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# THE ENDANGERED SPECIES ACT AMENDMENTS OF 1978: A STEP BACKWARDS?

by David B. Stromberg\*

## I. INTRODUCTION

Until recently, the Endangered Species Act of 1973<sup>1</sup> (ESA) reflected an unequivocal commitment to the preservation and recovery of endangered and threatened species. Mr. Chief Justice Burger, writing for the majority in *TVA v. Hill*,<sup>2</sup> proffered that "the Endangered Species Act of 1973 represent[s] the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."<sup>3</sup> Responding to concerns articulated in the House and Senate reports that "the elimination of one species from a natural community can result in disruption of the ecological balance necessary to preserve many interrelated lifeforms,"<sup>4</sup> section 2(b) of the 1973 Act succinctly states that "the purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species."<sup>5</sup> In addition, section 2(c) of the Act em-

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<sup>1</sup> 16 U.S.C. §§ 1531 *et seq.* (Supp. IV 1974), as amended by Pub. L. No. 95-632 (1978).

<sup>2</sup> \_\_\_ U.S. \_\_\_, 98 S. Ct. 2279 (1978).

<sup>3</sup> *Id.* at \_\_\_, 98 S. Ct. 2294.

<sup>4</sup> S. REP. No. 93-307, 93d Cong., 1st Sess. 2 (1973). See generally *Hearings on S. 1983 before the Senate Subcomm. on the Environment of the Commerce Comm.*, 93d Cong., 1st Sess. 93-67 (1973).

<sup>5</sup> 16 U.S.C. § 1531(b) (Supp. IV 1974). It should be noted that section 1531 is distinguishable from its counterpart in the Endangered Species Conservation Act of 1969, 16 U.S.C. § 668aa(b) (1970) (repealed 1973) in that the latter declared that congressional policy is to protect species threatened with extinction only "insofar as is practicable and consistent with

phasizes the strong congressional policy mandating federal cooperation by providing that "all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act."<sup>6</sup>

Perhaps the most critical section of the 1973 Act is section 7,<sup>7</sup> which delineates the duties of federal agencies in preventing the further decline of protected species. This section "imposes a significant restraint on federal activity by requiring federal agencies to insure that any action authorized, funded, or carried out by them does not jeopardize the continued existence of the protected species or result in the destruction or modification of their critical habitat."<sup>8</sup> This requirement has been interpreted by the courts<sup>9</sup> as "affording endangered species the highest of priorities,"<sup>10</sup> and as mandating an absolute proscription against interference with protected species. This interpretation differs greatly from the balancing of equitable considerations standard employed in National Environmental Policy Act (NEPA)<sup>11</sup> controversies. The Sixth Circuit and the United States Supreme Court in the landmark *Hill* case<sup>12</sup> concluded that such an interpretation should stand until Congress elects to re-evaluate its priorities.

In November, Congress passed the Endangered Species Act Amendments of 1978,<sup>13</sup> which were signed into law by President Carter on November 11, 1978. These Amendments de-emphasize the priority given to endangered and threatened species, and may impair the stated intent and purpose of the Endangered Species Act of 1973. This article will first examine the revisions to the statute generated by the 1978 Amendments. Then, an analysis of these revisions, including a discussion of their potential ramifications will follow.

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the primary purposes of such bureaus, agencies, and services." See Stromberg, *The Endangered Species Act of 1973: Is the Statute Itself Endangered?*, 6 ENV. AFF. 511 (1978) [hereinafter cited as Stromberg].

<sup>6</sup> 16 U.S.C. § 1531(c) (Supp. IV 1974).

<sup>7</sup> 16 U.S.C. § 1536 (Supp. IV 1974).

<sup>8</sup> Stromberg, *supra* note 5, at 533. See 16 U.S.C. § 1536 (Supp. IV 1974).

<sup>9</sup> See *Hill v. TVA*, 549 F.2d 1064 (6th Cir. 1977).

<sup>10</sup> *TVA v. Hill*, \_\_\_ U.S. \_\_\_, 98 S. Ct. 2279, 2302 (1978).

<sup>11</sup> The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.* (1970).

<sup>12</sup> 549 F.2d 1064, 1075 (6th Cir. 1977); 46 U.S.L.W. 4673, 4684 (1978).

