STEAMROLLING SECTION 7(d) OF THE ENDANGERED SPECIES ACT: HOW SUNK COSTS UNDERMINE ENVIRONMENTAL REGULATION

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I. INTRODUCTION

Sunk costs significantly undermine the effectiveness of environmental laws.¹ Sunk costs are a modern manifestation of the fait accompli tactic—a time-proven strategy utilized by both private and public sector development coalitions to forestall the application of environmental laws that pose obstacles to their plans.

The insidious effects of sunk costs are played out in this all too common scenario: The proponent of a project foresees that development may violate some environmental laws, such as the Endangered Species Act (ESA).² To avoid costly compliance with environmental

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¹ See Zygmunt J.B. Plater et al., Environmental Law and Policy: Nature Law and Society 242–43 (Supp. 1994). Although the term “sunk costs” is found frequently in the context of cost accounting and economics, Professor Plater’s textbook is one of the few sources to recognize the significance of sunk costs in the context of an environmental forum. See id.; see also Joseph L. Sax, Defending the Environment: A Strategy for Citizen Action 102–04 (1971) (explaining the strategy of public agencies and private developers to invest time, effort, and money into projects to make opposition to projects more difficult). Although there is much case law involving the issues surrounding sunk costs in environmental contexts, only one case has referred specifically to such issues as “sunk costs.” See Wade v. Dole, 631 F. Supp. 1100, 1111 (N.D. Ill. 1986), aff’d sub nom. Eagle Foundation Inc. v. Dole, 813 F.2d 798, 810 (7th Cir. 1987) (discussing whether construction costs which were incurred prior to completion of proper environmental evaluation of project should be considered during re-evaluation of the project).

regulations and to increase the likelihood that the proposed project will survive, the developer employs a well-established, devious, and still effective strategy—sinking money and resources into early and tangential phases of the project. In addition to massive investment, the early work drastically affects the environment and natural resources—the very resources that should have been protected until more thorough analysis of the project’s impact on the environment was conducted. By the time opponents of the project can get a court to consider enjoining the project, the court faces a fait accompli. Much damage to the environment already has been done; massive resources already have been sunk into the project. The public has had little, if any, input regarding the effects of the project on the local community; however, the court faces tremendous practical pressure not to enforce environmental laws because doing so would effect a short-term waste of resources.

The Tellico Dam—endangered species controversy illustrated the problem of sunk costs to Congress. Upon being informed of the discovery of an endangered species in the Little Tennessee River, the Tennessee Valley Authority (TVA) rushed construction of a minor dam—a dam that destroyed a vast area of ecological and cultural resources while achieving admittedly insignificant benefits in navigation, flood control, and power generation. Although the Supreme Court enforced the ESA and enjoined the project, the TVA, pointing to the costs that had already been sunk into the project, ultimately convinced Congress to authorize the completion of a dam that all analysts agreed should never have been started.

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4 See Plater, REFLECTED IN A RIVER, supra note 3, at 750; see also REISNER, supra note 3, at 325; ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: A COURSEBOOK ON NATURE LAW AND SOCIETY 661 (1992) [hereinafter PLATER ET. AL., NLS] (noting Tennessee Valley Authority (TVA) worked triple shifts, night and day, in its attempt to make the Tellico dam controversy moot, before an injunction could be issued enjoining construction on the dam). An agent of the TVA informed counsel for the plaintiffs that it was the intention of the TVA that not a single tree would be left standing in the valley by the time the case went to court. Interview with Zygmunt J.B. Plater, Counsel for Plaintiffs in Tennessee Valley Authority v. Hill, in Newton, MA (Mar. 23, 1995).


6 Advocates of the dam circumvented the injunction by attaching a rider to the Energy and Water Development Appropriation Act of 1980, exempting the Tellico dam from “all laws”
In the wake of the Tellico controversy, Congress responded by implementing § 7(d) of the ESA. Section 7(d) explicitly precludes agencies from making “irreversible or irretrievable” commitments of resources to projects that have the effect of precluding alternative design plans or strategies until consultation under § 7(a)(2) of the ESA is complete.

This Comment explores how, despite the passage of § 7(d), the sunk cost strategy remains powerful and effective. Section II of this Comment discusses legislative responses to the dangers of sunk costs. Section III of this Comment considers common arguments used to circumvent statutory prohibitions against sunk costs. Section IV of this Comment examines the implicit consideration given the sunk cost tactic by judicial opinions. This Comment concludes with section V, which demonstrates the insidious effects of sunk costs.

prohibiting its completion. See Pub. L. No. 96-69, 93 Stat. 449 (1979). This amendment is known as the “Duncan Amendment,” so-named because it was introduced by Tennessee Representative John Duncan. See Peter Goplerud III, The Endangered Species Act: Does It Jeopardize the Continued Existence of Species?, 3 ARIZ. ST. L.J. 487, 507 n.147 (1979); see also 125 CONG. REC. 18,936-37 (1979) (“explaining our frustration at the highly irregular nature of the Duncan amendment”) (letter from Rep. John Breaux, chair of the House Subcommittee on Fisheries and Wildlife Conservation and the Environment). For an excellent discussion of the Duncan Amendment, as well as examples of congressional exemptions from other environmental laws, see Victor M. Sher & Carol Sue Hunting, Eroding the Landscape, Eroding the Laws: Congressional Exemptions from Judicial Review of Environmental Laws, 15 HARV. ENVTL. L. REV. 435, 441-44 (1991). It is unlikely that such a rider would have passed if not for the fact that the dam was nearly complete. See Plater, Reflected in a River, supra note 3, at 763. Representative Duncan admitted before Congress that, “I would not be here today asking that the Tellico be exempted, if it was not now nearing completion, but, ... it is 99 percent complete.” 124 CONG. REC. 38,149 (1978), reprinted in A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979, AND 1980, at 863 (1982) [hereinafter LEGISLATIVE HISTORY]. Representative John Dingell vehemently opposed the Duncan Amendment, stating:

[the Tellico Dam] is a proposal where we have what was at the time of the construction an outlaw agency which arrogantly, flagrantly, and vigorously disregarded what they knew to be the clear thrust of the law . . . . What has happened is that TVA, with its usual bureaucratic use of public funds, has now wormed itself into a position where it has a project that now has public acceptance.

124 CONG. REC. 38,149 (1978) reprinted in LEGISLATIVE HISTORY, supra note 6, at 865–66.  

7 See discussion infra notes 9–13.  

8 ESA § 7(d), 16 U.S.C. § 1536(d). Section 7(d) states:

[a]fter initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

Id.
II. LEGISLATION DESIGNED TO PREVENT SUNK COSTS

A. The Purpose and Legislative History of the 1978 Amendments to the ESA

Section 7(d) was added to the ESA as a result of the controversy surrounding the Tellico Dam.\(^9\) Advocates of the dam, distraught over the fact that a three-inch fish temporarily had stopped the construction of a multi-million dollar dam, as well as those who supported the ESA, agreed that the survival of the ESA depended upon making the law more flexible.\(^10\) Towards this end, Congress added two important provisions to the ESA—§ 7(d) and § 7(h).\(^11\) The first addition, § 7(d), is a preventative measure designed to preserve the status quo of a project until the project's impact on an endangered species is evaluated thoroughly.\(^12\) The second addition to the ESA, § 7(h), adds an exemption procedure that would allow a project to proceed in spite of a violation of the ESA.\(^13\)

1. Section 7(d): The Preclusion of Sunk Costs

In passing § 7(d), Congress hoped to preclude agencies from using the sunk cost tactic to steamroll projects to completion.\(^14\) Congress
derived the amendment from a regulation first issued by the National Marine Fisheries Service (NMFS) and the Fish and Wildlife Service (FWS) which stated that "[u]ntil consultation has been completed and a biological opinion issued, good faith consultation shall preclude a Federal agency from making an irreversible or irretrievable commitment of resources which would foreclose the consideration of modifications or alternatives to the identified activity or program." The NMFS and FWS explained the purpose of this regulation when it was implemented:

The consultation process becomes a sham . . . if an agency can make irreversible and irretrievable commitments of resources during consultation which foreclose the adoption of the very alternatives being discussed. Such a commitment could easily lead to the waste of millions of dollars if the activity or program is subsequently enjoined for noncompliance with section 7. This is especially true in light of the ruling in Hill v. TVA, that even substantially completed projects are not immune from the requirements of section 7 . . . . The [NMFS and FWS] are confident that Federal agencies will recognize that this adopted language is a logical extension of the obligation to consult in good faith.

Before adopting § 7(d), Congress became fully aware of the FWS regulation and its implications due to an injunction issued by the United States District Court for the District of Nebraska in Nebraska v. Rural Electrification Administration [hereinafter Nebraska v. REA]. In that case, the court interpreted the regulation as providing broad protection of endangered and threatened species. The House Report accompanying the bill that ultimately became § 7(d) concluded:

(D.D.C.) ("Congress enacted § 7(d) to prevent Federal agencies from 'steamrolling' activity in order to secure completion of projects regardless of their impact on endangered species."), aff'd in part, rev'd in part, 642 F.2d 589 (D.C. Cir. 1980); James C. Kilbourne, The Endangered Species Act Under the Microscope: A Closeup Look From a Litigator's Perspective, 21 ENVTL. L. 499, 552 (1991) (noting that the purpose of § 7(d) is to defuse the administrative and economic momentum that could occur if a proposed action is going forward while § 7 consultation is occurring).

16 43 FED. REG. 870, 872-73 (Jan. 4, 1978) (Final Regulation regarding interagency cooperation) (citation omitted).
18 See id.; see also 124 CONG. REC. 38,141-47 (1978), reprinted in A LEGISLATIVE HISTORY, supra note 6, at 846-60 (showing Congress's discussion of Nebraska v. REA). For a thorough discussion of Nebraska v. REA see infra notes 44-54 and accompanying text.
The new section 7(c)(4) of the act would further strengthen the consultation process. It prohibits any Federal agency from making any irreversible or irretrievable commitment of resources once consultation has been initiated if such commitment would have the effect of foreclosing efforts to avoid the adverse impacts on the species or their critical habitat.

Senator John Culver of Iowa, the subcommittee Chairman who helped develop the compromise bill that evolved into § 7(d), recognized the need for a provision like § 7(d) to force agencies to consider the effects of projects on endangered species before investing in these projects. Senator Culver recognized that a project with momentum cuts off alternatives and that such actions could harm endangered species. Examination of the reports and debates accompanying the passage of § 7(d) supports the conclusion that Congress's purpose in passing § 7(d) was to prevent the sunk cost strategy from creating future Tellico scenarios.

See supra note 6, at 671. The Senate bill contained no similar provision. See id. at 744 (footnote added).

See 124 Cong. Rec. 21,347 (1978). Senator Culver stated:
[w]e are saying that when you designate an endangered species, you have to quit pouring the concrete at that very moment. We do not have that leverage under the current law. That was the problem with the old law: they said “endangered species,” and started working overtime, to go from 50 percent completed up to $100 million, so no one could come in and say this 3-inch snail darter could stop that $117 million project.

Id. Senator Culver’s recognition of the dangers of sunk costs is also supported by his comments during debate over the “Nelson Amendment” which would have allowed the Endangered Species Committee to review only those projects which were substantially completed when a conflict between an endangered species and a project was discovered. 124 Cong. Rec. 21,578 (1978). Senator Culver noted that the Nelson Amendment,
will in my judgment have the effect of discouraging agencies from undertaking a sound biological inventory early in the project’s stages, and it may also have the effect of deterring any real inclination to engage in good faith discussions and negotiations early in the planning stage. . . . This amendment says the only way you can have any hope for receiving an exemption is to get out there and build; then the damage is done. I thought this act was to preserve and protect the integrity of the environment. What do we want to say, “Just unleash the bulldozers and build, build, build so you can go in for an exemption . . . .”

See North Slope Borough v. Andrus, 486 F. Supp. 332, 351 (D.D.C. 1979) (quoting Senator Culver in 124 Cong. Rec. S10,896 (daily ed. July 17, 1978)) (“The earlier in the progress of a project a conflict [between a species and a project] is recognized, the easier it is to design an alternative consistent with the requirements of the act, or to abandon the proposed action.”).

See supra notes 17–22.
2. Section 7(h): The Exemption Process Under the ESA

When amending the ESA in 1978, Congress recognized that, in some situations, exemption from the ESA might be appropriate.24 Consequently, Congress created an Endangered Species Committee (Committee), whose duty was to grant exemptions from the requirements of § 7(a)(2) of the ESA.25 Congress, however, specifically enumerated the factors that would support an exemption.26 The sole authority to grant exemptions lies with the Committee, thereby precluding courts from usurping this role.27 Furthermore, reflecting Congress's intent that sunk costs not be used to steamroll projects to completion, the use of sunk costs to obtain an exemption was specifically forbidden by § 7(h).28 Thus, § 7(h) represents Congress's unambiguous mandate that exemptions only be granted from the ESA by the Committee when specifically enumerated factors are satisfied.

B. Similar Prohibitive Purposes of Other Environmental Statutes

Aside from the ESA, other environmental statutes also prohibit the use of the sunk cost tactic. In addition, case law interpreting the sunk cost prohibitions in these other statutes is more thoroughly developed

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24 For example, one project receiving an exemption from the ESA was the Greyrocks dam project, in which mitigative measures were taken to reduce the adverse effects of the dam on endangered whooping cranes. See infra note 54.

