining whether or not there exists any danger of an illegal taking of a listed species being perpetrated, the FWS cannot be allowed to disregard its own factual analysis and, as expressed in *State Farm*, to arrive at a decision that “run[s] counter to the evidence.”<sup>72</sup>

Here, the FWS had expressly concluded in its letters that a taking was likely to occur<sup>73</sup> and had requested PALCO to desist with its cutting activities and apply for a takings permit.<sup>74</sup> By not giving any rational explanation for its decision to not commence enforcement procedures against PALCO, the FWS should have triggered judicial review of its decision, for it arguably abused its enforcement discretion under the “arbitrary and capricious” standard.

#### IV.

#### *HECKLER V. CHANEY*

Under the *Chaney* decision, the courts might never even ask the question of whether the FWS has acted “arbitrarily and capriciously” if it finds that the ESA has supplied “no law to apply” which could guide judicial review of the agency’s enforcement authority.

Contrary to established precedent, the *Chaney* court focused its attention upon section 701 of the APA. Unlike section 706, which promotes judicial review, Section 701 of the APA states an exception to review when “(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.”<sup>75</sup> In practice, the pre-*Chaney* courts viewed the second exception as nothing more than a reiteration of the first. The first exception requires an “indication that Congress sought to prohibit judicial review,”<sup>76</sup> while the second exception requires a “showing of ‘clear and convincing evidence’ of [such] legislative intent.”<sup>77</sup> Under either exception, a high evidentiary standard was needed in order to restrain judicial review; therefore, the second excep-

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71. See *supra* notes 52-65 and accompanying text.

72. *State Farm*, 463 U.S. at 43.

73. *Supra* part II.A.

74. *Id.*

75. 5 U.S.C. § 701(a)(1)-(2) (1988).

76. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971).

77. *Id.* (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967)); see also *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 778 (1985).

tion did not have much effect upon a court's decision whether to restrict review.<sup>78</sup>

However, the *Chaney* court, in an attempt "to give effect . . . to every clause [of the APA],"<sup>79</sup> distinguished this second exception as applying to instances when "statutes are drawn in such broad terms that in a given case there is *no law to apply*."<sup>80</sup> *Chaney* thus struck a significant blow to the presumption of judicial review. Congress was no longer required to expressly restrict review, but rather, review could be denied merely for the lack of expressed statutory standards. For those now seeking justice against agency abuse and hoping to attain review under section 706, they must first overcome the hurdle of section 701.

Subsequent courts have, for the most part, conformed to the holding of the *Chaney* decision. While the law still favors allowing review, an agency can now rebut that presumption through section 701(a)(2) by proving that its discretion is so broad that there is "no law to apply" under the statute. However, for review of agency decisions whether or not to take enforcement actions, *Chaney's* presumption against review seems to be the majority rule. Rarely do courts interpret a statute as having created a non-discretionary enforcement duty upon an agency. Therefore, to secure the effectiveness of the ESA and other environmental protection statutes, Congress needs to make legislative amendments that will clarify agency duties and take into account *Chaney's* demanding standard of "law to apply".

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78. See *Chaney*, 470 U.S. at 834 (recognizing that it, too, had ignored the second exception in its prior opinion of *Dunlop v. Bachowski*, 421 U.S. 560, 566 (1975): "[o]ur textual references to the 'strong presumption' of reviewability in *Dunlop* were addressed only to the § (a)(1) exception [and not to § (a)(2)] . . ."). See also *Abbott Laboratories*, 387 U.S. at 140 (recognizing that there was a "basic presumption of judicial review."); and *Bland v. United States*, 412 U.S. at 912 (denying writ of cert.), where J. Douglas, along with J. Brennan and J. Marshall, in a dissenting opinion which criticized the majority's denial of a writ of certiorari by a 16 year old petitioner, who was challenging a new felony law that allowed prosecutors the discretion to choose whether to charge juveniles over 16 as an adult, had this to say: "[o]ne needs no reminder that government too can be lawless . . . . The [APA] is indeed part of the citizen's arsenal against lawless. As Kenneth Davis said . . . ' . . . under the [APA] judicial review of the exercise of executive discretion is the rule and unreviewability is the exception.' "

79. *Chaney*, 470 U.S. at 829 (citing *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)).

80. *Chaney*, 470 U.S. at 830 (citing *Overton Park*, 401 U.S. at 410) (emphasis added).

A. *Overton Park*, the Precursor to *Chaney*

The Supreme Court's startling interpretation of the APA came almost fifteen years before *Chaney*. In *Citizens to Preserve Overton Park v. Volpe*,<sup>81</sup> the Supreme Court briefly touched upon section 701 in order to dismiss the rule's relevance to its own case. In dealing with 701(a)(1), the Court noted that "there [was] no indication that Congress sought to prohibit judicial review,"<sup>82</sup> while in regards to 701(a)(2), the Court merely stated that "[it] is a narrow exception. . . . applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'"<sup>83</sup>

It is unfortunate that the *Chaney* court chose to recite this opinion, because commentators have since shown that the interpretation of the APA in *Overton* was unsound and erroneous. The crucial "no law to apply" statement was purportedly based upon legislative history. However, *Overton* misquoted the legislative report,<sup>84</sup> which states that, "[i]f, for example, 'statutes are drawn in such broad terms that in a given case there is no law to apply, courts of course have no statutory question to review.'"<sup>85</sup> The report dealt with "statutory questions," whereas, *Overton* was referring to non-statutory situations concerning review of agency discretion.<sup>86</sup> The Senate committee was correct in stating that there is "no statutory question" when "there is no law to apply." However, that does not mean that there is "no discretionary abuse question," since a court, without referring to any statute, can merely rely upon traditional standards of justice, fairness, reasonableness, and common sense as guidelines for review.<sup>87</sup> However, one of the consequences of the *Chaney* decision is that courts must now find standards of review within the narrow confines of the statutory language rather than from the broad traditional notions of equity.

Additionally, a more thorough examination of the legislative history reveals that great concerns existed, specifically in regard to potential misinterpretations of the APA, which may prohibit

81. 401 U.S. at 402 (1971).

82. *Id.* at 410.

83. *Id.* (emphasis added).

84. S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945).

85. *Id.* (emphasis added).

