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SEGMENTATION OF ENVIRONMENTAL REVIEW: WHY *DEFENDERS OF WILDLIFE v. U.S. NAVY* THREATENS THE EFFECTIVENESS OF NEPA AND THE ESA

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Abstract: In *Defenders of Wildlife v. United States Department of the Navy*, the U.S. Court of Appeals for the Eleventh Circuit held that the environmental review conducted by the Navy and the National Marine and Fishery Service regarding the proposed construction and operation of a warfare training range was in compliance with federal law. In particular, the court found that segmentation of review at its final stages did not violate the National Environmental Policy Act or the Endangered Species Act. This Comment addresses the danger of allowing a technicality to authorize segmentation of environmental review, and its potential negative impacts on endangered species, such as the North Atlantic right whale. The Eleventh Circuit could have followed the trends of other circuit courts, such as the Second and Ninth Circuits, to invalidate the Navy's and the NMFS's environmental review.

INTRODUCTION

The calving ground of the North Atlantic right whale sees the birth of anywhere from one to thirty-nine right whale calves per year.¹ The whaling industry of the eighteenth and nineteenth centuries decimated the right whale population, and in 1970, the marine mammal was placed on the endangered species list pursuant to the law that would eventually become the Endangered Species Act (ESA) in 1973.² Because the right whale population has remained critically low, the calves born annually are critical to replenishing the population, which ranges from just three to four hundred whales.³ Today, the right

* Staff Writer, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2014–2015.

¹ NORTHEAST FISHERIES SERV., NAT'L OCEANIC & ATMOSPHERIC AGENCY, NORTH ATLANTIC RIGHT WHALE (*EUBALAENA GLACIALIS*) 5-YEAR REVIEW: SUMMARY AND EVALUATION 8 (2012), available at http://www.nmfs.noaa.gov/pr/pdfs/species/narightwhale_5yearreview.pdf, archived at <http://perma.cc/J87M-GH95>.

² *North Atlantic Right Whales (Eubalaena Glacialis)*, NAT'L OCEANIC & ATMOSPHERIC AGENCY OFFICE OF PROTECTED RES., http://www.nmfs.noaa.gov/pr/species/mammals/cetaceans/rightwhale_northatlantic.htm (last updated Dec. 6, 2013), archived at <http://perma.cc/9YHV-8MYF>.

³ *See id.*

whale remains “the world’s most critically endangered large whale species and one of the world’s most endangered mammals.”⁴

The North Atlantic right whale is a species of baleen whale that migrates annually along the Atlantic coast of North America.⁵ Though their migratory patterns are not fully understood, there is only one known area to which pregnant females travel to give birth to calves.⁶ This calving ground—located off the coast of the Florida-Georgia border—is within thirty-five miles of the site of a proposed \$127 million U.S. Navy (the “Navy”) naval warfare training ground.⁷

Since 1996, the Navy has been developing a plan to establish a training range in shallow water to better prepare its fleets for overseas activity.⁸ In 2008, the Navy announced a plan to develop such a range within a site known as the Jacksonville Operating Area, which it has used as a fleet concentration area since World War II.⁹ Since that announcement, the Navy has worked to complete all statutorily required environmental reviews of the proposed action.¹⁰

Conservation groups are concerned by the placement of the proposed training range because of its proximity to the calving ground, which is a critical habitat of the North Atlantic right whale.¹¹ Once it is constructed, the Navy intends to perform approximately 470 training exercises annually in the range, involving vessel and aircraft traffic and the use of sonar technology within thirty-five miles of the calving ground.¹² Any threat from ship strikes, entanglements, or the use of sonar to even a few individual whales could jeopardize the continued existence of the species.¹³

In *Defenders of Wildlife v. United States Department of the Navy*, these concerned environmentalists brought a lawsuit against the Navy, the National Marine Fisheries Services (“NMFS”), and several other federal organizations,

⁴ Endangered Fish and Wildlife; Final Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales, 73 Fed. Reg. 60,173 (Oct. 10, 2008).

⁵ NORTHEAST FISHERIES SERV., *supra* note 1, at 7; *North Atlantic Right Whales (Eubalaena Glacialis)*, *supra* note 2.

⁶ NORTHEAST FISHERIES SERV., *supra* note 1, at 8, 10 (noting that available right whale sighting data suggests four important feeding areas and one calving area—the Georgia-Florida coast—along the Atlantic coast).

⁷ *Defenders of Wildlife v. U.S. Dep’t of the Navy*, 733 F.3d 1106, 1108, 1116 (11th Cir. 2013); *North Atlantic Right Whales (Eubalaena Glacialis)*, *supra* note 2, at 1–2.

⁸ *Defenders of Wildlife*, 733 F.3d at 1109.

⁹ *Id.* at 1110.

¹⁰ *Id.* at 1109.

¹¹ *See id.* at 1108.

¹² *Id.* at 1110–11.

