Endangered Species Act: Constitutional Tensions and Regulatory Discord

The broadest in scope of recent federal wildlife legislation,[1] the Endangered Species Act[2] prohibits the taking or transport of, or trade

1. In the past, the federal government's efforts to preserve the nation's resources of fauna and flora centered on the establishment of lands and refuges, Land and Water Conservation Fund Act of 1965, 16 U.S.C. §§ 460*l*-4 to *l*-6 (1970); *id.* §§ 471-538 (establishment and administration of national forests); regulation of migratory birds pursuant to the Migratory Bird Treaty Act, *id.* §§ 703-11; and enforcement of the Lacy and Black Bass Acts, which prohibit the transport in interstate commerce of any fish or wildlife taken in violation of national, state, or foreign laws. 31 Stat. 187 (1900) (partially codified at 16 U.S.C. §§ 667e & 701 (1970)); 16 U.S.C. §§ 851 *et seq.* (1970). Since 1971, however, Congress has, far more aggressively, enacted legislation protecting species of federal interest wherever they are found, and regardless of whether their movement crosses state or national lines; Endangered Species Act of 1973, *id.* §§ 1531-43; Marine Mammal Protection Act of 1972, *id.* §§ 1361-84; Wild Horses and Burros Act of 1971, *id.* §§ 1331-40. These statutes are respectively grounded on the Treaty, Commerce, and Property clauses of the Constitution. *See generally*, M. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW (1977); Note, *Federal Protection of Endangered Wildlife*, 22 STAN. L. REV. 1289 (1970).

2. 16 U.S.C. §§ 1531-43 (1970) [hereinafter referred to as the ESA]. This act superseded the Endangered Species Acts of 1966 and 1969, which provided only for positive conservation programs and the control of import trade in endangered animal species. Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275 (1970) (previously codified at 16 U.S.C. §§ 668aa to cc-6 (1970) (repealed 1973)); Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, 80 Stat. 926 (1967). The following legislative history of the ESA is frequently cited herein: SENATE COMM. ON COMMERCE, REPORT ON THE ENDANGERED SPECIES ACT OF 1973, S. REP. NO. 307, 93d Cong., 1st Sess. (1973) [hereinafter cited as SENATE REPORT]; HOUSE COMM. ON MERCHANT MARINE AND FISHERIES, REPORT ON THE ENDANGERED AND THREATENED SPECIES CONSERVATION ACT OF 1973, H.R. REP. NO. 412, 93d Cong., 1st Sess. (1973) [hereinafter cited as HOUSE REPORT]; COMMITTEE OF CONFERENCE, REPORT ON THE ENDANGERED SPECIES ACT OF 1973, H.R. REP. NO. 740, 93d Cong., 1st Sess. (1973) [hereinafter cited as CONFERENCE REPORT]; *Hearings on the Endangered Species Act of 1973 Before the Subcomm. on Environment of the Senate Comm. on Commerce*, 93d Cong., 1st Sess. (1973) [hereinafter cited as *Senate Hearings*]; *Hearings on Endangered Species 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*].

in, any species of plant or animal[3] determined to be endangered or threatened.[4] Its mandate restricts the operation of both state and federal agencies, creating a tension when it limits their control over any activities which affect protected species. The Act affects the states when it divests them of jurisdiction over federally protected species, which is not returned until the state enacts and enforces legislation which comports with federal conservation requirements.[5] As this intrusion conflicts with traditional state control over wildlife, the constitutional question arises whether the federal government may act in such a fashion toward an aspect of traditional state sovereignty. In *National League of Cities v. Usery*,[6] the Supreme Court recently held unconstitutional the application of the Fair Labor Standards Act when it intruded too severely into state government functioning; other cases have similarly held unconstitutional provisions of the Clean Air Act which coerced state lawmaking and enforcement.[7] This Note will discuss whether the rationale of these cases should apply to the Endangered Species Act (ESA), and with what result.

Another conflict involving the allocation of regulatory authority arises in section 7 of the Act, which requires federal agencies to

3. The ESA protects every "member of the animal kingdom . . . without limitation," as well as "any member of the plant kingdom." 16 U.S.C. § 1532(4), (5), (9), (11), (15) (1973), and the definition of "species" includes any subspecies. *Id.* § 1532(11). Thus far, protected species include mammals, fish, birds, reptiles, butterflies, amphibians, mollusks and plants (all four endangered plants located at San Clemente, Calif.). 50 C.F.R. § 17.11(i) (1976); 42 Fed. Reg. 40682, 42352 (1977); 41 *id.* 22041, 53033 (1976). Theoretically, the ESA could apply to microscopic species of plants and animals.

4. Endangered species are those which are "in danger of extinction throughout all or a significant portion of its range"; threatened species are those "likely to become an endangered species within the foreseeable future." 16 U.S.C. §§ 1532(4), (15) (Supp. V 1975) [hereinafter "protected species"]. Procedural requirements in the listing process involve published notice in the *Federal Register*, consultation with the affected states wherever a resident species is proposed to be listed, and maintenance of a list of officially protected species. *Id.* §§ 1533(b), (c).

5. *See* text accompanying notes 12-119 *infra*.

6. 426 U.S. 833 (1976).

7. Maryland v. EPA, 530 F. 2d 215 (4th Cir. 1975), *vacated as moot*, 431 U.S. 99 (1977); District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975), *vacated as moot*, 431 U.S. 99 (1977); Brown v. EPA, 521 F.2d 827 (9th Cir. 1975), *vacated as moot*, 431 U.S. 99 (1977). *See* text accompanying notes 12-119, *infra*. *Contra*, Pennsylvania v. EPA, 500 F.2d 246 (3d Cir. 1974). *See generally*, Note, *Coercive Enforcement of the Clean Air Act: A Clash of Federalist Principles*, 3 COLUM. J. ENVT'L L. 153 (1976); Note, *The Clean Air Act Amendments of 1970: A Threat to Federalism?*, 76 COLUM. L. REV. 990 (1976).

insure the survival of all protected species of plants and animals.[8] Although federal agencies retain power to judge the legality of their own conduct, the ESA effectively compels them to modify their projects and activities so as to insure the survival of any protected species which may be affected. A situation of irreconcilable conflict may occur, as dramatized in the recent decision, *Hill v. Tennessee Valley Authority*,[9] where a court halted construction of a $110 million dam that was eighty percent complete, in order to save a recently discovered species of small fish.[10] This decision prompted the introduction of several bills to amend this section,[11] which will be examined along with the present provision.

I. Constitutional Issues

The doctrine of intergovernmental immunities creates a constitutional problem concerning the division of federal and state authority over protected species. The statutory scheme which divides jurisdiction between the two governments originates with the prohibitions of the Act. The Act disallows "any person," which includes state and federal authorities,[12] from:

A. "taking" any protected animal species;
B. possessing or transporting, by any means whatsoever, illegally taken species;
C. carrying on interstate or foreign commerce in any protected species, including plants.[13]

The only exceptions to these prohibitions are for economic hard-

8. ESA § 7, 16 U.S.C. § 1536 (Supp. V 1975) (for text of section, *see* text accompanying note 122, *infra*). *See also* text accompanying notes 120-97 *infra*.

9. 549 F.2d 1064 (6th Cir.), *cert. granted*, 54 L. Ed. 2d 312 (1977).

10. The dam was TVA's Tellico Dam and the fish was the snail darter, a three-inch long member of the perch family, listed as endangered at 50 C.F.R. § 17.11(i) (1976).

11. Seven bills were introduced in the first nine months of 1977; *see* note 149 *infra*.

12. "The term 'person' means an individual, corporation, . . . or any other private entity, or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government." 16 U.S.C. § 1532(8) (Supp. V 1975).

13. ESA § 9(a), 16 U.S.C. § 1538(a) (Supp. V 1975). Similar prohibitions apply to endangered plant species, except the ESA does not prohibit the "taking" of protected plants. *Id.* § 1538(a)(2). The same provisions apply to threatened species of plants and animals, as the Secretary, in his discretion, has applied all the above prohibitions to threatened species unless a special rule applies. 50 C.F.R. § 17.31 (1975).

ship suffered by a business,[14] subsistence hunting by Alaskan Indians,[15] and "for scientific purposes or to enhance the propagation or survival of the affected species."[16] Discretion to grant these permits is vested in the Secretary of the Interior (hereinafter "Secretary"), who has primary responsibility for enforcing the Act.[17]

State activities are impinged primarily by the taking prohibition. The term "take" is broadly defined to include "harrass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect,"[18] thereby prohibiting virtually all acts affecting a species except the destruction of its habitat.[19] As such, the prohibition effectively eliminates

14. Such exceptions may only be made for a period of one year after notice is given that a species may be listed as endangered or threatened. 16 U.S.C. § 1539(b) (Supp. V 1975).

15. *Id.* § 1539(e).

16. 16 U.S.C. § 1539(a) (Supp. V 1975); 50 C.F.R. § 17.21(c)(3) & (5) (1976). The same exceptions apply to the prohibitions concerning threatened species, except that the Secretary has discretion to promulgate special rules. 16 U.S.C. § 1533(d) (Supp. V 1975); 50 C.F.R. § 17.31 (1975).

17. As used in the ESA, the term "Secretary" means the Secretary of the Interior, except as Reorg. Plan No. 4 of 1970, 3 C.F.R. 1075 (1966-1970 compilation), *reprinted in* 5 U.S.C. app., at 832 (1976), vests jurisdiction over marine species in the Secretary of Commerce, and certain minor duties concerning plants are delegated to the Secretary of Agriculture. 16 U.S.C. § 1532(10) (Supp. V 1975).

18. 16 U.S.C. § 1532(14) (Supp. V 1975).

19. The term "take" should not be construed to universally prohibit the destruction of a species' habitat. A prior version of the bill that became the ESA did specifically include "destruction, modification, or curtailment of habitat or range" within the definition of "take", but this was deleted in the final act. S. 1983, 93d Cong., 1st Sess. § 3(6)(A) (1973) (reproduced in *Senate Hearings*, *supra* note 2, at 27). Another indication of congressional intent is that the ESA provides broad federal authority to purchase land or an interest therein for the conservation of protected species. 16 U.S.C. § 1534 (Supp. V 1975). This authority, coupled with the ommission in the taking prohibition, may indicate that direct purchase is the intended response to private acts degrading a species' habitat. *Id.* Further, a prohibition against the destruction of habitat would engender due process problems of unconstitutional takings and of the adequacy of the hearings provided for in the ESA, as a restriction upon the use of land is a more tangible deprivation of property than a prohibition against harrassment of wildlife which may occur on private land. U.S. Const. Amend. V. *Cf.* Hamilton v. Kentucky Distilleries Co., 251 U.S. 146, 156 (1919) (equating the limitations imposed by the fifth amendment with those of the fourteenth). However, as the line between the prohibited harrassment of a species and the degradation of its habitat is hazy, certain destructive acts might be prohibited under the present Act if the Secretary acts within the boundaries of due process.

If enacted, a prohibition of habitat destruction would not result in an unconstitutional 'taking' of property. Past Supreme Court decisions indicate that even a gross diminution in the value of the property, if it is not total, will be insufficient in itself to require compensation. *E.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365,

a state's ability to control or manage the species without a federal permit.[20] Only by participating in the Act's Cooperative Agreement program may a state regain the ability to make independent decisions to take protected species.[21]

384 (1926) (75% loss; no compensation); Hadacheck v. Sebastian, 239 U.S. 394, 405 (1915) (87½% loss; no compensation). *See* Armstrong v. United States, 364 U.S. 40, 48 (1960) ("The total destruction by the Government of all value of these liens, . . . [is] a Fifth amendment 'taking' and is not a mere 'consequential incidence' of a valid regulatory measure."). *But cf.* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) ("if regulation goes too far it will be recognized as a taking"; held where "statute is admitted to destroy previously existing rights of property and contract", compensation was required). Even the complete destruction of a present use, if alternative uses are available, has been held inconsequential if the regulation is otherwise valid. *See, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); United States v. Central Eureka Mining Co., 357 U.S. 155 (1958). The inquiry into the type of regulatory activity involved, whether it merely regulates uses of property or appropriates something more like a fee interest in the property itself, appears more pertinent. The Court in *Goldblatt* quoted traditional doctrine to hold: "A prohibition simply upon the use of property for purposes that are declared by valid legislation, to be injurious, . . . cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." 369 U.S. at 593 (quoting Mugler v. Kansas, 123 U.S. 623, 668-69 (1887)). As a prohibition upon the destruction of habitat would be essentially a regulatory measure, it could not be a taking under the authoritative *Goldblatt* rationale.