25 ESA § 7(e), 16 U.S.C. § 1536(e) (creating the Endangered Species Committee comprised of seven members including: the Secretary of Agriculture, the Secretary of the Army, the Chairman of the Council of Economic Advisors, the Administrator of the Environmental Protection Agency, the Secretary of the Interior, the Administrator of the National Oceanic and Atmospheric Administration, and an individual appointed by the President from the affected state). This Committee has been dubbed the "God Squad," as the Committee's decisions could result in the extinction of a species. See, e.g., Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1536-37 (9th Cir. 1993); see also REISNER, supra note 3, at 327 (discussing "God Squad").

26 ESA §§ 7(h)(1)(A)(i-iv), 16 U.S.C. §§ 1536(h)(1)(A)(i-iv). The Committee may grant exemptions from the protective provisions required under § 7(a)(2) where no "reasonable or prudent" alternatives exist to the agency action, where the benefits of pursuing a project "clearly outweigh" any other course of action, or where the project is of regional or national significance. Id.; see also MICHAEL J. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW 370-73 (1983) (discussing exemption process); George C. Coggins & Irma S. Russell, Beyond Shooting Snail Darters in Pork Barrels: Endangered Species and Land Use in America, 70 GEO. L.J. 1433, 1480-95 (1982) (discussing the duties of the Endangered Species Committee in detail).


28 ESA § 7(h)(1)(A)(iv), 16 U.S.C. § 1536(h)(1)(A)(iv) (stating as a prerequisite to obtaining an exemption under § 7(h) that "neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section").
than case law under § 7(d) of the ESA. Therefore, some consideration of these statutes and cases will be informative to an assessment of sunk costs in the ESA context.

1. Preclusion of Sunk Costs in the National Environmental Policy Act (NEPA)

Congress promulgated NEPA to ensure that federal projects were not initiated until an accurate assessment of the project’s impact on the environment was complete. To achieve this purpose, § 102(2)(C) of NEPA requires that federal agencies complete a detailed statement of environmental consequences—an environmental impact statement (EIS)—prior to initiation of any project that is likely to “significantly affect[] the quality of the environment.” Regulations issued pursuant to NEPA state that “[u]ntil an agency issues a record of decision . . . no action concerning the proposal shall be taken which would: (1) [h]ave an adverse environmental impact; or (2) [l]imit the choice of reasonable alternatives.” This language in NEPA is similar to the language of § 7(d) of the ESA, which also precludes commitments of resources that would foreclose the formulation or implementation of any reasonable and prudent alternative measures. Because of the similar purposes of § 102(2)(C) of NEPA, and § 7(d) of the ESA, an

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30 See, e.g., Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc., 435 U.S. 519, 558 (1978) (finding Congress passed NEPA to ensure that federal agencies consider the environmental consequences of proposed actions during the decision-making process, thereby insuring “fully informed and well-considered” decisions); Massachusetts v. Watt, 716 F.2d 946, 953 (1st Cir. 1983) (“[NEPA’s] purpose is to require consideration of environmental factors before project momentum is irresistible, before options are closed, and before agency commitments are set in concrete.” (quoting W. ROGERS, ENVIRONMENTAL LAW § 7.7 at 767 (1977))); Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323, 1333 (4th Cir.) (stating that the “purpose of NEPA [is] to insure that actions by federal agencies be taken with due consideration of environmental effects”), cert. denied sub nom. Fugate v. Arlington Coalition on Transp., 409 U.S. 1000 (1972).
32 40 C.F.R. § 1506.1 (1995); see also 40 C.F.R. § 1501.2 (stating that agencies must “integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values . . . and to head off potential conflicts”). These regulations reflect the realization that the earlier in the planning stages a project is scrutinized the easier it is to modify the project in the interest of the environment. See id.; see also Leslye Herrmann, Injunctions for NEPA Violations: Balancing the Equities, 59 U. CHI. L. REV. 1263, 1268 (1992) (explaining that “early preparation of an EIS ensures that the EIS serves as an important contribution to the decision-making process rather than a post-hoc rationalization of decisions already made”).
33 ESA § 7(d), 16 U.S.C. § 1536(d).
analysis of judicial interpretations of NEPA to particular situations involving sunk costs will be helpful to understanding how courts should apply § 7(d). This analysis appears below in section III of this Comment.

2. Preclusion of Sunk Costs in § 4(f) of the Department of Transportation Act

Another group of cases that are helpful to understanding the insidious effects of sunk costs involves violations of the Parklands Act, more commonly referred to as “Section 4(f)” of the Department of Transportation Act. During the mid 1960’s Congress passed § 4(f) to slow down the conversion of parklands to roads. Section 4(f) provided that the Secretary of Transportation should not approve any project which required the use of any publicly owned land from a public park, “unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park . . . resulting from such use.”

Thus, § 4(f) of the Department of Transportation Act, like § 102(2)(c) of NEPA, and § 7(d) of the ESA call for consideration of the impacts of federal action on various aspects of the environment before federal action is taken. Looking at cases rejecting the use of sunk costs under § 4(f) will be helpful in understanding why courts should reject the use of sunk costs in the context of § 7(d). Cases interpreting the applicability of § 4(f) are analyzed below in section III of this Comment.

III. ARGUMENTS USED TO CIRCUMVENT THE PROHIBITION AGAINST SUNK COSTS

Federal agencies, states, and private parties generally advance three types of arguments to circumvent the protective provisions of the ESA. Agencies and non-agency actors with an interest in a project know that a project in progress is more difficult to stop than a project

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35 See Plater et al., NLS, supra note 4, at 559. The reason for this conversion was that parklands were much cheaper to acquire than private property and thus were attractive to federal agencies such as the Department of Transportation (DOT). See id.


37 See id.
with a mere approval on paper.\textsuperscript{38} As a result, agencies and interested parties desire to get projects initiated as quickly as possible. To achieve this goal, agencies have devised numerous arguments that allow them to circumvent the intent of § 7(d) of the ESA. This Comment divides these arguments into three general categories. First, agencies may make the “not irreversible” argument, claiming that because parts of projects potentially can be undone, the projects do not represent irreversible commitments of resources and thus do not violate § 7(d).\textsuperscript{39} Second, agencies may make the “segmentation” argument, urging the courts to view federal projects as individual segments that should be evaluated and approved individually, because none of the segments alone cause significant impacts.\textsuperscript{40} The third approach consists of arguing that unless plaintiffs can show the “bad faith” of the agencies—that is, unless plaintiffs prove that agencies specifically committed resources in order to circumvent an environmental regulation—then the sunk costs should be allowed.\textsuperscript{41} Unlike the first two approaches in which the defendant merely argues that § 7(d) does not apply, the “bad faith” argument asserts that § 7(d) should be ignored outright. If accepted, any one of these arguments would undermine the legislative intent of § 7(d) of the ESA.\textsuperscript{42}

A. Avoiding § 7(d) by Denying Sufficient Commitment of Resources

Agencies whose activities draw challenge under § 7(d) frequently argue that their actions are not “irreversible or irretrievable” because, theoretically, the actions can be undone or altered.\textsuperscript{43} Agencies

\begin{footnotesize}
\textsuperscript{38} See, e.g., Herrmann, supra note 32, at 1289 (“If an agency has been allowed to spend more resources on the project it is more likely to go forward with the previously selected options so as not to waste its investment.”).

\textsuperscript{39} See, e.g., Bays’ Legal Fund v. Browner, 828 F. Supp. 102, 112 n.24 (D. Mass. 1993) (accepting Massachusetts Water Resources Authority’s argument that investment of over $100 million was not “irreversible or irretrievable” because the project design could be altered if evidence revealed the right whale would be harmed by the project); see also discussion infra Section III.A.

\textsuperscript{40} See, e.g., Conner v. Burford, 848 F.2d 1441, 1452-57 (9th Cir. 1988) (discussing why oil and gas leases cannot be issued prior to considering effects of mineral exploration and extraction on endangered species), cert. denied sub nom. Sun Exploration & Prod. Co. v. Lujan, 489 U.S. 1012 (1989); see also discussion infra Section III.B.

\textsuperscript{41} See, e.g., Eagle Foundation, Inc. v. Dole, 813 F.2d 798, 809 (7th Cir. 1987) (holding that sunk costs be allowed unless intentionally incurred as an effort to give a preferred project design an advantage over other designs); see also discussion infra Section III.C.

\textsuperscript{42} See supra Section II.A.1.

\textsuperscript{43} See id.
\end{footnotesize}
make similar arguments when challenged under NEPA. Essentially, both arguments claim that insufficient resources have been committed to projects to invoke the prohibition of these environmental laws because the work already done could be undone.

1. Application of the Irreversible and Irretrievable Standard Under the ESA

One of the earliest cases interpreting the preclusion against “irreversible and irretrievable” commitments of resources was Nebraska v. REA. Although Congress had not adopted § 7(d) at the time of this case, the FWS had implemented regulations under § 7 that precluded irreversible and irretrievable commitments of resources—the same regulation from which the language of § 7(d) was adopted. The plaintiffs in Nebraska v. REA challenged the decision of the Rural Electrification Administration (REA) to make certain commitments and loan guarantees to the sponsors of the Missouri Basin Power Project before the REA had entered into consultation with the FWS regarding the impact of the project on endangered whooping cranes. The plaintiffs also challenged the Army Corps of Engineers’ (Corps) issuance of a federal permit necessary for the construction of the Grayrocks Dam, a portion of the project.

The United States District Court for the District of Nebraska found that the commitments made by REA and the Corps to the project violated the FWS regulations prohibiting irreversible and irretrievable commitments of resources. The court found that, although the FWS requested that the REA initiate formal consultation under § 7 of the ESA regarding the impact of the project on endangered whooping cranes, the formal consultation had not occurred. The court therefore inquired as to whether the loan guarantees made to sponsors of the project by REA violated the FWS regulations precluding irreversible or irretrievable commitments of resources. The court rejected defendants’ arguments that the regulation only precluded direct disruption of the whooping crane’s critical habitat and that therefore loan

45 See id. at 1170; see also supra note 15 (describing legislative history of § 7(d)).
46 Nebraska v. REA, 12 ERC at 1157.
47 Id.
48 Id. at 1170–72.
49 Id. at 1170.
50 Id. at 1172.
guarantees were not covered by the regulation.\textsuperscript{51} Instead, the court recognized the pressure for completion that the investment would create.\textsuperscript{52} Thus, applying the FWS regulations, the court enjoined REA from making loan guarantees to sponsors of the project.\textsuperscript{53} The court similarly considered the issuance of the permit by the Corps to be an irreversible and irretrievable commitment of resources which was precluded until the issuance of a biological opinion.\textsuperscript{54}

In contrast to the realistic interpretation of an "irreversible and irretrievable" commitment of resources in \textit{Nebraska v. REA}, the United States District Court for the District of Massachusetts reached a different interpretation in \textit{Bays' Legal Fund v. Browner}.\textsuperscript{55} Before \textit{Bays' Legal Fund} came to court, the plaintiffs before the same court had demanded an end to sewage discharge in Boston Harbor, and the court had ordered a stop to the dumping.\textsuperscript{56} Subsequently, Massachusetts state legislators created the Massachusetts Water Resources Authority (MWRA) to oversee construction of a new sewage treatment facility, including a sewage treatment tunnel that extended into Massachusetts Bay.\textsuperscript{57} After governmental actors had invested $148 million in design and construction of the tunnel, environmental organizations sued, claiming violations of the ESA and NEPA.\textsuperscript{58} At the time

\textsuperscript{51} See \textit{Nebraska v. REA}, 12 ERC at 1172 ("The making of the commitments by REA and allowing construction to begin amount to the kind of commitment which, as a practical matter, forecloses consideration of the kinds of modifications or alternatives to the Project that would avoid endangering the whooping cranes.").

\textsuperscript{52} Id. The court agreed with the testimony of the regional director of the FWS:

\begin{quote}
I believe that the investment of building the dam and the power plant and associated structures and the goods and services delivered from that investment would create pressures to continue the operation of the project in the face of information that it might be detrimental.
\end{quote}

\textit{Id.} at 1172. (quoting Harvey Willoughby, regional director of the FWS).

\textsuperscript{53} Id. at 1181.

\textsuperscript{54} See \textit{id.} at 1173. The regional FWS director's warning of the risks of sunk costs with respect to the Greyrocks dam proved to be true. Faced with the indisputable evidence that completion of the Greyrocks dam might threaten the continued existence of the whooping crane, the sponsors of the project obtained an exemption from the ESA through the Endangered Species Committee. \textit{See Species Panel Denies Exemption to Tellico Dam, But Exempts Grayrocks Dam}, 9 Env't Rep. (BNA) No. 39, at 1776 (Jan. 26, 1979).


\textsuperscript{58} Bays' Legal Fund, 828 F. Supp. at 112 n.22.
of the suit, the NMFS still had not issued the biological opinion required at the conclusion of the consultation process under § 7(a)(2). In fact, the NMFS had issued only a one-page response to the EPA, which preliminarily concluded that the project was not likely to adversely affect endangered species.