¹³ 50 C.F.R. pt. 224 (2015). “Recent . . . models indicate that the loss of even a single individual may contribute to the extinction of the species; likewise, according to the models, preventing the mortality of one adult female a year alters the projected outcome.” Endangered Fish and Wildlife; Advance Notice of Proposed Rulemaking (ANPR) for Right Whale Ship Strike Reduction, 69 Fed. Reg. 30,857, 30,858 (proposed June 1, 2004) (codified at 50 C.F.R. pt. 224).

alleging violations of the ESA, the National Environmental Policy Act (NEPA), and the Administrative Procedure Act (APA).¹⁴ The U.S. District Court for the Southern District of Georgia granted summary judgment in favor of the federal agencies and on appeal, the U.S. Court of Appeals for the Eleventh Circuit affirmed.¹⁵ This Comment argues that, although the Navy complied with the black letter law of NEPA and the ESA, the decision in *Defenders of Wildlife* threatens to weaken the environmental protection value of these statutes by authorizing the segmentation of the environmental review process.¹⁶

I. FACTS AND PROCEDURAL HISTORY

In 1996, the Navy issued a notice of its intent to prepare an environmental impact statement (“EIS”)—as required by NEPA—regarding its plan to develop a training range along the Atlantic seaboard.¹⁷ By 2005, the Navy released a draft EIS, listing a potential site off the coast of North Carolina for the range.¹⁸ In 2008, the Navy revised the draft EIS, moving the proposed site to an area off the coast of Florida, in a region known as the Jacksonville Operating Area (“JOA”), which it has used for military training purposes since World War II.¹⁹ The Navy designated the training range the Undersea Warfare Training Range (“USWTR”).²⁰ The USWTR will hold sea vessel and aircraft operations training and will be able to hold shallow-water training, which the Navy contends is essential to overseas operations.²¹

The USWTR will be located fifty nautical miles off the coast of the Florida-Georgia border.²² According to the Navy, this is the most efficient location for such a range, because the JOA is already in operation and houses a large volume of the Navy’s aircraft on the Atlantic coast.²³ Construction of the USWTR will involve the installation of 300 fiber optic cable nodes within an area

¹⁴ 733 F.3d at 1108–09.

¹⁵ *Id.*

¹⁶ *Id.*; see *Andrus v. Sierra Club*, 442 U.S. 347, 351 n.3 (1979); *Metcalf v. Daley*, 214 F.3d 1135, 1142–45 (9th Cir. 2000) (holding that the commitment of resources to a proposed action prior to environmental review violates NEPA); *Conner v. Burford*, 848 F.2d 1441, 1457–58 (9th Cir. 1988); see also *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 930 (9th Cir. 2008) (holding “a listed species could be gradually destroyed, so long as each step on the path to destruction is sufficiently modest”).

¹⁷ *Defenders of Wildlife*, 733 F.3d at 1109.

¹⁸ *Id.* at 1110.

¹⁹ *Id.*

²⁰ *Id.* at 1108.

²¹ *Id.* at 1109, 1111.

²² *Id.* at 1108.

²³ *Id.* at 1110.

of 500 square nautical miles of the Atlantic Ocean.²⁴ A trunk cable will then run to a receiver facility in Mayport, Florida.²⁵

The trunk cable will pass directly through the North Atlantic right whale critical habitat, located thirty-five miles from the USWTR.²⁶ The Navy will suspend installation during calving season, and will bury the trunk cable below the sea floor within the calving area.²⁷ These installations will use acoustic signals from operating vessels to produce valuable training information.²⁸

The Navy's draft EIS considered four alternative sites to the JOA, including waters off the coasts of North Carolina, South Carolina, Maine, and Virginia.²⁹ It heard public comments and issued a final EIS.³⁰ Further, pursuant to the ESA, the Navy prepared a biological assessment and completed a formal consultation with the NMFS.³¹ On July 28, 2009, the NMFS issued a biological opinion analyzing the effects of installation and use of the USWTR on endangered marine species.³² Portions of the biological opinion include summaries of pre-existing biological opinions regarding other naval training locations.³³ Once the Navy finalized its EIS and received the biological opinion from the NMFS, it issued a Record of Decision ("ROD") authorizing construction of the USWTR.³⁴ It, however, explicitly deferred issuance of a ROD for the operation phase of the USWTR until construction is at or near completion.³⁵

The biological opinion prepared by the NMFS stated that installation of the USWTR is not likely to adversely affect the North Atlantic right whale.³⁶ Operations, however, were found likely to adversely affect the whales, but the NMFS concluded operations are not likely to jeopardize the continued existence of the species, or to destroy or adversely modify its critical habitat.³⁷ Be-

²⁴ *Id.*

²⁵ *Id.* at 1111.

²⁶ *Id.* at 1110–11.

²⁷ *Id.* at 1111. The Navy will not suspend training activities during calving season because, it is argued, doing so would not fully prepare trainees on the range. Final Brief for Appellants at 15, 21–22, *Defenders of Wildlife v. U.S. Dep't of the Navy*, 733 F.3d 1106 (9th Cir. 2013) (No. 12-15680).

²⁸ See *Defenders of Wildlife*, 733 F.3d at 1110 ("The nodes will transmit and receive acoustic signals from ships and submarines operating within the range, thus allowing the position of exercise participants to be determined and stored electronically for real-time feedback and future evaluation.").

²⁹ *Defenders of Wildlife*, 733 F.3d at 1110.

³⁰ *Id.*

³¹ *Id.* at 1113.

³² *Id.* at 1118.

³³ *Id.* at 1119.

³⁴ *Id.* at 1113–14.

