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The Effect of the Endangered Species Act on Housing Construction

By

KATHARINE ROSENBERY*

Section 7 of the Endangered Species Act (ESA)\textsuperscript{1} provides that federal agencies must ensure that their actions do not jeopardize the continued existence of designated plants or animals\textsuperscript{2} or their designated critical habitats.\textsuperscript{3} While it is difficult to estimate, federal agencies are involved to some degree in over twenty-five percent of new housing starts.\textsuperscript{4} Section 7 thus requires federal agencies involved in housing

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2. 50 C.F.R. §§ 17.11, 17.12, 222.23, 227.4 (1980).
3. 50 C.F.R. §§ 17.95, 17.96 (1980).
4. It is difficult to obtain complete statistics on new housing starts for several reasons. First, statistics on federally funded housing starts are not kept in one central location. For example, statistics on housing starts funded with block grants are kept by the Community Planning and Development Division of the Department of Housing and Urban Development, while statistics on low-income housing starts are kept by the Management Information Systems Division of the same department. Thus, to obtain accurate statistics, one must first know the federal programs that authorize funding of new housing starts and then the governmental body that administers each program. The statistics below are thus incomplete; they are based only on a sampling of federal programs funding new housing starts.

Second, the loan guarantee statistics are for the Department of Housing and Urban Development’s (HUD) and the Veterans Administration’s (VA) loan guarantee programs only. While these two programs are the most extensive, they are not the only federal loan guarantee programs. The statistics are thus once again incomplete.

Finally, one cannot add the number of HUD insured housing units to the number of VA insured units to arrive at a total number of insured units because a dwelling unit may be insured under both programs and appear in both HUD and VA statistics. Similarly, a unit may be both funded and insured by HUD and again appear twice.

In fiscal year 1980, HUD funded 101,054 housing starts under the § 8 program, see 42 U.S.C. § 1437f (1976 & Supp. III 1979), 23,380 starts under the traditional public housing program, 10,676 under the Urban Development Action Grant Program, and 23,160 under the § 202 program, for a total of 158,270 units or approximately ten percent of the new housing starts for 1980. Approximately nine percent of the new housing starts in fiscal years 1978 and 1979 were funded in this manner.

Privately-owned housing unit starts under a HUD loan guarantee program totaled
construction to ensure that construction is not likely to jeopardize designated species.\footnote{5}

The published opinions discussing section 7 have considered the sale of federal leases,\footnote{6} rules promulgated by federal agencies,\footnote{7} and federal public works projects.\footnote{8} Housing construction has not been the subject of any reported decision under section 7, despite housing construction’s great potential for destroying native flora and fauna. Consequently, the courts have not yet determined the degree of federal involvement in the construction of housing units necessary to invoke ESA.

This Article reviews the history of Congress’ regulatory efforts to protect animals and plants threatened with extinction. It next examines

\footnote{5. Section 7 is not the only provision of the Endangered Species Act (ESA) that can affect housing construction. Housing developments also may be affected by § 9, which prohibits any person from “taking” a listed endangered animal. 16 U.S.C. § 1538(a)(1)(B) (1976 & Supp. III 1979). See discussion of “taking” in note 26 infra. Section 9 probably does not expand the responsibilities of federal agencies beyond those already imposed by § 7. Section 7 and its regulations already require federal agencies to ensure that their actions will not jeopardize the continued existence of a listed species or adversely modify its critical habitat. Section 9, however, also applies to actions by private individuals; one may not intentionally or negligently harm or harass a protected animal. Section 9's effect is limited by the fact that private individuals are not similarly prohibited from harassing plants. No published decision fully explores the possible effect of § 9. For example, a court holding that a person may not develop his or her property because to do so would harass or harm a listed animal would be faced with a taking issue. The landowner would argue that the federal government had inversely condemned his or her property. Thus, while there is presently a dearth of cases dealing with § 9, the potential for litigation is significant. 6. E.g., North Slope Borough v. Andrus, 486 F. Supp. 332 (D.D.C. 1980). 7. E.g., Connor v. Andrus, 453 F. Supp. 1037 (W.D. Tex. 1978). 8. E.g., TVA v. Hill, 437 U.S. 153 (1978) (construction of a dam); Sierra Club v. Froehlke, 534 F.2d 1289 (8th Cir. 1976) (construction of a dam); National Wildlife Federation v. Coleman, 529 F.2d 359 (5th Cir.), cert. denied, 429 U.S. 979 (1976) (construction of an interstate highway).}
the Endangered Species Act and its procedures. Finally, the Article examines several types of federal involvement in housing construction, and discusses the extent to which each type of involvement may be controlled by ESA.

**History of the Endangered Species Act**

**Previous Protective Acts**

Congress passed the first comprehensive act for the conservation of endangered fish and wildlife in 1966. The 1966 Act was designed to establish "a program for the conservation, protection, restoration and propagation of [endangered] species" and "to consolidate, restate and modify" the existing collection of authorities protecting various species. The 1966 Act provided protection by controlling activities that could occur on federal lands within the Federal Wildlife Refuge System. It also authorized the Secretary of the Interior to designate species of endangered native fish and wildlife and to acquire land and accept funds for the protection of these species.

The 1966 Act served merely as a policy statement, however, rather than as a vehicle for controlling federal actions. First, the 1966 Act affected only lands located in the Wildlife Refuge System. Second, it required the Secretaries of the Interior, Agriculture, and Defense to protect endangered species only "insofar as [was] practicable and consistent with the primary purposes" of their departments, and encouraged federal agencies to exercise their authority in furtherance of the 1966 Act only "where practicable. Thus, the 1966 Act did not control the effects of federal agencies on endangered species and their habitats.


10. Id. § 4(c), 80 Stat. 926, 928 (repealed 1973).

11. Id. § 1(b), 80 Stat. 926, 926 (repealed 1973).

12. Id. §§ 2(b)-2(c), 80 Stat. 926, 926 (repealed 1973).

13. Id. § 1(b), 80 Stat. 926, 926 (repealed 1973).

14. Id.
In 1969, Congress enacted the Endangered Species Conservation Act (1969 Act), which continued the provisions of the 1966 Act and provided additional protection for endangered animals. The 1969 Act authorized the Secretary of the Interior to determine which species were threatened "with worldwide extinction," prohibiting the importation of these designated species. The 1969 Act also prohibited the transportation or sale of wildlife taken in violation of any federal, state, or foreign law. It did not prohibit, however, the harassment of endangered animals on private land. In effect, the 1969 Act provided no greater control than the 1966 Act over the projects and programs of federal departments and agencies.

The Endangered Species Act

In 1973, Congress repealed the 1969 Act and enacted ESA, which with some modifications remains in effect today. ESA differs from the prior acts in several important respects. First, ESA extends protection to threatened species, as well as to endangered species. Second, ESA protects plants as well as animals. Third, ESA recognizes the importance of protecting the habitats of endangered wildlife. Finally, ESA forces federal departments and agencies to become actively involved in the protection of endangered and threatened species.

ESA empowers the Secretaries of the Interior and of Commerce to designate endangered and threatened species and to issue regulations to provide for the conservation of designated species. An endangered species is "any species which is in danger of extinction throughout all..."
or a significant portion of its range," and a threatened species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."

ESA protects animals designated as endangered by making it unlawful to take, import, export, commercially sell or transport any endangered animal or to possess an unlawfully taken endangered animal. The prohibition against taking of endangered animals does not extend to endangered plants. ESA does, however, protect endangered plants by making it unlawful to import, export, sell commercially or transport any endangered plant. Regulations promulgated by the Secretary establish the protection afforded plants and animals designated as threatened.

ESA also offers some protection to the habitats of protected plants and animals. Habitat protection is provided both by authorizing the United States government to acquire designated habitats and, because few habitats can be purchased, by controlling the effects of federal agency actions on protected species and their critical habitats.