More substantial problems would be encountered in the due process requirement of adequate notice and opportunity to be heard. This requirement extends to all "significant property interests", Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972), and typically requires "the best notice practicable under the circumstances," Mullane v. Central Hanover Bank & Trust, 339 U.S. 306 (1950). The ESA affords 60-day advance publication of all proposed regulations in the *Federal Register*, and public hearings for all adversely affected individuals. 16 U.S.C. § 1533(f)(2)(A)(i) (Supp. V 1975). Were individuals prohibited from destroying habitat, it is arguable that individual property owners within proposed critical habitat areas should receive individual notice. An analogy may be made to the National Historic Places Program, 16 U.S.C. §§ 470-470n (1970), which requires individual notice to property owners, as well as publication in the *Federal Register*, whenever a property is nominated as an Historic Place worthy of preservation, 36 C.F.R. §§ 60.12(c), 60.13(a) & 60.13(b) (1970).

20. Federal authorities are also subject to the taking ban, *see* text accompanying note 12 *supra*, but may be granted permits by the Secretary for conservation purposes. 16 U.S.C. § 1539(a) (Supp. V 1975). Additionally, federal agencies acting pursuant to section 7, which allows federal actions to go forward so long as they do not jeopardize the continued existence of a protected species or its habitat, appear exempt from the general prohibitions of the Act. *See* note 131 *infra*.

21. The states were granted a 15-month grace period after the effective date of the ESA before the Act's prohibitions would apply to them. 16 U.S.C. § 1535(g) (Supp. V 1975). Although the states were expected to adopt programs qualifying them for Cooperative Agreements during this time period, none did. *See* CONFERENCE REPORT, *supra* note 2, at 26.

A. *Requirement of a Cooperative Agreement*

When signed, a Cooperative Agreement between the federal and state authorities controls the division of their authority over protected species. The Act provides that the Secretary shall sign and annually reconfirm a Cooperative Agreement with any state whose conservation laws and program qualify as "adequate and active" under criteria specified in the Act.[22] These criteria require that the state wildlife agency be legally authorized to conserve protected animal species[23] and to conduct investigations of any resident animal species, and that it establish active conservation programs for all federally protected animal species.[24] Compliance with these

22. Once a state has enacted and implemented such legislation, its right to regain jurisdiction over its native endangered and threatened species is absolute, subject only to annual reconfirmation of its program by the Secretary. The Secretary is compelled to approve a State's Cooperative Agreement if it qualifies under the ESA's criteria. 16 U.S.C. § 1535(c) (Supp. V 1975). It would therefore also appear that a State could not lose its Cooperative Agreement if State authorities violate specific prohibitions of the ESA; the only recourse in such cases would be individual prosecution. *Id.* § 1538(a).

A bill has been introduced which would dilute the requirements of the Cooperative Agreement program by allowing a state to qualify for an Agreement without fulfilling all of the criteria mentioned above. H.R. 6405, 95th Cong., 1st Sess. (1977). Less conservation authority would be demanded of the state wildlife agency, and the agency would only need to give attention to those species "which the Secretary and the State agency agree are most urgently in need of conservation programs." *Id.* The passage of this bill would not affect the argument of this paper, as the form and effect of the Cooperative Agreement program would remain similar. As the bill would lessen the requirements of the Cooperative Agreement program, its enactment would only reinforce the arguments in favor of the program's constitutionality.

23. This particular criterion requires that the state agency be authorized to conserve all species protected either by the federal government or independently by the state government.

24. The listing of four plants as endangered species, 41 Fed. Reg. 40682 (all at San Clemente, Calif.), and the proposed listing of 1700 plants, 41 Fed. Reg. 24523-72 (1976), poses the difficult question of whether the Cooperative Agreement program and its federal funding provisions are meant to apply to plants. Although its general provisions refer to "the conservation of endangered species", thereby including endangered plants, the five criteria which establish the prerequisites for a state to enter into a Cooperative Agreement only apply to fish and wildlife. They either refer to "fish and wildlife" or concern the state agency "responsible for . . . fish and wildlife resources." 16 U.S.C. §§ 1532(13), 1535(a)-(d) (Supp. V 1975).

As the present Cooperative Agreement provisions are substantially indentical to those in the prior bills in the House and Senate, at which time "endangered species" only referred to "fish and wildlife" species, it would seem that the Conference Committee completely overlooked this issue in adapting the bill to include plants. *See* H.R. 37, 93d Cong., 1st Sess. §§ 3(3), 6 (1973) (reprinted in *House Hearings, supra* note 2, at 87); S. 1983, 93d Cong., 1st Sess. §§ 3(3), 6 (1973) (reprinted in *Senate Hearings, supra* note 2, at 24).

criteria places two burdens upon the states. First, as most states' wildlife laws have heretofore extended only to fish and game, these criteria have required virtually all states to enact substantial new legislation or regulations in order to qualify.[25] Second, once they have qualified, the requirement of an active conservation program for each species normally requires both state enforcement of the Act's prohibitions as well as the funding of recovery programs. However, federal funding is provided for such programs in amounts up to seventy-five percent.[26]

Once a Cooperative Agreement is established, a state regains the ability to make independent decisions about the taking and management of federally protected species.[27] A state's jurisdiction is

The Secretary has followed the specific wording of the five criteria to take the position that no state authorities or programs concerning plants are necessary in order for that state to qualify for a Cooperative Agreement. *See* the Model Cooperative Agreement where all references are to protected species of fish and wildlife. This position comports with the moving purposes of the Cooperative Agreement program, which is to restore to a state concurrent jurisdiction over the taking of listed species, as the taking of plants is unrestricted.

25. Of the 21 Cooperative Agreements signed to date, only one, California, did not need to adopt new laws or regulations. It enacted endangered species legislation in 1970. Cal. Fish & Game Code §§ 900 *et seq.* & 2050 *et seq.* (West Supp. 1977) (enacted 1970). Information provided by the Office of Endangered Species, Dept. of Interior, Washington, D.C.

26. The federal share of state conservation programs is not to exceed 66⅔% of the cost for an individual state's program, or 75% for joint programs entered into by two or more states. 16 U.S.C. § 1535(d)(2). The state's share may be in the form of money or real property. *Id.* The congressional conferees stated that "it seems only fair that [the federal government] should also bear a significant portion of [program] costs. The conferees wish to make it clear that the grant authority must be exercised if the high purposes of this legislation are to be met." CONFERENCE REPORT, *supra* note 2, at 26.

27. 50 C.F.R. § 17.21(c)(3) (1976) allows "any employee or agent of . . . a State conservation agency" to officially aid sick specimens, dispose of dead ones, and remove those threatening human safety. However, authority to take listed species for conservation programs in general is not conferred upon a State until that State signs a Cooperative Agreement:

> [A]ny qualified employee or agent of a State Conservation Agency which is a party to a Cooperative Agreement with the Service in accordance with section 6(c) of the Act, who is designated by his agency for such purposes, may, when acting in the course of his official duties take Endangered Species, for conservation programs in accordance with the Cooperative Agreement, provided that such taking is not reasonably anticipated to result in: (i) the death or permanent disabling of the specimen; (ii) the removal of the specimen from the State where the taking occurred; (iii) the introduction of the specimen so taken, or of any progeny derived from such a specimen, into an area beyond the historical range of the species; or (iv) the holding of the specimen in captivity for a period of more than 45 consecutive days.

50 C.F.R. § 17.21(c)(5) (1976). *Accord, id.* § 17.31(b) (threatened species).

not exclusive, however, as federal law continues to set the minimum standard: "[a]ny State law or regulation respecting the taking of [protected species] may be more restrictive than the exemptions or permits provided for in this Act or in any regulation which implements this Act but not less restrictive than the prohibitions so defined."[28] The present federal regulations provide that state authorities may not exercise their taking authority under a Cooperative Agreement except "for conservation programs in accordance with the Cooperative Agreement," and subject to certain safeguards.[29] This regulation roughly accords with the restriction upon federal authorities, as the Secretary may only allow takings "for scien-

28. 16 U.S.C. § 1535(f) (Supp. V 1975). The subsection further provides that state law which applies to interstate or foreign commerce in protected species is void if it is less or more restrictive than federal law. *Id.* This subsection therefore establishes ultimate federal control over protected species even in states which have signed Cooperative Agreements. In so doing, it significantly dilutes the language in the subsection which follows it:

> The prohibitions set forth in or authorized pursuant to . . . this Act shall not apply with respect to the taking of any resident endangered species or threatened species (other than species . . . specifically covered by any other treaty or Federal law) within any State—
>
> (A) which is then a party to a Cooperative Agreement with the Secretary pursuant to . . . this Act (except to the extent that the taking of any such species is contrary to the law of such State);

Id. § 1535(g)(2).

Although this statement appears to give a state exclusive jurisdiction, it must be read with the immediately preceding subsection (f), quoted in the text, which provides that no state law may be less restrictive than federal law. The legislative intent on this point is especially clear, as subsection (f) was adopted verbatim from language recommended by the Department of the Interior. In its explanatory letter, that Department stated: "This suggested language . . . permits the States, subject to very narrow limitations, to regulate . . . federally listed species, *in company with the federal government.*" *House Hearings*, *supra* note 2, at 387-388 (1973) (Communication of the Department of the Interior) (emphasis added).

The CONFERENCE REPORT, *supra* note 2, also indicates that concurrent jurisdiction was intended. It states at 26: "Following the establishment period (120 days), the law will apply as it would have under the House bill." The HOUSE REPORT, *supra* note 2, states in turn: "Regulatory jurisdiction is given to the Federal government under this legislation, and if a cooperative agreement is successfully negotiated and signed, to the states *as well.*" *Id.* at 7 (emphasis added). The rejected Senate bill, on the other hand, provided that "the State may have *sole* responsibility for the protection of endangered and threatened species of fish and wildlife if it establishes a plan for [them] in accordance with this Act." SENATE REPORT, *supra* note 2, at 5. *See generally*, Note, *The Endangered Species Act of 1973: Preservation or Pandemonium?*, 5 ENVT'L L. 29 (1974).

29. 50 C.F.R. §§ 17.21(c)(5), .31(b) (1976) (reprinted in note 26 *supra*). Other exceptions, such as for educational purposes, are provided for threatened species. *Id.* § 17.32-.48.

tific purposes or to enhance the propagation or survival of the affected species."[30]

Thus, a Cooperative Agreement allows a state to regain control over protected species, but subject to restrictions imposed by federal law. Practically, however, a state may exercise considerable freedom in managing protected species, as at the time of the Act's passage in 1973 there were 6000 state wildlife enforcement agents compared to only 158 federal ones.[31] This disparity underscores the practical importance of the Cooperative Agreement program, as the Act could not be enforced without state cooperation. Further, it raises the question whether the Cooperative Agreement program was not designed and intended to insure state participation and assumption of the lion's share of enforcement.[32] This position raises constitutional problems, as recent cases have held unconstitutional undue federal interference in traditional state functions.

B. *National League of Cities and the State Immunity Doctrine*

The Supreme Court has recently articulated limits to federal power when it regulates the conduct of the states. In *National League of Cities v. Usery*,[33] decided in 1976, the Court held that the federal commerce power could not be used to regulate state conduct in the same plenary fashion with which it exerts control over private conduct.[34] The opinion was based, not on a reading of the tenth amendment,[35] but on the implicit federalist system in the very structure of the Constitution which requires the existence of independent states.[36] Until *National League of Cities*, Supreme

30. 16 U.S.C. § 1539(a) (Supp. V 1975); 50 C.F.R. §§ 17.22, .31(b) (1976). More exceptions are allowed for the taking of threatened species, making possible takings for educational purposes or for zoological exhibition. *Id.* §§ 17.32-.48.

