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AGENCIES RUNNING FROM AGENCY DISCRETION

J.B. RUHL* & KYLE ROBISCH**

ABSTRACT

Discretion is the root source of administrative agency power and influence, but exercising discretion often requires agencies to undergo costly and time-consuming predecision assessment programs, such as under the Endangered Species Act (ESA) and National Environmental Policy Act (NEPA). Many federal agencies thus have argued strenuously, and counter-intuitively, that they do not have discretion over particular actions so as to avoid such predecision requirements. Interest group litigation challenging such agency moves has led to a new wave of jurisprudence exploring the dimensions of agency discretion. The emerging body of case law provides one of the most robust, focused judicial examinations of the nature and scope of agency discretion available in modern administrative law, but agency discretion aversion and the concerns it raises have gone largely unaddressed in legal scholarship. And yet the discretion aversion syndrome is primed only to expand as climate change implicates a broadening span of agency programs as having environmental impacts.

This Article is the first to comprehensively describe and assess the discretion aversion trend and to extract what it has to say not only about agencies, courts, and statutes, but also about agency discretion in general. Part I describes the origins and features of the ESA and NEPA assessment programs leading to agency discretion aversion.

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** Associate, Vonable LLP. This Article benefited greatly from workshops conducted at the Duke, Vanderbilt, and Richmond law schools, from comments on drafts by Eric Biber, Robin Craig, Dave Markell, Jim Salzman, Noah Sachs, and Kevin Stack, and from research and analysis provided by Vanderbilt law students Caroline Cecot (2014), Will Irvine (2016), and Daniel Naydenov (2017).

Part II identifies the strategies agencies use to escape the ESA and NEPA assessment programs by disclaiming discretion. Part III probes institutional concerns for agencies, courts, and the statutes that arise from the discretion aversion syndrome, including agency gaming behavior, judicial conflicts regarding when nondiscretion exists, and compromised statutory purposes. Before turning to solutions, Part IV steps back to assess what questions the ESA and NEPA nondiscretion case law raises for the conceptualization of agency discretion writ large, identifying discretion's "negative space" as the source of tension between agencies and courts. Part V then circles back to reexamine the ESA and NEPA nondiscretion doctrines, evaluating alternative measures to deflate agencies' discretion aversion impulse while promoting the statutes' purposes. We conclude that the most effective reform will be to eliminate discretion as the litmus test for the ESA and NEPA, replacing it with criteria more responsive to the statutes' twin purposes of improving agency decisions and providing information to other political institutions and the public.

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INTRODUCTION

*The law may be said to give an agency discretion when under clear facts the agency may make more than one choice. If, however, on undisputed facts the law permits only one choice, then the agency is said to have no discretion.*¹

If only it were that simple.

Discretion is the root source of administrative agency power and influence and thus a ubiquitous presence in the modern administrative state.² Agencies wield their statutorily delegated discretion through rulemaking, adjudication, licensing, enforcement, and policy setting to choose what gets done and who wins and who loses. Discretion also pays some incidental dividends for agencies: mandamus is unavailable for agency actions that are discretionary; tort liability does not lie against agencies exercising discretionary functions or against agency officials exercising discretionary authority; judicial review is unavailable for acts entirely committed by law to agency discretion; and even acts not committed to agency discretion in that absolute sense are usually reviewable only for abuse of discretion.³ With all these benefits flowing from the power to exercise discretion, one might reasonably assume that agencies soak discretion up like sponges and that it takes a hard squeeze for them to give back even a drop.

So why in 2013 did the U.S. Army Corps of Engineers—the agency responsible for building and maintaining much of the nation’s water resources infrastructure—loudly proclaim that it possesses not a scintilla of discretion over carrying out “the responsibility to maintain Civil Works structures so that they continue to serve their

1. John M. Rogers, *A Fresh Look at Agency “Discretion,”* 57 TUL. L. REV. 776, 777 (1983).

2. For classic assessments of the role and ubiquity of agency discretion in the modern administrative state, see generally Charles H. Koch, Jr., *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469 (1986); Rogers, *supra* note 1; Edward L. Rubin, *Discretion and Its Discontents*, 72 CHI.-KENT L. REV. 1299 (1997); Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487 (1983). The seminal work is KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969).

3. For a brief review of these doctrines see *infra* Part I. They are thoroughly examined in Rogers, *supra* note 1. Moreover, these are just the tip of the iceberg of the practical reasons why agencies value discretion. For more on the subject, see generally JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* (1989).

congressionally authorized purposes”⁴ That is a lot of authority for an agency to squeeze out of its discretion sponge. Yet the Corps is not alone in aggressively eschewing discretion, as the Environmental Protection Agency, Navy, Bureau of Land Management, Interstate Commerce Commission, Department of Agriculture, Federal Emergency Management Agency, Bureau of Reclamation, Coast Guard, and a host of other federal agencies have also insisted they have no or limited discretion over particular actions within their jurisdiction.⁵ Although some of the actions for which agencies have disavowed discretion are admittedly mundane, such as small-scale land exchanges, others lie at or near the core of vast agency regulatory domains, including issuing national flood insurance, approving mining on public lands, regulating pesticides, approving federal delegation of pollution control programs to states, operating major dam systems, and allocating irrigation water in the arid West.⁶

What is leading these and other federal agencies to run from agency discretion? One possible explanation is that the agencies are hoping to avoid the political heat that comes with the power to decide. At one time, for example, the EPA, for largely political reasons, took the position that it had no discretion to regulate greenhouse gas emissions under the Clean Air Act, a position the Supreme Court rejected—albeit by a narrow majority.⁷ But shying away from hard politics is not what is behind the wave of discretion aversion that led the Corps to shed maintaining water resources infrastructure from its inventory of discretionary functions. Rather, discretion comes with plenty of process baggage in the modern administrative state. In a broad range of settings, when agencies exercise discretion, they also must jump through procedural and substantive hoops requiring them to produce a litany of studies and findings before moving forward with a final decision about how to exercise their discretion, and even then they face rounds of litigation

4. See Memorandum from Earl H. Stockdale, Chief Counsel, U.S. Army Corps of Eng'rs, to All Counsel 2-3 (June 11, 2013), <http://planning.usace.army.mil/toolbox/library/MemosandLetters/13Jun11-ESA.pdf> [<https://perma.cc/TU39-GQWN>] [hereinafter Chief Counsel Memorandum].

5. See *infra* Part II.

6. See *infra* Part II.

7. *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007).

over whether they jumped through the hoops the right way.⁸ The perverse “ossification” effects of these decision-making prerequisites on agency behavior have been well documented and debated in legal scholarship.⁹ What is taking on an increasingly larger, and surprising, role in this dynamic is that agencies now think twice about claiming discretion at all, even going so far in many contexts as to actively claim nondiscretion over a particular action or class of actions.¹⁰

A primary driver behind this form of discretion aversion has been the combined effect of two environmental laws: the Endangered Species Act (the ESA)¹¹ and the National Environmental Policy Act (NEPA).¹² Section 7 of the ESA requires federal agencies to consult with the Secretaries of the Departments of Interior and Commerce to ensure actions they carry out, fund, or authorize do not jeopardize

8. See Robin Kundis Craig & J.B. Ruhl, *Designing Administrative Law for Adaptive Management*, 67 VAND. L. REV. 1, 4-5 (2014).

9. See, e.g., William S. Jordan III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 393-95 (2000) (pointing out criticisms that hard look review has ossified the informal rulemaking process); Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1671 (2012) (noting that “regulated industries, and occasionally beneficiary groups, are willing to spend millions of dollars to shape public opinion and influence powerful political actors to exert political pressure on agencies”); Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1385 (1992) (noting that the informal “rulemaking process has become increasingly rigid and burdensome”); Edward Rubin, *It’s Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 100-45 (2003) (providing a broad critique of the public participation and judicial review model of administrative law); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 483-89 (1997) (discussing criticisms that the informal rulemaking process has become “unnecessarily cumbersome”); Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251, 251-52 (2009) (surveying and assessing the extensive body of legal scholarship on agency ossification).

10. For other accounts of agency avoidance behavior designed to buffer against the procedural burdens of administrative decision-making processes, see Nina A. Mendelson & Jonathan B. Wiener, *Responding to Agency Avoidance of OIRA*, 37 HARV. J.L. & PUB. POL’Y 447, 448-49 (2014); Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV. 65, 68 (2015). In neither of these other contexts does the avoidance strategy involve the extreme step of the agency disavowing discretion.

11. 16 U.S.C. §§ 1531-1544 (2012). We follow the convention among environmental lawyers of referring to the Endangered Species Act as “the ESA.”

12. 42 U.S.C. §§ 4321-4370h (2012). We follow the convention among environmental lawyers of referring to the National Environmental Policy Act as simply “NEPA,” without the preceding definite article.

the continued existence of species designated under the ESA as endangered or threatened.¹³ NEPA requires federal agencies to prepare statements assessing the environmental impacts of their proposed actions.¹⁴ Often applying to agency decisions in tandem, these two processes impose costly and time-consuming impact assessment procedures, ensnare agencies in potentially years of litigation over the adequacy of their assessments, and in practical effect can substantially alter an agency's proposed action, if not flat-out kill it.¹⁵

But there is a way out of the ESA and NEPA assessment requirements for agencies: pursuant to judicial and administrative interpretations, the two programs do not apply to actions over which an agency has no discretion.¹⁶ Indeed, since the Supreme Court's 2007 decision in *National Ass'n of Home Builders v. Defenders of Wildlife*, in which the Court upheld an administrative policy that agency discretion over an action is necessary to trigger ESA consultation requirements,¹⁷ agencies have been aggressively attempting to wiggle out of ESA and NEPA assessment requirements by claiming nondiscretion.¹⁸ The Corps's declaration of nondiscretion over maintaining its water infrastructure projects, for example, was made in the context of a policy statement regarding the agency's approach to ESA section 7 consultations.¹⁹

This phenomenon is far from a trivial niche problem of environmental law. The scope of the ESA and NEPA is immense—they capture all actions federal agencies authorize, fund, or carry out. The only thing trivial is what is not swept into that space. And as climate change pulls more and more agency programs into the realm of affecting the environment,²⁰ the ESA and NEPA will only grow in reach. Agencies, particularly those new to the ESA and

13. 16 U.S.C. § 1536(a)(2). For a fuller description, see *infra* Part I.A.

14. 42 U.S.C. § 4332(c). For a fuller description, see *infra* Part I.B.

15. See Denis Binder, *NEPA, NIMBYs and New Technology*, 25 LAND & WATER L. REV. 11, 16-17 (1990).

16. See *infra* Part II.

17. 551 U.S. 644, 666-69 (2007).

18. See *infra* Part II.

19. See Chief Counsel Memorandum, *supra* note 4, at 1.

20. See Eric Biber & J.B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 DUKE L.J. 133, 214-17 (2014).

NEPA, are likely to evaluate whether and how to take advantage of the ESA and NEPA nondiscretion exemptions.

To evaluate the scope and impact of this agency discretion aversion trend, we analyzed all reported judicial decisions in which the court ruled on an agency's ESA or NEPA nondiscretion claim. From this rapidly expanding body of case law, we identified four distinct strategies agencies use for asserting nondiscretion to avoid the ESA and NEPA.²¹ One is to claim that any discretion that may have existed over a given matter has expired, which means the agency no longer has authority to take an action that would trigger the ESA and NEPA.²² Another position is that, while the agency might hold some ongoing discretion over a matter in the background, it is proposing no action that would require exercising that discretion at the moment and thus has not triggered the ESA and NEPA.²³ The third strategy is for an agency to concede it has discretion over an action and plans to exercise it, but to describe its discretion as sharply cabined such that the agency cannot act to fulfill the purposes of the ESA and NEPA, thus purportedly rendering the assessment procedures pointless.²⁴ The fourth approach is for the agency to claim it has a mandatory duty to act in a prescribed manner and that ESA and NEPA assessment would be irrelevant to, or even impermissibly contrary to, fulfilling that mandate.²⁵ If successful in any of these arguments, agencies hope they can go about their business unbothered by the ESA and NEPA assessment programs.

To be clear, we are not proposing that agencies should overreach in their claims of discretion. If an agency's discretion over a matter is unambiguously bounded, limited, or does not exist at all, the agency should say so. But agencies should also not underclaim their discretion if merely utilized as a strategy to avoid the burdens of decision-making. The proliferation of agency nondiscretion claims raises a red flag in that regard. Indeed, we identified three institu-

21. *See infra* Part II.

22. *See infra* Part II.A.

23. *See infra* Part II.B.

24. *See infra* Part II.C.

25. *See infra* Part II.D.

tional concerns arising from the rising trend of agencies running from agency discretion to avoid running into the ESA and NEPA.²⁶

The first concern is that agencies will attempt to game their ESA and NEPA nondiscretion positions to have the best of all worlds: discretion where and when they want it and nondiscretion for purposes of escaping the ESA and NEPA programs.²⁷ Such gaming behavior puts pressure on the conventional model that agency discretion over an action falls neatly into one of three mutually exclusive buckets: (1) no authority over the action; (2) discretion over the action; or (3) mandatory duty to act a certain way with regard to the action.²⁸ In effect, agencies are searching for a fourth state of discretion—one that costs them nothing but gets them out of the ESA and NEPA. Of course, agency watchdogs and courts could detect when an agency explicitly takes inconsistent positions about the presence of discretion over an action for different discretion-based doctrines. But agencies might attempt to game the system more subtly, such as by subdividing actions into discretionary and nondiscretionary components separated by fuzzy lines or by hiding the true exercise of discretion behind what they portray as a nondiscretionary mandate. Our analysis of the case law finds ample evidence that agencies engage in such gaming behavior.²⁹

The second concern has to do with how courts are to evaluate agency claims of nondiscretion. When an agency claims not to have discretion, the question for the court is whether the relevant statute or other authority extends more power than the agency purports to be able to exercise.³⁰ The agency is trying to prove a negative—lack of discretion—and the court must ask whether more can be extracted from the agency's statutory or other governing authority. That inquiry requires the court to hypothesize the positive—presence of discretion—in a context where the agency insists it has none and has structured its rules and behavior around that position. This role has proven difficult for courts to assume, as it requires the court, not the agency, to think like an agency would if attempting to

26. *See infra* Part III.

27. *See infra* Part III.A.

28. *See infra* Part III.A.

29. *See infra* Part III.A.

30. *See infra* Part III.B.

maximize its claim of discretion.³¹ The result has been that, notwithstanding broad judicial adoption of what on the surface appear to be clear tests for weighing agency nondiscretion claims, courts have been in turmoil over how to apply them and the outcomes defy any coherent synthesis.³² Indeed, the issue has recently come to a boil and sharply divided judges on the Ninth Circuit.³³

A third concern has to do with whether the mounting number of successful discretion aversion claims has begun to chip away at the underlying purposes of the ESA and NEPA. While it is true that both statutes are designed to improve agency decision-making by increasing information available to the agency, both are also designed to inform the public and other institutions about the effects of agency actions.³⁴ Relieving agencies of ESA and NEPA assessment procedures when they have no discretion relevant to the decision-improvement purpose arguably makes sense from the standpoint of agency decision-making; however, doing so may undesirably compromise the information-production functions of the two programs for other institutions and the public and thereby impair their decision-making.³⁵

In addition to these institutional concerns, the perverse effects the discretion aversion trend is having on agencies, courts, and the statutes raise challenging questions regarding the very concept of discretion in administrative law. Although agencies and courts in the ESA and NEPA nondiscretion cases purport to treat agency discretion as a binary state—it either exists or not³⁶—more questions are raised than answered by the courts' application of this simple conception of discretion. When does agency discretion begin, and when does it end for good? What is the effect of an agency having the discretion to decide whether and when to exercise discretion? What if an agency elects to limit its discretion through contract, permit terms, or other bilateral instruments? What, beyond enforcement discretion, is required before an agency can be

31. See *infra* Part III.B.

32. See *infra* Part III.B.

33. See *Alaska Wilderness League v. Jewell*, 811 F.3d 1111, 1112 (9th Cir. 2015) (Gould, J., dissenting from denial of petition for rehearing en banc).

34. See *infra* Part III.C.

35. See *infra* Part III.C.

36. See *infra* Part III.B.

said to have ongoing discretion over a matter? What effect does a “shall” mandate have on agency discretion if the mandate is triggered only when the agency makes discretionary findings? These and similar puzzling aspects of the ESA and NEPA nondiscretion case law reveal an untapped realm of potential discretionary power not exercised by the agency—what we call discretion’s negative space—the temporal, spatial, and institutional dimensions of which confound binary conceptions of agency discretion. Ultimately, the core question boils down to which institution defines that negative space: agencies or courts.

The body of ESA and NEPA case law on agency nondiscretion claims provides one of the most robust, focused judicial examinations of the nature and scope of agency discretion available in modern administrative law, yet it and the questions and concerns it raises have gone largely unaddressed in legal scholarship. What makes these cases a dataset of particular interest is the unusual perspective agencies take of disavowing, rather than claiming, discretion. Although the sources, contours, and consequences of agency discretion have been core themes of legal scholarship for decades,³⁷ the ESA and NEPA discretion aversion trend has built steam while remaining below the radar screen of close scholarly assessment. In legal commentary, the trend has been picked up only through the lens of assessing its effects on the implementation of the ESA and NEPA, not its effects on how agencies manage their discretion or, more broadly, how it informs conceptions of the nature and scope of agency discretion writ large.³⁸ And yet the discretion

37. See, e.g., Rogers, *supra* note 1, at 777.

38. See Steven G. Davison, *Federal Agency Action Subject to Section 7(a)(2) of the Endangered Species Act*, 14 MO. ENVTL. L. & POL’Y REV. 29, 63 (2006); Jan Hasselman, *Holes in the Endangered Species Act Safety Net: The Role of Agency “Discretion” in Section 7 Consultation*, 25 STAN. ENVTL. L.J. 125, 126 (2006); Linus Chen, *National Association of Home Builders v. Defenders of Wildlife and the Meaning of Agency “Discretion,”* 38 ENVTL. L. REP. NEWS & ANALYSIS 10,039, 10,043 (2008); Kyle Robisch, *The NEPA Implied Exemption Doctrine: How a Novel and Creeping Common Law Exemption Threatens to Undermine the National Environmental Policy Act*, 16 VT. J. ENVTL. L. 173, 175 (2014); Katharine Mapes, *Case Comment, National Association of Home Builders v. Defenders of Wildlife*, 32 HARV. ENVTL. L. REV. 263, 270 (2008); Kristen M. Quaresimo, *Comment, Endangering the Endangered Species Act: National Association of Home Builders v. Defenders of Wildlife and Its Threat to the Survival of Endangered Species Protection*, 72 ALB. L. REV. 1145, 1145 (2009); Derek Weller, *Note, Limiting the Scope of the Endangered Species Act: Discretionary Federal Involvement or Control Under Section 403.03*, 5 HASTINGS W. NW. J. ENVTL. L. & POL’Y 309,

aversion syndrome is primed only to expand as climate change implicates a broadening span of agency programs as having environmental impacts and thus forces more and more agencies to face the prospect of having to undergo the ESA and NEPA assessments.

This Article is the first to comprehensively piece together the ESA and NEPA discretion aversion trend to probe those questions and concerns. The discussion proceeds in five parts. Part I describes the origins and features of the ESA and NEPA assessment programs leading to agency discretion aversion. Part II identifies the strategies agencies use to escape the ESA and NEPA assessment programs by disclaiming discretion. Part III examines the institutional concerns for agencies, courts, and the statutes (and by extension, Congress) that arise from the discretion aversion syndrome. Before turning to solutions tailored to the ESA and NEPA, Part IV steps back to assess what questions the ESA and NEPA nondiscretion case law raises for the conceptualization of agency discretion writ large, identifying discretion's negative space as the source of tension between agencies and courts. With that broader context in place, Part V then reexamines the ESA and NEPA nondiscretion doctrines and evaluates alternative measures to deflate agencies' discretion aversion impulse while promoting the statutes' purposes. We conclude that the most effective reform will be to eliminate discretion as the litmus test for the ESA and NEPA, replacing it with criteria more responsive to the statutes' twin purposes of improving agency decisions and providing information to other political institutions and the public.

I. THE SOURCES OF AGENCY DISCRETION AVERSION

Agency discretion is the oil that keeps the administrative state running.³⁹ Each year, for example, hundreds of federal, state, and

314, 319 (1999). Several authors discussing *Home Builders* soon after it was decided suggested that the case could spawn agency nondiscretion claims and clutter the law of agency discretion, but did not undertake a comprehensive assessment of the case law in either respect. See Chen, *supra*, at 10,039, 10,056; Mapes, *supra*, at 263, 272-73; see also Robisch, *supra*, at 198-205 (discussing the potential effect of *Home Builders* on NEPA nondiscretion cases).

39. See Koch, *supra* note 2, at 469 ("Administrative law is dominated by the term *discretion*."); Rogers, *supra* note 1, at 776 ("Lawyers who represent or litigate against government agencies must wroctle so frequently with the concept of agency 'discretion.'"); Rubin, *supra* note 2, at 1299 ("The ubiquity of discretion in the implementation process is now widely

local agencies exercise legislatively delegated discretion under hundreds of statutes to issue tens of thousands of permits, licenses, and other forms of permission for individuals and businesses to engage in otherwise statutorily proscribed activities.⁴⁰ On the other hand, agencies also carry out a multitude of functions over which they have no discretion, merely serving as ministerial agents of legislatures.