ESA controls federal agencies' actions in two ways. First, federal agencies are required to conserve protected species. Agencies have an affirmative duty to promote an increase in the populations of protected plants and animals. Second, ESA controls actions undertaken by federal agencies in furtherance of their statutory duties. Prior to amendment, section 7 of the Act stated that all federal agencies must "insure that actions authorized, funded, or carried out by them do not jeopard-

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25. Id. § 1532(20).
27. The definition of "take" includes "harass" or "harm." Id. § 1532(14) (1976 & Supp. III 1979). Harass or harm means to annoy intentionally or negligently or to engage in an act likely to annoy a designated endangered animal to the point of significantly disrupting its normal behavior patterns. 50 C.F.R. § 17.3 (1980).
30. Areas designated as critical habitats of endangered or threatened species are listed at 50 C.F.R. §§ 17.95 (animals), 17.96 (plants) (1980).
32. The term "species" includes any subspecies of any listed species and also any species that so closely resembles a listed species that those responsible for enforcement would have substantial difficulty distinguishing between the listed and unlisted species. 16 U.S.C. § 1532(16) (Supp. III 1979); id. § 1533(c) (1976).
34. 16 U.S.C. § 1532(3) (Supp. III 1979) states that the term "conserve" means to use all methods necessary to bring endangered or threatened species to the point at which protection is no longer necessary.
ize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species . . . ."35 As originally enacted, therefore, ESA contemplated that its requirements would be imposed upon federal departments and agencies that took any action with respect to protected species.

The Duty Imposed Upon Federal Agencies

The strength of the original section 7 mandate upon federal departments and agencies was soon tested in several cases involving federal public works. For example, in *Sierra Club v. Froehlke*,36 the plaintiffs filed suit to enjoin construction of the Meramec Dam, located in Missouri. The plaintiffs contended, among other things, that the dam's construction would result in the flooding of caves that were the habitat of the Indiana bat, a protected species, and thus would violate section 7 of ESA.

The Eighth Circuit recognized that the habitat of the Indiana bat would be affected by the flooding, but held that section 7 of the Act as originally enacted (1973 Act) had not been violated. Although the Department of the Interior urged a moratorium on the entire project pending further study of the bat, the Army Corps of Engineers, the federal agency responsible for the project, suggested that "the Project would probably have no more than an infinitesimal effect upon the Indiana bat population in the Meramec Basin."37 The court found that, when a difference of opinion arises regarding a project, "the responsibility for decision after consultation is not vested in the Secretary [of the Interior] but in the agency involved."38 Accordingly, the court concluded that if a federal agency responsible for a project determines that the listed species will not be significantly affected, it may proceed with the project, as long as it has not acted in an arbitrary and capricious manner.

The Fifth Circuit in *National Wildlife Federation v. Coleman*39 found that section 7 of the 1973 Act places a greater burden on the agency to ensure that its actions are not harmful to a protected species or to its habitat. In *Coleman*, the plaintiffs brought an action to enjoin the construction of a section of an interstate highway through Jackson

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36. 534 F.2d 1289 (8th Cir. 1976).
37. *Id.* at 1305.
38. *Id.* at 1303.
County, Mississippi, alleging that the proposed highway would traverse a major portion of the designated critical habitat of the Mississippi sandhill crane, a protected species. The plaintiffs alleged that the highway construction would affect the habitat directly by taking a portion of the habitat for the highway bed and would affect the habitat indirectly by encouraging residential and commercial development, which would result in an even greater destruction of the habitat.

The Federal Highway Administration, the agency responsible for funding the major portion of the highway, reasoned that it had discharged its obligations under section 7 of the 1973 Act for three reasons: (1) other federal agencies intended to establish a refuge for the sandhill crane; (2) the highway would cross the proposed refuge at its narrowest point; and (3) the Highway Administration would prohibit the excavation of destructive borrow pits along the highway. The court refused to uphold the agency's determination.

Observing that the refuge proposed by the agency would be only a small portion of the designated critical habitat, the court concluded that the Federal Highway Administration had a "mandatory obligation" to ensure that its action would not destroy or modify any part of the habitat. The court further concluded that the Department of the Interior had primary jurisdiction for administering the 1973 Act, and therefore deferred to the Secretary of the Interior's determination of what was necessary to bring the proposed highway in compliance with the 1973 Act. Consequently, the court enjoined construction until the Secretary of the Interior could determine that the Federal Highway Administration had made the modifications necessary to ensure that the project would no longer jeopardize the continued existence of the Mississippi sandhill crane or would destroy or modify its critical habitat.

Thus, the circuits have found differing relationships between the agency in charge of the project and the Department of the Interior. The Eighth Circuit in Froehlke concluded that authority to determine the effect of the proposed federal project lies with the agency responsible for carrying out the project. On the other hand, while the Fifth Circuit in Coleman stated that the determination to proceed with a pro-

40. *Id.* at 366-67.
41. *Id.* at 373.
42. *Id.* at 375.
43. The Department of the Interior had demanded three modifications: (1) the elimination of a proposed interchange, (2) a prohibition of the evacuation of burrow pits anywhere within the critical habitat, and (3) the acquisition of substitute land for a refuge. *Id.*
ject lies with the responsible agency, it enjoined the project until the Secretary of the Interior determined that the project complied with section 7.

The district courts that considered section 7 prior to its amendment also seemed to differ on the degree of restraint imposed on federal agencies by the statute. In *Defenders of Wildlife v. Andrus*,44 the District Court for the District of Columbia determined that the rulemaking process of the Fish and Wildlife Service was inadequate under section 7 of the 1973 Act.45 The court held that the Service had a duty both to ensure that its hunting regulations did not destroy or modify critical habitats and to use all methods necessary to improve the reproductive and survival rate of protected species. The court concluded that “[t]he service cannot limit its focus to what it considers the most important management tool available to it, i.e. habitat control, to accomplish this end.”46 Instead, it must pursue all appropriate means to bring protected species back from the brink of extinction.

The District Court for the Western District of Texas held hunting regulations promulgated by the Fish and Wildlife Service invalid in *Connor v. Andrus*.47 In this case, however, the court did not hold that the hunting regulations were too lax; instead, it held that the hunting regulations were too stringent and, therefore, arbitrary. Recognizing that the Mexican duck was an endangered species, the court observed that the Fish and Wildlife Service had an affirmative duty to promote an increase in the population of the Mexican duck. It held, however, that hunting regulations prohibiting the killing of all ducks in certain areas of Texas and New Mexico were unreasonable because cross-breeding and habitat destruction, rather than hunting, were the major factors leading to the extinction of the Mexican duck.48

These district courts thus interpreted section 7 in slightly different ways. In *Defenders of Wildlife*, the court held that the Fish and Wildlife Service had not fulfilled its section 7 obligation because it had not fully considered the impact of its regulations on an endangered species.

45. Although shooting of endangered species had been banned, regulations promulgated by the Service permitted hunting of unprotected game birds during the twilight hours, when reduced visibility was likely to result in misidentification and accidental killing of protected birds. The rulemaking proceedings had not addressed this issue. “Based on evidence that the most important factor affecting the population of a given species is the quality of its habitat, the Service [had] concluded that it was unlikely that a minor alteration in shooting hours would jeopardize a species.” *Id.* at 169.
46. *Id.* at 170.
48. *Id.* at 1041.
In *Connor*, on the other hand, the court held that the Service had exceeded the scope of its section 7 obligation in promulgating hunting regulations. The District of Columbia district court appeared to prefer overprotection, while the Texas district court appeared to prefer underprotection.

Questions concerning the effect of section 7 on federal agencies’ projects were partially resolved in 1978 in *Tennessee Valley Authority (TVA) v. Hill.* The plaintiffs brought suit to enjoin the completion of the Tellico Dam in Tennessee, alleging that completion of the dam would destroy the critical habitat of the snail darter, a protected species, and thereby result in the extinction of the fish. Although the dam was seventy to eighty percent complete before the Secretary of the Interior designated the snail darter an endangered species, and although more than $100 million had already been spent on construction of the dam, the Supreme Court enjoined construction of the dam.

