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THE ENDANGERED SPECIES ACT OF 1973: IS THE STATUTE ITSELF ENDANGERED?

David B. Stromberg*

I. INTRODUCTION

A congressional commitment to the preservation of wildlife has long existed in the United States, as evidenced by such statutes as the Lacey Act of 1900,¹ the Migratory Bird Conservation Act of 1929,² and the Bald Eagle Protection Act of 1940.³ During the 1960's, Congress enacted comprehensive statutes designed to protect endangered species of fish and wildlife, beginning with the Endangered Species Preservation Act of 1966⁴ and followed by the Endangered Species Conservation Act of 1969.⁵ These later acts, however, proved to be largely ineffective because they required federal agencies administering federal projects only to *consider* the protection of endangered species rather than to defer to their absolute preservation.⁶ As a result, Congress enacted the Endangered Species Act of

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¹ 16 U.S.C. §§ 701 *et seq.* (1970) (Protection of Migrating Game and Insectivorous Birds).

² 16 U.S.C. §§ 715 *et seq.* (1970).

³ 16 U.S.C. §§ 668 *et seq.* (1970).

⁴ 16 U.S.C. §§ 668aa-668cc-6 (1970) *as amended* by Pub. L. No. 91-135 §12(e) (1969).

⁵ 16 U.S.C. §§ 668aa-668cc-6 (1970) (repealed 1973).

⁶ The weakness of these earlier statutes can be traced directly to the language of their statements of purpose and policy. For example, the 1969 Act declared that congressional policy is "to protect species of native fish and wildlife, including migratory birds, that are threatened with extinction, and, *insofar as is practicable and consistent* with the primary purposes of such bureaus, agencies, and services." 16 U.S.C. §§ 668aa(b)(1970) (emphasis added). Federal departments construed "*insofar as practicable*" as a congressional intent merely to *consider* the protection of endangered species, rather than a formal and fundamental requirement of preservation. See 5 ENVIR. L. REP. 50189 (1975). For further discussion of earlier federal animal protection legislation, see Comment, *Endangered Species Protection: A History of Congressional Action*, 4 ENV. AFF. 255 (1975); Comment, *Vanishing Wildlife and Federal Protective Efforts*, 1 ECOLOGY L.Q. 520 (1971).

1973⁷ (ESA) which mandated the preservation and protection of endangered and threatened species.

This article will explore the nature and framework of the 1973 statute, focusing on those sections significant to both environmentalists and agencies responsible for the construction of federal projects. Pertinent provisions of ESA and the National Environmental Policy Act (NEPA)⁸ will be compared to particularize the apparent strengths and potential weaknesses of ESA. An examination of the manner in which ESA has been interpreted by the courts will follow, with special concentration on *TVA v. Hill*, a case just decided by the Supreme Court. Finally, the article will assess ESA's relationship to such proposed projects as the Dickey-Lincoln School Lakes Dam Project in northern Maine and will suggest statutory revisions which may prevent similar conflicts from arising in the future.

II. THE ENDANGERED SPECIES ACT OF 1973

Senator Tunney of California, one of the Act's chief proponents, articulated the congressional rationale behind the passage of ESA in 1973:

The rate of extinction (of endangered species) has increased to a point where, on the average, one species disappears every year. . . . To allow the extinction of animal species is ecologically, economically, and ethically unsound. Each species provides a service to its environment; each species is a part of an immensely complicated ecological organization, the stability of which rests on the health of its components. At present, we are unsure of the total contribution of each species of fish and wildlife to the health of our ecology. To permit the extinction of any species which contributes to the support of this structure without knowledge of the cost or benefits of such extinction is to carelessly tamper with the health of the structure itself.⁹

The House and Senate reports offer stronger evidence of congressional concern for the continued preservation of endangered species:

[M]any biological, medical, and behavioral sciences value all living species as subjects for research and investigation. An uncommon plant or animal now considered 'worthless' may tomorrow prove important for scientific or medical research or for highly practical uses. . . . [T]he

⁷ 16 U.S.C. §§ 1531 *et seq.* (Supp. IV 1974).

⁸ 42 U.S.C. §§ 4321 *et seq.* (1970).

⁹ 119 CONG. REC. 25668 (1973).

elimination of one species from a natural community can result in disruption of the ecological balance necessary to preserve many interrelated lifeforms.¹⁰

Section 2(b) of ESA responds to these concerns by succinctly stating 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."¹¹ In addition, section 2(c) of the Act emphasizes 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."¹²

The protections afforded by the Endangered Species Act cover species and subspecies of all members of the plant and animal kingdoms. "Endangered species" are defined in the Act as "any species which is in danger of extinction throughout all or a significant portion of its range;"¹³ similarly, "threatened species" are defined as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."¹⁴ The phrase "throughout all or a significant portion of its range" has been interpreted by the Interior Department as sanctioning protection of a localized population of the species or subspecies *even if* populations of the same species or subspecies are surviving in some other geographical area.¹⁵

¹⁰ S. REP. NO. 93-307, 93d Cong., 1st Sess. 2 (1973). See generally *Hearings on S. 983 before the Senate Subcommittee on the Environment of the Commerce Committee*, 93d Cong., 1st Sess. 93-67 (1973).

¹¹ Pub. L. No. 93-205, 87 Stat. 884 (codified at 16 U.S.C. § 1531(b) (Supp. IV 1974)). Section 1531 is distinguishable from its counterpart in the 1969 Act (§ 668aa) in that the latter's "insofar as practicable" language has been deleted in the present statute in favor of a more substantive commitment to the preservation of endangered and threatened species. See note 6, *supra*. In addition, § 668aa of the 1969 Act referred to endangered species as those species of fish and wildlife "threatened with worldwide extinction." However, this term as defined in § 668cc-3 clearly is dealing with only endangered species, not with threatened species as defined in the 1973 Act. In this respect, the intent of Congress was to expand the scope of the coverage of ESA.

¹² 16 U.S.C. § 1531(c)(Supp. IV 1974).

¹³ 16 U.S.C. § 1532(4)(Supp. IV 1974). The definition of endangered species specifically excludes insects determined by the Secretary of the Interior to be pests.

¹⁴ 16 U.S.C. § 1532(15)(Supp. IV 1974). For a detailed look at "endangerment" decisions, see Ramsay, *Priorities in Species Preservation*, 5 ENV. AFF. 595 (1976).