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

32. *See* note 101 *infra*.

33. 426 U.S. 833 (1976). Five justices joined in the majority opinion. One, Justice Blackmun, also filed a concurring opinion stating that his understanding of the majority opinion was that it adopted a balancing test. *Id.* at 856; *see* text accompanying notes 45-52 *infra*. Four justices dissented. 426 U.S. at 856.

34. 426 U.S. at 842.

35. U.S. Const. amend. X: "The powers not delegated to the United States by The Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

36. 426 U.S. at 842-45.

> We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because

Court decisions since the New Deal have uniformly upheld congressional attempts to regulate state conduct under the commerce clause,[37] and generally blurred distinctions between federal regulation of state and of private conduct.[38]

National League of Cities concerned a challenge to the 1974 amendments to the Fair Labor Standards Act.[39] These extended maximum hour and minimum wage requirements to virtually all state employees, leaving exemptions only for administrative, executive and professional personnel, and political staffs.[40] The Court found this legislation unconstitutional because of its significant impact on state government functions. Broadly, the Court determined that the federal act displaced state choices in areas of "essential government decisions" and interfered with "functions essential to separate and independent existence" of the states.[41] The act undercut a state's power to determine wages and employment practices, forcing the relinquishment or restructuring of important government activities, as well as preempting policy choices of state officials, which was especially disturbing in areas of traditional state con-

> Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.

Id. at 845. This holding is consistent with previous Supreme Court cases which have held that federal powers were not independently limited by the tenth amendment. Parden v. Terminal Ry., 377 U.S. 184, 192 (1964); United States v. Darby, 312 U.S. 100, 124 (1941); Missouri v. Holland, 252 U.S. 416, 433-34 (1920).

37. *See, e.g.*, Fry v. United States, 421 U.S. 542 (1975) (federal wage-price freeze of 1970); Maryland v. Wirtz, 392 U.S. 183 (1968) (federal wage and hour regulations; overruled in *National League of Cities*); Parden v. Terminal Ry., 377 U.S. 184 (1964) (state waives its immunity from suit in federal court when it operates a railroad in interstate commerce); United States v. California, 297 U.S. 175 (1936) (federal regulation of state railroad).

38. "The state can no more deny the power [to regulate commerce] if its exercise has been authorized by Congress than can an individual." United States v. California, 297 U.S. 175, 185 (1936).

39. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (amending 297 U.S.C. § 201 *et seq.* (1970)).

40. Beginning in 1961, Congress began to extend the provisions of the Fair Labor Standards Act of 1938 to specific types of public employees. 426 U.S. at 837. These extensions culminated in the 1974 amendments which entirely removed the general exemption for state or local governments, except for state employees not subject to civil service laws or who serve under an elected official. 29 U.S.C. §§ 203(d), (e) (Supp. V 1975). Another section of the act provides exemptions for many specified employee classes, including executives and professionals. *Id.* § 213. Certain special rules allow greater flexibility for fire protection and law enforcement personnel, as these have no counterpart in the private sector. *Id.* § 207(k).

41. 426 U.S. at 845, 850.

trol.[42] Finally, the Court was concerned with the "substantial costs" the legislation would impose on the states.[43]

The Court's opinion in *National League of Cities* is susceptible to two alternative interpretations. Under one reading, the Court held that certain areas of traditional state conduct essential to the state's "separate and independent existence" are immune from federal regulation. This reading gains support from broad statements made by the Court: "Congress may not exercise that [commerce] power so as to force directly upon the states its choice as to how essential decisions regarding the conduct of integral government functions are to be made."[44] On the other hand, the concurring opinion of Justice Blackmun, who cast the fifth and deciding vote,[45] explicitly interprets the Court's opinion "to adopt a balancing approach" which gives weight to both the federal and state interests involved. His interpretation is supported by the majority's treatment of two earlier decisions which upheld federal control over state activities. In one, *Fry v. United States*,[46] the Court sustained the federal wage freeze of 1970.[47] The Court in *National League of Cities* approved that holding, citing the urgent need to fight inflation "which only collective action by the National Government might forestall," and the lesser intrusion posed by that wage freeze. The Court noted that the freeze was temporary, "operated to reduce the pressures upon state budgets rather than increase them," and acted only to freeze state-determined wages instead of requiring their remaking.[48] This balancing approach was also manifest in the

42. *Id.* at 845, 847 & 851. The especially disturbing areas involved "services . . . which the States have traditionally afforded their citizens," including "fire prevention, police protection, sanitation, public health, and *parks and recreation*." 426 U.S. at 851 (emphasis added).

43. *Id.* at 846-47. The State of California estimated that implementation of the Act would cost between $8 million and $16 million. *Id. But cf.* Employees of Dep't of Pub. Health v. Department of Pub. Health, 411 U.S. 279, 284 (1973) ("when Congress does act, it may place new, or even enormous fiscal burdens on the States").

44. 426 U.S. at 855. Other statements reinforce this theory by indicating it is the "manner" of Congress' lawmaking that renders it unconstitutional. *Id.* at 847.

45. *Id.* at 856. *See* note 33 *supra*.

46. 421 U.S. 542 (1975); discussed at 426 U.S. at 852-53.

47. Economic Stabilization Act of 1970, Title II of the Act of Aug. 15, 1970, Pub. L. No. 91-379, 84 Stat. 799 (expired 1974).

48. 426 U.S. at 852-53. The logic in the Court's distinction between the wage freeze and the FLSA amendments is questionable, as there appears little difference in the intrusion created by either. The wage freeze forbids a state to raise its wage rate, while the FLSA amendments require it to raise the same.

Court's approval of *Case v. Bowles*,[49] which sustained the Emergency Price Control Act[50] during World War II: the Court stated, "[n]othing we say in this opinion addresses the scope of Congress' authority under its war power."[51] These indications of a balancing approach considering both federal and state interests were expressly adopted by Justice Blackmun in his concurring opinion. He stated that the Court's opinion "does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater."[52]

Just such an application of the intergovernmental immunity rule to federal environmental legislation has recently occurred. Four circuit courts have considered the regulations restraining state conduct under the Clean Air Act Amendments of 1970,[53] although their decisions predate *National League of Cities*. One found the regulations permissible,[54] while three found them to exceed, to some extent, the constitutional limits to federal regulation of state conduct.[55] On appeal to the Supreme Court, the Government

49. 327 U.S. 92 (1946).

50. Emergency Price Control Act of 1942, Pub. L. No. 421, 56 Stat. 23, as amended, Pub. L. No. 383, 58 Stat. 632 (1944), Pub. L. No. 108, 59 Stat. 306 (1945).

51. 426 U.S. at 854 n.18. Congress' war power, like the commerce power, is granted in U.S. Const. art. 1, § 8. It does not appear distinguishable from the commerce power in applying the state immunity doctrine except on a rationale that the federal interests are greater.

The only other apparent exception to the holding of the case was the Court's statement that "[w]e express no view as to whether different results might obtain if Congress [acts under] . . . the spending power, Art. I § 8, cl. 1, or § 5 of the Fourteenth Amendment." 426 U.S. at 852 n.17. However, other statements by the Court indicated that it would apply its holding to federal powers exercised under clauses other than the ones just mentioned, and indeed the rationale of the opinion indicated that this would be appropriate. *See* note 36 *supra*. The Court stated that it saw no distinction between the federal commerce power and its taxing power, in citing decisions holding the latter subject to intergovernmental immunities:

> The asserted distinction, however, escapes us. Surely the federal power to tax is no less a delegated power than is the commerce power: both find their genesis in Art. I, § 8 . . . . [The intergovernmental] immunity is derived from the sovereignty of the States and the concommitant barriers which such sovereignty presents to otherwise plenary federal authority.

426 U.S. at 843 n. 13. The treaty power is discussed in the text accompanying notes 90-94 *infra*.

52. 426 U.S. at 856 (citing the majority opinion's discussion of *Fry v. United States*; *see* text at notes 46-48 *supra*).

53. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1976, *amending* 42 U.S.C. § 1857 *et seq.* (Supp. V 1975).

54. Pennsylvania v. EPA, 500 F.2d 246 (3d Cir. 1974).

55. Maryland v. EPA, 530 F.2d 215 (4th Cir. 1975), *vacated as moot*, 431 U.S. 99

apparently conceded that many of the regulations were impermissibly broad, thereby rendering the cases moot.[56]

The Clean Air Act Amendments provide that the Environmental Protection Agency (EPA) promulgate national standards for air quality, while giving to the states the responsibility for the development and enforcement of plans to conform with these standards.[57] Each state is required to submit a pollution control plan to the EPA within three years, which must then approve the plan if it conforms to certain statutory criteria;[58] if a state fails to submit a plan, the EPA may submit its own plan.[59] The state is then to provide for "implementation, maintenance, and enforcement" of the plan.[60]

The EPA regulations challenged in the four circuit court cases concerned the transportation control segments of such plans, and were adopted in response to a widespread state failure to formulate such controls.[61] Beginning in 1973, the EPA promulgated regu-

(1977); District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975), *vacated as moot*, 431 U.S. 99 (1977); Brown v. EPA, 521 F.2d 827 (9th Cir. 1975), *vacated as moot*, 431 U.S. 99 (1977). The Supreme Court said of the latter three decisions: "[a]ll of the courts rested on statutory interpetation, but noted also that serious constitutional questions might be raised if the statute were read as the United States argued it should be." EPA v. Brown, 431 U.S. 99 (1977).

56. The Supreme Court has vacated the latter three decisions for reasons of mootness. EPA v. Brown, 431 U.S. 99 (1977). The Court explained:

> [T]he federal parties have not merely renounced an intent to pursue certain specified regulations; they now appear to admit that those remaining in controversy are invalid unless modified in certain respects: . . . [Their] position now appears to be that, while the challenged transportation plans do not require the enactment of state *legislation*, they do now contain, and must be modified to eliminate, certain requirements that the State promulgate *regulations* . . . .
>
> We decline the federal parties' invitation to pass upon the EPA regulations, when the only ones before us are admitted to be in need of certain essential modifications. Such an action on our part would amount to the rendering of an advisory opinion.

Id. at 103-04. Justice Stevens, dissenting, expressed 'puzzlement', saying, "[u]nless and until the Environmental Protection Agency rescinds the regulations in dispute, it is perfectly clear that the litigation is not moot." *Id.* at 104.

57. 42 U.S.C. § 1857c-5(a)(1) (1970).

58. *Id.* § c-5(a)(2). The Endangered Species Act similarly provides for agency certification of state implementation plans if they accord to statutory criteria. 16 U.S.C. § 1535(c). *See* text accompanying notes 22-24 *supra*.

59. 42 U.S.C. § 1857c-5(c)(1) (1970).

60. *Id.* § c-5(a)(1).

61. 38 Fed. Reg. 30626-27 (1973). Not challenged were EPA regulations restricting the pollution from state-owned sources, as here the state is acting similarly to a private person and so subject to plenary federal power under the commerce clause.

lations which specified transportation controls for each state,[62] either pursuant to the state plan if the state had adopted a plan, or formulated by the EPA if the state had not. These regulations controlled the state's operations of its transportation systems and also required the state to inspect and regulate the pollution caused by private motor vehicles.[63] Critically, a state's failure to carry out any of the regulations would not merely allow the EPA to step in and carry them out itself,[64] but place the state in violation of its implementation plan, and subject to direct enforcement actions against it, including civil and criminal penalties.[65]

See, e.g., National League of Cities, 426 U.S. at 854 n.18; District of Columbia v. Train, 521 F.2d 971, 989 (1975), *vacated as moot*, 431 U.S. 99 (1977).

62. The first regulations to be imposed on a non-complying state were promulgated on January 22, 1973, 39 Fed. Reg. 2194 (1973) (subpart of California's implementation plan).