After tracing the legislative history of section 7, the Court concluded that Congress had not intended the costs and benefits of a particular project to be balanced against the costs of the extinction of a species. By passing the Act, Congress determined that the cost of extinction was incalculable. The Court noted that, although the 1973 Act allowed exceptions to be made in certain cases, none of these “hardship exemptions” were available to federal agencies. Instead, Congress expected section 7 to prohibit absolutely the completion of the construction of a federal project that would destroy the critical habitat of an endangered species.

Shortly after *TVA v. Hill*, a district court enjoined the construction of the Grayrocks Dam and Reservoir, located in Wyoming. In *Nebraska v. Rural Electrification Administration (REA)*, two federal agencies were involved in the reservoir project. The REA had granted the project a loan guarantee for sixty-six percent of the cost of its construction, and the Army Corps of Engineers (Corps) had issued a

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50. “[T]he plain language of the Act, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as ‘incalculable.’ Quite obviously, it would be difficult for a court to balance the loss of a sum certain—even $100 million—against a congressionally declared ‘incalculable’ value, even assuming we had the power to engage in such a weighing process, which we emphatically do not.” *Id.* at 187-88.
51. *Id.* at 188.
52. *Id.* at 186-87. “The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” *Id.* at 184.
54. Staff Report on Grayrocks Dam and Reservoir to the Endangered Species Committee at i (Jan. 19, 1979).
dredge and fill permit.

The court declared the REA’s loan guarantee unlawful, concluding that section 7 required the REA to consult with the Fish and Wildlife Service about the effect of the Grayrocks Dam on a listed endangered species, the whooping crane. The REA alleged that it did not consult with the Service because the REA had concluded independently that the whooping crane would not be adversely affected.\textsuperscript{55}

Rejecting the REA’s argument, the court concluded that the agency did not have the power to decide whether consultation was necessary. The 1973 Act required consultation whenever a protected species might be affected.\textsuperscript{56} The court further concluded that the REA did not satisfy its burden of proving that the project would ensure that the listed species would not be jeopardized.\textsuperscript{57}

Although the whooping crane was not listed as an endangered species at the time the Corps issued the dredge and fill permit, the court held that section 7 regulated the permit issued by the Corps, reasoning that once the area was listed as a critical habitat of the crane, the Corps was obligated to use all methods and procedures necessary to preserve the species.\textsuperscript{58} The court thus held that the REA loan guarantee commitments were unlawful, that the Corps permit was unlawful, and that the Grayrocks Dam could not be built until the REA and the Corps complied with section 7 of the 1973 Act. Before the case could be resolved, however, Congress passed an amendment to ESA,\textsuperscript{59} which made resolution unnecessary.\textsuperscript{60}

\textit{Exemption From the Act}

The 1978 and 1979 amendments to section 7 provide a procedure by which a federal agency may obtain an exemption from the mandates of ESA.\textsuperscript{61} The Supreme Court had held that the mandates of section 7 were absolute and did not permit a balancing of competing interests.\textsuperscript{62} After amendment, however, the Act itself authorized an exemption, and provided a detailed exemption procedure.\textsuperscript{63}

As amended, ESA requires a federal agency to request informa-
tion from the Secretary of the Interior regarding the possible existence of protected species in areas to be affected by agency projects. If a project is likely to affect a protected species or its habitat, the agency must consult the Secretary of the Interior or the Secretary of Commerce about this effect. During the consultation process, which must be concluded within ninety days, the federal agency is prohibited from making any irreversible commitment of resources that would foreclose the implementation of alternatives that would preserve the listed species.

At the conclusion of the consultation period, the Secretary of the Interior or the Secretary of Commerce must provide the federal agency with a written opinion and summary of the information on which the opinion is based, describing how the agency's action affects a listed species or its critical habitat. The Secretary's opinion must suggest reasonable alternatives to the project that would avoid jeopardizing the species or its habitat. If the agency, the governor of the state in which the agency action is to occur, or a permit or license applicant seeks to proceed as originally proposed, the interested party may apply for an exemption.

Application for an exemption must be made within ninety days of the conclusion of the consultation process. A review board is then established to review the project's effect on the species. The board must determine (1) whether an irresolvable conflict exists, (2) whether the applicant has carried out its consultation responsibilities in good faith and without a reasonable effort to develop modifications or alternatives that would not jeopardize the protected species, (3) whether the agency has failed to conduct biological assessments as required by ESA, or (4) whether the agency has made any irreversible commitment.

64. 16 U.S.C. § 1536(c) (Supp. III 1979).
65. Id. § 1536(a)(3).
66. Id. § 1536(b).
67. Id. § 1536(d).
68. Id. § 1536(b).
69. Id.
70. Id. § 1536(g)(1).
71. Id. § 1536(g)(2)(A).
72. Id. § 1536(g)(3)(A). The review board is composed of three members. One is appointed by the Secretary of the Interior, another is appointed by the President and must be a resident of a state that is affected by the project, and the third is an administrative law judge, appointed by the Director of the Office of Personnel Management.
73. The board must complete its review within 60 days of its appointment or within a longer time as agreed by the exemption applicant and the Secretary. During this review, the board may solicit information from other government agencies and hold hearings. Id. § 1536(g)(3), (9)(A).
of resources as prohibited by ESA.\textsuperscript{74} If any of these determinations are positive, the application for exemption must be denied.\textsuperscript{75}

If, on the other hand, the board makes a negative finding in all four categories, the board must then thoroughly review the project and submit a report to the Endangered Species Committee (Committee).\textsuperscript{76}

The Committee must grant an exemption if it determines, based on the report of the review board and on other testimony or evidence it has received, that:

1. there are no reasonable and prudent alternatives to the agency action;
2. the benefits of such action clearly outweigh the benefits of alternative courses of action . . . , and such action is in the public interest;
3. the action is of regional or national significance; and
4. [the Committee] establishes such reasonable mitigation and enhancement measures . . . as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.\textsuperscript{77}

With some minor exceptions,\textsuperscript{78} the Committee’s decision is final.

\textit{Application of the Exemption Procedure}

Although the full exemption procedure outlined in ESA has not yet been used, a modification of the procedure was used for the Tellico Dam and the Grayrocks Dam cases. When Congress amended ESA in 1978, it directed the Endangered Species Committee to consider the exemption of the Tellico and Grayrocks Dams within thirty days of the enactment of the 1978 amendment.\textsuperscript{79} Congress in effect found that the projects were of regional or national significance and stated that the

\textsuperscript{74} Id. § 1536(g)(5).
\textsuperscript{75} Id.
\textsuperscript{76} The Endangered Species Committee is composed of the Secretary of Agriculture, the Secretary of the Army, the Chair of the Council of Economic Advisers, the Administrator of the Environmental Protection Agency, the Secretary of the Interior, the Administrator of the National Oceanic and Atmospheric Administration, and one person from each affected state, appointed by the President. Id. § 1536(e). The Committee must make a final determination on the application within 90 days. Id. § 1536(h)(1).
\textsuperscript{77} Id. § 1536(h)(1)(A), (B).
\textsuperscript{78} Exceptions may occur in the following circumstances: (1) The Secretary of the Interior determines that a species that “was not the subject of consultation . . . or was not identified in any biological assessment conducted” and would become extinct as a result of the exemption. Id. § 1536(h)(2)(B)(i). (2) The Secretary of State finds that the exemption violates an international treaty obligation of the United States. Id. § 1536(i). (3) The President determines that the project is necessary to avert a disaster, in an emergency situation. Id. § 1536(p). (4) The Secretary of Defense finds that an exemption is necessary for reasons of national security. Id. § 1536(j).
\textsuperscript{79} Id. § 1539(i)(1).
Committee had to grant an exemption if the other criteria were satisfied. The Committee met on January 23, 1979, to consider both projects. It denied an exemption for the Tellico Dam and granted an exemption for the Grayrocks Dam.