¹⁵ 5 ENVIR. L. REP. 50190 n. 12 (1975). However, *dicta* in *Hill v. TVA*, 549 F.2d 1064 (6th Cir. 1977), *cert. granted* 46 U.S.L.W. 3322 (1977), implies that such an interpretation by the Interior Department may be only persuasive at best.

ESA is administered by the Secretaries of the Interior and Commerce,¹⁶ who are directed to determine which species of plants, fish, and wildlife are endangered or threatened according to additional statutory criteria.¹⁷ ESA requires that the Secretary of the Interior compile and publish in the Code of Federal Regulations a list of all species receiving these classifications.¹⁸

Section 7 of ESA, the most critical part of the Act, delineates the duties of federal agencies in preventing the further decline of protected species:

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.¹⁹

Conservation, as defined in section 4(2), includes "the use of all methods and procedures which are necessary to bring any endan-

¹⁶ Under 16 U.S.C. § 1533(a)(1)(Supp. IV 1974), the Department of the Interior is primarily responsible for the addition or deletion of species to or from the "endangered" or "threatened" species list. The Secretary of Commerce has the full authority pursuant to § 1533(a)(2) to protect or remove protection of certain marine species with the concurrence of the Secretary of the Interior. Under § 1533(a)(2)(C), the Interior Secretary may not list or remove from the list any endangered or threatened marine species without a prior favorable determination from the Secretary of Commerce.

¹⁷ *Id.* § 1533(a)(1). The criteria for this determination includes the following factors:

- (1) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (2) overutilization for commercial, sporting, scientific, or educational purposes;
- (3) disease or predation;
- (4) the inadequacy of existing regulatory mechanisms; or
- (5) other natural or manmade factors.

¹⁸ 50 C.F.R. § 17.11(i) (1975).

¹⁹ 16 U.S.C. § 1536 (Supp. IV 1974) (emphasis added). Although § 7's language indicates the Act's importance specifically for *federal* projects, privately-sponsored actions and state and local government-sponsored projects are indirectly included as well, since these usually require federal permits, licenses, or matching funds. Wood, *Section 7 of the Endangered Species Act of 1973: A Significant Restriction for All Federal Activities*, 5 ENVIR. L. REP. 50189, 50190 (1975).

gered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.”²⁰ The intent of these two sections, along with the mandate that *all* federal departments and agencies utilize their authority in acting to conserve such species, is to require *all* federal agencies to prevent the further decline of protected species and to restore them to an optimum level of safety.

Two additional sections of ESA warrant mention because of their role in ESA litigation. Section 9²¹ imposes criminal and civil penalties upon persons who “take” an endangered species: “take” is defined to mean “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in such conduct.”²² In addition, section 11(g) 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).”²³ Together, these sections subject to judicial scrutiny actions taken by federal agencies which amount to a “taking” of an endangered species.²⁴

III. SECTION 7: A GUARANTEE OF PROTECTION FOR ENDANGERED SPECIES

ESA imposes upon federal agencies certain duties comparable to those imposed by the National Environmental Policy Act of 1969 (NEPA),²⁵ in that both statutes require federal agencies to recognize and consider environmental concerns before undertaking any major federal project.²⁶ However, NEPA has been viewed as requiring only procedural safeguards,²⁷ which, because of their nonspecific nature,

²⁰ 16 U.S.C. § 1532(2) (Supp. IV 1974).

²¹ *Id.* § 1538.

²² *Id.* § 1532(14). The wording of § 9 makes no mention of threatened species as being protected by criminal and civil penalties; however, since a violation of § 7 applies to threatened as well as endangered species, it has been argued that § 9 penalties would be imposed on the “taking” of a threatened species as well. In several of the cases litigated on the provisions of ESA, plaintiffs have raised claims of violations of both § 7 and § 9. The courts, however, have declined to render a decision based on § 9, and have continuously relied on § 7. See *Sierra Club v. Froehlke*, 534 F.2d 1289 (8th Cir. 1976), and *Hill v. TVA*, 549 F.2d 1064 (6th Cir. 1977).

²³ 16 U.S.C. § 1540(g) (Supp. IV 1974).

²⁴ See text at note 22, *supra*.

²⁵ 42 U.S.C. § 4332 (1970). NEPA is the principal environmental statute and strengthens Congress’ ability to oversee agency actions with adverse environmental effects.

²⁶ Compare 42 U.S.C. § 4332 (1970) to 16 U.S.C. § 1531 (Supp. IV 1974).

²⁷ *Calvert Cliffs Coord. Comm. v. United States Atomic Energy Comm’n.*, 449 F.2d 1109 (D.C. Cir. 1971); *Nat’l. Helium Corp. v. Morton*, 455 F.2d 650, 656 (10th Cir. 1971); *Environmental Defense Fund v. Armstrong*, 487 F.2d 814 (9th Cir. 1973).

are less than fully enforceable. NEPA directs that "it is the continuing responsibility of the Federal Government to use *all practicable means, consistent with other essential considerations of national policy*,"²⁸ to improve plans and programs towards achieving the goal of environmental excellence. The compromising language of this provision requires merely that environmental protection be one of a totality of concerns to be taken into consideration. Thus, before an environmental safeguard is required, it (1) must be "practicable", and (2) must outweigh other national considerations, such as increased energy supplies or an improved economy.

Section 7 of ESA, by contrast, incorporates an inflexible substantive component into its provisions. Federal agencies are required to "insure"²⁹ against jeopardizing endangered or threatened species or destroying or modifying their critical habitat.³⁰ In addition, the definition of conservation in section 4(2) does not permit a balancing of ESA concerns against other national considerations. Commentators, therefore, have stated that the standard under ESA "is not the familiar [NEPA] test of maximum mitigation [of environmental injury], but a more demanding guarantee of nondegradation."³¹ The reason is obvious: whereas certain environmental concerns may be able to withstand minor interference without suffering irreparable damage, the subtlest of interferences will usually result in the complete destruction of an endangered or threatened species.

The federal agency proposing the construction of a project has the initial responsibility in its preparation of an Environmental Impact Statement (EIS) to examine whether and to what extent the project will have an effect on listed endangered species or their habitat.³² Once a determination is made that the project will in fact affect a protected species, the agency, under section 7, must then consult

²⁸ Pub. L. No. 91-190, 83 Stat. 852, 42 U.S.C. § 4331(b) (1970) (emphasis added).

²⁹ 16 U.S.C. § 1536 (Supp. IV 1974).

