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CONGRESSIONAL REACTION TO *TVA v. Hill*: THE 1978 AMENDMENTS TO THE ENDANGERED SPECIES ACT

I. INTRODUCTION

The first comprehensive legislation for the protection of endangered species was the Endangered Species Conservation Act of 1966.¹ It provided for "a program for the conservation, protection, restoration, and propagation of selected species of native fish and wildlife . . . that are threatened with extinction."² In 1969, Congress expanded the Act in several important respects;³ however, it became apparent, as stated in 1972 by President Nixon, that the existing legislation "simply [did] not provide the kind of management tools needed to act early enough to save a vanishing species."⁴

It was against this background that Congress enacted the Endangered Species Act of 1973.⁵ A key provision of that Act is section 7 which requires all federal departments and agencies to take "such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species"⁶ or destroy or modify their "critical habitat."⁷ An agency in charge of the administra-

1. Pub. L. No. 89-669, 80 Stat. 926 (1966)(repealed 87 Stat. 903 (1973)).

2. *Id.* The 1966 Act authorized the Secretary of the Interior to designate species threatened with extinction and to use his authority under existing acts for the protection of listed species.

3. Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275 (1969)(repealed 87 Stat. 903 (1973)). First, the 1969 Act expanded the Secretary's powers to protect species threatened with worldwide extinction by prohibiting their importation subject to two limited exceptions. Second, it made unlawful the sale or purchase of a domestically endangered species by any person who knows or should know it was taken illegally. Third, the 1969 Act increased appropriations for land acquisition to protect endangered species.

4. The President's Environmental Message (February 8, 1972)(quoted in S. REP. No. 307, 93d Cong., 1st Sess. 3 (1973)).

5. 16 U.S.C. §§ 1531-1543 (1974). This comment will focus on section 7 of the 1973 Act; however, for a section-by-section analysis of the entire Act, see S. REP. No. 307, 93d Cong., 1st Sess. 6 (1973); H.R. REP. No. 412, 93d Cong., 1st Sess. 9 (1973). See also Annot., 32 A.L.R. FED. 332 (1977).

6. 16 U.S.C. § 1536 (1973). The Act defines "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man." 16 U.S.C. § 1532(4)(1976).

7. "Critical habitat" is not defined by the 1973 Act. However, the regulations promulgated by the Fish and Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration (NOAA) state:

'Critical habitat' means any air, land, or water area (exclusive of those existing manmade structures or settlements which are not necessary to the survival and recovery of a listed species) and the constituent elements thereof, the loss of which would

tion of a federal program that may conflict with the Act is required to consult with the Secretary of the Interior and obtain his assistance in complying with the Act.⁸ In addition, section 11 of the Act provides that any person may bring an action in federal district court to enjoin the activity of an agency that is alleged to be in violation of the Act, without regard to the amount in controversy or citizenship of the parties.⁹

In a recent case, *TVA v. Hill*,¹⁰ the Supreme Court held that section 7 of the Act requires every federal department or agency to insure, regardless of the cost, that its activity does not jeopardize an endangered species, or destroy its critical habitat.¹¹ Furthermore, the district courts were held to have no discretion to deny an injunction once a violation of section 7 is shown by the party requesting it.

Although the Court's decision was based on its perception of legislative intent, the reaction to the case was swift. On July 19, a little more than a month after the opinion was announced, the Senate passed a bill amending the Endangered Species Act.¹² A similar bill was passed in the House of Representatives on October 14, and a compromise bill was agreed to by both houses on the same day.¹³ *TVA v. Hill* was mourned by some environ-

appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population.

43 Fed. Reg. 874-75 (1978)(to be codified at 50 C.F.R. § 402.02).

8. The procedure to be followed in the consultation process is set out in the FWS regulations. 43 Fed. Reg. 875-76 (1978)(to be codified at 50 C.F.R. § 402.04). Each agency is required to review its programs and identify activity that may affect a listed species. If such activity is found, the agency must initiate consultation with either the FWS or the National Marine Fisheries Service (depending on the species), and refrain 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 agency has the further responsibility to provide biological information necessary for adequate review by the FWS of the planned activity and its effect on the endangered species or its habitat. After receiving the recommendations of the Service, it is the responsibility of the agency to determine whether to proceed in light of its obligations under the Act. "The judicial decisions interpreting Section 7 indicate, however, that the biological opinion issued by the Fish and Wildlife Service will ordinarily be given great weight by the courts. Federal agencies proceeding with an action in the face of an adverse biological opinion will be doing so at their peril." H.R. REP. No. 1625, 95th Cong., 2d Sess. 12 (1978).

9. 16 U.S.C. § 1540(g)(1976).

10. 437 U.S. 153 (1978).

11. The cost may be in terms of loss of expected benefits or money already invested in an abandoned project, or in terms of added costs of modifying a project in order to comply with the Act.

12. S.2899, 95th Cong., 2d Sess. (1978).

13. H.R.14104, 95th Cong., 2d Sess. (1978). President Carter signed the Endangered Species Act Amendments of 1978 into law on November 10, 1978. Pub. L. No. 95-632, 92 Stat. 3751 (1978).

mentalists as a Pyrrhic victory,¹⁴ but section 7 appears to have survived attempts to eviscerate it. Under the 1978 amendments, a case in which the cost of protecting an endangered species is simply too great may be exempted from the Act. However, because of the composition of the committee which will review the exemption petitions and the strict requirements of extreme cost, only an exceptional case will be found to warrant an exemption.

II. BACKGROUND OF TVA v. HILL

The Tennessee Valley Authority began construction of the Tellico Dam and Reservoir Project, located near the mouth of the Little Tennessee River, in 1969.¹⁵ The project was to provide flood control, recreation, hydroelectric power,¹⁶ and industrial development in an economically depressed area.¹⁷ The dam, as planned, would convert the lower Little Tennessee River into a deep reservoir 30 miles in length and covering 16,500 acres of farmland.¹⁸

In an attempt to save the "winding, free-flowing lower Little Tennessee River [which] lies in a picturesque, pastoral setting untouched by urban and industrial blight and pollution"¹⁹ as well as several areas of historical importance,²⁰ local citizens and national conservation groups have delayed and, for the present, succeeded in halting the completion of the project.

14. It was feared that the victory over TVA would create so much resistance to the Act that it would be repealed altogether or severely limited by amendments.

15. For detailed factual findings on the Tellico project, see *Hill v. TVA*, 419 F. Supp. 753, 755 (E.D. Tenn. 1976), *rev'd*, 549 F.2d 1064 (6th Cir. 1977), *aff'd*, 437 U.S. 153 (1978); *Environmental Defense Fund v. TVA*, 339 F. Supp. 806, 808 (E.D. Tenn.), *aff'd*, 468 F.2d 1164 (6th Cir. 1972).

16. The Tellico dam itself was not intended to produce electricity, but a navigable canal connecting its reservoir with the nearby Ft. Loudon Reservoir would increase the latter's production capacity an amount sufficient to heat 20,000 homes. See *Hearings Before a Subcommittee of the House Committee on Appropriations*, 94th Cong., 2d Sess. 260 (1976).