63. The Supreme Court summarized:

> In general, the [transportation control plans] imposed upon the States the obligations (1) to develop an inspection and maintenance program pertaining to the vehicles registered . . . ; (2) to develop various retrofit programs pertaining to several classes of older vehicles . . . ; (3) to designate and enforce preferential bus and carpool lanes . . . ; (4) to develop a program to monitor actual emissions as affected by the foregoing programs; and to adopt certain other programs which varied from State to State.

431 U.S. at 101.

Each of the three circuit courts questioned whether these regulations were beyond the scope of the act, and two based their holdings on such statutory construction grounds, although also considering the constitutional issues. Brown v. EPA, 521 F.2d 827 (9th Cir. 1975); Maryland v. EPA, 530 F.2d 215 (4th Cir. 1975). *See* Note, *The Clean Air Act Amendments of 1970: A Threat to Federalism?*, 76 COLUM. L. REV. 990, 997-98 & n.51, 1009 n.119 (1976); note 12 *supra*.

64. The Clean Air Act § 113(a)(2), 42 U.S.C. § 1857c-8(a)(2) (1970) specifies:

> Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively, . . . the Administrator may enforce any requirement of such plan with respect to any person—
>
> (A) by issuing an order to comply with such requirement, or
>
> (B) by bringing a civil action under subsection (b) of this section.

65. 40 C.F.R. § 52.23 (1976) imposes the general penalities of the Clean Air Act on the states. *See, e.g.*, Clean Air Act § 113(a)(1), 42 U.S.C. § 1857c-8(a)(1) (1970):

> Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, . . . the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b).

Criminal penalties of up to one year imprisonment are imposed on any "person" who knowingly violates a requirement of a pollution control plan enforced by the EPA. *Id.* § c-8(c)(1). The term "person" includes a state or political subdivision thereof. *Id.* § 1857h(e).

Three circuits found these regulations unconstitutional, under varied analyses. In *District of Columbia v. Train*,[66] the District of Columbia Court of Appeals upheld those regulations which required the states to deploy certain mass transit alternatives,[67] while striking down most of those which ordered the states to control private conduct.[68] The court applied two different constitutional theories in vacating most of the latter type of regulations. It first held that those regulations which "merely prescribed a rule by which commerce . . . is to be governed" were within the federal commerce power, while those specifying the "manner in which the state is to comply" were not.[69] Therefore, the EPA regulations which "direct unconsenting states to enact regulations" in administering a regulatory scheme promulgated by the EPA, such as state inspection and retrofitting programs, were impermissible.[70] In its second constitutional holding, the court said "the Tenth Amendment[71] may prevent Congress from selecting methods of regulating which are 'drastic' invasions of state sovereignty where less intrusive approaches are available."[72] Under this test, the regulations requiring state inspection programs and retrofitting of all vehicles not passing federal standards were again found to be unconstitutional.[73] Surviving both tests were regulations which prohibited the

66. 521 F.2d 971 (D.C. Cir. 1975), *vacated as moot*, 431 U.S. 99 (1977).

67. *Id.* at 989: "[W]e believe that these state-owned transportation systems are analogous to the railroad operated by the state in *United States v. California*." United States v. California, 297 U.S. 175 (1936), held the state railroad subject to federal regulation, as its activity was indistinguishable from that of other common carriers; this holding was approved in *National League of Cities*, 426 U.S. at 854 n.18.

68. 521 F.2d at 990-95.

69. *Id.* at 991.

70. 521 F.2d at 992-94. "[E]ach federally-promulgated regulation includes provisions ordering the states to enact statutes and to establish and administer programs to force their citizens to comply with this federal directive." 521 F.2d at 990.

71. The Supreme Court in *National League of Cities* relied on the implicit structure of the Constitution, not the Tenth Amendment, to support the state immunity doctrine. *See* note 36 *supra*.

72. 521 F.2d at 994.

73. *Id.* at 994-95. The inspection and retrofit regulations were found valid only insofar as they prohibited persons from operating, and the states from registering, vehicles not complying with the federal standards. *Id.* at 995. The court affirmed, however, that the inspection and retrofit programs could be implemented as long as the federal government enforced those programs itself instead of compelling state enforcement. *Id.* at 992, 993 & 994 n.27 ("the recourse contemplated by the commerce clause is direct federal regulation of the offending activity"). *Accord*, Maryland v. EPA, 530 F.2d 215, 228 (1975), *vacated as moot*, 431 U.S. 99 (1977).

state from registering vehicles banned in interstate commerce.[74] The Ninth Circuit Court of Appeals in *Brown v. EPA*,[75] made a more rigid distinction between regulation of state economic activity and the regulation of its governmental activity as required by the Clean Air Act. It indicated that forcing a state to regulate private conduct would be unconstitutional, holding unenforceable EPA regulations requiring the state to implement and enforce federally-promulgated pollution control plans.[76] The Fourth Circuit Court of Appeals in *Maryland v. EPA*,[77] reasoned similarly, finding especially troublesome EPA regulations which required the states to enact new legislation in order to comply with the mandatory regulatory scheme. The court cited Supreme Court doctrine:

> By the constitution, a republican form of government is guaranteed to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies . . . .[78]

The analyses of these three circuit courts appear consistent with that of *National League of Cities*, handed down a year later. The circuit courts' decisions reflected the Supreme Court's concern with protecting "integral state functions" by holding that the federal government could not compel the states to enact specific legislation and regulations.[79] On the other hand, they also support the balancing approach which may be ascribed to the *National League of Cities* opinion; each court emphasized the drastic

74. 521 F.2d at 991, 994.

75. 521 F.2d 827 (9th Cir. 1975), *vacated as moot*, 431 U.S. 99 (1977).

76. 521 F.2d at 831-32, 837-42.

77. 530 F.2d 215 (4th Cir. 1975), *vacated as moot*, 431 U.S. 99 (1977).

78. 530 F.2d at 225, quoting In re Duncan, 139 U.S. 449, 461 (1891). The Fourth Circuit Court of Appeals gave additional arguments:

> [I]f there is any attribute of sovereignty left to the states it is the right of their legislatures to pass, or not to pass, laws . . . . [citing *In re* Duncan] Not far afield is the rejection by the Philadelphia Convention of Charles Pinkney's constitutional plan which would have enabled Congress to "revise," "negative", or "annul" the laws of a state. See *Elliot's Debates* (Michie Ed., Vol. I, Book I, pp. 149, 400-01).
>
> If the national legislature may not revise, negative or annul a law of a state legislature, how an Act of Congress may be construed to permit an agency of the United States to direct a state legislature to legislate is difficult to understand.

530 F.2d at 225.

79. *See* text at notes 69 (D.C. Cir.), 76 (9th Cir.), 78 (4th Cir.) *supra*.

intrusion created by the EPA regulations, and distinguished cases which had held federal laws of lesser intrusion constitutionally permissible.[80]

C. *The Endangered Species Act*

How does the Endangered Species Act measure up against these standards? An initial distinguishing feature is that the ESA is based primarily on the federal treaty power,[81] although it has alternative support from the federal commerce power.[82] The ESA enumerates seven treaties concerning endangered species,[83] the most pertinent

80. Maryland v. EPA, 530 F.2d at 228; District of Columbia v. Train, 521 F.2d at 990-94; Brown v. EPA, 521 F.2d at 837-38.

81. The only constitutional criterion for a treaty's validity is that it be "made under the Authority of the United States," U.S. Const. art. VI, cl. 2, a standard which the Supreme Court has stated "extends to all proper subjects of negotiation between our government and the governments of other nations." Geofroy v. Riggs, 133 U.S. 258, 266 (1890). Both standards denote exceptional judicial deference to the treaty-making authority of the Executive and Congress; no treaty and only one executive agreement, in Reid v. Covert, 354 U.S. 1 (1957), has ever been judicially vacated. The Court in *Reid* held an executive agreement void because it violated the fifth and sixth amendments, but excepted its holding from applying to the tenth amendment. *See* note 92 *infra*.

82. Federal power under the commerce clause, U.S. Const. art. I § 8, has been held to extend to anything moving in interstate commerce. Thornton v. United States, 271 U.S. 414 (1926) (free-roaming cattle ranging between two states); Pensacola Tel. Co. v. Western Union, 96 U.S. 1 (1877) (transmission of electrical impulses); United States v. Bishop Processing Co., 287 F. Supp. 624 (D.Md. 1968) (movement of air pollution). Alternately, it extends to any subject which may rationally be found to affect interstate commerce, Katzenbach v. McClung, 379 U.S. 294 (1964); Wickard v. Filburn, 317 U.S. 111 (1942) (home consumption of home-grown wheat). Many protected species move between states, and a rational argument may be made that those which do not, such as plants, are nevertheless important to interstate commerce. One source of affected commerce is outdoor and recreational activity: in 1970, 36 million people drove 38 billion miles and spent $7 billion while hunting and fishing. In 1972, recreation-related businesses grossed $13 billion and employed half a million people. [1975] COUNCIL ON ENVIRONMENTAL QUALITY ANN. REP. 468-71 (1975). Another ground supporting the "affecting commerce" theory is the relation of species preservation to a healthy national ecosystem, and so to healthy commerce. *See* Zabel v. Tabb, 430 F.2d 199, 204 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971), where the court held that "the destruction of fish and wildlife in our estuarine waters does have a substantial, and in some areas a devastating, effect on interstate commerce," and the Marine Mammal Protection Act of 1972 § 2(4), 16 U.S.C. § 1361(5) (Supp. V 1975), where Congress found as a basis of the act that "marine mammals . . . either—(A) move in interstate commerce, or (B) affect the balance of marine ecosystems in a manner which is important to other animals and animal products which move in interstate commerce."

83. [T]he United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish

of which mandate the regulation of import and export trade in endangered species[84] and the adoption of "appropriate measures . . . to prevent the threatened extinction of any given species of flora and fauna."[85]

Although *National League of Cities* concerned federal regulation under the commerce power, the federalist concerns expressed in that opinion are not logically limited to that clause.[86] The Court did not rely on the tenth amendment, but found a limit to federal power, when exercised to impair state sovereignty, in the federal system implicit in the structure of the Constitution.[87] The state immunity doctrine therefore logically limits all federal power exer-

or wildlife and plants facing extinction, pursuant to—

(A) migratory bird treaties with Canada and Mexico;

(B) the Migratory and Endangered Bird Treaty with Japan;

(C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;

(D) the International Convention for the Northwest Atlantic Fisheries;

(E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;

(F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and

(G) other international agreements.

16 U.S.C. § 1531(a)(4) (Supp. V 1975).

84. Convention on International Trade in Endangered Species of Wild Fauna and Flora, *entered into force* July 1, 1975, T.I.A.S. No. 8249.

85. Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, *entered into force* Apr. 30, 1942, 56 Stat. 1354, T.S. No. 981, 161 U.N.T.S. 193:

Article V: 1. The Contracting Governments agree to adopt, or to propose such adoption to their respective appropriate law-making bodies, suitable laws and regulations for the protection and preservation of flora and fauna within their national boundaries, but not included in the national parks . . . .

. . . .

Article VII: The Contracting Governments shall adopt appropriate measures for the protection of migratory birds . . . or to prevent the threatened extinction of any given species . . . .

Article VIII: [further prohibits the taking of species listed in the Annex to the Convention, in which a country may list species, at its discretion].

Although it entered into force in 1942, this treaty was not used as a basis of federal power over intrastate takings of wildlife and plants until enactment of the ESA in 1973. It therefore does not follow that the treaty does not authorize or contemplate such federal power, as the national government must continue to enforce its treaties in line with a changing international community and politics. Recent years have witnessed an increasing international concern with addressing world-wide environmental problems. *See generally* [1975] COUNCIL ON ENVIRONMENTAL QUALITY ANN. REP. 614-19 (1975).

86. *See* note 51 *supra*.