<sup>13</sup> Pub. L. No. 95-632 (1978).

## II. STATUTORY CHANGES IN THE ENDANGERED SPECIES ACT

The statutory changes enacted in the 1978 Amendments clearly reflect a congressional retreat from the 1973 unequivocal commitment to the continued viability of endangered and threatened species against any interference from federal public works projects. The Amendments are largely the product of the negative publicity and the backlash which ensued following the Supreme Court's *Hill* decision in April, 1978.<sup>14</sup> In that case, the existence of the snail darter, an endangered species, effectively halted completion of the \$120 million Tellico Dam project.<sup>15</sup> The foreseeable consequence of the 1978 Amendments is that endangered and threatened species, especially the more obscure ones, will now be in greater jeopardy of extirpation from the construction of federal projects.

Section 2 of the 1978 Amendments materially redefines the scope of endangered or threatened species' "critical habitat" which, under section 7 of ESA, is to be protected against destruction or modification resulting from federal agency activity.<sup>16</sup> Previously, this term was defined only in the Code of Federal Regulations 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."<sup>17</sup> This definition included not only the geographical area essential to the maintenance of the species at its present level of existence, but also the area necessary to allow expansion and recovery of that species. By broadly defining "critical habitat" the Code of Federal Regulations severely restricted the scope of permissible federal projects. As the Code stated:

[I]f such [federal] action might be expected to result in a reduction in the number 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 [a violation of section 7 would occur]. [A]pplication of the term 'critical habitat' may not be restricted to the habitat necessary for a minimum viable population.<sup>18</sup>

Under the 1978 Amendments, however, the definition of critical

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<sup>14</sup> Articles that appeared in national magazines and in several of the nation's leading newspapers focused primarily on the magnitude of the federal funds appropriated for a project that, at that point in time, appeared destined to remain uncompleted.

<sup>15</sup> On January 23, 1979, the Endangered Species Act Committee, in its premiere case, unanimously denied the exemption sought by the TVA for the Tellico Dam on economic grounds totally distinct from the endangered species issue. See text at note 25, *infra*.

<sup>16</sup> 16 U.S.C. § 1536 (Supp. IV 1974).

<sup>17</sup> 40 Fed. Reg. 17764-75 (1975).

<sup>18</sup> *Id.*

habitat has been included in section 3(5) of ESA and has been narrowed significantly. As it now reads:

[Critical habitats are] (i) the specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species . . . upon a determination by the Secretary that such areas are essential for the conservation of the species.<sup>19</sup>

Additionally, section 3(5)(c) provides that “[e]xcept in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.”<sup>20</sup> Clearly, this modification manifests a congressional desire to restrict the scope of the area considered essential to the viability of a protected species, and presumably to minimize the possibility of federal projects violating the provisions of section 7.

The most extensive and, fundamentally, the most significant modifications of ESA involve the series of amendments to section 7. Under the 1973 Act, this section read as follows:

The Secretary [of the Interior or Commerce, whichever is appropriate] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. 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 Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act 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 or threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation with the affected States, to be critical.<sup>21</sup>

The Sixth Circuit recognized,<sup>22</sup> and the Supreme Court intimated in *Hill*, that Congress had the jurisdiction to exempt certain projects from compliance with the statute.<sup>23</sup> The 1978 Amendments affirmed

<sup>19</sup> 16 U.S.C. § 1532(5), as amended by Pub. L. No. 95-632 (1978).

<sup>20</sup> *Id.* § 1532(5)(c).

<sup>21</sup> 16 U.S.C. § 1536 (Supp. IV 1974).

<sup>22</sup> *Hill v. TVA*, 549 F.2d 1064, 1075 (6th Cir. 1977).

<sup>23</sup> *TVA v. Hill*, \_\_\_ U.S. \_\_\_, 98 S. Ct. 2279, 2302 (1978). This jurisdiction is nowhere specified in the statute; the courts' references to such ability, presumably, is based on Con-

and delineated this authority by attaching a proviso to section 7 (now section 7(a)) requiring consultation and compliance "unless such agency action has been granted an exemption for such action . . . ." <sup>24</sup> To coordinate the review and determination of whether exemptions should be granted to the federal agency applicants, section 7(e) established the Endangered Species Committee (hereinafter referred to as the "Committee"). <sup>25</sup> This Committee is composed of seven members: the Secretaries of Agriculture, Army, and Interior (the latter serving as Chairman), the Chairman of the Council of Economic Advisors, the Administrators of EPA and the National Oceanic and Atmospheric Administration (NOAA), and one individual appointed by the President from the state in which the Federal project is to be constructed.