17. TVA's spokesman stated that the area surrounding the project was "characterized by underutilization of human resources and outmigration of young people." *Id.*

18. An additional 21,500 acres would be devoted to residential, industrial, and recreational development. 339 F. Supp. at 808.

19. *Environmental Defense Fund v. TVA*, 339 F. Supp. at 808.

20. In a 1972 case involving the Tellico project, the trial judge noted that:

On the south bank of the Little Tennessee River is Fort Loudon, built in 1756, as England's southwestern outpost in the French and Indian War. The river bottomlands also contain several village sites of the Cherokee Indian Nation that have considerable archeological significance. They include Chota, the ancient capital of the Cherokees, Tuskegee, the birthplace of Sequoyah, and Tennesse, from which Tennessee derives its name.

Id.

In the first confrontation,²¹ TVA was found to be in violation of the National Environmental Policy Act (NEPA),²² and construction was enjoined until an acceptable environmental impact statement was submitted.²³

On August 12, 1973, Dr. David A. Etnier made a discovery that formed the basis of continued resistance to the project. He identified a new species of fish, the snail darter,²⁴ which was found to exist only in the Little Tennessee River.²⁵ The Fish and Wildlife Service [hereinafter referred to as FWS] placed the snail darter on the endangered species list in November of 1975 noting:

[T]he snail darter occurs only in the swifter portions of shoals over clean gravel substrate in cool, low-turbidity water. Food of the snail darter is almost exclusively snails which require a clean gravel substrate for their survival. The proposed impoundment of water behind the proposed Tellico Dam would result in total destruction of the snail darter's habitat.²⁶

In February of 1976, the plaintiffs²⁷ filed suit in the United States District Court for the Eastern District of Tennessee to enjoin completion of the dam which they alleged would be in violation of section 7 of the Endangered Species Act of 1973.²⁸ The district court found that "closure of the Tellico Dam in January 1977 and the consequent creation of the Tellico Reservoir [would] result in the adverse modification, if not complete destruction, of the snail darter's critical habitat"²⁹ and that the project, if completed, would "jeopardize the continued existence of the snail

21. *Environmental Defense Fund v. TVA*, 339 F. Supp. 806 (E.D. Tenn.), *aff'd*, 468 F.2d 1164 (6th Cir. 1972).

22. 42 U.S.C. §§ 4331-4335 (1976).

23. *Environmental Defense Fund v. TVA*, 371 F. Supp. 1004 (E.D. Tenn.), *aff'd*, 492 F.2d 466 (6th Cir. 1974).

24. "In Tennessee alone there are 85 to 90 species of darters, of which upward to 45 live in the Tennessee River system. New species of darters are being constantly discovered and classified—at the rate of about one per year." 437 U.S. at 159 n.7 [citations omitted].

25. Extensive searches by the Interior Department and TVA failed to produce populations of snail darters in other rivers. 437 U.S. at 161 n.12.

26. 40 Fed. Reg. 47506. Destruction of the snail darter's source of food is not the only threat that the creation of a lake would present. The snail darter requires a fairly high amount of oxygen which flowing water provides at greater depths than a reservoir. The snail darter tends to exist at the bottom of the river, but it could not survive on the bottom of a reservoir of great depth. Also, reservoirs have more silt than rivers and this, coupled with the lower oxygen content, would render the survival of the darter's eggs unlikely. Finally, the adult darters would probably find a reservoir environment unsuitable for spawning. 419 F. Supp. at 756.

27. The plaintiffs were Hiram G. Hill, Jr., Zygmunt J.B. Plater, Donald S. Cohen, the Audubon Council of Tennessee, Inc., and the Assoc. of Southeastern Biologists.

28. 16 U.S.C. § 1536.

29. 419 F. Supp. at 757.

darther.”³⁰ However, the court concluded that TVA was not in violation of the Endangered Species Act. To force strict compliance with the interagency consultation requirement of section 7 “would be to require TVA to perform a useless gesture,”³¹ because “the nature of the project is such that there are no alternatives to impoundment of the reservoir, short of scrapping the entire project.”³²

The district court was certain that its interpretation of the Act was consistent with congressional intent due to the fact that Congress had approved annual appropriations for the Tellico Project with knowledge of the plight of the snail darter.³³ TVA’s position, as stated to congressional subcommittees in both houses in 1976, was that:

[C]ongress did not intend the Endangered Species Act to be retroactively applied to existing projects like Tellico, which was over 50 percent complete at the time of the Act’s passage and the fish’s discovery, and which was 70 to 80 percent complete at the time of the official listing of the snail darter as an endangered species.³⁴

Furthermore, TVA asserted that even if the Endangered Species Act was applicable, it required agencies to take reasonable steps, in consultation with the Secretary of the Interior, to protect listed species, but did not

30. *Id.*

31. 419 F. Supp. at 758.

32. *Id.* Citing a case decided under the NEPA, *Arlington Coalition on Transp. v. Volpe*, 458 F.2d 1323, 1331-32 (4th Cir.), *cert. denied sub nom.*, *Fugate v. Arlington Coalition on Transp.*, 409 U.S. 1000 (1972), the court reasoned that “at some point in time a federal project becomes so near completion and so incapable of modification that a court of equity should not apply a statute enacted long after inception of the project to produce an unreasonable result.” 419 F. Supp. at 760. This reasoning was rejected on appeal to the Sixth Circuit because “any judicial error in a NEPA case is subject to later review and remedial reversal before permanent damage is done to the environment. The same cannot be said for an erroneously granted exemption from the Endangered Species Act.” 549 F.2d at 1072. However, the analogy to decisions under the NEPA was reincarnated in the dissenting opinion of Mr. Justice Powell. 437 U.S. at 195 (Powell, J., dissenting). Citing the *Volpe* decision, he concluded:

Similarly under § 7 of the Endangered Species Act, at some stage of a federal project, and certainly where a project has been completed, the agency no longer has a reasonable choice simply to abandon it. When that point is reached, as it was in this case, the presumption against retrospective interpretation is at its strongest. The Court today gives no weight to that presumption.

437 U.S. at 206.

33. 419 F. Supp. at 761-62.