³⁰ 40 Fed. Reg. 17764-75 (1975). Critical habitat is defined in the Regulations to be "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." As such, a federal action would not be in compliance with § 7,

[I]f such 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]pplication of the term 'critical habitat' may not be restricted to the habitat necessary for a minimum viable population.

³¹ W. RODGERS, ENVIRONMENTAL LAW 830 (1977).

³² EIS's are required to be prepared under § 102(c) of NEPA. Included in the provisions of an EIS is a discussion of the proposed project's effect on any endangered species found within the construction area.

with the U.S. Fish and Wildlife Service, a division of the Department of the Interior. If this consultation sustains the agency's initial determination, the agency must then prepare a biological study which is to be forwarded to the Wildlife Service. The Service will then issue its biological opinion, in which it may propose modifications in the project, such as an alternative siting, to eliminate the impact on the endangered or threatened species. However, the initiating agency need not acquiesce in the Service's opinion; section 7 merely requires it to *consult* with the Interior Department. Should a difference of opinion arise as to whether or in what manner a given federal project should proceed to construction, the ultimate responsibility of decision is vested in the sponsoring federal agency.³³ That decision, though, is then subject to review by the courts which will ascertain whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."³⁴

IV. LITIGATION UNDER THE ENDANGERED SPECIES ACT

Since the passage of ESA in 1973, only four cases have been litigated concerning the protection of endangered species. An examination of these decisions reveals that the federal courts have construed the Act in a variety of ways, from establishing an inflexible substantive proscription against harming endangered species, to favoring a balancing test of equitable considerations. Unfortunately, this series of decisions has left both environmentalists and federal agencies without a comprehensible basis upon which to predict future judicial interpretations of ESA. Hopefully, the Supreme Court's recent decision in *TVA v. Hill* will eliminate this confusion.

The initial case involving endangered species, *United States v. Cappaert*,³⁵ arose in Nevada in 1974. The United States brought a civil action for a declaration of its rights to the use of so much of the waters appurtenant to Devil's Hole, Death Valley Monument, "as may be necessary for the needs and purposes of maintaining the pool"³⁶ in which the desert pupfish (*Cyprinodon diabolis*), an endan-

³³ See 119 CONG. REC. 14536, 25689-90 (1973) for the legislative history of this interpretation of § 7's provisions.

³⁴ *National Wildlife Federation v. Coleman*, 529 F.2d 359, 372 (5th Cir. 1976), *cert. denied, sub. nom. Boteler v. National Wildlife Federation*, 429 U.S. 979 (1976) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

³⁵ 375 F. Supp. 456 (D. Nev. 1974).

³⁶ *Id.* at 457.

gered species, was found to exist. In addition, the government sought both a preliminary and permanent injunction against the defendants, owners and manager of a nearby cattle ranch, to prevent them from pumping water into new and already-existing wells except for domestic purposes.

The district court found that through Presidential Proclamation³⁷ "the unappropriated waters in, on, under and appurtenant to Devil's Hole were withdrawn from private appropriation as against the United States"³⁸ and reserved for the preservation of the habitat of the pupfish. The district court admitted the evidence presented that the defendant's pumping of underground water which comprised the supply for Devil's Hole resulted in an inordinate decrease in the pool's water level, thereby seriously threatening the viability of the species. It granted the United States a permanent injunction limiting the defendants to pumping water solely for domestic purposes, so that the water level in Devil's Hole would remain sufficient for the survival of the pupfish.

Cappaert is consistent with the expressed congressional policy in favor of the absolute protection of endangered species. However, language in the opinion suggests that the court to some extent was employing its own balancing of considerations. Chief Judge Foley's conclusion that "the public interest lies in the preservation of this endangered species"³⁹ and that "the destruction of the Devil's Hole pupfish would go clearly against that theme of environmental responsibility,"⁴⁰ implies that a different decision might be rendered in another case if the public interest in the recognition of private economic interests were superior to the protection of an endangered species. Moreover, in examining the probable repercussions of denying the injunction, the court concluded that "there is grave danger that the . . . pupfish may be destroyed."⁴¹ This "grave danger" standard implies the use of a balancing test: given the defendants' economic injury, a "grave" danger to the pupfish was required to justify the denial of the defendants' right to pump the underground waters. Thus, the district court appears to have used a balancing

³⁷ Proclamation No. 2961, 17 Fed. Reg. 691 (1952).

³⁸ 375 F. Supp. at 458.

³⁹ *Id.* at 461.

⁴⁰ *Id.*

⁴¹ *Id.* at 460 (emphasis added). On the other hand, the court recognized the resulting economic injury to the defendants, and provided for the minimization, wherever possible, of the injury to the defendants' livestock and agricultural pursuits, and for the continued pumping for domestic purposes. *Id.* at 462.

test standard analogous to that in NEPA.

Section 7 of ESA was first analyzed in *National Wildlife Federation v. Coleman*,⁴² in which a conservation group sought an injunction against the Secretary of Transportation to prevent the construction of a portion of interstate highway (I-10) which would traverse the habitat of the Mississippi Sandhill Crane (*Grus canadensis pulla*), an endangered species whose entire population (approximately 40) was located within the proposed construction area. Despite official requests by the Interior Department for modifications of plans to avoid the deleterious effect on the subspecies, federal highway officials approved the proposal without alteration.⁴³ The conservation group sued in the federal district court to obtain judicial enforcement of the Interior Department's proposed modifications, alleging that construction of the segment would threaten the continued existence of the crane and would result in the destruction and modification of its critical habitat in violation of section 7.

The district court found that the Secretary of Transportation had "adequately considered" the danger to the crane, and that plaintiffs had failed to show that his actions were illegal under section 7. In dismissing the Interior Department's statements as speculation for "merely reflect[ing] opinions of the effect of the highway on the Crane without specifying facts upon which they are based,"⁴⁴ the court further noted that "there may be many kinds of actions which can be carried out within the 'critical habitat' of a species that would not . . . adversely affect that species," and would not, therefore, be inconsistent with section 7.⁴⁵

The Court of Appeals for the Fifth Circuit reversed,⁴⁶ asserting that the district court, in holding that the Secretary of Transportation "adequately considered" the effects of the highway on the crane, misconstrued the directive of section 7. Section 7, according to the court of appeals, "imposes on federal agencies the mandatory duty to insure that their actions will not either (i) jeopardize the existence of an endangered species, or (ii) destroy or modify critical

⁴² 400 F. Supp. 705 (S.D. Miss. 1975).

⁴³ *Id.* at 707.