Committee staff testified in the Tellico Dam hearing that the Tennessee Valley Authority (TVA), the responsible federal agency, had developed an alternative to completion of the dam. The alternative, referred to as the “River Development,” involved removing the dam and developing the river for agricultural, recreational, industrial, and other uses. The TVA estimated that the measurable benefits were slightly greater for the Tellico Dam than for the River Development; however, the River Development also would generate immeasurable benefits, such as “preservation of customary fish and wildlife values, including trout fishing, and ecological, esthetic and scenic value.” The Committee unanimously denied an exemption because there clearly was a reasonable alternative that would preserve the snail darter.

In contrast, the Committee did grant an exemption to the Grayrocks Dam. The decision was based on a settlement agreement between the parties, which provided that the Missouri Basin Power Project would limit its maximum annual use, would release water dur-
ing various periods of the year, would replace water withdrawn by Corn Creek Irrigation District, and would establish a trust fund of $7.5 million for the maintenance and enhancement of the whooping crane's remaining critical habitat along the Platte River. For the settlement agreement to be effective, however, two conditions had to be met. First, the Secretary of the Interior had to approve the agreement as satisfying the requirements of the Act; this approval was obtained. Second, the Committee had to grant an exemption under ESA or decide that an exemption was unnecessary. The Committee unanimously endorsed the settlement, granting an exemption according to the terms of the settlement.

As illustrated in these cases, ESA has influenced federal agency action. The published decisions, however, do not determine the degree of federal involvement necessary to invoke the Act. The application of ESA to federal agency action in housing construction is thus unclear.

92. Although the exemption process has only been used twice, the consultation process provided in ESA has been used on numerous occasions. In fiscal year 1979, the Fish and Wildlife Service received approximately 2,500 requests for consultation. Fifteen hundred of these requests were for informal consultations, for which no biological opinions were rendered, and 1,000 were requests for formal consultation, for which biological opinions were rendered. In fiscal 1980, the Fish Wildlife Service received approximately 3,010 informal requests and 750 formal requests. In the first half of fiscal 1981, it received 2,515 informal requests and 225 formal requests. Telephone interview with Nancy Sweeny, Consultation Coordinator, Office of Endangered Species, Fish and Wildlife Service, Department of the Interior, Washington, D.C., (May 7, 1981). The National Marine Fisheries Service in the Department of Commerce has also received requests for consultation with respect to species that are under their jurisdiction and listed in 50 C.F.R. §§ 222.23, 227.4 (1980). The National Marine Fisheries Service does not, however, have records identifying the total number of requests for consultation. Telephone interview with Charles Kornella, National Marine Fisheries Service, Department of Commerce, San Diego, California (May 27, 1981).

In North Slope Borough v. Andrus, 486 F. Supp. 332 (D.D.C. 1980), the remaining published decision addressing § 7 of ESA decided after the 1979 amendments, the plaintiffs alleged that the federal government violated ESA by offering offshore oil leases for sale and permitting pre-exploratory activities before the National Marine Fisheries Service rendered a formal biological opinion discussing whether the oil drilling would jeopardize the Bowhead Whale, a listed species. The court concluded that the government could not permit pre-exploration activities because, without a biological opinion, it could not ensure the safety of the work.
Federal Agencies Involved in Housing Construction

The Endangered Species Act includes within its scope "any action authorized, funded, or carried out by [a federal] agency." If this language were interpreted literally, all federal actions, even those actions only remotely facilitating housing construction, would be controlled by ESA. An examination of congressional intent in enacting ESA, rules promulgated pursuant to ESA, and cases decided under similar statutes, however, indicates that such an expansive view of ESA is unwarranted. Those actions that only remotely affect housing construction should not be controlled by ESA.

Direct Effects

Authorizing Construction

A federal agency can affect housing construction directly by granting a permit authorizing construction. Although construction permits are generally granted or denied at the local level, in at least two instances a developer may need a permit issued by a federal agency to construct housing units.

First, Congress has prohibited the construction of any structure in a port, harbor, canal, navigable water, or other water of the United States without the approval of the Army Corps of Engineers. Once waters are determined to be navigable, the entire surface of the body of water is deemed navigable, and the determination of navigability will not be extinguished by subsequent modifications that destroy navigability. "Navigable waters," therefore, need not be presently capable of navigation. Under this section, permits have been required for a housing project that included the construction of an internal waterway connecting with navigable waters, construction of an apartment building on private, submerged, lake-front property, and construction of a trailer park on private, submerged, bay-front property.

94. 33 U.S.C. § 403 (1976). An exception is made for those projects affirmatively authorized by Congress. Id.
95. The term "Navigable water" is defined as "waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. § 329.4 (1981).
96. Id.
97. Weizmann v. District Eng'r, United States Army Corps of Eng'rs, 526 F.2d 1302 (5th Cir. 1976).
Second, the Federal Water Pollution Control Act\textsuperscript{100} requires a developer to obtain a permit from the Corps if the developer's proposed housing project will result in dredging or filling in any navigable water.\textsuperscript{101} The Act's purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."\textsuperscript{102} As the term "navigable waters" is defined broadly in the Act to include coastal waters, navigable lakes, rivers, and streams, isolated wetlands and lakes, intermittent streams and canals, and any other waters that the Corps determines should be regulated for the protection of water quality,\textsuperscript{103} the Corps' jurisdiction over housing development is even greater under this Act than it is under section 403.

Under the Water Pollution Act, developers have been required to obtain permits for clearing wetlands of trees and vegetation,\textsuperscript{104} filling a river that is the source of a supply for lakes used for recreation,\textsuperscript{105} construction of a road that led from a state road through a lowland forest to a homesite,\textsuperscript{106} and brushing and grading land that contained vernal pools only during the spring.\textsuperscript{107}

The Corps, therefore, can affect housing through its permit process. This permit process should be subject to the Endangered Species Act. Although there are no published decisions addressing the relationship of ESA to housing construction, ESA should prohibit the Corps from issuing a permit to a developer whose project will jeopardize the continued existence of a protected species or adversely modify a critical habitat.

\textsuperscript{101}  33 U.S.C. § 1344(a) (Supp. III 1979). Pursuant to this Act, the Corps issued 5,282 permits in fiscal 1978, 4,401 permits in fiscal 1979, and 3,596 permits in fiscal 1980. Letter from George Brazier, Directorate of Civil Works, Department of the Army, Office of Chief of Engineers, to Katharine Rosenberry (June 9, 1981). The Corps, however, has not indicated how many of these permits involved housing projects.
\textsuperscript{102}  33 U.S.C. § 1251(a) (1976).
\textsuperscript{106}  United States v. Weisman, 489 F. Supp. 1331 (M.D. Fla. 1980).
\textsuperscript{107}  Letter from Gwynn A. Teague, Chief Engineer, Department of the Army, Army Corps of Engineers, to James F. Gleason, Director, Environmental Quality Department, City of San Diego, California (May 29, 1979). Vernal pools are isolated wetlands that are depressions in the earth containing water only a couple of months per year.

The Corps issued 2,481 dredge and fill permits in fiscal 1978, 2,280 permits in fiscal 1979, and 2,174 permits in fiscal 1980. Letter from George Brazier, Directorate of Civil Works, Department of the Army, Office of Chief of Engineers, to Katharine Rosenberry (June 9, 1981). The Corps, however, has not identified how many of these permits involved housing projects.
Several reasons mandate this conclusion. The Corps is a federal agency that issues permits.\textsuperscript{108} ESA’s regulations specifically state that ESA applies to any federal agency that issues permits.\textsuperscript{109} In addition, the Corps has promulgated regulations recognizing that ESA is “related” to the Corps’ permitting process,\textsuperscript{110} and that the Act must be “followed and considered.”\textsuperscript{111} Moreover, in \textit{Nebraska v. REA} \textsuperscript{112} the court has prevented the Corps from issuing a permit for construction until the Corps had complied with ESA’s consultation process. Finally, the Endangered Species Committee determined that Grayrocks Dam, which was authorized by the Corps, needed an exemption from ESA.\textsuperscript{113} If ESA were not applicable, there would be no need for an exemption. Therefore, ESA should govern the Corps’ grant of a permit to a developer.