³⁵ *Id.* at 1116. "[A]ny 'decision to implement training' at the USWTR 'will be based on the updated analysis of environmental effects in a future [EIS] . . . and consultation with the [NMFS] and after compliance with applicable laws and executive orders . . . as they relate to the operation of the proposed USWTR.'" *Id.*

³⁶ *Id.* at 1118.

³⁷ *Id.* at 1113.

cause the biological opinion determined the operation of the USWTR is likely to adversely affect an endangered species, the supplemental preparation of an incidental take statement will be required.³⁸ Further, if a proposed action threatens to adversely affect a marine mammal, the take must be authorized under the Marine Mammal Protection Act (“MMPA”) before the NMFS can issue the incidental take statement.³⁹ MMPA authorization is only valid for five years, and the construction phase of the USWTR is expected to take more than five years.⁴⁰ NMFS will not seek MMPA authorization until the construction is at or near completion, “[t]o avoid redundant authorizations and wasting resources.”⁴¹ The Navy will commence a new EIS consultation for USWTR operations with the NMFS, and it will seek a new biological opinion with an incidental take statement for operations, before operations commence.⁴²

In *Defenders of Wildlife v. United States Department of the Navy*, *Defenders of Wildlife* and several other conservation organizations (the “plaintiffs”) brought an action against the Navy, NMFS, and several other federal agencies (the “defendants”) for alleged violations of NEPA, the ESA, and the APA in the U.S. District Court for the Southern District of Georgia.⁴³ The court granted the defendants’ motion for summary judgment.⁴⁴ The plaintiffs appealed to the U.S. Court of Appeals for the Eleventh Circuit on three of their original claims: (1) the Navy violated NEPA by signing a contract for construction of the USWTR prior to issuance of a ROD to operate the range; (2) the NMFS violated the ESA and the APA by failing to “meaningfully” analyze the proposed action in its biological opinion; and (3) the NMFS violated the ESA and APA by failing to include an incidental take statement in its biological opinion.⁴⁵ The Eleventh Circuit affirmed the lower court’s holding on all counts, holding that the Navy and the NMFS fully complied with all statutorily mandated environmental review procedures.⁴⁶

³⁸ *Id.*; see *supra* notes 79–86 and accompanying text (explaining when an incidental take statement must be added to a biological opinion).

³⁹ *Defenders of Wildlife*, 733 F.3d at 1113.

⁴⁰ *See id.*

⁴¹ *Id.* at 1123.

⁴² *See id.* at 1116. (“[A]ny ‘decision to implement training’ at the USWTR ‘will be based on the updated analysis of environmental effects in a future [EIS] in conjunction and consultation with the [NMFS] and after compliance with applicable laws and executive orders including the [MMPA], the [ESA], the [NEPA] and the Coastal Zone Management Act.’”).

⁴³ *Id.* at 1114.

⁴⁴ *Id.*

⁴⁵ *Id.* Appellants initially argued before the district court that the defendants violated Section 1508.25 in addition to Section 1506.1 of the Council on Environmental Quality NEPA regulations. *Id.*; see *supra* notes 55–58 and accompanying text. Appellants only raise the Section 1506.1 violation on appeal, although Section 1508.25 is implicated in Appellants’ brief. *Defenders of Wildlife*, 733 F.3d at 1114. See generally Final Brief for Appellants, *supra* note 27.

⁴⁶ *Defenders of Wildlife*, 733 F.3d at 1108–09.

II. LEGAL BACKGROUND

The National Environmental Policy Act (NEPA) was enacted in 1969 to ensure that federal agencies would take a “hard look” at potentially harmful environmental effects of proposed agency projects and come to a “fully informed and well-considered decision” in light of those effects.⁴⁷ A critical part of the NEPA process is the disclosure of the “hard look” information to the public prior to rendering any decisions.⁴⁸ NEPA regulations provide detailed instructions to guide agencies in achieving this requirement.⁴⁹

To comply with NEPA and its policies, a federal agency must prepare an environmental impact statement (“EIS”) for any proposed action “significantly affecting the quality of the human environment.”⁵⁰ As part of this environmental review, an agency must first prepare a draft EIS and publish the draft in the Federal Register.⁵¹ Once public comments are considered and any reasonable alternative sites are reviewed, the agency publishes a final EIS.⁵² Finally, the agency issues a Record of Decision (“ROD”), announcing its determination regarding the project.⁵³ Once the ROD is issued, the agency is authorized to carry out the proposed action.⁵⁴

The Council on Environmental Quality (“CEQ”) promulgates compliance regulations as authorized by NEPA.⁵⁵ Pursuant to Section 1508.25 of the CEQ regulations, any EIS must cover the entire scope of a proposed action, considering all connected, cumulative, and similar actions in one document.⁵⁶ Pursuant to Section 1506.1(a) of these regulations, agency action cannot “[l]imit the

⁴⁷ *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978); *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976); *see* National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321–4347 (2012).

⁴⁸ 40 C.F.R. § 1500.1(b) (2013) (“NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.”).

⁴⁹ *Id.* § 1500.1(c) (“The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.”).

⁵⁰ 42 U.S.C. § 4332(c).

⁵¹ NEPA/EIS FACTSHEET, NAT’L OCEANIC & ATMOSPHERIC AGENCY (n.d.), available at <http://www.nmfs.noaa.gov/pr/pdfs/permits/nepa.pdf>, archived at <http://perma.cc/GHE6-PPRC>.