34. *Hearings Before a Subcommittee of the Senate Committee on Appropriations*, 94th Cong., 2d Sess. 3098-99 (1976); *Hearings Before a Subcommittee of the House Committee on Appropriations*, 94th Cong., 2d Sess. 260-62 (1976). *See also* Brief for Petitioner at 23-38, *TVA v. Hill*, 437 U.S. 153 (1978).

require abandonment of a project, without regard to its stage of completion or the cost of such action.³⁵ Recognizing "the rule that congressional approval of appropriations does not, standing alone, repeal provisions of law,"³⁶ the district court was persuaded that the appropriations endorsed TVA's position that Congress did not intend the Act to apply to Tellico.³⁷

In denying the injunction sought by the plaintiffs, the district court distinguished a prior case, *National Wildlife Federation v. Coleman*,³⁸ in which the United States Court of Appeals for the Fifth Circuit enjoined construction of a segment of an interstate highway that cut through the critical habitat of the Mississippi sandhill crane, an endangered species.³⁹ In the opinion of that court, the plaintiff, under section 7, has the burden only to show that a federal agency has failed to take "action necessary to insure" the continued existence of an endangered species.⁴⁰ However, the court in *Hill* reasoned that "the *Coleman* court was faced with a case that

35. The cost of abandoning the Tellico Project was estimated at the time of trial to be \$53 million. 419 F. Supp. at 760. On appeal to the Supreme Court, TVA did not contend that only reasonable efforts to comply were required under the Act. Instead, TVA argued that "assuming *arguendo* that the Endangered Species Act standing alone would prohibit completion of the Tellico Project, the subsequent appropriations for the project demonstrate Congress' intent that it should go forward notwithstanding." Brief for Petitioner at 21, *TVA v. Hill*, 437 U.S. 153 (1978).

36. 419 F. Supp. at 761.

37. TVA's position that the Act was not intended to apply to almost completed projects like Tellico was specifically approved in the committee reports accompanying the appropriations bills. "The Committee does not view the Endangered Species Act as prohibiting the completion of the Tellico Project at its advanced stage and directs that this project be completed as promptly as possible in the public interest." S. REP. NO. 960, 94th Cong., 2d Sess. 96 (1976). The House report on the 1977 bill did not mention Tellico other than to approve the entire \$9.7 million budget request. H.R. REP. NO. 1223, 94th Cong., 2d Sess. 83 (1976). The following year, after the circuit court decision, both committees voiced strong support for Tellico and another TVA project in conflict with the Endangered Species Act:

These projects are sound regional development projects which are vitally important to the people of the regions affected. This Committee has not viewed the Endangered Species Act as preventing the completion and use of these projects which were well under way at the time the affected species were listed as endangered. If the act has such an effect, which is contrary to the Committee's understanding of the intent of Congress in enacting the Endangered Species Act, funds should be appropriated to allow these projects to be completed and their benefits realized in the public interest, the Endangered Species Act notwithstanding.

S. REP. NO. 301, 95th Cong., 1st Sess. 99 (1977). For a similar expression of approval, see H.R. REP. NO. 379, 95th Cong., 1st Sess. 104 (1977).

38. 529 F.2d 359 (5th Cir. 1976).

39. For a discussion of *Coleman*, see 9 TRANSP. L.J. 221 (1977).

40. 529 F.2d at 372 [emphasis added]. The *Coleman* court emphasized the mandatory nature of the word "insure," reasoning that Congress intended to prohibit agency activity that would jeopardize an endangered species, at any cost.

was fundamentally different on its facts from the present case. Construction of the 5.7 mile segment was in its initial stages and relatively minor alterations were all that was necessary to effectuate full compliance with section 7."⁴¹ The district court in *Hill*, however, could not conceive that Congress intended to enjoin a project so near completion because it would jeopardize an endangered species.⁴²

On appeal to the United States Court of Appeals for the Sixth Circuit,⁴³ the plaintiffs argued that only Congress or the Secretary of the Interior can relieve TVA of strict compliance with the Act, and that the district court abused its discretion in denying the requested injunction.⁴⁴ The circuit court agreed and reversed the district court, noting that "this legal controversy may well enjoy a modicum of notoriety because it appears to pit the survival of an obscure fish against completion of a \$100 million reservoir."⁴⁵

The circuit court reasoned that the process of discovering the environmental impact of a project is so complex that a threat to an endangered species frequently may not be discovered until the project is well underway. Therefore, to hold, as did the district court, that a project is exempt from the requirements of the Act because it is nearly completed would "effectively defeat responsible review in those cases in which the alternatives are most sharply drawn."⁴⁶ To emphasize the point that courts should not engage in a balancing of equities in section 7 review, the court stated:

Current project status cannot be translated into a workable standard of judicial review. Whether a dam is 50 percent or 90 percent completed is irrelevant in calculating the social and scientific costs attributable to the disappearance of a unique form of life. Courts are ill-equipped to calculate how many dollars must be invested before the value of the dam exceeds that of the endangered species. Our responsibility under § 1540(g)(1)(A) is merely to preserve the status quo where endangered species are threatened, thereby guaranteeing the legislative or executive branches sufficient opportunity to grapple with the alternatives.⁴⁷

The circuit court cited with approval the case dealing with section 7 that the district court had distinguished, *National Wildlife Federation v. Coleman*.⁴⁸ The court also rejected the reasoning below that subsequent

41. 419 F. Supp. at 762.

42. *Id.* at 761-62.

43. *Hill v. TVA*, 549 F.2d 1064 (6th Cir. 1977).

44. *Id.* at 1069.

45. *Id.*

46. *Id.* at 1071.

47. *Id.*

48. 529 F.2d 359 (5th Cir. 1976). In *Coleman*, the activity which would endanger the cranes was not the agency activity, but the expected private development nearby. If injunctive relief

appropriations for the project, with knowledge of the plight of the snail darter, constituted congressional exemption from the Act.⁴⁹

Finding no reason to hold that the mandatory language of section 7 should not apply with full force to the case, the circuit court reversed the district court decision and granted the requested injunction. The court concluded that "[t]he separation of powers doctrine is too fundamental a thread in our constitutional fabric for us to be tempted to preempt congressional action in the name of equity or expediency."⁵⁰

III. TVA v. HILL

On June 15, 1978, Chief Justice Burger announced the opinion of the Supreme Court,⁵¹ noting that "[i]t may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million."⁵² However, after an analysis of the legislative history of the Endangered Species Act, the Court concluded that the Sixth Circuit was correct in reaching that result. The Chief Justice was so confident in his opinion that the language of the Act allowed no exceptions once a violation was proven that he stated, "it is not *necessary* to look beyond the words of the statute" to reach the result of the majority.⁵³ In order to hold that the Tellico Project was exempt from the Act because it was well underway when the Act was passed, the court "would be forced to ignore the ordinary meaning of plain language."⁵⁴ However, to meet the assertion of Mr. Jus-

was appropriate in that case, the *Hill* court reasoned, it was certainly proper when the agency activity is the source of the threat. 549 F.2d at 1071.

49. 549 F.2d at 1972-74. The court reasoned that interpretation of an existing statute is exclusively the province of the judiciary under Article III of the Constitution, therefore subsequent congressional declarations to effect that Tellico is outside the scope of the Act are "advisory opinions" that are not binding on the courts. Furthermore, "repeal by implication" is a disfavored doctrine, especially when the asserted claim is to an exemption from a prior act, and the subsequent legislation is an appropriations measure. *Committee for Nuclear Responsibility Inc. v. Seaborg*, 149 U.S. App. D.C. 380, 463 F.2d 783, 785 (1971), *quoted at*, 549 F.2d at 1072-73. The court also noted that House Rule XXI is specific on the latter point: "No appropriation shall be reported in any general appropriation bill Nor shall any provision in any such bill or amendment thereto *changing existing law* be in order. . . ." 549 F.2d at 1073 [*quoting* *Environmental Defense Fund, Inc. v. Froehлке*, 473 F.2d 346, 354 (8th Cir. 1972)] [*emphasis added*].