Because agency exercise of discretion often decides winners and losers, agencies inevitably take heat for their discretionary acts. Agencies also occasionally make mistakes in exercising discretion and could be exposed to liability for injuries caused to other parties.⁴¹ A number of doctrines, some ages old, have developed to insulate agencies from these consequences.⁴² Chief among them are mandamus, tort immunity, officer immunity, and deferential judicial review.⁴³ Each plays its role in the administrative state, and an agency's status under each depends on whether the agency is exercising discretion.⁴⁴

Discretion is not invariably a good thing for agencies, however. For example, section 7 of the ESA and NEPA both apply to actions federal agencies carry out, fund, or authorize, which covers a lot of territory.⁴⁵ Although both programs include mechanisms for avoiding or truncating assessments for what are obviously no-impact or low-impact actions,⁴⁶ many federal agency actions nonetheless trigger the requirements to engage in thorough assessment of impacts to species protected under the ESA, to prepare a comprehensive assessment of environmental impacts under NEPA, or to comply with both programs. Yet both programs also have evolved so as to provide exceptions for nondiscretionary actions, the history and details of which this Part examines.

recognized.”).

40. See Biber & Ruhl, *supra* note 20, at 140.

41. See Rogers, *supra* note 1, at 776.

42. See *id.*

43. See *id.*

44. See generally *id.*

45. See 16 U.S.C. § 1536(a)(2) (2012); 42 U.S.C. § 4332(C) (2012).

46. See 40 C.F.R. § 1508.4 (2015) (stating that low-impact actions may be categorically excluded from NEPA assessment); 50 C.F.R. § 402.13 (2015) (stating that a finding of “not likely to adversely affect” terminates the ESA consultation process).

A. *The Endangered Species Act*

Widely regarded as the “pit bull” of environmental laws,⁴⁷ the central purpose of the ESA is to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.”⁴⁸ The agencies delegated to administer the ESA, the United States Fish & Wildlife Service (FWS) for the Department of the Interior and the National Marine Fisheries Service (NMFS) for the Department of Commerce,⁴⁹ have authority over several core programs aimed toward that objective:

- *The Listing Programs.* Known as the listing function, section 4 authorizes the agencies to identify “endangered” and “threatened” species,⁵⁰ to designate a “critical habitat,”⁵¹ and to develop a “recovery plan[]”⁵² for each listed species.
- *Interagency Consultations.* Section 7 requires all federal agencies, using the “best scientific and commercial data available” and “in consultation with” the FWS or NMFS (depending on the species), to “insure” that actions they carry out, fund, or authorize do not “jeopardize” the continued

47. Steven P. Quarles, *The Pit Bull Goes to School*, ENVTL. F., Sept.-Oct. 1998, at 55, 55 (discussing the origins of this reputation); see also Steven P. Quarles & Thomas R. Lundquist, *The Pronounced Presence and Insistent Issues of the ESA*, 16 NAT. RESOURCES & ENV'T 59, 59 (2001) (giving additional historical context to highlight the ESA's “overbearing statutory certainty”).

48. 16 U.S.C. § 1531(b).

49. The FWS administers the ESA for all terrestrial, freshwater, and certain other specified species, and the NMFS administers the ESA for most marine species and anadromous fish. See 50 C.F.R. § 402.01(b) (sharing administration between the two agencies).

50. 16 U.S.C. § 1533(a)(1); see LAWRENCE R. LIEBESMAN & RAPE PETERSEN, *ENDANGERED SPECIES DESKBOOK* 13-27 (2d ed. 2010) (describing the listing process); J.B. Ruhl, *Listing Endangered and Threatened Species*, in *ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES* 16, 17-35 (Donald C. Baur & Wm. Robert Irvin eds., 2d ed. 2010).

51. 16 U.S.C. § 1533(a)(3); see LIEBESMAN & PETERSEN, *supra* note 50, at 29-34 (describing the critical habitat designation process); Federico Cheever, *Critical Habitat*, in *ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES*, *supra* note 50, at 40, 41-69 (same); Murray D. Feldman & Michael J. Brennan, *The Growing Importance of Critical Habitat for Species Conservation*, 16 NAT. RESOURCES & ENV'T 88, 88 (2001) (describing the history of critical habitat designation).

52. 16 U.S.C. § 1533(f); see LIEBESMAN & PETERSEN, *supra* note 50, at 35-38 (describing the recovery plan process); Dale D. Goble, *Recovery*, in *ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES*, *supra* note 50, at 70, 71-103 (same).

existence of listed species or result in “adverse modification” of their critical habitat.⁵³

- *The Take Prohibition.* Section 9 requires that all persons, including all private and public entities subject to federal jurisdiction, avoid committing “take” of listed endangered species of fish and wildlife.⁵⁴ The statute defines “take” to include “harm,”⁵⁵ which the FWS and NMFS have defined to include significant modification of habitat leading to actual death or injury of protected species.⁵⁶
- *Incidental Take Authorization.* Sections 7 (for federal agency direct, funding, and approval actions)⁵⁷ and 10 (for actions not subject to section 7)⁵⁸ establish the procedures and criteria for the FWS and NMFS to approve “incidental take” of listed species.⁵⁹

Consultation under section 7 involves a multi-step process in which the “action agency” (the agency proposing the action) and the “consulting agency” (the FWS or NMFS) exchange information and reports about the impacts of the action on listed species.⁶⁰ The process, laid out in regulations the FWS and NMFS have jointly

53. 16 U.S.C. § 1536(a)(2); see LIEBESMAN & PETERSEN, *supra* note 50, at 29-38 (describing the consultation process); Patrick W. Ryan & Erika E. Malmén, *Interagency Consultation Under Section 7*, in ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES, *supra* note 50, at 104, 105-25 (same).

54. 16 U.S.C. § 1538(a)(1)(B)-(C); see LIEBESMAN & PETERSEN, *supra* note 50, at 63-72 (describing the cases developing the legal standards for what constitutes “take”); Steven P. Quarles & Thomas R. Lundquist, *Land Use Activities and the Section 9 Take Prohibition*, in ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES, *supra* note 50, at 160, 161-68 (same).

55. 16 U.S.C. § 1532(19).

56. 50 C.F.R. § 17.3 (2015) (providing the FWS definition of harm); *id.* § 222.102 (providing the NMFS definition of harm). Most of the regulatory weight of the ESA comes through the agencies’ interpretation of harm and its application to land development and natural resources extraction. See Quarles & Lundquist, *supra* note 54, at 161-68.

57. 16 U.S.C. § 1536(b)(4). Permits under this provision are known as “incidental take statements.” 50 C.F.R. § 402.14(i).

58. 16 U.S.C. § 1539(a)(1). Permits under this provision are known as “incidental take permits,” but they require applicant submission of a “habitat conservation plan” and thus are also referred to as “HCP permits.” See Biber & Ruhl, *supra* note 20, at 174.

59. 16 U.S.C. § 1539(a)(1). Although “incidental take” is not explicitly defined in a specific statutory provision, it is described in section 10 of the statute as take that is “incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” *Id.* § 1539(a)(1)(B).

60. See *id.* § 1536.

promulgated,⁶¹ can take well over a year and can result in the consulting agency imposing conditions on the action that are, for all practical purposes, binding on the action agency.⁶² Despite efforts by the FWS, NMFS, and other agencies to reduce these time and resource burdens, in 2004, the General Accounting Office (now the Government Accountability Office) found that federal officials and nonfederal parties still had extensive concerns about the consultation process.⁶³

To be sure, the joint FWS and NMFS regulations governing consultations take some pressure off the cost and time associated with consulting by allowing agencies to exit the process early and with less assessment burden upon finding the action is “not likely to adversely affect” a protected species.⁶⁴ But there is another way around the section 7 quagmire: placed prominently at their beginning, the joint regulations provide that “[s]ection 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control.”⁶⁵ By implication, consultation requirements do not apply to actions over which there is not discretionary federal involvement or control. This “discretionary involvement or control” requirement, however, does not appear in the text or legislative history of the ESA, nor did it appear in the proposed consultation regulations the FWS and NMFS published in 1983, which applied the consultation process to all instances of federal “involvement or control.”⁶⁶ Rather, the qualification that the action agency must have discretion with respect to its “involvement and control” for section 7 consultation to apply appeared for the first time, out of the blue, in the 1986 final promulgated regulations, without a word of explanation for the change.⁶⁷

61. See 50 C.F.R. § 402.

62. See *Bennett v. Spear*, 520 U.S. 154, 169-71 (1997).

63. U.S. GEN. ACCOUNTING OFFICE, GAO-04-93, *ENDANGERED SPECIES: MORE FEDERAL MANAGEMENT ATTENTION IS NEEDED TO IMPROVE THE CONSULTATION PROCESS* 4-5 (2004).

64. See 50 C.F.R. § 402.13.

65. See *id.* § 402.03.

66. See Weller, *supra* note 38, at 323-25 (recounting the regulatory history and arguing that the final rule was not a logical extension of the proposed rule, lacked adequate explanation, and was contrary to the statute).

67. *Id.*; see also *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 679-83 (2007) (Stevens, J., dissenting) (explaining the regulatory history of section 7).

Nevertheless, in 2007 the Supreme Court, in a 5-4 decision, upheld the regulation and the agencies' implementation in the *Home Builders* case, ruling that "this interpretation is reasonable in light of the statute's text and the overall statutory scheme, and ... it is therefore entitled to deference under *Chevron*."⁶⁸ The majority's rationale emphasized how futile it would be to make agencies with no discretion nonetheless complete the ESA consultation process: "The regulation's focus on 'discretionary' actions accords with the commonsense conclusion that, when an agency is *required* to do something by statute, it simply lacks the power to 'insure' that such action will not jeopardize endangered species."⁶⁹

The lower courts had long been on board with that reasoning. For example, the Ninth Circuit has never questioned the validity of the regulatory exemption and has over time crafted a test requiring that the agency engage in consultation only if its statutory authority gives it "any discretion to act in a manner beneficial to a protected species or its habitat."⁷⁰ Under this test, it need not be shown that the agency must act for the benefit of the species, only that it could in some degree do so.⁷¹ Thus, "[t]he agency lacks discretion only if another legal obligation makes it impossible for the agency to exercise discretion for the protected species' benefit."⁷² The Supreme Court in *Home Builders* adopted basically the same test, holding that the consultation duty "covers only discretionary agency actions and does not attach to actions ... that an agency is *required* by statute to undertake once certain specified triggering events have occurred."⁷³ In short, lack of discretion is an agency's ticket out of ESA section 7 consultation.

68. *Home Builders*, 551 U.S. at 666 (majority opinion).

69. *Id.* at 667.

70. *Nat. Res. Def. Council v. Jewell*, 749 F.3d 776, 784 (9th Cir. 2014) (en banc).

71. *See id.*

72. *Id.*

73. *Home Builders*, 551 U.S. at 669. The Court rejected the argument that the ESA explicitly or impliedly preempts other statutes defining nondiscretionary duties by adding an independent consultation requirement for listed species. *Id.* at 664.

B. The National Environmental Policy Act

When Congress enacted NEPA in 1969, it intended the legislation to be applied broadly.⁷⁴ NEPA's text forces agencies to consider the environmental impacts of all "major Federal actions significantly affecting the quality of the human environment,"⁷⁵ which encompasses a wide universe of federal agency activity. And not only does NEPA cast a wide shadow, it imposes sizable reporting and analysis duties on agency actions that fall within its ambit. Agencies often must prepare an environmental assessment—which can be dozens of pages long⁷⁶—to decide whether to generate a full-blown environmental impact statement (EIS)—which often number hundreds of pages⁷⁷—all while navigating a complex maze of agency regulations promulgated by the White House Council on Environmental Quality (CEQ)⁷⁸ and subjecting each document to a lengthy period of public comment.⁷⁹ In short, even accepting the wisdom and efficacy of NEPA, the statute undoubtedly demands much of the many federal agencies charged with adhering to it.

So, if NEPA is both broad in its applicability and bulky in its procedural mandates, it would seem to follow that the statute leaves agencies little wiggle room when it comes to compliance. However, the courts have complicated matters considerably by creating an implied nondiscretion exemption. Instead of taking NEPA's text at its face and simply requiring agencies to engage in NEPA's procedural process for all "major Federal actions significantly affecting

74. See Charles J. Gartland, *At War and Peace with the National Environmental Policy Act: When Political Questions and the Environment Collide*, 68 A.F. L. REV. 27, 30-31 (2012) ("[NEPA's] language paints broad brush strokes of policy instead of detailed technical prescriptions. There is no limit or requirement to curtail specific pollution or activities of any kind—no micrograms per liter, parts per million, or other such limitations found in environmental statutes such as the Clean Air Act or Clean Water Act." (footnotes omitted)).

75. 42 U.S.C. § 4332(C) (2012).

76. See CHARLES H. ECCLESTON, *NEPA AND ENVIRONMENTAL PLANNING: TOOLS, TECHNIQUES, AND APPROACHES FOR PRACTITIONERS* 76-77 (2008).

77. See *id.* at 77.

78. NEPA established the CEQ, an agency in the Executive Office of the President, to promulgate regulations that would effectuate NEPA's requirements. See Council on Env'tl. Quality, *The Council on Environmental Quality - About*, WHITE HOUSE, <https://www.whitehouse.gov/administration/eop/ceq/about> [<https://perma.cc/FX6G-YREE>]. These regulations contain a bevy of specific definitions, requirements, and guidance for agencies tasked with complying with NEPA. See 40 C.F.R. § 1507 (2015).

79. See *id.* § 1506.6.

the quality of the human environment,”⁸⁰ courts allow agencies to argue that certain actions are “nondiscretionary” and therefore outside the scope of NEPA.⁸¹ To be sure, there are instances where Congress unambiguously intended certain classes of agency actions or specific agency projects to be exempt from NEPA, even if they can be appropriately classified as “major” and “significantly affecting the quality of the human environment.”⁸² But the implied nondiscretion exemption is entirely a product of judicial and agency craftsmanship; nothing in NEPA’s text explicitly allows agencies to avoid it when their action is nondiscretionary.⁸³

The NEPA implied exemption doctrine can be traced back forty years to *Flint Ridge Development Co. v. Scenic Rivers Ass’n of Oklahoma*, in which the Supreme Court considered an appeal by the U.S. Department of Housing and Urban Development (HUD) from a Tenth Circuit decision involving the the Interstate Land Sales Full Disclosure Act (Disclosure Act).⁸⁴ The Tenth Circuit affirmed an injunction against HUD that disallowed the approval of several disclosure statements from housing developers under the Disclosure Act until the agency prepared an EIS.⁸⁵ On its appeal to the Supreme Court, the government provided two legal theories as to why HUD had been exempted from producing an EIS due to the requirements of the Disclosure Act.⁸⁶ Both of the government’s distinct arguments were intended to limit NEPA’s applicability and relied on the ability of a statute to create an implied exemption to NEPA.⁸⁷

The government based one argument on compliance and argued that it was impossible to comply with both the Disclosure Act’s requirement to approve disclosure statements within thirty days of issuance and NEPA’s requirement to produce an EIS before undertaking that same action.⁸⁸ Therefore, if HUD’s approval of disclosure

80. 42 U.S.C. § 4332(C).

81. See Robisch, *supra* note 38, at 186-87.

82. See *id.* at 180-81 & nn.44-48.

83. See *id.* at 182-85.

84. 426 U.S. 776, 783-85 (1976). For an in-depth discussion of the *Flint Ridge* case, see Robisch, *supra* note 38, at 182-85.

85. *Flint Ridge Dev. Co.*, 426 U.S. at 783-84.

86. See *id.* at 785-86.

87. See *id.* at 786-87.

88. See *id.* at 787.

statements were to fall within the scope of NEPA as a “major federal action significantly affecting the quality of the human environment,”⁸⁹ then the agency would be forced to run afoul of either the Disclosure Act (because creating an EIS inevitably takes longer than thirty days) or NEPA (by declining to generate an EIS).⁹⁰

The government’s other argument was similarly grounded in the idea of an implied exemption to NEPA, but it focused on characterizing the inherent nature of the agency action as nondiscretionary instead of the impossibility of compliance.⁹¹ This argument asked the Court to examine the agency action in a vacuum, looking only to NEPA and not to any other statutory obligations.⁹² The government asked the Court to decide that NEPA could be inapplicable when an agency “by statute, has no power to take environmental consequences into account in deciding” whether to undertake an action.⁹³ Put simply, the government argued that HUD was not subject to NEPA’s requirements, because HUD could not exercise any discretion in discharging its Disclosure Act duties, as the statute’s language compelled the agency to approve disclosure statements within thirty days.⁹⁴

To support this argument, the government claimed that “NEPA is concerned only with introducing environmental considerations into the decision-making processes of agencies that have the *ability* to react to environmental consequences when taking action.”⁹⁵ Put otherwise, if an agency’s course was predetermined, then no measure of harmful environmental impacts could alter the agency’s course of action. The respondents countered by noting:

[E]ven if the agency taking action is itself powerless to protect the environment, preparation and circulation of an impact statement serves the valuable function of bringing the environmental consequences of federal actions to the attention of those

89. *Id.*

90. See Robisch, *supra* note 38, at 183.

91. See *Flint Ridge Dev. Co.*, 426 U.S. at 786.

92. See *id.*

93. *Id.* at 786.

94. *Id.* at 787.

95. *Id.* at 786 (emphasis added).

who are empowered to do something about them—other federal agencies, Congress, state agencies, or even private parties.⁹⁶

The two arguments thus juxtaposed NEPA's twin purposes of improving agency decision-making and providing information about agency actions to the public.

In the end, Justice Marshall's opinion for the Court accepted the government's impossibility of compliance argument, that "where a clear and unavoidable conflict in statutory authority exists, NEPA must give way," finding that this was the case under HUD's statute.⁹⁷ Because the Court resolved the case on this basis, it expressly reserved the question of whether an agency undertaking a nondiscretionary action must comply with NEPA.⁹⁸ While at least one prominent commentator has portrayed this outcome as a victory for environmentalists,⁹⁹ the dominant view has been that *Flint Ridge* ushered in a long line of Supreme Court cases antagonistic to NEPA's environmental protection goals.¹⁰⁰ In either case, since *Flint Ridge*, agencies have continued to advance the nondiscretion implied exemption position.¹⁰¹ While the government at first experienced some pushback from a few courts,¹⁰² over time the circuits almost uniformly coalesced around the Department of Justice's interpretation that NEPA does not apply to nondiscretionary agency actions. As a result, most (if not all) circuits now recognize an

96. *Id.* at 786-87.

97. *Id.* at 788.

98. *See id.* at 787 ("Because we reject this argument of respondents and find that preparation of an impact statement is inconsistent with the Secretary's mandatory duties under the Disclosure Act, we need not resolve petitioners' first contention.").

99. *See* Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 GEO. L.J. 1507, 1539 (2012).

100. *See, e.g.*, William H. Rodgers, Jr., *NEPA at Twenty: Mimicry and Recruitment in Environmental Law*, 20 ENVTL. L. 485, 497 (1990); Marla A. Weiner, Comment, *Flint Ridge Development Co. v. Scenic Rivers Association: Limiting the Applicability of NEPA*, 13 URB. L. ANN. 225, 226 (1977).

101. *See* Chief Counsel Memorandum, *supra* note 4, at 3.

102. *See, e.g.*, *Jones v. Gordon*, 792 F.2d 821, 826 (9th Cir. 1986) (finding a "congressional desire that we make as liberal an interpretation as we can to accommodate the application of NEPA"); *NAACP v. Med. Ctr., Inc.*, 584 F.2d 619, 634 (3d Cir. 1978) ("Even in a case in which the agency has no discretion ... substantial involvement [of the federal government] appropriately subjects the agency to the provisions of NEPA.").

implied exemption from NEPA's requirements when an agency can successfully portray its action as nondiscretionary.¹⁰³

II. AGENCY STRATEGIES FOR AVOIDING THE ESA AND NEPA

The ESA and NEPA both require at a minimum that the agency carry out, fund, or authorize an action for there to be any assessment requirement in play.¹⁰⁴ In other words, some identifiable agency action must exist and the agency must have some connection to the action before the question of whether the agency also has discretion becomes relevant. The nondiscretion exemptions reflect the additional requirement that there be some role for agency discretion to play in the action. Saving for later the question of whether the ESA and NEPA nondiscretion exemptions are reasonable

103. See Robisch, *supra* note 38, at 185-88. Almost three decades after *Flint Ridge*, the Supreme Court unquestionably tipped its hand that it would likely endorse the NEPA nondiscretion exemption when it ruled 9-0 in *Department of Transportation v. Public Citizen* that NEPA did not require the Federal Motor Carrier Safety Administration (FMCSA) to evaluate the environmental effects of cross-border operations of Mexican-domiciled motor carriers in connection with its NEPA assessment of new regulations it promulgated concerning safety of the Mexican operations. 541 U.S. 752, 756 (2004). Because under applicable statutes only the President could lift a long standing moratorium on such cross border operations, and FMCSA had no ability to countermand the President's lifting of the moratorium or otherwise categorically to exclude Mexican motor carriers from operating within the United States once the moratorium was lifted, the Court ruled that "the causal connection between FMCSA's issuance of the proposed regulations and the entry of the Mexican trucks is insufficient to make FMCSA responsible under NEPA to consider the environmental effects of the entry." *Id.* at 768. In other words, if all that happened was FMCSA's promulgation of the safety standards, there would have been no cross-border operations, thus the agency's NEPA assessment did not have to address the effects of the President's independent decision to lift the moratorium. *Public Citizen* thus does not involve the situation in which an agency argues that its decision is entirely exempt from NEPA because of lack of discretion, which is the thrust of the nondiscretion exemption claims covered in this Article. Therefore, *Public Citizen* did not take up and resolve the NEPA nondiscretion exemption question expressly reserved in *Flint Ridge*, a conclusion further supported by the fact that the *Public Citizen* opinion never so much as mentions *Flint Ridge*, much less suggests it is deciding the question *Flint Ridge* reserved. The majority opinion in *Home Builders* nonetheless points to *Public Citizen* as generally supporting its endorsement of the FWS and NMFS joint regulation creating the ESA's nondiscretion exemption. See Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 667-68 (2007). We have little doubt that had the *Public Citizen* Court or the *Home Builders* Court been presented with the question whether to endorse the lower courts' NEPA nondiscretion exemption, it would have. However, we do not purport to predict with any certainty what the current or a future composition of the Court would decide in that respect.