\textit{Funding Construction}

A federal agency’s action also may invoke the Act by funding construction of housing units. The Department of Housing and Urban Development (HUD) has funded, in whole or in part, a large number of housing units in recent years.\textsuperscript{114} Because HUD is a department of the United States government,\textsuperscript{115} and funding is an action within the scope of the Act,\textsuperscript{116} a court should conclude that the construction of these units should be governed by the Act. Thus, HUD should not fund, in whole or in part, any housing units that would jeopardize the continued existence of any protected species or adversely modify its critical habitat.

This conclusion is supported by case law, regulations promulgated pursuant to the Act, and comparisons with similar statutes. In \textit{TVA v. Hill},\textsuperscript{117} Congress appropriated funds for a wholly owned public corporation of the United States, the Tennessee Valley Authority, to construct the Tellico Dam. As the dam was constructed entirely with federal funds, the United States Supreme Court concluded that the Act

\textsuperscript{108} The Corps is within the Department of the Army, which is a department of the federal government. 10 U.S.C. § 3063 (1976).
\textsuperscript{109} 50 C.F.R. § 402.02 (1980).
\textsuperscript{110} 33 C.F.R. §§ 320.1(a), 320.3(i) (1981).
\textsuperscript{111} 33 C.F.R. § 320.4(j)(4) (1981).
\textsuperscript{112} 12 E.R.C. 1156 (D. Neb. 1978).
\textsuperscript{113} Endangered Species Comm. Decision on Grayrocks Dam and Reservoir Application for Exemption at 1 (Feb. 7, 1979). See text accompanying notes 88-92 \textit{supra}.
\textsuperscript{114} See note 4 \textit{supra}.
\textsuperscript{115} 42 U.S.C. § 3502 (1976).
\textsuperscript{116} See note 93 & accompanying text \textit{supra}.
\textsuperscript{117} 437 U.S. 153 (1978).
required that the construction of the dam comply with the substantive provisions of the Act.\textsuperscript{118} By analogy, the construction of housing units funded exclusively by HUD should also be controlled by ESA.

Housing units, however, are also constructed with partial federal funding. It is less clear whether ESA applies if federal funds constitute only a portion of the construction funds. Regulations have defined ESA’s scope to include “all actions of any kind, authorized, funded or carried out in whole or in part by federal agencies,”\textsuperscript{119} illustrating that the Department of the Interior, which is responsible for carrying out the Act and promulgating its regulations, finds partial funding sufficient to invoke ESA. The only published decision brought under the Act concerning a project partially, rather than exclusively, constructed with federal funds is \textit{National Wildlife Federation v. Coleman}.\textsuperscript{120} In this case, the highway project was only ninety percent financed by the federal government, but neither party raised the issue of ESA’s application to projects partially funded by the federal government. Thus, no published judicial decision\textsuperscript{121} and no decision of the Endangered Species Committee\textsuperscript{122} has raised the issue of whether ESA applies to a project only partially funded by the federal government. The construction of housing should be deemed subject to ESA, however, if any portion of the construction funds are supplied by the federal government.

Comparisons to similar statutes support this conclusion. Like the Endangered Species Act, the National Environmental Policy Act\textsuperscript{123} (NEPA) was enacted to regulate federal agency actions that threaten the environment.\textsuperscript{124} NEPA carries out its purpose by requiring that federal agencies prepare an environmental impact statement (EIS) for every major federal action that significantly affects the quality of the

\begin{itemize}
  \item \textsuperscript{118} Id. at 173.
  \item \textsuperscript{119} 50 C.F.R. § 450.01(2) (1980) (emphasis added).
  \item \textsuperscript{120} 529 F.2d 359 (5th Cir.), \textit{cert. denied}, 429 U.S. 979 (1976).
  \item \textsuperscript{121} In \textit{Nebraska v. REA}, 12 E.R.C. 1156 (1978), the Rural Electrification Administration, a federal agency, guaranteed loans for construction of the Grayrocks Dam. REA only guaranteed 66% of the construction loan, \textit{Staff Report on Grayrocks Dam and Reservoir to the Endangered Species Committee at 1 (Jan. 19, 1979)}, but the parties again failed to raise the issue of partial funding.
  \item \textsuperscript{122} The Endangered Species Committee also failed to raise the issue when the proponents of Grayrocks Dam came before it seeking an exemption. See text accompanying notes 88-92 \textit{supra}.
  \item \textsuperscript{124} NEPA was enacted “to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man, and to enrich the understanding of the ecological systems and natural resources important to the Nation . . . .” 42 U.S.C. § 4321 (1976).
\end{itemize}
human environment. While ESA applies to "all actions funded, authorized or carried out" by federal agencies, the EIS requirement of NEPA applies only to "major federal actions." Invocation of NEPA, therefore, appears to require a more significant federal involvement than does invocation of ESA. Consequently, an action construed as a "major" federal action under NEPA should be construed as any federal action under ESA.

In *Dalsis v. Hills,* HUD had approved a private redevelopment project and also had funded demolition of substandard structures in the project area. The court stated that this action constituted a major federal action subject to NEPA and that even a private developer may be enjoined under NEPA when "it has entered into a partnership or joint venture with HUD or has been the recipient of federal funds." Thus, under NEPA even partial funding of a project may constitute a major federal action.

Additionally, in highway construction cases, courts have held that NEPA applies even though the highway construction is financed jointly by federal and state agencies. Thus, federal agencies can be engaged in a "major federal action" under NEPA and the project can be enjoined if even a portion of the project is funded with federal funds.

Partial funding is also sufficient to bring a federal agency with the dictates of the National Historic Preservation Act (NHPA), an act analogous to ESA. In enacting NHPA, Congress found that "the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development . . . ." In enacting ESA, Congress found that wildlife should be preserved because it is of "esthetic, ecological, educational, historical, recreation and scientific value to the Nation and its people." Congress thus enacted NHPA to preserve our cultural heritage and ESA to preserve our biological

127. *Id.* at 787. An injunction nevertheless was denied in this action because the plaintiff failed to show that irreparable harm would otherwise result.
128. Similarly, in Boston Waterfront Residents Ass'n, Inc. v. Romney, 343 F. Supp. 89 (D. Mass. 1972), the court concluded that HUD's contribution of funds to a local redevelopment project constituted a major federal action subject to NEPA.
129. See, e.g., Iowa Citizens for Environmental Quality, Inc. v. Volpe, 487 F.2d 849 (8th Cir. 1973); Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693 (2d Cir. 1972); Scherr v. Volpe, 466 F.2d 1027 (7th Cir. 1972); Farmland Preservation Ass'n v. Adams, 491 F. Supp. 601, aff'd, 611 F.2d 233 (8th Cir. 1979).
heritage. Both preserve our heritage by controlling federal agency action.

Pursuant to NHPA, "the head of any Federal agency having . . . jurisdiction over a proposed Federal undertaking . . . [must] take into account the effect of the undertaking on any . . . site . . . that is included in . . . the National Register."132 In Hall County Historical Society v. Georgia Department of Transportation,133 the court concluded that, even though the highway construction at issue was a joint state-federal undertaking, the federal agency was nevertheless responsible for taking into account the impact of the highway on an historic district. Thus, the federal agency was still bound by NHPA, although the federal agency was only partially responsible for the undertaking.

Consequently, ESA should apply to the construction of housing units if those units are even partially funded by a federal agency. First, the only cases under ESA involving partial funding assume partial funding is sufficient to invoke ESA. Second, the Endangered Species Committee apparently agrees that partial funding is sufficient. Third, ESA regulations specifically state that an action funded "in part" is controlled by ESA. Finally, NEPA and NHPA, analogous acts, can apply to a project even if it is only partially funded by the federal government. Therefore, both public and private housing construction should be subject to ESA if a federal agency, such as HUD, contributes any funds to the construction.

