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NOTE

THE SNAIL DARTER V. THE TENNESSEE VALLEY AUTHORITY: IS THE ENDANGERED SPECIES ACT ENDANGERED?

If plaintiff's argument were taken to its logical extreme, the [Endangered Species] Act would require a court to halt impoundment of water behind a fully completed dam if an endangered species were discovered in the river on the day before such impoundment was scheduled to take place.¹

It is conceivable that the welfare of an endangered species may weigh more heavily upon the public conscience, as expressed by the final will of Congress, than the writeoff of those millions of dollars already expended for Tellico in excess of its present salvageable value.²

INTRODUCTION

The realization that numerous animal and plant species have become extinct because of human involvement with the environment has prompted increasing concern about the protection of endangered species. Natural selection is a slow process; species adapt to changes in their environments, evolving, appearing, and disappearing as their ecosystems change. However, the natural evolution of numerous species has been disrupted since humans began tampering with the environment.³ Industrial development and rapid population growth throughout the world have increased the negative effects on the environment, through, for example, pollution and destruction of native habitats. It has been estimated that two-thirds of all extinct species became extinct in the twentieth century as a

¹ Hill v. Tennessee Valley Auth., 419 F. Supp. 753, 763 (E.D. Tenn. 1976), *rev'd*, 549 F.2d 1064 (6th Cir. 1977), *cert. granted*, 98 S. Ct. 478 (1977) [Subsequent citations to the Tennessee Valley Authority will be abbreviated TVA].

² Hill v. TVA, 549 F.2d 1064, 1074 (6th Cir. 1977), *cert. granted*, 98 S. Ct. 478 (1977).

³ For example, the development of agriculture has resulted in the replacement of natural ecosystems composed of numerous plant and animal species with ecosystems limited to a few selected species.

result of human activities.⁴ It has been calculated that the rate of extinction has increased to approximately one species each year.⁵

These losses of species are not abstract events; they have repercussions for all things having any contact with the natural world. The continuation of the various species contributes to the maintenance of the "balance of nature" within specific environments.⁶ The existence of these species guarantees a varied gene pool which is necessary for scientific research.⁷

As the number of extinct species has increased, many people have expressed a desire that threatened species be saved through a concerted effort. As a result, Congress determined that legislation was needed to preserve the variety of living species. Its attempts at legislating such protection culminated in the Endangered Species Act of 1973.⁸

This note focuses on litigation and possible relief under section 7 of the Act, using primarily the Tennessee Valley Authority's (TVA's) confrontation with the three-inch snail darter at the Tellico Dam project in *Hill v. TVA*.⁹ Not all applications of the Endangered Species Act are of such magnitude; the substantial assets committed to this project and the relative obscurity of the snail darter are combining to create pressure for

⁴ Wood, *Section 7 of the Endangered Species Act of 1973: A Significant Restriction for All Federal Activities*, 5 ENV'T L. REP. 50,189, at 50,191 (1975).

⁵ SENATE COMM. ON COMMERCE, REPORT ON THE ENDANGERED SPECIES ACT OF 1973, S. REP. NO. 307, 93d Cong., 1st Sess. 2, reprinted in [1973] U.S. CODE CONG. & AD. NEWS 2989 [hereinafter cited as SENATE REPORT].

⁶ *Id.*

⁷ *Id.* See Wood, *supra* note 4, at 50,191. See also HOUSE COMM. ON MERCHANT MARINE AND FISHERIES, ENDANGERED AND THREATENED SPECIES CONSERVATION ACT OF 1973, H.R. REP. NO. 412, 93d Cong., 1st Sess. 5 (1973) [hereinafter cited as HOUSE REPORT].

[I]t is in the best interest of mankind to minimize the losses of genetic variations. . . . [T]hey are potential resources. They are keys to puzzles we cannot solve, and may provide answers to questions we have not yet learned to ask.

. . . .

. . . [S]heer self-interest impels us to be cautious.

Id.

See also notes 207-08 and accompanying text *infra* regarding the "importance" of particular species in nature.

⁸ 16 U.S.C. §§ 1531-1543 (1976).

⁹ 419 F. Supp. 753 (E.D. Tenn. 1976), *rev'd*, 549 F.2d 1064 (6th Cir. 1977), *cert. granted*, 98 S. Ct. 478 (1977).

legislative or judicial relief, either of which would undermine the purposes of the Act. In addition, the *Hill* controversy involves both the Endangered Species Act and the National Environmental Policy Act of 1969 (NEPA),¹⁰ affording an opportunity to compare the two statutes.

I. TELlico DAM LITIGATION

The Tellico project includes a dam near the mouth of the Little Tennessee River, a navigable canal between the Tellico Reservoir and Ft. Loudon Reservoir on the Tennessee River, and a navigable channel extending thirty miles up the Little Tennessee River.¹¹ The dam, a concrete and earthfill structure, would impound the Little Tennessee River and create a reservoir thirty-three miles long.¹²

In 1966, the first funds for the project were appropriated by Congress and authorization was given by the TVA. TVA's plans included acquiring 38,000 acres of land, including 16,500 acres of river bottomland to be flooded. The remaining area was to be used for industrial, recreational, residential, and commercial development, including a proposed community of 50,000.¹³

Construction of the dam began in 1967; by 1969 the concrete part of the dam was complete and relocation of roads and construction of bridges had started. By January 1970, the effective date of NEPA, about one-third of the entire project was

¹⁰ 42 U.S.C. §§ 4321-4347 (1970 & Supp. V 1975).

¹¹ *Environmental Defense Fund, Inc. v. TVA*, 339 F. Supp. 806, 808 (E.D. Tenn.), *aff'd*, 468 F.2d 1164 (6th Cir. 1972).

One of the stated purposes of the TVA is "to control the destructive flood waters in the Tennessee River . . . [Basin]." 16 U.S.C. § 831 (1976) (The Tennessee Valley Authority Act of 1933). The TVA "is a wholly owned corporate agency and instrumentality of the United States." *United States ex rel. TVA v. An Easement and Right-of-Way over Two Tracts of Land*, 246 F. Supp. 263, 266 (W.D. Ky. 1965), *aff'd*, 375 F.2d 120 (6th Cir. 1967).

Under the TVA Act, the agency has an enumerated power to build "dams, and reservoirs, in the Tennessee River and its tributaries, . . . [which] will best serve to . . . control destructive flood waters in the Tennessee . . . River drainage [basin]." 16 U.S.C. § 831c (j) (1976).

¹² *Environmental Defense Fund, Inc. v. TVA*, 468 F.2d 1164, 1169 (6th Cir. 1972).

¹³ *Environmental Defense Fund, Inc. v. TVA*, 339 F. Supp. 806, 808 (E.D. Tenn.), *aff'd*, 468 F.2d 1164 (6th Cir. 1972). See text accompanying note 29 *infra* for TVA's proposed uses of the Tellico Dam area.

finished.¹⁴ In 1971, the TVA submitted a "draft" environmental impact statement with the Council on Environmental Quality.¹⁵

Litigation involving the Tellico Dam and Reservoir project began in 1972 when a preliminary injunction was sought to stop construction of the dam and associated activities. It was contended that the TVA had not filed an adequate environmental impact statement as required by NEPA.¹⁶ The TVA argued that section 102 (2)(C) of NEPA did not apply because the project was started before the effective date of NEPA. The District Court of the Eastern District of Tennessee held that NEPA did apply to the Tellico Dam project because TVA receives annual appropriations from Congress and because NEPA has been interpreted to apply to federal actions which were started before it was enacted.¹⁷ The court granted the injunction against further work on the dam and reservoir until TVA submitted an acceptable environmental impact statement.¹⁸ The statement was inadequate because "although comprehensive in scope, the draft statement's cost-benefit analysis consists almost entirely of unsupported conclusions."¹⁹ The court faulted the TVA for not considering the long-range impact of the Tellico project on the environment in the area.²⁰

In December 1972, the Sixth Circuit Court of Appeals affirmed the district court's decision that the injunction against

¹⁴ 468 F.2d at 1170.

¹⁵ 339 F. Supp. at 808.

¹⁶ *Id.* at 806. The plaintiffs included the Environmental Defense Fund, Trout Unlimited, Association for the Preservation of the Little T, and an individual landowner of affected property. See text accompanying notes 41-42 *infra* for a discussion of the requirements of the environmental impact statement.

¹⁷ 339 F. Supp. at 811.

¹⁸ *Id.* at 812. The court did permit the continuation of some road construction and mapping which did not threaten the environment. At the time of the case, the court noted that \$29 million of the estimated \$69 million cost of the project had been spent and about two-thirds of the property had been purchased. *Id.* at 808. The original estimated cost was \$42.5 million. 468 F.2d at 1170.

¹⁹ 339 F. Supp. at 809. TVA's estimated cost-benefit ratio at this time was 1:3. *Id.* However, according to the court of appeals, TVA's original cost-benefit ratio was just 1:1.4. 468 F.2d at 1169.

²⁰ 339 F. Supp. at 809. In December 1971, the Governor of Tennessee also criticized TVA's impact statement and suggested that the project be discontinued. The TVA replied to the remarks, citing economic benefits of the dam, while downplaying environmental concerns. *Id.* at 809-10.

the TVA was proper.²¹ The court held that the Tellico Project was subject to the requirements of section 102 (2)(C) of NEPA and that the TVA was required to file an environmental impact statement before it could continue working on the project.²² However, the court stated that it would not decide the questions of the "advisability of proceeding with the project" and "whether plaintiffs may challenge, under the NEPA, the ultimate decision to proceed."²³

The action against TVA continued in 1973 with a trial on the merits in the district court. The court dissolved the preliminary injunction it earlier had imposed.²⁴ The plaintiffs argued that the TVA's environmental impact statement failed to adequately analyze the total impact of the project²⁵ and failed to discuss alternatives to the project in any detail.²⁶ However, the court held that TVA had complied with NEPA in its impact statement and could continue with the construction of the Tellico Dam.²⁷ The Sixth Circuit affirmed this decision in February of 1974, stating that the TVA had complied with the requirements of NEPA.²⁸

This litigation under NEPA balanced the benefits of the project against its harm to society. As conceived by the TVA, the Tellico project is a multi-purpose plan to "develop navigation; control destructive floods; generate electric power; provide water supply; promote recreation, fish and wildlife use, and shoreline development; create new job opportunities; advance industrial development; and foster improved economic conditions"²⁹ in a three-county area of eastern Tennessee.³⁰

²¹ Environmental Defense Fund, Inc. v. TVA, 468 F.2d 1164 (6th Cir. 1972).

²² *Id.* at 1180-81.

²³ *Id.* at 1181.

²⁴ Environmental Defense Fund, Inc. v. TVA, 371 F. Supp. 1004 (E.D. Tenn. 1973), *aff'd*, 492 F.2d 466 (6th Cir. 1974). At this time, TVA had spent about \$35 million of the estimated cost of \$69 million. *Id.* at 1006.

²⁵ 371 F. Supp. 1004. Plaintiffs contended the statement should have discussed historical sites, family relocation, ecology, water quality, shoreline development, and economy.

²⁶ *Id.* at 1011-12. See notes 59-61 and accompanying text *infra* on application of NEPA to the Tellico Dam.

²⁷ *Id.* at 1015. See text accompanying notes 49-58 *infra* for a discussion of the application of NEPA by other courts.

²⁸ Environmental Defense Fund, Inc. v. TVA, 492 F.2d 466 (6th Cir. 1974).

²⁹ Brief for Defendant-Appellee at 2-3, Hill v. TVA, 549 F.2d 1064 (6th Cir. 1977).

³⁰ Environmental Defense Fund, Inc. v. TVA, 339 F. Supp. 806, 807 (E.D. Tenn. 1972), *aff'd*, 468 F.2d 1164 (6th Cir. 1972).

However, the dam would destroy the relatively untouched, free-flowing character of the Little Tennessee River. A number of important historical and archaeological sites would be destroyed,³¹ valuable farm land would be lost, and development might adversely affect the local environment.³² The district court noted that "the free-flowing river is the likely habitat of one or more of 7 rare or endangered fish species."³³

The snail darter was discovered on August 12, 1973, in a seventeen-mile stretch of the Little Tennessee River, and was placed on the endangered species list on November 10, 1975, because construction of the Tellico Dam would destroy nearly all of the darter's habitat.³⁴ Thus, the conflict over the Tellico project again went to the courts in 1976;³⁵ this time the question was the applicability of the Endangered Species Act of 1973.³⁶

The district court found that completion of the Tellico Dam and impoundment of the Little Tennessee River would "jeopardize the continued existence of the snail darter,"³⁷ but concluded that the project should be finished since it was substantially completed. "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."³⁸

³¹ *Id.* at 808.

