No. 15-367

In the Supreme Court of the United States

BEAR VALLEY MUTUAL WATER COMPANY, ET AL.,
PETITIONERS

v.

SALLY JEWELL, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, applies to a federal agency's determination of the critical habitat for a threatened or endangered species under the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*

2. Whether the general policy statement in Section 2(c)(2) of the ESA, 16 U.S.C. 1531(c)(2), provides operative standards apart from the standards set forth in Section 4 of the ESA, 16 U.S.C. 1533.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-38) is reported at 790 F.3d 977. The opinion of the district court (Pet. App. 42-133) is not published in the *Federal Supplement*, but is available at 2012 WL 5353353.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 2015. The petition for a writ of certiorari was filed on September 22, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners challenged the decision of the Secretary of the United States Department of the Interior—acting through the United States Fish and Wildlife Service (the Service) and pursuant to the Endangered Species Act of 1973 (ESA or Act), 16 U.S.C. 1531

et seq.—to designate portions of a southern California watershed as critical habitat for the Santa Ana Sucker, a fish that the Service had previously determined was a threatened species for purposes of the ESA. Pet. App. 4-5. Petitioners argued, among other things, that the designation created water-resource issues that Section 2(c)(2) of the ESA required the Service to cooperate with them to resolve, and which must be analyzed in a document prepared pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq*. Pet. App. 5. The courts below rejected those arguments, holding that Section 2(c)(2) was a non-operative policy statement implemented only through the substantive standards in Section 4 of the ESA and that NEPA's requirements do not apply to designations of critical habitat under the ESA. *Id.* at 18-22, 38, 61-68, 132-33.

1. a. Under Section 4 of the ESA, when the Secretary[1] (acting here through the Service) lists a species as threatened or endangered, she is generally required to designate the species' critical habitat at the same time. 16 U.S.C. 1533(a)(3). The ESA defines critical habitat as "specific areas within the geographical area occupied by the species * * * on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. 1532(5)(A)(i)-(ii). Critical habitat is

[1] As used in the ESA, the term "Secretary" refers either to the Secretary of the Interior or to the Secretary of Commerce, depending on the wildlife species involved. 16 U.S.C. 1532(15). In this brief, the term refers to the Secretary of the Interior, as she was responsible for listing the Santa Ana Sucker as threatened under the ESA.

further defined as those "specific areas outside the geographical area occupied by the species * * * , upon a determination by the Secretary that such areas are essential for the conservation of the species." 16 U.S.C. 1532(5)(A)(ii). The ESA provides that, in determining critical habitat, the Secretary must rely on the "best scientific data available" and take into "consideration the economic impact, * * * and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. 1533(b)(2).

The ESA also dictates detailed procedural obligations the Secretary must meet when designating critical habitat. For example, she must publish notice of the proposed designation in the *Federal Register*; give actual notice of the proposal to, and invite comments from, each State and county in which the species is believed to occur; publish a summary of the proposal in local newspapers; and hold a public hearing on the proposal if anyone requests such a hearing. 16 U.S.C. 1533(b)(5).

Once an area is designated as critical habitat, Section 7(a)(2) of the ESA, 16 U.S.C. 1536(a)(2), governs any "action authorized, funded, or carried out by" any federal agency that might destroy or adversely modify such habitat. Specifically, in addition to requiring that federal agencies not take actions that are likely to jeopardize the continued existence of threatened or endangered species, Section 7(a)(2) provides that federal agencies shall, in consultation with the Secretary, insure that their actions are not likely to "result in the destruction or adverse modification of [designated critical] habitat." *Ibid.* If consultation on the action with the Secretary reveals that the agency action is likely to destroy or adversely modify desig-

nated critical habitat, the Secretary will recommend reasonable and prudent alternatives to the action, if any are available. 16 U.S.C. 1536(b)(3)(A).

b. NEPA's dominant purpose is to ensure that federal agencies consider the environmental consequences of a proposed action in advance of a final decision to take such action. See *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350-351 (1989); *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 558 (1978). NEPA imposes only procedural requirements and does not dictate a substantive environmental result. If an agency action is subject to NEPA and the proposed action will significantly affect "the quality of the human environment," NEPA generally requires the agency to prepare and make available to the public a "detailed statement" known as an environmental impact statement (EIS). 42 U.S.C. 4332(2)(C); see also *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 372, 375-376, 377 n.23, 378 (1989) (EIS required if proposed action "would be environmentally 'significant'"). An EIS describes, among other things, the purpose of and need for the proposed action, the alternatives to the proposed action, the affected physical environment, and the likely physical environmental consequences of available alternatives. 42 U.S.C. 4332(2)(C); 40 C.F.R. 1502.10.