In *Bays' Legal Fund* the plaintiffs asserted that the construction of the outfall tunnel violated § 7(d) of the ESA because consultation was incomplete. Continued construction of the outfall pipe, the plaintiffs argued, violated § 7(d) by foreclosing the development of ecologically safer discharge alternatives. In contrast, the defendants assured the court that the outfall tunnel could be incorporated into several alternative discharge approaches if subsequent information revealed that the project would harm endangered species. Relying on these assurances, the court allowed the outfall tunnel to continue unimpeded because the investment effectively had not foreclosed any options.

These two cases, *Nebraska v. REA* and *Bays' Legal Fund*, illustrate the divergent results that courts have reached when interpreting the irreversible and irretrievable standard. Given the disparity in results under the ESA, reference to judicial interpretations of similar

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59 See *id.* at 107; see also *Savage*, *supra* note 56, at 399 (noting that at the time of litigation, the EPA had conducted a Biological Assessment concluding that the endangered species were "not likely to be adversely affected" by the toxins that the outfall would discharge into the Harbor). A biological assessment, however, is the step that precedes the issuance of a Biological Opinion. See 50 C.F.R. § 402.12.


61 *Bays' Legal Fund*, 828 F. Supp. at 112. The factual situation in this case is similar to that of *TVA*—that is, a huge investment had been made, despite a violation of the ESA. A significant difference, however, between *TVA* and *Bays' Legal Fund* is that in *TVA* completion of the project was certain to destroy all the critical habitat of an endangered species, while in *Bays' Legal Fund* the effects of the project on the endangered species in the Bay was unknown. Compare *Bays' Legal Fund*, 828 F. Supp. at 109, *with TVA*, 437 U.S. 153, 173 (1978). An article in the Boston Globe also noted the similarity between the two cases stating:

"[T]he right whale is not just an overgrown . . . snail darter standing in the way of progress; it is an endangered species highly symbolic of man's deliberate squandering of a common natural heritage. If the right whale cannot be protected, the chances for survival of other threatened creatures are not good.


63 *Id.*

64 *Id.* at 112 n.24.; see also *Savage*, *supra* note 56, at 400 (noting that Judge Mazzone implied that if new evidence arose that the outfall tunnel would harm the right whale "it will be appropriate to reconsider the wisdom, not to mention the legality" of the decision (quoting *Bays' Legal Fund*, 828 F. Supp. at 109)).
language under NEPA may be informative to a thorough analysis of ESA language.

2. Application of the Irreparable Harm Standard Under NEPA

Although different from the standard in § 7(d), NEPA's prohibition against actions that are likely to significantly affect the environment prior to an EIS, has the same goal of preventing premature commitments to environmentally unsound projects. In determining whether NEPA has been violated by irreversible commitments of resources prior to the completion of a proper EIS, several NEPA cases revolve around whether such preliminary activities cause "irreparable" harm to the environment, thus warranting the issuance of a preliminary injunction. Courts confronted with this issue frequently discuss the dangers of sunk costs. Such discussions will be helpful in demonstrating how courts should respond to similar arguments in the context of the ESA.

Judge, now Supreme Court Justice, Breyer's reasoning in *Sierra Club v. Marsh* [hereinafter *Sears Island*] illustrates the dangers that sunk costs pose in the NEPA context. In *Sears Island*, the United States Court of Appeals for the First Circuit vacated a district court ruling denying a preliminary injunction to environmental plaintiffs. The plaintiffs sought to prevent the construction of a causeway to an island that the State of Maine wanted to develop into a marine terminal. The United States District Court for the District of Maine in denying the preliminary injunction, reasoned that the harm to the environment was not "irreparable" because the causeway always could be removed at a later time.

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65 See supra Section II.B.1.
66 See, e.g., Sierra Club v. Marsh, 872 F.2d 497, 500–01 (1st Cir. 1989) [hereinafter *Sears Island*]. Two unrelated cases in this Comment have identical party names—Sierra Club v. Marsh. For the purposes of clarity, in this Comment each case has been given a different designation.
67 See supra notes 74–78.
68 See *Sears Island*, 872 F.2d at 500.
70 *Sears Island*, 872 F.2d at 498; see also Herrmann, supra note 32, at 1286 (discussing *Sears Island*).
71 Sierra Club v. Marsh, 701 F. Supp. 886, 898 (D. Me. 1988) ("In the absence of any evidence that removal of the causeway is either impracticable or that it would not substantially restore the environmental status quo, the court concluded that the plaintiffs have failed to make a
Judge Breyer vacated the district court's decision not to issue a preliminary injunction.\textsuperscript{72} Citing extensively from his reasoning in \textit{Massachusetts v. Watt},\textsuperscript{73} Judge Breyer reiterated that setting aside an agency's decision at a later date would not undo environmental harm.\textsuperscript{74} Moreover, the commitment of resources already made to a project would influence any re-evaluation of the merits of the project.\textsuperscript{75} Judge Breyer pointed out that, "[i]t is far easier to influence an initial choice than to change a mind already made up."\textsuperscript{76} Judge Breyer added that, "the harm at stake is a harm to the environment, but the harm consists of the added risk to the environment that takes place when governmental decision makers make up their minds without having before them an analysis (with prior public comment) of the likely effects of their decision upon the environment."\textsuperscript{77} Judge Breyer recognized the essence of the risk that sunk costs create—that premature decisions irreparably harm the environment by increasing the risk to the environment.\textsuperscript{78} This insight should also underpin § 7(d)'s preclusion of irreversible and irretrievable commitments of resources until the consultation process is complete.

The United States Court of Appeals for the Fourth Circuit in \textit{North Carolina v. Virginia Beach} was not as cognizant of the dangers of sunk costs as was the First Circuit in \textit{Sears Island}.\textsuperscript{79} In \textit{Virginia Beach}, the City of Virginia Beach wanted to begin constructing a pipeline between a man-made lake and the city before the Federal

\textsuperscript{72} See \textit{Sears Island}, 872 F.2d at 505.

\textsuperscript{73} See \textit{id.} at 500 (citing Massachusetts v. Watt, 716 F.2d 946, 952-53 (1st Cir. 1983)).

\textsuperscript{74} \textit{Id.}

\textsuperscript{75} \textit{Id.}

\textsuperscript{76} \textit{Id.} at 499-500 (quoting \textit{Watt}, 716 F.2d at 952-53). Along a similar line of reasoning, Judge Breyer further articulates, "NEPA's object is to minimize . . . the risk of uninformed choice, a risk that arises in part from the practical fact that bureaucratic decision makers . . . are less likely to tear down a nearly completed project than a barely started project." \textit{Id.} at 500-01.

\textsuperscript{77} \textit{Sears Island}, 872 F.2d at 500.

\textsuperscript{78} See \textit{id.} at 500. On remand, the United States District Court for the District of Maine enjoined the construction on the project noting, "[w]ith the completion of each additional phase of construction, agency decision-makers may be more disposed to adhere to their earlier uninformed decision, rather than to entertain and fairly consider new information that might point to 'a new and different course of action.'" \textit{Sierra Club v. Marsh}, 714 F. Supp. 539, 591 (D. Me.), \textit{supplemented and amended} by 744 F. Supp. 352 (D. Me. 1989), \textit{aff'd}, 976 F.2d 763 (1st Cir. 1992). The controversy surrounding the Sears Island Project has yet to be resolved. \textit{See Scott Allen, Foes of Cargo Port Stand Their Ground, BOSTON GLOBE}, Sept. 24, 1995 (Metro/Region) at 33 (reporting that EPA officials soon will decide whether to approve the project).

\textsuperscript{79} See \textit{North Carolina v. Virginia Beach}, 951 F.2d 596, 598 (4th Cir. 1991).
Energy Regulatory Commission (FERC) had approved the project. The plaintiff, the State of North Carolina, argued that allowing Virginia Beach to proceed with construction, prior to FERC's approval of the project, would influence unfairly FERC's decision in favor of the project. The United States District Court for the Eastern District of North Carolina agreed with the plaintiffs and held that, "the public interest in a FERC decision uninfluenced by the vast expenditures of public funds and a partial completion of the project outweighs any anticipated delay. The public interest favors avoiding irreversible damage to the environment . . . even though compliance with NEPA may result in delays and cost increases." The court, recognizing the irreparable harm that the sunk costs would cause to the environment, enjoined initiation of the project.

On appeal, however, the United States Court of Appeals for the Fourth Circuit concluded that an injunction was inappropriate in the case. The court found that because nothing in the record suggested that FERC would be "unduly influenced" by allowing Virginia Beach to proceed with a portion of the project, the project should be allowed to proceed. The court reasoned that FERC still might reject the project, especially because FERC explicitly assured that it would not allow Virginia Beach's investment of $8.4 million to influence its evaluation of the project. Persuaded by this "protective barrier against

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80 See id. at 598.
81 Id. at 601.
82 Id. (quoting district court decision). The district court stated that, "federal regulatory agencies, such as FERC, should not be presented with public and political pressure brought on by partially completed projects in making important environmental decisions." Id. (quoting district court).
83 See id.
84 See Virginia Beach, 951 F.2d at 598.
85 Id. at 602. The court also noted:

the commencement of construction of two relatively small portions of the pipeline project outside FERC Project 2009 does not apply such public and political pressure on FERC that it will be unable rationally to discharge its statutorily imposed responsibilities and that this construction will not interfere with FERC's responsibility in conducting an environmental review on other parts of the pipeline.

Id. at 598. In reaching its conclusion to allow the construction to proceed, the Court of Appeals was especially impressed with FERC's assurances that:

[any] applicant that takes steps to further an unapproved project of action and in the process endangers the environment and contravenes the purposes of NEPA, does so at its financial peril because the Commission may withhold or condition its approval. Any argument made by an applicant that its project should be approved because of prior expenditures of funds or resources would be disregarded by the Commission in making its decision on the merits of the proposal.

Id. at 602.
86 Id.
any potential political pressure that otherwise might exist,” the appellate court lifted the district court’s injunction on the project.87

The contradictory conclusions reached in Nebraska v. REA and Bays’ Legal Fund as well as Sears Island and Virginia Beach demonstrate that the state of the law involving what constitutes an “irreversible and irretrievable” commitment of resources or “irreparable” harm is still unresolved. While agencies have achieved some success by arguing that early investment or construction is not an irreversible and irretrievable commitment, there are other means by which agencies may circumvent § 7(d)’s prohibitions.

B. Avoiding § 7(d) by Segmenting Projects Into Individual Parts

Private parties as well as state and federal government agencies try to circumvent § 7(d) by seeking piece-meal approval for individual parts of a project. This strategy, called segmentation, works because when a project’s pieces are viewed in isolation, the individual segments often do not appear to threaten an endangered species. Developers attempt to impose this narrow perspective on courts, and try to initiate portions of projects that later can be used to bootstrap the rest of the project to completion. Cases such as Citizens to Preserve Overton Park v. Volpe [hereinafter Overton Park], however, have made courts cognizant of the dangers of sunk costs in the segmentation context.88 Consequently courts almost uniformly have rejected segmentation as a means of circumventing § 7(d).

1. Segmentation Under the ESA

There are two basic ways in which developers or agencies might try to segment projects into parts to avoid § 7(d) of the ESA.89 In one segmentation context, private developers attempt to convince an agency to approve parts of a project in stages, thereby allowing resources to

87 Id. at 602–03.
88 Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 422 (1971) (Black, J., concurring). In Overton Park the DOT proceeded to condemn homes, to build two highway segments to the boundaries of the park, and to construct a multimillion dollar bridge across the Mississippi River on the Park highway alignment—all before asking the Secretary to approve the route through the park. See Plater et al., NLs, supra note 4, at 553 n.16. After years of litigation, the Secretary of Transportation admitted that completion of the road through the park would violate § 4(f). Id. at 556. In spite of the massive investment already sunk into the project, a court rejected the defendant’s pleas to allow construction through the park to continue. See id. at 557 n.23; see also, Citizens to Preserve Overton Park v. Brinegar, 494 F.2d 1212, 1215-16 (6th Cir. 1974), cert. denied sub nom. Citizens to Preserve Overton Park v. Smith, 421 U.S. 991 (1975).
89 See infra notes 92–116.
be invested prior to a comprehensive review of the effects of the entire project on endangered species. The other type of segmentation occurs when a developer attempts to segment a project into "nonfederal" and "federal" parts. By investing in early phases of the nonfederal parts of a project, a private developer presents the federal government with a *fait accompli*—leaving the federal government with no practical way to complete the project without doing significant harm to the environment. Both of these strategies use sunk costs to build project momentum and to undermine the purpose of § 7(d).

In *Conner v. Burford*, the United States Court of Appeals for the Ninth Circuit reinforced the notion that activities such as oil or mineral exploration cannot be segmented into parts for purposes of ESA § 7 analysis. In *Conner*, the FWS approved oil and gas leases for several tracts of land in a national forest. The FWS concluded that the lease sales themselves were not likely to jeopardize endangered species, but admitted that the FWS had not evaluated the impact of post-leasing oil and gas exploration and extraction activities on protected species. Parties interested in obtaining the leases argued that since, by the terms of the leases, the federal government could prohibit any activities that were likely to jeopardize protected species, mere approval of the leases posed no threat to wildlife. In other words, the companies argued that the lease sale was not an "irreversible or irretrievable" commitment of resources. The court rejected this reasoning based on the plain language of § 7(d) and § 7(a) of the ESA and required a comprehensive analysis of the impact of post-leasing oil and gas activities on endangered species, prior to the lease sales.