⁵² 40 C.F.R. § 1503.4.

⁵³ NEPA/EIS FACTSHEET, *supra* note 51.

⁵⁴ *See* 40 C.F.R. § 1506.1 (2013); *see also* *Bd. of Miss. Levee Comm’rs v. U.S. Envtl. Prot. Agency*, 674 F.3d 409, 419 (5th Cir. 2012) (“[ROD] is required to finalize an EIS under . . . [NEPA]”).

⁵⁵ *See generally* 42 U.S.C. § 4344 (2012) (listing duties and functions of the CEQ, such as “to review and appraise the various programs and activities of the Federal Government in light of the policy set forth in [NEPA]”).

⁵⁶ 40 C.F.R. § 1508.25; *see also* *Huntington v. Marsh*, 859 F.2d 1134, 1142 (2d Cir. 1988) (“CEQ guidelines provide that proposals should be included in the same EIS if they are ‘connected,’ that is, if they are ‘closely related’ such that they are ‘interdependent parts of a larger action and dependent on a larger action for their justification.’”).

choice of reasonable alternatives” before reaching a final decision in a published ROD.⁵⁷ These regulations ensure agencies will prepare a complete environmental analysis that results in a “hard look” at the environmental consequences of all proposed actions instead of segmenting environmental reviews and wasting resources.⁵⁸

Courts strike down environmental reviews where they perceive a violation of the CEQ regulations.⁵⁹ In *Huntington v. Marsh*, the Army Corps of Engineers (the “Corps”) prepared an EIS to lease a portion of the Long Island Sound for the disposal of waste.⁶⁰ The U.S. Court of Appeals for the Second Circuit affirmed the district court’s grant of summary judgment in favor of the plaintiffs, reasoning that the agency improperly segregated the leasing phase from the dump permit phase of the project, in violation of Section 1508.25.⁶¹ The court held the Corps’ segregation was “merely a variant of ‘segmentation’ which has been uniformly rejected by the courts.”⁶² The court required the agency to consider the cumulative impacts of the entire project, rather than its discrete stages, in order to properly adhere to the NEPA mandate.⁶³

In *Thomas v. Peterson*, the U.S. Court of Appeals for the Ninth Circuit found the U.S. Forest Service violated NEPA because the environmental review of its proposed action to build timber-harvest roads in the Nezperce National Forest failed to analyze the cumulative impacts of the entire proposed action.⁶⁴ The Forest Service had prepared an environmental assessment for the construction of the road, and deferred environmental review of timber sales for a future date.⁶⁵ By the time of trial, individual environmental assessments had been prepared for three timber sales—each resulting in a finding of no significant impact, and thus requiring no EIS.⁶⁶

Section 1508.25 requires “connected actions” to be considered together during a NEPA environmental impact analysis.⁶⁷ The court in *Thomas* found

⁵⁷ 40 C.F.R. § 1506.1(a).

⁵⁸ See *Huntington*, 859 F.2d at 1142–43 (“[Courts] do not take issue with particular conclusions reached by an agency after it has taken a ‘hard look’ at environmental factors involved.”); 40 C.F.R. §§ 1506.1(a), 1508.25 (2013).

⁵⁹ See, e.g., *Huntington*, 859 F.2d at 1142–43 (holding a federal agency in violation of NEPA regulations for segmenting review of a dump site designation and a dump permit); *Thomas v. Peterson*, 753 F.2d 754, 758–59 (9th Cir. 1985) (striking down separate environmental reviews of timber road construction and timber sales because they are “connected” and “cumulative” actions that must be considered together, pursuant to 40 C.F.R. § 1508.25).

⁶⁰ 859 F.2d at 1135–36.

⁶¹ *Id.* at 1142–43.

⁶² *Id.* The court further held, “[s]egmentation’ or ‘piecemealing’ occurs when an action is divided into component parts, each involving action with less significant environmental effects.” *Id.*

⁶³ *Id.*

⁶⁴ 753 F.2d at 761.

⁶⁵ *Id.* at 757.

⁶⁶ *Id.*

⁶⁷ 40 C.F.R. § 1508.25(a)(1) (2013).

the building of the road and the sale of timber constituted “connected actions” because “timber sales cannot proceed without the road, and the road would not be built but for the contemplated timber sales.”⁶⁸ The court reasoned that the “[I]ack of overall effort to document cumulative impacts could be having present and future detrimental effects” on the environment.⁶⁹ The Forest Service was thus found to be in violation of the NEPA rules against segmenting environmental review of the proposed action.⁷⁰

While NEPA balances the nation’s interest in the environment with the country’s economic needs, the Endangered Species Act (ESA) was enacted to “halt and reverse the trend toward species extinction, whatever the cost.”⁷¹ Whereas NEPA is only procedural, the ESA is both substantive and procedural.⁷² Section 7 of the ESA instructs federal agencies to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.”⁷³ Section 9 of the ESA prohibits the taking of an endangered or threatened species.⁷⁴

Pursuant to Section 7, a federal agency must prepare a biological assessment to determine whether it is necessary to initiate formal consultation with a reviewing agency.⁷⁵ The biological assessment discusses the potential effects of the agency action on a species and its habitat, and concludes whether or not the species, the habitat, or both, “are likely to be adversely affected by the action.”⁷⁶ If this is not likely, no consultation is needed.⁷⁷ If adverse effects are likely, a formal consultation is required and the reviewing agency must use

⁶⁸ *Thomas*, 753 F.2d at 758.