50. 549 F.2d at 1074.

51. *TVA v. Hill*, 437 U.S. 153 (1978).

52. *Id.* at 172.

53. 437 U.S. at 184, n.29.

54. 437 U.S. at 173. The Court stated:

tice Powell that Congress did not intend such an "absurd result,"⁵⁵ the Chief Justice contrasted the present language of section 7 with prior legislation and competing proposals before Congress in 1973.⁵⁶

Section 2(d) of the Endangered Species Conservation Act of 1966⁵⁷ is analogous to section 7 of the current Act. It states, in part, that "[t]he Secretary shall also encourage other Federal agencies to utilize, *where practicable*, their authorities in the furtherance of the purpose of this Act and shall consult with and assist such agencies in carrying out endangered species program."⁵⁸ Section 2(d) was untouched by the 1969 Act⁵⁹ except to add an appropriation to enable the Secretary of the Interior to purchase privately owned land for the protection of species that are threatened with extinction.⁶⁰ The absence of qualifying language in the 1973 Act⁶¹ was the

It has not been shown, for example, how TVA can close the gates of the Tellico Dam without 'carrying out' an action that has been 'authorized' and 'funded' by a federal agency. Nor can we understand how such action will 'insure' that the snail darter's habitat is not disrupted. Accepting the Secretary's determinations, as we must, it is clear that TVA's proposed operation of the dam will have precisely the opposite effect, namely the *eradication* of an endangered species.

Id. at 173, 174 [footnote omitted].

55. 437 U.S. at 196 (Powell, J., dissenting). Mr. Justice Powell, joined by Mr. Justice Blackmun, felt it was "the duty of this Court to adopt a permissible construction that accords with some modicum of common sense and the public weal." *Id.* They asserted that the word "actions" in section 7 applies only to the planning stages of a project, when reasonable alternatives still exist. In support of the proposition, Mr. Justice Powell pointed to decisions under the NEPA, 42 U.S.C. § 4331-4335, as the district court had done. *Supra* note 32. In a separate dissenting opinion, Mr. Justice Rehnquist opined that the district court did not abuse its discretion in denying the injunction. The court, in the exercise of traditional equitable powers, could decline to issue an injunction, even though authorized by statute to do so, unless Congress made it clear that the court was bound to act. 437 U.S. at 211-13 (Rehnquist, J., dissenting).

56. 437 U.S. at 74-88.

57. Pub. L. No. 89-669, § 2(d), 80 Stat. 926 (1966) (repealed 87 Stat. 903 (1973)).

58. *Id.* [emphasis added]. The Chief Justice was more impressed with the declaration of policy, § 1(b), of the 1966 Act which states that federal agencies shall protect endangered species "insofar as is practicable and consistent with the[ir] primary purposes . . ." 437 U.S. at 175.

59. Pub. L. No. 91-135, 83 Stat. 275 (1969)(repealed 87 Stat. 903 (1973)).

60. *Id.* at 282.

61. Section 7 now reads in pertinent part:

All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary [of the Interior or the Secretary of Commerce], utilize their authorities in furtherance of the purposes of this Chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or

result of concern over the ever-increasing rate of extinction of the world's plants and wildlife, the Court reasoned. The Chief Justice pointed to testimony before the congressional committees responsible for the endangered species legislation,⁶² and the committees' reports,⁶³ in support of his conclusion.

The Court also noted that all of the endangered species bills introduced in 1973 qualified the agencies' duty of compliance with the Act with language such as "insofar as is practicable and consistent with the[ir] primary objectives."⁶⁴ The bill which the Senate initially passed, S.1983, required federal agencies to "carry out such programs *as are practicable*

modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.

16 U.S.C. § 1536. Program responsibilities were divided between the Interior and Commerce Departments by Reorganization Plan Numbered 4 of 1970. 16 U.S.C. § 1532(10).

62. The Court quoted the testimony of the Assistant Secretary of the Interior:

[M]an and his technology has [sic] continued at an ever-increasing rate to disrupt the natural ecosystem. This has resulted in a dramatic rise in the number and severity of the threats faced by the world's wildlife. The truth in this is apparent when one realizes that half of the recorded extinctions of mammals over the past 2,000 years have occurred in the most recent 50-year period.

Hearings Before a Subcommittee of the House Committee on Merchant Marine and Fisheries, 93rd Cong., 1st Sess. 202 (1973), *quoted at* 437 U.S. 153, 176 (1978).

63. H.R. REP. No. 412, 93rd Cong., 1st Sess. (1973); S. REP. No. 307, 93rd Cong., 1st Sess. (1973). The opinion cites portions of H.R. REP. No. 412 which state:

As we homogenize the habitats in which these plants and animals evolved, and as we increase the pressure for products that they are in a position to supply (usually unwillingly) we threaten their—and our own—genetic heritage.

The value of this genetic heritage is, quite literally, incalculable.

From the most narrow possible point of view, *it is in the best interests of mankind to minimize the losses of genetic variations.* The reason is simple: they are potential resources. They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask.

To take a homely, but apt, example: one of the critical chemicals in the regulation of ovulations in humans was found in a common plant. Once discovered, and analyzed, humans could duplicate it synthetically, but had it never existed—or had it been driven out of existence before we know its potentialities—we would never have tried to synthesize it in the first place.

Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed? . . . Sheer self-interest impels us to be cautious.

The institutionalization of that caution lies at the heart of H.R. 37.

H.R. REP. NO. 412, 93rd Cong., 1st Sess. 4-5 (1973), *quoted at* 437 U.S. 153, 178 (1978).

64. 437 U.S. at 181. This phrase was first used in the 1966 Act. *Supra* note 58. It was also used to qualify the agencies' duty of compliance in the bill proposed by the Nixon Administration, H.R. 4758, § 2(b), 93rd Cong., 1st Sess. (1973).

for the protection of species listed. . . .⁶⁵ However, the conference committee adopted the strict language of the House bill, H.R.37, virtually without change in spite of the fact that the 1973 Act, with the exception of section 7, is essentially the Senate bill.⁶⁶ "The plain intent of Congress in enacting this statute," concluded the Court, "was to halt and reverse the trend toward species extinction, *whatever the cost.*"⁶⁷

The opinion quickly dismissed the contention that annual appropriations made with knowledge of the conflict between the Tellico Project and section 7 of the Act constituted an exemption from the prohibitions of the Act.⁶⁸ The Court agreed with the circuit court below concerning the "cardinal rule" disfavoring repeals by implication and legislation by appropriation.⁶⁹ But the Court did assess the weight that should be given to the specific declarations of congressional approval cited by TVA, in spite of the circuit court's holding that "advisory opinions" by Congress on existing legislation should be disregarded.⁷⁰ Considered important was the fact that the appropriations committees did not have jurisdiction over the substantive content of the Act, nor did they conduct the extensive hearings that the House Committee on Merchant Marine and Fisheries and the Senate Committee on Commerce held prior to reporting the 1973 Act.⁷¹