Federal agencies receive guidance in their compliance with NEPA from the Council on Environmental Quality (CEQ). Established by NEPA with the authority to issue regulations interpreting that statute, see *Andrus* v. *Sierra Club*, 442 U.S. 347, 356-357 (1979), CEQ has promulgated regulations implementing NEPA, 40 C.F.R. 1500 *et seq.*, including proce-

dures for involving the public in the process of preparing an EIS.

CEQ regulations require that an agency draft an EIS in stages.[2] The first stage requires an agency to publish in the *Federal Register* a notice of intent to prepare and consider an EIS. 40 C.F.R. 1501.7, 1508.22. The agency must then engage in a "scoping" process to identify the significant environmental issues related to the proposed action. 40 C.F.R. 1501.7. During the scoping process, the agency must, among other things, invite participation and input from the public as well as other federal, state, and local agencies. *Ibid.* After determining the scope of the issues to be addressed, the agency then prepares an initial draft EIS, which it must make available to the public and other agencies for comment. 40 C.F.R. 1502.9(a), 1503.1. The draft must analyze possible alternative actions that might be taken. 40 C.F.R. 1502.14, 1502.15, 1502.16. After receiving public comment, the agency prepares a final EIS that addresses any public or agency comments it received on its draft. 40 C.F.R. 1502.9(b), 1503.4. The agency then selects one alternative to implement from within the range of alternatives analyzed in the final EIS and prepares a "record of decision." The record of decision explains, in es-

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[2] CEQ regulations allow agencies first to prepare an Environmental Assessment (EA) to assess whether an action is likely to have a significant impact on the human environment and thus whether an EIS is needed. See 40 C.F.R. 1501.4(b). An EA is a concise public document that briefly describes the proposal, examines alternatives, considers environmental impacts, and provides a list of individuals and agencies consulted. See 40 C.F.R. 1508.9. If the agency makes a finding of no significant impact after analyzing its proposed action's potential effects in an EA, NEPA does not require the agency to prepare an EIS. See 40 C.F.R. 1508.13.

sence, why the agency selected the chosen alternative and "whether all practical means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not." 40 C.F.R. 1505.2.

2. The Santa Ana Sucker (*Catostomus santaanae*) —a small fish native to several rivers and streams in southern California—has been listed as "threatened" under the ESA. Pet. App. 4-5. When proposing to list the Sucker as "threatened" under the Act, the Service identified the primary threat to the Sucker as the ongoing destruction of its natural habitat from, among other things, "water diversions, extreme alteration of stream channels, changes in the watershed that result in erosion and debris torrents, [and] pollution." 64 Fed. Reg. 3915, 3917 (Jan. 26, 1999). As of 2000, the Service estimated that the Sucker had been eliminated from about 75% of its former native range. Pet. App. 9.

On December 14, 2010, the Service issued a final rule revising the critical habitat for the Sucker by designating 9331 acres of critical habitat in three southern California watersheds. Pet. App. 14. This rule was the culmination of a series of proposed and final rules issued in 2004, 2005, and 2009 that designated and then revised critical habitat for the Sucker. *Id.* at 8-15.

Prior to issuing the 2010 final rule, the Service worked with state and local agencies to protect the fish and conserve its habitat. Pet. App. 7-8. The Service twice published its proposed revisions to Sucker critical habitat in the *Federal Register* and invited public comment, and held two public hearings. *Id.* at 13-14. The Service contacted "appropriate Federal,

State, and local agencies; scientific organizations; and other interested parties and invited them to comment on the proposed rule." *Id.* at 14 (quoting 75 Fed. Reg. 77,989 (Dec. 14, 2010)). It also subjected its rule to peer review, responded to several Congressional inquiries, and met personally with various stakeholders, including petitioners. *Ibid.* (citing 75 Fed. Reg. at 77,989-77,994).