Section 7(g) <sup>26</sup> now provides that an application for exemption may be submitted within 90 days after completion of consultation to the Secretary by a federal agency, the Governor of the state in which such agency action will occur, or an applicant seeking a permit or license, where the Secretary has indicated that such action would jeopardize the continued existence of a protected species or destroy or modify a species' critical habitat in contravention of the requirements of section 7(a). <sup>27</sup> Initial consideration of the exemption application is to be conducted by a three-member review board established pursuant to section 7(g)(3)(A), <sup>28</sup> comprised of one appointee of the Secretary, one Presidential appointee who shall be a resident of the State in which the agency action is to be carried out, and one administrative law judge selected by the Civil Service Commission pursuant to 5 U.S.C. § 3344. Within sixty days after its appointment, the review board must determine, by a majority vote, whether an irresolvable conflict <sup>29</sup> exists and whether the applicant

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gress' authority as the legislative branch of government to amend or to create exceptions to any statute, so long as such revision is constitutionally permissible.

<sup>24</sup> 16 U.S.C. § 1536(a), as amended by Pub. L. No. 95-632 (1978).

<sup>25</sup> *Id.* § 1536(e).

<sup>26</sup> *Id.* § 1536(g).

<sup>27</sup> Section 7(b), 16 U.S.C. § 1536(b), as amended by Pub. L. No. 95-632 (1978), delineates the responsibility of the Secretary to provide the federal agency with an opinion as to how the agency action affects the species or its critical habitat, including those "reasonable and prudent alternatives" to achieve compliance with the intent of section 7(a). See Stromberg, *supra* note 5, at 517.

<sup>28</sup> 16 U.S.C. § 1536(g)(3)(A), as amended by Pub. L. No. 95-632 (1978).

<sup>29</sup> Section 3(11) defines this phrase as "a set of circumstances under which, after consultation as required in section 7(a) of this Act, completion of such action would (A) jeopardize the continued existence of an endangered or threatened species, or (B) result in the adverse modification or destruction of a critical habitat." 16 U.S.C. § 1532(11), as amended by Pub. L. No. 95-632 (1978).

has complied with the provisions of section 7(a), (c) and (d).<sup>30</sup> If the review board makes positive determinations, it would proceed to conduct a formal adjudicatory hearing to review the exemption question, and within 180 days must submit to the Committee a report discussing the following items:

- (a) [the existence of] reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the action and of alternative courses of action,
- (b) a summary of the evidence concerning whether or not the agency action is in the public interest and is of regional or national significance, and
- (c) appropriate reasonable mitigation and enhancement measures.

The board's role, in brief, is to summarize testimony and evidence received during its hearings, rather than to make recommendations to the Committee on compliance with specific criteria.

The Committee, upon receipt of the board's report, has 90 days to decide whether or not to grant the agency action an exemption from section 7(a).<sup>31</sup> Section 7(h)(1)<sup>32</sup> requires a vote of not less than five of the Committee members to grant an exemption, to be based on its determination that:

- (i) there are no reasonable and prudent alternatives to the agency action;
- (ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat,<sup>33</sup> and such action is in the public interest; and
- (iii) the

<sup>30</sup> 16 U.S.C. §§ 1536(c), (d), *as amended* by Pub. L. No. 95-632 (1978). Section 7(c) involves the biological assessment which the federal agency shall conduct "for the purpose of identifying any endangered species which is likely to be affected by such action." Such assessment may be undertaken as part of the preparation of the Environmental Impact Statement required under section 102 of NEPA. Section 7(d) states that subsequent to the initiation of the consultation required under section 7(a), the federal agency shall not make "any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures . . ." which would avoid a conflict with the section 7(a) proscriptions.

<sup>31</sup> *Id.* § 1536(h).

<sup>32</sup> *Id.* § 1536(h)(1).