65. S.1983, § 7(a), 93rd Cong., 1st Sess. (1973), *quoted at*, 437 U.S. 153, 182 (1978).

66. The text of section 7 of H.R.37 can be found at 119 CONG. REC. 30159 (1973).

67. 437 U.S. at 184 (emphasis added). During the recent House debate on H.R.14104, Rep. David R. Bowen (D-Miss.) stated:

There is no exemption process under present statute law—none at all. I recall from the debate that took place before the Supreme Court on the Tellico Dam case that Mr. Justice Marshall, I believe it was, asked a question of one of the witnesses from the Department of the Interior as to whether or not, if he located a species in the basement of the building which was listed as endangered, and whose continued existence was jeopardized by the presence of the Supreme Court Building, would that mean that the building was going to have to be torn down. The answer was yes, the building would have to be torn down. Of course, there may be a number of people who would think that would be a good idea, but nevertheless that is an actual application of the way the present law could be administered. The courts made it clear that they can go no other way, as the law is now written; they cannot give us any relief.

124 CONG. REC. H12868-69 (daily ed. October 14, 1978). Mr. Justice Marshall voted with the majority.

68. 437 U.S. at 189.

69. *Id.* at 189-90. The Court stated that the doctrine disfavoring repeals by implication "applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act." *Id.*

70. 549 F.2d at 1073.

71. The Chief Justice felt that they "would be somewhat surprised to learn that their careful work on the substantive legislation had been undone by the simple—and brief—insertion of some inconsistent language in Appropriations Committees' Reports." 437 U.S. at 191.

Furthermore, the fact that the appropriations committees agreed with TVA's position that Tellico was exempt from the requirements of the Act did not necessarily mean that Congress as a whole was aware of that position.⁷²

IV. THE 1978 AMENDMENTS TO THE ENDANGERED SPECIES ACT

Few things in life are considered so important as to receive protection at all cost,⁷³ and no one has seriously asserted that endangered species deserve such treatment. At some point, the cost of protecting an endangered species becomes too great.⁷⁴ Environmentalists concede this, but maintain that such circumstances are so rare that Congress can deal with them on a case-by-case basis.⁷⁵

In support of this proposition, environmentalists can point to the track record of the interagency consultation process under section 7. Senator Gaylord Nelson (D-Wisc.) argued on the Senate floor that there have been over 4500 consultations, and, of these, only Tellico has not resulted in the successful integration of agency objectives and the protection of endangered species.⁷⁶

72. In a recent opinion, *SEC v. Sloan*, 436 U.S. 103 (1978), the Court noted, they had declined to presume congressional approval of a practice of the SEC that had been long approved by the committee having jurisdiction over it. The Court emphasized that this policy would apply with more force where the committee did not have jurisdiction over the substantive aspects of the legislation. 437 U.S. at 192. In his majority opinion in *Sloan*, Mr. Justice Rehnquist had stated that the Court should be "extremely hesitant to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents." 436 U.S. at 121, *quoted at*, 437 U.S. at 192.

73. An extremely pragmatic position is that only one's own life is such an ultimate good. The United States Constitution places a similar value on liberty and certain property rights; however, even these rights are not protected at any cost. The Supreme Court frequently balances these individual rights against the interests of society.

74. The Supreme Court has held, however, that "neither the Endangered Species Act nor Art. III of the Constitution provides federal courts with authority to make such fine utilitarian calculations." 437 U.S. at 187.

75. An example of such congressional action is the exemption from the requirements of the NEPA which was granted to the Trans-Alaska Pipeline. 43 U.S.C.A. § 1652(d) (Supp. 1978).

76. 124 *Cong. Rec.* S11028 (daily ed. July 18, 1978) (remarks of Senator Nelson); 8 E.L.R. 10154, 10155 (1978). Two other cases also not settled were *Sierra Club v. Froehle*, 534 F.2d 1289 (8th Cir. 1976) (holding no violation of the Act by the Corps of Engineers in building a dam which would endanger only a small number of Indiana bats) and *National Wildlife Fed'n. v. Coleman*, 529 F.2d 359 (5th Cir.), *cert. denied*, 429 U.S. 979 (1976) (holding the Federal Highway Administration must reroute a segment of interstate highway which would cut through the habitat of the Mississippi sandhill crane). No attempt has been made to catalog section 7 decisions; however, at least one additional conflict has resulted in litigation since Sen. Nelson's statement. *See* note 106 *infra*.

Environmentalists argue that "the snail darter should not be the scapegoat for an unnecessarily debilitating attack on the Act,"⁷⁷ because Tellico is not a typical case. Under the directorship of Aubrey J. Wagner, TVA's position asserted that the only alternative to flooding the Tellico Reservoir and killing the snail darters was to transplant them first. But now that these efforts have proven successful,⁷⁸ TVA is no longer committed to completing the project. Since the appointment of S. David Freeman to TVA's Board of Directors in 1977, TVA, in conjunction with the Interior Department, has developed several alternatives to completion of the project as was originally planned.⁷⁹ Regardless of which alternative is pursued, their existence casts doubt both upon the good faith of initial attempts of TVA to comply with the Act, and the wisdom of the original plan.⁸⁰ Environmentalists argue that the subsequent litigation was not the fault of the consultation process, but of resistance to compliance with the Act on the part of TVA under Wagner. In fact, TVA's new director, Freeman, has acknowledged that the Tellico case in and of itself is not proof that the Act is flawed,⁸¹ and that the prolonged conflict was actually the result of TVA's

77. 8 E.L.R. 10159.

78. There are now as many as 3700 snail darters surviving and reproducing in the Hiwassee River where 710 were transplanted in 1975 and 1976. However, the species may become extinct in the Little Tennessee River by the time a final decision is made on the future of Tellico. 9 ENVIR. REP. (BNA) 664 (1978). "It therefore appears possible, that the snail darter ultimately will *not* control the final decision as to how the Tellico Project shall be completed." TENNESSEE VALLEY AUTHORITY AND U.S. DEPARTMENT OF INTERIOR, ALTERNATIVES FOR COMPLETING THE TELLICO PROJECT 5 (1978)(hereinafter referred to as ALTERNATIVES).

79. TVA has proposed developing the area without creating a lake. Thus, "the entire land base acquired for the reservoir project would be utilized in a planned fashion," and the scenic, recreational, and historic assets of the area could be preserved. ALTERNATIVES, *supra* note 79, at 27-32. Also, the project could be liquidated by removing the dam and selling the land, yielding up to \$40 million in revenues and \$10 million in savings. ALTERNATIVES, *supra* note 79, at 37.

Subsequent to Freeman's appointment, both Wagner and William L. Jenkins resigned, leaving Freeman the chairman and sole member of TVA's board. Richard M. Freeman has filled one directorship; however, the third is vacant at this time. The change in leadership has been characterized as the "beginning of a new era at TVA." 9 ENVIR. REP. (BNA) 364 (1978).