86. See Levin, *supra* note 42, at II.B.

87. KENNETH C. DAVIS, ADMINISTRATIVE LAW OF THE EIGHTIES: 1989 SUPPLEMENT TO ADMINISTRATIVE LAW TREATISE, § 28:1-2, at 488.

judicial review whenever an agency possesses any hint of discretion. To alleviate this concern, "the legislative sponsors filled their reports and floor colloquies with assurances that the APA would still permit courts to consider whether an agency had abused its discretion," even when agency discretion exists.<sup>88</sup> Hence, it was not the legislators's intent in creating the APA to insulate discretionary agency decisions from judicial review.

While *Chaney's* "no law to apply" test seems to be unpersuasive under close scrutiny, nevertheless, this Comment does not intend to pour more water into the vast pool of criticism that already surrounds this case. The purpose of this Comment is to examine whether *Chaney* has impacted in any way the effectiveness of the enforcement of the ESA. A closer look at the decision reveals the current status of the law governing review of agency enforcement decisions.

### B. *Examining the Chaney Decision*

The plaintiffs in *Chaney* were "death row" prison inmates who requested judicial review of the Food and Drug Administration's decision to not take enforcement action against the states of Texas and Oklahoma for their use of lethal drug injections in carrying out death sentences. The plaintiffs claimed that the Federal Food, Drug, and Cosmetic Act only approved the drug for medi-

88. Levin, *supra* note 42, at § I. See generally, 92 CONG. REC. 2152-54 (1946) (remarks of Senators in relevant parts):

"Mr. Reed: . . . In the light of the great expansion of governmental activities into the private lives of our citizens, some protection of the citizen against these agencies should be provided. It is long overdue;" and

"Mr. Donnell: . . . [I]s there any intention on the part of the framers of this bill (APA) to preclude a person who claims abuse of discretion from the right to have judicial review of the action . . . ?")

Mr. McCarran: Mr. President, let me say . . . where an agency without authority or by caprice makes a decision, then it is subject to review . . . .

Mr. Donnell: *But the mere fact that a statute may vest discretion in an agency is not intended, by this bill, to preclude a party . . . from having a review in the event he claims there has been an abuse of that discretion.* Is that correct? (emphasis added).

Mr. McCarran: It must not be an arbitrary discretion . . . *it must be a discretion based on sound reasoning . . .* (emphasis added).

Mr. Austin: Is it not true that among the cases cited . . . were some in which no redress or no review was granted, solely because the statute did not provide for a review?

Mr. McCarran: That is correct.

Mr. Austin: And is it not true that, because of the situation in which we are at this moment, this bill is brought forward for the purpose of remedying that defect and providing a review to all persons who suffer a legal wrong . . . ?

Mr. McCarran: That is true . . . .



cal purposes and not for executionary purposes, which was likely to inflict severe pain. In denying judicial review, Justice Rehnquist cited the *Overton* language of "no law to apply."<sup>89</sup> Although the court in *Overton* eventually found law to apply for guiding its review, *Chaney* distinguished itself from *Overton* on the basis that *Overton* "did not involve an agency's refusal to take requested enforcement action."<sup>90</sup> With respect to an agency's refusal to enforce, *Chaney* held that "the presumption is that judicial review is not available."<sup>91</sup> Thus, in addition to the two exceptions against review already expressed in section 701 of the APA,<sup>92</sup> *Chaney* created a third and separate exception<sup>93</sup> that deals specifically with agency decisions to not enforce.

The reasons enumerated by the Court in support of restricting review under such a context were as follows: (1) "[a]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise," including not only an assessment of whether a violation has occurred, but also whether agency resources are best spent on this or another violation, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and whether the agency has enough resources to undertake the action at all,"<sup>94</sup> (2) "when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, . . . areas that courts often are called upon to protect;"<sup>95</sup> (3) "where an agency *does* act to enforce, that action itself provides a focus for judicial review;"<sup>96</sup> and (4) "an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor . . . ." <sup>97</sup>

Although the Court offered these factors in support of the presumption against judicial review within the context of non-enforcement agency decisions, it still left open the possibility that "Congress may limit an agency's exercise of enforcement power

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89. *Chaney*, 470 U.S. at 831.

90. *Id.*

91. *Id.*

92. 5 U.S.C. § 701(a) of the Administrative Procedure Act states an exception to review when "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."

93. See *Natural Resources Defence Council v. Hodel*, 865 F.2d 288, 318, n.32.

94. *Id.*

95. *Id.* at 832.

96. *Id.*

97. *Id.*

if it wishes . . . ."<sup>98</sup> The legislatures can require judicial review "either by (1) setting substantive priorities, or, (2) by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue."<sup>99</sup> While the existence of statutory guidelines is the most convincing evidence for rebutting the presumption of non-review, the Court also hinted, in asides and footnotes throughout its opinion, at other means of triggering review. Such review may occur (1) when the agency refuses to "institute proceedings based solely on the belief that it lacks jurisdiction,"<sup>100</sup> (2) when the "agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities,"<sup>101</sup> (3) when the agency fails to follow its own adopted rules and guidelines;<sup>102</sup> or (4) when the plaintiff alleges the agency's failure to enforce has violated the Constitution.<sup>103</sup> *Chaney* therefore created a much more complex interpretation of section 701 than was first envisioned by *Overton* when it articulated the "no law to apply" test.<sup>104</sup>

Given the preliminary structure of *Chaney*, an examination of how the ESA fits within this legal framework is appropriate.

## V.

### THE ESA — SURVIVING UNDER *CHANNEY*

In order to attain review of an agency's refusal to enforce under section 706's "arbitrary and capricious" standard, one must first rebut section 701's presumption against such a review. The preferred method established by *Chaney* is to show that Congress has either established "substantive priorities" or

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98. *Id.* at 833.

99. *Id.* (numeration added).

100. *See id.* at n4. For a case example of an agency erroneously believing it lacked jurisdiction, see *Montana Air Ass'n of Civilian Technicians, Inc. v. Federal Labor Relations Auth.*, 898 F.2d 753 (9th Cir. 1990).

101. *See id.* (quoting *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973)). For a case example of an agency abdicating its statutory responsibilities, see *N. Ind. Pub. Serv. Co. v. FERC*, 782 F.2d 730, 745 (7th Cir. 1986).

102. *See id.* at 836. For a case example of an agency failing to follow its own adopted rules and guidelines, see *Frisby v. U.S. Dep't of Hous. and Urban Dev.*, 755 F.2d 1052 (3rd Cir. 1985).