The Service reviewed comments from the State of California and local agencies, including petitioners, and responded to them in its final rule. Pet. App. 14 One commenter suggested that the Service must prepare an EIS under NEPA. 75 Fed. Reg. at 78,001. The Service responded that the Secretary's determinations under Section 4 of the ESA are not subject to NEPA, *ibid.*, relying on a long-standing policy first announced by the Secretary in 1983 and upheld by the Ninth Circuit in 1995, *id.* at 78,009 (citing 48 Fed. Reg. 49,244 (Oct. 25, 1983), and *Douglas Cnty.* v. *Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied, 516 U.S. 1042 (1996)). In adopting that policy, the Secretary had "accepted CEQ's judgment that Section 4 listing actions are exempt from NEPA review 'as a matter of law.'" 48 Fed. Reg. at 49,244. The Secretary based the policy on the fact that all 130 environmental analyses prepared between 1973 and 1983 resulted in a decision not to prepare an EIS, and on the Sixth Circuit's holding in *Pacific Legal Foundation* v. *Andrus*, 657 F.2d 829 (1981), that listing decisions under Section 4 of the ESA are not subject to NEPA. 48 Fed. Reg. at 49,244-49,245.

3. Petitioners brought this suit for declaratory and injunctive relief to challenge the 2010 final rule designating critical habitat for the Sucker. Pet App. 15. As

relevant here, petitioners contend that, in issuing the final rule, the Service violated NEPA by failing to prepare an EIS and violated Section 2(c)(2) of the ESA by failing to cooperate with petitioners to "resolve" their water-resource concerns. *Ibid.*

The district court rejected petitioners' claims, concluding that NEPA does not apply to critical-habitat designations, Pet. App. 132-133, and that the policy statement in Section 2(c)(2) of the ESA does not impose any substantive or procedural requirements on the Service's designation of critical habitat for the Sucker, *id.* at 61-68.

4. The court of appeals affirmed. Pet. App. 1-38. The court of appeals concluded that petitioners' NEPA argument was "foreclosed by the controlling law of this Circuit, which holds 'that * * * NEPA does not apply to the designation of critical habitat.'" *Id.* at 38 (quoting *Douglas Cnty.*, 48 F.3d at 1502). In *Douglas County* v. *Babbit*, *supra*, the Ninth Circuit held that "NEPA does not apply to the Secretary's decision to designate a [critical] habitat for an endangered or threatened species under the ESA because (1) Congress intended that the ESA critical-habitat procedures displace the NEPA requirements, (2) NEPA does not apply to actions that do not change the physical environment, and (3) to apply NEPA to the ESA would further the purposes of neither statute." 48 F.3d at 1507-1508.

The court of appeals also affirmed the district court's holding that Section 2(c)(2) of the ESA does not create any independent basis for a cause of action under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* Pet. App. 19-22. Relying on the ESA's plain text indicating that Section 2(c)(2) is a

statement of "policy," the court held that "Section 2(c)(2) is a non-operative statement of policy that 'does not create an enforceable mandate for some additional procedural step.'" *Id.* at 19 (quoting *id.* at 68). The court noted that "the policy goals embodied in Section 2(c)(2) are implemented through the substantive and procedural requirements set forth in Section 4," *id.* at 21, requirements all parties agreed that the Secretary, acting through the Service, had followed when designating critical habitat for the Sucker. Although the court of appeals found congressional intent "clear" from the ESA's text and structure, the court noted that the ESA's legislative history also supports the view that Section 2(c)(2) was a non-operative policy statement, as that history explains that Section 2(c)(2) was "not intended to and does not change the substantive or procedural requirements of the Act." *Id.* at 20 (quoting S. Rep. No. 418, 97th Cong., 2d Sess. 25-26 (1982) (Senate Report)).[3]