⁶⁹ *See id.* at 756, 759 (holding segmentation of environmental review of timber road construction and sales could have “detrimental effects” on the endangered Rocky Mountain Gray Wolf population).

⁷⁰ *Id.* at 761.

⁷¹ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

⁷² *Wilderness Watch v. Mainella*, 375 F.3d 1085, 1094 (11th Cir. 2004) (“NEPA imposes procedural requirements rather than substantive results.”); *Thomas*, 753 F.2d at 763 (“The ESA contains both substantive and procedural provisions. Substantively, the Act prohibits the taking or importation of endangered species . . . , and requires federal agencies to ensure that their actions are not ‘likely to jeopardize the continued existence of any endangered species.’”).

⁷³ Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(2) (2012).

⁷⁴ *Id.* § 1538(a)(1)(C). A “take” is broadly defined as: “[T]o harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* § 1532(19).

⁷⁵ *See id.* § 1536. The U.S. Fish and Wildlife Service and the National Marine Fisheries Service oversee the enforcement of the ESA; the NMFS is charged with enforcement regarding marine mammals, such as the North Atlantic right whale. *See FISHERIES SERV., NAT’L OCEANIC & ATMOSPHERIC ADMIN., THE ENDANGERED SPECIES ACT - PROTECTING MARINE RESOURCES* (n.d.), available at http://www.nmfs.noaa.gov/pr/pdfs/esa_factsheet.pdf, archived at <http://perma.cc/6V3X-GLD7>.

⁷⁶ 50 C.F.R. § 402.12(a) (2013).

⁷⁷ *Id.* § 402.14(b)(1).

“the best scientific and commercial data available” to provide the agency with guidance in the form of a biological opinion.⁷⁸

If, after consultation, the reviewing agency determines the action is likely to jeopardize the continued existence of a listed species, it must suggest “reasonable and prudent alternatives which . . . can be taken by the Federal agency or applicant in implementing the agency action.”⁷⁹ A biological opinion violates the ESA if it authorizes an initial stage of a project that would “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.”⁸⁰ Thus, a biological opinion that fails to analyze the entire scope of a project will not satisfy the ESA, because allowing such a segmented review would permit a multi-phase project to harm the environment without cognizing of how that harm will add up within the project as a whole.⁸¹

In 1982, Section 7 was amended to allow for an exception to the prohibition against a “take” in Section 9.⁸² When an action will not jeopardize a species, but “will result in taking of some species incidental to that action” the federal agency may avoid ESA liability by complying with additional requirements.⁸³ The reviewing agency must prepare an incidental take statement (“ITS”) as part of its biological opinion to instruct the federal agency on how to comply with the ESA.⁸⁴ If the proposed action is likely to result in a taking of a marine mammal protected under the ESA, the National Marine Fisheries Services (“NMFS”) may not prepare an ITS until the take has first been authorized under the Marine Mammal Protection Act (“MMPA”).⁸⁵ For a take to be authorized under the MMPA, it must be “incidental, but not intentional,” it must constitute “small numbers” of marine mammals, and it must be perpetrated by persons “engage[d] in a specified activity” during periods of “not more than five consecutive years.”⁸⁶

In *Conner v. Burford*, the U.S. Court of Appeals for the Ninth Circuit held that the reviewing agency violated the ESA by failing to analyze the entire scope of the agency action in its biological opinion, because “[t]o hold other-

⁷⁸ 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8).

⁷⁹ 16 U.S.C. § 1536(b)(3)(A) (2012).

⁸⁰ *Id.* § 1536(d).

⁸¹ See *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988); *Greenpeace v. Nat’l Marine Fisheries Serv.*, 80 F. Supp. 2d 1137, 1150 (D. Wa. 2000).

⁸² Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, §§ 4(a), 8(b), 96 Stat. 1417, 1426 (1982) (current version at 16 U.S.C. § 1536(b)(4)(C) (2012)).

⁸³ H.R. REP. NO. 97-567, at 26 (1982).

⁸⁴ 16 U.S.C. § 1536(b)(4)(C); see also 50 C.F.R. § 402.14(i) (2013) (requiring ITSs to include discussion of impact on species, reasonable and prudent measures necessary to mitigate impact, terms and conditions for compliance, and species disposal procedures).

⁸⁵ 16 U.S.C. § 1536(b)(4)(C) (2012).