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90 See infra notes 92–107.
91 See infra notes 108–16; see also supra note 88 (discussing *Overton Park*).
93 Id.
94 Id. at 1455.
95 See id.
96 See id.
97 *Conner*, 848 F.2d at 1455 n.34. But see *Park County Resource Council, Inc. v. United States Dep't of Agric.*, 817 F.2d 609, 620–24 (10th Cir. 1987) (upholding BLM's decision that agency action under review was merely the lease sale itself in context of challenge under NEPA); see also Kilbourne, *supra* note 14, at 550 (discussing contrary conclusions reached by courts in *Conner v. Burford* and *Park County Resource Council, Inc. v. United States Department of Agriculture*).
Unlike the Conner court, the United States Court of Appeals for the District of Columbia Circuit in North Slope Borough v. Andrus, was not as cognizant of the dangers of sunk costs. \textsuperscript{98} Andrus involved the development of oil lands in the Beauford Sea off the coast of Alaska. \textsuperscript{99} The plaintiffs, fearing that oil development would threaten several endangered whales, sought to enjoin the Secretary of Interior from entering into lease agreements with several oil companies. \textsuperscript{100} The plaintiffs claimed that § 7(d) of the ESA required a comprehensive assessment of the effects of oil exploration and extraction on endangered species before the federal government could issue leases for those activities. \textsuperscript{101} The United States District Court for the District of Columbia agreed, noting:

[a] massive amount of resources must be invested to facilitate exploration. Given the Tellico Dam experience, the investment of a massive amount of resources before the safety of an endangered species is insured is precisely what Congress intended to preclude with the enactment of § 7(d). Plaintiffs have made a substantial showing that the lease sale in question would violate § 7(d) of the ESA. \textsuperscript{102}

On appeal, however, the United States Court of Appeals for the District of Columbia Circuit ultimately allowed the leases to be approved in stages. \textsuperscript{103} The court’s reasoning relied on the unique statutory provisions of the Outer Continental Shelf Leasing Act (OCSLA). \textsuperscript{104} That statute required stage-by-stage review of the oil leasing and exploration process and allowed for the Secretary to approve individual segments of the oil exploration process if review of the effects of the entire project on the environment were completed before any individual segment was approved. \textsuperscript{105} In concluding that the lease sales were not “irreversible or irretrievable” commitments of

\textsuperscript{98} See North Slope Borough v. Andrus, 642 F.2d 589, 611 (D.C. Cir. 1980).

\textsuperscript{99} See id. at 592–93.


\textsuperscript{101} Id. at 329–30.

\textsuperscript{102} Id. Although the court agreed with this aspect of the plaintiffs’ claims the court was persuaded that the economic interests of Alaska were significant enough to deny the issuance of a preliminary injunction to the plaintiffs at that stage of the case. Id. at 331. However, one month later, after reconsideration of the case for different ESA and NEPA violations, the court enjoined the leases. See North Slope Borough v. Andrus, 486 F. Supp. 332, 364 (D.D.C.), aff’d in part, rev’d in part, 642 F.2d 589 (D.C. Cir. 1980).

\textsuperscript{103} Andrus, 642 F.2d at 611.


\textsuperscript{105} Andrus, 642 F.2d at 608–09.
resources, the court further noted that the oil companies were willing to risk the loss of their investment during the leasing stage if the Secretary ever chose to revoke the leases.\textsuperscript{106} The court in \textit{Andrus} did not suggest that an incremental step approach is warranted under the ESA, but merely recognized the unique situation raised in \textit{Andrus} because of the statutory construction of OCSLA.\textsuperscript{107}

A final example of an attempt to segment a project into individual phases occurred in \textit{Sierra Club v. Marsh} [hereinafter \textit{California Least Tern}].\textsuperscript{108} In \textit{California Least Tern}, the Corps planned to obtain land adjacent to a wetlands to mitigate the detrimental effects of a proposed road on several species of endangered birds that nested in the area.\textsuperscript{109} Because the Corps was delayed in obtaining the land necessary for mitigation, plaintiffs sued to enjoin the project until the mitigation plans were implemented.\textsuperscript{110} The Corps argued that the court should not stop the entire project because the Corps would likely obtain the necessary land.\textsuperscript{111} However, by applying the principles behind § 7(d),\textsuperscript{112} the United States Court of Appeals for the Ninth Circuit noted that the project would require significant modification if the Corps failed to obtain the land and that "the risk that the [Corps] might not prevail must be borne by the project, not by the endangered species."\textsuperscript{113} Not only did the court enjoin all work on the side of the highway where the birds nested, the court also ordered

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\textsuperscript{106} \textit{Id.} at 611.
\textsuperscript{107} \textit{Id.} at 608–11; see also Conner v. Burford, 848 F.2d 1441, 1455–56 (9th Cir. 1988) (analyzing \textit{Andrus}); Kilbourne, \textit{supra} note 14, at 548–49 (discussing how \textit{Conner} is different from \textit{Andrus} in that \textit{Conner} concerns the Mineral Land Leasing Act (MLA), which did not contain the same segmented system of "checks and balances" as OCSLA and thus warranted a different conclusion).
\textsuperscript{108} \textit{California Least Tern}, 816 F.2d 1376, 1380–81 (9th Cir. 1987).
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{Id.} at 1381. A change in circumstances often requires an agency to reinitiate formal consultation. See 50 C.F.R. § 402.16. Section 402.16(b) states:
[r]einitiation of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and . . . . (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered.
\textit{Id.} § 402.16(b); see also John W. Steiger, \textit{The Consultation Provision of Section 7(A)(2) of the Endangered Species Act and Its Application to Delegable Federal Programs}, 21 ECOCOLY L.Q. 248, 255 n.64 (1994) (noting several cases involving obligation to reinitiate consultation); Deborah Freeman, \textit{Reinitiation of ESA § 7 Consultations Over Existing Projects}, 8 NAT. RESOURCES & ENV'T. 17 (1993) (discussing reinitiation process under the ESA § 7(a)).
\textsuperscript{111} \textit{California Least Tern}, 816 F.2d at 1385.
\textsuperscript{113} \textit{California Least Tern}, 816 F.2d at 1386.
the state workers on the other side of the highway to stop work as well.\textsuperscript{114} The court recognized that investment in construction on one side of the highway could preclude alternatives on the other.\textsuperscript{115} The court issued an injunction, ordering the Corps to reinitiate consultation with the Secretary and specifically noted that the prohibitions against "any irreversible or irretrievable commitment of resources" applied during the consultation process.\textsuperscript{116}

Case law under the ESA involving segmentation generally rejects such arguments.\textsuperscript{117} These cases, however, offer far from a resounding rejection of sunk costs. Thus, judicial application of § 7(d) could be improved by reference to analysis under other laws with similar purposes such as NEPA and § 4(f) of the Department of Transportation Act, in which segmentation has been rejected more firmly.

2. Segmentation Under NEPA and § 4(f) of the Department of Transportation Act

Project proponents using the sunk cost strategy often come into conflict with NEPA and § 4(f). Generally, case law applying NEPA and § 4(f) to sunk cost problems firmly denies effect to the sunk cost strategy. The reasoning behind these cases could help minimize inconsistent and ineffective implementation of §7 (d) of the ESA.

A situation strikingly similar to Overton Park\textsuperscript{118} occurred in Named Individual Members of San Antonio Conservation Society v. Texas Highway Department [hereinafter San Antonio Conservation Soci-

\begin{itemize}
  \item \textsuperscript{114} \textit{Id.} at 1378, 1389 ("The institutionalized caution mandated by section 7 of the ESA requires the COE to halt all construction that may adversely affect the habitat until it insures the acquisition of the mitigation lands or modifies the project accordingly."). Members of Congress recognized the broad reach of the ESA during debate of the 1978 Amendments to the ESA. \textit{See} Steiger, \textit{supra} note 110, at 271. For instance, Senator Stennis, during the floor debate of the 1978 Amendments to the ESA stated:
  
  \textit{Let me emphasize, so that we do not lose sight of it, that this law and its potential impact is not limited to Federal projects. It applies to any project, Federal, State, municipal, or private, which is supported by Federal funds, including, permitting or otherwise. The scope of the reach of the law must be recognized before its potential impact is fully understood.}

  \textit{As the law now stands, any Federal project, or any project involving Federal action, even though it involved the highest national interest, could be stopped cold if it impacted on the most insignificant, most obscure and most worthless plant or vertebrate.}

  \textsuperscript{124} \textsc{Cong. Rec.} 21,146 (1978), \textit{reprinted in Legislative History, supra} note 6, at 992.

  \item \textsuperscript{115} \textit{California Least Tern}, 816 F.2d at 1389.

  \item \textsuperscript{116} \textit{Id.} (explicitly relying on § 7(d) to justify injunction until consultation is complete).

  \item \textsuperscript{117} \textit{See supra} notes 92–97, 108–16.

  \item \textsuperscript{118} \textit{See supra} note 88 (discussing Overton Park).
\end{itemize}
State and federal defendants sought to build the two end segments of a highway prior to complying with NEPA and § 4(f). The defendants justified their action by claiming that § 4(f) was not yet applicable because the end segments actually did not go through the park.

In rejecting the defendants' arguments, the United States Court of Appeals for the Fifth Circuit observed that adopting the defendant's narrow view of the applicability of § 4(f) would undermine Congress's intent in passing the statute. The court adamantly refused to view the project as discrete segments and criticized the tactics of the Secretary. The court stated that "[t]he Secretary's approach to his section 4(f) responsibilities thus makes a joke of the 'feasible and prudent alternatives' standard, and we not only decline to give such an approach our imprimatur, we specifically declare it unlawful." Another clever strategy used to evade federal environmental regulation and incur sunk costs is to mask federal projects as state or

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119 Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dep't, 446 F.2d 1013, 1014 (5th Cir. 1971) [hereinafter San Antonio Conservation Soc'y].
120 See San Antonio Conservation Soc'y, 446 F.2d at 1017.
121 Id. at 1022.
122 Id. at 1023. The court noted that "[t]he frustrating effect such piecemeal administrative approvals would have on the vitality of section 4(f) is plain for any man to see." Id.
123 See id.
124 Id. (emphasis added). Many courts have rejected allowing highway projects to be segmented into parts. See, e.g., Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't, 400 U.S. 968, 970–71 (1970). In this case the Supreme Court stated: if it is simply not realistic to consider the construction of this expressway "section by section" as the District Court and the Secretary of Transportation have done here. Once construction is begun and heavy investment made on the two end segments, the available options for routing the middle segment are severely limited . . . . [T]he two segments now approved stand like gun barrels pointing into the heartland of the park. Id. (Black, J., dissenting from denial of certiorari); see also Environmental Defense Fund v. TVA, 468 F.2d 1164, 1183–84 (6th Cir. 1972) ("The more time and resources [the agency is] allowed to invest in this project, the greater becomes the likelihood that compliance with section 102 of the NEPA, and the reconsideration of the project in light of the provisions of section 101, will prove to be merely an empty gesture."); Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323, 1333 (4th Cir. 1972) (halting construction on I-66 until a NEPA review was performed, noting: [f]urther investment of time, effort, or money in the proposed route would make alteration or abandonment of the route increasingly less wise and, therefore, increasingly unlikely. If investment in the proposed route were to continue prior to and during the Secretary's consideration of the environmental report, the options open to the Secretary would diminish, and at some point his consideration would become a meaningless formality); Highland Cooperative v. City of Lansing, 492 F. Supp. 1372, 1383 (W.D. Mich. 1980) (enjoining all parts of highway project because "[t]o allow defendants to make a substantial commitment of resources to one segment, while preparing the EIS for the other would be to avoid the spirit and letter of NEPA").
private actions. For example, in *Maryland Conservation Council v. Gilchrist*, a county tried to ensure that a partially federally funded highway would be routed through a park, as the county, and investors in a nearby development project preferred. The county exerted influence by approving construction on portions of the highway outside the boundary of a park prior to completion of the federal government’s EIS. The issue for the United States Court of Appeals for the Fourth Circuit was whether to enjoin the county from authorizing private parties to begin construction outside the park.

Prior to completing the segments of the road outside the park, the private parties in *Gilchrist* needed to obtain several federal permits. Any action authorized by federal permit is deemed to be a federal action for purposes of NEPA and § 4(f). The court concluded that effectuating the purpose of NEPA required completion of an EIS before construction of any portion of the road. Allowing any construction before issuance of a final EIS inevitably would influence the Secretary of Transportation’s decision. The court stated that “[n]on-federal actors may not be permitted to evade NEPA by completing a project without an EIS and then presenting the responsible federal

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125 See supra notes 126-40.


127 Id. By authorizing construction by private real estate developers near the park, over 26% of the road would have begun prior to completion of the federal government’s EIS. Id. at 1041.