ARGUMENT

Petitioners ask this Court to review the court of appeals' rejection of their arguments that NEPA applies to critical-habitat designations and that Section 2(c)(2) of the ESA created an independent, judicially enforceable requirement that the Service cooperate with petitioners to resolve their water-resource concerns before proposing a critical-habitat designation for the Sucker. Further review of the first question is not warranted because the court of appeals correctly rejected it and because any disagreement

[3] The court of appeals also rejected petitioners' other challenges to the Service's designation of certain lands as critical habitat. Pet. App. 24-37.

among the courts of appeals on that question is limited and not yet ripe for this Court's intervention. Further review of the second question is also unwarranted because the court of appeals correctly rejected it and that decision does not conflict with any decision of this Court or of any other court of appeals.

1. a. The court of appeals correctly held that the requirements of NEPA do not apply to the Service's designation of critical habitat pursuant to the ESA. That holding is consistent with the text and purposes of NEPA and with this Court's decisions interpreting NEPA.

This Court has previously concluded that the requirements of NEPA require consideration by a federal agency of its proposed action's effects on the physical environment. *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766, 773-775 (1983).[4] The Ninth Circuit correctly held in *Douglas*

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[4] Consistent with *Metropolitan Edison*, courts of appeals have agreed that NEPA does not apply to decisions that do not change the physical status quo. See *Dallas* v. *Hall*, 562 F.3d 712, 721-723 (5th Cir. 2009) (holding that setting an acquisition boundary for a wildlife refuge did not alter the physical environment and therefore did not require preparation of an EIS), cert. denied, 559 U.S. 935 (2010); *Utah* v. *Babbitt*, 137 F.3d 1193, 1214 (10th Cir. 1998) (holding that NEPA did not apply at the inventory stage until the agency took further action (based on the inventory) that would result in physical effects); *National Wildlife Fed'n* v. *Espy,* 45 F.3d 1337, 1343 (9th Cir. 1995) ("[W]here a proposed federal action would not change the status quo, * * * an EIS is not necessary.") (quoting *Upper Snake River Chapter of Trout Unlimited* v. *Hodel*, 921 F.2d 232, 235 (9th Cir. 1990)); *Sabine River Auth.* v. *U.S. Dep't of the Interior*, 951 F.2d 669, 679 (5th Cir.) ("[T]he acquisition of the [negative conservation] easement by [FWS] did not effectuate any change to the environment which would otherwise trigger the need to prepare an EIS."), cert. denied, 506 U.S. 823 (1992);

County v. *Babbitt*, 48 F.3d 1495, 1505-1506 (1995), cert. denied, 516 U.S. 1042 (1996), and reaffirmed in this case, Pet. App. 38, that NEPA does not apply to the designation of critical habitat pursuant to ESA Section 4 because the designation of critical habitat has no effect on the physical environment. Relying on this Court's decision in *Metropolitan Edison*, the Ninth Circuit explained that, because "the purpose of NEPA is to protect the *physical* environment," "an EIS is unnecessary when the action at issue does not alter the natural, untouched physical environment at all." *Douglas Cnty.*, 48 F.3d at 1505. The court further explained that, because the designation of critical habit "maintain[s] the environmental status quo," such a designation does not require preparation of an EIS pursuant to NEPA. *Id.* at 1506.

The Ninth Circuit's holding and reasoning are correct. A critical-habitat designation has no immediate physical effect on the natural world, see *Douglas Cnty.*, 48 F.3d at 1505-1506, and does not affect private property or water rights, see 75 Fed. Reg. at 77,964. Nor does such a designation create wildlife preserves or require private landowners to restore, recover, or enhance their properties for the species' benefit. *Ibid.* A critical-habitat designation is simply a depiction on a map and a description in the *Federal Register* of the geographical areas that qualify as critical habitat for a particular listed species. See

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Committee for Auto Responsibility v. *Solomon*, 603 F.2d 992, 1003 (D.C. Cir. 1979) (requiring an agency to complete an EIS where its action does not change the physical status quo "would trivialize NEPA's EIS requirement and diminish its utility in providing useful environmental analysis for major federal actions that truly affect the environment"), cert. denied, 445 U.S. 915 (1980).