<sup>33</sup> The similarity between this standard and the one employed in NEPA controversies is significant. See text at note 11, *supra*. The term "benefit" is intended by Congress to include, *inter alia*, ecological and economic considerations; the economic criteria to be considered by the Committee include: (1) the cost impact on consumers, business markets, federal, state, and local governments; (2) the effect on productivity of wage earners, businesses and government; (3) the effect on competition; (4) the effect on supplies of important materials, products, and services; (5) the effect on employment; and (6) the effect on energy supply and demand. See OMB Circular A-107 and Executive Order 11949. Further, considerations of the national interest and the aesthetic, ecological, educational, historical, recreational and scientific value of any endangered or threatened species are to be evaluated by the Committee. See H.R. REP. No. 95-1804, 95th Cong., 2d Sess. 21 (1978).

action is of regional or national significance.<sup>34</sup>

Such an exemption requires that reasonable mitigation and enhancement measures be taken by the applicant "including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement . . ." <sup>35</sup> "Reasonable" actions, as defined in the Conference Report, must be so "in their cost, likelihood of protecting the listed species, and the availability of the technology required to make them effective . . ." <sup>36</sup> The result of the enactment of these subsections is that, whereas under the 1973 statute federal actions were prohibited from impinging in any manner upon endangered and threatened species or their critical habitat, now a balancing of these considerations against such criteria as the public interest must occur. Under the 1978 Amendments, interference with the initial purposes of ESA may be statutorily permissible if the public interest in the federal action supercedes the desire to protect such species or their habitat.

Finally, section 7(h)(2) of the Amendments<sup>37</sup> provides that an exemption shall be permanent with respect to all endangered and threatened species for the purposes of completing such agency action, provided that a biological assessment has been conducted under section 7(c). An exemption shall *not* be permanent, according to section 7(h)(2)(B) if the Secretary finds that "based on the best scientific and commercial data available," such an exemption would result in the extinction of the species.<sup>38</sup>

### III. COMMENTS

Subsequent to the Supreme Court's landmark *TVA v. Hill*<sup>39</sup> decision, substantive revisions to ESA were inevitable. Recognizing the significant lobbying power of federal agencies and the adverse public reaction to the halting of a multimillion dollar dam project to

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<sup>34</sup> It should be stressed that the public interest/national significance considerations to be evaluated by the Committee represent the initial involvement of such factors under ESA. Prior to the 1978 Amendments, the public interest/national significance criteria were regarded as pertinent only in NEPA cases.

<sup>35</sup> 16 U.S.C. § 1536(h)(1)(B), *as amended* by Pub. L. No. 95-632 (1978).

<sup>36</sup> H.R. REP. No. 95-1804, 95th Cong., 2d Sess. 22 (1978).

<sup>37</sup> 16 U.S.C. § 1536(h)(2), *as amended* by Pub. L. No. 95-632 (1978).

<sup>38</sup> *Id.* § 1536(h)(2)(B). To reconcile the exemption subsection with the section 9 proscription against the "taking" of protected species (defined to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in such conduct"), section 7(o) states that any action for which an exemption is granted shall not be considered a taking of such species. *Id.* § 1536(o).

<sup>39</sup> \_\_\_ U.S. \_\_\_, 98 S. Ct. 2279 (1978).



protect a 3-inch fish, commentators in near unanimity acknowledged the 1973 Act itself to be "endangered."<sup>40</sup> Indeed, repeal of the entire statute was feared as a viable, albeit extreme, result of the *Hill* decision.

Given the accuracy of the inevitable revision prophecy, the issue becomes whether the 1978 Amendments have emasculated the initial policies and purposes of ESA. The focus of the revisions is clearly to provide federal agency actions with a greater probability of proceeding to completion without becoming embroiled in controversies with regard to endangered and threatened species, while purporting to uphold "the integrity" of the policies of ESA at the same time. Unfortunately, this two-fold premise is inherently contradictory. Reiterating Senator Tunney's testimony behind the passage of ESA in 1973 that "[t]o permit the extinction of any species which contributes to the support of [our 'immensely complicated ecological organization'] without knowledge of the cost or benefits of such extinction is to carelessly tamper [sic] with the health of the structure itself,"<sup>41</sup> and Judge Celebrezze's admonishment that "any judicial error in a NEPA case is subject to later review and remedial reversal before permanent damage is done to the environment . . . . If we were to err on the side of permissiveness [in ESA cases] . . . the most eloquent argument would be of little consequence to an extinct species,"<sup>42</sup> it can hardly be claimed that the establishment of the Endangered Species Committee to balance species protection against the public interest and economic considerations is designed to uphold the "integrity" of ESA. In fact, the whole concept of applying a balancing test in ESA cases is paralogical. To illustrate, the Dickey-Lincoln School Lakes Dam Project in northern Maine, a \$600 million proposed development "to harness the natural energy of the upper St. John River for use as a source of electrical energy to help meet the needs of New England consumers,"<sup>43</sup> initially conflicted with all known populations of the Furbish lousewort, an endangered plant. Given the criteria to be evaluated by the Committee in determining whether an exemption from compliance with ESA is warranted,<sup>44</sup> it is clear that the magnitude of the economic considerations alone would subordinate the concerns for the continued viability of an "unattractive and useless" plant.