103. *See id.* at 838. For a case example of a Constitutional claim against an agency's failure to enforce, see *Webster v. Doe*, 486 U.S. 592, 603 (1988).

104. *See Levin, supra* note 42, at § II.C.3. While it is true that these exceptions help to give more avenues for overcoming the presumption against review, only the third and fourth ones are of much practical use; whereas the first and second rarely occur and are hard to prove, especially since a general policy of abdication requires a consistent pattern of abdication to be shown.

“otherwise circumscrib[ed] an agency’s power to discriminate among issues or cases it will pursue.”<sup>105</sup> In other words, the inquiry is whether Congress has placed any statutory limitations upon the agency’s enforcement discretion.<sup>106</sup> Whether a party is opposing or requesting judicial review, “[b]oth *Overton Park* and *Heckler [v. Chaney]* emphasized that section 701(a)(2) requires careful examination of the statute on which the claim of agency illegality is based.”<sup>107</sup> The following sections will examine the ESA, arguing that the statute *does* establish such guidelines within its provisions, and will outline the contrary arguments.

#### A. Statutory Interpretation

Under section 1531(b) of the Act, it is declared that two of “the purposes of [the ESA] are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species.”<sup>108</sup> Under section 1531(c), “[i]t is further declared to be the policy of Congress that all Federal departments and agencies *shall seek to conserve endangered species and threatened species and shall utilize their authorities* in furtherance of the purposes of this Act.”<sup>109</sup> Congress’ concern for species conservation is emphasized by the Act’s definition of “conserve.” Under section 1532(3), agencies are required to use “*all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided . . . are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance . . . , and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.*”<sup>110</sup>

This statutory language must first be analyzed to determine if there is “law to apply” to rebut *Chaney*’s presumption against

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105. *Chaney*, 470 U.S. at 831.

106. *National Wildlife Fed’n v. EPA*, 980 F.2d 765, 773 (D.C. Cir. 1992) (noting that “most critically, the presumption of unreviewability does not apply where there is ‘law to apply.’”).

107. *Webster v. Doe*, 486 U.S. 592, 600 (1988).

108. 16 U.S.C. § 1531(b) (1988).

109. *Id.* § 1531(c) (emphasis added).

110. *Id.* § 1532(3) (emphasis added).

review. Second, the rationales underlying *Chaney's* presumption must be examined to determine their applicability to the ESA.

### 1. The Use Of "Shall" As A Directive For Action

The language of these provisions seem to indicate a command for action. "Statutory language that an act 'shall' be carried out is generally regarded as mandatory."<sup>111</sup> Though this rule is not absolute, it is especially true "where the statute's purpose is the protection of public or private rights (as is the case with the ESA), as opposed to merely providing guidance for government officials . . . ."<sup>112</sup> If the legislature intended that agencies have the discretion to do nothing, then it could have merely stated the policy in terms of all agencies "should" seek to conserve and "may" utilize their authorities in furtherance of the Act. However, the legislature did not do this, instead, it used the expression "shall." In addition, the definition of "conservation" under section 1532(3) requires agencies to use "all methods and procedures which are necessary," including the use of law enforcement, to bring endangered or threatened species back to a healthy level whereby the protective measures of the Act "are no longer necessary." Taken together, these two provisions mandate that agencies shall use law enforcement, along with all other methods as is necessary, to conserve protected species.<sup>113</sup>

In *Defenders of Wildlife v. Andrus*,<sup>114</sup> the court interpreted the definition of "conservation" under the ESA to mean that the FWS "must do far more than merely avoid the elimination of protected species. It must bring these species back from the brink so that they may be removed from the protected class, and it must use all methods necessary to do so. The [FWS] cannot limit its focus to what it considers the most important management tool available to it, i.e., habitat control, to accomplish this

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111. *South Carolina Wildlife Fed'n (SCWF) v. Alexander*, 457 F. Supp. 118, 130 (1978) (citing to *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935) (noting that "'shall' is the language of command.")). See also *Alaska Ctr for the Env't v. Reilly*, 762 F. Supp. 1422, 1427 (W.D. Wash. 1991) (noting "Congress' repeated use of the term 'shall' in sec. 303(d) clearly places a mandatory duty upon the EPA to take affirmative action [under the CWA] . . . .").

112. *Id.* (parenthetical added); see also *Dubois v. Thomas*, 820 F.2d 943, 948 (recognizing the general rules of statutory construct stated in *SCWF*).

113. *National Wildlife Fed'n*, 980 F.2d at 773 (noting that, "If [Congress] has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is 'law to apply' under § 701(a)(2), and courts may require that the agency follow that law . . . .").

114. 428 F. Supp. 167 (D.C. 1977).

end.”<sup>115</sup> Thus, while deference should be given to an agency’s determination of what methods are “necessary,” the ESA requires that the agency make such a determination in regards to *all* possible methods of protection and not “limit its focus” to only a few. A reviewing court, based upon this guiding standard of “necessity,” can ascertain whether the agency’s decision to do nothing is reasonable under the circumstances and whether law enforcement was given adequate consideration along with other methods of conservation.

On the other hand, the court in *Dubois v. Thomas*<sup>116</sup> noted that, despite the use of the term “shall” within a statute, *Chaney*’s presumption against judicial review helps to tip the statutory interpretation scale in favor of agency discretion when dealing with non-enforcement decisions. The *Dubois* court recognized that if taken together, the general rule that “shall” is a language of command and the notion that agency refusals to enforce are discretionary, may each lead to conflicting interpretations. However, the court remarked that if substantial arguments can be made both ways when interpreting the use of the term “shall,” “[i]n such circumstances, resort[ing] to extrinsic aids to give effect to the intent of Congress is appropriate.”<sup>117</sup> The *Dubois* court looked to the other provisions within the Federal Water Pollution Control Act (“FWPCA”) to find further hints of Congressional intent. The court’s conclusion that enforcement was discretionary was supported by two factors: (1) the FWPCA statement that “the Administrator is *authorized* to commence a civil action . . . ,”<sup>118</sup> rather than stating that the Administrator *must* commence a civil action; and (2) the existence of the citizen suit provision within the FWPCA, which “allows citizens to supplement [the government’s enforcement] power by bringing actions directly against violators.”<sup>119</sup> These factors suggest that “the

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115. *Id.* at 170. The court held that the FWS failed to adequately focus upon its obligation to conserve and increase species population when it permitted twilight shooting of game birds, which undoubtedly occasioned some killing of protected species. The fact that the FWS may be conserving the species through other means, such as habitat preservation, does not allow the FWS to ignore the use of regulated hunting hours as possibly a necessary method of conservation. The court directed the FWS to compile evidence to determine whether or not a change in hunting hours is necessary.