87. *See* note 36 *supra*.

cised under constitutional grants except those expressly directed against state action, such as the fourteenth amendment.[88] The Court in *National League of Cities* therefore found that the state immunity doctrine extended equally to the federal taxing and commerce powers, and implied that it would extend to all federal powers which "find their genesis in Art. I, § 8."[89]

The treaty power falls between these two poles, as it is neither a power granted in section 8 of article I, nor an express limitation on state power. Instead, it derives from both section 2 of article II[90] and the Supremacy Clause, which declares supreme all treaties "made under the authority of the United States."[91] However, as the treaty power is not an express limitation on state power, it falls within the scope of the *National League of Cities* rule.[92] An argu-

88. In *National League of Cities*, the Court excepted Congressional powers under constitutional provisions "such as . . . the Fourteenth Amendment." 426 U.S. at 852 n.17. *See* note 48 *supra*. The thirteenth, fourteenth and fifteenth amendments (the Civil War Amendments) are expressly directed against state action, and so distinguishable from the commerce clause in *National League of Cities*. This exception voiced by the Court would leave standing decisions such as South Carolina v. Katzenbach, 383 U.S. 301 (1966), where the Court approved provisions of the Voting Rights Act of 1965 which suspended new voting regulations in designated states until federal authorities determined that their use would not violate the fifteenth amendment.

89. 426 U.S. at 843 n.14. *See* note 51 *supra*.

90. U.S. Const. art. II § 2 lists the powers granted to the executive branch, and so is analogous to art. I § 8 which lists powers granted to the legislative branch.

91. U.S. Const. art. VI cl. 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." The treaty-making power has been broadly construed; *see* note 81 *supra*.

92. A contrary argument would maintain that the foreign affairs power of the national government is plenary even as to the states. Support for this argument may be found in Missouri v. Holland, 252 U.S. 416 (1920), which upheld the constitutionality of the Migratory Bird Treaty Act against a tenth amendment claim. The Court rejected the notion that the tenth amendment could restrict federal power under the treaty clause, regardless of whether it could restrict other powers. 252 U.S. at 433-34. Later, in Reid v. Covert, 354 U.S. 1 (1957), the Court reaffirmed *Missouri* while holding that an executive agreement with Great Britain could not waive U.S. citizens' right to jury trial, in violation of the specific provisions of the fifth and sixth amendments. The Court stated,

> There is nothing in Missouri v. Holland, 252 U.S. 416, which is contrary to the position taken here. There the Court . . . was concerned with the Tenth Amendment which reserves to the States or the people all power not delegated to the National Government. To the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier.

Id. at 18. The Court in *National League of Cities*, however, did not rest its reasoning

ment that the national government is supreme in international affairs does not affect the rule of *National League of Cities*, as the same may be said of interstate commerce.[93] Both powers are restricted when they are used in a manner threatening the very existence of the states. However, as in *Case v. Bowles*,[94] international concerns may weigh heavily in a balancing standard which tests the constitutionality of a federal law.

Applying the state immunity doctrine to the Endangered Species Act, the Act's impact upon a state is twofold. First, a state's law is rendered void to the extent it is less restrictive than federal law.[95] Second, a state may not escape federal control over its ability to "take" protected species until it agrees to implement and enforce legislation which complies with the Act.[96]

The first restriction is not subject to challenge by a claim of state immunity, as it places no affirmative burdens upon the state. Hence, the Act voids inconsistent state laws pursuant to the Supremacy Clause.[97]

on the tenth amendment. It found that the federalist structure of the Constitution limited federal power which derogates state functions even though the exercise of that power was otherwise constitutional. *See* 426 U.S. at 845; note 36 *supra*. As stated by an authority on foreign affairs, writing before the *National League of Cities* opinion,

> The Constitution probably protects some few States' rights activities, and properties against any federal invasion, even by treaty. . . .
>
> . . . .
>
> There is also something more left, too—how much cannot be said with confidence—of the sovereign immunity of the States, that would presumably limit federal regulation under foreign affairs powers as well . . . . In principle, then, the strictly "governmental" activities of the States might have some immunity.
>
> . . .

L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 147, 246-47 (1972).

93. Cases prior to *National League of Cities* had stated "the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce." Parden v. Terminal Ry. Co., 377 U.S. 184, 191 (1964). *Accord*, Maryland v. Wirtz, 392 U.S. 183 (1968); United States v. California, 297 U.S. 175, 183-85 (1936). The rationale of *National League of Cities*, however, does not depend on whether the Constitution grants the federal government power over a subject. *See* note 36 *supra*.

94. *See* text accompanying notes 49-51 *supra*.

95. 16 U.S.C. § 1535(f) (Supp. V 1975). *See* text accompanying notes 27-29 *supra*.

96. 16 U.S.C. § 1535(c) (Supp. V 1975). *See* text accompanying notes 22-26 *supra*.

97. The Supreme Court has traditionally held federal wildlife legislation to be supreme over inconsistent state law. Kleppe v. New Mexico, 426 U.S. 529 (1976) (federal regulation under the property clause, U.S. Const. art. I § 8); Hunt v. United States, 278 U.S. 96 (1928) (property clause); Missouri v. Holland, 252 U.S. 416 (1920) (treaty power). Earlier decisions of the Court had however intimated an inconsistent

The second restriction, however, resembles those provisions of the Clean Air Act which were held unconstitutional. Unlike the unyielding requirements of the Clean Air Act, however, state enforcement of the ESA is not compelled but encouraged by a "carrot and stick" approach. The "stick" is the exertion of federal control over a state's taking ability before it signs a Cooperative Agreement; the incentives are a return of the state's taking jurisdiction and up to seventy-five percent federal funding of state programs[98] once a state signs a Cooperative Agreement. This distinction may be dispositive if one views the Cooperative Agreement program as merely a condition upon a federal grant-in-aid program. The use of conditional grants-in-aid is a common device to induce state cooperation in federal programs, and the Court has traditionally upheld their constitutionality.[99] The Court in *National League of Cities* it-

theory of wildlife law, the "state ownership" doctrine. In McCready v. Virginia, 94 U.S. 391 (1876), the Court upheld Virginia's right to regulate the taking of oysters in its tidewaters, but additionally stated the state owned not only the tidewaters but also "the fish in them, so far as they are capable of ownership." *Id.* at 394. Later, in Geer v. Connecticut, 161 U.S. 519 (1896), the Court upheld a state law which required that wildlife taken within the state remain within the state, rejecting an argument that it was preempted by the commerce clause, U.S. Const. art. I § 8:

> In view of the authority of the State to affix conditions to the killing and sale of game, predicated as is this power on the peculiar nature of such property and its common ownership by all the citizens of the State, it may well be doubted whether commerce is created by an authority given by a State to reduce game within its borders to possession . . . .

Id. at 530. This broad statement, however, overreached the holding of the case, which concerned state power in the *absence* of federal legislation. Later cases have emphasized that "[t]he whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." Toomer v. Witsell, 334 U.S. 385, 402 (1948). *Accord*, M. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW (1977).

The affirmance of the supremacy of federal law in *Kleppe*, *Hunt* and *Missouri* therefore puts to rest any argument of a unique state interest in wildlife. Such unique interests concern peculiar powers such as the Court found in Coyle v. Smith, 221 U.S. 559, 565 (1911), where it stated: "The power to locate its own seat of government . . . [is] essentially and peculiarly [a] state power" not subject to federal regulation.

98. *See* note 26 *supra*.

99. The Court has emphasized that each state possesses sovereign power, and that it is "the essence of sovereignty to be able to make contracts and give consents" to regulations from which it would otherwise be immune. United States v. Bekins, 304 U.S. 27, 51-52 (1938). It has therefore rejected federalism-based attacks on conditioned grants in aid, as the states may "adop[t] the 'simple expedient' of not yielding." Oklahoma v. Civil Service Comm'n, 330 U.S. 127, 143 (1947). *See* Steward

self specifically declined to extend its holding to federal power under the spending clause.[100]

Practically, however, the structure of the ESA is designed to virtually assure state enforcement, and the congressional reports indicate that this was in fact the intent of Congress.[101] Although

Mach. Co. v. Davis, 301 U.S. 548 (1937). *See generally* Maryland v. EPA, 530 F.2d 215, 228 (4th Cir. 1975). In the leading case of *Steward Machine Co.* the Court sustained provisions of the Social Security Act of 1935; that act imposed a payroll tax on employees, but granted a 90 percent federal credit to monies paid by the employer into qualifying state unemployment funds. Although many such state funds were subsequently created, the Court rejected the claim of interference with state sovereignty, emphasizing the state's ability to choose. It noted that a prior statute had been held constitutional even though, as a result, "material changes of [inheritance] laws were made in 36 states." 301 U.S. at 592 (referring to Florida v. Mellon, 213 U.S. 12 (1927), which upheld a federal statute permitting an eighty percent credit for amounts paid in state inheritance taxes). The Court made an important qualification to its holding, however, in distinguishing the challenged legislation from a situation where it could be shown that "the tax and the credit in combination are weapons of coercion, destroying or impairing the autonomy of the states." 301 U.S. at 586. The Court added, "the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree,—at times, perhaps, of fact." *Id.* at 590. As the Supreme Court has only rarely considered the limits to the federal spending power, and shown great deference to that power when it has, the factors which would bear on the showing of coercion suggested in *Steward* are speculative. The *Steward* Court, however, discussed two factors which may be of general application. It noted that the federal funding in the Social Security Act subsidized the same activity the tax was designed to promote—income maintenance. So too the ESA's funding relates to the same conservation goals its prohibitions enforce, the preservation of species. A second factor mentioned in *Steward* was the wide range of alternatives left the state governments in complying with the Act. Although the ESA is restrictive in its definition of the state laws which must be passed to comply with the Cooperative Agreement program, it leaves wide discretion to the state in the choice of programs and enforcement policies which it may adopt. *See* text at notes 22-24 *supra*. Compare with the detailed Clean Air Act regulations, *supra* note 63 (although that act was not a grant-in-aid program). As the Fourth Circuit stated in *Maryland v. EPA*, the crucial distinction is that, "[i]nviting [the state] to administer the regulations, and compelling her to do so under threat of injunction and criminal sanctions, are two entirely different propositions." 530 F.2d at 228. The ESA would appear to fall in the former category.

A final factor weighing against the ESA is that it contains not only a promise of benefit in federal funding, but also a "stick" in divesting states of traditional area of their governmental control until they sign Cooperative Agreements. However, federal preemption of state law is always coercive in some sense, though constitutionally valid under the supremacy clause.

100. 426 U.S. at 852 n.17. *See* note 51 *supra*. Justice Brennan, speaking for three dissenting justices, indicated that federal power under the spending clause was an easy way around the majority's holding. 426 U.S. at 880.

101. It should be noted that the successful development of an endangered species program will ultimately depend upon a good working arrangement be-

courts are generally unwilling to view the purpose behind a statute,[102] the strong federalism concerns expressed in *National League of Cities* may require that the practical effect of the ESA be considered.[103]

Under the first reading of *National League of Cities*, the constitutional test would be whether the ESA displaced "essential decisions regarding the conduct of integral [state] government functions." The pervasive wage and hour regulations involved in that decision may be fundamentally distinguished from the regulation of a subject matter—native species of wildlife and plants—which is traditionally under a state's jurisdiction, but the regulation of which in no way regulates the state itself.[104] State control over such species, although "traditional," does not then appear "integral" in

> tween the federal agencies, which have broad policy perspective and authority, and the state agencies, which have the physical facilities and the personnel to see that state and federal endangered species policies are properly executed.

CONFERENCE REPORT, *supra* note 2, at 26.

> The Committee finds that the most efficient way to enforce the prohibitions of this bill and to develop the most appropriate and extensive programs is through utilization of the agencies already established for such purposes within the States and development of the potential for such State programs where they do not already exist.

SENATE REPORT, *supra* note 2, at 4. *Accord*, HOUSE REPORT, *supra* note 2, at 7.

102. United States v. Darby, 312 U.S. 100 (1941). *But cf.* Gunther, *"The Supreme Court, 1971 Term: Foreword . . . A Model for a Newer Equal Protection,"* 86 HARV. L. REV. 1 (1972), which identifies an increasing "means-oriented" scrutiny by the Court under the due process and equal protection clauses.