³² *Id.*

³³ *Id.* Critics of the Tellico project have pointed out that the dam would only provide "one tenth of one percent of the electricity within the TVA system" and that the dam would add "only 1.3 percent to the water storage above Chattanooga." In addition, the plans for a 30,000-person model community, which was going to be built near the dam, were dropped by its builder, Boeing Corporation. Critics also discount TVA's estimate that the dam would provide \$1.44 million each year in recreational benefits because of the number of lakes in the area and because one of the river's main attractions is trout fishing, which would disappear if the dam were closed. Stevens, *Little Fish, Big Dam: Issue up to Congress*, Louisville Courier-Journal & Times, Mar. 20, 1977, § D, at 6, col. 1 (state ed.).

³⁴ *Hill v. TVA*, 419 F. Supp. 753 (E.D. Tenn. 1976), *rev'd*, 549 F.2d 1064 (6th Cir. 1977), *cert. granted*, 98 S. Ct. 478 (1977).

See notes 142-49 and accompanying text *infra* for discussion of the application of regulations under the Endangered Species Act to the snail darter, and TVA's objections.

³⁵ 419 F. Supp. 753.

³⁶ 16 U.S.C. §§ 1531-1543 (1976). The Act was passed by Congress on December 28, 1973.

³⁷ 419 F. Supp. at 757.

³⁸ *Id.* at 760. At the time of this suit, the dam was about 85% complete, and the

The Sixth Circuit, on January 31, 1977, reversed,³⁹ holding that the completion of the dam would violate the Endangered Species Act and that the TVA could not be exempted from compliance by the courts. In effect, it stated that the courts do not have wide discretion in determining whether the Act should apply to an endangered species.⁴⁰

II. THE PROVISIONS AND PURPOSES OF NEPA

Because the Tellico controversy has been litigated with respect to both NEPA and the Endangered Species Act, it is instructive to discuss briefly the requirements and philosophy of NEPA to determine why different results occurred when the two acts were each applied to the dispute.

NEPA requires all federal agencies to draft an environmental impact statement for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."⁴¹ This statement must include, among other things, information about the "environmental impact of the proposed action," unavoidable adverse environmental effects of the project, and alternatives to it.⁴²

The purposes of NEPA emphasize the relation of environmental protection to human welfare and the need to protect the nation's resources.⁴³ Congress, by enacting NEPA, has declared that environmental concerns must be considered along with the other aspects of our industrial society in future planning and that environmental quality must be restored and maintained.⁴⁴ To carry out the policies of NEPA, federal laws and regulations are to be interpreted in light of this act,⁴⁵ and all federal agen-

entire project was 80% complete. Further, \$78 million had been invested in the project; the TVA estimated that \$53 million would be lost if the project were stopped. *Id.* at 759.

³⁹ *Hill v. TVA*, 549 F.2d 1064 (6th Cir. 1977).

⁴⁰ *Id.* See text accompanying notes 151-62 *infra* for a discussion of the court's discretion in applying section 7 of the Endangered Species Act.

⁴¹ 42 U.S.C. § 4332(2)(C) (1970). See Seeley, *The National Environmental Policy Act: A Guideline for Compliance*, 26 VAND. L. REV. 295 (1973).

⁴² 42 U.S.C. § 4332(2)(C)(i)(iii) (1970). Copies of the environmental impact statement go through the process of agency review. *Id.* at (2)(C).

⁴³ *Id.* § 4321. See note 206 *infra* for the policies underlying NEPA.

⁴⁴ *Id.* § 4331.

⁴⁵ *Id.* § 4332(1).

cies are required to consider environmental factors along with technical and economic aspects in their decision making.⁴⁶ Congress, through NEPA, has made environmental protection a national priority to be balanced with other priorities in our society. "In some instances environmental costs outweigh economic and technical benefits and in other instances they may not. But NEPA mandates a rather finely tuned and 'systematic' balancing analysis in each instance."⁴⁷

Cases decided under NEPA have applied this balancing test to determine whether a particular federal agency complied with the environmental impact statement requirement "to the fullest extent possible."⁴⁸ In *Calvert Cliffs Coordinating Committee, Inc. v. United States Atomic Energy Commission*⁴⁹ the District of Columbia Circuit said that "the general substantive policy of the Act is a flexible one,"⁵⁰ yet the procedural requirements of preparing an environmental impact statement under NEPA are stringent. It concluded that a "case-by-case balancing judgment"⁵¹ is required for every federal action subject to NEPA. In *Arlington Coalition on Transportation v. Volpe*⁵² the Fourth Circuit, holding that NEPA applied to the construction of Interstate 66 in Arlington County, Virginia, stated that the Secretary of Transportation must consider all the information in the impact statement including the previous investment in the project.⁵³ The Eighth Circuit in *Environmental Defense Fund, Inc. v. Corps of Engineers*⁵⁴ accepted the defendant's environmental impact statement on the Gillham Dam in Arkansas. The court concluded that the impact statement was not biased, that it did consider reasonable alternatives to the

⁴⁶ *Id.* § 4332(2)(A)-(B).

⁴⁷ *Calvert Cliffs Coordinating Comm., Inc. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1113 (D.C. Cir. 1971).

⁴⁸ This is what is required in the statute, 42 U.S.C. § 4332 (1970).

⁴⁹ 449 F.2d 1109 (D.C. Cir. 1971).

⁵⁰ *Id.* at 1123.

⁵¹ *Id.*

⁵² 458 F.2d 1323 (4th Cir. 1972).

⁵³ *Id.* at 1332-33.

⁵⁴ 470 F.2d 289 (8th Cir. 1972). The intent of NEPA, according to the court, is that the agencies seriously consider environmental effects which are included in their environmental impact statements. Review by the courts includes deciding whether the agency acted within the scope of its authority and whether the action was arbitrary or capricious. *Id.* at 300. See notes 155-58 and accompanying text *infra* on judicial review of federal agency action.

dam, and that it contained a full disclosure of facts relevant to the project.⁵⁵ As a result, a temporary injunction was dismissed and the dam could be completed. The same court in *Environmental Defense Fund, Inc. v. Froehlke*⁵⁶ rejected the Corps' impact statement on the Cache River-Bayou DeView project because it did not discuss alternatives, was too vague, and lacked supporting evidence.⁵⁷ The Eighth Circuit again, in *Sierra Club v. Froehlke*,⁵⁸ held that the Corps' impact statement for the Meramec Dam was adequate. The statement incorporated a discussion of alternatives and a consideration of the consequences of the dam on the Indiana bat.

The Tellico controversy initially focused on the applicability of NEPA. After deciding NEPA applied to the controversy, the court enjoined TVA from further construction because of the inadequacy of its impact statement. The injunction was later dissolved when its environmental impact statement complied with section 102 (2)(C) of NEPA.⁵⁹ The statement presented economic, social, and environmental consequences of the dam and possible alternatives. It contained agency and individual comments and was appropriately filed with the Council on Environmental Quality.⁶⁰ The court concluded that "[t]here has been on the part of TVA in reaching its decision a good faith consideration and balancing of environmental factors . . . the actual balance of costs and benefits struck was not arbitrary and gave sufficient weight to environmental values."⁶¹

Work was again halted as a result of litigation under the Endangered Species Act. This Act does not contemplate a balancing approach, but requires mandatory action by federal

⁵⁵ 470 F.2d 289.

⁵⁶ 473 F.2d 346 (8th Cir. 1972). The channelization project is in Arkansas and Mississippi.

⁵⁷ *Id.* at 348.

⁵⁸ 534 F.2d 1289 (8th Cir. 1976).

⁵⁹ *Environmental Defense Fund, Inc. v. TVA*, 371 F. Supp. 1004 (E.D. Tenn. 1973), *aff'd*, 492 F.2d 466 (6th Cir. 1974). See notes 24-28 and accompanying text *supra*, for details of TVA's environmental impact statement. TVA's final environmental impact statement consisted of approximately 600 pages.

⁶⁰ 371 F. Supp. 1004. See 42 U.S.C. § 4332(2)(C) (1970). The establishment and duties of the Council on Environmental Quality are covered in 42 U.S.C. §§ 4341-4347 (1970 & Supp. V 1975) (Subchapter II of the National Environmental Policy Act of 1969).

⁶¹ 371 F. Supp. at 1015.

agencies to ensure the protection of endangered and threatened species.⁶²

III. THE ENDANGERED SPECIES ACT OF 1973

A. *Background of Endangered Species Act: Earlier Federal Legislation*

The Endangered Species Act⁶³ was passed by Congress in 1973 as a successor to earlier federal acts which dealt with endangered species. Among the earliest federal legislation protecting wildlife was the Lacey Act,⁶⁴ passed in 1900. The act prohibited the importation into the United States of certain animals which the Secretary of the Interior determined would be harmful to "human beings, . . . the interests of agriculture, horticulture, forestry or to wildlife or the wildlife resources of the United States."⁶⁵ In addition the act, as amended, prohibited transporting in interstate commerce animals taken in violation of state and federal laws and required animals to be shipped under humane conditions.⁶⁶ The major weakness of this act was that it depended to a large extent on state and foreign laws, rather than on a federal program, for the protection of endangered species.⁶⁷

Federal legislation aimed at protecting particular species included the Black Bass Act of 1926,⁶⁸ the Migratory Bird Conservation Act of 1929,⁶⁹ and the Bald Eagle Protection Act of 1940.⁷⁰ Legislation protecting endangered species in general

⁶² See notes 89, 190 and accompanying text *infra* for the purposes of the Endangered Species Act.

⁶³ 16 U.S.C. §§ 1531-1543 (1976).

⁶⁴ 18 U.S.C. §§ 41-44 (1976); 16 U.S.C. §§ 667(e), 701 (1976).

⁶⁵ 18 U.S.C. § 42(a)(1) (1976). See Comment, *Vanishing Wildlife and Federal Protective Efforts*, 1 *ECOLOGY L.Q.* 520, 537 (1971).

⁶⁶ Coggins, *Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973*, 51 *N.D.L. REV.* 315, 317 (1974); Palmer, *Endangered Species Protection: A History of Congressional Action*, 4 *ENV'TL AFF.* 255, 256-57 (1975).

⁶⁷ Palmer, *supra* note 66, at 258.

⁶⁸ 16 U.S.C. §§ 851-856 (1976).

⁶⁹ 16 U.S.C. §§ 715-715r (1976). This act provides for federal purchase or rental of lands and waters for migratory bird sanctuaries.

⁷⁰ 16 U.S.C. § 668d. Articles dealing with the history of federal environmental legislation in the United States include the following: Coggins, *supra* note 66; Palmer, *supra* note 66; Note, *Federal Protection of Endangered Wildlife Species*, 22 *STAN. L. REV.* 1289 (1970); Comment, *supra* note 65.

dates from the Endangered Species Preservation Act of 1966.⁷¹ This was the first attempt by the federal government to protect all native endangered species of fauna. The purposes of the act were to:

provide for a program for the conservation, protection, restoration, and propagation of selected species of native fish and wildlife, including migratory birds, that are threatened with extinction, and to consolidate, restate, and modify the present authorities relating to administration by the Secretary of the Interior of the National Wildlife Refuge System.⁷²

The Secretary of the Interior had authority to establish and carry out programs as well as to encourage other federal agencies to further the purposes of the act.⁷³ The act was criticized for neglecting causes of extinction other than destruction of habitat and for limiting itself to native wildlife.⁷⁴ Furthermore, other federal agencies did not have a mandatory obligation to protect endangered species.

In an effort to strengthen federal protection of endangered species, Congress enacted the Endangered Species Conservation Act of 1969 which amended the 1966 act.⁷⁵ The new act covered several significant areas. First, authority was given to the Secretary of the Interior to develop a list of endangered animal species and subspecies which could not be imported into the United States.⁷⁶ There were two limited exceptions:

⁷¹ Pub. L. No. 89-669, 80 Stat. 926 (1966). This act was originally codified at 16 U.S.C. §§ 668aa-668ee. §§ 668 cc(1-6) were added by amendment in 1969. All of the act except 16 U.S.C. §§ 668dd-668ee (1976), governing the National Wildlife Refuge System, was repealed in 1973.

⁷² Pub. L. No. 89-669, § 1(a), 80 Stat. 926 (1966), *quoted in* Palmer, *supra* note 66, at 258-59.

⁷³ Palmer, *supra* note 66, at 259, 287 n.46; *See* SENATE REPORT, *supra* note 5, at 2.

⁷⁴ Palmer, *supra* note 66, at 259, 262.