116. 820 F.2d 943, 948 (8th Cir. 1987) (citing to cases where the use of “shall” does not preclude enforcement discretion).

117. *Id.* at 949.

118. 33 U.S.C. § 1319(b) (emphasis added).

119. *Dubois*, 820 F.2d at 949.

FWPCA was not intended to enable citizens to commandeer the federal enforcement machinery."<sup>120</sup> Unfortunately, the rationales which support a finding of enforcement discretion in *Dubois* are applicable to the ESA as well.

More will be said about the enforcement provisions of the ESA later in this comment.<sup>121</sup> Although the use of "shall" is often interpreted as creating a mandatory duty to act under most circumstances, this is a rebuttable presumption that may not completely preclude agency discretion.

## 2. Giving Life To The Spirit Of The Act

In the process of weighing the arguments, however, *Dubois* seemed to have forgotten the well established principle that "traditional statutory interpretation directs that the court give life to the *spirit of the Act*."<sup>122</sup> The tragic consequence of the *Chaney* decision is that it robbed the courts of their ability to look at legislative intent, and instead, replaced it with a kind of tunnel vision that can only see what is expressly written.

The court in *Sierra Club v. Yeutter*,<sup>123</sup> however, was able to escape this fate. There the plaintiff petitioned the court to declare that the United States possessed water rights in twenty-four wilderness areas and that the failure of the government agencies to claim these rights violated the Wilderness Act.<sup>124</sup> The act "impose[d] an affirmative duty on the Forest Service to administer the wilderness areas so as 'to preserve [their] wilderness character.'"<sup>125</sup> The court held that "if the Forest Service were, by its inaction, to permit strip-mining, road construction, or other action directly inconsistent with the Wilderness Act, this court could review that inaction."<sup>126</sup> Hence, a failure to enforce the preservation policies of the statute is reviewable. The opinion

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120. *Id.*

121. *See infra* § V(B)(4).

122. *Alaska Center for the Environment v. Reilly*, 762 F. Supp. 1422, 1429 (W.D. Wash. 1991)(emphasis added).

123. 911 F.2d 1405 (10th Cir. 1990).

124. 16 U.S.C. §§ 1131-1136 (1988).

125. 16 U.S.C. § 1133(b) reads as follows: "Except as otherwise provided in this chapter, each agency administering any area designated as wilderness *shall be responsible for preserving* the wilderness character of the area and *shall so administer* such area for such other purposes for which it may have been established as also to preserve its wilderness character. Except as otherwise provided in this chapter, wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use." (emphasis added).

126. *Sierra Club*, 911 F.2d at 1413.

further noted that "the Forest Service's decision to use or not to use federal reserved water rights . . . is 'committed to agency discretion by law,' except in those situations where the agency's conduct cannot be reconciled with the Act's mandate to preserve the wilderness character of the wilderness areas."<sup>127</sup> The court further noted that "[d]etermining whether the statutory mandate is so threatened requires evaluation of the extent and immediacy of the alleged harm, possible agency responses, and the probable efficacy of such responses."<sup>128</sup>

*Sierra Club's* holding recognized the power, and arguably the duty, of the court to uphold the "spirit of the Act" by guarding against agency actions which could not be reconciled with the statute's purpose. Similarly, the "spirit" of the ESA is clearly expressed through its purpose, which is to conserve endangered species and their ecosystems, and its policy, which is to require all federal departments and agencies to conserve and utilize their authorities towards that goal. Both the ESA and the Wilderness Act provide almost identical preservation provisions. While the latter states that "each agency . . . shall be responsible for preserving the wilderness character of the area,"<sup>129</sup> the former states that "all Federal departments and agencies shall seek to conserve the endangered . . . and threatened species."<sup>130</sup>

Applying the holding of *Sierra Club* to the problem of the marbled murrelet, it is apparent that the decision of the FWS to not commence enforcement actions against PALCO, in light of the convincing evidence that an illegal taking is being committed, "cannot be reconciled with the [ESA]'s mandate to preserve." Just as the Forest Service in *Sierra Club* could not sit on its hands while strip-mining is destroyed the wilderness character of the area, the FWS cannot do the same while PALCO inflicts harm upon the marbled murrelets. Based upon the ESA's explicit policy to conserve, this inaction by the FWS is judicially reviewable.

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127. *Id.* at 1414 (emphasis added).

128. *Id.* at 1415. Ultimately, the court declined to review because the threat to the wilderness areas was not imminent and the issue was "not ripe". However, in the case of the marbled murrelet, the danger is clearly imminent due to PALCO's reckless clear-cutting methods.

129. 16 U.S.C. § 1133(b) (1988).

130. 16 U.S.C. § 1531(c) (1988).

## B. *The Inapplicability Of Chaney's Rationales To The ESA*

In support of its presumption against review, the *Chaney* court articulated certain reasons why agency enforcement decisions are not appropriate for judicial review. However, most of these rationales are either inapplicable to the ESA or are simply unconvincing.

### 1. Agency Expertise Is Required To Balance Complicated Factors

The first of *Chaney's* arguments in support of a presumption against review is predicated upon the notion that enforcement decisions involve a complicated balancing of factors which are particularly within an agency's expertise. These factors include the determination of such matters as (1) the allocation of its own resources, (2) the likelihood of prosecutorial success, (3) how enforcement would fit into its own policies, and (4) the existence of sufficient resources to begin enforcement.<sup>131</sup> The ESA, however, may have preempted agency discretion by already addressing these matters.

The Supreme Court, in *Tennessee Valley Authority v. Hill (TVA)*,<sup>132</sup> dramatically illustrated the extent to which the ESA's policy of conservation mandates that economic interests be made subordinate to the interests of endangered species. In order to prevent the eradication of a population of endangered snail darters and the destruction of the species' habitat, the Supreme Court prohibited a dam under construction from being completed and put into operation. While the Court recognized that the holding would result in the loss of anticipated benefits from the project and of many millions of dollars in public funds,<sup>133</sup> the Court concluded that "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities," and that the "plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost."<sup>134</sup> 135

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131. 470 U.S. at 831.

132. 437 U.S. 153 (1978).