⁸⁶ 16 U.S.C. § 1371(a)(5)(A). Once achieved, MMPA authorization is valid for five years. *Id.*

wise would eviscerate Congress' intent to 'give the benefit of the doubt to the species.'"⁸⁷ At issue in *Conner* was the U.S. Forest Service's formal consultation with the Fish and Wildlife Service ("FWS") regarding proposed oil and gas permit leasing in the Flathead and Gallatin National Forests in Montana.⁸⁸ The FWS prepared a biological opinion—reviewing the leasing phase of the proposed action—without discussion of the potential effects of future lessee activity.⁸⁹ The Ninth Circuit held the biological opinion must be coextensive in scope to comply with the ESA, and therefore, it was improper to exclude post-leasing activity.⁹⁰

In *Greenpeace v. National Marine Fisheries Services*, the U.S. District Court for the Western District of Washington similarly found that "[a] biological opinion which is not coextensive in scope with the identified agency action necessarily fails to consider important aspects of the problem and is, therefore, arbitrary and capricious."⁹¹ In *Greenpeace*, the North Pacific Fishery Management Council (the "Council") prepared several proposed Fishery Management Plans ("FMPs") for groundfish fisheries in the North Pacific Ocean.⁹² The Council then sought to comply with the ESA by initiating a formal consultation with NMFS.⁹³ Each biological opinion considered the impacts of a single FMP on the endangered Stellar sea lion.⁹⁴ The district court held that NMFS violated the ESA because the biological opinion failed to consider the cumulative impact of all related FMPs on the endangered sea lion.⁹⁵

The Administrative Procedure Act (APA) authorizes judicial review of final agency actions, such as the issuance of a ROD pursuant to NEPA or the preparation of a biological opinion mandated by the ESA.⁹⁶ The standard of review under the APA is whether the federal agency's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁹⁷ A reviewing court will find an agency action arbitrary and capricious when an agency, in rendering its decision, considers "factors which Congress has not intended to consider" or "entirely failed to consider an important aspect of the

⁸⁷ 848 F.2d 1441, 1454 (9th Cir. 1988).

⁸⁸ *Id.* at 1444.

⁸⁹ *Id.*

⁹⁰ *Id.* at 1457–58.

⁹¹ 80 F. Supp. 2d 1137, 1150 (D. Wa. 2000).

⁹² *Id.* at 1139.

⁹³ *Id.* at 1140–41.

⁹⁴ *Id.* at 1141.

⁹⁵ *Id.* at 1150.

⁹⁶ Administrative Procedure Act (APA), 5 U.S.C. § 704 (2012); see *Miccosukee Tribe of Indians of Fla. v. United States*, 566 F.3d 1257, 1264 (11th Cir. 2009).

⁹⁷ 5 U.S.C. § 706(2)(A).

problem.”⁹⁸ Short of such a finding, a court is unlikely to disturb an agency action.⁹⁹

III. ANALYSIS

In *Defenders of Wildlife v. United States Department of the Navy*, the U.S. Court of Appeals for the Eleventh Circuit held that the U.S. Navy (the “Navy”) and the National Marine Fisheries Services (“NMFS”) complied with all applicable requirements under the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and the Administrative Procedure Act (APA).¹⁰⁰ The Navy and the NMFS had fully analyzed both the construction and operation phases of the proposed Undersea Warfare Training Range (“USWTR”) in the environmental impact statement (“EIS”) and the biological opinion, and neither NEPA, nor the ESA require every phase of environmental review to be coextensive in scope.¹⁰¹

Specifically, the Navy did not violate Section 1506.1 of the Council on Environmental Quality (“CEQ”) regulations by entering into a contract for construction of the USWTR before issuing a Record of Decision (“ROD”) for its operation.¹⁰² Further, the NMFS had sufficiently analyzed the impacts from operation on the USWTR in its biological opinion, and therefore complied with the requirements of the ESA and the APA.¹⁰³ Finally, the NMFS did not violate the ESA or the APA by failing to issue an incidental take statement (“ITS”) detailing the incidental take of North Atlantic right whales that is expected to occur during operation of the USWTR.¹⁰⁴

Although the Eleventh Circuit’s decision aligns with the black letter law of NEPA and the ESA, an alternative decision in *Defenders of Wildlife* would have better served the environmental protection purposes of these statutes.¹⁰⁵

⁹⁸ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁹⁹ *Miccossukee Tribe of Indians*, 566 F.3d at 1264 (“We are not authorized to substitute our judgment for the agency’s as long as its conclusions are rational.”).

¹⁰⁰ See 733 F.3d 1106, 1116, 1121 (11th Cir. 2013). The court reasoned that NEPA required a complete EIS, but was silent regarding a Record of Decision. *Id.* Similarly, the ESA does not expressly prohibit segmentation of a biological opinion or incidental take statement. *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 1115; see 40 C.F.R. § 1506.1 (2013).

¹⁰³ *Defenders of Wildlife*, 733 F.3d at 1118.

¹⁰⁴ *Id.* at 1123–24.

¹⁰⁵ See *Huntington v. Marsh*, 859 F.2d 1134, 1141–43 (2d Cir. 1988) (finding a violation of NEPA for segmenting review of the Long Island dump site designation and permitting, noting that only “faithful adherence to NEPA’s mandate . . . will insure ‘excellent decisions’ regarding the future of the Sound”); *Thomas v. Peterson*, 753 F.2d 754, 761 (9th Cir. 1984) (“A central purpose of an EIS is to force the consideration of environmental impacts in the decisionmaking process . . . and the purpose cannot be fully served if consideration of the cumulative effects of successive, interdependent steps is delayed until the first step has already been taken.”); see also *Wilderness Watch v. Mainella*, 375 F.3d 1085, 1094 (11th Cir. 2004) (“NEPA essentially forces federal agencies to document the