80. During Senate debates on the amendments to the Act, Senator Gaylord Nelson stated:

So the fact of the matter is that we have a project that should not have been started, should not have been completed, and now, [sic] as a consequence of the project being stopped, because it turns out that it involves an endangered species, everybody has joined in the stampede to modify a very good law.

Not a single episode in this 5-year period, not a single event, not a single problem, has occurred that justifies, that is a valid reason for changing the law.

Why do we not leave it alone?

124 CONG. REC. S11028 (daily ed. July 18, 1978)(remarks of Senator Nelson).

81. 9 ENVIR. REP. (BNA) 664 (1978).

refusal to give alternatives more than mere "cursory" consideration.⁸²

Finally, environmentalists maintain that the absence of exceptions to section 7 is "a very powerful lever which has caused every case to be resolved, except that of the snail darter. . . ."⁸³ The FWS, they assert, is the body best able to assess the aesthetic, scientific, and ecological value of an endangered species. It has also been stated that the existence of an avenue of appeal to a body more receptive to economic factors, which a project will always have in its favor, would destroy the integrity of the consultation process by encouraging agencies to stand fast during consultation with the Service, anticipating review by a body more inclined to favor their position.⁸⁴

The authorization for the Endangered Species Act expired September 30, 1978,⁸⁵ and that, coupled with the Tellico case, prompted congressional reevaluation of section 7. The Senate Committee on Environment and Public Works and the House Committee on Merchant Marine and Fisheries held hearings in which they discovered that the FWS expects some 20,000 consultation requests in fiscal year 1979, compared to 4500 in the last 5 years combined.⁸⁶ As Senator John C. Culver (D-Iowa) stated on the Senate floor, "you do not have to be Jimmy the Greek to know that [the twenty-fold increase] spells trouble politically."⁸⁷ The committees were also informed that almost 2000 plants and animals are to be added to the Endangered Species List in the near future. "The potential for conflict is inevitable and unavoidable," said Senator Culver during Senate debates on the proposed amendments to the Act.⁸⁸

82. 9 ENVIR. REP. (BNA) 365 (1978).

83. 124 CONG. REC. S11028 (daily ed. July 18, 1978) (remarks of Senator Nelson).

84. 8 E.L.R. 10159.

85. 16 U.S.C. § 1542 (Supp. 1978).

86. S. REP. NO. 874, 95th Cong., 2d Sess. 2 (1978). H.R. REP. NO. 1625, 95th Cong., 2d Sess. 13 (1978).

87. 124 CONG. REC. S11034 (daily ed. July 18, 1978) (remarks of Senator Culver).

88. 124 CONG. REC. S10974 (daily ed. July 18, 1978) (remarks of Senator Culver). Of the 2000 additions to the Endangered Species List, 1850 are expected to be plants, and 137 animals. S. REP. NO. 874, 95th Cong., 2d Sess. 2 (1978); H.R. REP. NO. 1625, 95th Cong., 2d Sess. 13 (1978). The House committee noted, however, that many of the plant species are located in isolated portions of California and Hawaii, and are therefore unlikely to conflict with federal agency activity. H.R. REP. NO. 1625, 95th Cong., 2d Sess. 13 (1978). "It is clear, nevertheless, that there will continue to be some Federally authorized activities which cannot be modified in a manner which will avoid a conflict with a listed species." *Id.* Both committees were very concerned about allegations by the General Accounting Office that the FWS had deliberately refrained from listing two species threatened by a dam project in California for fear of provoking Congress into major revisions of the Act. The House committee stated:

The committee considers these allegations to be extremely serious. Those individuals charged with the administration of the act do not have the legal authority to weigh

Congressional dissatisfaction with section 7 was so strong that an amendment offered by Senator John C. Stennis (D-Miss.) which would have severely weakened the section won the approval of almost a quarter of the Senate.⁸⁹ Senator Howard H. Baker (R-Tenn.) stated during the debate:

I am absolutely convinced that after the decision of the Supreme Court in the Tellico case, if we did not build more common sense into the Endangered Species Act, if we did not create some flexibility, if we did not create some way to relieve the tensions created by situations like Tellico, if we did not affect the realism that the law requires in the long term, the Endangered Species Act would expire; that there would be so much opposition to it that the act would be in jeopardy.⁹⁰

In order to preempt attempts to devastate section 7 when the reauthorization bill came to the Senate floor, Baker and Culver, both members of the Committee on Environment and Public Works, proposed a moderate amendment which passed by a vote of 94-3 on July 19, 1978.⁹¹ A similar bill was approved by the House of Representatives on October 14 by a margin of 384-12.⁹² Recognizing that Congress cannot possibly handle the

the political importance of an endangered species. The fact that the very administrators of the act have apparently determined that the act is insufficiently flexible is evidence itself of the necessity for amendment.

Id. See also S. REP. No. 874, 95th Cong., 2d Sess. 3 (1978).

89. Senator Stennis' amendment inserted the "insofar as is practicable" clause that was omitted in 1973, provided for numerous exemptions from the Act, and authorized agency heads to balance the "social, cultural, economic, and other benefits to the public if such action is carried out as planned against the aesthetic, ecological, educational, historical, recreational, or scientific loss to the public which would occur if such species were to become extinct." 124 CONG. REC. S10971 (daily ed. July 18, 1978) (text of amendment offered by Senator Stennis).

90. 124 CONG. REC. S11029 (daily ed. July 18, 1978) (remarks by Senator Baker).

91. 124 CONG. REC. S11158 (daily ed. July 19, 1978). The text of the bill, S.2899, can be found at 124 CONG. REC. S11158-60.

92. 124 CONG. REC. H12902 (daily ed. October 14, 1978). The text of the bill, H.R. 14104, as reported by the Committee on Merchant Marine and Fisheries, can be found at 124 CONG. REC. H12877-80.

Representative Robert L. Leggett (D-Calif.), Chairman of the House Committee on Merchant Marine and Fisheries Subcommittee on Fisheries and Wildlife Conservation and the Environment, introduced H.R.13807 on August 15, 1978. That bill retained the current language of section 7 and provided that unresolved disputes would be heard by an administrative law judge jointly appointed by the FWS and the agency involved. Application for an exemption from the act by the President, if necessary, was provided for by H.R.13807. Representative John Dingell (R-Mich.) introduced a bill similar to S.2899 shortly after the introduction of H.R.13807. The House subcommittee reported a bill resembling the Senate bill, but retaining the number H.R.13807. The Committee on Merchant Marine and Fisheries reported this bill with minor changes on September 25, 1978, with a new number, H.R.14104, to reflect

expected number of conflicts between agency activity and section 7 on a case-by-case basis, the 1978 Amendments establish an Endangered Species Committee to deal with each situation. The seven-member committee is to be composed of the Secretaries of the Army, Interior, and Agriculture, the Administrators of the National Oceanic and Atmospheric Administration and the Environmental Protection Agency, the Chairman of the Council of Economic Advisors, and an individual from the affected state appointed by President.⁹³