133. *Id.* at 174 n.19 (finding that the "failure to complete the Tellico Dam would result in the loss of some \$53 million in non-recoverable obligations.").

134. *Id.* at 184, 194. As the Ninth Circuit would later hold, "Congress has decided that any possible expense and inconvenience to the public cannot equal the potential loss from extinction." *Sierra Club v. Marsh*, 816 F.2d 1376, 1386 n.13 (9th Cir. 1987).



The effect of *TVA*'s decision appears to be that it is improper under the ESA for agencies to consider cost factors when determining whether to take enforcement measures. Hence, factors (1) and (4) of *Chaney*'s argument are rendered inapplicable because the ESA requires that agencies act "in favor" of species protection without regards for the effect upon agency resources.

However, such a conclusion seems rather severe. It is difficult to ignore the fact that agencies are limited in their resources, and that they need to be able to prioritize and allocate their resources towards the most egregious violations.<sup>136</sup> This apparent conflict between a judicial ideal and reality can be resolved by narrowly interpreting *TVA*'s holding as applying only to a direct agency action (*i.e.* finishing the dam and operating it) that would result in a taking, and not to an agency's mere refusal to spend its resources to prevent a taking it did not cause. Under the first scenario, an agency must cease any direct action that would cause a taking of a protected species regardless of costs. Under the second scenario, an agency has discretion to prioritize its enforcement actions and not have to respond to every single violation, which would be cost prohibitive. By limiting the holding of *TVA* in such a manner, *Chaney*'s presumption remains sound.

With regard to factor (2), there is little reason to believe that an agency is in a better position to analyze the likelihood of prosecutorial success than a court of law. Although not an expert in the given field, a judge is, however, well trained to weigh the evidence and make a determination of the merits.

Finally, factor (3) of *Chaney*'s rationale argues that an agency should be able to decide whether enforcement actions would fit its overall policies. This argument ignores the existing policies created by the ESA. Under section 1531(c), the declared policy of Congress is for all Federal departments and agencies to conserve listed species and to utilize their authorities to further the

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135. *United States v. Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126, 1132 (E.D. Cal. 1992) (citing *Sierra Club v. Marsh*, 816 F.2d 1376, 1386 n.13 (9th Cir. 1987)).

136. In *Dubois v. Thomas*, 820 F.2d 943, 948 (8th Cir. 1987), the court denied plaintiff's request to compel EPA to take enforcement action against defendant city. The court noted that,

EPA could be compelled to expend its limited resources investigating multitudinous complaints, irrespective of the magnitude of their environmental significance. As a result, EPA would be unable to investigate efficiently and effectively those complaints that EPA, in its expertise, considers to be the most egregious violations of the FWPCA (Federal Water Pollution Control Act). Only if the Administrator has discretion to allocate its own resources can a rational enforcement approach be achieved.

Act's purposes.<sup>137</sup> Since utilizing an agency's enforcement authority against a violator to conserve a protected species is clearly harmonious with the mandated policies, any discordance with the agency's own policies is thus irrelevant. The policies of an agency charged with administering the Act should be made to fit those of the Act, and not vice versa.

## 2. An Agency's Refusal To Act Is Not An Exercise Of Coercive Powers

*Chaney's* second argument is that "when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights."<sup>138</sup> The Court thus implied that an improper inaction is not as insidious as improper action, since the latter is more coercive.

Such an argument is unpersuasive since courts have long recognized that "the decision to enforce - or not to enforce - may itself result in significant burdens on a defendant or a statutory beneficiary, even if he is ultimately vindicated in an adjudication."<sup>139</sup> An important aspect of the *Sierra Club* holding is its recognition that an agency's failure to act in lieu of a mandate for affirmative action is no different from an improper agency action. Both can be equally harmful and are easily reviewable for contravention of statutory intent. In fact, Justice Marshall's concurring opinion in *Chaney* noted that "one of the very purposes fueling the birth of administrative agencies was the reality that governmental refusal to act could have just as devastating an effect upon life, liberty, and the pursuit of happiness as coercive governmental action."<sup>140</sup>

In addition, *Chaney's* argument is inapplicable because of the unique purpose of the ESA. The reason that Congress passed the Act was not to protect "individual liberty or property rights," but to preserve endangered species. Unlike persons who can safeguard their own rights through the judicial system without the help of agencies, these animals are completely dependent upon active agency intervention for protection. Thus, while the

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137. 16 U.S.C. § 1531(c) (1988).

138. *Supra* note 95.

139. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980). *See also* *City of Chicago v. United States*, 396 U.S. 162, 166 (1969) (" 'An order of the Commission dismissing a complaint on the merits and maintaining the *status quo* is an exercise of administrative function, no more and no less, than an order directing some change in status.' ") (quoting *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 142-43 (1939)).

140. *Chaney*, 470 U.S. at 851 (Marshall, J., concurring).

FWS's inaction may not be "coercive," it can still be injurious to the interests at stake.

Finally, the implausibility of distinguishing between an enforcement action and a refusal to enforce can best be illustrated by considering the ESA's Permit provision. By creating a precise permit system whereby a private person can avoid the taking prohibition, Congress has preempted agency discretion over private takings of endangered species. Under section 1539, Congress established a distinct and finite list of factors that would justify a taking. This section allows the Secretary to authorize a takings permit only when the taking is for scientific purposes or to enhance the species' survival, or if the taking is incidental to, and not the purpose of, a lawful activity.<sup>141</sup>

A further restriction upon the Secretary's discretionary authority is found in section 1539(a)(2), where it forbids the Secretary from issuing any permit under the "incidental" take section without first receiving from the petitioner an adequate "conservation plan" that sufficiently ensures mitigation of the damage to protected species. Thus, the Secretary's ability to authorize a takings permit is so well defined that one cannot truly say that there is "no law to apply."

Clearly an agency decision to authorize a takings permit which does not satisfy any of the above exceptions would be reviewable. Why then should an agency not be held accountable for knowingly permitting the same improper taking through its inaction? The same impropriety would exist whether the agency acted or refused to act. An agency should not be allowed to contravene the intentions of Congress and to do covertly what it could not do overtly. As demonstrated here, the false distinction between action and non-action "serves no useful purpose."<sup>142</sup>

### 3. Enforcement Actions Provide A Focus For Judicial Review

The third argument which the *Chaney* court put forth was that "when an agency does act to enforce, that action itself provides for a focus for judicial review."<sup>143</sup> The *Chaney* court again tried

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141. 16 U.S.C. § 1539(a)(1) (1988). The short list of exemptions against takings also allows for "substantial economic hardship" and use by "Alaskan natives." 16 U.S.C. § 1539(b) & (e).