⁴⁴ *Id.* at 711.

⁴⁵ *Id.* at 712 (quoting United States Fish and Wildlife Service, 40 Fed. Reg. 21499 (1975)). The district court concluded that the evidence presented clearly showed that the construction of I-10 fell within this description, 400 F. Supp. at 712.

⁴⁶ *National Wildlife Federation v. Coleman*, 529 F.2d 359, 373 (5th Cir. 1976), *cert. denied*, *sub. nom. Boteler v. National Wildlife Federation*, 429 U.S. 979 (1976).

habitat of an endangered species.”⁴⁷ The “adequate consideration” standard employed by the district court was in direct contravention with the specific statutory provision. The court of appeals concluded that the defendants had failed to take the steps necessary to guarantee that the highway would not jeopardize the crane or modify its habitat. Further construction was enjoined until the modifications suggested by the Interior Department were fully implemented.

The court of appeals in *Coleman* strictly construed section 7, and in doing so, rejected the balancing test of competing considerations employed by the district court. The appellate court acknowledged that, pursuant to section 7, the federal agency has the ultimate responsibility to decide whether or not to proceed with a project, despite allegations of statutory violation by the Interior Department. However, Judge Simpson noted that the courts can review that decision “to ascertain whether ‘the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.’”⁴⁸ Thus, the Fifth Circuit created a second and formidable check on agency compliance with the substantive provisions of the statute. The court directed the district court on remand to enter an injunction against construction until the Secretary of the Interior determined modifications necessary for the protection of the threatened crane.

Environmentalists were unsuccessful in enforcing ESA requirements in *Sierra Club v. Froehlke*.⁴⁹ In *Froehlke*, an environmental group and four individual landowners sought to enjoin construction of the Meramec Park Lake Dam and any other dams planned in the Meramec Basin in Missouri. The project, which would impound a 23,000 acre reservoir in the Basin, was intended to provide flood control, water supply, and recreational and navigational benefits to the area. However, a serious question was raised as to the effect of the project on the continued existence of an endangered species, the Indiana bat (*Myotis sodalis*). Pursuant to the Interior Department’s

⁴⁷ 529 F.2d at 371.

⁴⁸ *Id.* at 372. The scope of judicial review with respect to the rejection or modification of federal agency decisions was later expanded by the Sixth and Eighth Circuits in *Hill v. TVA*, 549 F.2d 1064, 1074 n.21 (6th Cir. 1977), and *Sierra Club v. Froehlke*, 534 F.2d 1289, 1304-05 (8th Cir. 1976), which also asserted that the standard to be used was the one espoused in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-14 (1971): the agency decision should be overturned if it was “outside the scope of its authority” and/or if it was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

⁴⁹ 392 F. Supp. 130 (E.D. Mo. 1975).

recommendation that a moratorium on construction be declared, the Army Corps of Engineers conducted a survey on the bat in the project area. It conceded that the bat population "*could be adversely affected by continued work on the project,*"⁵⁰ but nevertheless decided to proceed with construction.

Claiming that the Corps' decision was arbitrary and capricious,⁵¹ plaintiffs brought suit in federal district court, alleging that the construction activities and the rising reservoir would flood the bat caves, thereby jeopardizing the continued existence of the bat and destroying its habitat in violation of section 7. The plaintiffs also claimed a section 7 violation in that the defendants effectively ignored the consultation requirement by disregarding the Interior Department's warnings concerning the danger to the bats and its request for a moratorium on construction.⁵² Despite evidence presented by the plaintiff's expert witness that the project construction *would* jeopardize the continued existence of the endangered species,⁵³ the district court concluded that no evidence had been introduced showing that the Corps' *present activities* were inimical to the bats; indeed, the court stated that the Corps had made "all possible reasonable good faith efforts"⁵⁴ to comply with ESA. The Court of Appeals for the Eighth Circuit affirmed, dismissing the plaintiff's section 7 arguments by reiterating that the section merely required consultation, not acquiescence by the Corps.⁵⁵ Further, the contradictory evidence presented by the plaintiff's expert witness and the Corps' survey led the court to conclude that the district court could have found that the plaintiffs failed to meet their "burden of showing that the action of the Corps had jeopardized or would jeopardize the continued existence of the Indiana bat."⁵⁶ The

⁵⁰ 5 ENVIR. L. REP. 50189, 50194 (1975), citing Plaintiff's Exhibit 16-A, pp. 3,51-2, from the District Court brief. The decision to proceed was presumably because relatively little information on the species was available from any source, including the Federal Fish and Wildlife Service. See 392 F. Supp. at 144.

⁵¹ 392 F. Supp. at 142.

⁵² *Id.* at 143. Further, the project was alleged to be a violation of § 9 of the Act in that its construction was a "clear attempt to harass or harm" the bats by flooding its caves. 534 F.2d at 1301-02.

⁵³ 392 F. Supp. at 144.

⁵⁴ 392 F. Supp. at 138.

⁵⁵ 534 F.2d at 1303.

⁵⁶ *Id.* at 1305. The court also rejected the § 9 allegation, stating that:

The allegation . . . rests upon the asserted ground that the erection of the dam is a 'clear attempt to harass or harm' the Indiana bat. We are cited to no portion of the record so stating nor do we believe that from a fair reading thereof any such attempt may be found. The purposes of the dam's construction have heretofore been discussed in some

court rejected the plaintiff's "arbitrary and capricious" contention by allowing the agency to employ a balancing process:

It is clear that the decisions reached by the Corps, in the light of conflicting considerations involved, were difficult and onerous, but they were far from capricious. There is manifested, on the record, a balancing, on the one hand, of the benefits expected to be derived from the project by way of flood control, water supply and abatement of pollution, and recreation, among other considerations, against, on the other hand, the importance of an unspoiled environment. Nor are we unmindful . . . that portions of the project involving large sums of money have now been completed. . . . We find nothing arbitrary or capricious, or an abuse of discretion therein.⁵⁷

Several aspects of *Froehlke* deserve criticism. In ruling for the Corps, the district court apparently gave less weight to the testimony of a professor of zoology, who had conducted extensive research on the Indiana bat, than to the Corps' conclusion that "the Project would probably have no more than an infinitesimal effect upon the Indiana bat population in the Meramec basin."⁵⁸ However, the court noted the professor's statement that the Indiana bat would probably become extinct even if the project were not built.⁵⁹ While the court certainly has discretion to weigh the credibility of the conflicting evidence presented, it does not seem to have recognized the inherent prejudice of the federal agency contemplating construction of the project. By either party's evidence, some effect on the endangered species was stipulated, as was the fact that the species was on the verge of extinction anyway. The district court, therefore, should have employed the protections afforded by ESA, especially in light of the congressional intent that the Act's provisions extend to protect species already on the way to extinction.⁶⁰

Of greater significance is the fact that the Eighth Circuit clearly allowed the Corps to employ a NEPA-like balancing test, notwithstanding the undisputed effect of some magnitude on the endangered species.⁶¹ The use of this balancing approach is proscribed when endangered species are involved, and, in light of ESA's ex-

detail. . . . An attempt to harass may not reasonably be found therein. This Act, as any other, must have a reasonable construction.