104. See *supra* note 45 and accompanying text.

interpretations of the statutes and prudent policy, as the courts, FWS, and NMFS have determined,¹⁰⁵ in this Part, we examine the different approaches agencies have used to fit their way into the exemptions. To be sure, we are not suggesting that agencies should overclaim the scope of their discretion or unnecessarily engage in ESA and NEPA assessments. But agencies underclaiming the scope of their discretion to avoid the ESA and NEPA should be a concern, and the case law reveals a growing propensity among many agencies for doing so. We have identified four distinct agency discretion avoidance strategies.

A. *Expired Discretion*

Agency discretion often is exercised in one-off contexts, such as in negotiating conditions of regulatory permits, property transfers, or funding agreements.¹⁰⁶ The exercise of discretion in such contexts is concentrated in the discrete moment of the action, at which time the ESA and NEPA apply. Therefore, discretionary authority arguably terminates once the action is completed, and thus the time for ESA and NEPA compliance ends. As the Ninth Circuit has explained, “there is no ‘ongoing agency action’ where the agency has acted earlier but specifically did not *retain* authority,”¹⁰⁷ and thus, for example, “[w]here private activity is proceeding pursuant to a vested right or to a previously issued license, an agency has no duty to consult ... if it takes no further affirmative action regarding the activity.”¹⁰⁸ In what we call the “expired discretion” approach to avoiding the ESA and NEPA, agencies argue that their position fits this scenario because they once could, but no longer can, take affirmative discretionary action regarding the activity in question. What is done is done.

The problem for agencies arises when conditions change after the agency has in theory terminated its discretionary contacts with the action. For example, a new species listing might put a previously permitted activity in the path of the species’ habitat. Or, a previously “minor” federal project may significantly expand in scope,

105. See *infra* Part IV.

106. See Rogers, *supra* note 1, at 776-77.

107. W. Watersheds Project v. Matejko, 468 F.3d 1099, 1109 (9th Cir. 2006).

108. Karuk Tribe of Cal. v. U.S. Forest Serv., 681 F.3d 1006, 1021 (9th Cir. 2012) (en banc).

becoming a “major” federal action subject to NEPA. Indeed, both the ESA and NEPA programs contemplate changed circumstances and can require reassessment of the action, but not after discretion has expired. The ESA consultation regulations require “reinitiation” only if “discretionary Federal involvement or control over the action has been retained or is authorized by law,”¹⁰⁹ and the NEPA regulations require a “supplemental” EIS only for proposed actions.¹¹⁰ Hence the expiration of agency discretion shuts the door to further ESA and NEPA entanglements for the action, but the possibility that an agency may have somehow retained discretion opens the door to questioning whether the agency has truly escaped the assessment programs.

Although some of the expired discretion claims rest on indisputable termination of all agency contacts with the action,¹¹¹ the success of expired discretion claims has more often hinged on the terms of the instrument the agency approved or entered into under its statutory authority. For example, in the earliest example of the expired discretion approach, *Sierra Club v. Babbitt*, the plaintiffs argued that the Bureau of Land Management (BLM) should have conducted ESA consultation and NEPA assessment with regard to effects from construction of a logging road across federal land pursuant to a previously issued right-of-way agreement.¹¹² The BLM argued, and the majority of the Ninth Circuit panel agreed, that the agreement created a permanent vested right and contained only three conditions triggering BLM authority to enforce the agreement—directness of route, interference with landowner facilities, and excessive erosion—none of which was relevant to the protection of species or the environment.¹¹³ Thus, the court concluded, BLM had no ongoing discretion and, even if one of the conditions were violated, could not withdraw or modify the road approval for the benefit of species or the environment.¹¹⁴

109. 50 C.F.R. § 402.16 (2015).

110. 40 C.F.R. § 1502.9(c) (2015).

111. See, e.g., *Wild Equity Inst. v. U.S. EPA*, 147 F. Supp. 3d 853, 864-65 (N.D. Cal. 2015) (stating that the EPA had no discretion regarding a permit it issued to an industrial facility that had expired, having been entirely replaced by a state permit), *appeal docketed*, No. 15-17502 (9th Cir. Dec. 23, 2015).

112. 65 F.3d 1502, 1507-10 (9th Cir. 1995).

113. *Id.* at 1511-13.

114. *Id.* at 1509. For a similar outcome, see *Western Watersheds Project v. Matejko*, in

Sierra Club v. Babbitt holds a particularly notable place in the nondiscretion jurisprudence because of the court's nearly indistinguishable treatment of the separate ESA and NEPA questions. After disposing of the ESA claim based on its interpretation of the agreement, the court opined that "[t]o a large extent, our decision concerning [the ESA claim] dictates the resolution of the NEPA claim ... [because] [b]oth of the statutes' procedural requirements are triggered by a discretionary federal action."¹¹⁵ Though the court acknowledged a subtle difference in the two doctrines, noting that "[i]f anything, case law is more forceful in excusing nondiscretionary agency action or agency 'inaction' from the operation of NEPA,"¹¹⁶ it nonetheless treated them as one singular legal theory, as opposed to two distinct doctrines rooted in distinct justifications and statutory schemes. The result has been to instill cross-statute fungibility of the varying discretion doctrines across the ESA and NEPA, as well as other federal laws imposing similar discretion-based impact assessment triggers.¹¹⁷

Of course, whether an agency retains discretion to take action under its governing instrument depends on how one interprets the instrument and the agency's statutory authority. In a dissenting opinion in *Sierra Club v. Babbitt*, for example, Judge Pregerson observed that an "environmental stipulation" in the agreement authorized the BLM to halt construction of the roadway if it would

which the court held that the BLM did not need to consult regarding continued water diversions on federal lands when the rights were vested under pre-1978 agreements. 468 F.3d 1099, 1109-10 (9th Cir. 2006). Under BLM regulations, those agreements are subject to agency control only if they substantially deviate from vested use or location, and in any event the only enforcement remedy is to return to the vested use or location. *See id.*

115. *Sierra Club*, 65 F.3d at 1512-13.

116. *Id.* How the court reached this conclusion is unclear. If anything, it appears that the ESA excuse doctrine is more fully developed than its NEPA counterpart, given the direct guidance supplied by the Supreme Court in *Home Builders*. *See supra* notes 68-73 and accompanying text. NEPA has no such analog in the Supreme Court. Indeed, the doctrine developed in response to the Supreme Court expressly reserved the nondiscretion exemption question in *Flint Ridge*. *See supra* notes 97-98 and accompanying text.

117. In *Sac & Fox Nation of Missouri v. Norton*, the Tenth Circuit aptly demonstrated that this issue is not confined to ESA and NEPA jurisprudence. 240 F.3d 1250, 1262-63 (10th Cir. 2001). There, the Tenth Circuit was "persuaded that a similar [nondiscretionary excuse] rule should apply" to National Historic Preservation Act (NHPA) compliance, holding that "because the Secretary exercised no discretion in acquiring [the land], he reasonably concluded that NEPA or NHPA analysis would have been pointless." *Id.* at 1263.

violate any environmental laws.¹¹⁸ The agency construed this provision as not providing any further discretion over the road than already provided through the three enforcement conditions.¹¹⁹ Suggesting that the court not bind itself to the agency's own interpretation of its scope of discretion, the dissent argued that "[t]he authority to review the project pursuant to the contract or stop it until the conditions of the environmental stipulation are met plainly constitutes 'discretion,' albeit limited."¹²⁰

The focus on contract interpretation in *Sierra Club v. Babbitt* suggests the importance of drafting of agency contracts, permits, and other instruments to define the scope of any retained agency discretion or to make clear there is none. Indeed, the expired discretion approach could lead to the perverse effect of agencies actively omitting any hint of ongoing discretion from their agreements and approvals. For example, in *Environmental Protection Information Center v. Simpson Timber Co.*, the plaintiff argued that the FWS must consult under the ESA regarding a section 10 incidental take permit the agency had issued if subsequently listed species could be affected by the permitted activities.¹²¹ The Ninth Circuit agreed with the agency that, once the FWS issued the permit, no provision retained agency discretion to alter the terms to impose new requirements to protect subsequently listed species.¹²² In this sense, the agency action was completed once the permit issued and thus there was no ongoing agency action over which to exercise discretion.

Yet, as in *Sierra Club v. Babbitt*,¹²³ there was room for a different interpretation. A dissenting opinion in *Simpson Timber* objected that the ESA regulation "does not require the parties to anticipate the specific purpose for which discretion may be exercised in order for there to be sufficient discretionary control that it can benefit a newly listed species."¹²⁴ The dissent argued there were multiple sources of discretion authorizing the FWS to reconsider the

118. *Sierra Club*, 65 F.3d at 1513 (Pregerson, J., dissenting).

119. *Id.* at 1506-07 (majority opinion).

120. *Id.* at 1514 (Pregerson, J., dissenting).

121. 255 F.3d 1073, 1081 (9th Cir. 2001).

122. *Id.*

123. See *supra* notes 118-20 and accompanying text.

124. *Simpson Timber*, 255 F.3d at 1085 (Nelson, J., dissenting).

permit.¹²⁵ Specifically, a regulatory phrase written into the permit “reserve[d] the right to amend any permit for just cause at any time during its term,”¹²⁶ and a permit implementation agreement stated that nothing in the permit limited the government’s authority or responsibility to fulfill its responsibilities under the ESA.¹²⁷ The dissent thus concluded that “[t]hese sources of discretion, together with the promises made by Simpson in its HCP, provide sufficient remedial authority for [the] FWS to implement measures that inure to the benefit of the [species],” thereby satisfying the condition of retained federal discretion that triggers the FWS’s duty to reinstate consultation.¹²⁸ *Sierra Club v. Babbitt* and *Simpson Timber* thus could easily have come out the other way, suggesting that even the slimmest reed of retained discretion in a permit or contract could derail an expired discretion claim, depending on how a court interprets the language.

In *Sierra Club v. Babbitt* and *Simpson Timber*, agency discretion was held to have expired immediately once the agency concluded the instrument.¹²⁹ But agencies sometimes structure their regulatory permitting processes in such a way as to ratchet down the scope of discretion as a particular project moves through the approval process, in effect expiring chunks of discretion in stages.¹³⁰ A classic example is *Hammond v. Norton*, in which plaintiffs alleged that the BLM violated NEPA when it failed to conduct a supplemental EIS for a pipeline project across public land managed by the BLM.¹³¹ The BLM conducted an EIS for what was known as the Williams pipeline project and granted the pipeline the necessary right-of-way across BLM land, which included imposing environmental protection conditions.¹³² From that point, the BLM’s only additional discretion over the project was to approve a plan of development incorporating, among other things, the environmental protection measures imposed in the right-of-way, and then to issue a notice to proceed when the agency was satisfied the project would fully

125. *Id.* at 1084.

126. *Id.*

127. *Id.*

128. *Id.* at 1084-85.

129. *See supra* notes 112-14, 121-22 and accompanying text.

130. *See, e.g.,* *Hammond v. Norton*, 370 F. Supp. 2d 226, 254-56 (D.D.C. 2005).

131. *Id.* at 231-32.

132. *Id.*

comply with the plan of development.¹³³ Before the plan of development was approved, however, a separate Holly pipeline project announced plans to expand capacity to the origination point of the Williams pipeline, which could have boosted the amount of oil the Williams pipeline would transport.¹³⁴ The plaintiffs argued that this required the BLM to prepare a supplemental EIS on the Williams pipeline to account for the Holly pipeline's environmental impacts.¹³⁵ Had the Holly pipeline project been proposed prior to the approval of the right of way for the Williams pipeline, the BLM presumably could have taken its effects into account when designing conditions for the Williams pipeline.¹³⁶ But once the right-of-way was issued, the BLM's discretion to do so expired.¹³⁷ As the court explained, "BLM's discretion now that the [right-of-way] has been approved ... is limited to determining whether the proposed [plan of development] adequately embodies the environmental stipulations set forth in the [record of decision], and whether Williams is complying adequately with those conditions, so that the [notice to proceed] may issue."¹³⁸ In other words, although plan and notice approvals are not "purely ministerial" acts,¹³⁹ they do not trigger the kind of "discretion that might usefully be informed by further environmental review."¹⁴⁰

B. Dormant Discretion

Unlike the expired discretion claim, in some cases an agency cannot plausibly deny that it could exercise discretion over a matter that would allow further affirmative action regarding the activity.¹⁴¹ In what we call the "dormant discretion" category, an agency in this

133. *Id.* at 256.

134. *Id.* at 254.

135. *Id.* at 256.

136. *See id.*

137. *Id.*

138. *Id.*

139. *Id.* ("These actions by BLM are not 'purely ministerial' because BLM still retains discretion to halt the Williams project should Williams not meet its environmental obligations.")

140. *Id.* at 255.

141. *See, e.g.,* WildEarth Guardians v. U.S. EPA, 759 F.3d 1196, 1208 (10th Cir. 2014) (contrasting actions of the ESA that authorize agencies to take certain actions with those that require agencies to take certain actions).

predicament argues that, despite possessing discretion to make a particular decision, it is proposing no affirmative exercise of it at the time and thus cannot be dragged into the ESA and NEPA as if it were.¹⁴² The dormant discretion claim resonates with the simple reality that agencies cannot be expected to be exercising all of their potential discretion all of the time and thus should be subject to the ESA and NEPA only when they are.¹⁴³ For example, when the EPA acted to regulate particulate emissions from a power plant to control regional haze, it was not required to consult under the ESA regarding other pollutants it possibly had discretion to also regulate.¹⁴⁴ As the court explained,

[T]he possibility that the EPA would have discretion—in some other regulatory proceeding—to directly regulate mercury and selenium emissions at the Plant did not impose a duty to consult under the ESA before taking the only action under consideration at the time. Life is short. The EPA can, and by necessity must, proceed step by step.¹⁴⁵

But the fact that the agency is not attempting to exercise discretion at a particular moment has proven unpersuasive in cases in which either the regulatory contacts never functionally expire or the agency's discretion appears to be generally "on call" and available for the agency to exercise at will.¹⁴⁶ An example of the first problem is *Washington Toxics Coalition v. EPA*, in which the plaintiffs argued that the EPA should have consulted under the ESA over continued registration of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) if the pesticides affected listed species.¹⁴⁷ The EPA argued that FIFRA alone governed rescission of pesticide active ingredient registrations; thus, once registered (at which time ESA consultation would take place), no

142. *See, e.g., id.* at 1208-10.

143. *Id.* at 1209 ("When an agency action has clearly defined boundaries, we must respect those boundaries and not describe inaction outside those boundaries as merely a component of the agency action.")

144. *Id.* at 1203.

145. *Id.* at 1209-10 (footnotes omitted).

146. *See, e.g., Wash. Toxics Coal. v. EPA*, 413 F.3d 1024, 1032-33 (9th Cir. 2005) (holding that the EPA's discretion in regard to pesticides did not expire because such discretion is ongoing).

147. *Id.* at 1028.

subsequent action triggered the ESA consultation requirements.¹⁴⁸ The court disagreed, finding that the EPA retained continual discretion to alter the registration of pesticides for reasons that include environmental concerns and thus must consult under the ESA if it turns out that a registered pesticide is affecting a listed species.¹⁴⁹ Indeed, the court found the EPA's argument "remarkable" and flatly rejected the EPA's reliance on the expired discretion cases of *Sierra Club v. Babbitt* and *Simpson Timber*.¹⁵⁰ As the court reasoned, "[t]he principle enunciated in those cases does not apply here ... because here [the] EPA retains ongoing discretion to register pesticides, alter pesticide registrations, and cancel pesticide registrations."¹⁵¹ In short, some forms of agency discretion never go away, and thus neither does the ESA or NEPA.¹⁵²

In the second problem for dormant discretion claims, agencies must be careful when they call on allegedly dormant discretion on a regular basis, particularly if done through a formal procedure for deciding whether to exercise discretion. The more structured and hands-on this process becomes, the more the agency risks being deemed to have crossed the line from possessing to exercising ongoing discretion. For example, in *Karuk Tribe of California v. U.S. Forest Service*, a split en banc panel of the Ninth Circuit rejected the Forest Service's position that its review of a mining company's notice of intent to conduct mining operations on public land did not involve discretionary control that could inure to the benefit of species listed under the ESA.¹⁵³ The Forest Service argued that the mining companies had a statutory right to enter public lands to conduct mining activities and that the agency's review of a company's notice of intent did not include assessment of impacts to species.¹⁵⁴ In the Forest Service's view, all the agency did was

148. *Id.*

149. *Id.* at 1032-33.

150. *Id.* at 1033.

151. *Id.*; see also *Ctr. for Biological Diversity v. EPA*, 65 F. Supp. 3d 742, 760 (N.D. Cal. 2014) (stating that pesticide reregistration was an affirmative discretionary action), *appeal filed*, No. 14-16977 (9th Cir. argued May 9, 2016).

152. See also *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1084-88 (9th Cir. 2015) (requiring the Forest Service to consult regarding a newly listed species during the interim between forest management plan revisions).

153. 681 F.3d 1006, 1017, 1024-25 (9th Cir. 2012).

154. *Id.* at 1023.

receive and analyze the information about the intended mining operation.¹⁵⁵ The Ninth Circuit observed, however, that the Forest Service's regulations allow the agency to take further action on a notice of intent by requiring a company to submit a more detailed "plan of operations," which, according to agency regulations, could have included species protection requirements.¹⁵⁶ Indeed, the agency's regulations pronounced broad criteria governing the decision whether to require a plan of operations, including environmental impact criteria, and the agency had done just that to several notices of intent involved in the litigation and in those cases explicitly identified species impacts as the grounds for requiring a plan of operations.¹⁵⁷ Piecing together the agency's regulations and practices, the Ninth Circuit concluded that "the Forest Service can exercise its discretion to benefit a listed species by approving or disapproving [notices of intent] based on whether the proposed mining activities satisfy particular habitat protection criteria."¹⁵⁸ In other words, exercising discretion to decide whether to exercise more discretion is still exercising discretion.

C. Nonenvironmental Discretion

In what we call the "nonenvironmental discretion" claim category, the agency concedes it possesses ongoing discretion over an action and is affirmatively engaged in exercising it—thus eliminating the expired discretion and dormant discretion claims—but contends that its discretion is strictly limited such that species and environmental concerns are outside its scope, making ESA and NEPA assessment pointless.¹⁵⁹ In other words, the agency argues that it is not within whatever discretion it is purporting to exercise over the action to consider factors relevant to the ESA and NEPA.¹⁶⁰ The Ninth Circuit has embraced this approach with a caveat that agency discretion is necessary but not sufficient to impose ESA consultation

155. *Id.*

156. *Id.* at 1025.

157. *See id.* at 1020, 1025-26.

158. *Id.* at 1025.

159. *See, e.g.,* *Ctr. for Food Safety v. Vilsack*, 844 F. Supp. 2d 1006, 1017 (N.D. Cal. 2012), *aff'd*, 718 F.3d 829 (9th Cir. 2013).

160. *Id.*

on an agency action—for consultation to be triggered, the agency must also be capable of exercising its discretion for the benefit of a listed species.¹⁶¹ Similarly, courts have explained that as a general principle NEPA assessments are not required when “agencies have no discretion that might usefully be informed by further environmental review.”¹⁶²

A classic example involves the Animal and Plant Health Inspection Service (APHIS) and its removal of genetically modified “Roundup Ready” alfalfa (RRA) from its list of regulated plants under the Plant Protection Act (PPA).¹⁶³ In *Center for Food Safety v. Vilsack*, plaintiffs argued that the agency should have consulted under the ESA to determine the effects on listed species of alfalfa farmers’ increased use of the active ingredient in Roundup, glyphosate.¹⁶⁴ APHIS did not dispute those possible effects, but argued, and the court agreed, that regardless of the causal effects of its RRA delisting decision on farmers’ glyphosate use, its statutory authority extends only to the determination whether a crop itself is a plant pest and thus provided no authority to determine where or how glyphosate can be applied.¹⁶⁵ Once the agency determined RRA posed no such plant pest risks, that was the limit of the agency’s discretion as far as the court was concerned and thus no duty to consult regarding listed species was triggered.¹⁶⁶

Although the PPA erected a formidable barrier between APHIS’s plant pest determination and any discretion to exercise for the benefit of species, the divide is less clear when courts appear willing to probe harder to identify a source of discretion to trigger the ESA or NEPA.¹⁶⁷ A key principle in this respect is that the absence of explicit environmental terms associated with the grant of discretion

161. *Nat. Res. Def. Council v. Jewell*, 749 F.3d 776, 784 (9th Cir. 2014).