128 See id. at 1042.

129 Id.

130 See id. If a private, local, or state authority has to obtain a federal permit to complete the action, essentially giving the federal government “approval power,” the action is brought into the realm of a federal “action,” subject to all applicable regulations. See id. at 1043. This reasoning applies to cases involving the ESA as well. See, e.g., Roosevelt Campobello Int’l Park v. U.S.E.P.A., 684 F.2d 1041, 1046–47 (1st Cir. 1982) (showing how the requirement that a privately financed oil refinery obtain a permit from EPA brings entire project into realm of ESA scrutiny); see also Michael C. Blumm, *The National Environmental Policy Act at Twenty: A Preface*, 20 ENVTL. L. 447, 469 (1989) (discussing “Small Federal Handle Problem”). The “small federal handle problem” is about NEPA’s ability to affect private actions which require federal permission. See id. The “small federal handle problem” consists of figuring out how broadly an agency should consider the effects of its action on the environment. To illustrate the problem, Professor Blumm presents an example of an oil refinery requesting a permit from the Corps of Engineers to build a dock. Id. Courts have supported the view that the Corps only need analyze the effects of the dock on the water, rather than analyzing the effects of the entire oil refinery on the environment, although, without the dock the refinery could not proceed. See id.; see also Patrick A. Parenteau, *Small Handles, Big Impacts: When Do Corps Permits Federalize Private Development?*, 20 ENVTL. L. 747, 756–57 (1990) (criticizing Corps’s approach to NEPA which ignores cumulative effects of its actions, and suggesting that scope of NEPA analysis should depend on reasonably foreseeable effects of proposals).

131 See *Gilchrist*, 808 F.2d at 1042.

132 See id.
agency with a *fait accompli*." The court rejected the county's attempt to "evade" NEPA and to use sunk costs to influence the decision-making process by recognizing that the scope of NEPA reaches beyond federal actors.

Similarly, in *Alpine Lakes Protection Society v. United States Forest Service* [hereinafter *Alpine Lakes*], the United States District Court for the Western District of Washington also recognized that the scope of NEPA review can extend beyond immediate federal actions. In *Alpine Lakes* the Forest Service had approved the use of a temporary access road across National Forest lands without issuing either a formal environmental assessment or an environmental impact statement as required by NEPA. The Forest Service claimed that the access roads qualified for categorical exclusions under the Service's own internal rules. The court, however, noted that agencies cannot divide projects into parts, each of which has an insignificant environmental impact, but which collectively have a substantial impact. Moreover, the court reasoned:

> [t]he Ninth Circuit has held that where access road construction and contemplated timber harvesting are "inextricably intertwined" such that the timber harvesting could not proceed without the road and the road would not be built but for the contemplated harvesting, the Forest Service was required to consider the environmental effect of the timber cutting which the access road was being built to facilitate . . . . This requirement extends to non-federal actions undertaken exclusively by private parties if the federal actions are so interrelated as to constitute "links in the same bit of chain."

Because the Forest Service did not consider the impact of the private logging activities in determining whether an Environmental Assessment (EA) or an EIS was necessary, the court found the agency approval of the access permit arbitrary and capricious.

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133 Id.
134 See id.
136 Id. at 480.
137 Id.
138 Id. at 481.
139 Id. at 482. (quoting Morgan v. Walter, 728 F. Supp. 1483, 1493 (D. Idaho 1989) quoting Sylvester v. United States Army Corps of Engineers, 884 F.2d 394 (9th Cir. 1989)) (citations omitted).
Judicial reasoning rejecting the sunk cost tactic in the context of segmentation under NEPA and § 4(f) is consistent. Such reasoning should inform courts confronted with similar violations under the ESA. Even if segmentation is rejected by courts, however, agencies have yet another argument with which to circumvent environmental protection.

C. Sunk Costs Not Committed in “Bad Faith”

This Comment has thus far considered cases in which attempts were made to circumvent environmental laws by arguing that those laws did not apply to actions undertaken because of the reversibility or limited effect of the actions. A different strategy, used by developers, as well as state and federal agencies, is to argue that although investment in a project technically violated environmental statutes, the project should continue unless the project proponents used the sunk cost strategy in “bad faith.”

Proving bad faith is a notoriously difficult proposition; yet, in the only case to consider sunk costs explicitly, Eagle Foundation, Inc. v. Dole, the United States Court of Appeals for the Seventh Circuit placed that burden on the plaintiffs. In Eagle Foundation, a highway project had progressed in violation of environmental law. The court held that the sunk costs already invested in the project could be used to influence the decision to allow the project to proceed, unless those costs were incurred intentionally to undermine objective evaluation of the project. This analysis gave the preferred project design of the Department of Transportation (DOT) nearly a three million

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141 See discussion supra Sections III.A–B.
142 See infra notes 142–50.
143 See, e.g., Sierra Club v. Costle, 657 F.2d 298, 390 n.450 (D.C. Cir. 1981) (noting that the Environmental Defense Fund had not made the requisite showing of bad faith or improper conduct to warrant further discovery); Organized Fishermen of Florida, Inc. v. Franklin, 846 F. Supp. 1569, 1574 (S.D. Fla. 1994) (requiring showing of “clear and convincing evidence” to prove NOAA administrator acted in bad faith); North Slope Borough v. Andrus, 486 F. Supp. 332, 358 (D.D.C. 1979) (finding no evidence that Secretary was trying to “steamroll” project and no evidence of bad faith), aff’d in part, rev’d in part, 642 F.2d 589 (D.C. Cir. 1980).
144 See Eagle Foundation, Inc. v. Dole, 813 F.2d 798, 809 (7th Cir. 1987).
145 See id. at 800–01.
146 See id. at 808–09 (“Perhaps the right accommodation is to allow the Secretary to take account of sunk costs unless the expenses were incurred as part of an effort to undermine a fair comparison of costs.”) The court, however, never resolved the issue of whether the costs were incurred for such a purpose, finding that the $2.7 million in sunk costs was so insignificant compared to the total costs of the project, that the sunk costs would play virtually no role in the DOT's final decision. Id.
dollar advantage over the plaintiff's proposed route, because the DOT had already incurred that amount of sunk costs.\textsuperscript{147}

Similarly, in \textit{Ogunquit Village Corp. v. Davis}, the United States Court of Appeals for the First Circuit was troubled by the Soil Conservation Service's rush to finish a dune restoration project without fulfilling the environmental mitigation measures set forth in the EIS.\textsuperscript{148} Nevertheless, the court was not willing to issue an injunction absent a clear showing of "bad faith," shown by "a conscious design to circumvent the requirements of NEPA."\textsuperscript{149} The plaintiffs in \textit{Ogunquit Village} were unable to meet this difficult burden and the Soil Conservation Service's project was never altered.\textsuperscript{150}

Federal agencies repeatedly present far-fetched interpretations of environmental statutes. Although these interpretations do not constitute "bad faith" according to the strict standards of most courts, these interpretations nonetheless permit the agencies to incur sunk costs.\textsuperscript{151} For example, in \textit{Lane County Audubon Society v. Jamison} the Bureau of Land Management (BLM) sought to circumvent § 7(d) of the ESA by arguing that adopting a massive spotted owl recovery plan was merely a "policy statement," as opposed to an "agency action."\textsuperscript{152} This interpretation would have allowed the agency to avoid formal consultation with the FWS.\textsuperscript{153} The United States Court of Appeals for the Ninth Circuit did not accept the BLM's tortured interpretation of the ESA and found that the recovery plan was an "agency action."\textsuperscript{154} Because implementing the plan prior to consultation would have violated § 7(a)(2) of the ESA, the court enjoined implementation of the plan.

\textsuperscript{147} See Wade v. Dole, 631 F. Supp. 1100, 1111 (N.D. Ill. 1986), aff'd sub nom. Eagle Foundation, Inc. v. Dole, 813 F.2d 798 (7th Cir. 1987). The United States District Court for the Northern District of Illinois, however, did recognize the dangers of the sunk costs involved in the case, noting:

\begin{quote}
[w]e have serious reservations about the validity of the defendants' cost analysis. Because it excludes sunk costs, and the Napoleon Hollow alternative is the only alternative on which any costs were "sunk," the defendants' analysis gives Napoleon Hollow a cost advantage relative to the other alternatives. In effect, Napoleon Hollow becomes the only alternative for which no "start-up" costs would have to be paid. As one federal official noted, this approach does not provide an "apples-to-apples" comparison of Napoleon Hollow with the alternative routes.
\end{quote}

\textit{Id.}

\textsuperscript{148} Ogunquit Village Corp. v. Davis, 553 F.2d 243, 244 (1st Cir. 1977); see also Thomas O. McGarity, \textit{Judicial Enforcement of NEPA—Inspired Promises}, 20 \textit{ENVT.L.} 569, 595 (1990).

\textsuperscript{149} \textit{Ogunquit Village}, 553 F.2d at 246.

\textsuperscript{150} \textit{Id.} at 247.

\textsuperscript{151} See supra notes 152–56.

\textsuperscript{152} Lane County Audubon Soc'y v. Jamison, 958 F.2d 290, 293 (9th Cir. 1992).

\textsuperscript{153} See \textit{id.}

\textsuperscript{154} \textit{Id.} at 294. Federal agency "action" is defined broadly as, "all activities or programs of any
This injunction ended all timber sales under the plan, because those sales represented "irreversible and irretrievable" commitments of resources, strictly prohibited by § 7(d). Agencies use "bad faith" to circumvent environmental law. Because "bad faith" is difficult to prove in court, however, this strategy has been successfully employed in some instances. The arsenal of arguments used by defendants places a heavy burden on plaintiffs. For protectors of the environment, the question remains whether the plain language of environmental laws, legislative history, or public policy is strong enough to refute the underhanded use of the sunk cost strategy.

IV. ANALYSIS OF CASES INVOLVING USE OF SUNK COST TACTIC

The effectiveness of arguments that take advantage of the sunk costs strategy is troubling because § 7(d) plainly prohibits sunk costs. Allowing courts to usurp Congress's role by creating exemptions from the ESA threatens endangered species and is contrary to Congress's statutory scheme in creating the ESA. Although the ESA contemplates no role for courts in creating exemptions from the statute, the seductiveness of sunk costs defenses are so persuasive that some courts succumb to the practical pressure to let illegal projects continue. Analysis under the ESA should be informed by the more consistent interpretations under other similar environmental laws such as NEPA and § 4(f) of the Department of Transportation Act.

A. When Is an Irreversible Commitment of Resources not "Irreversible?"

One common argument used to facilitate the sunk cost strategy is to claim that there has been no "irreversible or irretrievable" commitment of resources. The court in Bays’ Legal Fund ignored the statutory provisions of the ESA. Undoubtedly, the court desired to see the sewage treatment plant completed, because every day that

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kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas." 50 C.F.R. § 402.02 (1994).

155 See Lane County Audubon, 958 F.2d at 294.

156 Id. at 295; see also Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1056–57 (9th Cir. 1994) (suggesting that going forward with timber, range and road projects should be considered violative of § 7(d)).

157 See supra Section II.A.1.

158 See supra notes 55–64 (discussing Bays’ Legal Fund v. Browner).

the plant was inoperative was another days' pollution being dumped into Massachusetts Bay. However, reasoning that the commitment of resources to the sewage treatment facility was not "irreversible or irretrievable" under § 7(d) is inconsistent with Congress's purpose in passing § 7(d). The ESA allows a court no role in balancing the interests of completing a project against the interests of protecting endangered species. As the Supreme Court noted, Congress had already done the balancing between projects and endangered species and found in favor of the latter. In Bays' Legal Fund the agencies involved in approving the sewage treatment facility should have applied for a formal exemption from the Committee assigned to grant exemptions under § 7(h) of the ESA. Judicial exemption from the ESA undermines congressional intent and implicitly encourages agencies and private developers to use sunk costs.

The court in Bays' Legal Fund ignored not only the reasoning of the Supreme Court in TVA v. Hill, but also ignored the lesson of

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160 See id. at 113 ("Halting construction altogether, with an eye toward abandoning the outfall tunnel project, would not be a reasonable or prudent approach, given the adverse impact that such non-action has already had on coastal water quality.").

A court was faced with a similarly difficult decision, the results of which would inconvenience the public by delaying the completion of a much needed highway expansion, in California Least Tern, 816 F.2d 1376, 1390 (9th Cir. 1987). But, in contrast to Bays' Legal Fund, the court in California Least Tern enjoined construction on the project in light of the ESA violation. See California Least Tern, 816 F.2d at 1389 ("We are aware that our decision may delay the public's enjoyment of the project's benefits and may significantly increase the costs . . . . We conclude, however, that regardless of any consequences of delay, the ESA requires this result.").

161 See discussion supra Section II.A.1.

162 See Zygmunt J.B. Plater, Statutory Violations and Equitable Discretion, 70 CAL. L. REV. 524, 527 (1982) (arguing that when a court is confronted with any clear statutory violation, a court has no discretion or authority to balance the equities so as to permit that violation to continue); Oliver A. Houck, The 'Institutionalization of Caution' Under § 7 of the Endangered Species Act: What Do You Do When You Don't Know?, 12 ENVTL. L. REP. 15,001, 15,010 (1982) ("It is not a matter of balancing the equities; the Congress has already struck the balance in favor of endangered species."); see also California Least Tern, 816 F.2d at 1383 ("We may not use equity's scale to strike a different balance [between endangered species and federal projects].").