⁷⁵ 16 U.S.C. §§ 668aa to 668cc-6 (1969) (originally enacted as Pub. L. No. 91-135, 83 Stat. 275, and repealed by the present act, 16 U.S.C. §§ 1531-1543 (1973)).

⁷⁶ The prohibition extended to not simply the animals, but also to any part, product, or egg of such endangered animal. The covered animals included all vertebrates and two classes of invertebrates. SENATE REPORT, *supra* note 5, at 2; Palmer, *supra* note 66, at 262; Comment, *supra* note 65, at 547.

The 1969 act also directed the Secretary of the Interior to seek an international meeting on endangered fish and willlife. This resulted in the Convention on International Trade in Endangered Wild Fauna and Flora in 1973. A result of this meeting, according to Palmer, was the enactment of the Endangered Species Act in 1973. Palmer *supra* note 66, at 263-65.

permits could be obtained to import endangered animals for use in "scientific, educational, zoological or propagational purposes"⁷⁷ and to commercially import animals pursuant to a pre-existing contract for the period of one year following the animal's placement on the endangered species list.⁷⁸ Second, to protect domestically endangered species, the act made it illegal for persons in the United States to buy or sell such species if the persons "[know], or in the exercise of due care should know, that such animal was taken in any manner in violation of the laws or regulations of a state or foreign country."⁷⁹ The Lacey Act was also expanded to include a larger number of protected animals.⁸⁰ Third, more money was appropriated for the Secretary of the Interior's acquisition of land to protect endangered species.⁸¹

Several weaknesses existed in the 1969 act. The Secretary of the Interior had problems implementing parts of the program; the Secretary also could not act to protect species until they became so endangered that their chances for survival were minimal.⁸² In addition, the fifteen million dollars appropriated for land acquisition were spent by 1973.⁸³ Finally, the 1969 act, like the 1966 act, did not protect plants.

B. *Provisions of the Act*

Finding that the 1966 and 1969 acts were not sufficient protection for endangered species, Congress in 1973 passed the Endangered Species Act⁸⁴ which replaced the 1969 act and the

⁷⁷ SENATE REPORT, *supra* note 5, at 2. See Palmer, *supra* note 66, at 262; Comment, *supra* note 65, at 553.

⁷⁸ SENATE REPORT, *supra* note 5, at 2. See Palmer, *supra* note 66, at 263; Comment, *supra* note 65, at 552. The purpose of this exception was to avoid economic hardship.

⁷⁹ SENATE REPORT, *supra* note 5, at 2.

⁸⁰ Palmer, *supra* note 66, at 265.

⁸¹ *Id.* See SENATE REPORT, *supra* note 5, at 3; Comment, *supra* note 65, at 546.

⁸² Palmer, *supra* note 66, at 263; SENATE REPORT, *supra* note 5, at 3. Other weaknesses are:

No protection is afforded endangered species while still wild; no protection is given against continued destruction within a state; and no pressure is placed upon the states to declare the hunting or other taking of endangered species contrary to state law in order to give effect to the purpose of the Act.

Note, *supra* note 70, at 1306.

⁸³ HOUSE REPORT, *supra* note 7, at 2. See also SENATE REPORT, *supra* note 5, at 4.

⁸⁴ 16 U.S.C. §§ 1531-1543 (1976). Articles on the 1973 Act include the following: Lachenmeier, *The Endangered Species Act of 1973: Preservation or Pandemonium?*,

1966 act with the exception of provisions concerning the National Wildlife Refuge System.⁸⁵ To improve upon the earlier acts, the Senate felt that new legislation must provide that threatened as well as endangered species be protected, that more money be authorized for acquisition of land, and that state agencies provide protection programs for endangered species.⁸⁶

1. *General Provisions of the Act*

Section 2 of the Endangered Species Act sets out congressional findings and policy.⁸⁷ Congress finds that there are various endangered and threatened species in the United States which are of "esthetic, ecological, educational, historical, recreational and scientific value to the Nation and its people"⁸⁸ and which should be conserved. The purpose of the 1973 Act is to provide a means to save such species and their ecosystems;⁸⁹ federal departments and agencies are to further the purposes of the Act.⁹⁰

Definitions used in the Act are set out in section 3.⁹¹ The definition of "conservation" is a broad one, encompassing "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary."⁹² An endangered species is "any species

5 ENV'T L. 29 (1974); Wood, *supra* note 4, at 50,189; Note, *Obligations of Federal Agencies under Section 7 of the Endangered Species Act of 1973*, 28 STAN. L. REV. 1247 (1976). See also Palmer, *supra* note 66.

Legislative history includes: *Endangered Species Act of 1973: Hearings on S. 1592 and S. 1983 Before the Subcomm. on Environment of the Senate Comm. on Commerce*, 93d Cong., 1st Sess. (1973) [hereinafter cited as *Senate Hearings*]. *Endangered Species: Hearings on H.R. 37 et al. Before the Subcomm.; on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 93d Cong., 1st Sess. (1973) [hereinafter cited as *House Hearings*].

⁸⁵ Palmer, *supra* note 66, at 268.

⁸⁶ SENATE REPORT, *supra* note 5, at 3.

⁸⁷ 16 U.S.C. § 1531 (1976). Section 1 of the Senate bill sets out the title. S. 1983, 93d Cong., 1st Sess. § 1 (1973).

⁸⁸ 16 U.S.C. § 1531(a)(3) (1976).

⁸⁹ *Id.* § 1531(b).

⁹⁰ *Id.* § 1531(c).

⁹¹ *Id.* § 1532.

⁹² *Id.* § 1532(2).

which is in danger of extinction throughout all or a significant portion of its range."⁹³ A threatened species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."⁹⁴ The addition of the "threatened" species category allows the Secretary of the Interior to provide for protection of species before they become virtually extinct; it gives a certain amount of discretion to the Secretary to find whether "a measurable risk to those species could be said to exist."⁹⁵

Under the 1973 Act "species" includes fish or wildlife and plants. The definition of "species" provides broader coverage than that provided by the 1969 act. "Fish or wildlife" includes "any member of the animal kingdom"⁹⁶ and encompasses captive and domestic animals⁹⁷ as well as wild ones. Also, plants were not protected in earlier legislation.⁹⁸ The Act extends to subspecies and other "smaller taxa."⁹⁹ The effect of including subspecies and "smaller taxa" as categories is to allow for the protection of a population even if the entire species is not endangered or threatened.¹⁰⁰

⁹³ *Id.* § 1532(4). The Act does exclude species of the class Insecta which are determined to be pests, providing great risks to humans. This definition of "endangered" species is more inclusive than the use of the term in the 1969 act. Under the 1973 act, species are protected if their existence is threatened in all or "a significant" portion of their range, whereas in the earlier act species which are "threatened with worldwide extinction" are protected. Pub. L. No. 91-135, § 3(a), 83 Stat. 275 (repealed 1973). "This definition is a significant shift in the definition in existing law, which considers a species to be endangered only when it is threatened with world-wide extinction." HOUSE REPORT, *supra* note 7, at 10. Now, if a species is in danger of extinction in one range but not in another, it can be protected. See Wood, *supra* note 4, at 50,190.

⁹⁴ 16 U.S.C. § 1532(15)(1976).

⁹⁵ HOUSE REPORT, *supra* note 7, at 11. See also *House Hearings, supra* note 84, at 284-85 (statement by Rep. B. Blackburn); *Senate Hearings, supra* note 84, at 76 (statement by E. U. Curtis Bohlen); Palmer, *supra* note 66, at 269; Note, *supra* note 84, at 1250.

For both endangered and threatened species, the Secretary will have flexibility in deciding where species are to be protected, but the question remains of what a "significant portion of its range" means. Lachenmeier, *supra* note 84, at 36, 41.

⁹⁶ 16 U.S.C. § 1532(5)(1976). The 1969 act included "any wild mammal, fish, wild bird, amphibian, reptile, mollusk, or crustacean." Pub. L. No. 91-135, § 1(2), 83 Stat. 275 (repealed 1973).

⁹⁷ Lachenmeier, *supra* note 84, at 37-38.

⁹⁸ 16 U.S.C. § 1532(9)(1976). "Plants" are defined as "any member of the plant kingdom, including seeds, roots and other parts thereof"

⁹⁹ 16 U.S.C. § 1532(11)(1976).

¹⁰⁰ According to the House Report, the term "species" includes "any subspecies . . . or any population of such species." HOUSE REPORT, *supra* note 7, at 11. For

Finally, the "taking" of endangered fish and wildlife, which is prohibited in section 9, is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."¹⁰¹

Section 4 establishes that the Secretary of the Interior, by regulation, is to determine whether a species is endangered or threatened.¹⁰² The determination follows an analysis of scientific and commercial data and consultation with interested parties. Before any species can be considered endangered or threatened, the Secretary publishes notice in the Federal Register and allows ninety days for comments from states where the species is a "resident."¹⁰³ Section 4 also provides for publication in the Federal Register of lists of all endangered and threatened species and their geographic locations.¹⁰⁴

example, American alligators are endangered in some areas and threatened in others. Note, *supra* note 84, at 1250 n.29. The inclusion of "subspecies" as well as "species" was made in the 1969 act, Pub. L. No. 91-135, § 3(a), 83 Stat. 275 (repealed 1973). See also *Senate Hearings*, *supra* note 84, at 55, 85-86.

¹⁰¹ 16 U.S.C. § 1532(14)(1976). The Senate report stated that taking should be defined "in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." SENATE REPORT, *supra* note 5, at 7. The House report also indicated that the definition should be broad. HOUSE REPORT, *supra* note 7, at 11.

Although during Senate and House hearings it was suggested that "taking" includes destruction or modification of habitat, this was not incorporated in the final bill. See *Senate Hearings*, *supra* note 84, at 108, 129, 146; *House Hearings*, *supra* note 84, at 299. See also Lachenmeier, *supra* note 84, at 38-41; Note, *supra* note 84, at 1251 n.31.

¹⁰² 16 U.S.C. § 1533 (1976). See HOUSE REPORT, *supra* note 7, at 11-12; SENATE REPORT, *supra* note 5, at 7-8. See notes 142-49 and accompanying text *infra* on application of procedures to the snail darter.

¹⁰³ 16 U.S.C. § 1533(b)(1976). The five factors used in making these determinations are: "curtailment of its habitat; over-utilization; disease or predation; inadequacy of other regulatory mechanisms; and other 'natural or other manmade factors affecting its continued existence.'" *Id.* § 1533(a)(1).

See Lachenmeier, *supra* note 84, at 44-45 for a discussion of "resident species"; SENATE REPORT, *supra* note 5, at 7.

¹⁰⁴ 16 U.S.C. § 1533(c)(1976). Before any species is placed on or taken off such lists, the Secretary of the Interior must, if an interested person petitions under the Administrative Procedure Act, review the supporting evidence. 16 U.S.C. § 1533(c)(1976). The Secretary has the discretion to make such review for public suits on a finding that "such person has presented substantial evidence which in [the Secretary's] judgment warrants such a review." *Id.* § 1533(c)(2). See Lachenmeier, *supra* note 84, at 45.

Subsections 1533(d) and 1533(f) provide for the issuance of regulations protecting such species; § 1533(e) provides for protecting species which "closely [resemble] in appearance" an endangered or threatened species.

Section 5 pertains to the authority of the Secretary of the Interior to acquire property for the purpose of implementing the Act.¹⁰⁵ Section 6 deals with federal cooperation with the states.¹⁰⁶ The Secretary has the authority to enter into a "cooperative agreement" with any state that has an acceptable conservation program;¹⁰⁷ any such state is entitled to federal financial assistance.¹⁰⁸

Section 7, entitled "[i]nteragency cooperation," indicates the roles of other federal departments and agencies with respect to the protection of endangered and threatened species. This was the primary section in issue in *Hill v. TVA* and is discussed in further detail below.¹⁰⁹

Section 8 authorizes financial assistance by the United States to foreign countries for the purposes of encouraging conservation of endangered and threatened species.¹¹⁰ Illegal acts under this Act are set out in Section 9.¹¹¹ In particular, it is illegal to "take any such [endangered] species [of fish and wildlife] within the United States."¹¹² Section 10 provides for

See SENATE REPORT, *supra* note 5, at 7-8. Regulations promulgated under the Endangered Species Act identify the endangered and threatened species of animals and plants, the extent to which they are endangered or threatened, and the ranges of these species. 50 C.F.R. Part 17 (1976). Subpart C of Part 17 pertains to endangered wildlife and subpart D applies to threatened species. The List of Endangered and Threatened Species is found at § 17.11.