Id. at 1304.

⁵⁷ *Id.* at 1305.

⁵⁸ *Id.*

⁵⁹ *Id.* See 392 F. Supp. at 144.

⁶⁰ 119 CONG. REC. 30166 (1973).

⁶¹ See text at note 49, *supra*.

pressed policy and purpose of insuring the continued existence of endangered species, it is "not in accordance with law."⁶²

The most recent challenge to ESA occurred in *Hill v. TVA*.⁶³ The Tellico Dam and Reservoir Project, to be constructed near the mouth of the Little Tennessee River, was proposed by the TVA and approved by Congress in October, 1966. The project, as described by the court of appeals, was to be a "multipurpose water resource and regional economic development project,"⁶⁴ in which a 16,000 acre navigable reservoir would be created. It was designed to "stimulate new shoreline industrial development, increase recreational opportunities and tourism, and augment existing hydroelectric power generating and flood control capabilities" in an area "characterized by underutilization of human resources and outmigration of young people."⁶⁵ Closure of the dam had been scheduled for January, 1977. In 1976, plaintiffs, representing the Audubon Council of Tennessee and the Association of Southeastern Biologists, brought suit in the federal district court, alleging that the proposed reservoir would flood and destroy the only known habitat of the snail darter fish (*Percina Imostoma tanasi*), in violation of section 7 of ESA and seeking a permanent injunction against the completion of the dam project. The TVA countered that there was clear congressional intent that the project "be completed as promptly as possible in the public interest,"⁶⁷ in an attempt to neutralize plaintiff's claim of an ESA violation.

The district court admitted that "the preponderance of the evidence demonstrates that closure of the Tellico Dam in January, 1977 and the consequent creation of the Tellico Reservoir will result in the adverse modification, if not complete destruction, of the snail darter's critical habitat."⁶⁸ However, the court denied injunctive

⁶² See note 48, *supra*.

⁶³ 419 F. Supp. 753 (E.D. Tenn. 1976).

⁶⁴ 549 F.2d 1064, 1067 (6th Cir. 1977), *cert. granted*, 46 U.S.L.W. 3322 (1977).

⁶⁵ *Id.*

⁶⁶ 419 F. Supp. 753 (E.D. Tenn. 1976). The snail darter was discovered in the Little Tennessee River in August, 1973, nearly seven years after congressional approval of the project and four months before the enactment of ESA. A search for the species in the rivers throughout the Alabama-Tennessee region proved unsuccessful. In November, 1975, the snail darter was officially designated an endangered species by the Interior Department, and in April, 1976, two months after the suit was filed by the plaintiffs, the section of the Little Tennessee River was designated as the "critical habitat" of the snail darter. *Id.* at 755-56.

⁶⁷ *Id.* at 758. See also S. REP. NO. 94-960, 94th Cong., 2d Sess. 96 (1976); *Hearings on Public Works for Water and Power Development Appropriations Bill, 1977 before a Subcomm. of the House Comm. on Appropriations, 94th Cong., 2d Sess. 260-62 (1976).*

⁶⁸ 419 F. Supp. at 757.

relief after employing a balancing approach and weighing the survival of an endangered species against the completion of a public works project more than 80% completed and representing a federal investment of almost eighty million dollars.⁶⁹

On appeal,⁷⁰ the Court of Appeals for the Sixth Circuit reversed, recognizing that its responsibility under section 11(g) of ESA was to insure the conscientious enforcement of the Act, even if it meant halting a project the day before its completion.⁷¹ The court noted its ability to review and grant permanent injunctive relief in *any* ESA case at *any* time prior to actual project completion.⁷² It also rejected as inapposite all but one of the NEPA cases cited by the TVA in support of its proposition that on-going projects in the advanced construction stage should be exempted from statutory compliance.⁷³ The court of appeals relied on the expression of the congressional intent behind NEPA in *Environmental Defense Fund v. TVA*⁷⁴ as an "accurate reflection of the pervading spirit" of ESA: "Congress envisaged on-going agency attempts to minimize environmental harm caused by the implementation of agency programs. This could encompass not only *constant reevaluations of projects already begun* . . . but also the consideration of the environmental impact of all proposed agency action."⁷⁵

The Sixth Circuit, in determining the inapplicability of the balancing approach, distinguished NEPA and ESA on this issue: "[A]ny 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."⁷⁶ The court of appeals rejected the

⁶⁹ *Id.* at 759.

⁷⁰ *Hill v. TVA*, 549 F.2d 1064 (6th Cir. 1977).

⁷¹ *Id.* at 1071. As such, the court dismissed the TVA's argument that the extent of project completion should be the determinative standard of judicial review, and that the closure of Tellico Dam as the terminal phase of an on-going project should fall outside the category of "actions" of departments and agencies to be scrutinized for compliance. "Current project status . . . is irrelevant in calculating the social and scientific costs attributable to the disappearance of a unique form of life." *Id.*

⁷² *Id.*

⁷³ *Id.* at 1072. See *Ragland v. Mueller*, 460 F.2d 1196 (5th Cir. 1972); *Environmental Defense Fund v. TVA*, 339 F. Supp. 806 (E.D. Tenn. 1972), 468 F.2d 1164 (6th Cir. 1972); *Environmental Defense Fund, Inc. v. Corps of Engineers of the United States Army*, 470 F.2d 289 (8th Cir. 1972).

⁷⁴ 468 F.2d 1164 (6th Cir. 1972).

⁷⁵ 549 F.2d at 1072 (emphasis added) (quoting 468 F.2d 1164, 1176 (6th Cir. 1972)).

⁷⁶ 549 F.2d at 1072.