This simple rule may be subject to two qualifications. First, a project that has not received any federal funds directly might in an unusual circumstance be held bound by ESA. This qualification is illustrated by Ely v. Velde,134 in which the State of Virginia applied for and received federal grants to construct a penal center.135 In an earlier decision, the Fourth Circuit had determined that the project was subject to NEPA and NHPA because the federal funding of the project constituted a major federal undertaking.136 Subsequently, the state legislature reallocated the federal funds to other crime prevention programs and substituted state funds for the construction of the penal center. The state then claimed that its construction was not subject to NEPA and NHPA because the penal center was being built with state

134. 497 F.2d 252 (4th Cir. 1974).
funds. Agreeing that NEPA and NHPA did not apply to construction of the penal center if built with state funds, the court concluded that the state must return the federal funds to avoid being governed by NEPA and NHPA.

The selection of new projects for the center's federal funds may make it impossible, as the state asserts, to prove that the federal funds released state funds for the center. But this argument misses the mark. The significant point is that the state is retaining federal funds that it obtained for the center on the premise that it would comply with federal environmental Acts, while at the same time it is planning to construct the center without compliance.137

Although the court refused to enjoin the construction of the center, it held that the "funds allocated for its construction were impressed with a commitment to preserve the environment of [an historic district]."138

The state could thus construct the center independently of the federal Act only if it returned the federal funds.

By analogy, construction of housing units with state or local funds might still be governed by ESA if the units were originally to be constructed with federal funds that the state or local government transferred to its general funds. The protections afforded by the Act should not be avoided through creative bookkeeping.139

A second qualification is that, in some circumstances, housing units built with federal funds should not be subject to ESA. This qualification is illustrated by Carolina Action v. Simon,140 in which the plaintiff filed an action to enjoin the construction of a local government building on the grounds that the construction violated NEPA: although the structure was partially funded by federal revenue sharing funds, no EIS had been prepared. The court held, however, that "NEPA does not apply to a project in which the only federal participation is the distribution of revenue sharing funds to aid local communities in financing the project."141

The court based its conclusion on three grounds. First, the court recognized that the Council on Environmental Quality Guidelines state

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137. 497 F.2d 252, 256 (4th Cir. 1973).
138. Id. at 257.
139. See Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dep't, 446 F.2d 1013 (5th Cir. 1971) (involving an attempt to evade NEPA requirements by dividing a highway project into segments).
141. Id. at 1245.
that NEPA is not applicable to revenue sharing funds. Second, the court noted the nature of federal revenue sharing funds: revenue sharing funds "are not disbursed as a consequence of a state's request and are not conditioned on the filing of a comprehensive plan but are disbursed almost automatically and with considerably less federal involvement." Finally, the court concluded the legislative history of the revenue sharing act indicates that the government did not intend to require federal control or federal approval of specific projects. Therefore, the court held that NEPA did not apply to the construction of a building that was funded with federal revenue sharing funds. Similarly, ESA should not regulate any construction with federal funds that are allocated to a state or local government without reference to a specific project and without federal control.

**Lending Money for Construction**

In addition to funding construction, a federal agency can directly affect the housing market by loaning money for the construction or purchase of a new dwelling unit. Loaning federal money appears to be an action "authorized, funded or carried out" within the meaning of ESA. Such construction funded with a federal loan, therefore, should comply with ESA.

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143. 389 F. Supp. 1244, 1248 (M.D.N.C. 1975). The court contrasted revenue sharing funds with block grant funds, which were obtained in Ely v. Velde, 497 F.2d 252 (4th Cir. 1974), noting that block grant funds are generated by a state's request for federal participation pursuant to a comprehensive plan. The court thus suggested that block grant funds require a greater federal involvement. 389 F. Supp. at 1248.
145. 389 F. Supp. at 1248.
146. See note 4 supra.
148. ESA applies to a "department, agency, or instrumentality of the United States", 16 U.S.C. § 1532(7) (Supp. III 1979), and to "each authority of the government", 50 C.F.R. § 402.02 (1980). In the context of conflicting state and federal banking laws, federally chartered institutions have been held to be "instrumentalities of the Federal government." Davis v. Elmira Savings Bank, 161 U.S. 275, 283 (1896); see Rushton v. Schram, 143 F.2d 554 (6th Cir. 1944); Starr v. O'Connor, 118 F.2d 548 (6th Cir. 1941); Smith v. Witherow, 102 F.2d 638 (3d Cir. 1939); Coon v. Smith, 4 F. Supp. 960 (E.D. Ill. 1933). If these federally chartered institutions are deemed to be instrumentalities in the context of ESA, then ESA would be invoked to regulate their financing of housing construction. The decisions in the context of banking laws, however, indicate only that a financial institution is governed by the law of the entity that chartered it and do not suggest that actions by financial institutions should be subject to ESA. The imputation of the duties of a federal agency to a privately
Indirect Effects

Guaranteeing Loans for Construction

HUD and the Veterans Administration (VA) guarantee loans for the construction and purchase of new homes. Both HUD and the VA are departments of the federal government, and all the loan guarantee programs that they administer are funded by the federal government. These loan guarantee programs potentially affect a large amount of housing construction.

To determine whether ESA ought to apply to loan guarantee programs, the statute and its regulations must first be examined. Neither the Act nor the regulations promulgated by the Department of the Interior include loan guarantees in the definition of "federal activities and programs." One regulation, however, does state that the Act controls "federal actions directly or indirectly causing modifications to the land, water, or air." Arguably, loan guarantees cause modifications to land "indirectly" if a developer engages in construction in reliance on loan guarantees.

Furthermore, while regulations promulgated by the VA pursuant to its loan guarantee program do not mention ESA, HUD regulations do refer to ESA: HUD must review a proposed project's impact on owned institution should be based only on a clear congressional intent or the fulfillment of ESA's policies.

A court is unlikely to conclude that a federally chartered bank or savings and loan is an instrumentality of the federal government, if the issue were presented in the context of ESA, because these financial institutions are not generally considered to be agencies of the federal government. For example, the Internal Revenue Code provides that federally chartered banks and savings and loans must pay federal income tax. I.R.C. § 581 (1976); see Treas. Reg. §§ 1.581-1, 1.581-2 (1960). Unlike federal agencies, they are not exempt from federal income tax. See I.R.C. § 501(c)(1) (1976). In addition, the Code does not distinguish between federally chartered financial institutions and state chartered institutions. See, e.g., I.R.C. § 581 (1976). Although banks that are members of the FDIC, savings and loan associations, and members of any Federal Home Loan Bank can be employed as fiscal agents of the United States, 12 U.S.C. §§ 265 (1976); 12 U.S.C. § 1464(k) (Supp. IV 1980), the legislative history of ESA does not suggest that Congress intended this limited role of fiscal agent to be a federal involvement sufficient to invoke ESA. Absent this congressional intent, the ESA requirement that an entity be an instrumentality of the United States should not be construed broadly to include financial institutions acting as fiscal agents of the federal government.

152. 50 C.F.R. § 402.02 (1980).
153. Id.
protected species and, if a HUD action is likely to affect a protected species, HUD must consult with the Department of the Interior or the Department of Commerce.\textsuperscript{154} HUD regulations, however, do not require that HUD refuse to guarantee a loan for construction or purchase if the Department of the Interior or the Department of Commerce determines that the construction of the unit will jeopardize a protected species or adversely modify a critical habitat. Therefore, it is necessary to look outside of HUD and its regulations to determine whether ESA should control federal loan guarantee programs.