Before the Committee may review an application for an exemption, the applicant must prove to a review board⁹⁴ that certain threshold requirements have been met. The Board consists of one person appointed by the President,⁹⁵ one person appointed by the Secretary of the Interior, and an

changes since the introduction of H.R.13807. See 9 ENVIR. REP. (BNA) 668-69 (1978); H.R. REP. No. 1625, 95th Cong., 2d Sess. 3-4 (1978). The bill did not reach the floor of the House in time to meet the September 30, 1978 reauthorization deadline and "[a]s a result, the Department of the Interior's procedures for considering special protection for endangered plants and animals have ceased, issuance of permits has ground to a halt, and there is a moratorium on enforcement." 9 ENVIR. REP. (BNA) 1102 (1978). The 200 agency personnel employed under the Act were assigned to other tasks. *Id.*

For further legislative history see 124 CONG. REC. H12984 (House conferees appointed); S19011 (Senate conferees appointed); H13450 (Conference Report read in the House); H13579 (House agreed to Conference Report); S19160 (Senate agreed to Conference Report)(daily ed. October 14, 1978).

93. Pub. L. No. 95-632, § 3, 92 Stat. 3751 (1978)(subsection (e) of amended § 7). In addition to creating the Committee, the 1978 Amendments also change the definition of "species" to include plants but exclude invertebrate animals, define "critical habitat" and require the Secretary to take economic considerations into account in making designations, alter the FWS listing procedure, and extend the authorization of the Act for 18 months. This comment is limited in scope to the amendments to section 7 creating the Committee and setting out the requirements for an exemption. For an explanation of the entire act, see the Joint Explanatory Statement of the Committee of Conference, 124 CONG. REC. H13455 (daily ed. October 14, 1978); 9 ENVIR. REP. 1305 (1978).

94. The Senate bill proposed by Baker and Culver did not provide for a separate review board. Instead, the Committee was to make threshold determinations similar to those required by section 7(g)(5). See 124 CONG. REC. S11159 (daily ed. July 19, 1978) (§ 7(e)(1)(A) of S.2899).

95. The House bill, H.R.14104, provided that the Secretary of the Interior and the Governor of the affected state would each appoint one member to the review board, and that these two persons would appoint the third jointly. H.R. REP. No. 1625, 95th Cong., 2d Sess. 14 (1978)(explaining section 7(d)(3)(A)). It was amended on the House floor due to concern that such a scheme would be unconstitutional. "The appointments clause [of the Constitution] provides that Congress may vest the appointment of inferior officers of the United States in the President, heads of departments and courts of law." 124 CONG. REC. H12882 (daily ed. October 14, 1978) (amendment offered by Rep. David R. Bowen (D-Miss.) and remarks following).

administrative law judge selected by the Civil Service Commission. Section 7(g)(5) now provides that:

It shall be the duty of a review board . . . to make a determination, by a majority vote, (1) whether an irresolvable conflict exists and (2) whether such exemption applicant has—

(A) carried out its consultation responsibilities as described in subsection (a) in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which will avoid jeopardizing the continued existence of an endangered or threatened species or result in the adverse modification or destruction of a critical habitat;

(B) conducted any biological assessment required of it by subsection (c); and

(C) refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d).⁹⁶

If the review board makes positive determinations on the threshold requirements, it forwards the application to the Committee along with a report summarizing the evidence, and discussing alternatives to the proposed agency action and mitigation measures. Section 7(h) now provides for a final determination by the committee:

The committee shall grant an exemption from the requirements of subsection (a) for an agency action if, by a vote of not less than five of its members voting in person—

(A) it determines on the record, based on the report of the review board and on such other testimony or evidence as it may receive, that—

(i) there are no reasonable and prudent alternatives to the agency action;⁹⁷

96. Pub. L. No. 95-632, § 3, 92 Stat. 3751 (1978). The language is essentially that of the House bill. See 124 CONG. REC. H12878 (daily ed. October 14, 1978) (§ 7(d)(5) of H.R.14104).

97. In its report accompanying H.R.14104, the House committee stated:

The terms 'feasible and prudent' alternatives are intended to insure that the review board evaluates a wide variety of alternatives to the agency action before recommending an exemption from the act.

. . . Their search should not be limited to original project objectives or the acting agency's jurisdiction. The Committee does intend that the review board should only consider alternatives which are both technically capable of being constructed and prudent to implement.

H.R. REP. NO. 1625, 95th Cong., 2d Sess. 22 (1978). The phrase "reasonable and prudent" was substituted for "feasible and prudent" on the House floor by an amendment proposed by Rep. Robin L. Beard (R-Tenn.). 124 CONG. REC. H12881 (daily ed. October 14, 1978). The reason for the substitution was that "feasible and prudent" had been interpreted by the Supreme Court in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), to include

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest; and

(iii) the action is of regional or national significance; and

(B) it establishes such reasonable mitigation and enhancement measures . . . as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.⁹⁸

Baker and Culver were sensitive to the environmentalists' position that amending section 7 would weaken the consultation process by removing the incentive to compromise, and that if any balancing were to be allowed, the endangered species would always bow to economic interests. First, the 1978 Amendments preserve the Interior Department's power during the consultation process because the Committee cannot review the merits of a petition for an exemption until it is satisfied that "there has been a good-faith effort to achieve a mutually agreeable and acceptable resolution of the conflict so as to protect the endangered species to the maximum extent."⁹⁹ Since the FWS has a chance to reply to the agency's petition, and the Secretary of the Interior sits on the Committee, there is little chance of deliberate agency resistance. Second, the composition of the Committee is such that adequate consideration of scientific, aesthetic, and ecological factors is insured.¹⁰⁰ As Senator Culver stated during debate on the amendments to the Act:

"virtually every conceivable alternative," and it was feared that "[i]nclusion of this phrase in H.R.14104 would guarantee a litigative tool which could be used to delay indefinitely any granting of exemptions allowed under the provisions of this bill." In addition, "reasonable and prudent" was used in the Senate bill. However, in their Joint Explanatory Statement, the Conference Committee explained "reasonable and prudent" in terms almost identical to those of the House committee, *supra*. 124 CONG. REC. H13456 (daily ed. October 14, 1978).

98. Pub. L. No. 95-632, § 3, 92 Stat. 3751 (1978). Again, the wording is that of the House bill. 124 CONG. REC. H12878 (daily ed. October 14, 1978)(§ 7(f)(1) and (2)). However, the language is very similar to that originally proposed by Baker and Culver in the Senate. See 124 CONG. REC. S11159 (daily ed. July 19, 1978)(§ 7(e)(2) and (g)).

99. 124 CONG. REC. S11022 (daily ed. July 18, 1978) (remarks of Senator Culver).