¹⁰⁵ 16 U.S.C. § 1534 (1976). The Secretary has authority to acquire "lands, waters, or interests therein." *Id.* § 1534(a)(1).

¹⁰⁶ 16 U.S.C. § 1535(a) (1976) provides that the Secretary of the Interior "shall cooperate to the maximum extent practicable with the States." *See* CONF. REPORT ON THE ENDANGERED SPECIES ACT OF 1973, H.R. REP. NO. 740, 93d Cong., 1st Sess. 1, 25-26 (1973), reprinted in [1973] U.S. CODE CONG. & AD. NEWS 2989, 3001-08 [hereinafter cited as CONF. REPORT]. *See also* HOUSE REPORT, *supra* note 7, at 13-14; Lachenmeier, *supra* note 84, at 50-54.

¹⁰⁷ 16 U.S.C. § 1535(c) (1976).

¹⁰⁸ *Id.* § 1535(d).

¹⁰⁹ *Id.* § 1536. *See* notes 118-27 and accompanying text *infra* for analysis of section 7 of the Endangered Species Act.

¹¹⁰ 16 U.S.C. § 1537 (1976).

¹¹¹ *Id.* § 1538. Prohibited acts are stated as are requirements for permits for "any activity otherwise prohibited by the regulations" in 50 C.F.R. §§ 17.22, 17.32 (1976). The permits are only available for stated purposes, "for scientific research or for enhancing propagations or survival" of endangered and threatened species and for "economic hardship; or zoological exhibition; or educational purposes; or special purposes consistent with the purposes of the Act" for threatened species. *Id.*

¹¹² 16 U.S.C. § 1538(a)(1)(B)(1976). It is also illegal to "possess, sell, carry, transport or ship" any such illegally taken species. *Id.* § 1538(a)(1)(D). Subsection (a)(1) deals with specified prohibited acts with respect to fish and wildlife, and (a)(2) with

the Secretary of Interior to make exceptions to the prohibitions set out in section 9.¹¹³

Penalties for violating the Endangered Species Act are stated in section 11.¹¹⁴ Civil penalties up to \$10,000 for each violation are possible for any person "who knowingly violates, or who knowingly commits an act in the course of commercial activity which violates any provision of this chapter, or any provision of any permit or certificate issued hereunder, or of any regulation."¹¹⁵ Criminal penalties are established for willful violations of the Act.¹¹⁶

One important feature of the Act is the provision for citizen suits, by which "any person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter."¹¹⁷

2. Section 7 of the Endangered Species Act

Section 7 of the Endangered Species Act establishes the responsibilities of federal agencies for the conservation of endangered and threatened species. The section states:

The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes

respect to plants. This section also covers violations of the Convention on International Trade in Endangered Species of Wild Fauna and Flora and unlawful imports and exports of fish and wildlife and plants. See CONF. REPORT, *supra* note 106, at 27.

The meaning of the term "taking" is discussed in note 101 and accompanying text *supra*.

¹¹³ 16 U.S.C. § 1539 (1976). The Act does not apply to certain Alaskan natives who take any endangered or threatened species "primarily for subsistence purposes." *Id.* § 1539(e). See note 111 *supra* for the regulations concerning permits.

¹¹⁴ 16 U.S.C. § 1540 (1976).

¹¹⁵ *Id.* § 1540(a)(1). Persons who violate the Act unknowingly may be subject to a fine of up to \$1000. Usually, however, a person coming under this provision, such as a casual tourist, would just forfeit the items concerned. CONF. REPORT, *supra* note 106, at 28.

¹¹⁶ 16 U.S.C. § 1540(b)(1) (1976). Maximum penalties are \$20,000 and one year imprisonment for each violation. Jurisdiction over any actions arising under the Act is in the United States district courts. *Id.* § 1540(c).

¹¹⁷ *Id.* § 1540(g)(1)(A).

There are also provisions in the Act for the Smithsonian Institution to establish a list of endangered plants in § 1541. The Act is to be applied in conjunction with the Marine Mammal Protection Act of 1972. See § 1543. See § 1542 for authorization of annual appropriations.

of this chapter. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, 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 modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.¹¹⁸

The wording of this section makes it mandatory that federal agencies ensure the existence of such species and prevent the destruction of critical habitats.¹¹⁹ Federal departments and agencies "shall . . . utilize their authorities in furtherance of the purposes of this chapter."¹²⁰

Legislative history confirms this interpretation of the statute. The Interior Department described the proposed Endangered Species Conservation Act of 1972 at House hearings on the 1973 Act as "the first piece of substantive law which agencies would have to adhere to in carrying out their programs and duties, as it would prevent them from taking action which would jeopardize the continued existence of endangered species."¹²¹ At the Senate hearings, an Interior official stated that

¹¹⁸ *Id.* § 1536 (1976).

¹¹⁹ *Id.* The Fish and Wildlife Service, by regulation, has defined "critical habitat" as "the entire habitat or any portion thereof, if, and only if, any constituent element is necessary to the normal needs or survival of that species." 40 Fed. Reg. 17,764 (1975), *quoted in* 41 Fed. Reg. 13,927 (1976). Several factors to be considered for the determination of critical habitat are included, as well as a definition of "habitat." Any action by a federal agency which would destroy or modify a critical habitat would violate section 7 if it "might be expected to result in a reduction in the numbers or distribution of that species of sufficient magnitude to place the species in further jeopardy, or restrict the potential and reasonable expansion or recovery of that species." 40 Fed. Reg. 17,765 (1975), *quoted in* 41 Fed. Reg. 13,927 (1976).

There is a current controversy in Houston, Texas, on the issue of establishing critical habitats for the Houston toad where commercial development would be limited. The areas in question have the proper environmental elements for the toad's existence, but biologists have been unable to actually find any of the elusive animals. NBC Weekend, Jan. 7, 1978.

¹²⁰ 16 U.S.C. § 1536 (1976) (emphasis added).

¹²¹ *House Hearings, supra* note 84, at 188, *cited in* Note, *supra* note 84, at 1255. This mandatory language is in contrast to that of the earlier acts; *see* notes 63-83 and accompanying text *supra* for provisions of the earlier legislation.

this section of the proposed Act "for the first time would prohibit another Federal agency from taking action which does jeopardize the status of endangered species."¹²² In addition, the House Report declares that section 7 "requires the Secretary and the heads of all other Federal departments and agencies to use their authorities in order to carry out programs for the protection of endangered species."¹²³ Representative Dingell, reporting on the conference bill before the House of Representatives, explained, "Another important step which we have taken in this bill . . . is that we have substantially amplified the obligation of both agencies [Commerce and Interior] and other agencies of Government as well, to take steps within their power to carry out the purposes of this act."¹²⁴ Citing the problems associated with whooping cranes and grizzly bears, Dingell asserted that "every agency of Government is committed to see that those purposes [of the Act] are carried out. . . . [T]he agencies of Government can no longer plead that they can do nothing about [the extermination of a species]. They can, and they must. The law is clear."¹²⁵

The original text of section 7¹²⁶ included the statement that all federal departments and agencies "shall, in consultation with and with the assistance of the Secretary—(a) carry out such programs *as are practicable* for the protection of species listed . . . as endangered or threatened."¹²⁷ The bill as it was

¹²² *Senate Hearings, supra* note 84, at 68.

¹²³ HOUSE REPORT, *supra* note 7, at 14. The Senate report also states, "All agencies, departments, and other instrumentalities of the Federal government are directed to cooperate in the implementation of the goals of this Act." SENATE REPORT, *supra* note 5, at 8-9.

¹²⁴ 119 CONG. REC. 42913 (1973).

¹²⁵ *Id.* House Bill 37 was introduced to the whole House and passed (391-12) on September 18, 1973. 119 CONG. REC. 30157, 30167-68 (1973). The Conference Committee presented the Conference Report to the House on December 19, 1973. 119 CONG. REC. 42621 (1973). The House agreed to the report the following day.

Senate Bill 1983 was considered by the entire Senate and passed (60-33) on July 24, 1973. 119 CONG. REC. 25662, 25691 (1973). The Conference Committee reported to the Senate and the Senate agreed to the report on December 19, 1973. 119 CONG. REC. 42451, 42528 (1973).

See Note, *supra* note 84, at 1255.

¹²⁶ This language was contained in Senate Bill S. 1983, 93d Cong., 1st Sess. (1973).

¹²⁷ 119 CONG. REC. 25664 (1973) (emphasis added). Similarly in the House, original legislation included, in the policy sections, qualifying phrases when referring to the roles of other federal agencies. For example, H.R. Rep. No. 37, 93d Cong., 1st Sess. § 2(c)(1973) stated, "All Federal departments and agencies shall seek to protect species

finally enacted omitted this qualifying phrase, a further indication that Congress did not intend the federal agencies to have discretion in carrying out the provisions of the Endangered Species Act.

C. *Litigation Under the Endangered Species Act*

Litigation under the Endangered Species Act has centered on the application of the statute, particularly section 7, to projects undertaken by federal agencies. The nature of the relief sought, the standard of judicial review, the role of the Department of the Interior, and the mandatory duty imposed on the federal agencies are major issues in these cases.

In *National Wildlife Federation v. Coleman*¹²⁸ the plaintiff sought to enjoin construction by the Department of Transportation of a 5.7 mile section of Interstate 10 which would pass through the habitat of the Mississippi sandhill crane. At the time of the litigation there were an estimated forty cranes in existence. Their only natural habitat was a 40,000 acre region in Mississippi,¹²⁹ part of which was a proposed refuge area. The crane was listed as an endangered subspecies in 1973; in 1975 its "critical habitat" designation was issued pursuant to an emergency determination.¹³⁰ In its decision to halt the construction until modifications in the plans were made,¹³¹ the

. . . , and wherever practicable, shall utilize their authorities in furtherance of the purpose of this Act." *House Hearings, supra* note 84, at 89 (emphasis added). The language in H.R. Rep. No. 4758, 93d Cong., 1st Sess. § 2(b) (1973) read: "in so far as is practicable and consistent with the primary purposes of such bureaus, agencies and services." *House Hearings, supra* note 84, at 166-67. The subcommittee counsel at the hearings responded favorably to the suggestions by the Sierra Club that such language be taken out. *Id.* at 345. These qualifying phrases were not included in the policy section of H.R. 37 as reported to the whole House, nor are they in the Act as passed. 16 U.S.C. § 1531(c)(1976).

See SENATE REPORT, *supra* note 5, at 18-19; Note, *supra* note 84, at 1254 n.53.

¹²⁸ 529 F.2d 359 (5th Cir.), *cert. denied*, 429 U.S. 979 (1976). Plaintiff sought relief under the Endangered Species Act, NEPA, and the Department of Transportation Act. Plaintiff, National Wildlife Federation, had standing to sue under 16 U.S.C. § 1540(g)(1) which provides for citizen suits. *National Wildlife Federation v. Coleman*, 400 F. Supp. 705, 710 (S.D. Miss. 1975). See text accompanying note 117 *supra* for a discussion of citizen suits under the Endangered Species Act.

¹²⁹ 529 F.2d at 362-63. The Mississippi sandhill crane is a subspecies of sandhill crane.

¹³⁰ *Id.* at 367. The emergency designation was made the day before the trial started, because of the threat created by the highway to the crane's habitat. *Id.* at 367-68.

¹³¹ *Id.* at 375.

court stated that section 7 imposes a mandatory duty on the Department of Transportation not to jeopardize the existence of the crane or destroy its habitat. Even though the Department considered the danger of the highway project to the cranes, the court found that it did not take the steps required by section 7.¹³²

The court stated that once a federal agency consults the Department of the Interior under Section 7, it becomes the responsibility of the agency, not the Interior Department, to decide whether it has ensured that the endangered species and its habitat will not be destroyed, and then whether to proceed with its project. In other words, the Department of the Interior does not have a "veto over the actions of other federal agencies, provided that the required consultation has occurred."¹³³ The agency's decision, however, is subject to judicial review to determine whether it was "based on a consideration of relevant factors and whether there has been a clear error of judgment."¹³⁴ In this instance the Department of Transportation was forced to make certain changes to ensure that the habitat of the crane would not be destroyed or modified.¹³⁵

The applicability of section 7 of the Endangered Species Act was also questioned in *Sierra Club v. Froehlke*.¹³⁶ The

¹³² *Id.* at 373. The court of appeals reversed the decision of the district court which, in denying the injunction, had commented that the Department of Transportation had "adequately considered the effects of this project on the Crane in all phases of its planning." *National Wildlife Federation v. Coleman*, 400 F. Supp. 705, 712 (S.D. Miss. 1975). The court of appeals, stating that the lower court misinterpreted section 7, indicated that the Department of Transportation did not merely have to recognize the effects of the highway on the cranes but had to ensure that the project would not have adverse effects on the crane. 529 F.2d at 373.