142. *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 143 (1939) (criticizing the unsound distinction between "negative orders" and "affirmative orders").

143. *Supra* note 96.

to make a tenuous distinction between action and inaction. As noted earlier, courts traditionally have not been bound to only review affirmative actions. Whether an agency decides to act or not to act, the process which led up to this final decision may be flawed and should be reviewed for such "pure" discretion abuses as the agency's misunderstanding of facts, divergence from precedence without good reason, reasoning in an irrational manner, or making of an unconscionable value judgment.<sup>144</sup>

#### 4. Agency Decisions Not To Enforce Are Similar To Prosecutorial Discretion

The final argument discussed in *Chaney* supporting the presumption against review states that "an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor."<sup>145</sup> An examination of the Act's enforcement section<sup>146</sup> is useful to determine whether Congress has already addressed this issue with regard to the ESA.

A careful reading of the relevant provisions reveals much agency discretion and few requirements. Under section 1540(a), the Secretary "may" order civil penalties against violators.<sup>147</sup> In section 1540(b), violators "shall" be fined or imprisoned, but only "upon conviction."<sup>148</sup> And under section 1540(f), the Secretary is "authorized to promulgate such regulations as may be appropriate to enforce" the Act.<sup>149</sup> Except under certain circumstances as stated within the citizen suits provision, nowhere within the penalties and enforcement section of the Act is the Secretary required to take enforcement actions against a violator.

While the Secretary is not directly compelled to enforce the ESA, the citizen suit enforcement provision is an indirect requirement that the Secretary enforce the ESA. The relevant part of citizen suits provision of section 1540(g)(1) provides,

[A]ny person may commence a civil suit on his own behalf. . .

(B) to compel the Secretary to apply, pursuant to section 1535(g)(2)(B)(ii), the prohibitions set forth in or authorized pursu-

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144. Levin, *supra* note 42.

145. *Supra* note 97.

146. 16 U.S.C. § 1540 (1988 & Supp. V 1993).

147. 16 U.S.C. § 1540(a)(1) ("Any person who knowingly violates . . . may be assessed a civil penalty by the Secretary . . .").

148. 16 U.S.C. § 1540(b)(1) ("Any person who knowingly violates . . . shall, upon conviction, be fined . . . or imprisoned . . .").

149. 16 U.S.C. § 1540(f) (1988).

ant to section 1533(d) or 1538(a)(1)(B) of this title with respect to the taking of any [listed species];<sup>150</sup>

Under this section, any person can “compel” the Secretary to take enforcement actions. However, this request is made pursuant to section 1535(g)(2)(B)(ii), which states that prohibitions against taking must apply if the Secretary finds that an “emergency” exists posing a significant risk to the species’ well-being.<sup>151</sup> Congress must have intended judicial review to be available here, because in order for a court to decide whether or not to grant a petitioner’s request to “compel” the Secretary to take action, the court needs first to review the circumstances to determine if an “emergency” exists. In other words, while the Secretary may have the decision to decide to do nothing, this decision is not immune from judicial review because the citizen suit provision allows a court to disagree with the Secretary and to compel him to apply the prohibitions when the circumstances pose a significant risk to the health of a listed species.

Unfortunately, the provision seems to require that such a citizen suit be brought only “after [the Secretary] finds” that an emergency exists. A problem arises when the Secretary, or an authorized agency, decides to not make any findings whatsoever, thereby effectively blocking judicial review.

This was not allowed to happen in *South Carolina Wildlife Federation (SCWF) v. Alexander*<sup>152</sup> when the court was confronted with a similar problem. There, the court was grappling with section 309(a)(3) of the FWPCA, which states that “[w]hen . . . the Administrator finds that any person is in violation of section 1311 (§ 301 of the Act) . . . , he shall issue an order requiring such person to comply . . . , or he shall bring a civil action . . . .”<sup>153</sup> The

150. 16 U.S.C. § 1540(g)(1) (1988). The following sections are referred to within § 1540(g)(1):

Section 1533(d) states, in relevant part, that “the Secretary shall issue such regulations as he deems necessary and advisable” when a species is listed as a protected species. Section 1538(a)(1)(B) states, in relevant part, that it is “unlawful for any person . . . to . . . take any [endangered or threatened] species within the United States . . . .”

151. 16 U.S.C. § 1535(g)(2)(B)(ii). Section 1535(g)(2)(B)(ii) states, in relevant part, “(2) The prohibitions set forth . . . shall not apply with respect to the taking of any resident endangered species . . . within any State-  
(B) *except for any time within the establishment period when -*

(ii) *the Secretary applies such prohibitions after he finds . . . that an emergency exists posing a significant risk to the well-being of such species and that the prohibition must be applied to protect such species.*” (Emphasis added).

152. 457 F. Supp 118 (S.C. 1978).

153. 33 U.S.C. § 1319(a)(3).

court held that if it is necessary to have an express finding before the administrator's enforcement duties are activated, then the court can compel such a finding to be made.<sup>154</sup> The court recognized that "[t]o hold otherwise would vitiate the enforcement scheme of the FWPCA, since the Administrator could otherwise totally avoid his enforcement duty by closing his eyes to violations and refusing to make any 'finding' either way with respect to violations of the Act to which his attention is directed."<sup>155</sup> Similarly, the court presiding over an action under the citizen suit provision of the ESA can compel the Secretary to make a finding of whether an "emergency" exists, and that finding will then be the focus of the court's review.

However, since the decision in 1978, some courts have criticized *SCWF*.<sup>156</sup> One court, the *Dubois* court, accused the *SCWF* court of having ignored the principle that agency decisions which refuse enforcement generally are unsuitable for judicial review.<sup>157</sup> Apparently, the *Dubois* court was much influenced by *Chaney*. As discussed earlier, *Dubois* relied upon two statutory constructs within the FWPCA to support the conclusion of agency enforcement discretion: (1) the FWPCA merely stated that the Administrator is authorized to commence a civil action,<sup>158</sup> rather than must; and (2) the existence of the citizen suit provision whereby citizens can take enforcement actions themselves rather than depending upon an agency, which suggests that "the FWPCA was not intended to enable citizens to commandeer the federal enforcement machinery."<sup>159</sup>

These two rationales are applicable to the ESA as well. First, the language within the enforcement provisions of the Act implies discretion by its use of such terms as "may" and "authorized." Second, the citizen suit provision does allow any person to "commence a civil suit on his own behalf" against a violator without agency assistance.<sup>160</sup> As a result, it remains doubtful whether bringing a citizen suit to compel agency enforcement will have much effect upon agency discretion. The practical of the citizen suit provision is to allow citizens to enforce the ESA

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154. *SCWF*, 457 F. Supp. at 130.