The only published decision decided under ESA that involved a loan guarantee program is \textit{Nebraska v. REA}.\textsuperscript{155} The REA insured sixty-six percent of the loans for the construction of the Grayrocks Dam.\textsuperscript{156} The court held that ESA controlled the REA's loan guarantee program, and found the loan guarantee commitments to be unlawful because of the REA's failure to follow both ESA and NEPA. The court did not, however, enjoin the construction of the project based on REA's involvement because it concluded that a loan guarantee was not sufficient to create a partnership between REA and the private developer.\textsuperscript{157}

The Fifth Circuit also has suggested that actions having only an indirect effect on protected species should be subject to ESA. In \textit{National Wildlife Federation v. Coleman},\textsuperscript{158} the Department of Transportation sought to construct a highway across a portion of the critical habitat of the Mississippi sandhill crane, an endangered species. The plaintiffs contended that along with the direct loss of crane habitat, such construction would facilitate and encourage private development along the highway, adversely modifying the remainder of the crane's critical habitat. The defendants recognized this indirect effect in their EIS, stating that they had "no control" over private development of

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\item 154. 24 C.F.R. § 50.43 (1980).
\item 156. Staff Report on Grayrocks Dam and Reservoir Project to the Endangered Species Committee at i (Jan. 19, 1979).
\item 157. 12 E.R.C. at 1181. The \textit{Nebraska} court enjoined the construction, however, because the Army Corps of Engineers issued the permit without an adequate EIS and because it had failed to comply with the requirements of ESA. The issue became moot when the Endangered Species Committee granted an exemption to the Grayrocks Dam project. See text accompanying notes 79-92 \textit{supra}. The Committee apparently assumed that the loan guarantee program was subject to the ESA because it concluded an exemption was necessary. If the ESA did not apply to the REA's loan guarantee program, the committee presumably would not have had to decide whether to grant an exemption.
\item 158. 529 F.2d 359 (5th Cir.), \textit{cert. denied}, 429 U.S. 979 (1976).
\end{itemize}
privately owned land.\textsuperscript{159} Simply recognizing the danger to the crane, however, did not satisfy section 7; the court held that the defendants must take the necessary steps to ensure that the highway would not jeopardize the crane or modify its habitat.\textsuperscript{160} "The fact that the private development surrounding the highway . . . does not result from direct federal action does not lessen the appellee's duty under § 7."\textsuperscript{161} This court, like the Nebraska court, recognized that federal actions having only an indirect effect on protected species or their critical habitats are also subject to the requirements of ESA.

The contention that ESA governs federal loan guarantees is also supported by comparisons with NEPA. The EIS requirement under NEPA applies to "major federal action significantly affecting the environment."\textsuperscript{162} In Sierra Club v. Lynn,\textsuperscript{163} HUD made an offer of commitment to guarantee $18 million in bond obligations for the development of a new community consisting of 28,676 dwelling units.\textsuperscript{164} In determining that HUD's action was subject to NEPA requirements, the court held that "HUD's commitment to guarantee 18 million dollars in bond obligations for the Ranch constituted a major federal action 'significantly affecting the quality of the human environment . . . .'"\textsuperscript{165}

Similarly, both HUD and the courts have assumed that HUD's insuring a loan constitutes a major federal action, obligating HUD to satisfy NEPA requirements. In Hiram Clarke Civic Club v. Lynn,\textsuperscript{166} HUD insured a $3,763,200 loan to a private developer pursuant to the National Housing Act,\textsuperscript{167} which provides federal mortgage insurance for housing projects designed for low and moderate income families. The court assumed that HUD had to satisfy NEPA requirements.\textsuperscript{168} An action that constitutes a "major federal action" under NEPA should constitute a "federal action" under ESA. Therefore, ESA should also apply to loan guarantee programs.

\textsuperscript{159} Id at 365-66.
\textsuperscript{160} Id at 373.
\textsuperscript{161} Id at 374.
\textsuperscript{162} 42 U.S.C. § 4332 (1976).
\textsuperscript{163} 502 F.2d 43 (5th Cir. 1974), cert. denied, 421 U.S. 994 (1975).
\textsuperscript{164} 502 F.2d at 57.
\textsuperscript{165} Id at 57-58.
\textsuperscript{166} 476 F.2d 421 (5th Cir. 1973).
\textsuperscript{168} Similarly, in Wilson v. Lynn, 372 F. Supp. 934 (D. Mass. 1974), the court stated that "[a]ll the parties agree that the mortgage insurance undertaken by HUD and the guarantee of interest payments to be made by the Developer by HUD constitute 'major federal action.'" Id at 935.
The VA has also indicated its belief that loan guarantee and similar financing programs are subject to ESA, as illustrated by its recent actions involving a housing development in San Diego, California. In 1974, the VA approved grading plans for the subdivision of 279 acres on which the developer planned to build 1,429 dwelling units. In September 1978, the Department of the Interior published a proposed final rule listing *Pogogyne abramsii*, the San Diego mesa mint, as an endangered plant species. The rule was to become effective on October 29, 1978. Noting that the proposed subdivision might affect this protected species or its habitat, the VA requested consultation with the Fish and Wildlife Service of the Department of the Interior. Pending this consultation, the VA “determined not to issue final approvals on any of the units . . . [and] not to guaranty any loans for the purchase of newly constructed homes or for the construction of homes in the affected area.” In October 1978, the San Diego VA office informed the developer of the presence of the mesa mint. The developer immediately graded the ungraded lots, thereby destroying the mesa mint.

In December, the Fish and Wildlife Service issued a biological opinion pursuant to ESA. The Service found that vernal pools, the habitat of mesa mint, had been present over much of the developer’s land and that the brushing and grading had resulted in the loss of approximately one third of the species’ total habitat. The Service stated that the VA had therefore been negligent in its section 7 responsibilities “by not taking appropriate steps to prevent an irreversible and irretrievable commitment of resources on the project site.” Thus, because of the developer’s actions, the Service was precluded from recommending reasonable and prudent alternatives to the proposed action as

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170. *Id.*
171. A division of the Department of the Interior, the Fish and Wildlife Service, is responsible for protected species that live on land or in the air. *See* 50 C.F.R. § 402.01 (1980).
172. Letter from John G. Miller, Director of the Regional Office of the Veterans Administration in Los Angeles, California, to Kahler Martinson, Regional Director of the United States Fish and Wildlife Service in Portland, Oregon, at 2 (Oct. 25, 1978).
174. *Id.* at 1.
175. *Id.* at 4.
176. *Id.*
provided for by ESA.\textsuperscript{177}

After the biological opinion was rendered, the developer withdrew its request for loan guarantee eligibility.\textsuperscript{178} It subsequently renewed its request for a determination of eligibility for part of the development. In response to the new request, the VA again asked the Fish and Wildlife Service to identify protected species on the property. The Fish and Wildlife Service responded that there were no protected species on the property.\textsuperscript{179} The developer had destroyed them.\textsuperscript{180} Thus, the VA agreed to insure this part of the development.\textsuperscript{181}

The Fish and Wildlife Service apparently recognized an exemption not provided for in ESA. It appears to have concluded that the VA is not violating ESA if it guarantees loans on a project in which the protected species has been wilfully destroyed, provided that the species is destroyed before the loan guarantee commitment is actually made. Nothing in the Act, however, suggests Congress anticipated or provided for such an exemption. If a developer knowingly destroys a listed species in an effort to avoid ESA, the VA and HUD should refuse to guarantee loans for the developer’s project.

Technically, the developer, not the VA, irreversibly committed resources before the biological opinion was rendered. If the VA encouraged this type of behavior by guaranteeing loans under these conditions, however, it would be unable to ensure that its program did not jeopardize the continued existence of a protected species. At a minimum, once the consultation process has begun, section 7’s prohibition against the commitment of irreversible and irretrievable resources should become effective.\textsuperscript{182}

\textsuperscript{177} Id.

\textsuperscript{178} Letter from C.S. DeLette, Assistant Vice President, Pardee Construction Company, to Jack Dweck, Loan Guaranty Officer, Veterans Administration, Los Angeles, California (Aug. 3, 1979).

\textsuperscript{179} Letter from William Sweeney, Area Manager, Fish and Wildlife Service, Department of the Interior, Area Office in Sacramento, California, to Jack Dweck, Acting Director, Veterans Administration, Los Angeles, California (June 23, 1980).