¹³³ *National Wildlife Federation v. Coleman*, 529 F.2d 359, 371 (5th Cir.), *cert. denied*, 429 U.S. 979 (1976).

¹³⁴ *Id.* at 372 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) which applied the Administrative Procedure Act, § 706 for the standard of review). See notes 155-58 and accompanying text *infra* on judicial review of agency action under the Endangered Species Act.

¹³⁵ 529 F.2d at 375. The modifications which had to be made included the elimination of a particular interchange and of "borrow pits" (excavated areas) near the highway in the critical habitat. The possibility of the Federal Highway Administration acquiring additional property to replace that which is taken by the highway also was considered. *Id.*

¹³⁶ 392 F. Supp. 130 (E.D. Mo. 1975), *aff'd*, 534 F.2d 1289 (8th Cir. 1976). Plaintiff sought relief against the Army Corps of Engineers under NEPA, Federal Water Pollution Control Act Amendments of 1972, and the Endangered Species Act, among others. 534 F.2d at 1291.

Eighth Circuit considered the effect of the Meramec Park Dam and resulting lake on the Indiana bat, an endangered species.¹³⁷ The plaintiffs argued that further construction of the dam would "[jeopardize] the continued existence" of the bat and would result in the destruction or modification of its habitat.¹³⁸ The court of appeals noted that there are approximately 700,000 Indiana bats, 30,000 of which are found in the Meramec Basin, and between 10,000 and 15,000 of these would be affected by the proposed dam.¹³⁹ The injunction was denied because the plaintiffs failed "to show that any of the defendant's present activities in constructing the Meramec Park Reservoir are adversely affecting Indiana bats in the project area."¹⁴⁰ The court adopted the reasoning of the Fifth Circuit in *National Wildlife Federation* with respect to the responsibility of each federal agency to decide whether to carry out its project and with respect to the standard of judicial review.¹⁴¹

¹³⁷ The Indiana bat has been on the list of endangered species since 1966. The Meramec Park Lake Project was first authorized in the Flood Control Act of 1938; the current project was approved and authorized by Congress in 1966. 534 F.2d at 1297.

See note 58 and accompanying text *supra* for the application of NEPA to this controversy.

¹³⁸ 534 F.2d at 1301. The plaintiffs also contended that the Meramec project violated section 9 of the Endangered Species Act because the construction of the dam and subsequent flooding was a "taking" of the Indiana bat by a "person subject to the jurisdiction of the United States." *Id.* at 1301-02, 1304; see 16 U.S.C. § 1538(a)(1)(B) (1976). "Taking" is defined to include harassing and harming an endangered species. *Id.* § 1532(14). See note 101 and accompanying text *supra* for a definition of a "taking." A "person" includes an "instrumentality of the Federal Government." *Id.* § 1532(8). The court rejected this argument, finding no evidence to show harassment. "This Act, as any other, must have a reasonable construction." 534 F.2d at 1304-05.

The court of appeals in *Sierra Club v. Froehlke* distinguished the situation of *National Wildlife Federation v. Coleman*, with respect to the designation of the "critical habitat." The Fish and Wildlife Service had proposed six caves in Missouri to be included in the Indiana bat's critical habitat, three of which were in the Meramec River area. Two of the caves, however, would not be flooded by the reservoir, and the other would be flooded only if the reservoir reached flood stage. At the time of the court's decision, these caves had not yet been so designated. The habitat of the Mississippi sandhill crane, in contrast, was designated as critical pursuant to an emergency ruling, implying for the Fifth Circuit a greater threat by government agency action to the cranes than to the bats. *Id.* at 1302 n.37.

¹³⁹ 534 F.2d at 1303. The closing of the dam gates would create a reservoir which would flood a number of caves where the bats are found.

¹⁴⁰ *Id.* at 1305 (citing 392 F. Supp. at 138).

¹⁴¹ *Id.* at 1303-05. See notes 133-34 and accompanying text *supra* for the decision of the court in *National Wildlife Federation v. Coleman* on these issues.

IV. *Hill v. TVA* AND THE ENDANGERED SPECIES ACT

The process leading to the protection of the snail darter began when pursuant to Department of the Interior regulations, a petition requesting that the snail darter be listed as an endangered species was received for review and notice was published on March 12, 1975.¹⁴² The Department of the Interior, applying section 4 of the Endangered Species Act, proposed that the snail darter be listed as an endangered species because of "the present or threatened destruction . . . of its habitat or range"¹⁴³ in the Little Tennessee River. The Department stated that the construction and operation of the Tellico Dam would destroy the darter's habitat because it would eliminate the darter's food source, fresh water snails, which only live in the flowing river.¹⁴⁴ Public comments were requested.

The TVA, among others, submitted comments, arguing that no one was certain yet that the snail darter was in fact a distinct species and also that the TVA was studying means to conserve the fish. In addition it contended that since the environmental consequences of the Tellico project were described in its environmental impact statement, further consideration would serve "no worthwhile purpose."¹⁴⁵

The Fish and Wildlife Service, however, decided to include the snail darter on the list of endangered species, effective November 10, 1975. Rejecting TVA's arguments, it stated that scientific studies have indicated that the fish is a valid species and there there has been no evidence that the fish

¹⁴² 40 Fed. Reg. 11,618 (1975). The petitioners requested that review be granted under the emergency provisions of the Endangered Species Act, 16 U.S.C. § 1533(f)(2)(B)(ii) (1976). The Department, stating that the petitioners "presented substantial evidence," published notice of the petition.

The scientific name for the snail darter is *Percina (Imostoma) tanasi*, 41 Fed. Reg. 13,927 (1976).

¹⁴³ 40 Fed. Reg. 25,597 (1975). This action is authorized by 16 U.S.C. § 1533(a)(1) (1976).

¹⁴⁴ 40 Fed. Reg. 25,597 (1975).

¹⁴⁵ *Id.* at 47,505. The TVA has transplanted a number of the snail darters to the Hiwassee River in an attempt to save the species. *Hill v. TVA*, 419 F. Supp. 753, 757 (E.D. Tenn. 1976), *rev'd*, 549 F.2d 1064 (6th Cir. 1977), *cert. granted*, 98 S. Ct. 478 (1977). However, the report of the Comptroller General to Congress stated that a wait of 5 to 15 years may be necessary in order to determine whether this transplant is successful. U.S. GEN. ACCOUNTING OFFICE, THE TENNESSEE VALLEY AUTHORITY'S TELLICO DAM PROJECT—COSTS, ALTERNATIVES, AND BENEFITS (1977). This report is discussed in greater detail *infra* at notes 210, 226.

could survive elsewhere. Furthermore, since the TVA's impact statement was completed before the Endangered Species Act was passed and before the snail darter was discovered, there was no evidence that it considered the effect of the dam on this species.¹⁴⁶

Next, the Fish and Wildlife Service proposed that the "critical habitat" of the snail darter extend from mile 0.5 to mile seventeen of the Little Tennessee River, the only presently known range of the species.¹⁴⁷ The TVA objected to this determination, stating that further research needed to be done as to the darter's habitat.¹⁴⁸ The Director of the Fish and Wildlife Service, however, designated these miles a "critical habitat," effective May 3, 1976.¹⁴⁹ The effect of such a designation is that all federal agencies must ensure that this habitat is not destroyed or modified.¹⁵⁰ This designation led to the Sixth Circuit's injunction prohibiting the TVA from proceeding with the Tellico project.

A. *Extent of Court Discretion in Applying Section 7*

The effect of stopping the ninety-million-dollar Tellico project was considered by the district court in *Hill* to be an important factor in determining whether it had discretion to apply the Endangered Species Act to the controversy. After concluding that the completion of the dam and creation of the reservoir would "result in the adverse modification, if not complete destruction, of the snail darter's critical habitat,"¹⁵¹ the

¹⁴⁶ 40 Fed. Reg. 47,505-06 (1975). The court of appeals took into account the interpretation given to the Act by the Department of the Interior (of which the Fish and Wildlife Service is a division). *Hill v. TVA*, 549 F.2d 1064, 1070 (6th Cir. 1977). The court cited *Udall v. Tallman*, 308 U.S. 1, 16 (1964), which stated that courts generally show "great deference to the interpretation given the statute by the officers or agency charged with its administration." Noting comments made by the Fish and Wildlife Service regarding the establishment of critical habitats, the court concluded that TVA's action violated section 7 of the Act. 549 F.2d at 1070. The comments made by the Fish and Wildlife Service are discussed in note 119 *supra*.

¹⁴⁷ 40 Fed. Reg. 58,308 (1975). Again, the Fish and Wildlife Service requested comments from interested parties.

¹⁴⁸ 41 Fed. Reg. 13,927 (1976). At this time, the snail darter's habitat was found to be from mile 0.1 to mile 17 of the Little Tennessee River; mile 0.1 to 0.4 is below the Tellico Dam. *Id.*

¹⁴⁹ *Id.* at 13,926-28. The State of Tennessee supported the designation of the snail darter's "critical habitat." The critical habitat designation for the snail darter is found at 50 C.F.R. § 17.61 (1976). See 41 Fed. Reg. 41,915 (1976).

¹⁵⁰ 41 Fed. Reg. 58,310 (1976).

¹⁵¹ 419 F. Supp. at 757.

district court nevertheless stated that the Act did not apply to this case because the project was so close to completion.¹⁵² Thus this court felt that it had discretion under the Endangered Species Act to decide whether or not section 7 applied, in a manner similar to the application of NEPA.¹⁵³ However, the court of appeals stated that the courts do not have such discretion; if a species comes under the protection of section 7, the court must apply the Act to the actions of the federal agency.¹⁵⁴

The extent of the court's discretion in applying the Endangered Species Act was considered in *National Wildlife Federation v. Coleman*, *Sierra Club v. Froehlke*, and now in *Hill v. TVA*. All of these cases apply the *Overton Park*¹⁵⁵ interpretation of section 706 of the Administrative Procedure Act.¹⁵⁶ The court is to decide whether the agency has acted "within the scope of [its] authority"¹⁵⁷ and then it shall set aside agency action which is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."¹⁵⁸

In the *Hill* case, it is arguable that the TVA acted within the scope of its authority in constructing the dam and in informing Congress of the snail darter problem when it asked for appropriations.¹⁵⁹ However, the TVA did not act "in accordance with law." The language and legislative history of section 7 show that it must be construed as mandatory, that is, the TVA "shall" make certain that the critical habitat of the snail darter is not destroyed.¹⁶⁰ Thus the court of appeals, applying the requirements of the Administrative Procedure Act, had no choice but to enjoin further construction of the Tellico Dam.¹⁶¹ The standard in section 7 is not one of a "good faith effort" at

¹⁵² *Id.* at 763.

¹⁵³ See notes 41-61 and accompanying text *supra* on the application of NEPA.

¹⁵⁴ 549 F.2d at 1074.

¹⁵⁵ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

¹⁵⁶ 5 U.S.C. §§ 551-559, 701-706 (1976).

¹⁵⁷ 401 U.S. at 416.

¹⁵⁸ *Id.* at 413, 414 (quoting 5 U.S.C. § 706(2)(A) (1976)). See also *Environmental Defense Fund, Inc. v. Corps of Engineers*, 470 F.2d 289 (8th Cir. 1972).

¹⁵⁹ See Brief for Defendant-Appellee at 26, *Hill v. TVA*, 549 F.2d 1064 (6th Cir. 1977). See also notes 163-70 and accompanying text *infra* on congressional appropriations.

¹⁶⁰ See notes 119-27 and accompanying text *supra* on mandatory language in section 7 as seen through its legislative history.

¹⁶¹ See *Hill v. TVA*, 549 F.2d 1064, 1074 (6th Cir. 1977), *cert. granted*, 98 S. Ct. 478 (1977).

compliance as the district court held, but one of "strict compliance."¹⁶²

B. *Effect of Congressional Appropriations on the Application of the Endangered Species Act*

The TVA has argued that because Congress has continually authorized appropriations for the project with knowledge of the snail darters, Congress has in effect "ratif[ie]d] TVA's interpretation of the Endangered Species Act as it applies to the Tellico project."¹⁶³

In *United States ex rel. TVA v. Two Tracts of Land*¹⁶⁴ the Sixth Circuit was faced with the issue of whether the TVA had authority to acquire property by eminent domain under a statute creating the Land Between the Lakes Project in western Kentucky. The court, holding that the TVA had such authority, stated that the fact that congressional committees had appropriated money for the project several times, even though land owners had objected, indicated that Congress "demonstrated its intention" that the statute in fact authorized the project.¹⁶⁵

On the other hand, the Sixth Circuit has stated that the mere fact of Congress authorizing funds for the Tellico project does not mean that Congress intended to "repeal the NEPA as

¹⁶² *Hill v. TVA*, 410 F. Supp. 753, 763 (E.D. Tenn. 1976). See Brief for Plaintiffs-Appellants at 26, *Hill v. TVA*, 549 F.2d 1064 (6th Cir. 1977).