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<sup>40</sup> See, e.g., Stromberg, *supra* note 5.

<sup>41</sup> 119 CONG. REC. 25668 (1973).

<sup>42</sup> *Hill v. TVA*, 549 F.2d 1064, 1072 (6th Cir. 1977).

<sup>43</sup> Dickey-Lincoln School Lakes Dam Project — Draft EIS 1-1 (1977).

<sup>44</sup> See note 33, *supra*.

Indeed, only those "glamorous" endangered and threatened species, such as the bald eagle, have a *clear* chance of prevailing against agency actions designed to promote such national concerns as greater energy production or an improved national economy.

Prior criticism of section 7's consultation requirement was that "[u]ltimate responsibility of decision on whether a given project should proceed to construction [rests] with the sponsoring federal agency, which necessarily would be predisposed towards project continuance, rather than with the Secretary of the Interior, who remains objectively committed to upholding the intent of the Act."<sup>45</sup> With the advent of the Committee and its composition, the desired objectivity is in greater doubt. The only redeeming factor is that Congress has mandated that a minimum of five affirmative votes is necessary in order to grant an exemption, rather than requiring a simple majority vote. With the presence of the Secretary of the Interior and the Administrators of EPA and NOAA, environmentalists at least can be assured that exemptions will not be granted freely.

In the totality of the circumstances, the Endangered Species Act Amendments of 1978 may be a legitimate compromise between the initial congressional commitment to the unequivocal preservation of protected species, and the desire by some to repeal the statute entirely; indeed, a literal reading and interpretation of the Amendments demonstrates that such species may actually be afforded greater protection. Formerly, a sponsoring federal agency did *not* have to acquiesce to suggestions by the Secretary of ways to mitigate the harm to endangered and threatened species, and could proceed to construction until either the Secretary or some concerned environmental organization brought suit to compel enforcement of the provisions of ESA.<sup>46</sup> Under the 1978 Amendments, however, no exemption will be granted if it will result in the extinction of the species.<sup>47</sup> Moreover, section 7(1)(1) provides that the Committee shall specify the mitigation and enhancement measures which *shall be carried out and paid for* by the exemption applicant in implementing the agency action.<sup>48</sup> This section mandates federal agencies to undertake a more comprehensive examination in order to recog-

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<sup>45</sup> See Stromberg, *supra* note 5, at 531.

<sup>46</sup> 16 U.S.C. § 1540(g) (Supp. IV 1974) allows any person to file a civil suit on his or her own behalf in federal district court to enjoin any person or agency (including the United States) "alleged to be in violation of any provision of this [Act]."

<sup>47</sup> 16 U.S.C. § 1536(h)(2)(B), *as amended* by Pub. L. No. 95-632 (1978).

<sup>48</sup> *Id.* § 1536(l)(1).

nize and avoid any negative impact on protected species and their habitat. In effect, the new section 7 requires the agencies to acquiesce to the Secretary's (or the Committee's) proposals for the protection of the species in order to proceed with project construction.

It can only be hoped that the Endangered Species Act Amendments of 1978 will permit the construction of federal projects necessary for the national interest, while coextensively affording all endangered and threatened species, including those perceived of as "unattractive and useless," with a viable prospect of continued preservation. The groundwork has been laid; only when the applications for exemption begin to be submitted will we learn whether the Amendments are successful compromises or are actually a major step backwards in the campaign against the extirpation of such species.