TVA's theory that congressional approval of Tellico's appropriations in light of the full disclosure of the project's effect on the snail darter constituted legislative acquiescence in the agency's noncompliance with ESA.⁷⁷ Quoting from an earlier District of Columbia Circuit opinion,⁷⁸ Judge Celebrezze noted that repeal by implication is disfavored, especially when "the subsequent legislation is an appropriations measure, and when the prior Act is to continue in its general applicability."⁷⁹ Moreover, House Rule XXI specifically provides that "no appropriation shall be reported in any general appropriation bill. . . . Nor shall any provision in any such bill or amendment thereto changing existing law be in order."⁸⁰ The Sixth Circuit construed the Appropriations Committee's reports as "advisory opinions"⁸¹ lacking the force of law, and decided that "to credit them would be tantamount to permitting the legislature to invade a province reserved to the courts by Article III of the constitution."⁸²

Both the Sixth Circuit in *Hill* and the Eighth Circuit in *Froehlke* purported to apply the standard of review that an agency decision should be overturned only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁸³ The *Hill* court, unlike its counterpart in *Froehlke*, found an agency's decision to complete a project at the expense of an endangered species to be in complete derogation of section 7 of ESA and hence "not in accordance with law." Further, the court posited a more rational interpretation of the section 7 consultation requirement:

Section [7] conveys a pivotal role to the Secretary of the Interior to achieve voluntary compliance with the policy objectives of the Act by federal agencies and departments . . . his compliance standards may properly influence final judicial review of such actions, particularly

⁷⁷ The Appropriations Committees of both houses of Congress continued to recommend appropriations for the project from 1975 until 1977, stating in the Senate Committee report that "the Committee does not view the Endangered Species Act as prohibiting the completion of the Tellico project at its advanced state . . ." S. REP. NO. 94-960, 94th Cong., 2d Sess. 96 (1976). For a complete account of the Congressional appropriations for Tellico during this period, see Brief for the Petitioner at 8-11, *TVA v. Hill*, 46 U.S.L.W. 4673 (1978).

⁷⁸ *Committee For Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783, 785 (D.C. Cir. 1971).

⁷⁹ 549 F.2d at 1072-73.

⁸⁰ *Id.* at 1073 (quoting Rules of the House of Representatives, Rule XXI, 2, 94th Cong. (1975)).

⁸¹ *Id.*

⁸² 549 F.2d at 1072.

⁸³ See note 48, *supra*.

as to technical matters committed by statute to his special expertise. . . . We see positive benefit to be gained by impressing his criteria with a judicial imprimatur.⁸⁴

While agencies are not obligated to defer to the Secretary's position and may choose to proceed with a project despite objections from the Interior Department, they should do so with the understanding that, upon judicial review of their decision, the opinion of the Secretary may receive great deference.

Most importantly, the *Hill* court rejected a balancing test of considerations and based its ruling on a strict deference to the separation of powers doctrine. The court acknowledged that "[its] responsibility under [Section 11(g)] is merely to preserve the status quo where endangered species are threatened, thereby guaranteeing the legislative or executive branches sufficient opportunity to grapple with the alternatives,"⁸⁵ and that "only Congress or the Secretary of the Interior can properly exempt Tellico from compliance with the Act."⁸⁶ Although it expressed sympathy with the TVA's analysis of the "equitable factors present"⁸⁷ and noted the agency's reasonable efforts to preserve the snail darter, the *Hill* court stated 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 salvagable value."⁸⁸ Lastly, in rejecting the repeal by implication theory, the court stated that, "[e]conomic exigencies . . . do not grant courts a license to rewrite a statute no matter how desirable the purpose or result might be."⁸⁹ The Sixth Circuit exercised its proper judicial role by granting the injunction, stating that it shall remain in effect "until Congress, by appropriate legislation, exempts Tellico from compliance with the Act or the snail darter has been deleted from the list of endangered species or its critical habitat materially redefined."⁹⁰ The Supreme Court affirmed the Sixth Circuit's reasoning in *TVA v. Hill*.⁹¹

⁸⁴ 549 F.2d at 1070.

⁸⁵ *Id.* at 1071.

⁸⁶ *Id.* at 1074.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* (relying on *West Virginia Division of Izaak Walton League of America, Inc. v. Butz*, 522 F.2d 945, 955 (4th Cir. 1975)).

⁹⁰ 549 F. 2d at 1075.

⁹¹ 46 U.S.L.W. 4673 (1978).

V. FROEHLKE AND HILL: WHERE DO WE GO FROM HERE?

The seemingly incongruous judicial analyses in *Hill* and *Froehlke* illustrates the discrepancies in the circuit courts' view of ESA prior to the Supreme Court's decision. On the one hand, the Eighth Circuit in *Froehlke* advocated the adoption of a balancing test to determine whether a given federal project should proceed to construction, notwithstanding the deleterious effect on an endangered or threatened species. The Sixth Circuit, without specifically refuting *Froehlke*, proffered the position that the proper role of the judiciary is to adhere strictly to the inflexible statutory language of sections 2(c) and 7 of ESA in order to maintain the *status quo* with respect to protected species.

The Dickey-Lincoln School Lakes Dam Project in northern Maine illustrates the problem that pending and proposed projects faced until the *Froehlke/Hill* dispute ultimately was resolved. This \$600 million proposed development, in the planning stage for the past decade, is to consist of two dams with associated reservoirs and hydroelectric generating facilities designed to "harness the natural energy of the upper St. John River for use as a source of electrical energy to help to meet the needs of New England consumers."⁹² In addition, the project will provide both recreational facilities and flood control protection for downstream areas and communities plagued by severe flooding in recent years.⁹³ However, the Army Corps of Engineers has acknowledged that all presently known populations of the Furbish lousewart (*Pedicularis furbishiae*), a species of plant scheduled for inclusion this year in the list of endangered flora,⁹⁴ are within the project area. For the present, Dickey-Lincoln remains tabled.⁹⁵

A. *TVA v. Hill: The Supreme Court's Dilemma*

The United States Supreme Court granted *certiorari* in *Hill*,

⁹² Dickey-Lincoln School Lakes Dam Project—Draft EIS 1-1 (1977).

⁹³ *Id.*

⁹⁴ *Id.* at 2-59.