The court could have followed the precedent of other circuits and struck down segmentation of environmental review as a violation of NEPA.¹⁰⁶ In *Huntington v. Marsh*, the U.S. Court of Appeals for the Second Circuit held the Army Corps of Engineers violated NEPA by preparing separate EISs for the lease-phase and post-lease phase of a proposed disposal dump permit program, because such “segmentation” violated NEPA’s mandate.¹⁰⁷ In *Thomas v. Peterson*, the Ninth Circuit found the U.S. Forest Service to be in violation of NEPA for segregating road construction from timber sales in its environmental review of a proposed timber harvest operation, holding that such a failure to analyze cumulative impacts of a project threatens “detrimental effects” to the environment, in violation of NEPA.¹⁰⁸

Unlike in *Huntington* and *Thomas*, the agencies in *Defenders of Wildlife* did not segment environmental review at the EIS phase.¹⁰⁹ The agencies did, however, separate the installation phase from the operation phase of the USWTR during the ROD process.¹¹⁰ Although the segmentation occurred later in the process than in either *Thomas* or *Huntington*, the procedure still arguably falls short of the complete environmental review mandated by NEPA.¹¹¹ As such, the Eleventh Circuit could have also followed Ninth and Second Circuit precedent to find that the Navy and the NMFS violated the ESA by preparing an incomplete biological opinion.¹¹² According to the Ninth Circuit, a reviewing agency may not prepare multiple biological opinions for a coextensive project.¹¹³

In *Defenders of Wildlife*, the biological opinion analyzed both the installation and the operation of the USWTR, but failed to include an ITS.¹¹⁴ The court could have concluded that the biological opinion was incomplete and

potential environmental impacts of significant decisions before they are made, thereby ensuring that environmental issues are considered by the agency.”)

¹⁰⁶ See *Huntington*, 859 F.2d at 1135–36; *Thomas*, 753 F.2d at 761.

¹⁰⁷ 859 F.2d at 1135–36, 1142–43.

¹⁰⁸ 753 F.2d at 759, 761.

¹⁰⁹ *Defenders of Wildlife v. U.S. Dep’t of the Navy*, 733 F.3d 1106, 1117 (11th Cir. 2013).

¹¹⁰ *Id.* at 1117.

¹¹¹ See *id.*; *Huntington*, 859 F.2d at 1135–36, 1142–43; *Thomas*, 753 F.2d at 759, 761.

¹¹² See *Conner v. Burford*, 848 F.2d 1441, 1457–58 (9th Cir. 1988); *Greenpeace v. Nat’l Marine Fisheries Serv.*, 80 F. Supp. 2d 1137, 1143–44 (D. Wa. 2000).

¹¹³ *Conner*, 848 F.2d at 1457–58 (finding the U.S. Fish and Wildlife Service (“FWS”) to be in violation of the ESA when it prepared a biological opinion for the U.S. Forest Service that analyzed only the lease-phase of the Forest Service’s proposed oil and gas permit program, because such segmentation would “eviscerate Congress’ intent” in enacting the ESA); *Greenpeace*, 80 F. Supp. 2d at 1143–44 (finding the NMFS in violation of the ESA because the biological opinion the NMFS prepared for the North Pacific Fishery Management Council failed to assess the cumulative impact of the multiple related groundfish fishery management plans).

¹¹⁴ 733 F.3d 1106, 1121–23 (11th Cir. 2013). The Eleventh Circuit refused to adopt the rule illustrated in *Conner* and *Greenpeace* that biological opinions must be coextensive in scope. *Id.* Nevertheless, the court noted that such a rule would be satisfied here, despite the absence of an ITS. *Id.*

thus not coextensive, and therefore violative of the ESA as arbitrary and capricious.¹¹⁵

The Eleventh Circuit should have found violations of NEPA and the ESA, because any segmentation of environmental review, even at its final stages, weakens its effectiveness.¹¹⁶ Each step in an environmental review—initial review, public comment, internal investigation, formal consultation, finalization, and publication—provides information to complete a “fully informed and well-considered decision.”¹¹⁷ Congress crafted explicit instructions for carrying out these steps so that reviewing agencies may advance the statutory purpose of environmental protection.¹¹⁸ Skipping a step reduces the amount of information collected and decreases the effectiveness of the environmental review.¹¹⁹

While the CEQ regulations are clear regarding the timing of many of these steps, NEPA does not explicitly require one ROD for one EIS.¹²⁰ In *Defenders of Wildlife*, the Navy acknowledged that it will be “collecting data after the issuance of [ROD] and the contract for construction that will ‘inform the Navy’s . . . NEPA analysis for training on the USWTR.’”¹²¹ Such information would enrich the record of the environmental review on which the Navy relies to make its decision.¹²²

It was within the Eleventh Circuit’s authority to hold that the biological opinion was arbitrary and capricious for failure to include an ITS.¹²³ Similar to the CEQ regulations, the ESA regulations do not explicitly reject the NMFS’s decision to defer preparation of an ITS.¹²⁴ The ITS, however, is critical to

¹¹⁵ See *Comer*, 848 F.2d at 1457–58; *Greenpeace*, 80 F. Supp. 2d at 1143–44.

¹¹⁶ See *Comer*, 848 F.2d at 1457–58; *Greenpeace*, 80 F. Supp. 2d at 1143–44.

¹¹⁷ 40 C.F.R. § 1500.1(c) (2013) (“The NEPA process is intended to help . . . make decisions that are based on understanding of environmental consequences These regulations provide the direction to achieve this purpose.”); see also *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978).