162. *Hammond v. Norton*, 370 F. Supp. 2d 226, 255 (D.D.C. 2005).

163. *Ctr. for Food Safety*, 844 F. Supp. 2d at 1009-10.

164. *Id.* at 1018.

165. *Id.* However, APHIS did complete a NEPA EIS on the decision to deregulate RRA, because it had a choice between no action (not deregulating) and deregulating RRA, and the plant pest risk did trigger environmental impact concerns. *Id.* at 1010-11.

166. *Id.* at 1020; *see also* *Ctr. for Biological Diversity v. U.S. Dep’t of Hous. & Urban Dev.*, 541 F. Supp. 2d 1091, 1100 (D. Ariz. 2008) (stating that HUD may not consider environmental factors when guaranteeing loans, thus no ESA consultation was required), *aff’d*, 359 F. App’x 781 (9th Cir. 2009).

167. *See, e.g., Turtle Island Restoration Network v. Nat’l Marine Fisheries Serv.*, 340 F.3d 969, 975-76 (9th Cir. 2003).

does not cinch the nonenvironmental discretion claim, or any of the other forms of nondiscretion claim for that matter.¹⁶⁸ As one court put it, triggering the ESA or NEPA “does not ... require the statute at issue to use environmental terminology for agency discretion to be found: there is no environmental-words test.”¹⁶⁹ Moreover, “an environmental purpose need not be expressed in the enabling statute.”¹⁷⁰ Hence, unless the statute shuts the door as sharply as the PPA did to APHIS, the question is what the agency could do, not what it must do, to take species and the environment into consideration.¹⁷¹ The approach, however, can lead courts down convoluted paths of reasoning.

In *Turtle Island Restoration Network v. National Marine Fisheries Service*, for example, the Ninth Circuit held that the NMFS had to consult under the ESA when issuing fishing permits under the High Seas Fishing Compliance Act.¹⁷² The statutory permitting provision required the agency to “establish such conditions and restrictions on each permit ... as are *necessary and appropriate* to carry out the obligations of the United States” under an international treaty intended to address the tactic of reflagging a fishing vessel to avoid the species protection measures contained in bilateral agreements.¹⁷³ Because the permitting provision described the conditions as “including but not limited to” the markings of the boat and reporting requirements—conditions hardly conjuring up images of species and the environment—the agency argued, and the district court agreed, that it had no discretion to exercise on behalf of species.¹⁷⁴ But the Ninth Circuit interpreted the “but not limited to” caveat liberally and observed that the statute included within the scope of “obligations of the United States” all “international conservation measures,” which the statute defined to mean “measures to conserve or manage one or more species of living marine resources.”¹⁷⁵ Leveraging that combination of provisions, the

168. See *Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1141 (11th Cir. 2008); *Nat'l Wildlife Fed'n v. FEMA*, 345 F. Supp. 2d 1151, 1172 (W.D. Wash. 2004).

169. *Fla. Key Deer*, 522 F.3d at 1141.

170. *Nat'l Wildlife Fed'n*, 345 F. Supp. 2d at 1172.

171. See *id.*

172. *Turtle Island*, 340 F.3d at 977.

173. *Id.* at 975-76.

174. *Id.* at 927, 975-76.

175. *Id.* at 975-76.

court pointed to the sea turtle conservation terms of yet another convention to which the United States was party—which made it an “obligation[] of the United States”—to arrive at the sum effect that the NMFS had ongoing discretion to condition fishing permits based on impacts to turtle species.¹⁷⁶ The NMFS had never purported to hold or exercise such discretion when issuing fishing permits, but the finding that the agency could do so was all the court needed to require the agency to consult under the ESA.¹⁷⁷

D. No Discretion

The ultimate and most frequently employed strategy for arguing lack of discretion for purposes of the ESA and NEPA is what we aptly call the “no discretion” claim, in which the agency contends that its action is “purely ministerial” in that it is directed by a statutory mandate—a “shall” or a “shall not”—leaving no room for agency choice in the matter.¹⁷⁸ For example, when a statute required the Navy to conduct missile testing at a particular base, the Navy was not required to consult under the ESA to evaluate the effects of accidental missile explosions on threatened salmon “because the Navy lacks the discretion to cease [missile] operations at [the base] for the protection of the threatened species.”¹⁷⁹ In other cases, however, the analysis is not so cut-and-dry.

Home Builders is the leading no discretion claim case. The statutory mandate in question was the Clean Water Act (CWA) provision for transferring permit issuance and administration authority from the EPA to a state.¹⁸⁰ The provision enumerates nine factors of “adequate authority” a state must demonstrate its state program satisfies.¹⁸¹ If the EPA determines that adequate authority exists, the CWA provides that the EPA “shall approve” the program

176. *Id.*

177. *See id.* at 972, 977.

178. *See, e.g., Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 653-54 (2007).

179. *Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of the Navy*, 383 F.3d 1082, 1092 (9th Cir. 2004). The agency did, however, conduct an ESA consultation on aspects of facility construction that were discretionary. *Id.* at 1092 n.8.

180. *See Home Builders*, 551 U.S. at 649; *see also* 33 U.S.C. § 1342(b) (2012) (providing the full text of the CWA's state permit program).

181. *See* 33 U.S.C. § 1342(b); *Home Builders*, 551 U.S. at 656.

for transfer.¹⁸² Defenders of Wildlife argued that the transfer action was subject to ESA consultation given that it was necessary to authorize state administration of the CWA permit program.¹⁸³ In a 5-4 split decision, however, the majority of the Court disagreed.¹⁸⁴

As discussed above, the *Home Builders* majority endorsed the joint FWS and NMFS regulation creating the “discretionary Federal involvement or control” requirement as a reasonable interpretation of the ESA—describing it as exempting from consultation “actions ... that an agency is *required* by statute to undertake once certain specified triggering events have occurred.”¹⁸⁵ The next question was whether the CWA provision for transfer of permitting authority to the states fit that description.¹⁸⁶ The majority determined it did because the provision specified enumerated standards that left the EPA, in the majority’s view, no discretion “to consider the protection of threatened or endangered species as an end in itself when evaluating a transfer application.”¹⁸⁷ Rather, the majority concluded, “[w]hile the EPA may exercise some judgment in determining whether a State has demonstrated that it has the authority to carry out [the] enumerated statutory criteria, the statute clearly does not grant it the discretion to add another entirely separate prerequisite to that list.”¹⁸⁸ Hence, once the EPA finds that a state has met the enumerated criteria, it is duty-bound to transfer permitting authority to the state.¹⁸⁹ The reasoning behind this “if find/then shall” exemption appears to be that agency findings made on the “if find” side of the process are not actions in the ESA sense. The findings then trigger the action taken on the “then shall” side of the process, but because the action follows from a “shall” command triggered by the findings it cannot be considered discretionary. After *Home Builders*, any agency that can identify such an “if find/then shall” trigger in its statutory program has found an

182. See *Home Builders*, 551 U.S. at 656.

183. *Id.* at 671.

184. *Id.* at 647-48, 671.

185. *Id.* at 669.

186. *Id.* at 671.

187. *Id.* at 671.

188. *Id.* As noted above, the majority also rejected the argument that the ESA imposes such a prerequisite by its own terms, concluding that the ESA neither explicitly nor implicitly preempted the CWA’s narrow enumerated standards. *Id.* at 664.

189. *Id.* at 671.

opportunity to insulate its “if find” determinations and the “then shall” action they trigger from the burdens of the ESA and NEPA.¹⁹⁰

Indeed, courts had embraced this form of the no discretion claim well before *Home Builders*.¹⁹¹ A prototypical NEPA example comes from the D.C. Circuit in *Citizens Against Rails-to-Trails v. Surface Transportation Board*, in which the court faced a challenge to the Surface Transportation Board’s (STB) approval of a plan to convert a railway into a trail under the National Trails System Act (Trails Act).¹⁹² Specifically, the plaintiffs argued that the STB failed to conduct the requisite NEPA analysis before approving the conversion.¹⁹³ The STB countered that it had no discretion in the approval process because once the agency determined the railway was eligible for conversion under the Trails Act, it had no choice but to approve the conversion.¹⁹⁴ In siding with the STB, the D.C. Circuit conducted a thorough analysis of STB’s discretion under the Trails Act.¹⁹⁵ Though it did not view it as an automatic nondiscretion “trigger,” the D.C. Circuit noted that under the Trails Act, the STB “shall” approve conversions that meet certain conditions.¹⁹⁶ And though the plaintiffs tried to couch those conditions as discretionary, the court disagreed, noting that the six conditions “relate either to the statutory conditions for sponsorship [of the trail] or to decisions that Congress has determined shall be made by the railroad and trail sponsor in their voluntary agreement.”¹⁹⁷ Thus, the D.C. Circuit deemed both the front end Trails Act “if find” analysis and the final Trails Act “then shall” decision “largely ministerial” and, therefore, it did not imbue the STB with sufficient discretion to implicate NEPA.¹⁹⁸ Similar “if find/then shall” statutory triggers have supported agency no discretion claims in a variety of ESA and NEPA contexts.¹⁹⁹

190. *See id.*

191. *See id.* at 661 (citing cases).

192. 267 F.3d 1144, 1147-48 (D.C. Cir. 2001).

193. *Id.* at 1149.

194. *Id.* at 1150.

195. *Id.* at 1152.

196. *Id.* at 1152-53.

197. *Id.*

198. *Id.*

199. *See Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1224-26 (9th Cir.) (stating that an agency was required to approve oil spill response plans if it found they meet statutory criteria as implemented by agency regulations), *reh’g and reh’g en banc denied*, 811 F.3d 1111

Agency actions have failed to fit the no discretion category, however, when the “if find/then shall” obstacle to exercising discretion appears overplayed. A glaring example involves the Federal Emergency Management Agency (FEMA), which has argued several times that it has no discretion in its administration of the National Flood Insurance Program (NFIP) because once an area meets flood insurance eligibility criteria, the statute requires the agency to make flood insurance available.²⁰⁰ FEMA had already lost this argument twice before *Home Builders*,²⁰¹ but the agency took another shot after the Court’s ringing endorsement of the “if find/then shall” style of no discretion claim. While on the surface the agency’s position parrots the *Home Builders* scenario, the difference is that FEMA exercised its statutory discretion to design the NFIP eligibility criteria by regulation and enjoyed considerable latitude in how to craft them,²⁰² whereas in *Home Builders* the statute established the “if find” criteria that triggers the “then shall” mandate.²⁰³ As the courts before it, the Eleventh Circuit saw through FEMA’s no discretion claim in the most recent case, observing that “although FEMA is required to issue flood insurance to localities that satisfy certain criteria, FEMA itself is charged with developing those criteria and enjoys broad discretion in so doing.”²⁰⁴ FEMA could “tailor[] the eligibility criteria that it develops to prevent jeopardy to listed species” and thus must consult regarding the

(9th Cir. 2015); *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1017-19 (9th Cir. 2012) (stating that once an agency adopted regulation required by statute for defining criteria for operation of a dam, annual operating plans could not deviate from the criteria); *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1261-64 (10th Cir. 2001) (stating that once the Department of Interior purchased a tract using a public law’s funds, the agency had no discretion in placing that land into a trust); *Minnesota v. Block*, 660 F.2d 1240, 1259 (8th Cir. 1981) (stating that an agency was required to implement nondiscretionary motorboat restrictions); *Nevada v. United States*, 221 F. Supp. 2d 1241, 1246-47 (D. Nev. 2002) (stating that a statute required the Department of Interior to take land into trust pursuant to nondiscretionary statutory factors); *Strahan v. Linnon*, 967 F. Supp. 581, 621 (D. Mass. 1997) (stating that a statute required Coast Guard to issue vessel certification if vessel satisfied statutory criteria, none of which related to endangered species), *aff’d*, 187 F.3d 623 (1st Cir. 1998).

200. See *Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1141-42 (11th Cir. 2008).

201. See *Nat’l Wildlife Fed’n v. FEMA*, 345 F. Supp. 2d 1151, 1174 (W.D. Wash. 2004); *Fla. Key Deer v. Stickney*, 864 F. Supp. 1222, 1239-40 (S.D. Fla. 1994).

202. See *Fla. Key Deer*, 522 F.3d at 1141-42.

203. See *supra* notes 68-69, 180-90 and accompanying text.

204. *Fla. Key Deer*, 522 F.3d at 1142.

development of the criteria.²⁰⁵ Nevertheless, in other cases courts have found that agencies can impose an “if find/then shall” trigger on themselves by promulgating tightly worded regulatory approval criteria implementing more broadly worded statutory criteria.²⁰⁶

In some cases, the no discretion strategy does not depend on an “if find/then shall” trigger provision; rather, the agency argues that it is hemmed in by a statutory mandate or other constraint that gives it no choice over the action.²⁰⁷ However, although a statutory “shall” mandates agency action even when standing alone with no “if find” trigger, it does not necessarily limit the agency’s discretion to shape the action with species and the environment in mind. As with the nonenvironmental discretion claim,²⁰⁸ courts have questioned what the agency could do without exceeding its authority, not what it must do to fulfill its authority.²⁰⁹ For example, in *RESTORE: The North Woods v. United States Department of Agriculture*, the court rejected the U.S. Department of Agriculture’s (USDA) argument that the agency’s sale of fifty-seven acres of land to a ski resort was nondiscretionary and therefore outside the scope of NEPA.²¹⁰ Though the court observed that the Sugarbush Land Exchange Act (SLEA) limited the agency’s discretion in the land exchange, it found that the agency did “not lack all discretion in the process, its actions [were] not purely ministerial, nor [would] compliance with NEPA be an empty formality.”²¹¹ While the SLEA stated that the USDA “shall ... convey all right, title, and interest of the United States in and to the land,” the SLEA nonetheless “did not invade the [USDA’s] discretion to impose terms and conditions upon the exchange ... [or] to consider whether the lands to be acquired ... will be ‘acceptable’ in light of any environmental

205. *Id.* at 1144; *see also* *Swan View Coal. v. Weber*, 52 F. Supp. 3d 1133, 1142 (D. Mont. 2011) (stating that the Forest Service must consult when developing criteria for accepting land donations, even though it must accept land donation if the criteria are met).

206. *See, e.g.*, *Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1224-26 (9th Cir.), *reh’g and reh’g en banc denied*, 811 F.3d 1111 (9th Cir. 2015); *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1017-19 (9th Cir. 2012).

207. *See, e.g.*, *RESTORE: The N. Woods v. U.S. Dep’t of Agric.*, 968 F. Supp. 168, 170-71, 173 (D. Vt. 1997).

208. *See supra* Part II.C.

209. *See, e.g.*, *RESTORE*, 968 F. Supp. at 175.

210. *Id.* at 173-74.

211. *Id.*

consequences identified by a NEPA review.”²¹² The court thus looked behind the statute’s “shall” mandate to uncloak discretion resting generally within the agency’s statutory authority.²¹³

Similarly, courts have rejected agency interpretations of contracts as imposing “shall” duties obviating ESA and NEPA compliance when there is so much as a sliver of an argument that the agency has ongoing room to exercise choice on behalf of species or the environment.²¹⁴ Recently, for example, in *Natural Resources Defense Council v. Jewell*, the Ninth Circuit rejected the Bureau of Reclamation’s position that it could not renegotiate terms on renewal of long-term water service contracts for diversions from the Central Valley Project and thus did not need to conduct ESA consultation when renewing the contracts.²¹⁵ The district court had applied what it described as the “federal common law” of federal contract interpretation and held that the express terms of the contracts prevented the agency from reducing diversion volumes on renewal.²¹⁶ Therefore, the agency had no discretion to exercise on behalf of an endangered fish in the river system, the delta smelt.²¹⁷ The Ninth Circuit initially affirmed,²¹⁸ but reversed en banc on the basis that nothing in the original contracts required the agency to renew them at all even under the same terms and, more to the point, the contracts constrained renegotiation of only the quantities and allocations of water.²¹⁹ Hence, “the Bureau could benefit the delta smelt by renegotiating the Settlement Contracts’ terms with regard to, *inter alia*, their pricing scheme or the timing of water distribution.”²²⁰ Using that kind of “could do” interpretation of the contracts,

212. *Id.* at 174 (footnotes omitted).

213. *See also* *W. Land Exch. Project v. Bureau of Land Mgmt.*, 315 F. Supp. 2d 1068, 1082 (D. Nev. 2004) (noting that an agency argued it had no discretion in land exchange and thus need not undergo NEPA assessment, yet the applicable statute broadly required the agency to “comply with ‘applicable law’” and expressly provided for “‘reimbursement’ of the costs of NEPA compliance”).

214. *See, e.g.*, *Nat. Res. Def. Council v. Jewell*, 749 F.3d 776, 785 (9th Cir. 2014) (en banc).

215. *Id.* at 784-85.

216. *Nat. Res. Def. Council v. Kempthorne*, 621 F. Supp. 2d 954, 979-80 (E.D. Cal. 2009), *aff’d sub nom.* *Nat. Res. Def. Council v. Salazar*, 686 F.3d 1092 (9th Cir. 2014)), *rev’d sub nom.* *Nat. Res. Def. Council v. Jewell*, 749 F.3d 776 (9th Cir. 2014) (en banc).

217. *See id.* at 1000-01.

218. *Nat. Res. Def. Council v. Salazar*, 686 F.3d at 1100.

219. *See Nat. Res. Def. Council v. Jewell*, 749 F.3d at 785.

220. *Id.*

the en banc court ruled there was sufficient discretion to trigger ESA consultation.²²¹

Agencies also have argued that they lack all discretion, not because of a discrete “shall” or “shall not” in a statute or other authority, but rather because a confluence of authorities mandating and constraining agency action aggregates into the equivalent of a nondiscretionary regime.²²² Here as well, however, the distinction courts have drawn is between what could be and what must be. For example, in *National Wildlife Federation v. National Marine Fisheries Service*, federal agencies overseeing dams and other facilities in the Federal Columbia River Power System argued that a “reference operation” designed to balance a plethora of competing statutory mandates was, for all practical purposes, a nondiscretionary baseline not subject to ESA consultation.²²³ However, the Ninth Circuit interpreted the mandates as specifying broad goals, such as flood control and power generation, without specifying exact levels.²²⁴ Hence, “while the goals themselves may be mandatory, the agencies retain considerable discretion in choosing what specific actions to take in order to implement them” and thus could act on behalf of species.²²⁵ By contrast, in *Defenders of Wildlife v. Norton*, because a combination of “a Supreme Court injunction, an international treaty, federal statutes, and contracts between the government and water users ... account for every acre foot of lower Colorado River water,” a district court found that the Bureau of Reclamation had no discretion to release more water from federal reservoirs into Mexico for the benefit of endangered species in the Gulf of California and thus was not required to consult under the ESA regarding effects on those species.²²⁶

221. *Id.* The Ninth Circuit reached the same conclusion decades earlier when confronted by similar contracts and the same claim by the Bureau. *See Nat. Res. Def. Council v. Houston*, 146 F.3d 1118, 1126 (9th Cir. 1998) (stating that because the contract based delivery volumes on “available water” and the Bureau could constrict the “available water,” consultation was required).

222. *See, e.g., Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 928 (9th Cir. 2008).

223. *Id.* at 926.

224. *See id.* at 928-29 (noting that the agencies had said as much in different reports).

225. *Id.* at 929.

226. 257 F. Supp. 2d 53, 66-69 (D.D.C. 2003).

III. INSTITUTIONAL SYMPTOMS OF AGENCY DISCRETION AVERSION

The case law reviewed in Part II reveals some rather inventive thinking by agencies in their quest to escape the ESA and NEPA. Agencies have prevailed in some cases²²⁷ and failed spectacularly in others.²²⁸ But there is more at stake than agencies' win-loss records. Taken as a whole, the rise of agency discretion aversion directed at avoiding the ESA and NEPA raises concerns about the institutional integrity of agency behavior, the capacity of courts to sort through creative agency nondiscretion claims, and the effects on the ability of agencies and courts to fulfill the purposes of the ESA and NEPA.

A. The Agencies—Trade-Offs and Gaming

One remarkable feature of the ESA and NEPA nondiscretion cases is the myopic focus of the agencies and the courts on the presence or absence of discretion purely in connection with the ESA and NEPA. The written judicial opinions suggest the agencies and the courts give no attention to the broader consequences of an agency prevailing on its nondiscretion claim. But those consequences could be very real and, in some cases, severe.