⁹⁵ It should be noted that Dickey-Lincoln has been stalled for other reasons in addition to the lousewart. The EPA determined in its review of the Corps of Engineers' Draft EIS that certain serious environmental dangers will arise from the construction of the project. For example, the ecosystem of the St. John River will be destroyed, the water quality of the impoundment will be poorer, and the wildlife habitat under the impoundment will be totally destroyed. See letter from William Adams, Jr. EPA Region I Administrator to Col. John Chandler, U.S. Army Corps of Engineers, (Dec. 7, 1977).

and has made what will hopefully be the ultimate judicial decision on the construction and effect of ESA with respect to future projects. The case raised basically the same two issues that were presented before the Sixth Circuit. First, the TVA contended that the phrase "actions authorized, funded, or carried out" in section 7 of ESA should not extend to the concluding stages of a project such as the final closure of a dam.⁹⁶ Extension of ESA would prohibit agencies from putting into use a fully completed project found to threaten the existence of a protected species regardless of the amount of resources expended on the project and regardless of the importance of the project to the public interest.⁹⁷ To avoid this result, the TVA analogized *Hill* to the NEPA cases supporting the balancing test: "at some stage, federal action may be so 'complete' that applying the Act could be considered a 'retroactive' application not intended by the Congress."⁹⁸

Respondent Hill's answer to this initial argument closely paralleled the conclusions reached by the Sixth Circuit. That is, ESA was intended by Congress to be applicable to *all* federal projects, including those commenced prior to the passage of the statute in 1973. When Congress believes it necessary to exempt on-going projects from its legislation, it inserts a grandfather clause providing that the statute shall not affect particular projects commenced before a certain date;⁹⁹ section 7 contains no such clause and, in light of the legislative history and subsequent congressional action, it is clear that one was not implied.¹⁰⁰ Given Congress' priority in preventing the extinction of protected species, it is highly doubtful that Congress intended an "unexpressed exemption" for on-going projects. Thus, the TVA's reliance on NEPA jurisprudence is irrelevant to an ESA case because ESA incorporates a different standard.

The respondents also argued before the Supreme Court that evidence shows that even under a balancing analysis, the TVA's position is untenable. The TVA spent nearly twice as much in the four years after discovery of the endangered species and passage of the Act as it had in the preceding seven years.¹⁰¹ In addition, excavation

⁹⁶ Brief for the Petitioner at 19, *TVA v. Hill*, 46 U.S.L.W. 4673 (1978).

⁹⁷ *Id.* at 19-20.

⁹⁸ *Arlington Coalition on Transportation v. Volpe*, 458 F.2d 1323, 1331 (4th Cir. 1972), *cert. denied, sub. nom. Fugate v. Arlington Coalition on Transportation*, 409 U.S. 1000 (1972).

⁹⁹ Brief for the Respondents at 35, *TVA v. Hill*, 46 U.S.L.W. 4673 (1978). *Cf.* Department of Transportation Act of 1966, *as amended*, 82 Stat. 824, 49 U.S.C. § 1653(f)(1970).

¹⁰⁰ Brief for the Respondents at 23, 35, *TVA v. Hill*, 46 U.S.L.W. 4673 (1978).

¹⁰¹ *Id.* at 13.

and construction of the interreservoir canal, tree cutting, and ground scraping in the reservoir area remain to be completed, not just the closure of the spillway gates.¹⁰² Finally, a 1977 study prepared by the Comptroller General concludes that the Tellico impoundment project's claimed benefits are unreliable, and that "the public value of a river-based development project (capitalizing upon the valley's agricultural, recreational, industrial and tourism potential) may be several times greater than the . . . benefits claimed for the impoundment."¹⁰³ Thus, acceptance of the TVA's argument would encourage agencies to resist compliance with the statute by spending additional funds towards completion, and subsequently arguing that it is economically unreasonable to halt the project.

Secondly, the TVA maintained that the legislative history of subsequent statutes appropriating funds for Tellico's completion for three successive years, with full knowledge of its potential effects on the snail darter, manifests a congressional intent not to halt completion of Tellico in its advanced stage,¹⁰⁴ regardless of ESA's mandate. That is, since the appropriations for Tellico's completion are inconsistent with the provisions of ESA, the doctrine of repeal by implication should apply.¹⁰⁵

Respondent Hill countered that, in light of House Rule XXI and Senate Rule XVI,¹⁰⁶ the differing nature of appropriations acts and substantive laws, and the separation of powers between court and Congress, the judiciary has declined to permit appropriations acts to alter existing law.¹⁰⁷ Such acts have been allowed to repeal a substantive act of Congress only when (1) the text of the appropriations act itself includes language showing a congressional intent to amend the substantive statute; (2) the legislative history is clear and unambiguous in expressing the intent to amend the existing law; and (3) the two congressional acts are mutually irreconcilable.¹⁰⁸ The 1977 appropriations act for Tellico's completion provided \$2 million for the promotion of the purposes of ESA; hence, the

¹⁰² *Id.* at 38.

¹⁰³ *Id.* at 43. See Comptroller General of the United States, General Accounting Office Report No. EMD-77-58, at 21-27 (October 14, 1977).

¹⁰⁴ Brief for the Petitioner at 21, *TVA v. Hill*, 46 U.S.L.W. 4673 (1978).

¹⁰⁵ See *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974).

¹⁰⁶ Rule XVI (4), Standing Rules of the Senate, is to similar effect as House Rule XXI. See text at note 80, *supra*. The Senate Rule was not mentioned in the circuit court opinion.

¹⁰⁷ Brief for the Respondents at 48, *TVA v. Hill*, 46 U.S.L.W. 4673 (1978). See *Environmental Defense Fund v. Froehlke*, 473 F.2d 346, 355 (8th Cir. 1972); *Environmental Defense Fund v. TVA*, 468 F.2d 1164, 1182 (6th Cir. 1972).

¹⁰⁸ Brief for the Respondents at 25, *TVA v. Hill*, 46 U.S.L.W. 4673 (1978).

Tellico appropriations act is not irreconcilable with ESA and should not be construed as a desire to emasculate its provisions or purposes. The appropriations act is not entirely inconsistent with section 7 because, as the Sixth Circuit wrote, "Congress must be free to appropriate funds for public works projects with the expectation that resulting executive action will pass judicial muster."¹⁰⁹ Respondents concluded that the appropriate course of action for the TVA is to seek an exemption for Tellico from the congressional committees with substantive jurisdiction over ESA¹¹⁰ rather than to seek a court decision which would fashion an implied amendment from the appropriations committees which have no such congressional jurisdiction in the area.