103. In Employees of Dep't of Pub. Health v. Department of Pub. Health, 411 U.S. 279 (1973), the court considered a question concerning the scope of the 1966 amendments to the Fair Labor Standards Act of 1938, the same statute involved in *National League of Cities*. The 1966 amendments extended federal minimum wage and maximum hour legislation to cover employees in state hospitals and schools, and as a result several of these employees brought suit in federal court seeking overtime compensation due them. The Court held the FLSA amendments did not deprive a state of its immunity from suit in federal court, relying on a scrutiny of congressional purpose:

> The question is whether Congress has brought the states to heel . . . .
>
> . . . .
>
> But we have found not a word in the history of the 1966 amendments to indicate a *purpose* of Congress to make it possible for a citizen of that State or another State to sue the State in the federal courts . . . . [W]e are reluctant to believe that Congress in pursuit of a harmonious federalism desired to treat the States so harshly.

411 U.S. at 283, 285-86 (emphasis added).

104. At times, the Court in *National League of Cities* paraphrased the constitutional restraint as being against "interfer[ence] with traditional aspects of state sovereignty." 426 U.S. at 849. *See* note 36 *supra*.

the same sense employment relationships are integral, nor "essential" to the state's functioning or independence.

Viewing the Clean Air Act cases along such a standard, several circuits would consider it unconstitutional to force the states to affirmatively enact and enforce legislation according to federal standards.[105] Even if the practical effect of the ESA is to create new state law and enforcement programs, important distinctions exist between it and the Clean Air Act regulations. The latter impose both civil and criminal penalties on government entities which violate them,[106] whereas no consequences attach to a state's failure to submit or act under a Cooperative Agreement except the rescission of that agreement.[107] The states are not then forced to enact new law, but only strongly influenced to do so. This distinction allows the ESA to fall within precedents which establish that federal programs may influence state law-making, such as the federal grant-in-aid programs discussed above.[108] A related argument would emphasize that the ESA never imposes a federally-authored program upon the states, unlike the Clean Air Act regulations.[109] Although the ESA may leave little option to a state but to join in a Cooperative Agreement, the agreement's program is always formulated by the states.[110] Thus, interpretation of the standards applied in *National League of Cities* and the most restrictive of the Clean Air Act cases shows that the restraints upon the states imposed by the ESA are qualitatively different. They do not intrude upon integral or essential state functions inconsistently with the federalist structure of our Constitution.

If the Court in *National League of Cities* has adopted a balancing approach, the case for the constitutionality of the ESA becomes even stronger. The greatest effect a Cooperative Agreement may

105. *See* text at note 79 *supra*.

106. *See* text at note 80 *supra*.

107. Cooperative Agreements are subject to annual reconfirmation by the Secretary. 16 U.S.C. § 1535(c) (Supp. V 1975). *See* text at note 22 *supra*. If at that time the state program is deficient, the Cooperative Agreement would be rescinded, recreating the original relationship between the national and state governments permitting federal enforcement of preemptive federal law. *See* text at notes 12-21 *supra*.

108. *See* text at notes 98-100 and note 99 *supra*.

109. If a state fails to submit an air pollution control plan, the EPA may formulate one and force the state to implement it under the EPA regulations. *See* text at note 59 *supra*.

110. The Court in *National League of Cities* emphasized that the intrusive "manner" of federal regulation would be a consideration in assessing constitutionality. *See* 426 U.S. at 847.

have upon a state is to influence the state to adapt its laws to the federal standards and allocate funds to programs, including enforcement activities, which conserve protected species.[111] On the negative side, the Cooperative Agreement program, like the Clean Air Act regulations, induces the states to implement new legislation and affirmative programs in an area which has traditionally been wholly a governmental concern.[112] Further, there is consequently an increased financial burden placed upon the states. Compared with the federal programs invalidated in *National League of Cities* and the Clean Air Act cases, however, the ESA is considerably less intrusive.

First, the above arguments that the ESA does not intrude into "essential" or "integral" state functions remain applicable, as such intrusions would weigh heavily on the state interests side of the balance. Second, state involvement is merely encouraged, not mandated as it is with the Clean Air Act. This difference is not only qualitative, but in a balancing test involves a lesser amount of coercion upon the states. A third factor is that the ESA does not force the curtailment or restructuring of state government functions, emphasized in *National League of Cities*.[113] The functioning of state wildlife agencies is not impaired by the ESA—it only removes a small segment of their subject matter jurisdiction until they agree to conserve it by signing a Cooperative Agreement. Fourth, the Cooperative Agreement itself would only require the states to adopt that minimum in new laws and conservation programs which adequately allows the conservation of listed species; beyond that minimum, a state may act as it chooses. In contrast, the minimum protection required by the Clean Air Act imposes a detailed scheme of specific duties upon state governments. Related—and perhaps most important—is a fifth point, that the costs imposed by the ESA upon the state are not substantial. Not only are there existing state wildlife agencies which could take over additional duties under a Cooperative Agreement,[114] but generous federal funding is available for the conservation programs. A state may be reimbursed for up to seventy-five percent of its costs for programs that are required by its Cooperative Agreement

111. *See* text at notes 95-110 *supra*.
112. *See* note 97 *supra*.
113. 426 U.S. at 851-52.
114. *See* SENATE REPORT, *supra* note 2, at 3, 4; note 101 *supra*.

as well as for related programs adopted by a state.[115] The impact upon a state's budget therefore does not approach that imposed by the pervasive wage and hour regulations at issue in *National League of Cities*, nor by the detailed regulatory activity required by the Clean Air Act.

Balanced against this relatively low degree of intrusion upon the states is the significant federal interest in protecting our environment, articulated by Justice Blackmun in his concurring opinion in *National League of Cities*. In enacting the ESA, Congress stressed the significance of preserving the nation's heritage in wildlife and plants as an important part of our environmental policy.[116] Further, Congress found the purposes of the Act required "coherent national and international policies" which could only be addressed on the federal level.[117] International comity was also involved in creating the ESA, as the United States had "pledged itself as a sovereign state in the international community to conserve . . . fish or wildlife and plants facing extinction."[118]

In summary, an argument may be made that the scheme of the ESA poses the least possible intrusion into state functionings consistent with these important federal interests. The taking prohibition imposed upon the states is necessary to the ESA's effectiveness, as inconsistent state policies would prevent the nationwide protection of species. Mitigating this imposition, the Cooperative Agreement program returns to the states the capacity to take species, although under stringent requirements. That program, importantly, does not compel state enforcement, and its requirements, although strict, are required by the conservation purposes of the Act. The court decisions discussed above intimate that this "least intrusive" argument may resolve constitutional doubts as to the application of a federal program upon the states.[119]

115. 16 U.S.C. § 1535(d) (Supp. V 1975). *See* note 26 *supra*.

116. *See, e.g.*, 16 U.S.C. § 1531 (Supp. V 1975) (purposes of the ESA); HOUSE REPORT, *supra* note 2, at 1-2, 4-6; SENATE REPORT, *supra* note 2, at 1-3.

117. HOUSE REPORT, *supra* note 2, at 7.

118. 16 U.S.C. § 1531(a)(4) (Supp. V 1975). *See* text at notes 83-85 *supra*.

119. 426 U.S. at 852-53, where the Court distinguished Fry v. United States, 421 U.S. 542 (1975), noting that "[t]he means selected were carefully drafted so as not to interfere with the States' freedom beyond a very limited, specific period of time." 426 U.S. at 853. *See* text at notes 46-48 *supra*. The Third Circuit in upholding the Clean Air Act regulations adopted the "least intrusive" rationale: "The only alternative implementation would be for the Federal Government to . . . directly enforce the programs . . . . [W]e fail to see how this would represent less of an intrusion

II. Resolving Conflict Among Federal Agencies

Striking in its compulsory language, section 7 rounds out the complete protection afforded listed species under the ESA. It regulates the activities of all[120] federal departments:

> Federal departments and agencies shall, in consultation and with the assistance of the Secretary, . . . insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of [protected species] or result in the destruction or modification of [critical][121] habitat of such species.[122]

upon state sovereignty." Pennslyvania v. EPA, 500 F.2d 246, 262-63 (3d Cir. 1974). The D.C. Circuit in District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975), *vacated as moot*, 431 U.S. 99 (1977), disapproved the Third Circuit's conclusion, but not its reasoning, in pointing out that less intrusive alternatives were available. *Id.* at 994 n.27.

120. This section begins: "The Secretary 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 . . . ." The "Secretary" refers in most instances to the Secretary of the Interior. *See* note 17 *supra*. Although a distinction appears to be made between the Secretary and other federal departments, the Secretary has determined that his departments must comply with this section's prohibitions. No legislative history supports the radical conclusion that the most pertinent federal departments of all, those of the Secretary, are exempt from a major provision of the Act. Furthermore, the prohibitions contained in the second sentence of this section, printed in text above, arguably apply to the Secretary through the more general first sentence. In Defenders of Wildlife v. Andrus, 428 F. Supp. 167 (D.D.C. 1977), Judge Gesell held that an even higher standard of care applied to the Secretary's actions. He voided the Secretary of Interior's regulation of game bird shooting hours as "arbitrary" because insufficient consideration was given to endangered and threatened species, stating: "It is clear from the face of [section 7] that the Fish and Wildlife Service, as part of Interior, must do far more than merely avoid the elimination of protected species." *Id.* at 170. The Secretary's regulations for implementing section 7, 43 Fed. Reg. 870 (1978) (to be codified in 50 C.F.R. §§ 402.01-.05), make no distinction between the Secretary and other federal agencies in applying the prohibitions of section 7. 43 Fed. Reg. 870, 875 (1978) (to be codified in 50 C.F.R. § 402.02 (definition of "federal agency").

121. Critical habitat is "determined by the Secretary, after consultation as appropriate with the affected State." ESA § 7, 16 U.S.C § 1536 (Supp. V 1975). The criteria used in determining critical habitat are mentioned in the text accompanying note 133 *infra*.

122. 16 U.S.C. § 1536 (Supp. V 1975). Section 7 contains a second, discretionary provision, that federal agencies "utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of [protected species]."

There are no exceptions to section 7. This section only affects federal actions, and so does not affect private persons unless the federal action or inaction constitutes an unconstitutional "taking" of property. U.S. Const. amend. V. Although withdrawal of a federal discretionary grant may cause a person economic harm, she has no rights of compensation against the federal government when it is authorized to act at its dis-

The mandatory nature of this provision[123] contrasts with that of other federal environmental legislation, such as the National Environmental Policy Act (NEPA).[124] Although NEPA requires that environmental concerns be considered in all federal decisionmaking, its provisions are qualified by language such as "use [of] all practica-

cretion. *See* United States v. Fuller, 409 U.S. 488 (1973) (value of private lands due to their use in conjunction with federal Taylor Grazing Act leases held not compensable in a governmental taking, as government need not compensate for the value it has created); Penn Central Transp. Co. v. City of New York, 42 N.Y.2d 324, 397 N.Y.S.2d 914, 366 N.E.2d 1271 (1977) (publicly-created component in the value of Grand Central Station held not compensable in governmental taking). *See generally*, Comment, *A New, New Takings Analysis Blooms in New York*, 7 ENVT'L L. REP. 10166 (1977). *See also* note 19 *supra*.

Regulations for implementing section 7 appear at 43 Fed. Reg. 870 (1978) (to be codified in 50 C.F.R. §§ 402.01-.05). Before the regulations were promulgated in early 1978, only discretionary Guidelines were available, published in brief at 40 Fed. Reg. 17764 (1975); these were substantially similar in content to the regulations.