16 U.S.C. 1532(5)(A); 50 C.F.R. 424.12(c). The acts of merely issuing a map and publicly describing why a geographical area qualifies as critical habitat do not result in any physical environmental effects at all.

A critical-habitat designation also does not authorize any agency to take any action that will affect the physical environment. On the contrary, such a designation prospectively requires federal agencies contemplating certain actions to consult with the Service under Section 7 of the ESA to "insure" that particular actions they authorize, fund, or carry out are "not likely to * * * result in the destruction or adverse modification of [critical habitat]." 16 U.S.C. 1536(a)(2); 50 C.F.R. 402.14(a); 75 Fed. Reg. at 77,964. The Section-7 consultation process may result in the Service's recommending "reasonable and prudent alternatives" to a federal agency's proposed action in order to avoid the destruction or adverse modification of critical habitat. 16 U.S.C. 1536(a)(2), 1536(b)(3) and (4); 75 Fed. Reg. at 77,964. And, of course, when an agency considers an action that will affect the physical environment, it must conduct NEPA analysis as to *that* action.

It is true that a critical-habitat designation may eventually affect a future federal action (because, *e.g.*, the future Section-7 consultation process may lead an agency to adopt a more species-protective alternative than the action originally proposed). But the chance (or even likelihood) that a designation will affect a yet-to-be-proposed federal action does not require NEPA analysis with respect to the designation itself, which has no contemporaneous effect on the environment. This Court held in *Kleppe* v. *Sierra Club*, 427 U.S. 390 (1976), that NEPA requires preparation of an EIS

only "in the event of a proposed action," but does not require such analysis for "contemplated actions." *Id.* at 401, 410 n.20. As the Court explained, NEPA "speaks solely in terms of *proposed* actions; it does not require an agency to consider the possible environmental impacts of less imminent actions." *Id.* at 410 n.20. The Court explained that, as a practical matter, there is no "factual predicate" for an EIS absent a proposal for action. *Id.* at 402. When no specific action is proposed, the Court noted, "it is impossible to predict" the future activity and "thus impossible to analyze the environmental consequences." *Ibid.*

The reasoning of *Kleppe* applies with equal force to the designation of critical habitat. Requiring NEPA analysis at the designation stage would be unduly speculative and would be of limited public utility, as it would require the Service to anticipate what actions other federal agencies *might* take and how those other agencies *might* react to the Section-7 consultation requirements. See *Pacific Legal Foundation* v. *Andrus*, 657 F.2d 829, 836 (6th Cir. 1981). At the time of designation, the Service could not reliably predict, for NEPA purposes, how other agencies would act or what the physical effects of other agencies' yet-to-be-proposed actions might be.[5] Cf. 40 C.F.R. 1508.8

[5] See, *e.g.*, *Safeguarding the Historic Hanscom Area's Irreplaceable Resources, Inc.* v. *FAA*, 651 F.3d 202, 218 (1st Cir. 2011) ("For NEPA purposes, an agency need not speculate about the possible effects of future actions that may or may not ensue."); *Wilderness Workshop* v. *United States Bureau of Land Mgmt.*, 531 F.3d at 1228-1231 (10th Cir. 2008) (holding that NEPA did not require the agency to analyze the impacts of future actions that were "speculative" or not "imminent" connected actions); *Sierra Club* v. *Lujan*, 949 F.2d 362, 368 (10th Cir. 1991) ("NEPA does not require an agency to consider the environmental effects that

(NEPA analysis limited to "reasonably foreseeable" effects).

Petitioners err in suggesting (Pet. 22) that there is no "factual basis" for concluding that the designation at issue here will not itself affect the physical environment. By its very nature, a critical-habitat designation has no immediate effects on the physical world —as reflected in petitioners' own speculative description of the alleged effects that "may" or "could" "effectively" result from the designation. Pet. 22-23. By itself, the designation will not cause any water to be reallocated, will not impede any flood-control efforts, and will not yield any other physical effects. The types of physical effects petitioners fear can occur only if, at some unknown future date, another federal agency proposes to take a different action that will affect designated critical habitat. It is impossible to know whether such a hypothetical major federal action would, *e.g.*, reallocate water or impede flood control—and no such action could proceed without the appropriate NEPA analysis of *that* proposed action.