163 See TVA, 437 U.S. 153, 194 (1978) ("Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.'"); see also Williams, supra note 60, at 128 (questioning Judge Mazzone's ruling in light of the reasoning in TVA).

164 See discussion supra Section II.A.2. (discussing exemption process under ESA § 7(h)); see also California Least Tern, 816 F.2d at 1383 n.10 ("We find it significant that Congress gave the power to grant exemptions to the Endangered Species Committee, not to the courts.").

165 Even if the ruling in Bays' Legal Fund never results in harm to endangered species in Massachusetts Bay, the precedent that Judge Mazzone set may harm endangered species elsewhere. See Williams, supra note 60, at 133 (claiming that not enjoining the defendants from further action in Bays' Legal Fund set bad precedent). Judge Mazzone's ruling may induce
Overton Park. In Overton Park the Supreme Court recognized that reading § 4(f) to allow the Secretary to approve the highway without any meaningful consideration would be to assume that Congress passed § 4(f) for no reason. The Supreme Court rejected the idea that Congress passes meaningless statutes. The court in Bays’ Legal Fund, however, reads § 7(d)’s preclusion against “irreversible and irretrievable” commitments so narrowly as to render the entire section meaningless.

Realistically, the problem in Bays’ Legal Fund was not that Judge Mazzone did not understand the implications of the ESA. Rather, $150 million in sunk costs had been invested in the outfall tunnel project. The practical pressure not to enjoin such a project was simply irresistible.

Bays’ Legal Fund demonstrates the insight shown by Judge Breyer in Sears Island. Judge Breyer warned that merely because something theoretically can be removed, or taken apart, or never turned on, does not mean the project is not harming the environment. The sunk costs themselves are an increased risk to the environment and should be enjoined.

courts similarly to ignore the ESA when courts feel that to enforce the ESA would be an “exaltation of form over substance.” Bays’ Legal Fund, 828 F. Supp. 102, 111 (D. Mass. 1995).

Bays’ Legal Fund, 828 F. Supp. at 112.

Judge Mazzone authored the district court’s opinion in Massachusetts v. Watt, in which he reiterated the Supreme Court’s finding that the ESA is designed to prevent the loss of any endangered species and “admit[s] of no exception.” Massachusetts v. Watt, 560 F. Supp. 561, 573 (D. Mass.) aff’d, 716 F.2d 946 (1st Cir. 1983). In Bays’ Legal Fund, apparently Judge Mazzone changed his mind. Compare Watt, 560 F. Supp. at 573 (applying reasoning of Supreme Court in TVA that ESA “admit[s] of no exception[s]”) with Bays’ Legal Fund, 828 F. Supp. at 111 (refusing to enforce ESA because enjoining construction on outfall tunnel would be “an exaltation of form over substance”).

Bays’ Legal Fund, 828 F. Supp. at 112 n.22. Over $148 million had been invested in the construction of an outfall tunnel and an additional $48 million would be lost if the court ordered termination of the project. Id.

Bays’ Legal Fund reflects a general sympathy towards proponents of the project in light of the perceived waste that would occur if the project were stopped. Id. at 111 (noting that the Biological Opinion in the case “satisfied the spirit, if not the letter, of § 7(c) [of the ESA]”). But see California Least Tern, 816 F.2d 1376, 1384 (9th Cir. 1987) (“Only by requiring substantial compliance with the [ESA’s] procedures can we effectuate the intent of the legislature.”); Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985) (“If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA’s substantive provisions will not result”).

See supra notes 68–78.

See Sears Island, 872 F.2d 497, 500–01 (1st Cir. 1989).

See id.; see also Herrmann, supra note 32, at 1288 (noting that when a court is deciding
By allowing federal agencies to commit resources prior to the completion of consultation, the government irreparably harms the environment by tipping the balance in favor of one particular alternative.\textsuperscript{176} As in \textit{Bays' Legal Fund}, asserting that projects can proceed at their own risk is disingenuous because the more time and money spent on a project, the less likely alteration or abandonment becomes.\textsuperscript{177} Agencies must not be allowed to forge ahead with projects without complete information regarding the impact of the projects on an endangered species.\textsuperscript{178} Ignoring § 7(d) places courts in the precarious position of choosing between ordering the loss of millions of taxpayers' dollars\textsuperscript{179} or threatening the existence of an endangered species.\textsuperscript{180} Similarly, courts need to prohibit the use of the sunk costs strategy that agencies justify with other arguments, such as segmentation.

B. \textit{Segmentation Rejected Across the Board: § 7(d) of the ESA, NEPA and § 4(f) of the Department of Transportation Act}

Allowing projects to be segmented into individual parts to avoid environmental regulation has been rejected, although not uniformly, in the context of government lease sales, highway construction cases, and combined state/federal projects under the ESA,\textsuperscript{181} NEPA,\textsuperscript{182} and whether or not an action which violates NEPA should be enjoined, "[t]he pertinent question is not whether an agency can retrieve its investment, but whether an agency's investment, retrievable or not, will increase the risk that it will make a decision causing environmental harm").

\textsuperscript{176} See Sears Island, 872 F.2d at 500-01.

\textsuperscript{177} See supra notes 3-6 (discussing Tellico Dam-endangered species controversy).

\textsuperscript{178} See Seattle Audubon Soc'y v. Evans, 771 F. Supp. 1081, 1093 (W.D. Wash.) (noting that, rather than rush to get projects rolling, agencies should wait months, years, or sometimes longer, in order to assure that they have made the most informed decision possible), aff'd, 952 F.2d 297 (9th Cir. 1991). The Seattle Audubon Society court considers the issue of what happens if an agency has done everything it can to obtain information on the effects of an endangered species but still does not know what the effect of the project will be on endangered species. See id. at 1096. Technically, the consultation does not end until the agency determines the likely effect on the species and issues a Biological Opinion. ESA § 7(b)(3)(A), 16 U.S.C. § 1536(b)(3)(A). This suggests that the § 7(d) preclusion against "irreversible and irretrievable commitment[s] of resources" might remain in effect in perpetuity if the effects of a project on a species cannot be determined. See Houck, supra note 162, at 15,010 (proposing solution to this problem by advocating that agencies should adhere to § 7(d) for a period of time, but that after a specified waiting period, if a project's impact on the endangered species is still inconclusive, that "jeopardy" under § 7(a)(2) be presumed and the agency be allowed to proceed to the exemption process).


\textsuperscript{181} See supra notes 92-97 (discussing \textit{Conner v. Burford}).

\textsuperscript{182} See supra notes 135-40 (discussing \textit{Alpine Lakes Protection Society v. United States Forest Service}).
§4 (f) of the Department of Transportation Act. Cases rejecting segmentation illustrate that environmental regulations cannot be circumvented by using sunk costs to steamroll projects to completion.

The court in Conner v. Burford held that allowing a lease sale prior to thorough evaluation of the effects of mineral exploration and extraction on the endangered species in the area would violate § 7(d). Implicitly, the court recognized the danger posed by allowing the lease—that the project would gain momentum that would undermine later objective assessment of environmental impacts. Moreover, the court was realistic in recognizing the importance of this segment to the entire project and thus was wary of the segmentation argument.

Although the North Slope Borough v. Andrus court allowed an oil exploration project to be approved in phases, this holding was not an endorsement of segmentation. Rather, the holding was based specifically on the fact that the OCSLA explicitly called for viewing the project in distinct phases—oil leasing, oil exploration, and oil production and that provisions within the statute enhanced rather than hindered the strength of the ESA. Moreover, the court could rely on the Secretary of the Interior's altering the terms of the leases if oil exploration activities threatened endangered species. Thus, the specific statutory framework in Andrus authorized segmentation.

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183 See supra notes 118–24 (discussing San Antonio Conservation Society).
185 See id. at 1454–57.
186 See id.
188 North Slope Borough v. Andrus, 642 F.2d 589, 595, 609 (D.C. Cir. 1980); see also Secretary of Interior v. California, 464 U.S. 312, 339–40 (1984) (explaining how the interaction between the OCSLA and the ESA combine to preserve the protection due endangered species even though oil exploration is approved segmentally); Conservation Law Found., Etc. v. Andrus, 623 F.2d 712, 715 (1st Cir. 1979) (reasoning that the OCSLA and the ESA work together to assure the highest protection to endangered species).
189 See Andrus, 642 F.2d at 596.
190 See id. at 611. The regulations implementing the ESA explicitly allow agencies to approve projects in “incremental steps” when authorized by statute. See 50 C.F.R. § 402.14(k) (1994) (allowing the Secretary to authorize a biological opinion on an incremental step of a federal project and allow that step to proceed if such an incremental approach is authorized by statute). When doing so, however, agencies must consider each step in the context of the entire agency action and apply the principles of § 7(d). Id. Section 402.14(k) is qualified in that incremental steps only may be approved so long as they do not, “violate section 7(d) of the Act concerning irreversible or irretrievable commitment of resources” and as long as “[t]here is reasonable likelihood that the entire action will not violate section 7(a)(2) of the Act.” 50 C.F.R. §§ 402.14(4)–(5).
and the case does not stand for the effectiveness of segmentation otherwise. 191

In addition to rejecting agency segmentation arguments in ESA cases, courts have rejected agency segmentation arguments aimed at avoiding comprehensive review under other environmental statutes such as NEPA and § 4(f) of the Department of Transportation Act. 192 Courts most consistently and adamantly reject this approach in cases involving highway projects. 193 For example, the court's reasoning in San Antonio Conservation Society achieved Congress's goal of preventing parklands from being converted into highways, unless a careful consideration of alternatives has been completed. 194 In language similar to that used in TVA seven years later, the court in San Antonio Conservation Society noted "[t]he conflict between Parklands and Highways has already been resolved in the Halls of Congress, which is the proper place in our system of Government for priority decisions to be made. And, as the statutes here in question make clear, parklands and environmental values are considered paramount." 195 The same reasoning should apply to the ESA, erecting § 7(d) as Congress intended—as a blanket prohibition against sunk costs. 196

Likewise, agencies not characterizing projects as federal actions should be no more effective in circumventing the ESA than NEPA. Thus, § 7(d) should prohibit non-federal actors from sinking resources into a project in which federal actors participate. For example, the Fourth Circuit in Maryland Conservation Council v. Gilchrist held that if a federal agency's approval is required at any stage of a pri-

191 Despite statutory authority to approve the lease sales, the court failed to realize, or perhaps ignored, that if the Secretary of Interior did revoke the leases, the Secretary would have had to compensate the oil companies. See Houck, supra note 162, at 15,009 n.105; see also North Slope Borough v. Andrus, 486 F. Supp. 326, 330 (D.D.C. 1979) (noting damages resulting from cancellation of a lease under OCSLA may be formidable). This potential liability would influence any Secretary contemplating revocation of oil exploration leases and is the kind of pressure that § 7(d) was designed to prevent. See Houck, supra note 162, at 15,009 n.105; see also Massachusetts v. Watt, 716 F.2d 946, 952–53 (1st Cir. 1983) (rejecting approval of oil exploration project in phases and recognizing that the more planning and investment oil companies committed to a project, the more pressure there would be on federal agencies to approve the project).

192 See supra Section III.B.2.

193 See supra note 124.

194 See San Antonio Conservation Soc'y, 446 F.2d at 1013, 1021 (5th Cir. 1971), cert. denied sub nom. Texas Highway Dep't v. Named Individuals, 406 U.S. 933 (1972). Congress similarly mandated the emphasis that must be placed on the preservation of endangered species when their survival is in conflict with a proposed project. See TVA, 437 U.S. 153, 194 (1978).

195 San Antonio Conservation Soc'y, 446 F.2d at 1024; see also TVA, 437 U.S. 153, 194 (1978).

196 See supra Section II.A.1.
arily non-federal project, the non-federal actor cannot evade NEPA by completing a portion of the project and then seeking agency approval. Another court endorsed the same reasoning, noting that if private actions are so interrelated to federal actions as to constitute "links in the same bit of chain" then the non-federal actions cannot go forward without proper review under NEPA. Adopting similar reasoning, the court in California Least Tern issued a broad injunction halting state sponsored construction on both sides of a highway. The court recognized that although the nests of endangered species were only on one side of the road, construction activities even on the other side of the road effectively could eliminate alternatives that might mitigate harmful effects on endangered species.

It is necessary for courts to resist allowing characterization of projects as non-federal because tangential state or private actions can cut off federal project alternatives just as effectively as federal actions. Thus, courts must recognize the impact that projects paid for and implemented by private, state, or local parties have on federal projects. If the influence of such projects threatens to cut off alternatives for federal decision-makers, § 7(d) requires courts to halt such activities. To limit the scope of § 7(d) only to activities conducted directly by a federal agency allows sunk costs to occur and undercuts the purpose and effectiveness of § 7(d).

Wariness of segmentation in cases involving NEPA and § 4(f) should be retained in cases involving § 7(d). Still, there are more tactics that are employed to pursue the sunk costs strategy.