To begin, prevailing on a nondiscretion claim means the agency must be comfortable with having no or limited discretion. In the expired discretion context, therefore, the agency must cut all ties with the action once the discretionary event—for example, issuance of the regulatory permit or execution of a contract—is completed.²²⁹ To be sure, retaining the background prosecutorial discretion to enforce against violations of a permit or breach of a contract has never been held to constitute the kind of ongoing discretion relevant to the discretion doctrines system, and that may be all the agency desires in the way of its future relationship with the permit or contract. But retaining any more formal relationship embodied in the permit or contract, even a generic reopener clause, risks being found to have retained discretion. Similarly, dormant discretion claims work best

227. See *supra* notes 112-14, 121-22, 130-40, 144-45, 163-66, 181-91, 193-99, 226 and accompanying text.

228. See *supra* notes 147-58, 173-78, 201-06, 211-14, 216-25 and accompanying text.

229. See *supra* Part II.A.

when the agency assumes essentially an inert position with respect to the potential exercise of discretion.²³⁰ Registration procedures and notice of intent review requirements thus undercut the dormant discretion claim. Nonenvironmental discretion claims likewise require the agency to stay unambiguously on the nonenvironmental side of the discretion divide.²³¹ And the full-on no discretion claim requires the agency to behave in a purely ministerial manner.²³²

But the effect of prevailing on any form of nondiscretion claim goes beyond loss of power to decide. Disavowing discretion for purposes of the ESA and NEPA means the agency might have to accept the consequences of throwing the switch to “no discretion.” After all, some beneficial doctrines for agencies are based on the presence or absence of discretion—mandamus, tort immunity, officer immunity, and deferential judicial review.²³³ In the “if find/then shall” no discretion claim context the agency would be subject to mandamus if it makes the trigger findings but fails to carry out the mandated action, and its reasons for not following through would not be entitled to deferential judicial review. Agency and officer immunities also would disappear. Similarly, if an agency prevailing on a nonenvironmental discretion claim were later to attempt to impose environmental conditions, it would be subject to an *ultra vires* mandamus challenge and receive no judicial deference regarding its action.

In some contexts, agencies may be perfectly comfortable accepting these trade-offs. Consider an agency issuing a permit to construct a home near the habitat of an endangered species. Issuing the permit may require modestly burdensome ESA and NEPA assessments that lead to a few conditions in the permit, such as avoiding construction in a specified area. Once the home is built, however, the agency has little at stake besides ensuring the conditions are enforced, and the other discretion doctrines have no continuing relevance. In that context, pursuing an expired discretion claim would only be beneficial for the agency, as it could cut all ties with the ESA and NEPA. With careful drafting, including omitting broad reopener clauses to leave only basic enforcement of the terms of the

230. See *supra* Part II.B.

231. See *supra* Part II.C.

232. See *supra* Part II.D.

233. See Rogers, *supra* note 1, at 776.

permit as a prosecutorial contingency, the agency could safely put this strategy into action and stand behind the precedent laid down in *Sierra Club v. Babbitt* and *Simpson Timber*.

As the cases covered in Part II reveal, however, in many contexts agencies do not seem to really mean what they say when advancing a nondiscretion claim to avoid the ESA and NEPA. To put it bluntly, they wish only to avoid the ESA and NEPA and face none of the “bad” consequences of disclaiming discretion. As the cases illustrate, each of the four nondiscretion claim types agencies use to avoid the ESA and NEPA contains the seeds of potential gaming designed to retain discretion and its benefits by shifting or hiding its whereabouts in the agency’s overall program. Agencies may engage in such gaming simply to retain power over the action in some degree, or more deliberately to claim the advantages of the benefits of discretion when they are convenient. Although such gaming is not evident in every case that tests an agency’s nondiscretion exemption claim, in this section we identify four strategies agencies have used, separately or in combination, to attempt to buffer the effects of successfully claiming nondiscretion to deflect the ESA and NEPA.

1. Blatant Arbitrage

One bold discretion gaming strategy agencies employ is to pull out the nondiscretion claim only when needed to stave off the ESA and NEPA and put it back in the box for all other purposes. Although we found no example of an agency simultaneously declaring in one judicial forum that it has discretion—such as for purposes of deflecting a mandamus action—but in another courtroom claiming nondiscretion for purposes of the ESA or NEPA, the case law is replete with examples of agencies changing their tune regarding their discretion depending on the audience.²³⁴ Generally, this inconsistency is the result of an agency flexing its muscle when broadly describing the scope of its discretion in a regulatory program to regulated entities or the public, but then backing off when confronted with claims that it improperly omitted ESA or NEPA assessments for particular actions under the program. The

234. See *infra* notes 236-43 and accompanying text.

obviousness of such flip-flopping, however, has not escaped judicial detection—courts have frequently made agencies eat their words.

For example, in the most recent of FEMA's trio of no discretion claim losses involving its flood insurance program,²³⁵ the court noted that while FEMA on the one hand argued lack of discretion for purposes of ESA consultation, a finding that the agency indeed does enjoy "discretion to consider endangered and threatened species ... is consistent with FEMA's *own* regulations implementing the NFIP, wherein wildlife and environmental concerns are considered."²³⁶ Similarly, in the *Karuk Tribe* case involving Forest Service review of mining notices of intent,²³⁷ whereas the agency insisted that "approval of a [notice of intent] is merely a decision not to regulate the proposed mining activities" and thus not an exercise of discretion,²³⁸ the agency had in a 2005 commentary on the same program emphasized that it has "broad discretion to regulate the manner in which mining activities are conducted on the national forest lands."²³⁹ The agency also had on numerous occasions rejected notices on the basis of impacts to species and the environment, thus "exercising ... judgment by formulating and applying different criteria when deciding whether to approve or deny [notices of intent].... This is the very definition of discretion."²⁴⁰ Other examples include the Bureau of Reclamation insisting it has no discretion to renegotiate any terms of water delivery contracts when a prior agency legal opinion concluded it had "considerable discretion,"²⁴¹ the NMFS arguing that it was bound by a myriad of statutes to manage hydroelectric dam operations in a nondiscretionary manner when it had previously declared that Congress had not prescribed the precise manner of operations or levels of power generation,²⁴² and the Bonneville Power Administration's contention that it could not renegotiate terms of power delivery contracts notwithstanding its declaration in a prior report that it "possesses a great deal of

235. *See supra* notes 201-06 and accompanying text.

236. *Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1143 (11th Cir. 2008).

237. *See supra* notes 153-58 and accompanying text.

238. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1023 (9th Cir. 2012).

239. *Id.* at 1025.

240. *Id.* at 1026.

241. *Nat. Res. Def. Council v. Houston*, 146 F.3d 1118, 1126 (9th Cir. 1998).

242. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 928-29 (9th Cir. 2008).

discretion in contract matters.”²⁴³ In short, courts have made agencies fess up when it appears they have been talking out of both sides of their mouths.

2. *Fuzzy Lines*

When an agency clearly has at least some discretion to exercise, a subtler discretion gaming strategy is to build flexibility into the reach of the nondiscretion claim by obscuring the boundary between discretionary and nondiscretionary actions. For example, the Corps’s water infrastructure maintenance memo draws a line between the nondiscretionary “responsibility to maintain Civil Works structures so that they continue to serve their congressionally authorized purposes” versus the discretionary “how and when of the maintenance activities [which] may be subject to Section 7 consultation if the process of maintenance (as opposed to the results of maintenance) could affect listed species.”²⁴⁴ When a particular action falls in this trio of buckets—maintaining purposes, process of maintenance, and results of maintenance—will not always be self-evident. The agency could use this ambiguity as cover to sort discrete actions into discretionary or nondiscretionary modes and thus allow the agency to both retain power when desired and optimize the discretion doctrines, such as when protection against mandamus for a particular action outweighs protection from the ESA and NEPA.

Indeed, this kind of line blurring was involved when federal agencies responsible for water management on the Snake and Columbia Rivers concocted a “reference operation” they contended was mandated by the aggregate of federal statutes governing the rivers’ management and thus outside the scope of ESA consultation.²⁴⁵ When pressed, the agencies conceded that they “chose the reference operation approach in order to avoid ‘trying to precisely determine the extent of the Action Agencies’ discretionary operation.’”²⁴⁶ The Ninth Circuit flatly rejected this attempt to “sweep so-called

243. *Forelows on Bd. v. Johnson*, 743 F.2d 677, 681 (9th Cir. 1984).

244. Chief Counsel Memorandum, *supra* note 4, at 3.

245. *See Nat’l Wildlife Fed’n*, 524 F.3d at 928.

246. *Id.*

‘nondiscretionary’ operations” outside the reach of ESA consultation.²⁴⁷

To be fair to infrastructure and resource management agencies, the beginning and end of their discretion often is not as neat and tidy as issuing a one-off permit to build a home. Maintaining and operating a major reservoir system and managing a national forest are broad agency functions involving an ongoing multitude of different decisions across time and space. If every discrete decision were subject to ESA and NEPA assessment and its ensuing rounds of litigation, agency management could grind to a halt. But if an agency wants to deal with that problem by drawing lines between discretionary and nondiscretionary actions, it can expect courts to demand clarity and accuracy.

3. *Decision Disaggregation*

Another gaming tactic evident from the discretion aversion case law is to carve up a particular regulatory action into more granular decision components and tag threshold determinations as nondiscretionary, thereby squeezing as much of the ESA and NEPA out of the regulatory program as possible while still retaining sufficient discretion to effectively control the regulated activity at will.²⁴⁸ This strategy was at the core of the Forest Service’s approach to regulation of mining in national forests dealt with in *Karuk Tribe*, which purported to divide the process into what the agency described as a nondiscretionary first-step review of mining notices of intent and, based on that review, possibly move the notice to a second-step discretionary plan of operations negotiation.²⁴⁹ The court easily detected the kink in that strategy, as the only way the agency could have decided to move a mining project from first-step notice of intent status onto the second-step planning of operations process is to reach a judgment at the first step based on the notice of intent, which the court observed is “the very definition of discretion.”²⁵⁰

247. *Id.* at 929.

248. *See Mapes, supra* note 38, at 275 (suggesting that agencies might try to segregate parts of programs as nondiscretionary).

249. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1023 (9th Cir. 2012).

250. *Id.* at 1026.

As described in *Hammond v. Norton*, the BLM used a similar approach in disaggregating its review of pipeline rights of way, though the discretion was phased out rather than phased in.²⁵¹ BLM conducted full ESA and NEPA assessments when granting a pipeline the necessary right-of-way across BLM land, which could have included imposing environmental protection conditions.²⁵² From that point, according to its regulations, the BLM's only additional discretion over the project was to approve a plan of development incorporating, among other things, the environmental protection measures imposed in the right-of-way, and then to issue a notice to proceed when the agency was satisfied the project would fully comply with the plan of development.²⁵³ Although an invention of the agency's rules, the *Hammond* court agreed that the no-looking-back effect of the phase out of discretion insulates the plan of development decision from NEPA.²⁵⁴

Some agencies have employed similar decision disaggregation strategies but in a less obviously sequential format as the Forest Service used for mining *Karuk Tribe* or the BLM used for rights-of-way in *Hammond*. For example, the Corps has developed a complex permitting system for implementing section 404 of the CWA, which requires permits for discharges of fill material into waters of the United States.²⁵⁵ The permitting system spans from "general permits," which the agency promulgates by regulation for later use by any action fitting into a general set of parameters, to "individual permits" issued after a comprehensive agency review of a specific permit application.²⁵⁶ For general permits, which cover many different kinds of small-scale activities, NEPA compliance is conducted at the time of promulgation of the rule creating the permit, thus obviating (in theory) the later need for users of the permit to conduct NEPA review, whereas NEPA review for specific permits is conducted at the time of permit application review.²⁵⁷ In this sense, use of a general permit by a qualifying project does not

251. 370 F. Supp. 2d 226, 255-56 (D.D.C. 2005).

252. *See id.*

253. *See id.* at 256.

254. *Id.*

255. *See* 33 U.S.C. § 1344(a) (2012). The section 404 permitting program is discussed extensively in Biber & Ruhl, *supra* note 20, at 160-73.

256. *See* Biber & Ruhl, *supra* note 20, at 160-64.

257. *See id.* at 167-68.

constitute an exercise of Corps discretion. However, many of the general permits require the user to submit a “preconstruction notification” and allow the Corps to request and review more detailed site-specific information and impose additional conditions on the use of the general permit.²⁵⁸ Although this approach seems similar to the Forest Service’s process for reviewing mining notices,²⁵⁹ the Corps nonetheless treats these reviews as part of general permitting and thus not triggering NEPA review.²⁶⁰ While some courts have held that the act of verifying the applicability of a general permit with no additional conditions added does not convert the process into an individual permitting decision, others have reasoned that more intensive review of notifications could trigger more demanding process requirements of the Corps, which would include NEPA assessment.²⁶¹ And some courts have held that the Corps fully crosses the line into NEPA territory when it incorporates conditions on the project’s use of the general permit.²⁶² Other agencies’ similar general permitting programs have raised the same concern.²⁶³

We are not suggesting that agencies construct disaggregated decision processes exclusively or even primarily to avoid the ESA and NEPA. A reasonable objective would be to enhance administrative efficiency by sorting out at the front end projects with potentially substantial impacts to species and the environment from the multitude of projects clearly presenting no substantial concerns. But agencies have argued that this format does indeed insulate the

258. *Id.* at 172-73.

259. *See supra* notes 153-58, 249-50 and accompanying text.

260. *See Biber & Ruhl, supra* note 20, at 187-90.

261. *Compare Spiller v. Walker*, No. A 98 CA 255 SS, 1998 U.S. Dist. LEXIS 18341, at *46-47 (W.D. Tex. Aug. 25, 1998) (finding that review constitutes specific action subject to process), *with Ouachita Riverkeeper, Inc. v. Bostick*, 938 F. Supp. 2d 32, 35-36, 45-46, 46 n.7 (D.D.C. 2013) (finding that no process was required).

262. *See Sierra Club v. U.S. Army Corps of Eng’rs*, 803 F.3d 31, 45 (D.C. Cir. 2015) (stating that NEPA was triggered when the Corps imposed species mitigation conditions on a project using a general permit).

263. *See Jennifer L. Seidenberg, Texas Independent Producers & Royalty Owners Ass’n v. Environmental Protection Agency: Redefining the Role of Public Participation in the Clean Water Act*, 33 *ECOLOGY L.Q.* 699, 700-01 (2006) (discussing a split among the courts as to when public notice and comment is required for project-specific use of a CWA pollution general permit the EPA issued for certain oil and gas operation activities).

purportedly nondiscretionary decisions from the ESA and NEPA,²⁶⁴ which presumably is not an inconsequential reason for constructing decision review in this manner. We also are not addressing at this point whether it makes sense to treat this kind of threshold decision as an ESA or NEPA assessment event—that is a question we take up later in Part V. The point to be made for now is that, if the presence of discretion is to be the trigger for the ESA and NEPA, it can stretch credulity for an agency to characterize its threshold sorting decision as not demanding the exercise of discretion.

4. Firewalls

The final discretion gaming strategy is closely linked to the “if find/then shall” no discretion claim type. In this approach, the agency identifies a barrier to discretion—the “shall”—to act as a firewall behind which it can, in effect, use the “if find” process to exercise all or most of the discretion it cares to exert. Sometimes the “if find” process truly involves no meaningful exercise of discretion,²⁶⁵ but often it does, in which case the concern is that exercising this discretion without ESA or NEPA compliance can undermine the purposes of the statutes.

The classic, and ultimately highly successful, example of the firewall strategy is in the EPA’s CWA permitting authority transfer process taken up in *Home Builders*. Writing for the majority, Justice Alito fleetingly conceded that “the EPA may exercise some judgment in determining whether a State has demonstrated that it has the authority to carry out [the] enumerated statutory criteria,” but quickly left that nagging detail behind.²⁶⁶ However, as anyone familiar with the CWA delegation process would know, EPA’s exercise of “some judgment” is actually the locus of considerable and enduring power over the states. As Justice Stevens pointed out in dissent, not only does the EPA review state delegation applications, but thereafter maintains a regular oversight role by entering into agreements with the states receiving delegation that mandate the

264. See *supra* Part II.D.

265. See *Strahan v. Linnon*, 967 F. Supp. 581, 621 (D. Mass. 1997) (involving a statute that required the Coast Guard to issue vessel certification if the vessel satisfied statutory criteria, none of which related to endangered species), *aff’d*, 187 F.3d 623 (1st Cir. 1998).

266. *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 671 (2007).

states allow the EPA to review state permits, object to and block state permits not meeting EPA guidelines, and conduct regular audits of state programs.²⁶⁷ The statute also authorizes the EPA to withdraw delegation from states with deficient programs,²⁶⁸ a process that has been described as “largely discretionary.”²⁶⁹ Indeed, at one time EPA took the position that it must consult under the ESA when granting state delegation precisely because of the extensive discretion it wields over states, having changed its position prior to *Home Builders*.²⁷⁰ Apparently life is better for the agency when that discretion is hidden behind a firewall.

We are not suggesting that the EPA gamed the nondiscretion claim by creating the firewall—Congress was responsible for the CWA’s “if find/then shall” structure—but rather that it has taken full advantage of the firewall to substantially expand its discretion on one side while giving the appearance of being merely ministerial in function on the other. For example, the EPA has issued a plethora of guidance documents outlining to states how it will administer its sweeping oversight regime and elaborated in extensive detail on the statutorily expressed criteria.²⁷¹ Therefore, this is hardly a ministerial check-the-boxes “if find” process, as the EPA goes far beyond exercising “some judgment” by essentially looming over delegated states as an omnipresent overseer. As one commentator has summed up, “[a]lthough this system is called *cooperative* federalism, one can make no mistake about who is ultimately in charge—the EPA.”²⁷²

To be fair, the CWA provision establishing the delegation approval criteria speaks primarily to the state’s administrative capacity and does not expressly mention endangered species, but neither does it expressly preclude EPA from considering the effects

267. See *id.* at 688-89 (Stevens, J., dissenting).

268. 33 U.S.C. § 1342(c)(3) (2012).

269. Erik R. Lehtinen, Note, *Virginia as a Case Study: EPA Should Be Willing to Withdraw NPDES Permitting Authority from Deficient States*, 23 WM. & MARY ENVTL. L. & POL’Y REV. 617, 628 (1999).

270. See *Home Builders*, 551 U.S. at 689-90.

271. See, e.g., *NPDES Program Management and Oversight*, EPA, <https://www.epa.gov/npdes/npdes-program-management-and-oversight> [<https://perma.cc/8587-JJ5Y>] (last updated Mar. 1, 2016).

272. Lehtinen, *supra* note 269, at 623.

of state programs on endangered species.²⁷³ Several criteria are quite open ended, such as that the state must show it has authority to terminate or modify permits for cause, including for violation of permit conditions, and will allow public comment on permit applications.²⁷⁴ Based on reasoning in other ESA and NEPA nondiscretion cases, particularly the Ninth Circuit's reminder that there is no environmental words test,²⁷⁵ the EPA arguably could accommodate species concerns in such provisions or at least prod states into designing their delegated programs with ESA purposes among the permitting factors.²⁷⁶ The bottom line is that, far from being a ministerial agent in the delegation process, the EPA wields extensive discretion over the states. All that seems to protect such discretion from the EPA consultation requirement is the "then shall" firewall the *Home Builders* majority made impenetrable.

Home Builders already seems to have influenced how lower courts approach the ESA and NEPA discretion tests when confronted with agencies' statutory firewall claims, making them reluctant to challenge the agency's assertion that it fits the no discretion category. In two recent and prominent cases, for example, the Ninth Circuit refused to peek behind the curtain to search for discretion on the other side that could be leveraged to trigger the ESA or NEPA.²⁷⁷ Indeed, only FEMA has failed since *Home Builders* to convince a court to turn a statutory "if find/then shall" provision into a barrier to the ESA and NEPA, and even FEMA has been required only to consult on its rules establishing the "if find" criteria, not on the

273. See 33 U.S.C. § 1342(b); *supra* notes 215-22 and accompanying text.

274. See 33 U.S.C. § 1342(b)(1)(C)(i), (b)(5).

275. Nat. Res. Def. Council v. Jewell, 749 F.3d 776, 785 (9th Cir. 2014) (en banc).

276. Justice Stevens suggested ways the EPA could do this in his *Home Builders* dissent. See Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 688-91 (2007) (Stevens, J., dissenting). EPA's consulting with the FWS and NMFS also could shield the states from allegations that their program implementation illegally takes protected species, as consultation includes an incidental take authorization that extends to the action agency and its permittee. See Chen, *supra* note 38, at 10,053.

277. See *Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1224-25 (9th Cir.) (stating that because agency is required to approve oil spill response plans if it finds they meet statutory criteria as implemented by agency regulations, plan approval is not subject to assessment), *reh'g and reh'g en banc denied*, 811 F.3d 1111 (9th Cir. 2015); *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1017-19 (9th Cir. 2012) (finding that once agency adopted regulation required by statute for defining criteria for operation of a dam, annual operating plans could not deviate from the criteria and thus were not subject to assessment).

“then shall” act of issuing flood insurance once it finds a locality meets the agency’s criteria.²⁷⁸

It remains to be seen how many other firewalls lurk in statutory regimes for agencies to use in ESA and NEPA avoidance or how extensively in the future Congress will take advantage of this mechanism for deflecting the ESA and NEPA without having to expressly exempt agency action from them, the latter being more likely to attract attention. Of all the discretion gaming strategies, however, the firewall strategy seems to have gained the most immunity to judicial inspection and skepticism. Therefore, the end result of a proliferation of *Home Builders* replicas would be to allow agencies to wield all the discretion they could wish for before making the “if find” findings official, then take the mandatory “then shall” action without having to undergo ESA or NEPA assessments, and then continue to exercise discretion over their decisions without the ESA or NEPA haunting them and without accountability to the interests the ESA and NEPA are intended to protect.²⁷⁹

B. The Courts—Applying Clear Tests with Incoherent Results

Two seemingly straightforward tests have guided courts in their evaluations of agency nondiscretion claims: ESA consultation is required if the agency has “any discretion to act in a manner beneficial to a protected species or its habitat,”²⁸⁰ and NEPA is triggered if the agency has any “discretion that might usefully be informed by further environmental review.”²⁸¹ But these tests have proven easier for courts to recite than to apply.