¹¹⁸ See 40 C.F.R. § 1500.1(c).

¹¹⁹ See *id.*; *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 558 (“NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural . . . to insure a fully informed and well-considered decision.”).

¹²⁰ See *Sensible Traffic Alts. & Res., Ltd. v. Fed. Transit Admin. of U.S. Dep’t of Transp.*, 307 F. Supp. 2d 1149, 1166 (D. Haw. 2004) (holding there is no “categorical bar” on issuing a ROD authorizing one phase of a two-phase project).

¹²¹ Final Brief for Appellants at 19, *Defenders of Wildlife v. U.S. Navy*, 733 F.3d 1106 (9th Cir. 2013) (No. 12-15680).

¹²² See 40 C.F.R. § 1505.2 (requiring a ROD to include the decision made and discussion of all alternatives considered and whether practical mitigation practices will be adopted, and if not, why not).

¹²³ See *Greenpeace*, 80 F. Supp. 2d at 1150 (“A biological opinion which is not coextensive in scope with the identified agency action necessarily fails to consider important aspects of the problem and is, therefore, arbitrary and capricious.”).

¹²⁴ See *Defenders of Wildlife v. U.S. Dep’t of the Navy*, 733 F.3d 1106, 1121–23 (11th Cir. 2013); see also *supra* notes 55–58 and accompanying text.

completing a biological opinion, which is, in turn, relied upon by the Navy to make important decisions.¹²⁵ Even though the ESA framework is silent regarding such a particular instance, it is apparent that the biological opinion regarding the USWTR is incomplete.¹²⁶ The Navy specifically states that it will reinitiate consultation with NMFS and seek MMPA authorization and an ITS closer in time to operations.¹²⁷ This supplemental review should be performed prior to authorization of the first phase of the project, prior to commitment of \$127 million, and in a public forum.¹²⁸

In *Defenders of Wildlife*, although the Eleventh Circuit correctly applied precedent in holding that the Navy and the NMFS did not violate the black-letter law of NEPA or the ESA,¹²⁹ such segmentation of environmental review frustrates the purpose of the environmental statutory scheme.¹³⁰ The arbitrary and capricious standard under the APA is “exceedingly deferential” to agency decision-making.¹³¹ Although such a deferential standard of review is difficult to overcome, the Eleventh Circuit was free to follow the trend of other circuits by rejecting an agency failure to complete a comprehensive environmental analysis as violative of the statutory requirements.¹³²

CONCLUSION

The decision in *Defenders of Wildlife v. United States Department of the Navy* illustrates a textual shortcoming in the environmental statutory scheme comprised within the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA). Although the Eleventh Circuit properly applied the black letter law, the outcome does not further the statutory purpose of either law. Environmental review requirements should not allow for any seg-

¹²⁵ See *Bd. of Miss. Levee Comm'rs v. U.S. Envtl. Prot. Agency*, 674 F.3d 409, 419 (5th Cir. 2012) (“[ROD] is required to finalize an EIS under [NEPA].”).

¹²⁶ 50 C.F.R. § 402.14(i) (2013) (requiring a ITS to include discussion of impact on species, reasonable and prudent measures necessary to mitigate impact, terms and conditions for compliance, and species disposal procedures).

¹²⁷ *Defenders of Wildlife*, 733 F.3d at 1123.

¹²⁸ See *id.* at 1116; *Conner*, 848 F.2d at 1457–58; *Greenpeace*, 80 F. Supp. 2d at 1143–44.

¹²⁹ See *Defenders of Wildlife*, 733 F.3d at 1118, 1121. This is true because segmentation occurred later in the statutorily mandated review process than in precedential cases, and further because it allows an agency to stop short of a complete environmental analysis. *Id.*

¹³⁰ See *Conner*, 848 F.2d at 1454 (“FWS violated the ESA by failing to . . . prepare a comprehensive biological opinion considering all stages of the agency action, and thus failing to adequately assess whether the agency action was likely to jeopardize the continued existence of any threatened or endangered species.”); *Greenpeace*, 80 F. Supp. 2d at 1150.

¹³¹ *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 541–42 (11th Cir. 1996).

¹³² See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) (“The plain intent of Congress in enacting the [ESA] was to halt and reverse the trend toward species extinction, whatever the cost.”); *Conner*, 848 F.2d at 1454 (“To hold otherwise would eviscerate Congress’ intent to ‘give the benefit of the doubt to the species.’”).

mented review of discreet parts of a reviewed federal action because segmentation detracts from the environmental protection goals of the statutes.

The textual shortcoming led to a particularly distressing result in *Defenders of Wildlife*, in light of the particularly precarious status of the North Atlantic right whale. By accepting such a compartmentalization of environmental review, the court risks allowing federal agencies to gradually destroy an endangered species, which is surely repugnant to both the ESA and NEPA. As acknowledged by the Ninth Circuit in *National Wildlife Federation v. National Marine Fisheries Service*, however, “so long as each step on the path to destruction is sufficiently modest,” an agency can satisfy federal law at the expense of the environment. As such, the court’s decision is not inherently wrong. Given the high level of deference courts afford administrative agencies, the furthering protection of delicate endangered species is left to Congress, which could to clarify its intent, or to the agencies themselves, who could put forth a stronger and more deliberate effort to thoroughly consider the environmental implications of their actions before they act.