The district court in *Hill v. TVA* approved the statement made by the Eighth Circuit in *Sierra Club v. Froehlke* that the Act must have a "reasonable construction." *Hill v. TVA*, 419 F. Supp. 753, 760 (E.D. Tenn. 1976). See note 138 *supra* for "reasonable construction" of the Endangered Species Act. The court in *Froehlke*, by that statement, meant that the "taking" language of section 9 of the Endangered Species Act did not fit that case based on the fact that few bats would be harmed by the Meramec Dam. The district court in *Hill*, however, applied this language to infer that Congress would not have intended the Act to stop the Tellico project which was 80% complete.

¹⁶³ Brief for Defendant-Appellee at 13, *Hill v. TVA*, 549 F.2d 1064 (6th Cir. 1977). The TVA states that the Senate Appropriations Subcommittee in fact knew of the district court's decision in *Hill v. TVA* when it decided to continue appropriations for the project. "The Committee does not view the Endangered Species Act as prohibiting 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), *quoted in* Brief for Defendant-Appellee, at 12-13.

¹⁶⁴ 456 F.2d 264 (6th Cir. 1972), *cert. denied*, 409 U.S. 887 (1972).

¹⁶⁵ *Id.* at 267 (quoting *TVA v. Kinzer*, 142 F.2d 833, 837 (6th Cir. 1944)).

it applied to the [project]."¹⁶⁶ Other courts have similarly held that congressional appropriations do not repeal the substantive aspects of applicable laws. In *Environmental Defense Fund, Inc. v. Froehle*¹⁶⁷ the Eighth Circuit stated that congressional appropriations for the Cache River-Bayou DeView Channelization Project did not exempt the Corps of Engineers from complying with NEPA. This "general rule against repeal by implication" also was articulated in *Committee for Nuclear Responsibility, Inc. v. Seaborg*.¹⁶⁸ The plaintiff requested an injunction to stop the underground nuclear test on Amchitka Island, Alaska, on the grounds that the Atomic Energy Commission's environmental impact statement did not comply with NEPA. The District of Columbia Circuit rejected the commission's contention that congressional authorization for the test "represented a conclusive determination of the sufficiency of the impact statement."¹⁶⁹

Congress, therefore, can appropriate funds for federal projects while third parties are challenging the validity of the projects in court. These are not inconsistent acts, but imply that if the courts hold that the projects are valid, the funds are available for implementation. Furthermore, as the court of appeals in *Hill v. TVA* argues, if a court uses an advisory opinion by Congress to determine the impact of a statute (here the House Appropriations Committee's interpretation that snail darters be exempted from protection) Congress would be invading the court's domain.¹⁷⁰

¹⁶⁶ *Environmental Defense Fund, Inc. v. TVA*, 468 F.2d 1164, 1182 (6th Cir. 1972).

¹⁶⁷ 473 F.2d 346 (8th Cir. 1972).

¹⁶⁸ 463 F.2d 783 (D.C. Cir. 1971). See also *West Virginia Div. of Izaak Walton League of America, Inc. v. Butz*, 522 F.2d 945 (4th Cir. 1975).

¹⁶⁹ 463 F.2d at 783. Eventually, the court of appeals refused to enjoin the nuclear test because of the commission's argument of "potential harm to national security and foreign policy." However, the court did not agree that the Atomic Energy Commission's impact statement satisfied NEPA. *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 796, 798 (D.C. Cir. 1971). The Supreme Court, three days later, also denied plaintiff's request for an injunction, 404 U.S. 917 (1971). Justice Douglas would have granted the injunction while Justices Brennan and Marshall would have granted a temporary restraining order pending a court decision on the matter.

¹⁷⁰ *Hill v. TVA*, 549 F.2d 1064, 1072-73 (6th Cir. 1977), cert. granted, 98 S. Ct. 478 (1977). See Brief for Plaintiffs-Appellants at 34-37, *Hill v. TVA*, 549 F.2d 1064 (6th Cir. 1977). The Sixth Circuit, in *Environmental Defense Fund, Inc. v. TVA*, 468 F.2d 1164 (6th Cir. 1972), held that congressional appropriations for the Tellico dam in 1970 and 1971 were not "to be taken as expressing any view with respect to compliance with NEPA." *Id.* at 1182.

C. *Application of the Endangered Species Act to Ongoing Projects*

Another issue in *Hill v. TVA* was whether the Endangered Species Act applied to projects begun before the Act was passed. The question becomes more difficult if the projects were nearing completion or significantly completed at the date of enactment.

A number of courts have faced analogous issues under NEPA with varying results. One case that held that NEPA should not be applied retroactively to an ongoing project is *Ragland v. Mueller*.¹⁷¹ Plaintiffs in *Ragland* sought to enjoin federal and state officials from completing a highway through a wildlife refuge because the officials did not comply with section 102 (2)(C) of NEPA. Sixteen of the twenty affected miles were already complete. The court stated that "it is simply unreasonable to assume that Congress intended that at this point in time, construction should halt, an environmental impact study be made, and the highway possibly be rerouted."¹⁷²

A number of cases hold that NEPA does apply to projects begun before the act was in effect. In *Environmental Defense Fund v. Corps of Engineers* the court stated that the NEPA requirement of an environmental impact statement applied to the Gillham Dam project in Arkansas which was authorized in 1958 and sixty-three percent complete by September 1, 1970, one month before the suit was filed.¹⁷³ In *Sierra Club v. Callaway*¹⁷⁴ the court required an environmental impact statement for the Wallisville Project in Texas, which was originally authorized in 1962 and seventy-two percent complete by the end of 1971.¹⁷⁵ Also, in *Arlington Coalition on Transportation v. Volpe*¹⁷⁶ the court held that NEPA's environmental impact statement requirement applied to a highway begun before Jan-

¹⁷¹ 460 F.2d 1196 (5th Cir. 1972).

¹⁷² *Id.* at 1198.

¹⁷³ 325 F. Supp. 728, 743 (E.D. Ark. 1971). NEPA was passed in 1969. On appeal, the court held that the environmental impact statement submitted by the Corps of Engineers satisfied NEPA and permitted further work on the dam to continue. 470 F.2d 289 (8th Cir. 1972).

¹⁷⁴ 499 F.2d 982 (5th Cir. 1974).

¹⁷⁵ *Id.* at 985-86. See also *Environmental Defense Fund, Inc. v. Corps of Engineers*, 324 F. Supp. 878 (D.D.C. 1971), with respect to the Cross Florida Barge Canal.

¹⁷⁶ 458 F.2d 1323 (4th Cir. 1972), *cert. denied*, 409 U.S. 1000 (1972).

uary 1970 because it "was and is a project ongoing *after* the effective date of the Act."¹⁷⁷ The court also stated that the stage of completion of a project is a factor which must be taken into consideration in determining whether NEPA applies and that Congress probably did not "intend that all projects ongoing at the effective date of the Act" require an impact statement.¹⁷⁸

Finally, the Sixth Circuit in *Environmental Defense Fund, Inc. v. TVA*¹⁷⁹ held that NEPA applied to the ongoing Tellico project. The court rejected the idea of dividing such a project into "stages" and of allowing those stages which began before 1970 to be excluded from NEPA.¹⁸⁰ Yet, the court did state that "this is not to say that the degree of completion of a project is irrelevant; the amount of completed construction or investment will certainly affect the ultimate determination whether modification should be made in the project or whether the project should be abandoned."¹⁸¹

Because NEPA involves a balancing between expected economic, social, and health benefits and environmental harm,¹⁸² the work done on a particular project, including that which was completed before the Act was passed, must be taken into account. The costs of stopping such a project must be compared with the benefits the project would provide.¹⁸³

The TVA, emphasizing the degree of completion of the Tellico project, has argued that similar standards should apply to ongoing projects under the Endangered Species Act as were applied under NEPA.¹⁸⁴ One gets the impression from the TVA that the importance of the Tellico project, contrasted with the insignificance of the snail darter,¹⁸⁵ is the overriding consideration. However, this philosophy is not compatible with the poli-

¹⁷⁷ *Id.* at 1330. See also *Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dept.*, 446 F.2d 1013, 1025 (5th Cir. 1971).

¹⁷⁸ 458 F.2d at 1331.

¹⁷⁹ 468 F.2d 1164 (6th Cir. 1972).

¹⁸⁰ *Id.* at 1179.

¹⁸¹ *Id.*

¹⁸² See notes 47-48 and accompanying text *supra* on the balancing test of NEPA.

¹⁸³ *Arlington Coalition of Transp. v. Volpe*, 458 F.2d 1323 (4th Cir. 1972), *cert. denied*, 409 U.S. 1000 (1972).

¹⁸⁴ Brief for Defendant-Appellee at 19-21, *Hill v. TVA*, 549 F.2d 1064 (6th Cir. 1972).

¹⁸⁵ *Id.* at 8. This case is "[e]xtreme in the sense of the competing factors—a \$100 million project against a 3-inch fish."

cies of the Endangered Species Act.

The Endangered Species Act does not involve a balancing between conflicting factors, but requires that federal agencies carry out their programs in a manner that will not jeopardize the existence or the critical habitat of an endangered or threatened species.¹⁸⁶ It can be argued that the Act should be applied with more force than NEPA to projects started before the act was passed, including those near completion. The primary factor is the effect of the project on an endangered or threatened species, there being the element of finality. If the project is completed, jeopardizing or destroying the species' critical habitat, such species probably would become extinct in a relatively short time.

The federal courts of appeals have applied the Endangered Species Act to ongoing projects. In *National Wildlife Federation v. Coleman* the Act was held applicable to a highway project begun in 1963.¹⁸⁷ In *Sierra Club v. Froehle* the Eighth Circuit, holding that the Endangered Species Act did not apply to the Meramec project first authorized in 1938, based its decision on evidence that the dam would not affect the critical habitat of the Indiana bat. By discussing whether sections 7 and 9 applied to the facts presented, the court implied that the Act could be applied to projects begun before its effective date.¹⁸⁸

Similarly the Sixth Circuit, in *Hill v. TVA*, distinguished the applicability of the Endangered Species Act from that of NEPA for projects substantially completed.¹⁸⁹ The statement of the court reflects the philosophical differences between the two acts:

¹⁸⁶ 16 U.S.C. § 1536 (1976). The legislative history of section 7 is discussed in notes 119-27 and accompanying text *supra*.

¹⁸⁷ 529 F.2d 359 (5th Cir. 1976), *cert. denied*, 429 U.S. 979 (1976).

¹⁸⁸ 534 F.2d 1289 (8th Cir. 1976). *Cf.* *United States v. Cappaert*, 508 F.2d 313 (9th Cir. 1974), in which the Ninth Circuit limited the drilling by underground water users which was lowering the water table in Devil's Hole, in Death Valley National Monument, Utah. The limitations were justified under the doctrine of prior appropriations, the United States Government having reserved the waters since 1952 for the requirements of Devil's Hole. The litigation involved an action by the government to limit the amount of water taken in order to protect the Devil's Hole pupfish, an endangered species. In this case, the Endangered Species Act was applied to water appropriations dating from 1952.

¹⁸⁹ 549 F.2d 1064, 1071-72 (6th Cir. 1977), *cert. granted*, 98 S. Ct. 478 (1977).

[A]ny 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. If we were to err on the side of permissiveness here, and allow TVA to complete and close the dam as scheduled, the most eloquent argument would be of little consequence to an extinct species.¹⁹⁰

Given the federal government's commitment to the protection of endangered and threatened species, the application of the Endangered Species Act to federal projects begun before the Act was passed, even those substantially completed, can be considered vital.

D. *The Nature of Relief Under the Endangered Species Act*

The Act provides for injunctive relief against any "person" violating the Act or any regulation issued under it.¹⁹¹ Section 11 does not direct whether a party may seek a permanent or temporary injunction. Rather, the relief sought must be related to the magnitude of the injury alleged.¹⁹² For example, in *National Wildlife Federation v. Coleman*, the Fifth Circuit granted a temporary injunction stopping construction of Interstate 10 until certain modifications were made on the highway project.¹⁹³

However, in *Hill v. TVA*, the only way in which the snail darter can be protected is by a permanent halt to the construction and operation of the Tellico Dam. Since the district court

¹⁹⁰ *Id.* at 1072. See Wood, *supra* note 4, at 50,196-97. The author distinguishes the procedural aspects of NEPA's environmental impact statement with the substantive emphasis of the Endangered Species Act reflecting federal policy to protect endangered and threatened species.