123. The scanty legislative history supports the plain meaning of section 7's language. The old Endangered Species Conservation Act of 1969, *see* note 2 *supra*, qualified the duty of federal agencies with language such as "to the extent practicable" and "where practicable," 16 U.S.C. § 668bb(d) (1970) (repealed 1973); such language was omitted in the ESA, which repealed the 1969 Act. Similarly, both bills reported out of the House and Senate committees originally contained qualifying language, which was excised in the final versions. *See* S. 1983, 93d Cong., 1st Sess. §§ 2(b), 5(d) (1973), *reprinted in Senate Hearings*, *supra* note 2; H.R. 37, 93d Cong., 1st Sess. §§ 2(c), 5(d) (1973), *reprinted in House Hearings*, *supra* note 2. Although none of the Congressional reports analyze section 7, Representative Dingell, House manager of the conference committee bill containing section 7 in its present form, expounded:

> Once this bill is enacted, the appropriate Secretary . . . will have to take action to see that [the situation of a protected species] is not permitted to worsen, and that these [species] are not driven to extinction . . . . [T]he agencies of Government can no longer plead that they can do nothing about it. They can, and they must. The law is clear.

119 Cong. Rec. 42913 (1973). *See generally*, Note, *Obligations of Federal Agencies Under Section 7 of the Endangered Species Act of 1973*, 28 STAN. L. REV. 1247, 1252-57 (1976).

124. 42 U.S.C. § 4331 *et seq.* (1970). Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 1653 (f) (1970), is also qualified. It requires that the Secretary of Transportation,

> shall not approve any program or project which requires the use of any publicly owned land from a [significant] public park . . . unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all planning to minimize harm to such park.

Similar provisions exist in National Historic Preservation Trust Act of 1966 § 106, 16 U.S.C. § 470f (1970); Federal-Aid Highway Act of 1968 § 18(a), 23 U.S.C. § 138 (1970); Airport and Airway Development Act of 1970 § 16(c)(4), 49 U.S.C. § 1716(c)(4) (1970).

ble means consistent with other essential considerations" and "to the fullest extent possible."[125] The inflexible nature of section 7, however, is tempered by its neutral biological standard and its authorization of the acting agency, and not the Secretary, to make the final decisions about the propriety of its conduct. An irreconcilable conflict may result, however, when a project cannot be modified to conform with section 7. This occurred in the recent case of *Hill v. Tennessee Valley Authority*,[126] which aroused considerable controversy when the Sixth Circuit Court of Appeals halted construction on a 110 million dollar dam, virtually completed, in order to protect the critical habitat of a species of small fish.[127] Several bills have been introduced to amend section 7,[128] and these will be discussed once the working of the present statute is understood.

A. *The Section 7 Standard*

The two rules within section 7 prohibit federal agencies, including the Secretary, from endangering the existence of any protected species or its critical habitat. Federal agencies are thus significantly more restricted in their activities than are the states, as section 7 requires them to protect both animal and plant species, and to preserve their critical habitat.[129] The states need only conserve the former without protecting critical habitat.[130] In one respect, however, section 7 is more lenient, as it only prohibits actions which would jeopardize the continued existence of the species, as opposed to the general rule prohibiting the taking of a single individual. Although that prohibition against such takings applies to "any per-

125. NEPA §§ 101(b), 102, 42 U.S.C. §§ 4331(b), 4332 (1970). An agency decision cannot be "reversed . . . on its merits, under section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values." Calvert Cliff's Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1115 (D.C. Cir. 1971). A stricter standard applies to an agency's procedural failures. *Id.* at 1114-15.

126. 549 F.2d 1064 (6th Cir), *cert. granted*, 54 L. Ed. 2d 312 (1977).

127. *See generally*, Comment, *Wildlife Protection: Marine Mammals, Endangered Species Threatened in Congress by Economic Concerns*, 7 ENVT'L L. REP. 10124 (1977).

128. *See* note 149 *infra*.

129. Both animals and plants are included because section 7 protects all listed "species," defined to include both animals and plants. 16 U.S.C. §§ 1532(4), (11), (15) (Supp. V 1975). To date, critical habitat has been determined for mammals, fish, reptiles and birds, 50 C.F.R. §§ 17.60 *et seq.* (1976) (to be renumbered in 50 C.F.R. § 17.95-.96; *see* 42 Fed. Reg. 40687 (1977)).

130. *See* note 24 *supra*.

son," including federal agencies, section 7's specific rules governing federal agencies should exempt them when they comply with the section's procedural requirements.[131]

How restrictive are section 7's substantive standards when ap-

131. The more specific section 7 should be construed to preempt the general taking prohibitions of the Act (section 9; see text at note 13 *supra*), where the two standards are incompatible. *See* Sierra Club v. Froehlke, 534 F.2d 1289, 1304 (8th Cir. 1976) (addressing the merits of a "taking" allegation against a federal agency building a dam). The regulations fail to clarify the extent of section 9's applicability to a federal project. The final regulations are silent on the subject, and in their proposed form stated: "The Federal agency should be aware that in addition to satisfaction of section 7 requirements, a permit may be required for activities otherwise prohibited by section 9 of the Act." 42 Fed. Reg. 4868, 4872 (at § 17.93(e)(1)). Were it not so, section 7's standard of "jeopardy" would be meaningless, as the taking of a single individual, prohibited under section 9, would occur long before "the continued existence of such [protected species]" was jeopardized under section 7. Further support for construing section 7 as an exemption to section 9 would be that federal agencies may be subject to large damage awards were they liable for every "taking" violation caused by their programs. In the case of the Tellico Dam in *Hill*, 11,500 snail darters appear to have been indirectly destroyed by its partial completion. *See* note 148 *infra*. Each separate violation of section 9's taking prohibition is penalized at a maximum of $10,000 if the violation is knowing, and $1000 if not, which would result in a liability of $115 million (the cost of the dam itself) or $11.5 million, respectively. 16 U.S.C. § 1540(a)(1) (Supp. V 1975). The Secretary, however, may exercise discretion to waive this penalty. *Id.* The violators could also be subject to criminal sanctions of up to two years imprisonment. *Id.* at § (b)(1). These large individual penalties appear more appropriately intended for discrete takings of individual animals, not wide-scale agency actions which may indirectly affect thousands of individuals.

If the two provisions are to be interpreted together, the scope of section 7's exemption is yet to be determined. It should not be construed so broadly as to allow "takings" of a species which are not required by the agency's program. To allow malicious killings by federal personnel while working on a federal project would plainly contravene the purpose of the ESA without forwarding any other federal goal. The proposed bill to amend section 7 adopts this approach in agency programs to which its provisions apply. *See* § 7(c)(3) of the proposed bill at note 192 *infra*. Section 7's exemption from the taking prohibition should then be limited to takings directly attributable to a project's implementation.

Should good faith compliance with section 7 also be required? A good faith requirement would forward the ESA's goals in encouraging consultation and planning concerning protected species, but would still leave some agencies subject to civil and criminal penalties. Agencies, such as the TVA in *Hill*, which consulted with the Secretary but chose to reject his findings might then be subject to criminal penalties so severe that it would be unwise to proceed without clear congressional intent. On the other hand, the language of section 9's taking prohibition is explicit, and it is difficult to justify an exemption to that prohibition via section 7 unless an agency complies at least with section 7's procedural requirements. *Cf.* 43 Fed. Reg. 870, 875 (1978) (to be codified in 50 C.F.R. § 402.04(a)(3)) (prohibiting agencies from making an irretrievable commitment of resources to a project before consulting with the Secretary on pertinent protected species matters).

plied to federal agency practices? Although mandatory, their design acts to minimize inter-agency conflict whenever that is possible; they act only to compel modification of agency projects which threaten the extinction of protected species. A first mitigating factor is that the standards are determined along neutral biological principles. The final section 7 regulations contemplate that determinations under section 7 be founded on "appropriate studies and . . . biological information necessary for an adequate review of the effect an identified activity or program has upon listed species or their habitat."[132] The important determination of critical habitat, entrusted to the Secretary, is also to be made along neutral biological considerations of the listed species' "behavioral, ecological, and evolutionary requirements for [its] survival and recovery."[133]

Secondly, the section 7 standards, although rigid in principle, promote flexibility in their application. The concept of "jeopardy" in particular sets a standard which encourages the greatest flexibility in allowing other federal goals to coexist with those of the Act. It allows unlimited change and adaptation of other federal projects so long as, in their final form, they do not threaten the essential concern of the Endangered Species Act, the existence of a living species.[134] The second prohibition, barring "the destruction or

132. 43 Fed. Reg. 870, 875 (1978) (to be codified in 50 C.F.R. § 402.04(c)). *See also* Interagency Cooperation Regulations, Supplementary Information, 43 Fed. Reg. 870, 872 (1978).

133. 43 Fed. Reg. 870, 875 (1978) (to be codified in 50 C.F.R. § 402.05(b)). In full, the criteria for determining critical habitat are:

> *Criteria.* The Director [of the Fish and Wildlife Service] will consider the physiological, behavioral, ecological, and evolutionary requirements for the survival and recovery of listed species in determining what areas or parts of habitat *(exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of the species)* are critical. These requirements include, but are not limited to:
>
> (1) Space for individual and population growth and for normal behavior;
>
> (2) Food, water, air, light, minerals, or other nutritional or physiological requirements;
>
> (3) Cover or shelter;
>
> (4) Sites for breeding, reproduction, or rearing of offspring; and generally,
>
> (5) [Habitats] that are protected from disturbances or are representative of the geographical distribution of listed species.

Id. (emphasis added).

134. "Jeopardy" is defined similarly to the definition of "destruction or adverse modification," reprinted in note 135 *infra*. 43 Fed. Reg. 870, 875 (1978) (to be codified in 50 C.F.R. § 402.02). The definition concludes: "The level of reduction necessary to constitute 'jeopardy' would be expected to vary among listed species." *Id.*

modification of critical habitat", is more rigid, as that habitat is the minimum which can sustain the recovery of a species. At a logical minimum, this prohibition must include any change which renders the critical habitat unfit to sustain such recovery.[135] The "destruction" of any part of an irreducible minimum habitat, in a way which destroys its functional ability to sustain a species, does render such a change, and poses an ultimate threat to the habitat, and so to the species. As by destruction, habitat may also be removed from a species' use by "modification." The two words should be interpreted together: does any given modification or destruction of critical habitat so change that habitat as to render it unfit to sustain the recovery of the protected species?[136]

Not only do such tests—whether a given federal action poses an ultimate threat to a species or its habitat—appear logical, but they best serve the conflict-reconciling nature of section 7. Essentially, they preserve the fundamental concern of the Act while allowing maximum leeway for other important federal programs. The Fifth Circuit Court of Appeals held such a functional standard to apply in *National Wildlife Federation v. Coleman*,[137] a suit to modify a proposed interstate highway project. Although the highway would traverse the critical habitat of the Mississippi Sandhill Crane, the Secretary of the Interior found that the project would not fail the section 7 tests so long as a proposed interchange and gravel pits were deleted, thereby minimizing the excavation and halting the commercial development along the highway.[138] The court adopted this plan in allowing construction of the highway while mandating

135. The regulations provide the definition:

> "Destruction or adverse modification" means a direct or indirect alteration of critical habitat which appreciably diminishes the value of that habitat for survival and recovery of a listed species. . . . There may be many types of activities or programs which could be carried out in critical habitat without causing such diminution.

43 Fed. Reg. 870, 875 (1978) (to be codified in 50 C.F.R. § 402.02).

136. The ESA provides not only for the preservation of species, but also for their recovery to the point where they no longer need protection. The definition of "conserve" states: "The terms 'conserve' . . . and 'conservation' mean to use and the use of all methods and procedures which are necessary to bring any [protected species] to the point at which the measures provided pursuant to this Act are no longer necessary." 16 U.S.C. § 1532(2) (Supp. V 1975). The Secretary is directed to further the ESA's purpose in species recovery in his actions under section 7. *See* note 120 *supra*.

137. 529 F.2d 359 (5th Cir.), *cert. denied*, 429 U.S. 979 (1976).

138. *Id.* at 366-67.

that the Secretary's proposed modifications be implemented.[139] Other species' critical habitats could pose yet more extreme problems were section 7's standards not flexible. That of the grizzly bear would constitute a huge thirteen million acre section of Wyoming;[140] other species have critical habitats in the midst of densely populated urban areas.[141] Even parts of commercial rivers are expected to be designated as necessary habitats for the recovery of certain fish and mollusks.[142] No interpretation of section 7 can be practicable unless it allows modifications and uses of critical habitat which do not biologically alter the habitat's capacity to sustain the species' recovery.[143]

The third and most important conflict-reducing element of section 7's standards is that the acting agency makes the final decisions about the legality of its own activities. Although each agency is required to consult[144] with the Secretary, the latter, acting through

139. *Id.* at 375.