Petitioners purport to rely (Pet. 22) on "uncontradicted record evidence" demonstrating that "significant impacts to the human environment may result" from the designation. The "evidence" on which petitioners rely for such speculation is the economic analysis that accompanied the designation and that, by design, contemplated best-case and worst-case scenarios for incremental costs, assuming the "highly unlikely" scenario "that rights to water * * * will be completely eliminated as a result of the critical habitat designation." Pet. App. 138. That analysis expressly

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speculative or hypothetical projects might have on a proposed project.").

states that such contemplated losses were speculative, noting that "specific project modifications that will be associated with critical habitat for the sucker are unknown" and that "a high probability of critical habitat impacts does not necessarily mean that impacts to water access are likely." C.A. E.R. 677; Pet. App. 138 ("In our experience it is highly unlikely that Federal projects would be halted completely as a result of the critical habitat designation."). In any case, before a federal agency could undertake any action that might have such an effect, it would have to analyze the direct, indirect, and cumulative effects of such action as mandated by NEPA and the ESA. Petitioners do not identify any potential information that could be gained by requiring NEPA analysis of a critical-habitat designation long before an agency proposes any action that could affect the physical environment. As discussed above, a mere designation has no effect on the physical environment. In an analogous context, the Sixth Circuit has expressed the view that demanding NEPA analysis of a decision to list a species as endangered is simply "an obstructionist tactic to prevent environment-enhancing action." *Pacific Legal Foundation*, 657 F.2d at 838, cited in *Douglas Cnty.*, 48 F.3d at 1508; see also *Drakes Bay Oyster Co.* v. *Jewell*, 747 F.3d 1073, 1090 (9th Cir.), cert. denied, 134 S. Ct. 2877 (2014).

b. As petitioners note (Pet. 11), the only court of appeals to hold that NEPA applies to critical-habitat designations is the Tenth Circuit in its now almost 20 year-old decision in *Catron County Board of Commissioners, New Mexico* v. *United States Fish & Wildlife Service*, 75 F.3d 1429, 1435-1439 (1996). Although the Tenth Circuit in that decision expressed disagreement

with the Ninth Circuit's decision in *Douglas County*, it did not address this Court's decisions in *Metropolitan Edison* and *Kleppe*. See *Catron County*, 75 F.3d at 1436. The Tenth Circuit wrongly assumed, without record citation and seemingly based on a misunderstanding of how designations work, that a critical-habitat designation itself causes "immediate" physical effects in the natural world. *Ibid.* This Court's intervention to resolve the disagreement between *Catron County* and *Douglas County* is not warranted at this point, however, because the Court would benefit from further percolation of this issue in the courts of appeals, including additional analysis of the issue based on a correct understanding of the actual effects of a critical-habitat designation.

Moreover, petitioners significantly overstate the significance of the disagreement between the Ninth and Tenth Circuits on the first question presented. Petitioners' assertion (Pet. 13) that the Ninth Circuit's decision in *Douglas County* "is so broad that it effectively exempts from NEPA compliance all federal actions subject to the notice and comment rulemaking procedures of the Administrative Procedure Act," 5 U.S.C. 551 *et seq.*, finds no support in the court of appeals' decision. The Ninth Circuit's decisions in *Douglas County* and in this case turned on the fact that a critical-habitat designation does not itself affect the physical environment and on a statute-specific analysis of the interaction between NEPA and the ESA. In making that comparison, the court in *Douglas County* explained that "the procedural requirements of the ESA, combined with review of decisions possible under the Administrative Procedure Act, are adequate safeguards" to ensure that the purposes of

NEPA are served when the Service designates critical habitat. 48 F.3d at 1503-1505. The implication of that reasoning is *not* that any government action subject to the APA is exempt from NEPA. Indeed, petitioners rely (Pet. 13-14) on a district court decision that has declined to extend the holding of *Douglas County* to a different provision of the ESA. See *In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litig.*, 818 F. Supp. 2d 214, 236-237 (D.D.C. 2011). And, in the 20 years since *Douglas County* was decided, the holding of that case has not been extended to any other statute.