155. *Id.*

156. Disapproved by *Dubois*, 820 F.2d 943 (8th Cir. 1987) and *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (1982).

157. *Dubois*, 820 F.2d at 948 (citing to *Chaney*).

158. 33 U.S.C. § 1319(b) (emphasis added).

159. *Dubois*, 820 F.2d at 949.

160. 16 U.S.C. § 1540(g)(1)(A) (1988).

in lieu of agency inaction, rather than to compel enforcement by the agency.

C. *An Alternative To Challenging Agency Enforcement Discretion*

With *Chaney's* presumption against review backing the agencies up, challenging an agency's enforcement discretion is an uphill battle, to say the least. There is, however, an alternative route to achieving agency action — compelling the agency to fulfill the duty of developing a protective plan. This method has achieved some success, but a recent ESA case involving an endangered beach mouse seem to have foreclosed any hopes of future results by this means.

Part (C) of the citizen suits provision allows for actions to be brought against the Secretary "where there is alleged a failure of the Secretary to perform any act or duty under [16 U.S.C. § 1533] which is not discretionary with the Secretary."<sup>161</sup> The referred to provision, section 1533, not only requires that the Secretary makes determinations and listings of endangered and threatened species, but also that

The Secretary . . . to the maximum extent prudent and determinable -

(A) shall, concurrent with making a determination . . . that a species is an endangered . . . or a threatened species, designate any habitat of such species which is considered to be critical habitat; and

(B) may, from time-to-time thereafter as appropriate, revise such designation.<sup>162</sup>

In addition, section 1533(f)(1) provides that

The Secretary shall develop and implement plans (hereinafter in this subsection referred to as "recovery plans") for the conservation and survival of endangered . . . or threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species. The Secretary, in developing and implementing recovery plans, shall, to the maximum extent practicable -

(A) give priority to those endangered . . . or threatened species . . . that are most likely to benefit from such plans, particularly those

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161. *Id.* § 1540(g)(1)(C) (1988).

162. *Id.* § 1533(a)(3) (1988).

species that are, or may be, in conflict with construction or other development projects or other forms of economic activity . . . .<sup>163</sup>

This latter section is mandating, rather than merely authorizing, the Secretary to develop and implement recovery plans to protect endangered and threatened species. The duty is non-discretionary and thus can be compelled under part (C) of the citizen suits provision. While the Secretary may have discretion as to what types of measures to implement,<sup>164</sup> he is denied the option of inaction "unless he finds that such a plan will not promote the conservation of the species."

Surely this provision has sufficient "law to apply" to guide a court's review. First of all, a request for judicial review should be more freely granted because the presumption against review is inapplicable to matters not related to enforcement. Secondly, this language in section 1533(f) is very similar to that which was held by the *Overton* court to be "clear and specific directives" for guiding agency decisions.<sup>165</sup> The statutes at issue in *Overton* denied the approval of any program or project that requires the use of parkland "unless (1) there is no feasible and prudent alternative . . . ." <sup>166</sup> The similarity between the ESA and the acts in *Overton* is that they both require the subject agencies to take a specific course of action (to protect endangered species versus to deny project approval, respectively) and both limit agency discretion to one exception (a finding that such a plan will not promote conservation versus a determination that no feasible and prudent alternative exists). Likewise, in *National Treasury Employees Union v. Horner*,<sup>167</sup> the court held that provisions restricting the Office of Personnel Management ("OPM") from departing with normal procedures *except* when "necessary" for "conditions of good administration" were sufficient to establish that "the discretion Congress gave to OPM is not unfettered."<sup>168</sup> The court further noted that, "*If Congress is not indifferent to the choices an agency makes, . . . and does not reserve oversight exclusively to itself by precluding judicial review, then we presume*

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163. *Id.* § 1533(f) (1988) (parenthetical in original).

164. *Id.* at § 1533(d) (noting that the Secretary has discretion as to what regulations "he deems necessary and advisable to provide for the conservation of [endangered or threatened] species.").

165. *Overton Park*, 401 U.S. at 411.

166. *Id.* (referring to the Department of Transportation Act and the Federal-Aid Highway Act).

167. 854 F.2d 490 (D.C. Cir. 1988).

168. *Id.* at 495.



the legislature expected the courts to review those choices . . . .”<sup>169</sup> The fact that the ESA only states one exception for failure to implement a recovery plan makes it evident that Congress was “not indifferent to the choices an agency makes.”<sup>170</sup> Finally, section 1533(f) requires that “priority” be given “to the maximum extent practicable to those species which are in direct conflict with human activities.”<sup>171</sup> The existence of “substantive priorities” within an act, as recognized by *Chaney*, can rebut the presumption of non-review.<sup>172</sup>

The use of the ESA’s recovery plan provision to compel the FWS to take action was successfully litigated in the recent case of *Sierra Club v. Lujan*.<sup>173</sup> The case involved the taking of endangered species at two natural springs as a result of the FWS’s failure to adopt a recovery plan that would ensure sufficient water levels to these habitats. The court noted that the Secretary has the “duty to develop and implement a plan . . . [u]nless he finds that such a plan will not promote the conservation of the [endangered] species.”<sup>174</sup> Although the defendants argued their decision to not act was discretionary due to “severe budget constraints,” the court refused to take budget factors into account.<sup>175</sup> However, two important factors in this case must be noted: (1) the FWS in this case not only failed to implement an existing plan for one spring, but it never even developed a plan for the other; and (2) the endangered species associated with each spring were almost unique to that area. Thus, it is debatable whether the holding would have changed had the issue been about the content rather than the development and implementation of a recovery plan, or had the habitat been not as vital a part of the overall survival of these species.

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169. *Id.* (emphasis added).

170. *Id.*

171. *Id.*

172. *Chaney*, 470 U.S. at 833.