At heart, the nondiscretion exemptions require the courts to scour through an agency’s authorities and hypothesize how the agency could maximally exercise discretion regardless of the agency’s position that it has none or is limited in ways that exclude ESA and NEPA review. This kind of comparison between agency authorities and scope of discretion works reasonably well in the more typical

278. See *supra* notes 201-05, 236 and accompanying text.

279. For commentary on the erosion of agency accountability more broadly, see generally David Markell, “Slack” in the Administrative State and Its Implications for Governance: *The Issue of Accountability*, 84 OR. L. REV. 1 (2005).

280. *Nat. Res. Def. Council v. Jewell*, 749 F.3d 776, 784 (9th Cir. 2014) (en banc).

281. *Hammond v. Norton*, 370 F. Supp. 2d 226, 255-56 (D.D.C. 2005).

case in which an agency is claiming affirmatively to have discretion and is being challenged in that respect as overclaiming. There, the court can ask whether the agency's position fits within the scope of the authority and not worry about whether the agency could exercise yet more discretion.²⁸² But nondiscretion claims require the court to essentially assume the role of the agency and think about how far the agency could go were it to try to maximize its discretion under the relevant authority and receive a court's endorsement. Designed to smoke out agency underclaiming of discretion, this kind of role reversal, "what-if" thinking has proven challenging for the courts and led to some contentious battles between jurists.

Indeed, the judicial friction began with the earliest of the cases. For example, the BLM's expired discretion claim in *Sierra Club v. Babbitt*, involving whether the agency had retained discretion over a logging road right-of-way, sharply divided the appellate court panel regarding the proper interpretation of an "environmental stipulation" in the contract.²⁸³ The division within and between courts seems only to have grown over time. For example, the EPA's no discretion claim in *Home Builders* initially failed in the Ninth Circuit with a split panel sharply disagreeing over the scope of the EPA's discretion when approving state program delegation of CWA NPDES permitting.²⁸⁴ The Ninth Circuit then denied en banc hearing, with two dissenting opinions containing stinging, personal critiques of the opposing judges and their respective reasoning.²⁸⁵ Ultimately, the judges wishing to grant en banc review and endorse EPA's no discretion claim won in the Supreme Court, but only by the narrowest of margins as the Court split on a 5-4 vote with sharply conflicting views of the scope of the EPA's discretion in Justice Alito's majority opinion and Justice Stevens's dissent.²⁸⁶

282. See Koch, *supra* note 2, at 474-75.

283. Compare 65 F.3d 1502, 1511 (9th Cir. 1995), *with id.* at 1514 (Pregerson, J., dissenting).

284. Compare *Defs. of Wildlife v. U.S. EPA*, 420 F.3d 946, 968-71 (9th Cir. 2005), *rev'd sub nom.* Nat'l Ass'n of Home Builders v. *Defs. of Wildlife*, 551 U.S. 644 (2007), *with id.* at 979-80 (Thompson, J., dissenting).

285. See *Defs. of Wildlife v. U.S. EPA*, 450 F.3d 394, 395-401 (9th Cir. 2006) (Kozinski, J., dissenting from denial of rehearing en banc); *id.* at 402-06 (Kleinfeld, J., dissenting from denial of rehearing en banc).

286. Compare *Home Builders*, 551 U.S. at 664-73, *with id.* at 690-94 (Stevens, J.,

The post-*Home Builders* judicial climate is no less contentious. The Ninth Circuit has on three occasions used en banc proceedings to air out its internal conflicts over agency nondiscretion claims. In *Natural Resources Defense Council v. Jewell*, involving the Bureau of Reclamation's claim that it had no discretion to negotiate terms of water delivery contracts for the benefit of species, a unified en banc court reversed the panel decision and found that the agency had sufficient latitude to negotiate terms of the contract to trigger ESA consultation.²⁸⁷ The en banc result in *Karuk Tribe* was not as harmonious. The prevailing view was that the Forest Service triggers ESA consultation when making its threshold decision whether to subject mining notices to closer environmental scrutiny, characterizing the agency's decision as fitting "the very definition of discretion."²⁸⁸ However, the dissenting judges held no punches, accusing the majority of "undermin[ing] the rule of law" and entangling agencies "in the ligatures of new rules created out of thin air."²⁸⁹ The two descriptions of the nature of the agency's decision could not have been more diametrically opposed. Most recently, in *Alaska Wilderness League v. Jewell*, a sharply split panel disagreed over whether the Bureau of Safety and Environmental Enforcement triggers the ESA and NEPA when approving oil spill plans of off shore drilling operations, with the majority finding the "if find/then shall" trigger for plan approval insulated the agency from the statutes.²⁹⁰ The Ninth Circuit's denial of en banc rehearing came over a strongly worded dissent.²⁹¹

The upshot is that, notwithstanding uniform agreement among the courts that the ESA and NEPA assessment programs apply only when an agency has the right kind of discretion over the action, the case law does little to help define when an agency has the right kind of discretion over the action. *Home Builders* may have emboldened agencies to advance nondiscretion claims, but the case has brought no clarity in the lower courts, particularly the Ninth Circuit, where

dissenting).

287. 749 F.3d 776, 779 (9th Cir. 2014).

288. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1026 (9th Cir. 2012) (en banc).

289. *Id.* at 1031 (Smith, J., dissenting).

290. 788 F.3d 1212, 1219-26 (9th Cir.), *reh'g and reh'g en banc denied*, 811 F.3d 1111 (9th Cir. 2015).

291. *Alaska Wilderness League v. Jewell*, 811 F.3d at 1120 (Gould, J., dissenting from denial of rehearing en banc).

much of the ESA nondiscretion case law has transpired.²⁹² Even similar no discretion claims relying on the same firewall strategy have met inconsistent results.²⁹³ Our point for now is simply that the clear tests courts routinely describe for evaluating agency nondiscretion claims have not produced a clear jurisprudence. We probe possible reasons and solutions in Parts IV and V.

C. The Statutes—Undermined Information-Production Purposes

Courts and agencies justify the nondiscretion exemptions from the ESA and NEPA on the ground that if an agency cannot shape its decision to benefit or account for impacts to species and the environment, there is no point to conducting the assessment procedures. But the ESA and NEPA also provide important information-production functions. As the D.C. Circuit has observed with respect to NEPA, “[t]he twofold purpose of NEPA is ‘to inject environmental considerations into the federal agency’s decision-making process and to inform the public that the federal agency has considered environmental concerns in its decision-making process.’ Such information may cause the agency to modify its proposed action.”²⁹⁴

The nondiscretion claim strategies appeal primarily to the agency’s inability to fulfill the decision process purpose when it does not have discretion to influence environmental outcomes. But not having influence over the environmental outcomes of a decision does not mean the decision has no environmental outcomes. Even if an agency truly must take a particular action (no discretion) or its discretion is limited so as to foreclose taking environmental concerns into account (nonenvironmental discretion), the information-production purpose of the ESA or NEPA may still be an operative and useful policy goal. As Justice Marshall, paraphrasing the *Flint Ridge* respondents, put it:

292. See *supra* notes 283-85, 287-91 and accompanying text.

293. Compare *Alaska Wilderness League*, 788 F.3d at 1224-25 (declining to require consultation), and *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1017-19 (9th Cir. 2012) (declining to require consultation), with *Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1141-43 (11th Cir. 2008) (requiring consultation).

294. *Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1151 (D.C. Cir. 2001) (citations omitted) (quoting *Macht v. Skinner*, 916 F.2d 13, 18 (D.C. Cir. 1990)).

[E]ven if the agency taking action is itself powerless to protect the environment, preparation and circulation of an impact statement serves the valuable function of bringing the environmental consequences of federal actions to the attention of those who are empowered to do something about them—other federal agencies, Congress, state agencies, or even private parties.²⁹⁵

However, one effect of the successful nondiscretion claim is to completely cut off that flow of information. For example, as discussed previously, APHIS was relieved of undergoing ESA consultation for its decision to deregulate RRA because the statute constrained its decision to only consider the plant pest risks of the strain, which does not encompass the effects of farmers' increased use of Roundup's active ingredient, glyphosate, on species.²⁹⁶ However, the problem with this reasoning is that the ESA consultation process, as well as the NEPA EIS process, requires an agency to evaluate the indirect effects of its actions, even if the agency has no discretionary control over those indirect effects.²⁹⁷ For example, a section 7 consultation for an EIS for a federal highway project will consider the indirect effects of induced development over which the Federal Highway Administration has no regulatory control.²⁹⁸ Thus, while it is true that APHIS has no discretion regarding where, how, and how much glyphosate is used,²⁹⁹ the indirect effects of deregulating RRA very likely may have included increased use of the chemical. Nevertheless, because APHIS could not have refused to deregulate RRA on the basis of these indirect effects, but rather could exercise its statutory discretion only with respect to its judgment about the plant pest and noxious weed risks of RRA, the court agreed with the

295. *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 786-87 (1976); see Robisch, *supra* note 38, at 184. *But see* *Dep't of Trans. v. Pub. Citizen*, 541 U.S. 752, 768-69 (2004) (describing the information-production purpose more narrowly, and somewhat circularly, as being "to ensure that the 'larger audience' ... can provide input as necessary to the agency making the relevant decisions" and thus if "the 'larger audience' can have no impact on [the agency's] decisionmaking," the information-production purpose has no function to serve).

296. See *supra* notes 163-66.

297. 50 C.F.R. § 402.14 (2015) (requiring indirect effects analysis); see also *id.* § 402.02 (defining indirect effects as "those that are caused by the proposed action and are later in time, but still are reasonably certain to occur").

298. See *Ctr. for Food Safety v. Vilsack*, 844 F. Supp. 2d 1006, 1018-20 (N.D. Cal. 2012), *aff'd*, 718 F.3d 829 (9th Cir. 2013).

299. See *supra* notes 163-66 and accompanying text.

agency that ESA consultation was not required.³⁰⁰ The consequence is that one of the indirect effects of the agency's discretionary action to deregulate RRA—the impact of increased glyphosate use on listed species—remains unassessed. Had APHIS been required to assess those effects and publish its findings, the information may have influenced action by other federal agencies, Congress, state agencies, or even private parties.

Of course, not every nondiscretion claim involves agency action over a matter for which more information will be either available or useful to anyone. But the same could be said about agency actions that are indisputably discretionary—ESA and NEPA assessments do not necessarily produce valuable information in all such cases. However, the point of ESA and NEPA assessments is that the agency does not necessarily know ahead of time the nature and extent of the action's impacts or the value of that information to the agency and other stakeholders.³⁰¹ Shutting down assessments when the action fits a nondiscretion claim category may make sense if only the decision-improvement goal of the statutes matters—the decision cannot be changed, so it cannot be improved—but the effect is to ditch the information-production goal before even asking the question whether there is any important information that could be produced through assessment.

It is by no means clear, or even plausible, that Congress intended such an outcome, particularly given that the statutes contain no provision coming even close to creating a nondiscretion exemption—the ESA nondiscretion exemption is a creature of administrative regulation and NEPA's is one of judicial doctrine.³⁰² If, for example, there were a good chance that increased use of glyphosate resulting from AHPIS's deregulation of RRA would wipe out several aquatic and avian species, does it make sense to interpret the ESA as meaning that Congress would not want Congress, other federal agencies, state agencies, and even private parties to know that? Our point for now is that there is a cost to the statutory purposes when agencies succeed in nondiscretion claims—a cost borne not by the agency making the claim but by Congress, other federal agencies,

300. *See Ctr. for Food Safety*, 844 F. Supp. 2d at 1020-21.

301. *See, e.g., id.* at 1018.

302. *See supra* Part I.

state agencies, and private parties—in the form of lost information. We turn in Part V to alternative constructions of the statutes as ways to rectify this effect. First, however, in Part IV, we consider what the ESA and NEPA nondiscretion case law teaches regarding the nature of agency discretion in general.

IV. MAPPING DISCRETION'S NEGATIVE SPACE

As previously noted, legal scholarship on the ESA and NEPA nondiscretion doctrines has focused primarily on their effects on the statutory programs and purposes.³⁰³ We agree this is a significant concern and cover it in Part III, along with the additional institutional concerns we identify from our survey of the case law—agency gaming and judicial incoherence. However, even if threats to the statutes' purposes were the chief concern, we believe scholars have worked too narrowly in designing solutions around the ESA and NEPA without first reflecting on what the nondiscretion jurisprudence reveals about agency discretion at its core. Agency gaming and judicial incoherence flow not from any lack of clarity about the ESA and NEPA nondiscretion doctrines, but rather from a lack of clarity about the nature of agency discretion.³⁰⁴ In short, legal scholarship on the ESA and NEPA nondiscretion doctrines has treated administration of the statutes as the complex issue and the question of whether agency discretion exists as a rather straightforward analysis, when in fact it has been just the reverse.

What is it about the nondiscretion cases that clouds the picture of agency discretion? As we observed above in the discussion of judicial incoherence, when agencies affirmatively assert discretion and are challenged as having overclaimed, the court's job is to measure the agency's claimed extent of discretion against the statute to determine whether the agency has at least as much discretion as it claims.³⁰⁵ If it does, the agency prevails. This analysis does not require that the court map the outermost limits of the statutory boundaries on agency discretion, only that it locate the agency's

303. *See supra* note 38.

304. *See supra* Part III.

305. *See supra* Part III.B.

discretion somewhere on the map this side of the boundary, wherever that limit might be in the distance.

By contrast, the nondiscretion claims require the courts to determine whether an agency has even more discretion than it claims. In some cases, as we have shown above, agency claims of nondiscretion go well beyond litigation claims, being backed up by agency regulatory interpretations of statutes, complex regulatory programs built around the agency's position, and long-standing agency practice.³⁰⁶ Peering behind the agency's curtain of legal arguments thus can lead the court to explore and map the farthest reaches of discretion the statute would allow the agency to exercise. By all accounts from our survey of the case law, courts have frequently been willing to embark on that mapping expedition, albeit the case law has produced little clarity regarding how to chart the map.³⁰⁷

We call the gap between the line the agency has drawn on itself and the line a court draws in its search for a more expansive boundary line the negative space of agency discretion—the discretion the agency legally possesses but refuses to acknowledge, much less exercise. Perhaps the most important lesson from the ESA and NEPA nondiscretion cases is that discretion's negative space can occupy a large amount of territory. Its presence, heretofore largely unnoticed, raises profound questions regarding the temporal, spatial, and institutional dimensions of agency discretion in general.

A. The Temporal Dimension of Discretion

The ESA and NEPA nondiscretion doctrines require that, for the statutory assessment program to be triggered, there must be both an agency action and agency discretion over that action.³⁰⁸ The core rationale behind the expired discretion and dormant discretion arguments is that the agency action and the existence of agency discretion are temporally coterminous—the agency has no discretion until it begins to take an action, loses discretion when it stops taking action, and has no discretion between actions.³⁰⁹ In fact,

306. *See supra* Part III.

307. *See supra* Part III.B.

308. *See supra* Part I.

309. *See supra* Parts II.A-B.

however, the nondiscretion jurisprudence reveals that action and discretion can be temporally distinct.

1. When Does Agency Discretion Begin?

The decision disaggregation gaming strategy described above is at heart an effort by agencies to ramp up a decision-making process so that it aligns the timing of what the agency considers to be the important substantive action with the time when the agency concedes it has discretion that matters for purposes of the ESA and NEPA. But if there is a possibility an agency will pull a particular project out from the masses of no-concern projects at the “pre-action” stage and apply more rigorous review and conditioning in the “action” stage, when exactly is it exercising discretion? For example, in the *Karuk Tribe* case involving Forest Service review of mining notices, the agency described its action as the imposition of conditions on mining projects that the agency has previously sorted out at the notice stage as presenting potential concerns.³¹⁰ The dissent agreed with the agency that the sorting process at the notice stage was merely about “receiving and analyzing information, and deciding not to take further action.”³¹¹ The majority emphatically disagreed, describing the decision not to take further action as “the very definition of discretion.”³¹² Agency discretion began, in other words, before the agency took any action other than deciding whether it should exercise its discretion to place conditions on the mining project.

If *Karuk Tribe* is the right way to think about when agency discretion begins, it will not matter how gradually agencies ramp up decision-making processes towards the ultimate substantive action—discretion begins when the project notice or other form of application comes across the transom. Even multiple sorting steps will not buffer the agency action against *Karuk Tribe*’s reasoning—the ESA and NEPA apply at the first sorting step. This conception of agency discretion could have profound consequences for many agencies. Consider the Corps’s section 404 general permitting

310. See *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1012-13 (9th Cir. 2012).

311. *Id.* at 1037 (Smith, J., dissenting).

312. *Id.* at 1026 (majority opinion).

program previously discussed,³¹³ under which many of the general permits require users to file preconstruction notifications allowing the Corps time to decide whether to impose special conditions on the project or move it over to the full individual permitting program.³¹⁴ Tens of thousands of such notifications are filed and reviewed each year around the nation, with most resulting in no conditions.³¹⁵ Under *Karuk Tribe*, each such notification review triggers the EPA and NEPA.³¹⁶

To be sure, deciding not to take further action necessarily requires some kind of judgment. If it is not an exercise of discretion, then what is it? The ESA and NEPA programs incorporate mechanisms to deal with what are obviously no-impact actions, such as through NEPA's categorical exclusion option.³¹⁷ But *Karuk Tribe* makes every sorting decision, no matter how preliminary, fair game for full-blown ESA and NEPA challenges and potentially impedes agency decision-making designs intended to manage agency resources efficiently.³¹⁸ Those impacts can be debated as a policy matter; however, what is indisputable from *Karuk Tribe*, is that it requires agencies to acknowledge the possibility of discretion's negative space and rethink when their discretion begins regardless of when they believe their actions begin.³¹⁹

2. When Does Agency Discretion End?

Just as the reasoning of *Karuk Tribe* makes it difficult for agencies to buffer discretion at the front end of decision-making processes, so too have agencies had difficulty shedding discretion at the back end. Making a clean break can be a challenge. Recall, for example, that *Sierra Club v. Babbitt* and *Simpson Timber*—the “go to” precedents for expired discretion claims—had strong dissenting opinions regarding the discretion-extending effects of seemingly innocuous provisions in the instruments.³²⁰ The ramp-down

313. See *supra* notes 255-62 and accompanying text.

314. See Biber & Ruhl, *supra* note 20, at 162-63, 167-69.

315. See *id.* at 150, 167-69.

316. See *Karuk Tribe*, 681 F.3d at 1029-30.

317. See *supra* note 46 and accompanying text.

318. See *Karuk Tribe*, 681 F.3d at 1030.

319. See *id.*

320. See *supra* notes 118-20, 124-28 and accompanying text.

approach the BLM used for pipeline right-of-way review, under which successive stages of approval decisions were locked in by prior exercise of discretion over environmental conditions, depended for its success in avoiding the ESA and NEPA on the agency's regulations clearly spelling out the handcuffing effects of the prior decision events.³²¹

To succeed in an expired discretion claim, the agency thus must be willing to sever ties with discretionary control over the action, either completely or in stages, and not look back.³²² Even the slightest hint that the agency has kept a finger in the action can potentially extend the temporal reach of the agency's discretion far beyond when the agency considers its action complete. The question can come down to whether judges take a narrow or expansive interpretation of the effect of such dangling provisions.³²³ Indeed, courts have disagreed even over the effect of generic reopener clauses, with some ruling such clauses "in and of themselves are not sufficient to constitute any discretionary agency 'involvement or control,'"³²⁴ others ruling that they represent retained discretion by "specifically contemplat[ing] discretion to amend,"³²⁵ and others ruling that a reopener clause could confer retained discretion but if the agency opts not to include one, it has severed ties with its discretion.³²⁶

The temporal tentacles of agency discretion cast a cloud over innovative agency decision-making approaches such as adaptive management. The idea of adaptive management is that agencies should spread out decision-making "into a continuous process that makes differentiating between the 'front end' and the 'back end' of decision[s] much less relevant."³²⁷ Rather than make one decision—to issue a permit or develop a land use plan—and exit, agencies employing adaptive management engage in a program of iterative decision-making following a structured, multistep protocol using monitoring and assessment to adjust decisions over time.³²⁸ With

321. See *supra* notes 130-40 and accompanying text.

322. See *supra* Part II.A.

323. See *supra* notes 112-14, 118-28 and accompanying text.

324. *Cal. Sportfishing Prot. All. v. FERC*, 472 F.3d 593, 599 (9th Cir. 2006).

325. *Protect Our Water v. Flowers*, 377 F. Supp. 2d 844, 873 (E.D. Cal. 2004).

326. See *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 32 (D.C. Cir. 1992).

327. See *Craig & Ruhl*, *supra* note 8, at 7.

328. See *id.* at 16-27.

deep roots in natural resources management theory, the adaptive management protocol has begun to find use in public lands management.³²⁹

Some agencies have begun to insert comprehensive and complex adaptive management provisions in their permits and contracts in order to allow adjustment of permit or contract implementation over time in response to changing conditions.³³⁰ The effect of such a provision on the agency's discretion status is unclear. On the one hand, these provisions usually specify "trigger" events, such as a significant decrease in species population, required for the agency to operationalize the adaptive management protocol.³³¹ The trigger event requirement arguably constrains the agency's discretion.³³² On the other hand, the presence of an adaptive management provision implies a long-term, continuing, substantive role for the agency, with the possibility of its exertion of discretion always looming.³³³ An adaptive management provision is no mere reopener clause. In short, the agency's authority to exercise discretion, while constrained by the trigger events, cannot reasonably be described as having fully expired. No court has yet been asked to divine what the negative space of the adaptive management approach means for purposes of the ESA and NEPA.