C. Asking Plaintiffs to Prove "Bad Faith" is Asking Too Much

Requiring plaintiffs to prove that an agency acted in bad faith before a court will disqualify sunk costs is supported by neither the

197 See Maryland Conservation Council v. Gilchrist, 808 F.2d 1040, 1042 (4th Cir. 1986).
198 Alpine Lakes, 838 F. Supp. 478, 482 (W.D. Wash. 1993); see also Profitt v. Department of Interior Ex. Rel. Lujan, 825 F. Supp. 159, 161 (W.D. Ky. 1993) ("Nonfederal defendants are amenable to the strictures of NEPA . . . if they enter into a partnership or a joint venture with the federal government.")
199 See California Least Tern, 816 F.2d 1376, 1389 (9th Cir. 1987).
200 See id.
201 See, e.g., Gilchrist, 808 F.2d at 1042 (private parties increasing likelihood that federally funded highway would harm park).
202 See Steiger, supra note 110, at 245 (arguing that when a federal program is delegated to a state that state actions taken pursuant to the federal program should be deemed federal action, requiring the state to assume § 7(a)(2) obligations directly).
203 See ESA § 7(d), 16 U.S.C. § 1536(d).
statutory language of the ESA nor its legislative history. Thus, this judicially imposed restriction is unwarranted and undermines the effectiveness of § 7(d)’s unqualified prohibition of “irreversible and irretrievable” commitments of resources prior to the conclusion of consultation.

As was demonstrated in Eagle Foundation v. Dole and Ogunquit Village, plaintiffs rarely will be able to prove successfully bad faith because agencies are usually politically astute enough not to reduce incriminating remarks to paper for plaintiffs to find. One commentator noted, in the context of environmental litigation, that “[a] plaintiff will, no doubt, find it very difficult to prove bad faith in most cases, absent some ‘smoking pistol’ memorandum betraying a clear intent to violate NEPA’s procedural requirements.” Courts should thus focus on the effects of sunk costs, not the subjective intentions of the actors who incurred the costs. Whether incurred intentionally or not, in good faith or bad, sunk costs increase the likelihood that a project will proceed prematurely, contrary to congressional intent in passing § 7(d).

In addition to freeing plaintiffs from having to prove bad faith, courts should be reluctant to accept assurances of objective reassessment from agencies that already are involved in a project. In North Carolina v. Virginia Beach, although the Fourth Circuit recognized the dangers of bureaucratic momentum, the court was not willing to find that sunk costs were so likely to influence later decisions that an injunction was warranted. However, the court’s reliance on agency assurances that the sunk costs would not affect an objective re-evaluation of the project amounts to “whistling in the dark.” The Fourth Circuit’s reliance on agency good faith is unrealistic in light of the self-interests many agencies have in seeing certain federal projects through to completion. Moreover, the ESA, as well as the other environmental statutes discussed in this Comment, call for assessment before investment of resources, not reassessments relying on agency good faith.

204 See supra Section II.A.1.
205 See McGarity, supra note 148, at 594.
206 Id. McGarity continues, “[t]he bad faith test that the court [in Ogunquit Village Corporation v. Davis] articulated for requiring a supplemental EIS . . . may be impossible to meet in practice.” Id. at 595.
207 See supra Section II.A.1.
208 See supra notes 85–87.
Although assessing the effects before committing resources seems like the obvious timing contemplated by Congress, agencies have argued that the prohibition against irreversible and irretrievable commitments does not apply until consultation begins. To sustain this interpretation agencies point to the language of § 7(d), which states that "[a]fter initiation of consultation required under [§ 7(a)(2)], the Federal agency . . . shall not make any irreversible or irretrievable commitment or resources . . . ." Thus, agencies have an incentive to delay intentionally entering into consultation for as long as possible to avoid § 7(d)'s preclusion of commitments of resources.

This reasoning, however, is simply and fatally flawed. Section 7(a)(2) enjoins activities which "may affect" the endangered species including activities undertaken prior to initiation of consultation. Thus, an agency gains nothing by arguing that § 7(d) does not apply to a project because the agency had not yet entered into consultation regarding that project. Before consultation, an even more stringent prohibition against commitments of resources to the project would apply—that is, anything that "may affect" an endangered species would be precluded under § 7(a)(2), whereas only things which are "irreversible and irretrievable" are prohibited under § 7(d).

Thus, agencies may not delay entering into consultation for the purposes of avoiding § 7(d). As soon as an agency realizes that its action "may affect" an endangered species, the need for consultation is triggered, § 7(d) is effective, and "resources may not be committed in violation of this section." As stated in Andrus, "[a]ny other interpretation would defeat the legislative purposes underlying the amend-

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210 ESA § 7(d), 16 U.S.C. § 1536(d) (emphasis added); see also Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1056 (9th Cir. 1994) ("As the ESA's plain language makes clear, § 7(d) applies only after an agency has initiated consultation under § 7(a)(2).").

211 See, e.g., Pacific Rivers Council, 30 F.3d at 1056 (remanding case to district court to determine scope of injunction when Forest Service failed to enter into consultation with NMFS, as required under § 7(a)(2), with respect to timber sales which "may affect" endangered salmon); Lane County Audubon v. Jamison, 958 F.2d 290, 295 (9th Cir. 1992) (halting timber sales until the BLM entered into consultation with the FWS regarding effects of timber sales on spotted owls).


213 50 C.F.R. § 402.14(a) (1994) (noting that an agency must determine "at the earliest possible time" whether the proposed action "may affect listed species or critical habitat"); see also Cutler v. Hayes, 818 F.2d 879, 896–97 (D.C. Cir. 1987) (noting that "excessive delay" in agency actions "saps the public confidence in an agency's ability to discharge its responsibilities," and that "unjustifiable delay" may undermine statutory schemes and harm individuals).

ments to the ESA, and undermine the effectiveness of the ESA Committee." In other words, courts cannot let agencies stick their heads in the sand and continue with detrimental projects under the false presumption that no news is good news.

V. RESULTS OF SUNK COSTS

The previous section of this Comment analyzed how defendants sometimes use a smokescreen of arguments to undermine the intent of environmental laws. Viewing these defendants' actions broadly, a basic strategy emerges. If a project that is initiated prematurely faces a challenge, an agency likely will argue that environmental laws do not apply, suggesting that a portion of project is not "irreversible or irretrievable," or is a segment too insignificant to require formal consultation. If these arguments are unsuccessful, the agency may argue that despite a technical statutory violation, there was no "bad faith" involved on the part of the agency and therefore the project should proceed. As developers continue to pour concrete and remove trees, the project proceeds without any discussion of its merits having occurred. If plaintiffs finally are able to obtain review of the agency's actions, defendants then take full advantage of the sunk costs that were incurred. Agencies point to the sunk costs and argue that enforcing the ESA after so much investment in the project would be not only a waste of money, but also bad public policy.

If plaintiffs actually survive all these hurdles and force a court to look at the merits of the case, courts should not let sunk costs prevent the enforcement of the ESA. Prohibiting sunk costs is overwhelmingly in the public interest. Prohibiting sunk costs will, in the long run, save taxpayers money. Additionally, agencies such as the FWS and the NMFS, free from the political pressures to approve an already existing project, will be able to assess honestly and accurately the impacts of a project on endangered species and to constructively mitigate such effects. Finally, perhaps the most insidious effect of sunk costs is the risk of stifling public debate and preventing citizens from taking an active part in decisions affecting their environment.

215 Id.
216 See Sierra Club v. Gorsuch, 715 F.2d 653, 658 (D.C. Cir. 1983) ("judicial review of decisions not to regulate must not be frustrated by blind acceptance of an agency's claim that a decision is still under study") (emphasis in original).
217 See infra Section V.A.
218 See infra Section V.B.
219 See infra Section V.C.
Judicial enforcement of § 7(d) as Congress intended will ensure that the public continues to have an active voice in shaping the natural world around us.

A. Public Funds Are Wasted by Allowing Sunk Costs

Wise economic policy dictates that government agencies not incur sunk costs. One of the motivating factors in passing § 7(d) was to protect public funds from being wasted. In TVA developers rushed construction of the Tellico Dam, hoping to complete the project before an accurate cost-benefit analysis revealed that the long range economic benefits of the project were at most speculative, and hardly could justify the permanent long-term environmental damage the dam would cause.

Several courts and commentators have noted the waste of public resources that can occur when projects, like the Tellico Dam, are begun prematurely. For instance, in South Carolina Department of Wildlife & Marine Resources v. Marsh, the United States Court of Appeals for the Fourth Circuit questioned the economic prudence of the Corps’ decision to install pumped storage generators before the generators were approved for use in the project. The court noted the “financial waste” that could occur by the Corps’ decision to install pumped storage facilities which may never be allowed to operate.

In Bays’ Legal Fund, only four percent of the $148 million being invested in the outfall tunnel project was federal funds. The balance of the project would be paid by increased water rates to local homeowners. The residents surrounding Boston would have paid for the cost of the project regardless of whether the project became opera-

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220 See National Wildlife Federation v. National Park Service, 669 F. Supp. 384, 390 (D. Wyo. 1987) (“[Section 7(d)] was enacted by Congress mainly to prevent incidents such as the more than $50 million loss at Tellico Dam as a result of TVA v. Hill.”).

221 See Species Panel Denies Exemption to Tellico Dam, But Exempts Grayrocks Dam, 9 Env’t Rep. (BNA) No. 39, at 1776 (Jan. 26, 1979) (quoting Charles Schultze, Chairman of Economic Advisors, noting that “[t]he project is 95 percent complete and if one takes just the cost of finishing it against the benefits ... it doesn’t pay, which says something about its original design”).

222 See, e.g., South Carolina Dept’ of Wildlife & Marine Resources v. Marsh, 866 F.2d 97, 101 (7th Cir. 1989); see also, Williams, supra note 60, at 137 n.68.

223 South Carolina Dept’ of Wildlife & Marine Resources, 866 F.2d at 101.

224 See id.

225 See Williams, supra note 60, at 137 n.68.

226 Id. Homeowners’ rates were expected to increase from $535 annually in 1993 to $855 annually in 1998. See Elizabeth Ross, Boston Harbor Goes Clean, THE CHRISTIAN SCIENCE MONITOR, Sept. 10, 1992 (Habitat) at 10.
tional. Thus, preventing sunk costs is not just an environmental concern; preventing sunk costs is sound fiscal management of the public funds.

**B. Agencies Become Biased and Effective Consultation is Eviscerated**

Allowing the sunk costs strategy to prevail promotes pressured and biased decisions from the agencies designed to protect this nation's wildlife. Sinking costs into early phases of projects places increased pressure on the FWS and the NMFS and individuals in those agencies, to approve the projects. The FWS and the NMFS are not immune from political pressures and may authorize or support politically expedient, though illegal, projects. The United States District Court for the Western District of Washington in *Seattle Audubon Society v. Evans* even noted that there has been "a deliberate and

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227 See Williams, supra note 60, at 137 n.68.
228 See Zygmunt J.B. Plater, *From the Beginning, A Fundamental Shift of Paradigms: A Theory and Short History of Environmental Laws*, 27 Loy. L.A. L. Rev. 981, 991 (1994) [hereinafter Plater, *From the Beginning*] (noting employees within the Forest Service have been fired, demoted, transferred, or suffered similar reprisals for failing to tailor data to fit official needs). In a case involving the University of Arizona's desire to build a multi-million dollar observatory on Mount Graham, home of the endangered Mount Graham Red Squirrel, "two biologists working on the biological opinion indicated that the Fish and Wildlife report used to obtain the rider [which proclaimed the project to have satisfied the requirements of the ESA and NEPA] was suspect because the conclusion of the study may have been 'preordained.'" Sher & Hunting, supra note 6, at 450 (quoting Mountain Graham Red Squirrel v. Yeutter, No. 89-410-GLO-ACM (D. Ariz. May 2, 1990)).
229 See Scott Allen, *Judge Gives Go Ahead to Sewage Pipe; Tunnel to Aid Harbor Cleanup*, BOSTON GLOBE, July 27, 1993 (Metro/Region), at 1 (noting that when the NMFS writes the Biological Opinion relating to the outfall tunnel project the NMFS "will be under political pressure to let the outfall tunnel continue").
230 See, e.g., Dale D. Goble, *Of Wolves and Welfare Ranching*, 16 Harv. Envtl. L. Rev. 101, 125-26 (1992) (showing several violations by the FWS and the NMFS of the ESA and concluding that these agencies often succumb to political expediency, noting specifically the NMFS's decision to list the Snake River Fall Chinook Salmon run as threatened rather than endangered despite the fact that less than 100 wild fish returned to spawn in 1990); R.D. Peltz & J. Weinman, *NEPA Threshold Determinations: A Framework of Analysis*, 31 U. Miami L. Rev. 71, 89 (1976) ("[A]gencies often become carried away with their own abilities and defiantly refuse to comply with laws which they feel might hinder their operation. They may seek to insulate themselves from the law and judicial scrutiny, hiding behind the shield of expertise and self-proclaimed autonomy."); Steiger, supra note 110, at 357 n.75 (noting lapse of Service's objectivity during the Reagan-Bush era); Williams, supra note 60, at 130 (noting that the EPA and the NMFS waited until public concern literally forced the EPA to enter into consultation with the NMFS to assess the impact of the sewage outfall tunnel on endangered right whales); see also Warren E. Leary, *Interior Secretary Questions Law on Endangered Species*, N.Y. Times, May 12, 1990 § 1, at 8 (quoting Manuel Lujan, Secretary of the Interior, stating, "[d]o we have to
systematic refusal by the Forest Service and the FWS to comply with laws protecting wildlife.231 Likewise, in *Northern Spotted Owl v. Hodel*, the FWS decided not to list the spotted owl as endangered despite overwhelming evidence that the owl qualified for listing.232 There, the United States District Court for the Western District of Washington found that,

the Service disregarded all the expert opinion on population viability, including that of its own expert, that the owl is facing extinction, and instead merely asserted its expertise in support of its conclusions.