¹⁹¹ 16 U.S.C. § 1540(g)(1)(A) (1976). See text accompanying note 117 *supra* on citizens suits under section 1 of the Endangered Species Act.

¹⁹² "The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Hecht v. Bowles*, 321 U.S. 321, 329 (1944). See also *Rondeau v. Mosinee Paper Co.*, 422 U.S. 49 (1975); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959); and *SEC v. Advance Growth Capital Corp.*, 470 F.2d 40 (7th Cir. 1972).

¹⁹³ 529 F.2d 359 (5th Cir. 1976), *cert. denied*, 429 U.S. 979 (1976). This case is discussed in greater detail *supra* at notes 128-35 and accompanying text.

found, in effect, that the TVA violated section 7 by not ensuring the continued existence of the snail darter, the court of appeals held that the lower court had no choice but to grant a permanent injunction.¹⁹⁴ This result may seem severe, but any lesser remedy would be ineffective in protecting the critical habitat of the snail darter.

Injunctive relief with a similarly substantial impact has been directed in other environmental litigation. In *Wilderness Society v. Morton* the District of Columbia Circuit enjoined the Secretary of the Interior from granting special land use permits for construction of the Alaska pipeline since such grants would violate section 28 of the Mineral Lands Leasing Act.¹⁹⁵ The court in *Wilderness Society* stated that any relief from the injunction would have to come from Congress, either as an amendment to the width requirement or as an exception of the pipeline from the statute.¹⁹⁶

The alternative of obtaining relief from the legislative or executive branches of government is open to the TVA and has been cited as appropriate action in other litigation. The Fourth Circuit, in *West Virginia Division of Izaak Walton League of America, Inc. v. Butz*,¹⁹⁷ addressed the role of the Forest Service under the Organic Act of 1897 and stated that "our reading of the Organic Act will have serious and far-reaching consequences. . . . However, the appropriate forum to resolve this complex and controversial issue is not the courts but the Congress."¹⁹⁸

This alternative was also recommended in another recent case involving the Endangered Species Act, *Delbay Pharmaceuticals, Inc. v. Department of Commerce*.¹⁹⁹ Plaintiff, a drug

¹⁹⁴ 549 F.2d 1064, 1074-75 (6th Cir. 1977), cert. granted, 98 S. Ct. 478 (1977). Even though private parties brought the suit, because a federal law is involved, "the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief." *Id.* at 1075 (quoting *Hecht v. Bowles*, 321 U.S. 321, 331 (1944)).

¹⁹⁵ 479 F.2d 842 (D.C. Cir. 1973). The statute required all construction work to take place within 25 feet of either side of the pipeline.

¹⁹⁶ *Id.* at 847-48. Congress amended the act to allow the Department of the Interior to grant the permits, allowing construction of the pipeline. See *Alyeska Pipeline Serv. v. Wilderness Soc'y*, 421 U.S. 240, 241 (1975).

¹⁹⁷ 522 F.2d 945 (4th Cir. 1975).

¹⁹⁸ *Id.* at 955 (dictum).

¹⁹⁹ 409 F. Supp. 637 (D.D.C. 1976).

manufacturer, sought an injunction to prevent enforcement of section 9 of the Act which prohibits importing endangered species into the United States and shipment of such species in interstate or foreign commerce.²⁰⁰ The Act prevented plaintiff from importing spermaceti, a substance derived from the sperm whale, which was used in the production of one of the plaintiff's drugs. The district court dismissed plaintiff's action, stating that a hardship under the 1969 act permitting importation of the spermaceti into the country does not become, by extension, a permit to sell the project in interstate commerce under the Endangered Species Act.²⁰¹ The court said that the plaintiff should address its problem to Congress rather than to the courts.²⁰²

Similarly, the Sixth Circuit in *Hill* directed the TVA to seek legislative or administrative relief since the courts have no choice but to apply the Act as written. "[O]nly Congress or the Secretary of Interior can properly exempt Tellico from compliance with the Act. The 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."²⁰³

E. *Alternative Sources of Relief for TVA*

1. *Legislative Relief*

Congress can deal with the Tellico situation by exempting the dam from section 7 of the Endangered Species Act or by amending the Act more broadly to exempt certain ongoing projects from its coverage.²⁰⁴

²⁰⁰ 16 U.S.C. § 1538(a)(1) (1976).

²⁰¹ 409 F. Supp. at 637.

²⁰² *Id.* at 644-45. In another case, *United States v. Kepler*, 531 F.2d 797 (6th Cir. 1976), Kepler, a Kentuckian, was convicted of violating section 9 of the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(E) and (b). He transported an endangered species through interstate commerce for a commercial purpose. Kepler had transported a leopard and a cougar from Florida to Dogpatch Zoo at Flatlick, Kentucky. He also was cited under state and federal laws for transporting animals without a written permit.

²⁰³ *Hill v. TVA*, 549 F.2d 1064, 1074 (6th Cir. 1977), *cert. granted*, 98 S. Ct. 478 (1977).

²⁰⁴ Another possible means of action would be to seek administrative relief, either by removal of the snail darter from the list of endangered species or by redefining its critical habitat. *Id.* at 1074-75.

TVA has suggested that the Act should be amended to make it more flexible by requiring a balancing between the benefits of any project and the detriment to endangered species. Factors which would be considered include "the needs of man, the importance of the particular project, the importance of the species, the stage of completion or amount of private or public funds already in a project."²⁰⁵ The TVA's suggestions, which would make the application of the Endangered Species Act considerations more similar to those of NEPA, reflect TVA's concern with developing water and energy resources in the region under its jurisdiction.

One of the problems with TVA's argument is that the purpose of the Endangered Species Act is to preserve species which have become endangered primarily because of the encroachment of the products of economic development on their habitats. Although NEPA requires consideration of conflicting elements, the purpose of the Endangered Species Act precludes compromising the preservation of species.²⁰⁶

TVA also argues that the importance of the species be considered when using the balancing test. However, even if "importance" is defined in economic or health terms, one does not necessarily know today what the future contribution of a particular species will be, and if the species is exterminated, one will never know.²⁰⁷ Also, the existence of a greater variety of plant and animal wildlife for its own sake, rather than just for its "importance," is a positive value to be encouraged in our society.²⁰⁸

²⁰⁵ 8 ENVIR. REP. (BNA) 481 (July 29, 1977) (statement of Aubrey J. Wagner, TVA chairman, to Senate Environment and Public Works Subcommittee on Resource Protection, July 22, 1977). However, S. David Freeman, the newest director of the TVA, has stated that the Endangered Species Act should not be amended unless there has been sufficient study. *Louisville Courier-Journal*, Aug. 17, 1977; § B, at 1, col. 2 (state ed.). The U.S. Chamber of Commerce also argued before the subcommittee that a balancing approach should be adopted.

²⁰⁶ The policies behind NEPA include the encouragement of measures which "create and maintain conditions under which man and nature can exist in productive harmony." 42 U.S.C. § 4331 (1970).

²⁰⁷ The National Wildlife Federation cites penicillin and the horseshoe crab as "lowly" species making economic contributions. NATIONAL WILDLIFE FEDERATION, CONSERVATION REPORT, No. 24 at 363 (July 29, 1977).

²⁰⁸ This is the policy of the Endangered Species Act, except that it exempts from endangered species "pests" of the class Insecta which are an "overwhelming and overriding risk to man." 16 U.S.C. § 1532(4) (1976). See note 93 *supra* on this exclusion

Perhaps TVA's desire to amend is unnecessary and overbroad. TVA looks at the impact of the Endangered Species Act on a large and economically significant project and does not take into account the numbers of consultations under the Act which have been resolved without litigation. There have been an estimated 4,500 such consultations with the Fish and Wildlife Service since the passage of the Act; of these, all but 124 were resolved informally. Only three cases have actually gone to court, and only one, Tellico, has gone to Congress.²⁰⁹ These data challenge the argument of the TVA that the Act is a complete bar to the construction of federal projects.

TVA's conduct during the NEPA litigation may present another barrier to a Congressional amendment. Application of the Act to the Tellico dam produced a General Accounting Office (GAO) report criticizing TVA's procedures.²¹⁰ Evidence

from the Act.

An example of thinking on the question of the importance of a particular species, in this case the snail darter, comes from an editorial in the *Lexington Leader*, "A small, relatively useless fish on a remote river should not stop a major project which will benefit many people." *Lexington Leader*, Dec. 1, 1977, § A, at 4, col. 1.

²⁰⁹ NATIONAL WILDLIFE FEDERATION, CONSERVATION REPORT, No. 24 at 363 (July 29, 1977).

²¹⁰ UNITED STATES GENERAL ACCOUNTING OFFICE, THE TENNESSEE VALLEY AUTHORITY'S TELLICO DAM PROJECT—COSTS, ALTERNATIVES, AND BENEFITS, (Oct. 14, 1977). [hereinafter cited as GAO REPORT].

The General Accounting Office (GAO) studied the implications of the Tellico Dam controversy at the request of Congress. It concluded that further studies of alternatives to the project, including cost-benefit analyses, should be made before Congress acts on proposed legislation which would exempt the dam from the Endangered Species Act. Such studies should also be made before Congress grants appropriations to the project in the event the Supreme Court reverses the decision of the Sixth Circuit. *Id.* at 38-39.

The GAO reported that the alternatives considered by the TVA in its environmental impact statement of 1972 included the construction of the full dam and reservoir, the erection of low or intermediate dams, or the restoration of the Little Tennessee as it was before construction began. The only viable alternative for saving the darter would be to preserve the scenic river since any dam would destroy the darter's habitat. *Id.* at 17. Alternative proposals suggested by others include returning all the property to private owners, establishing a state park and historic sites, or declaring the Little Tennessee River to be a scenic river. Combinations of these suggestions have been proposed. *Id.* at 20.

TVA had spent approximately \$103 million of the estimated \$116 million cost for this project by February 1977. The GAO estimated that about \$56.3 million of these costs could provide benefits for any alternative uses in the area. *Id.* at 5.

The GAO determined that if the Tellico Dam should not be completed, at least part of the dam must be removed since the dam threatens the survival of the snail darter. By closing off the north channel of the river, it is preventing the darters from

of TVA's actions indicates that it continued with the construction of the dam even after it knew of the existence of possibly endangered fish species,²¹¹ and it requested appropriations after it knew about the snail darter.²¹² TVA's behavior has not ensured the continued existence of the fish as required by the Endangered Species Act.

The TVA asserts that the Endangered Species Act "is being used by some not to protect endangered species, but to stop projects."²¹³ There are a number of situations in which the existence of an endangered species has been used to halt a federal project. For example, the Furbish lousewort, a rare snapdragon, was found in Maine at the site of a proposed hydroelectric project.²¹⁴ Other endangered species found at the sites of proposed federal projects include shellfish (two types of mussels)²¹⁵ and sturgeon²¹⁶ at a proposed nuclear power plant in Tennessee, Higgins Eye clams at a dredging site in Minnesota,²¹⁷ and the leopard darter near a dam project in Oklahoma.²¹⁸ The TVA may have a point that the Act will in some

reaching their spawning areas. *Id.* at 4. The GAO's report observed: "There is no feasible compromise. Only completion of the Tellico Project can provide those reservoir benefits which TVA projected for the area. Likewise, alternatives for the project area must include removing a portion of the dam to ensure the snail darter's survival in the Little Tennessee River." *Id.*

See also NATIONAL WILDLIFE FEDERATION REPORT, *supra* note 207, at 368; NATIONAL WILDLIFE FEDERATION REPORT No. 26 at 394 (Sept. 9, 1977).

²¹¹ See text accompanying note 33 *supra* on the Little Tennessee River as the likely habitat for endangered species of fish.

²¹² Brief for Defendant-Appellee at 14-16 and appendix: A-1, A-2, B-1, B-2, *Hill v. TVA*, 549 F.2d 1064 (6th Cir. 1977). The question of congressional appropriations is dealt with at notes 163-70 and accompanying text *supra*.

²¹³ 8 ENVIR. REP. (BNA) 481 (July 29, 1977). Another witness at the Senate hearings argued that parties opposing federal projects in the southeast could find enough "endangered" species to stop all of these projects. *Louisville Courier-Journal*, July 21, 1977 (state ed.).