3. *When Is Agency Discretion Perpetual?*

Even if an agency's discretion unambiguously begins and ends when its action begins and ends, the dormant discretion cases reveal a nagging ambiguity regarding the status of agency discretion between actions.³³⁴ For example, because the EPA was not required

329. *Id.* at 7-8. The adaptive management protocol has also been noted to appear in other policy contexts, such as pollution control, financial regulation, environmental impact assessment, public health and safety, civil rights, and social welfare. *See id.* at 8.

330. *See id.* at 25-26. *See generally* Notice of Availability of a Final Addendum to the Handbook for Habitat Conservation Planning and Incidental Take Permitting Process, 65 Fed. Reg. 35,242 (June 1, 2000) (providing notice of, and reasons for, the adaptive management revisions).

331. *See, e.g.*, Courtney Schultz & Martin Nie, *Decision-Making Triggers, Adaptive Management, and Natural Resources Law and Planning*, 52 NAT. RESOURCES J. 443, 455-56 (2012).

332. *See id.* at 455.

333. *See id.*

334. *See supra* Part II.B.

to consult under the ESA regarding pollutants it had discretion to regulate simply because it chose to regulate other pollutants,³³⁵ the EPA has found itself perpetually locked into a “discretion on” position to consult about pesticides it has registered under FIFRA in the past.³³⁶ Even though the agency consults when taking the initial registration action, the registration action clearly qualifies as final agency action, and FIFRA specifies a time for a reregistration review decision at which time the agency will consult again.³³⁷ Therefore, the courts consider the ongoing registered status of a pesticide between the registration and reregistration actions as preventing the agency from turning off its discretion between the two actions.³³⁸ Similarly, the Forest Service has been deemed stuck in “discretion on” status between its forest management plan approval actions because it has “continuing authority” over the plans and thus “a continuing obligation” to consult under the ESA when species-relevant conditions change.³³⁹ Each plan is a discrete final agency action, but these plans emanate a kind of ongoing aura of discretionary authority the agency cannot turn off between plans.

On the one hand, imposing perpetual discretion status on an agency prevents the agency from falling asleep between actions with regard to species and the environment. On the other hand, many statutory programs anticipate spacing out successive actions, such as plans for public lands and permits for ongoing facilities, as discrete final agency actions.³⁴⁰ Thus the programs may be presumed to give the agencies a break from the ESA and NEPA in between. Nevertheless, in what represents the most extreme temporal disconnect between action and discretion, agencies advancing dormant discretion claims must be prepared for courts to redraw the discretion boundary, transforming the negative space of discretion—the interlude between successive final actions—into the agency’s ball and chain of perpetual discretion.

335. See *WildEarth Guardians v. U.S. EPA*, 759 F.3d 1196, 1209-10 (10th Cir. 2014); *supra* notes 141-45 and accompanying text.

336. See *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024, 1032-33 (9th Cir. 2005).

337. See *id.*

338. See *id.*; *supra* notes 146-51 and accompanying text.

339. See *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1084-88 (9th Cir. 2015), *petition for cert. filed*, No. 15-01387 (U.S. May 13, 2016).

340. See, e.g., *Biber & Ruhl*, *supra* note 20, at 176.

B. The Spatial Dimension of Discretion

In addition to requiring an action and discretion over the action, the ESA and NEPA nondiscretion doctrines require that the agency's discretion have some connection to the statutory zones of interest—species for the ESA and, more broadly, the environment for NEPA. The core rationale behind the nonenvironmental discretion and no discretion claims is that the agency's discretion does not meet that condition, that the boundaries on the agency's discretion do not creep into the space of the ESA and NEPA.³⁴¹ However, as with the temporal dimension,³⁴² the case law reveals a substantial negative space problem for such claims.

1. Can Discretion Be Compartmentalized?

The nonenvironmental discretion claim depends for its success on spatial compartmentalization of the agency's discretion so as to exclude anything having to do with the ESA and NEPA.³⁴³ Similarly, some forms of the no discretion claim depend on the court agreeing to a sharp boundary line ending where the ESA and NEPA begin.³⁴⁴ Yet the courts have emphatically rejected the idea that there is an "environmental-words test" for delineating the spatial dimension of agency discretion,³⁴⁵ and have expanded the spatial analysis from what an agency must do to what it could do.³⁴⁶ Moreover, because the ESA and NEPA map out different zones of interest—the ESA more narrowly focuses on species compared to NEPA's sweeping embrace of all matters environmental—the nonenvironmental discretion claim faces two negative space mapping challenges. Some courts treat the two as roughly the same in scope for these purposes,³⁴⁷ but APHIS's deregulation of Roundup-Ready Alfalfa demonstrates that the two zones are not always coterminous:

341. *See supra* Parts II.C-D.

342. *See supra* Part IV.A.

343. *See supra* Part II.C.

344. *See supra* Part II.D.

345. *See Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1141 (11th Cir. 2008); *supra* note 170 and accompanying text.

346. *See Nat'l Wildlife Fed'n v. FEMA*, 345 F. Supp. 2d 1151, 1172 (W.D. Wash. 2004); *supra* notes 171-72 and accompanying text.

347. *See Sierra Club v. Babbitt*, 65 F.3d 1502, 1512-13 (9th Cir. 1995).

APHIS prepared a NEPA assessment because its noxious weed assessment necessarily touches on environmental concerns but was able to wall out the ESA because species concerns inarguably could not play into its decision.³⁴⁸

In the absence of clearly delineated compartments of discretion, the courts, having eschewed an “environmental-words test” and moved from “must do” to “could do,” have been quite willing to explore discretion’s negative space. An extreme example is the *Turtle Island* case, in which the court patched together provisions from far-flung international conventions to import species-protection discretion into NMFS’s domestic fishing permit program.³⁴⁹ But the courts have repeatedly made it look easy to poke holes in agency boundary drawing, rejecting arguments that a statutory “shall” or “shall not,” without more, necessarily precludes consideration of species and environmental impacts.³⁵⁰ The upshot of the non-discretion doctrines case law is that, rather than drawing a nonenvironmental line on the discretion map, the absence of ESA and NEPA interests on the face of the statute in fact invites courts to search harder for discretion’s negative space.

2. Does “If Find” Discretion Matter?

The “if find/then shall” form of no discretion claims depends for its success on convincing the court of the firewall effect of the spatial separation between “if find” discretion and “then shall” nondiscretion. As discussed above, there is disagreement among lower courts regarding how far *Home Builders* goes in putting the “if find” discretion off limits for negative space exploration.³⁵¹ The majority in *Home Builders* inaccurately claimed that the EPA exercises only “some judgment” in making the findings requisite for program delegation,³⁵² suggesting that if an agency may exercise much or extensive judgment, the firewall might be less secure. *Home*

348. See *Ctr. for Food Safety v. Vilsack*, 844 F. Supp. 2d 1006, 1010-11 (N.D. Cal. 2012), *aff’d*, 718 F.3d 829 (9th Cir. 2013); *supra* notes 163-66, 296-300 and accompanying text.

349. See *Turtle Island Restoration Network v. Nat’l Marine Fisheries Serv.*, 340 F.3d 969, 971 (9th Cir. 2003); *supra* notes 173-78 and accompanying text.

350. See *supra* Part II.D.

351. See *supra* Part II.D.

352. See *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 671 (2007). The EPA in fact exercises extensive judgment over the findings. See *supra* Part III.A.4.

Builders thus arguably does not resolve how much and what kind of discretion over the “if find” decision it would take to defeat the shield of the “then shall” mandate.³⁵³

For example, consider again the ESA’s section 10 incidental take permitting provision involved in *Simpson Timber*.³⁵⁴ Much like the CWA transfer provision, the ESA permit provision enumerates several criteria for permit issuance and provides that “if the Secretary finds” the applicant has satisfied the criteria “the Secretary shall issue the permit.”³⁵⁵ The issuance criteria range from the mundane, such as “the applicant will ensure that adequate funding for the plan will be provided,”³⁵⁶ to the open-ended “such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.”³⁵⁷ Under *Home Builders*, one could reasonably argue that once the agency makes the specified findings, the permit must be issued and thus the agency is not required to consult under the ESA or conduct environmental impact assessment under the NEPA.³⁵⁸ The “such other measures” criterion, however, arguably opens the door to broader discretion over the terms of the permit.³⁵⁹ Does such discretion, depending on its bounds, negate the principles of *Home Builders*, or does the “shall issue” command make the scope of discretion in defining the “such other measures” terms of the permit irrelevant? As a matter of policy, the FWS and NMFS routinely subject section 10 incidental take permits to the ESA and NEPA processes,³⁶⁰ but after *Home Builders*, it is not at all clear that they must do so.³⁶¹

As Justice Stevens argued in his *Home Builders* dissent, “our analysis should not end simply because a statute uses the word ‘shall.’ Instead, we must look more closely at its listed criteria to determine

353. See *supra* Part III.A.4.

354. See *Env'tl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1082 (9th Cir. 2001).

355. 16 U.S.C. 1539(a)(2)(B) (2012).

356. *Id.* § 1539(a)(2)(B)(iii).

357. *Id.* § 1539(a)(2)(A)(iv), (B)(v).

358. See *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 673 (2007).

359. See 16 U.S.C. § 1539 (a)(2)(A)(iv).

360. U.S. FISH & WILDLIFE SERV. & NAT'L MARINE FISHERIES SERV., HABITAT CONSERVATION PLANNING AND INCIDENTAL TAKE PERMIT PROCESSING HANDBOOK, 1-5 to -7 (1996), <https://www.fws.gov/midwest/endangered/permits/hcp/hcphandbook.html> [<https://perma.cc/H44E-B2JB>].

361. See *Home Builders*, 551 U.S. at 673.

whether they allow for discretion, despite the use of ‘shall.’”³⁶² At heart, his observation is about how deeply courts should explore the negative space of agency discretion. As he suggested, EPA could use its “if find” discretion to require that states ensure species protection as a condition of delegation.³⁶³ In fact, the EPA did exactly that under its earlier position that ESA consultation was required.³⁶⁴ It remains to be seen how far the lower courts will follow Justice Stevens’s lead in searching for negative space behind the firewalls agencies erect.³⁶⁵

C. Institutional Discretion over Discretion

At bottom, Justice Stevens’s admonition in *Home Builders* is also about the institutional dimensions of discretion’s negative space.³⁶⁶ The specific inquiry focuses on who gets to map the negative space: agencies or courts?³⁶⁷ This question arises in the ESA and NEPA nondiscretion cases in two distinct contexts. One involves instances in which the agency acknowledges that it could exercise discretion triggering the ESA and NEPA but takes affirmative steps to prevent itself from doing so,³⁶⁸ the other involves instances in which the agency interprets its authority to fit one of the nondiscretion claims.³⁶⁹

362. *Id.* at 691 (Stevens, J., dissenting).

363. *See id.* at 689-90 (describing the EPA’s ability to negotiate provisions requiring a state to protect endangered species in accordance with ESA § 7(a)(2) to receive pollution permits).

364. *Id.*

365. Similar critiques of the firewall effect of “if find/then” statutory structures have been made with regard to so-called *Field* delegation, in which a Congress delegates authority to the Executive to act if specified contingencies are declared to exist. *See* Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 *YALE L.J.* 952, 982-83 (2007) (explaining the *Field* or contingency theory of delegation and critiquing its effects). *See generally* *Field v. Clark*, 143 U.S. 649 (1892).

366. *See Home Builders*, 551 U.S. at 678-80 (Stevens, J., dissenting).

367. *See id.* (explaining the discord between the courts’ and agencies’ interpretations of discretion’s negative space).

368. *See infra* Part IV.C.1.

369. *See infra* Part IV.C.2.

1. *Do Agencies Have Discretion to Abdicate Discretion?*

The “must do” versus “could do” distinction drawn in the nondiscretion case law, with courts emphatically adopting a “could do” test, becomes particularly fuzzy when the agency’s nondiscretion claim is reasonably based on the terms of a contract or permit but the statute authorizing the agency to enter into the instrument arguably provided authority to exercise more discretion. For example, the court in *Simpson Timber* interpreted the terms of the ESA incidental take permit issued by the FWS to rule out any continuing discretion, thus fitting the expired discretion category.³⁷⁰ But what if the agency could have approved a permit with clear reopener clauses retaining ongoing discretion? Indeed, the statutory provision for issuing incidental take permits confers broad discretion on the FWS and NMFS to impose “such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.”³⁷¹ Arguably, this would authorize a permit provision requiring future consultations to determine whether a species listed after the permit is issued could be affected by the actions approved in the permit. Assuming that the FWS and NMFS have discretion to include such a reopener condition in section 10 permits, does the fact that they do not do so in a particular permit mean it fits the expired discretion category? Or does the fact that the agencies could insert such a provision mean section 10 permits inherently implicate the agencies’ ongoing discretion? The *Simpson Timber* court did not open the door to this line of analysis.

Allowing agencies to voluntarily abdicate their own discretion creates perverse incentives. As discussed above, effective administration of regulatory permit programs may lean in favor of incorporating adaptive management provisions in permits and contracts,³⁷² but it behooves agencies not to do so if they hope to assert an expired discretion claim.³⁷³ Allowing the agency to opt in and out of the ESA and NEPA might not produce a coherent adaptive management policy. Also, if the agency opts not to include

370. See *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1082-83 (9th Cir. 2001); *supra* notes 121-22 and accompanying text.

371. 16 U.S.C. § 1539(a)(2)(a)(iv) (2012).

372. See *supra* notes 327-33 and accompanying text.

373. See *supra* Part II.A.

reopener clauses triggered by ESA and NEPA concerns, effectively cutting off its discretion when the permit or contract is signed, courts will need to police against the agency later gaming the same action as discretionary because the statute itself, instead of the specific contract, confers broad discretion. Courts could avoid these concerns by taking the “could do” test to its logical negative space limits,³⁷⁴ finding that the ESA and NEPA are triggered so long as the agency could have included reopener, adaptive management, and similar provisions. On the other hand, in the ESA section 10 permitting example, Congress provided that the agency “may require” such provisions, suggesting that it gave the agency case-by-case authority to determine whether it wants continued discretion or not, based on any factors the agency deems relevant.³⁷⁵ If it opts not to, the only condition is that it stick to an expired discretion consequence and not later attempt to revive its discretion out of negative space.³⁷⁶ The nondiscretion case law provides no clear direction as to which approach is required.

2. Must Courts Defer?

Resolution of agency ESA and NEPA nondiscretion claims inevitably leads to questions of statutory interpretation and thus in turn to the topic of judicial deference. The negative space concept is inherently about the gap, if any, between the agency’s interpretation of its statutory authority and the court’s.³⁷⁷ This is true even when the agency directly bases its nondiscretion claims on the terms of a permit or contract or on the provisions of its own regulations: the “could do” test necessarily leads back to the proper interpretation of the agency’s statutory authority. Nevertheless, courts weighing agency nondiscretion claims seldom engage in any kind of judicial deference analysis, and when they do the result is a bit of a muddle.³⁷⁸ To be sure, courts hearing nondiscretion claims have had little trouble evaluating the deference given to an agency’s

374. See *supra* note 222 and accompanying text.

375. See *supra* notes 121-22, 355-60 and accompanying text.

376. See *supra* notes 121-22, 355-60 and accompanying text.

377. See *supra* Part IV.A.

378. See *supra* Part III.B.

interpretation of its own organic statutes and other authorities.³⁷⁹ The problem arises from the other pieces of the puzzle—what do the ESA and NEPA mean, and how do the two fit together with agencies' authorizing statutes?

The first question is about the scope of the ESA and NEPA nondiscretion doctrines. Courts have consistently held that because they do not administer the ESA and NEPA, action agencies are not entitled to any deference regarding their interpretation of those statutes.³⁸⁰ This principle ought to apply to interpretations of the ESA and NEPA nondiscretion doctrines, but this has been pointed out only by judges dissenting from opinions endorsing an agency's nondiscretion claim.³⁸¹ The analysis is further complicated by the fact that the ESA nondiscretion doctrine is a creature of agency rulemaking—the FWS and NMFS have promulgated a rule interpreting the statute to imply the exemption, which the *Home Builders* majority deemed a reasonable interpretation entitled to *Chevron* deference.³⁸² However, the NEPA doctrine is entirely a creature of judicial interpretation.³⁸³ Therefore, in the ESA's case, agencies are purporting to interpret another agency's *Chevron*-blessed rule that interprets the statute, whereas in NEPA's case, agencies are interpreting a judge-made interpretation of the statute.

The second question is about which statutory regime—the agency's authorizing statute or the ESA and NEPA duo—defines discretion's negative space. On the one hand, the action agency's authorizing statute defines the boundaries of its discretion.³⁸⁴ On the other hand, the ESA and NEPA define the boundaries of their respective nondiscretion doctrines and of the scope of species and

379. See, e.g., *Defs. of Wildlife v. Norton*, 257 F. Supp. 2d 53, 66-69 (D.D.C. 2003) (concluding that the agency's interpretation of various statutes, compacts, and other authorities comprising the Law of the River was entitled, at the very least, to *Skidmore* deference).

380. See, e.g., *Grand Canyon Trust v. FAA*, 290 F.3d 339, 342 (D.C. Cir. 2002) (explaining that the court owes no deference to the FAA's interpretation of NEPA because Congress did not entrust its administration to the agency alone).

381. See, e.g., *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 682-83 (2007) (Stevens, J., dissenting).

382. *Id.* at 673 (majority opinion).

383. See *supra* Part I.B.

384. See *Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1221-23 (9th Cir.) (treating the question as one of interpretation of the agency's authorizing statute), *reh'g and reh'g en banc denied*, 811 F.3d 1111 (9th Cir. 2015).

environmental concerns.³⁸⁵ However, tests the courts have articulated conflate the two. One such test requires ESA consultation if the agency has “any discretion to act in a manner beneficial to a protected species or its habitat,”³⁸⁶ and another triggers NEPA if the agency has any “discretion that might usefully be informed by further environmental review.”³⁸⁷ Perhaps it is no surprise that courts hearing nondiscretion claims generally skip the judicial deference analysis. Nonetheless, the question is a serious one, as it will drive the negative space analysis either toward agency claims that negative space does not exist or toward allowing judicial mapping expeditions. Yet we could not divine from the nondiscretion case law even a rough pattern to suggest which statutory regimes the courts believe they and agencies are interpreting. At best, the pattern appears to be a blend of both regimes, lending further support to our thesis that discretion’s negative space is an elusive creature in the already dense jungle of administrative law.³⁸⁸

V. EVALUATING REMEDIES FOR THE DISCRETION AVERSION SYNDROME

The ESA and NEPA nondiscretion case law extends the problems agency discretion aversion poses for the ESA and NEPA well beyond the statutes. The real challenge is to find a way to reduce the opportunity for discretion’s negative space to creep into the picture in the first place. This could be achieved through courts tightening down on agencies,³⁸⁹ FWS, NMFS, and CEQ smoothing out the way the ESA and NEPA work,³⁹⁰ or decoupling agency discretion from the ESA and NEPA entirely.³⁹¹ Each approach requires some rethinking of the nature of agency discretion and its negative space.

385. See *supra* Part I.

386. *Nat. Res. Def. Council v. Jewell*, 749 F.3d 776, 784 (9th Cir. 2014) (en banc).

387. *Hammond v. Norton*, 370 F. Supp. 2d 226, 230 (D.D.C. 2005).

388. The majority in *Home Builders* engaged in *Chevron* Step Two analysis of the ESA for purposes of upholding the regulatory nondiscretion exemption and applied *Auer* deference to a letter FWS and NMFS issued to EPA finding that NPDES delegation is nondiscretionary within the meaning of the regulation. See *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 672-73 (2007).

389. See *infra* Part V.A.

390. See *infra* Part V.B.

391. See *infra* Part V.C.

Of the three, we conclude that only the decoupling approach offers a plausible way out of the morass.

A. Tightening—Discretion as a Toggle Switch

Putting a spotlight on discretion's negative space challenges the conventional "on or off" toggle switch conception of agency discretion. But courts could go far toward shrinking negative space territory by more aggressively enforcing the tests they have developed for the presence of agency discretion, thus placing a stiff burden on the agency to satisfy the tests before throwing the switch to off. Under this approach, courts would extend no deference to the agency's description of its discretionary boundaries on the basis that the question is a matter of ESA and NEPA scope, not of the agency's authorizing statute. Courts would take the "could do" inquiry to its fullest when interpreting the agency's authorizing statute, even going so far as to require agencies opting not to include reopener and similar provisions in contracts and permits to nonetheless conduct ESA and NEPA assessments. Furthermore, *Home Builders* would be limited in firewall cases to statutory "if find/then shall" regimes that extend only "some" discretion to the agency with respect to the trigger findings, interpreting "some" to mean *de minimis*. In short, under this approach, the aggressive judicial reasoning seen in cases like *Karuk Tribe*,³⁹² *Turtle Island*,³⁹³ and *National Resources Defense Council v. Jewell*³⁹⁴ would be the norm.