In assessing the TVA's arguments before the Supreme Court, it appears that a balancing test, while appropriate for NEPA analyses, is unwarranted in ESA controversies. The most significant reason for this disparity of statutory standards is that environmental concerns improperly subordinated under NEPA may be judicially remediable; however, once a protected species is interfered with, the situation is irreversible, for extinction is absolute.¹¹¹ The Court, therefore, must remain cognizant of the fact that this case presents policy issues far broader than whether a 3-inch fish should prevail over a 70-foot dam; from a purely economic standpoint, the benefits of conserving endangered species can never compare to those benefits derived from public works projects. Moreover, the precarious nature of the existence of all endangered or threatened species warrants their protection against interference from federal agency projects at *any* point during the construction phase if the congressional commitment in section 7 is to have any merit.

Congress has weighed the inherent scientific and aesthetic values to be derived from the preservation of endangered species against the benefits of public works projects and has enacted a substantive statute designed to promote a major federal commitment to the former. The Court, therefore, must not disregard the fundamental tenet of separation of powers and must permit Congress to be the sole legislative body. Congress and the Secretary of the Interior have the authority to exempt a project from statutory compliance, and the courts, in recognizing the expertise of these parties, must avoid

¹⁰⁹ 549 F.2d at 1073.

¹¹⁰ Brief for the Respondents at 58-59, *TVA v. Hill*, 46 U.S.L.W. 4673 (1978). See H.R. 4167, H.R. 4557, H.R. 5079, H.R. 7392, 95th Cong., 1st Sess. (1977).

¹¹¹ See text at note 76, *supra*.

usurping or pre-empting the authority of the executive and legislative branches. The judiciary must avoid becoming the grantor of statutory exemptions on a case-by-case basis.

C. The Hill Decision and its Ramifications

The ruling by the Supreme Court affirming the Sixth Circuit's decision in *Hill* signified a cogent ratification of the legislative intent in ESA to guarantee unequivocally the continued viability of endangered and threatened species against interference from any federal public works project, regardless of the extent of completion. The balancing test of economic and other considerations should now be strictly limited to NEPA cases. The effect of the Court's affirmation should be to compel the TVA in *Hill* and the Corps of Engineers in the Dickey-Lincoln case to undertake a more comprehensive examination of project alternatives in the preparation of their Environmental Impact Statements, so as to recognize and avoid any negative impact on protected species and their habitat. The indirect result of this ruling should also be to strengthen the consultation requirement of section 7 by placing greater emphasis on the Secretary of the Interior's determination of a negative impact and proposed project modifications.

Nevertheless, even strengthening the statute in its present form would not remove entirely the controversy surrounding the consultation requirement. Ultimate responsibility of decision on whether a given project should proceed to construction will still rest 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. The effect of this statutory system is that the Secretary or some concerned environmental organization must seek injunctive relief in the courts to prevent irreversible damage to protected species, an action which necessitates considerable time and money and conceivably could be "too little too late." This procedure is inconsistent with the policy and purpose of the statute and represents the most significant obstacle to absolute preservation of endangered species. The situation is easily rectifiable by amending section 7 to compel the sponsoring federal agency not only to consult with the Secretary of the Interior, but also to acquiesce in whatever is ultimately decided by the Secretary, even if it means scrapping the project. Of course, federal agencies would still be provided with the alternative of seeking a congressional exemption of the project from

compliance with ESA. For example, H.R. 4167¹¹² and H.R. 4557,¹¹³ currently pending in Congress, would specifically exempt Tellico. However, the number of the agency/species conflicts requiring judicial intervention would be substantially reduced. If the congressional commitment to the preservation of the species is to have any significance, such a statutory amendment is essential.

Environmental proponents must recognize the significant lobbying power of federal agencies. The affirmation of *Hill* by the Supreme Court might serve as sufficient impetus for those agencies collectively to lobby for the repeal of ESA. H.R. 7392¹¹⁴ provides for an amendment to section 7 exempting all public works projects commenced prior to the date on which notice of the intent to include the relevant species in the list of endangered species was published in the Federal Register. Although this bill has yet to receive committee consideration, it is not inconceivable that the Court decision in *Hill* in favor of the respondents may result in the intensification of the agencies' lobbying activities for H.R. 7392, or for modification of ESA to allow the application of the NEPA balancing test approach, or even for repeal of the entire statute. Therefore, while the Court's decision initially amounts to a victory in the environmentalists' battle to protect endangered species, the federal agencies may ultimately win the war if their lobbying abilities prove successful.

On the other hand, if the Supreme Court had reversed the Sixth Circuit different ramifications would have occurred depending upon what rationale was employed by the Court. If the Court had determined that the appropriations acts constitute an exemption for Tellico, then the snail darter would have been extirpated; however, ESA would have retained its statutory effect for such future projects as Dickey-Lincoln, in which the repeal by implication question is not at issue. Significantly, the Sixth and Eighth Circuits' dispute over the propriety of the balancing test would have remained unresolved by this decision. If, instead, the Court had incorporated a NEPA balancing test then the endangered species and the statute itself would have received their death knell. Under such a balancing test, a 3-inch fish could never compete with a \$90

¹¹² H.R. 4167, 95th Cong., 1st Sess. (1977).

¹¹³ H.R. 4557, 95th Cong., 1st Sess. (1977).

¹¹⁴ H.R. 7392, 95th Cong., 1st Sess. (1977). This bill is sponsored by Representative Beard of Tennessee and has been referred to the Committee on Merchant Marine and Fisheries with subject matter jurisdiction over ESA.

million dam project, an "unattractive and useless" Furbish louse-wart plant could not hope to survive against a \$600 million project. Indeed, no protected species could ever expect to prevail against such national concerns as greater energy production or an improved national economy. In short, a Supreme Court decision adopting the NEPA approach in ESA cases would have resulted in the elimination of virtually every endangered or threatened species which comes into conflict with a federal public works project.

VI. CONCLUSION

The Endangered Species Act of 1973 represents a congressional commitment to the preservation and recovery of endangered and threatened species. The statute 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. Prior to the Supreme Court's decision in *Hill*, however, the courts had been unable to reach any consensus as to whether the statute creates an absolute proscription against interfering with protected species, or whether the preservation of such species is but one equitable consideration to be balanced against other national concerns. The absolute proscription requirement, proffered by the Sixth Circuit in *Hill*, and affirmed by the Supreme Court, is warranted in ESA controversies where interference with the species invariably results in their absolute elimination. The Supreme Court's decision in *Hill* has served for the time being to preserve the congressional policy of preservation and conservation. However, while efforts to repeal and weaken ESA go unanswered the Endangered Species Act of 1973 will, itself, be endangered.