The Service has failed to provide its own or other expert analysis supporting its conclusions . . . . Accordingly, the . . . decision not to list at this time the northern spotted owl as endangered or threatened under the Endangered Species Act was arbitrary and contrary to law.233

The conversion of agencies from their statutory role as protector of wildlife to a role of complicity with those threatening wildlife is another result of sunk costs. When faced with pressure from industries which have invested heavily in a project, agencies often have no freedom to modify a project in the interest of environmental protection or to reject it outright. Thus Congress's purpose in mandating consultation in the ESA is completely undermined.

Ignoring § 7(d) and the sunk costs problem eviscerates the entire consultation process. If courts are unwilling to prohibit irreversible and irretrievable commitments of resources, courts may as well stop enforcing the consultation provision as well. The ultimate results in

save every subspecies? The red squirrel is the best example. Nobody's told me the difference between a red squirrel, a black one or a brown one.”). The pressure that private parties place on agencies also contributes to the effectiveness of sunk costs. See, e.g., *Saving a Seabird*, DAILY CAMERA, March 6, 1995 (Environment) at 1. The Pacific Lumber Company wanted to conceal that endangered marbled murrelets were in a grove which the timber company wanted to cut down. As a result the company "conducted biased and unreliable surveys, tried to pressure surveyors into changing their findings and altered reports before turning them over to the state." *Id.*

231 Seattle Audubon Soc'y v. Evans, 771 F. Supp. 1081, 1090 (W.D. Wash.), aff'd, 952 F.2d 297 (9th Cir. 1991). The court concluded, "The problem here has not been any shortcoming in the laws, but simply a refusal of administrative agencies to comply with them." *Id.* at 1096; Christopher A. Cole, Note, *Species Conservation in the United States: The Ultimate Failure of the Endangered Species Act and Other Land Use Laws*, 72 B.U. L. REV. 343, 362 (1992) (noting the FWS has, in many cases, bowed to political pressures by allowing harmful secondary uses to continue on refuge lands).


233 *Id.; see also* Northern Spotted Owl v. Lujan, 758 F. Supp. 621, 627–28 (W.D. Wash. 1991) (chastising the FWS's decision not to designate critical habitat for the spotted owl).
situations such as those involving the Tellico Dam,234 the Grayrocks Dam235 and the outfall pipe in Bays’ Legal Fund,236 are testament to the ineffectiveness of consultation after an agency or developer has made significant commitments of resources to a project. Only by courts strictly enforcing the preclusion against sunk costs codified in § 7(d), will the consultation process continue to have substantive meaning in the future.

Congress saw the consultation process as the most effective way of ensuring that federal actions did not jeopardize endangered species.237 Working with the FWS or the NMFS during the early stages of a project often resolves any conflict between a project and an endangered species.238 Preventing all significant commitments of resources until consultation is complete not only protects endangered species, it also serves the best interest of the project as well. If meaningful consultation occurs early on, the ESA will stop only those few projects that have absolutely no design alternatives or that are so detrimental to an endangered species that they cannot be completed without jeopardizing the species.239

234 See supra notes 3-6.
235 See supra note 54.
236 See supra notes 55-64.
237 H.R. REP. 1625, supra note 10, reprinted in LEGISLATIVE HISTORY, supra note 6, at 736 (Congress recognizing “that in many instances good faith consultation between the acting agency and the Fish and Wildlife Service can resolve many endangered species conflicts”).
238 See Steiger, supra note 110, at 259 (citing several studies of projects which indicate effectiveness in identifying alternatives to avoiding completely abandoning a proposed project). Steiger reveals that a 1992 General Accounting Office (GAO) study of consultations during 1987–91 found that over 90% of all formal consultations resulted in a no-jeopardy opinion, and that 90% of all projects for which a jeopardy opinion had been issued were allowed to go forward after the project sponsor adopted the Service’s suggested alternatives. See id. at 259 n.86 (citing U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-92–131BR, ENDANGERED SPECIES ACT: TYPES AND NUMBER OF IMPLEMENTING ACTIONS 16 (1992)); see also Douglas H. Chadwick, Dead or Alive: The Endangered Species Act, 187 NATIONAL GEOGRAPHIC No.3 (March 1995) at 2, 15 (noting that out of 98,237 interagency consultations between 1987 and 1992, just 55 projects were stopped completely).
239 See Oliver A. Houck, The Endangered Species Act and its Implementation by the U.S. Department of Interior and Commerce, 64 U. COLO. L. REV. 277, 320 (1993) (noting 1993 study of 99 biological opinions issued between 1988 and 1992 and concluding that “no major public activity, nor any major federally-permitted private activity was blocked”); Steiger, supra note 110, at 259–60 & n.87 (citing WORLD WILDLIFE FUND, FOR CONSERVING LISTED SPECIES, TALK IS CHEAPER THAN WE THINK: THE CONSULTATION PROCESS UNDER THE ENDANGERED SPECIES ACT III (1992), which found that less than one percent of all agency activities subject to formal consultation between 1987 and 1991 were stopped for § 7 reasons); Terry Tang, A Grossly Warped Picture of Endangered Species Act, SEATTLE TIMES, June 21, 1995 (Opinion)
C. Public Participation in Decision-Making Process is Curtailed

Project proponents use sunk costs to undermine the effectiveness of public opposition to controversial projects.\textsuperscript{240} The farther along a project has proceeded, the more difficulty the public faces in organizing opposition to the project.\textsuperscript{241} One commentator has described a symptom of sunk costs as the "nibbling phenomenon," in which the environmental quality of a region is destroyed gradually by a series of minor decisions.\textsuperscript{242} The damage caused by each individual decision may not arouse sufficient public concern to support effective opposition, thus allowing the project to proceed so far along as to be virtually impossible to stop.\textsuperscript{243}

Barriers to public opposition are especially troubling because citizen suits are the primary means of enforcement for many environmental statutes, a fact not lost on regulated industries.\textsuperscript{244} For example, at B6 (noting that out of 73,600 instances between 1987 and 1991 where federal government action potentially put a listed species in jeopardy, only 19 projects were blocked or canceled).

\textsuperscript{240} See Sax, supra note 1, at 103. Professor Sax recalls the tactics of oil companies at Santa Barbara to invest significant sums into oil exploration before public opposition could be heard. See id. Professor Sax notes, that "[i]n the planning for offshore oil drilling . . . the oil companies made much of the fact that by the time citizens began to complain, they had already invested millions of dollars in exploratory work and that it was by then too late to begin reexamining the proposal to drill." Id. (emphasis in original). A chemical company applied similar tactics in South Carolina, quietly obtaining the approval of South Carolina officials for its chemical plant, before public opposition to the project materialized. See id.

\textsuperscript{241} See Kim Herman Goslant, Citizen Participation and Administrative Discretion in the Cleanup of Narragansett Bay, 12 Harv. Envtl. L. Rev. 521, 527 (1988) (noting federal agencies deliberately minimize public awareness of decisions to ensure that their actions are not disrupted); see also Jonathan Plosner, Environmental Values and Judicial Review after Lujan: Two Critiques of the Separation of Powers Theory of Standing, 18 Ecol. L.Q. 335, 366 n.207 (1991) ("[A]dministrators often allow money to be spent on projects prior to public review because sunk costs diminish public opposition to the project.") (citing Goslant, supra note 62, at 527); Joseph L. Sax, The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471, 496-97 (1970) (discussing how a government project whichquietly proceeds "will approach the point of irreversibility before those who would question it can initiate their questioning").

\textsuperscript{242} Sax, supra note 1, at 55-56.

\textsuperscript{243} See David Berscauer, Is the "Endangered Species Act" Endangered?, 21 Sw. U. L. Rev. 991, 1014-15 (1992). Berscauer presents an example of the "nibbling phenomenon" in Southern California where "developers are slowly cutting some of the last viable riparian habitat, coastal sage scrub, chaparral, and oak woodlands in Southern California into small 'islands' incapable of supporting native plants and animals, many of which are endangered and threatened species." Id.

\textsuperscript{244} See Plater, From the Beginning, supra note 228, at 992. Professor Plater notes a general acknowledgment by Congress, government agencies, and private interests that citizen enforcement of environmental statutes are required to effectively enforce the law. Id. at 983-94.
the timber industry's successful efforts to prevent citizen groups from interfering with logging operations by suing to enforce environmental laws, exemplifies the important role citizens play in the enforcement of this nation’s environmental laws.245 As Professor Zygmunt Plater noted, “[t]he timber lobbyists and their congressional spokespersons realized . . . that they did not have to repeal the statutes in order to nullify the existing protective laws. All they had to do was block citizen enforcement actions.”246 Similarly, sunk costs make enforcement of the ESA less likely because the effectiveness of citizen enforcement of the ESA becomes increasingly marginalized the farther along the project proceeds.247

Judge Breyer, in Sears Island, noted that federal decision makers should know the public’s concerns about a project before the federal government commits to pursuing any course of action that significantly affects the environment.248 Allowing sunk costs to be incurred prior to public comment eviscerates the seriousness with which the public’s concerns can be alleviated by subsequent modifications to a project. Thus, by eliminating public comment, sunk costs undermine the democratic, decision-making process mandated in our environmental statutes.249 Instead, because of sunk costs, these decisions can be usurped by special interest groups with the money, power, and influence to invest significant funds into projects before the public can react.250

245 See 1990 Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 101-121, § 318(g), 103 Stat. 701, 749 (1989) (codified in scattered titles of U.S.C.) (containing rider precluding citizen enforcement of environmental statutes which would interfere with logging operations); see also Plater, From the Beginning, supra note 228, at 984, 992.

Riders attached to appropriations bills exempting logging from environmental laws such as the ESA and NEPA continue. President Clinton has signed a budget rescissions act which contained a rider suspending enforcement of environmental laws such as NEPA and the ESA for massive logging programs on public lands. See Salvage Timber Sale Program, Pub. L. No. 104-19, 109 Stat. 240. (July 22, 1995); see also Timothy Egan, As Clear-Cutting Returns, Motives Are Questioned, N.Y. TIMES, Dec. 5, 1995, at A16 (“The timber industry bought Congress and in essence got them to remove all citizens’ rights, barring them from the courthouse door.”) (statement of Tim Hermach of the Native Forest Council in Oregon referring to Pub. L. 104-19).

246 See Plater, From the Beginning, supra note 228, at 992.

247 See supra note 240.

248 See Sears Island, 872 F.2d 497, 500 (1st Cir. 1989).

249 Most environmental statutes require public notice and allow for public comment before an agency decision is finalized. See, e.g., ESA § 4(f)(4), 16 U.S.C. § 1533(f)(4) (requiring the Secretary to “consider all information presented during the public comment period prior to the approval of [any recovery plan for an endangered or threatened species]”).

250 See supra note 240. An excellent example of a community organizing to confront a power company's use of sunk costs to justify relicensing a dam with few economic benefits, but a
VI. Conclusion

The longer a project proceeds, the more likely the project’s momentum will preclude objective analysis of economic, environmental, and social costs. Both public and private developers take advantage of this momentum before communities or conservation organizations realize what the long-term implications of the project may be. Countless ill-conceived, yet finished federal projects stand as testament to the power of the sunk cost tactic. Until courts uniformly recognize the dangers of sunk costs and strictly enforce § 7(d), sunk costs will continue to be an effective strategy employed by both public and private developers intent on bypassing environmental regulation.

The legislature has condemned the use of sunk costs to bypass environmental regulation. Judicial responses to § 7(d), as well as to other statutory schemes prohibiting sunk costs, reveal that few courts fully comprehend the pervasiveness of the sunk cost tactic or recognize the insidious effects sunk costs have in undermining environmental laws. Section 7(d)’s preclusion of irreversible and irretrievable commitments of resources is an unambiguous mandate from Congress not to let sunk costs be used to withdraw the environmental decision-making process from the public. During a time when the public’s input in environmental decisions is becoming increasingly marginalized by the influence of private industry, it is especially crucial that the purpose of § 7(d) not be ignored. Congress has acted. The courts must now make the sunk cost tactic a thing of the past, rather than allow the strategy to continue to be business as usual.

significant ecological impact, is demonstrated by the controversy surrounding the Clyde River in Vermont. See generally, John Dillon, Heroes of the Clyde: How TU Activists Are Bringing Vermont’s Clyde River Back to Life, TROUT, Summer 1995, at 14. When a dam on the Clyde River virtually was washed away by a flood, the power company that owned the dam immediately reconstructed a significant part of the dam under the guise that it “was merely stabilizing the clay bank that had eroded . . .,” in violation of the Clean Water Act. Id. at 52. By the time concerned citizens groups and the EPA were able to obtain an injunction ordering the power company to stop working on the dam, most of the work was complete. Id.