Although tightening down on agencies in this manner would not eliminate the opportunity for negative space to creep in, it would send a clear message to agencies that nondiscretion claims are highly disfavored and will be excruciatingly difficult to mount in the absence of unambiguously clear statutory language. This would likely have deterred many of the losing nondiscretion claims we have summarized,³⁹⁵ but this would have accepted meritorious claims like those APHIS made regarding its decision not to consult under the ESA when deregistering RRA.³⁹⁶

392. See *supra* notes 153-58 and accompanying text.

393. See *supra* notes 172-77 and accompanying text.

394. See *supra* notes 70-72, 215-21 and accompanying text.

395. See *supra* notes 147-58, 172-77, 201-06, 210-13, 215-21 and accompanying text.

396. See *supra* notes 163-66 and accompanying text.

Of course, while this tightening down approach would go a long way toward policing agency gaming behavior, its success relies upon the support of every federal court which must get on board and stick with the game plan. *Home Builders* certainly is no pep talk in that respect, and even the Ninth Circuit has been unable to produce unanimity for or against an aggressive policing approach—if anything, its case law is in disarray.³⁹⁷ Moreover, the consequences of this approach would be to expose agencies to a near constant barrage of litigation over whether they must consult. As noted above, more ESA and NEPA consultation does not necessarily produce better decisions or more valuable information.³⁹⁸ The objective of solving the negative space problem should not be to maximize ESA and NEPA consultation, but rather to optimize it. Overall, therefore, the tightening down approach is unlikely to come about as a practical matter, and even if it did, it is less than clear that it would fulfill the purposes of the ESA and NEPA.

B. Smoothing—Discretion as a Dial

As it stands, ESA and NEPA implementation allows only a limited range of administrative outcomes, each based on the level of impact from the agency action, despite the vast universe of potential agency actions. For example, though NEPA compliance has many steps, there are, broadly, only three possible outcomes: a categorical exclusion, an environmental assessment that leads to a finding of no significant impact (known as a FONSI), or a full-blown EIS.³⁹⁹ Similarly, ESA consultation outcomes ramp up incrementally in terms of impact from no effect to species jeopardization, with additional assessment and process imposed at each incremental step along the way.⁴⁰⁰ So, all agency actions must be squeezed into one of just a few possible impact-based outcomes. Not surprisingly, litigation under the ESA and NEPA is often directed at challenging the stage at which the agency completed the process, with claims involving whether an agency should have prepared an environmental impact statement rather than stopping at the environmental

397. See *supra* notes 33, 284-85 and accompanying text.

398. See *supra* notes 296-300 and accompanying text.

399. See *supra* Part I.B.

400. See *supra* Part I.A.

assessment or whether the agency was mistaken that its action would not affect species.⁴⁰¹ The result is that an agency with only a small discretionary handle in the matter faces the possibility of full-blown assessment duties, which has contributed to agencies' discretion aversion.

What if, however, the intensity of ESA and NEPA assessment requirements could take into account not just the level of impact but also the degree of agency discretion? Thinking of agency discretion not as a toggle switch but as a dial of intensity could allow agencies to match their discretionary skin in the game to the burden of ESA and NEPA assessment. For example, instead of requiring EPA to engage in full-blown ESA consultation between initial registration and reregistration of pesticides when new species listings occur,⁴⁰² this approach would allow EPA to make a quick assessment whether deferring consultation until reregistration poses a significant concern for the species. Similarly, if the only discretionary hook an agency retains with respect to a permitted activity is a reopener clause, a short memo entry in the permit file finding that some new condition poses no significant concern would be enough. And if, as *Karuk Tribe* requires, preliminary sorting decisions must nonetheless trigger the ESA and NEPA,⁴⁰³ let the agency handle the no-impact applications by checking off a box on the application form. This kind of smoothing out of the ESA and NEPA assessment obligations based on the intensity of agency discretion could remove much of the agency incentive to game nondiscretion claims, because conceding that some discretion exists will not necessarily pour the agency into the depths of the ESA and NEPA.

Negative space problems will persist, however, and new concerns will arise. First, if litigation regarding the existing increments of ESA and NEPA assessment burden based on intensity of impact is any indication,⁴⁰⁴ coupling that system with increments based on intensity of agency discretion invites only more litigation over whether the agency correctly characterized its intensity of discretion. Incentives will remain for agencies to argue their discretion

401. See cases cited *supra* Part II.

402. See *supra* notes 147-51, 336-38 and accompanying text.

403. See *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027, 1029-30 (9th Cir. 2012).

404. See cases cited *supra* Part II.

dials are set at lower intensity levels, and courts will be asked to make the agency turn up the dial. Negative space will creep back in, as it is likely courts and agencies will continue to disagree often. Moreover, in some cases, the level of impact could be significant while the level of discretion is low, in which case this proposal offers no safe harbor for the agency—conceding some discretion could drag the agency into full-blown ESA and NEPA assessments. Therefore, overall, while this proposal moves closer to the heart of the problem than does the tightening down approach, it is unlikely to work in the long run. Whether it is switching a toggle or twiddling a dial, the inevitability of litigation over the agency's position will drive the system toward mapping discretion's negative space.

C. Decoupling—Discretion as the Wrong Question

We opened this Article with the observation that the applicability of a number of administrative law doctrines hinges on the presence or absence of agency discretion. The discretion/nondiscretion test arguably serves as a proxy for the broad set of factors motivating each of the doctrines.⁴⁰⁵ Yet, while that might justify the use of discretion as the limit test for mandamus or tort immunity,⁴⁰⁶ we have shown that it can lead to significant institutional concerns when discretion is made the trigger for the ESA and NEPA.⁴⁰⁷ Hence, another possible remedy to the discretion aversion syndrome is to altogether eliminate discretion as a factor for the ESA and NEPA, completely reversing the tightening and smoothing approaches. We acknowledge this will be viewed as a radical approach, but it is both legally permissible and, we believe, an effective way of administering the statutes. Obviously, eliminating use of discretion as a factor also completely removes the incentives for agencies to make ESA and NEPA nondiscretion claims, avoiding the problems that follow, as well as prevents the confusion that the ESA and NEPA cases have caused from bleeding into the “good” discretion doctrines.

405. See Rogers, *supra* note 1, at 834-35.

406. See *id.* at 776.

407. See *supra* Part III.

1. Proposal

Neither the ESA nor NEPA include explicit statutory exemptions for nondiscretionary actions.⁴⁰⁸ The statutes require that there be only a proposed agency action, with neither the statutory texts nor the legislative histories mentioning agency discretion as an additional requirement.⁴⁰⁹ From that statutory baseline, the key step in our proposal requires the FWS, NMFS, and CEQ to promulgate rules eliminating the respective nondiscretion exemptions. Both actions are legally permissible under existing law, would be entitled to *Chevron* deference, and should be deemed reasonable.

First, as for the ESA nondiscretion doctrine, FWS and NMFS promulgated it by rule and the Court upheld it in *Home Builders*,⁴¹⁰ importantly, however, *Home Builders* was a *Chevron* Step Two case.⁴¹¹ The majority did not foreclose the possibility of other reasonable interpretations, and thus the Supreme Court's interpretation of *Chevron* in *National Cable and Telecommunications Ass'n v. Brand X Internet Services* and subsequent cases allows FWS and NMFS room to rethink the ESA side provided the agencies display awareness of and show good reasons for a change in position.⁴¹² As for the NEPA nondiscretion doctrine, CEQ has promulgated no rule on point and the Court has yet to decide the question Justice Marshall explicitly left open in *Flint Ridge*.⁴¹³ Lower courts have implied the NEPA nondiscretion exemption in the absence of a CEQ rule but have never suggested, much less ruled, that CEQ is handcuffed from engaging in a different reasoned administrative interpretation.⁴¹⁴ CEQ thus has room to rethink the NEPA side.

As the agencies responsible for administering the ESA and NEPA, the FWS, NMFS, and CEQ rules would be entitled to *Chevron* Step Two deference. The question thus boils down to whether they could replace the (presumed) reasonable nondiscretion

408. See *supra* Part I.

409. See Weller, *supra* note 38, at 327-30.

410. See Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 664, 666-67, 672 (2007); *supra* notes 65-67 and accompanying text.

411. *Home Builders*, 551 U.S. at 665-66; *supra* note 388.

412. See *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2124-26 (2016); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-84 (2005).

413. See *supra* note 98 and accompanying text.

414. See *supra* note 103 and accompanying text.

doctrine interpretations with an alternative reasonable interpretation based on the rationales we have spelled out. Indeed, we believe our proposal set out below is an even more reasonable interpretation of the statutes.

We have demonstrated from our survey of the nondiscretion case law that the rising tide of agency nondiscretion claims poses three institutional concerns. Agency gaming and judicial incoherence concerns flow from the use of discretion as the touchstone for applying the ESA and NEPA,⁴¹⁵ and the demotion of the statutes' information-production function is the consequence of successful nondiscretion claims.⁴¹⁶ These perverse effects are eliminated entirely by replacing the nondiscretion exemptions with the following rules defining the scope of the respective agencies' implementation regulations based on the statutes' purposes:

Scope: These regulations apply to any proposed agency action not otherwise excluded by law if following their requirements is reasonably likely to either:

(1) assist the agency in making an informed decision regarding the action based on knowledge the assessment will provide about the impacts of the action within the scope of assessment required by these regulations, or

(2) provide Congress, state legislatures, federal agencies, state agencies, private businesses and organizations, or a significant number of private persons interested in the agency action important information regarding the action and its impacts within the scope of assessment required by these regulations which otherwise (a) is not readily available to such entities or persons at the time the agency proposes the action, or (b) will not be provided by another agency's assessment required under subsection (1) before the impacts of the action are irreversible.

2. *Virtues*

Recognizing that this proposal is bound to raise some questions, we initially discuss its virtues. The first condition zeroes in on what the nondiscretion exemptions purportedly aim to achieve—improving agency decision-making—without all the baggage that comes

415. *See supra* Parts III.A-B.

416. *See supra* Part III.C.

with the discretion-based tests. Its scope is both broader and narrower than what the discretion-based tests have produced. The proposal is broader in that it would put agency decisions up for grabs, such as the EPA's CWA state delegation for being an action based on decisions the EPA makes about the statutory criteria.⁴¹⁷ The proposal is narrower in that it clearly requires both an action and an agency decision, such that the time between the EPA's initial registration and reregistration of pesticides would not trigger the ESA or NEPA under this condition; the agency has not proposed an action, and there is no decision-making process underway. The result is that agency discretion no longer is of relevance. So long as an agency is moving toward taking final agency action within the meaning of the EPA, it is fair game for the ESA and NEPA. The additional requirement that the assessment would "assist the agency in making an informed decision" allows agencies, like APHIS in its noxious weed regulation program, to continue to avoid the ESA under this condition, as APHIS's statute makes clear nothing about species impacts can assist in informing APHIS's decision.⁴¹⁸

The second condition introduces the information-production function of the two statutes as an independent basis for requiring assessment. This could result in a requirement that agencies, like APHIS, must prepare ESA assessments even when they cannot take species impacts into account in their decisions. The information expected to be produced, however, must be "important" and either "not otherwise readily available" to the other entities or not expected to be produced by another agency pursuant to the first condition. For example, the potential impacts on species of farmers' increased glyphosate use after APHIS's deregulation of Roundup Ready Alfalfa likely would have been important information;⁴¹⁹ however, if some other agency with relevant expertise and decision-making authority had already assessed the effects or will do so in a reasonable time frame, APHIS need not.⁴²⁰ If the increased glyphosate use

417. See *supra* notes 181-82 and accompanying text.

418. See *supra* notes 163-71 and accompanying text.

419. See *Ctr. for Food Safety v. Vilsack*, 844 F. Supp. 2d 1006, 1018 (N.D. Cal. 2012), *aff'd*, 718 F.3d 829 (9th Cir. 2013).

420. In fact, following on the heels of court orders discussed above requiring the EPA to consult under ESA section 7 regarding continued pesticide registrations, the EPA settled other litigation with the Center for Biological Diversity in 2015 by agreeing to conduct nationwide assessments of glyphosate use. See *Endangered Species Litigation and Associated*

would jeopardize a species in violation of ESA section 7, and there is *no* agency with authority to regulate glyphosate use to avoid such a result, the ESA provides a procedure under which APHIS, and any other agency contributing to the impacts, could seek an exemption from the jeopardy prohibition on the basis that their statutory authorities leave them “no reasonable and prudent alternatives to the agency action.”⁴²¹

The net result of the two triggering conditions of our proposal is to prioritize assessment by the agencies actually making decisions that could be meaningfully informed by knowledge about impacts of the proposed action within the scope of the ESA and NEPA. Therefore, the proposal fulfills the decision-improvement function of the statutes, while simultaneously ensuring that the information-production function of the statutes is advanced for all proposed actions. Only when neither statutory function can be advanced will the ESA or NEPA not be triggered for an agency’s proposed action.

Furthermore, decoupling the ESA and NEPA from a discretion-based test does not injure the other discretion-based doctrines. A finding that an agency has no discretion for purposes of the ESA and NEPA, while not necessarily binding for purposes of the other “good” doctrines, could be influential. Yet there is no inherent reason to link the “good” with the “bad”—the purposes of the ESA and NEPA have little to do with the purposes justifying the mandamus shield, immunity doctrines, and judicial deference. The result should be that a finding that an agency must complete ESA or NEPA assessment for decision-improvement or information-production purposes will not lock in or influence any finding regarding the presence of discretion for the “good” discretion doctrines. For example, under this approach *Home Builders* would

Pesticide Limitations, EPA, <https://www.epa.gov/ondangered-species/ondangered-species-litigation-and-associated-pesticide-limitations> [<https://perma.cc/URE6-XSKG>] (last updated June 22, 2016). Under our proposal, APHIS could point to its limited scope of decision criteria for concluding consultation would not improve its decision process, and to EPA’s consultation for concluding that any important information will be provided by an agency with appropriate expertise and authority.

421. 16 U.S.C. § 1536(h)(1)(A)(i) (2012). Justice Stevens pointed to this procedure in *Home Builders* as a reason why the CWA and ESA do not irreconcilably conflict and as evidence that Congress intended the potential extinction of a species to override nondiscretionary mandates. See *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 687-88, 67 n.10 (2007) (Stevens, J., dissenting).

have come out the other way: the EPA must consult—as indeed it used to—to explore how different state program designs play out under the ESA, so in the future it could steer states in that direction; the decision to approve delegation once the CWA criteria are met would nonetheless remain nondiscretionary for purposes of the other discretion doctrines.

3. *Objections*

We have no delusions that our proposal is free from its own set of concerns. One objection certainly will be that it will fuel litigation over the key concepts, such as the meaning of “assist,” “informed,” and “readily available.” As with any new agency rule that introduces substantive terms to the agency’s program, our solution will not be litigation free. However, under our proposal the litigation would be over the meaning of terms that actually matter to fulfilling the purposes of the ESA and NEPA rather than bickering over esoteric theories and nuances of agency discretion. Moreover, the FWS, NMFS, and CEQ can provide definitions of the key terms, spelling out the factors agencies and courts can weigh in their determinations. Over time, a body of agency policy, practice, and judicial review will clarify and stabilize the provision’s implementation, a state the agencies and courts seem nowhere close to reaching under the nondiscretion doctrines.

We also expect objections based on which agencies are put under the thumb of the ESA and NEPA and which are let off the hook relative to how the nondiscretion doctrines’ case law allocated that dichotomy. We agree that a reshuffling is likely to occur. But if the statutes’ purposes drive the reshuffling of which agencies receive more or less oversight under our proposal, instead of a determination based on agency and judicial conceptions of agency discretion, we find that to be an improvement on the status quo. If APHIS has to consult under the ESA because the consequences of its deregulation of RRA is an important matter to Congress or the public and no other agency is looking at the impacts, so be it.⁴²² If EPA does not need to consult between its FIFRA registration and reregistration decisions because doing so advances neither statutory goal, so be

422. See *supra* notes 163-71 and accompanying text.

it.⁴²³ The objective of our proposal is not to maximize or minimize agency ESA and NEPA burdens but rather to align them with the statutes' purposes. That our proposal might sweep in some agency actions not subject to the ESA or NEPA under the nondiscretion doctrines, or leave out others that would have been covered, simply reflects that we view both the agency action requirement and the goal of fulfilling statutory purposes seriously.

Finally, there is the question whether our proposal can make it through the agencies and the courts and survive Congress's scrutiny. It is worth noting that we put Congress at the end of that question rather than at the beginning. Putting our proposal into action does not require a legislative fix. The ESA and NEPA apply on their face to all proposed federal agency actions, but neither the ESA nor NEPA has been interpreted as requiring the nondiscretion exemption. Hence, so long as our proposed interpretation of the statutes is reasonable, Congress need only avoid legislating our proposal into oblivion. For the above reasons, we evaluate the agencies, courts, and Congress in that order.

As for the agencies, we concede that the FWS, NMFS, and CEQ appear to be comfortable with the status quo. However, unless the agencies are not paying attention, it must be apparent that the nondiscretion exemptions generate disarray in the agencies and the courts.⁴²⁴ We have no evidence that anything like our analysis of the status quo or our proposal for improving upon it has been presented to, or considered by, the agencies. From there, the question becomes whether it is realistic to believe that the agencies might adopt our proposal. We do not profess to know how to read those tea leaves. We do point out, however, that the ESA nondiscretion doctrine was the product of an administration openly hostile to the ESA.⁴²⁵ We see no reason to believe that an Administration openly supportive of the ESA and NEPA could not envision our proposal as consistent with its agenda.

Assuming the agencies were to adopt our proposal, the courts would look to present administrative law doctrine to determine

423. See *supra* notes 147-51, 336-38 and accompanying text.

424. See *supra* Parts III.A-B.

425. See STANFORD ENVTL. LAW SOC'Y, THE ENDANGERED SPECIES ACT 24-25 (2001) (recounting the history of the ESA and noting the hostility of then Secretary of the Interior James Watt to the ESA).

whether the proposal is a reasonable interpretation of the statutes within the meaning of the *Chevron* Step Two test.⁴²⁶ Anticipating that challenge, we designed our proposal to hue very closely to operationalizing the statutes' purposes. To find our proposal impermissible under the ESA or NEPA, a court would have to conclude that advancing both the decision-improvement and information-production purposes of the statute is unreasonable. We contend that such a finding would be untenable. Of course, the skeptics that ultimately matter would be the Justices of the Supreme Court. We do not profess to know how to read those tea leaves, either. We do point out, however, that *Home Builders* was a 5-4 decision with a robust dissent, and the majority unequivocally framed the question as a *Chevron* Step Two analysis.⁴²⁷ If the agencies were to adopt our proposal through legislative rulemaking, it is not implausible to believe the courts would accept it, albeit in some cases grudgingly.

As far as reading the tea leaves of Congress goes, those are the most inscrutable. Republican and Democratic administrations alike have been tinkering with the ESA and NEPA implementation regulations for the past two decades with no instance of legislative override.⁴²⁸ Moreover, our proposal results only in a reshuffling of which agency programs at the margins are and are not subject to the ESA and NEPA, rather than the kind of across the board expansion or contraction of coverage more likely to attract Congress's attention. If Congress has an interest in protecting a particular agency from the ESA and NEPA assessment burdens our proposal imposes, it can enact targeted carve-outs as it has in the past for the military.⁴²⁹ Ultimately, therefore, our proposal stands a realistic chance of surviving the courts and Congress, if the FWS, NMFS, and CEQ put it into action.

426. See, e.g., *Home Builders*, 551 U.S. at 665 (relying on *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

427. See *id.* at 666.

428. See J.B. Ruhl, *Does Congress Exist?*, 30 J. LAND USE & ENVTL. L. 79, 83-85 (2014) (recounting extensive administrative policy reform beginning in 1994 in the absence of congressional override).

429. See *id.* at 86 (discussing military exemptions).

CONCLUSION

At first blush, the either-or, discretion-or-not approach applied by agencies and courts to nondiscretion claims makes sense. But upon closer examination and when subjected to real-world application through the ESA and NEPA nondiscretion cases, this binary system unravels and becomes nearly impossible to administer in a consistent fashion. Each facet of discretion's negative space injected by the ESA and NEPA case law complicates the temporal, spatial, and institutional dimensions of discretion, to the point that what is supposed to be a straightforward inquiry has transformed into an unwieldy, byzantine doctrine the courts seem incapable of managing.

This is no narrow specialist's problem of environmental law. The ESA and NEPA capture all actions federal agencies authorize, fund, or carry out, except (for now) actions over which the agency has no discretion or control. That is no small universe of actions, and as climate change makes more and more agency programs potential sources of injury to protected species and the environment, that universe only grows larger. If the nondiscretion exemption battles now in full force on the Ninth Circuit are any indication, the developing jurisprudence of the ESA and NEPA nondiscretion exemptions does not bode well for a smooth incorporation of those programs into its space.

We propose a simpler way forward. By discarding the ESA and NEPA discretion exemptions and replacing them with an analysis grounded in the statutes' purposes, our approach forces agencies to stay true to congressional intent, allows agencies to avail themselves of the "good" discretion doctrines without worry, and relieves courts and agencies from the burden and uncertainty of navigating the discretion doctrines' system. While our proposed approach will certainly invite litigation over the meaning of certain terms and implementation, the lawsuits will turn on questions related to ESA and NEPA statutory purposes, not on the scope or pertinence of agency discretion. We will happily take that over the growing morass of discretion aversion litigation that clogs courts today.