173. 36 ERC 1533 (W.D. Tex. 1993) (also cited in Westlaw as 1993 WL 151353).

174. *Id.* at \*11 of Westlaw cite.

175. *Id.* (refusing to read the ESA provision to say: “the Secretary shall develop and implement a recovery plan unless he claims, or suspects, that ‘tight budget constraints’ make develop or implementation of a recovery plan inconvenient or difficult . . . .”). The court also cited to *Northern Spotted Owl v. Lujan*, 758 F. Supp. 621, 629 (W.D. Wash. 1991), which held that budgetary excuse is not sufficient to continue inaction even when “prodigious resources and a truly remarkable effort had already been made by the Forest Service.”

The significance of these two factors was evident in the case of *Morrill v. Lujan*.<sup>176</sup> The plaintiff in the case was a research biologist who alleged that the construction activities occurring on the land of a private defendant was threatening the existence of a few endangered Perdido Key Beach mice that had wandered away from their critical habitat. The plaintiff requested the court to enjoin the construction and also compel the Secretary to acquire and designate the property as critical habitat. The court refused to grant either. One reason being that the plaintiff failed to adequately prove that the mouse ever even existed upon the property. More significant, however, was the court's explanation for its denial the plaintiff's second cause of action against the Secretary. The court indicated that a claim under part (C) of the citizen suit provision must be compelling a non-discretionary duty, whereas the plaintiff's request to add land to already established critical habitat is a revisionary action that is discretionary under section 1533(a)(3)(B). This is distinguished from other cases where the agency failed to designate critical habitat at the time of the listing.<sup>177</sup> The court noted further that even if the claim is challenging the adequacy of the existing recovery plan, rather than the critical habitat designation, the plaintiff still could not prevail. Although the Secretary has a duty to develop and implement a recovery plan, "the contents of the plan are discretionary, as evidenced by the language 'to the maximum extent practicable.'<sup>178</sup> Like the designation of critical habitat, once established, a recovery plan becomes immuned from any challenges.

## VI.

### RESOLVING THE PROBLEMS

Ultimately, all of this analysis boils down to just two conclusions: the first being that the ESA, with all of its mandates and protective language, remains quite vulnerable to agency dereliction; and the second being that the law is far from clear with respect to judicial review of agency decisions not to enforce.

Much of this problem stems from the statute itself. On the one hand, the ESA is resolute in its purpose to protect — mandating the Secretary to conserve using all methods necessary, to regu-

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176. 802 F. Supp. 424 (S.D. Ala. 1992).

177. *Id.* at 432 (citing Spotted Owl, 758 F. Supp. 621 as an example).

178. *Id.* at 433.

late taking through a permit system, to designate critical habitat, to develop and implement recovery plans; on the other hand, the ESA is imprecise in its command — no requirements to enforce, no requirement for periodic revisions of critical habitat, no guidelines for determining the adequacy of recovery plans. Congress was walking a fine line between tough environmental protection, which required action, and human economic activity, which required flexibility. In the process, it may have stepped too far over onto the latter side of the line. By allowing too much agency discretion, Congress has left the ESA wide open for abuse.

Facilitating review by establishing coherent guidelines need not sacrifice flexibility. For example, under section 1535(g)(2)(B)(ii), Congress could clarify whether or not a finding of an emergency must first be made by amending it to state that “the Secretary shall not allow circumstances to exist whereby an emergency is created that would pose a significant risk to the well-being of the protected species.” The Secretary is not forced to make any findings and has discretion to act, as long as no “emergency” is allowed to exist. Another example would require the Secretary to enforce the permit system when there is substantial evidence of an illegal taking. Requiring a party to apply for a permit costs nothing except the postage on the notice letter. And prosecuting a party who fails to apply for a permit does not require any marshalling of evidence except the fact that no permit application was filed. Hence, statutory amendments could go a long way in improving the effectiveness of the ESA.

Another source of the problem is the courts. *Heckler v. Chaney* placed the ESA in a precarious situation. With case law supporting both sides and no cases yet which deal specifically with this issue, it is arguable whether the ESA will overcome the presumption against review for agency decisions not to enforce. This Comment has shown that the statute’s purpose, language, and various provisions advocate for judicial review. In addition, the rationale for *Chaney*’s presumption has been shown to be inapplicable to the ESA. But the final decision rests with the interpretations of the courts.

## VII. CONCLUSION

The survival of the small marbled murrelet, with its uncompromising choice of habitat, will continue to be uncertain as long as

enforcement of the ESA remains unguarded against the abuse of agency discretion. More significantly, the need for agency review cuts across all aspects of environmental law because the interests that are being protected by these statutes are often too easily ignored and too dependent upon the goodwill of Congress, the courts, the agencies, and the people of this nation to conserve them. Unless the protected interest has some direct impact upon people's lives, few people will concern themselves with its preservation.

This unfortunate reality is vividly illustrated by a recent incident in the news.<sup>179</sup> A special task force was created in 1991 within the U.S. Forest Service to investigate and prosecute timber thefts of large amounts of federal trees and accounting for tens of millions of dollars in revenue lost. The culprits were believed to be the timber companies who were cutting timber of better quality and in greater numbers than they were paying for. But it was not until recently that the investigators began complaining, not about the thieves, but about the Forest Service officials themselves! The investigators "claimed that they have been hamstrung by 'agency management that winked at industry misconduct and blackened the eyes of agents who did not wink with them.'"<sup>180</sup> The federal prosecutor recognized that "[t]he chief culprit here is the Forest Service. If [it] didn't permit it, it would never have occurred."<sup>181</sup> What is so surprising here is not that an agency has been caught conspiring with the violators, but instead, it is the exhibition of such zealous enforcement of the environment. One has to wonder whether such response would have been elicited if the same flagrant agency misconduct was made with respect to an interest that did not have such a obvious monetary effect.

The point is that animals and plants cannot protect themselves against human activities. Unlike the case above, there are few incentives to protect endangered species because their benefits and contributions to human society are not so obvious — or as yet unknown. In fact, conserving endangered species often results in great costs to society and may incite opposition. Hence, in place of obvious incentives for conservation, there is the ESA.

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179. Alan C. Miller, *Forest Service Undercut Own Probes, Agents Say*, L.A. TIMES, January 16, 1995, at A1.

180. *Id.* at A1, A16.

181. *Id.* at A16.

It can be a powerful tool for providing protection to endangered species. But it cannot be effective unless it is being used.