²¹⁴ 35 CONG. QUARTERLY, WEEKLY REPORT 454 (Mar. 12, 1977); *Ky. Kernel*, Nov. 9, 1976, at 3, col. 3.

²¹⁵ *Louisville Courier-Journal*, Feb. 25, 1977, § B, at 2, col. 1 (state ed.). The TVA reported that the habitat of the mussels would not be threatened if the power plant's diffuser pipe were moved. However, there is also the problem of the effect of radioactivity in the area. *Id.*, Feb. 26, 1977, § B, at 3, col. 1 (state ed.).

²¹⁶ *Louisville Courier-Journal*, June 4, 1977, § B, at 3, col. 1 (state ed.). The fish were found 20 miles upstream from the proposed plant.

²¹⁷ *Louisville Courier Journal*, Mar. 26, 1977, § A, at 2, col. 2 (state ed.). Work was temporarily stopped when the clam was found, but the Corps of Engineers resumed work when no other clam shells were found.

²¹⁸ CBS Evening News, Mar. 26, 1977. The leopard darter is related to the snail

cases be used to stop federal construction, but the rationale of the opponents of such projects is that endangered species must be saved.

One bill has been introduced into the House of Representatives which amends section 7 in a matter compatible with TVA's suggested approach.²¹⁹ The bill would add a new subsection which exempts federal public works projects which were started before the endangered species affected were published in the Federal Register. Responsibility would be on the Secretary of the Interior to set up requirements minimizing the adverse effect of such projects on any endangered or threatened species or critical habitat and to implement any necessary measures for the protection of such species.²²⁰ Although the Secretary would be able to minimize the negative effects of such a project on endangered species, it does not appear that the Secretary would have the power to completely stop the project.

Several other bills have been introduced in the House calling for the express exemption of certain projects from the Endangered Species Act. One such bill covers the Tellico Dam²²¹ and another the Columbia Dam and Reservoir, also in Tennessee.²²² This technique could create precedents by which members of Congress could campaign to decrease the scope of the applicability of the Endangered Species Act in places where it might be most necessary, where human activities are the greatest threat to wildlife.

2. *Judicial Relief*

In addition to these legislative remedies, the Justice Department has petitioned the United States Supreme Court for

darters. Eighty other types of darters are found in Tennessee. Louisville Courier-Journal, Apr. 6, 1977, § A, at 14, col. 2 (state ed.).

Several other endangered species affecting federal programs are listed in 35 CONG. QUARTERLY, WEEKLY REPORT 454 (Mar. 12, 1977).

²¹⁹ H.R. 4167, 95th Cong., 1st Sess. (1977) (introduced Mar. 1, 1977).

²²⁰ *Id.* § 7(c)(2).

²²¹ H.R. 4557, 95th Cong., 1st Sess. (1977) (introduced Mar. 7, 1977).

²²² H.R. 5879, 95th Cong., 1st Sess. (1977) (introduced Mar. 31, 1977).

As of December 23, 1977, none of these bills had been considered at a House hearing. NATIONAL WILDLIFE FEDERATION CONSERVATION REPORT. No. 35 at 525 (Dec. 23, 1977).

a review of the Sixth Circuit decision.²²³ Its brief argues that Congress intended to complete the dam by making appropriations. The Justice Department also argues that projects substantially completed before the Act was enacted or the affected endangered species was listed should be excluded from the Endangered Species Act.²²⁴ On November 14, 1977, the Supreme Court agreed to hear this case.²²⁵

CONCLUSION

The controversy over the snail darter, now well-known because the threat to the existence of a three-inch fish has managed to prevent the completion of a multi-million dollar dam, has serious implications for environmental legislation. The Sixth Circuit, reading section 7 of the Act strictly, has held that the TVA cannot complete and operate the Tellico Dam. It has also stated that the resolution of conflicts under this Act is a matter for Congress or the Interior Department since the courts do not have much discretion in the interpretation of such acts. Pressure to change the Endangered Species Act comes from both legislative and judicial forces.

Congress would be able to exempt the Tellico Dam from the Endangered Species Act even if the Supreme Court upholds the Sixth Circuit decision. However, the GAO's suggestion that congressional consideration be stopped until alternatives to the project are formulated²²⁶ is a reasonable approach. Besides threatening the survival of the snail darter, completion of the dam and impounding the reservoir would, according to the GAO, destroy numerous archaeological sites, flood 16,500 acres of farmland, and destroy stream fishing along the river. Furthermore, a scenic river would be effective in relieving over-

²²³ 8 ENVIR. REP. (BNA) 224-25 (June 10, 1977). The petition for certiorari was filed May 31, 1977.

²²⁴ *Id.*

²²⁵ 98 S. Ct. 478 (1977).

²²⁶ In considering such alternatives, the GAO insists that the benefit-cost figures for the project, most recently calculated in 1968, be reanalyzed. GAO REPORT, *supra* note 210, at 27. The use of benefit-cost ratios is inappropriate when the initial determination of whether a project violates the Endangered Species Act is made. The GAO is arguing that before Congress decides to exempt this project from the requirements of the Endangered Species Act, TVA's methods of calculating costs and benefits of the dam should be reviewed. Congress can then compare these new figures with the costs and benefits of possible alternatives to the dam.

crowding caused by tourism in the Great Smokies area.²²⁷ In effect, the GAO report indicates that more than the survival of the snail darter is involved here. Completion of the Tellico Dam "would threaten survival of the snail darter, which is important not only as an endangered species but also for its role in setting a precedent for future decisions under the Endangered Species Act of 1973."²²⁸

Regardless of the GAO's suggestions, congressional relief presents further difficulties. Legislation specifically exempting the Tellico Dam from its coverage or the snail darter from its protection could be interpreted as a sign for certain parties that their pet projects can be constructed regardless of the Act. Any piece-by-piece determination would gut the Endangered Species Act.

If Congress takes this specific action or makes more general amendments such as excluding "substantially completed" federal projects, it would be saying that the protection of endangered and threatened species, although an important consideration, must be weighed against other factors. The more flexible approach is no doubt more politically appealing, especially in the short run. However, one must not forget the long-term effects which the demise of species will have on our environment.²²⁹ The policy behind the Act is that protection of endangered and threatened species is a serious government priority which federal agencies must take into account when they plan, finance, and develop their building projects. The protection of such species is not to be weakened by expensive federal projects or the supposed lack of importance of a particular species. The legislative history indicates that this protection is mandatory for government agencies and is not to be balanced with other considerations as in NEPA.

The Supreme Court will consider the effect of congressional appropriations on the Act and the exclusion of "substantially completed" federal projects from the Act.²³⁰ The

²²⁷ *Id.* at 40.

²²⁸ *Id.*

²²⁹ Any approach which creates exceptions to the Endangered Species Act would need to provide procedural safeguards to minimize the adverse effects on protected species or habitats.

²³⁰ See text accompanying note 224 *supra* on the brief submitted by the Justice Department.

TVA is arguing that projects "substantially completed" before the Endangered Species Act was passed or before the species is put on the endangered species list should be eliminated from the Act's protection. One could possibly argue that the practical effect of excluding "substantially completed" projects would not be too significant over a period of time. There probably would not be many such federal projects which were "substantially completed" by 1973 at which endangered species are likely to be found in the future. However, this would not apply as readily to the alternative, projects "substantially completed" before the species is placed on the endangered species list, as this placement could occur at any time in the future.

Any decision to exempt "substantially completed" projects from the Endangered Species Act could also be construed to apply to similar projects covered by other federal environmental legislation such as NEPA. Large-scale federal projects often require years of planning and construction. This factor, plus a question as to what "substantially completed" means, could have the effect of exempting a number of projects begun before the enactment dates of various federal environmental legislation. Also, as new federal environmental acts are promulgated in the future, such exclusions of ongoing projects are apt to be incorporated, either into the statute or by court interpretation, weakening the thrust of environmental legislation. This would reverse the current trend of federal court decisions which include such ongoing projects under the requirements of the Endangered Species Act and NEPA.²³¹

The effect of a judicial decision for the TVA would have the same impact as would Congressional amendments on the policies behind the Act and on mandatory compliance by federal agencies. A decision for the TVA would have a significant impact on other environmental legislation as well as on the fate of the snail darter.

If the Endangered Species Act is kept intact, its effect would be to stop the Tellico project. Some alternative to the dam, including the removal of at least part of the structure, would have to be determined.²³² While this effect is clear, the

²³¹ See notes 171-90 and accompanying text *supra* for discussion of these decisions.

²³² See note 210 *supra* for possible alternatives to the dam.

ramifications for future federal actions must also be considered.

It is important to remember that the three cases litigated under section 7 have led to three different results. The Tellico controversy, in which no revision of the plans could remove the threat to the snail darter, resulted in a complete halt to the project. In *National Wildlife Federation v. Coleman*,²³³ application of the Act meant only that highway plans had to be revised in order to preserve endangered species. This is certain to be a viable alternative in a great number of cases. Finally, the *Sierra Club v. Froehlke*²³⁴ court held that a federal project would be constructed as planned when the project was found to not jeopardize the endangered species.

Thus, the present Act, as it is now interpreted, would not necessarily be an absolute prohibition against federal projects which encounter endangered or threatened species. The existence of these protected species in some situations would indeed halt or relocate proposed projects, but in other cases, reconsideration of the plans and some modifications of the project would be sufficient. In still others, construction could continue as originally planned. The extremes of the Tellico controversy are not likely to be repeated in the future, as the identification of protected species and their habitats will probably occur early enough to prevent such significant expenditures.

Any court decision or legislative enactment which in effect excludes the Tellico Dam from the requirements of the Act would mean the demise of the snail darter. The Act does not just protect this species of fish but protects numerous other endangered and threatened species of plants and animals including, for example, the well-publicized bald eagle, whooping crane, California condor, and American alligator. If one species is excluded from protection by the Act, all species could share the same fate.

If the Sixth Circuit decision is upheld, this would mean that the courts must construe the Endangered Species Act exactly as it is written and that federal agencies must act to

²³³ 529 F.2d 359 (5th Cir. 1976), *cert. denied*, 429 U.S. 979 (1976). See notes 128-35 and accompanying text *supra* for a discussion of this case.

²³⁴ 392 F.Supp. 130 (E.D. Mo. 1975), *aff'd*, 534 F.2d 1289 (8th Cir. 1976). See notes 136-41 and accompanying text *supra* for details of this decision.

protect endangered species and their habitats from threats to their continued existence.²³⁵ Any relief for agencies through Congress would be a policy decision that the protection in the Endangered Species Act can be compromised in certain situations.²³⁶ The Supreme Court should affirm the Sixth Circuit decision in *Hill v. TVA* and Congress should not rashly amend the Endangered Species Act because of the notoriety of the Tellico controversy.*

Dale Deborah Brodkey

²³⁵ 16 U.S.C. § 1536 (1976).

²³⁶ Congress should consider TVA's action in this controversy before reaching a decision. See notes 210-12 and accompanying text *supra* for some of TVA's activities.

* *Editor's Note.* On June 15, 1978, the United States Supreme Court, in a 6-3 decision, held that the Endangered Species Act protects the snail darter, thus requiring the TVA to abandon construction on the Tellico Dam. Chief Justice Burger, writing for the majority, said that congressional intent "was to halt and reverse the trend toward species extinction, whatever the cost." 46 U.S.L.W. 4681 (U.S. June 13, 1978) (No. 76-1701). The Court rejected TVA's argument that congressional appropriations for the dam repealed by implication the Act as it applied to the Tellico Dam. *Id.* at 4683-84.

Justice Powell, in dissent, felt that the majority had engaged in "an extreme example of a literalist construction" of the Act and that congressional intent that the project be completed could be seen through its continuing appropriations. *Id.* at 4686. Powell also thought that Congress would amend the Act "to prevent the grave consequences made possible" by the Court's decision. *Id.* at 4688.

Even before the Supreme Court decision, Congress had begun to consider amendments to the Endangered Species Act. Because appropriations for the Act expire on September 30, 1978, bills authorizing appropriations for the fiscal years 1979, 1980, and 1981 have been introduced. H.R. 10883, 95th Cong., 2d Sess. (1978); S. 2899, 95th Cong., 2d Sess. (1978).

The Senate bill would also amend Section 8 of the Act (16 U.S.C. § 1536) by establishing an Endangered Species Committee which would review applications submitted by Federal agencies where the agency has determined that an "irresolvable conflict" exists. S. 2899, § 3. The Committee would have the authority to grant exemptions where it has determined that "there is no reasonable and prudent alternative to such action; and . . . the project is of national and regional significance; and . . . the benefits of such action clearly outweigh the benefits of conserving the species or its critical habitat, and that such action is in the public interest." S. 2899, § 3.