100. The membership of the committee has been the subject of much debate and alternative proposals. The original Senate version included the Secretaries of the Army, Agriculture, Interior, and Transportation, the head of the Smithsonian Institute, the Council on Environmental Quality Chairman, and the Environmental Protection Agency Administrator. The final Senate version substituted representatives of the National Oceanic and Atmospheric Administration and the Governor of the affected state for the Transportation Department and Smithsonian Institution committee members. The House bill reported by the Merchant Marine and Fisheries Committee dropped the EPA representative from the Senate bill. During the House debate on H.R.14104, Rep. Bowen stated:

[The members of the Committee on Environment and Public Works] have tried to design a committee that, unlike ourselves, is relatively free of intense lobbying and political pressures. These can be factors taken into consideration but are not in and of themselves, decisive. This commission will be composed of seven members who are relatively insulated and isolated from those pressures. They are also better equipped by background, training, and expertise to make informed, scientific, knowledgeable judgments, not to be buffeted by the political winds of the moment but to be sober in the implementation of this act.¹⁰¹

V. CONCLUSION

The Supreme Court's decision in *TVA v. Hill*¹⁰² has not necessarily harmed environmental causes. However, the case has forced the collective realization that an absolute guarantee of the continued existence of endangered species is unrealistic. At some point, it simply costs too much. It was inevitable that such a conflict would arise and, in light of the testimony before congressional committees, it is certain that such conflicts will become more frequent in the future. Congress could not possibly handle a great number of section 7 conflicts on a case-by-case basis; therefore, the creation of some mechanism for their resolution was necessary.

The committee created by the 1978 Amendments is a reasonable accommodation of the competing interests in this area. It does provide a means

We have a balanced six-man committee representing on the one hand the environmental interests, as we see it, the Interior Department, the National Oceanic and Atmospheric Administration, the Council on Environmental Quality; and on the other hand the Department of the Army, representing the Corps of Engineers, the Department of Agriculture, and the Governor of the state where the affected project is located. 124 CONG. REC. H12869 (daily ed. October 14, 1978). The Governor of the affected state was replaced by an appointee of the President due to a concern that the bill, as reported, would be subject to constitutional challenge. See note 95 *supra*. However, Rep. Bowen noted that "in nearly all cases we would expect the Governor to nominate himself to be appointed by the President." 124 CONG. REC. H12882 (daily ed. October 14, 1978).

The Conference Committee opted for a seven-member committee, however, it substituted a representative of the Council on Economic Advisors for Chairman of the Council on Environmental Quality. It should be noted that five votes are required for an exemption. Therefore, the applicant must convince, for instance, the representative of the Interior Department, the Environmental Protection Agency, or the National Oceanic and Atmospheric Administration that an exemption from the requirements of the Act is warranted.

101. 124 CONG. REC. S11022 (daily ed. July 18, 1978) (remarks of Senator Culver). Even Senator Nelson, one of only three senators to vote against the bill, stated: "I will say—I think it is correct—that if it is politically necessary to modify the law, then I think that the distinguished authors of the pending measure [S.2899] have done a pretty good job of designing a modification." 124 CONG. REC. S11029 (daily ed. July 18, 1978) (remarks of Senator Nelson).

102. 437 U.S. 153 (1978).

by which a project may be found to warrant killing the last remnants of a species, but it makes that process difficult enough to insure that it is employed only in exceptional circumstances.¹⁰³

Although clothed in the rhetoric of only comparing existing plans to alternatives consistent with the preservation of the listed species and not the value of the species itself,¹⁰⁴ the committee's function is essentially to place a value on a vanishing species.¹⁰⁵ However, environmentalists have no valid reason to criticize the 1978 Amendments to the Endangered Species Act because Congress has insured that that value will be appropriately high.¹⁰⁶

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103. The criteria established by the amendments preserve the integrity of the consultation process by destroying the incentive for an agency to resist compromise with the FWS, hoping for a more favorable forum on appeal. Furthermore, the composition of the committee itself insures due consideration of the aesthetic, ecological, and scientific factors, not just the economic value of the project. As Senator Culver said of the Endangered Species Committee, "I think this deck may be stacked, but I don't mind the way it's stacked." 9 ENVIR. REP. (BNA) 44 (1978).

104. In the report which accompanied S.2899 to the Senate floor, the Committee on Environment and Public Works noted:

In the balancing process the Endangered Species Committee is not expected to balance simply the importance of a species against the value of a Federal action. The criteria expressly mandate that the balancing which is to take place is between the benefits of a proposed Federal action and the benefits of alternative courses of action which will not result in harm to the species or its critical habitat.

S. REP. NO. 874, 95th Cong., 2d Sess. 7 (1978). For a similar statement by the House Committee on Merchant Marine and Fisheries, see H.R. REP. NO. 1625, 95th Cong., 2d Sess. 22-23 (1978).

105. Assuming benefits remain constant, the difference between the cost of a project as planned and the cost after modifications necessary to conserve a listed species is the cost of preserving the species. At some point, the difference will become so great that five of the seven committee members will vote to exempt the project from the Act. That amount is the value of the species. If benefits do not remain constant, as would be the case in which a project must be abandoned to protect the species, lost benefits would enter into the consideration as the extra cost of modification of the project.

106. The House voted 231-157 in favor of an amendment exempting the Tellico project from the Act. 124 CONG. REC. H12890-93 (daily ed. October 14, 1978)(amendment offered by Rep. John J. Duncan (R-Tenn.)). A similar amendment, proposed by Rep. Teno Roncalio (D-Wyo.), was prompted by a U.S. district court decision handed down in early October enjoining construction on the Grayrocks Dam in Wyoming. 124 CONG. REC. H12883-89 (daily ed. October 14, 1978). The compromise bill which emerged provided that the future of both projects would be determined promptly by the Committee, subject to the requirements of the amended Act. Pub. L. No. 95-632, § 5, 92 Stat. 3751 (1978)(§ 7(i)(1) of the amended Act). Following hearings on January 8, 1979, in Washington, D.C., Cheyenne, Wyoming, and Knoxville, Tennessee, the Committee met on January 23 to determine the future of the projects. The Committee reached unanimous decisions on both conflicts. In denying the exemption to

Tellico, Council of Economic Advisors Chairman Charles Schultze said, "[t]he project is 95 percent complete, and if one takes just the cost of finishing it against the benefits, and does it properly, it doesn't pay, which says something about the original design." 9 ENVIR. REP. (BNA) 1776 (1979). The Committee affirmed an out-of-court settlement in the Grayrocks case creating a \$7.5 million trust fund for the maintenance of the whooping cranes' habitat. *Id.* See 9 ENVIR. REP. (BNA) 1418 (1978). The Committee's decision prompted differing reactions. Sen. John Culver commended the Committee saying, "[t]he unanimous votes by the committee in these two cases prove these kinds of issues can be resolved by consensus." Richmond Times-Dispatch, January 24, 1979 at A1, col. 6. However, Sen. Howard Baker stated:

If that's all the good the committee process can do, to put us right back where we started from, we might as well save the time and expense. I will introduce legislation to abolish the [C]ommittee and exempt the Tellico Dam from the provisions of the Act.

9 ENVIR. REP. (BNA) 1777 (1979).