2. In what petitioners admit (Pet. 25) is "a case of first impression," petitioners ask this Court to review the court of appeals' rejection of their argument that the Service violated Section 2(c)(2) of the ESA when it revised Sucker critical habitat without sufficiently cooperating with petitioners to resolve all water-resource issues of concern to them. Review of that argument is not warranted because the court of appeals correctly rejected it and the court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals.

a. Section 2 of the ESA is titled "Congressional findings and declaration of purposes and policy." 16 U.S.C. 1531. It states in part: "(c) Policy * * * (2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species." *Ibid.* By its own terms, Section 2(c)(2) states a general policy; it does not create any substantive rights, impose any specific duties on any government agency, or provide

any standards by which to assess whether an agency has fulfilled the policy goal of cooperation.[6]

Instead, Congress implemented that policy goal of cooperation through Section 4 of the ESA, which sets forth the procedures for providing notice to local and state agencies. See 16 U.S.C. 1533(a)(3), (b)(5), and (i). For example, Section 4 instructs the Service to "give actual notice of the proposed regulation * * * to the State agency in each State in which the species is believed to occur." 16 U.S.C. 1533(b)(5)(A)(ii). Section 4 further instructs the Service to submit to a State agency a "written justification" for any rule issued in conflict with the State agencies' comments. 16 U.S.C. 1533(i). Those specific commands implement the policy goal of cooperation and represent the full extent of agencies' specific duties with respect to that policy goal.

Petitioners do not allege, nor could they allege, that the Service failed to comply with the procedural requirements of Section 4. The Service has worked closely with the State of California and its local agencies on Sucker-related issues for years, and its revisions to the Sucker's critical habitat were the subject of full public notice and comment. Pet. App. 7-8, 14. Petitioners instead contend (Pet. 31-34) that Section 2(c)(2) imposes an additional, implicit obligation on the

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[6] When Congress added Section 2(c)(2) in 1982, it was clear that Section 2(c)(2) was a "statement of congressional policy." Senate Report 25-26. Although Congress also discussed that the statement's purpose was to "recognize the individual States' interest and, very often, the regional interest with respect to water allocation," Congress simultaneously explained that the statement of policy was "not intended to and does not change the substantive or procedural requirements of the Act." *Ibid.*

Service to formally consult with local agencies *before* issuing a draft designation. Nothing in Section 2(c)(2) supports that contention. At bottom, petitioners' real complaint is that water-resource issues they anticipate could arise in the future have not been resolved in their favor in advance. That interpretation of Section 2(c)(2) finds no support in the text (or anywhere else in the ESA). See 16 U.S.C. 1531(c)(2) ("It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species."). Indeed, if adopted, petitioners' interpretation would give state or local agencies with water-resource concerns the power to indefinitely hold up the Service's efforts to designate critical habitat (as required by the ESA) by perpetuating "unresolved" water-resource concerns.

The court of appeals correctly recognized that petitioners' interpretation is untenable. Courts must interpret a statute in a manner that is consistent with the statute's overall purpose. See *United States Nat'l Bank* v. *Independent Ins. Agents of Am.*, 508 U.S. 439, 455 (1993) ("[I]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.") (citation omitted). Granting state and local governments such a veto power would significantly undermine the ESA's purpose of conserving listed species. See *United States* v. *Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126, 1134 (E.D. Cal. 1992) (rejecting argument that Section 2(c)(2) meant

that "state water rights should prevail over restrictions set forth in the [ESA]").[7]

b. Petitioners err in contending (Pet. 26-28) that the court of appeals' decision conflicts with decisions of this Court.