\textsuperscript{181} Letter from C.R. Schmidt, Acting Loan Guaranty Officer, Veterans Administration, to Katharine Rosenberry (July 16, 1981). HUD did, however, refuse to guarantee the loans for these units. Letter from Donald C. Lamke, Supervisor of the Department of Housing and Urban Development Service Office, in San Diego, California, to David E. Landon, Executive Vice President of Pardee Construction Company (Feb. 5, 1979).

\textsuperscript{182} 16 U.S.C. § 1536(d) (Supp. III 1979). When presented with a similar situation, the
A federal agency guaranteeing loans for construction should thus be controlled by ESA. First, although loan guarantee programs only indirectly affect housing construction, regulations state that ESA controls federal actions that indirectly affect land. Second, in the only published decision involving a loan guarantee, the court in *Nebraska v. REA* assumed federal loan guarantee programs are subject to ESA. Third, both NEPA and the NHPA apply to loan guarantee programs. Finally, both HUD and the VA have assumed that the Act applies to their loan guarantee programs. Therefore, no federal agency should guarantee loans for construction or purchase of housing units without complying with ESA.

**Rulemaking by Federal Financial Institutions**

Federal agencies also indirectly affect housing construction by making rules that regulate the amount of money financial institutions may make available for the construction and purchase of new homes. For example, the Board of Governors of the Federal Reserve System and the Federal Reserve Banks control the flow and supply of real estate credit. The Federal Deposit Insurance Corporation (FDIC) also may establish limits on mortgage lending and real estate investment by member banks. The Federal Home Loan Bank Board, Federal Home Loan Banks, and the Federal Savings and Loans Insurance Corporation (FSLIC) perform similar functions through their control of savings and loan associations.

These institutions are agencies or "authorities" of the federal government. They make rules that indirectly affect construction of new dwelling units; consequently, all these rules potentially can affect protected species. Therefore, it is necessary to determine if there is a sufficient nexus between the rulemaking powers of these agencies and ESA for one to conclude that these agencies must make rules forcing financial institutions under their control to comply with ESA.

Regulations under ESA specifically provide that the promulgation of regulations by federal agencies falls within ESA. Furthermore,
the courts have concluded that the promulgation of rules by federal agencies is governed by ESA.

These courts, however, considered hunting regulations promulgated by the Department of the Interior that directly affected an endangered species. No published decision has considered application of the Act to a rulemaking process that only indirectly affects a protected species, and no published decision has addressed ESA's effect on actions by any of these financial agencies.

Rule promulgation by a federal agency was involved in *Natural Resources Defense Council, Inc. v. SEC,* in which the plaintiffs alleged that NEPA required the Security and Exchange Commission (SEC) to promulgate rules requiring comprehensive disclosures by corporations of their environmental policies. The court concluded that NEPA made environmental considerations part of the SEC's mandate and that NEPA applied to the SEC's rulemaking procedures. It also concluded, however, that NEPA did not require the SEC to promulgate specific rules. Instead, NEPA merely required the SEC to consider alternatives and to consult with the Council on Environmental Quality.

While NEPA merely requires an agency to consider alternatives to...
a proposed agency action, ESA may prohibit the proposed action. This difference arises from the distinction between the two acts:

NEPA essentially imposes a procedural requirement on agencies, requiring them to engage in an extensive inquiry as to the effect of federal action on the environment; by way of contrast, the Act [ESA] is substantive in effect, designed to prevent the loss of any endangered species, regardless of the cost.\textsuperscript{192}

Thus, if ESA is deemed to apply to a particular agency's rulemaking process, the agency should be required to make rules ensuring that its actions will not jeopardize the continued existence of a protected species and will not adversely modify a critical habitat. ESA and its legislative history do not suggest, however, that federal financial institutions should be required to make rules ensuring that their actions do not jeopardize a protected species.

Both the Circuit Court of the District of Columbia and the Supreme Court of the United States have acknowledged that NEPA and ESA apply to agencies who have a primary purpose other than the protection of the environment. In \textit{Natural Resources}, the court stated that NEPA applied to the SEC although "environmental concerns to some extent run counter to the SEC's primary mandate of financial protection of investors."\textsuperscript{193} Similarly, in \textit{TVA v. Hill} the Supreme Court stated:

\textit{[T]he legislative history undergirding § 7 reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species. The pointed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies.}\textsuperscript{194}

These statements suggest that ESA should apply to all rules promulgated by federal agencies, and that the Federal Reserve Bank, the FDIC, the Federal Home Loan Bank Board, and the FSLIC should promulgate rules prohibiting banks under their control from loaning money to a developer who would jeopardize a listed species or critical habitat. Only by prohibiting these transactions could the financial agencies ensure that their actions would conserve, and not jeopardize, species.

In enacting ESA, however, Congress probably did not intend to govern federal financial agencies. Although the SEC was bound by

\textsuperscript{193}. 606 F.2d 1031, 1049 (D.C. Cir. 1979).
\textsuperscript{194}. 437 U.S. 153, 185 (1978).
NEPA in *Natural Resources*, this conclusion is justified because the SEC’s own disclosure rules facilitate NEPA’s aims. The SEC is able to evaluate a corporation’s compliance with disclosure law, including environmental disclosure law. In contrast, the federal financial agencies do not control the type of projects for which loans can be made and are not set up to review the merits of each loan. In enacting ESA, Congress must have been fully aware that the federal financial agencies do not evaluate each loan made by its various members. Had Congress intended the ESA to apply to these agencies, it undoubtedly would have mentioned them specifically.

Furthermore, although in *TVA* the Supreme Court stated that Congress intended to give endangered species priority over the primary missions of federal agencies, the only agencies to which the Court referred were agencies whose actions directly affect endangered species.\(^{195}\) The Court’s discussion of the legislative history of ESA further indicates that it included only agencies whose effect on protected species was direct. In discussing hearing testimony, it stated, “Witnesses recommended, among other things, that Congress requires all *land-managing agencies* ‘to avoid damaging critical habitat for endangered species and to take positive steps to improve such habitat.’”\(^{196}\) The Court apparently did not consider agencies such as the Federal Reserve Banks or the FDIC.

Therefore, while ESA does apply to the promulgation of rules by federal agencies, it is unlikely that a court would apply ESA to the promulgation of rules by federal financial agencies. The rules promulgated by these financial agencies do not directly affect endangered species. Neither the Federal Reserve Act, the Homeowner’s Bank Act, or the history of ESA indicate that Congress intended these agencies to control the kind of projects for which loans can be made.

**Conclusion**

If the Endangered Species Act is applied to all federal agencies that authorize, fund, in whole or in part, and guarantee loans for construction or purchase of dwelling units, ESA’s effect on the housing

\(^{195}\) For example, the Court referred to testimony regarding the Air Force bombing affecting whooping cranes, *id.* at 183, and the obligation of the Director of the Park Service to alter forestry practices to protect the habitat of the grizzly bear, *id.* at 187.

\(^{196}\) *Id.* at 179 (emphasis added) (quoting *Hearings on H.R. 37 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment*, 93d Cong., 1st Sess. (1973) (statement of A. Gene Gazlay, Director, Michigan Department of Natural Resources; Chairman, Legislative Committee, International Association of Game, Fish and Conservation)).
market could be substantial. Approximately 205 animals and 60 plants are presently protected by ESA. Protected animals can be found in almost every state, with some states, such as California, having as many as 36.197 Protected plants can be found in approximately one-half of the states. ESA, therefore, potentially could affect construction in almost every state in the Union.

Section 7 of the Act regulates federal agencies' actions that affect a protected species. The scope of its authority has not yet been delineated by the courts. When one considers, however, that over twenty-five percent of housing construction is "authorized, funded or carried out" by federal agencies and additional construction is regulated indirectly by federal agencies, section 7 appears capable of reaching a great many housing developments. Only future interpretation of the Act will determine its breadth.

197. 50 C.F.R. §§ 17.11, 17.12, 222.23, 227.4 (1980).