Petitioners argue (Pet. 28) that this Court in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971), entertained challenges brought pursuant to statutory provisions that were mere "declarations of policy." Petitioners are incorrect. Although both statutes at issue in that case contained statements of policy, those statements were followed by substantive standards and specific mandates that implemented the policy statements. *Id.* at 404-405 nn.2-3. The Court evaluated the plaintiffs' challenge in light of those substantive standards rather than the general statements of policy. See *id.* at 409-420. The court of appeals in the instant case endorsed the same approach by recognizing that the policy statement in Section 2(c)(2) of the ESA is not itself operative and enforceable but is instead implemented through other provisions of the statute. Of course, a court is free to examine a statutory statement of policy as a tool in statuto-

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[7] The court of appeals was correct in declining to recognize an independent enforceable duty under Section 2(c)(2) for an additional reason: because that provision lacks any substantive standard by which to assess the adequacy of cooperation, the Service's compliance with Section 2(c)(2) is committed to agency discretion by law and is therefore not reviewable under the APA, 5 U.S.C. 701(a)(2). An agency action is committed to agency discretion by law where a "statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion" and where "no judicially manageable standards are available for judging how and when an agency should exercise its discretion." *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985).

ry construction. In *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), for example, this Court explained that "a prefatory clause" is useful for "resolv[ing] an ambiguity in the operative clause[,] * * * [b]ut apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause." *Id.* at 577-578. The other cases that petitioners cite (Pet. 28) merely reflect the notion that policy statements, while not independently operative, may inform a court's interpretation of a statute's operative provisions. See *Test* v. *United States*, 420 U.S. 28, 29-30 (1975) (relying on specific provision authorizing inspection of jury lists, not on policy statement)[8]; *South Fla. Water Mgmt. Dist.* v. *Miccosukee Tribe of Indians*, 541 U.S. 95, 108 (2004) (relying on specific nonpreemption provision).

c. Petitioners cannot identify any court of appeals decision that adopts their view of Section 2(c)(2). That is a sufficient reason to deny the petition for a writ of certiorari as to the second question presented.

Instead, petitioners rely (Pet. 28-30) on court of appeals decisions that interpret other statutory provisions—and therefore do not conflict with the court of appeals' decision in this case. In each case in which a court of appeals enforced a statutory provision, the provision contained specific substantive

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[8] Petitioners err in relying (Pet. 28) on *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614 (1991). Although that decision noted the existence of a statutory provision expressing a policy of random juror selection from a fair cross-section of the community, *id.* at 622 (citing 28 U.S.C. 1861), the case involved a challenge to the use of peremptory strikes, not to the selection of potential jurors from the community, see *Edmonson*, 500 U.S. at 617. In any case, the policy statement in 28 U.S.C. 1861 is implemented through other substantive statutory standards. See, *e.g.*, 28 U.S.C. 1863.

commands, not standardless statements of policy. And in each of those cases, the court looked to the substantive provisions for enforcement purposes, not to general statements of policy. See *Delta Airlines, Inc.* v. *Export/Import Bank of the U.S.*, 718 F.3d 974, 977 (D.C. Cir. 2013) (policy statement included specific directives about what factors to consider in deciding whether to authorize a loan or guarantee); *Defenders of Wildlife* v. *Administrator*, 882 F.2d 1294, 1299-1300 (8th Cir. 1989) (noting broad policy statement in Section 2(c)(1) of the ESA but relying on substantive standards in Sections 7 and 9 of the ESA to implement that policy); *NRDC, Inc.* v. *EPA*, 859 F.2d 156, 175 (D.C. Cir. 1988) (noting general statement of policy without inferring or enforcing any substantive requirements therefrom); *13th Regional Corp.* v. *U.S. Dep't of the Interior*, 654 F.2d 758, 762 (D.C. Cir. 1980) (relying on substantive mandate to undertake a specific study included in section declaring findings and policies).

d. Finally, resolving the question whether Section 2(c)(2) requires the Service to cooperate to resolve water-resource issues in this case would be of little value because critical-habitat designations do not raise water-resource issues. Designating critical habitat for the Sucker does not allocate water rights or specify conservation actions that implicate water resources. As discussed above, the designation of critical habitat does not affect the physical environment, but rather merely establishes a regulatory framework for future consultation on a range of issues (including water-resource issues) when such issues actually arise. If questions about the sufficiency of cooperation with respect to water-resource issues

arise in connection with a future Section 7 consultation, a court may address the enforceability of Section 2(c)(2) in that context.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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