140. 41 Fed. Reg. 48757 (1976) (proposed regulations). *See The Audubon Cause —Uproar Over Grizzly Habitat*, AUDUBON, May, 1977, at 126.

141. 42 Fed. Reg. 27009 (1977) (proposed regulations defining the critical habitat of the Houston Toad to include areas of metropolitan Houston).

142. Information of the Office of Endangered Species, Dept. of Interior, Washington, D.C.

143. The regulations state "There may be many types of activities or programs which could be carried out in critical habitat without causing ["destruction or adverse modification"]." 43 Fed. Reg. 870, 875 (1978) (to be codified in 50 C.F.R. § 402.02). *See* note 135 *supra*. *Accord*, 41 Fed. Reg. 48758 (1976) (Statement by Fish and Wildlife Service that: "There has been widespread and erroneous belief that a Critical Habitat designation is something akin to establishment of a wilderness area . . . and automatically closes an area to most human uses.")

144. One court has interpreted section 7 to require "meaningful" consultation. *Coleman*, 529 F.2d at 371. *Cf. Hill*, 549 F.2d at 1070 ("requisite" consultation required).

Consultation is typically a three step process. 43 Fed. Reg. 870, 875-76 (1978) (to be codified at 50 C.F.R. § 402.04). First, the acting agency makes an initial determination whether its action will affect any protected species. If it does, the agency must next request consultation with the Secretary, who will perform a threshold examination of the action's effect on the species. Within 60 days, the Secretary must determine whether the action will jeopardize the continued existence of the species or its critical habitat, or alternately conclude that further study is necessary to make this determination. If the threshold examination shows that the activity is not likely to place the species or its habitat in jeopardy, the acting agency's obligations under section 7 are terminated; if the activity will have the prohibited effect, the acting agency is so informed. If the Secretary deems the available information inadequate to determine the effect of the action, the third step of consultation will ensue. The acting agency is required to make further biological studies and submit them to the Secretary, who will, within 60 days, issue an opinion on the activity's effect on the

the Fish and Wildlife Service,[145] is given no "veto" over other agencies' determinations under section 7, a point emphasized by courts construing the standard.[146] However, the Secretary's biological judgment as to whether section 7 standards are violated in a given instance may be determinative in suits brought by private persons to enforce the Act.[147]

A final aspect of section 7 which does not reduce conflict among agencies is its retroactive application.[148] The section affects all agency actions regardless of whether they were initiated before the ESA was enacted or the affected species was listed as protected. The political difficulty in requiring agencies to abandon partially completed projects has prompted several congressional bills pro-

species. During each step, the primary responsibility is upon the acting agency to make the appropriate biological studies, with assistance from the Secretary to the extent he is able to provide it.

145. Department of the Interior Memoranda, 242 DM 1, 632 DM 1.4 (1976). *See* 50 C.F.R. § 1.4 (1976); 43 Fed. Reg. 870 (1978).

146. Hill v. TVA, 549 F.2d 1064, 1070 (6th Cir.), *cert. granted*, 54 L. Ed. 2d 312 (1977); Sierra Club v. Froehlke, 534 F.2d 1289, 1303 (8th Cir. 1976); National Wildlife Federation v. Coleman, 529 F.2d 359, 371 (5th Cir.), *cert. denied*, 429 U.S. 979 (1976). *See also* 119 CONG. REC. 25689-90 (floor manager of the ESA bill in Senate interpreting bill to allow "final decision" in acting agency).

147. *See* note 150 *infra*.

148. Applicability to previously initiated actions.

> Section 7 applies to all activities or programs where Federal involvement or control remains which in itself could jeopardize the continued existence of a listed species or modify or destroy its critical habitat.

43 Fed. Reg. 870, 875 (1978) (to be codified in 50 C.F.R § 402.03). Although retroactive, section 7 will not normally require agencies to undo past actions, as opposed to halting present actions. As the words "jeopardize" and "destroy or modify" connote positive action, structures already built, and which a species has learned to live with, will rarely "jeopardize the continued existence" of the species. *See* note 133 *supra*. The Tellico Dam appears to be an exception, as, although incomplete, it has apparently so disrupted the breeding habits of the snail darter that the population has suffered a fourfold reduction, from 15,000 to 3,500. N.Y. Times, Oct. 16, 1977, § 1, at 47, col. 1. Does section 7 require the dam's dismantling at a cost of $16 million? The strict "insure" language of section 7 would indicate it does.

An interesting controversy where the federal agency does not appear to have "control or involvement" has arisen under a federal mineral leasing law, 30 U.S.C. § 211(b) (1970). This provision mandates that the Secretary of the Interior issue a lease to mine phosphate to any holder of a federal prospecting permit who is successful in discovering the mineral. A permit holder has discovered phosphate adjacent to the critical habitat of the California Condor, 50 C.F.R. § 17.64 (1976), and initial studies show that the proposed mining activity will severely disrupt the remaining Condors. *See* 123 CONG. REC. S7110 (1977). Subsequently, a Senate Joint Resolution has been introduced to ban mining in the Condor's habitat. S.J. Res. 3, 95th Cong., 1st Sess. (1977).

posing the amendment of section 7 to mitigate this harsh retroactivity rule.[149]

B. *Judicial Review of Agency Action under Section 7*

In suits brought by private persons to enforce section 7,[150] the Administrative Procedure Act (APA)[151] controls the judicial interpretation of agency actions under the statute.[152] Although courts normally show "great deference" to administrative determinations,[153] the APA requires the courts to overrule determinations which are "without observance of procedure required by law" or which are "arbitrary and capricious."[154]

The application of these standards to section 7 is complicated however, in that there are typically two agency determinations involved: that of the Secretary and that of the acting agency. The "arbitrary and capricious" standard of judicial review is only clearly applicable if the Secretary formally agrees with the project agency that the latter's actions do not violate section 7,[155] or if the Secre-

149. Specific exemptions for particular projects are H.R. 5879, 4557, 95th Cong., 1st Sess. (1977); a bill to amend section 7 appears in identical form at H.R. 7392, 6838, 5079, 5002, 4167, 95th Cong., 1st Sess. (1977).

150. [A]ny person may commence a civil suit on his own behalf—

(A) to enjoin any person, including the United States and any . . . agency . . . , who is alleged to be in violation of [this Act] or regulations issued under the authority thereof.

16 U.S.C. § 1540 (g) (Supp. V 1975).

151. 5 U.S.C.A. § 701 *et seq.* (West Supp. 1977).

152. The ESA has adopted the provision of the Administrative Procedure Act, with minor exceptions. ESA § 4(f), 16 U.S.C. § 1533(f) (Supp. V 1975). *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 413 (1971).

153. Udall v. Tallman, 380 U.S. 1, 16 (1965).

154. 5 U.S.C. § 706 (1970), which states:

The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law.

See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971) (APA requires "the court [to] consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment"); National Wildlife Federation v. Coleman, 529 F.2d 359, 372 (5th Cir. 1976).

155. The Secretary's regulations affecting a protected species were held to be "ar-

tary makes no determination at all.[156] In either case, the agencies act with one voice, which a plaintiff must prove "arbitrary and capricious." Even in this situation, however, plaintiffs may be aided by an emerging judicial rule that favors protection of the environment when agency actions are of uncertain effect due to the complexity of the ecological sciences.[157]

Another clear application of the APA is when a plaintiff proves that the acting agency has failed to comply with section 7's procedural requirements, notably its duty to consult with the Secretary. A *prima facie* violation of the APA is then made out by the agency's failure to "observ[e] procedure required by law."[158]

More troublesome is the situation when the two agency determinations conflict—how does the court then proceed? Three circuit courts have considered this problem and have come to varying

bitrary" in Defenders of Wildlife v. Andrus, 428 F. Supp. 167 (D.D.C. 1977). At issue was the Fish and Wildlife Service's regulation of migratory game bird shooting hours, which allowed hunting in the half hour before sunrise. The court held misidentifications during this time could endanger protected species, and that the Fish and Wildlife Service had acted "arbitrarily" by promulgating regulations without sufficient evidence that the hours chosen would create the minimum risk to protected species consistent with the game laws. *Id.* at 170.

156. The Secretary would violate the regulations if he fails to make a biological determination in a section 7 consultation, as the regulations state: "the [Secretary, acting through the Fish and Wildlife Service] will end consultation by issuing a biological opinion." 43 Fed. Reg. 870, 876 (to be codified in 50 C.F.R. § 402.04(f)). He could then be forced to render a biological opinion, if he has failed to do so, in a suit under the APA, 5 U.S.C. § 706(1), (2)(D) (1970), alleging his failure to follow the required regulatory procedure. *See* note 154 *supra*.

157. Where a statute is precautionary in nature, the evidence difficult to come by, uncertain, or conflicting because it is on the frontiers of scientific knowledge, the regulations designed to protect the public health, and the decision that of an expert administrator, we will not demand rigorous step-by-step proof of cause and effect. Such proof may be impossible to obtain if the precautionary purpose of the statute is to be served. . . . The Administrator may apply his expertise to draw conclusions from suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections from imperfect data, from probative preliminary data not yet certifiable as "fact," and the like.

Ethyl Corp. v. EPA, 541 F.2d 1, 28 (D.C. Cir.) (*en banc*), *cert. denied*, 426 U.S. 941 (1976) (upholding regulations under the Clean Air Act). *E.g.*, Hill v. TVA, 549 F.2d 1064, 1071 (6th Cir. 1977), *cert. granted*, 54 L. Ed. 2d 312 (1977) (Endangered Species Act); Amoco Oil Co. v. EPA, 501 F.2d 722, 735, 740-41 (D.C. Cir. 1974) (Clean Air Act). This rule is reinforced by the stringent language of section 7 that agencies "insure" the safety of their actions. *See* Defenders of Wildlife v. Andrus, 428 F. Supp. 167 (D.D.C. 1977).

158. 5 U.S.C. § 706(2)(D) (1970).

results. The earliest decision, *Sierra Club v. Froehlke*,[159] concerned a dam being constructed by the Army Corps of Engineers which would flood caves inhabited by the Indiana Bat, an endangered species.[160] The Eighth Circuit Court of Appeals found that the district court did not abuse its discretion in allowing the dam to be built, even though the Army Corps had not consulted with the Secretary.[161] The circuit court essentially allowed the district court to impose its own biological judgment on the facts.[162] In *Froehlke*, however, the Secretary had not yet made a determination that the flooded caves constituted a critical habitat, although he was considering doing so.[163] In both cases where critical habitat has been defined, and determined by the Secretary to be adversely modified by an agency action, the courts have deferred to his judgment. In *Coleman*, the Fifth Circuit Court of Appeals enjoined the building of an interstate highway unless its design was altered to include specific modifications found necessary by the Secretary to safeguard the Mississippi Sandhill Crane's critical habitat.[164] A more extreme case was posed in *Hill* where the Sixth Circuit Court of Appeals enjoined the TVA from completing the Tellico Dam when the court found, applying the Secretary's interpretation of

159. 534 F.2d 1289 (8th Cir. 1976) (Meramec Park Lake Dam).

160. 50 C.F.R. § 17.11 (1976); critical habitat designation at *id.* § 17.65 (to be recodified in 50 C.F.R. § 17.95 (a)).

161. 534 F.2d at 1305. The trial court's findings of facts may be found in Sierra Club v. Froehlke, 392 F. Supp. 130, 133-38 (E.D. Mo. 1975). Additionally, the district court waived plaintiff's failure to provide the Secretary with 60 day notice of its suit, which is required whenever a private party commences an action under the Act, 16 U.S.C. § 1540(g)(2)(a)(i) (Supp. V 1975). 392 F. Supp. at 143. The Eighth Circuit sustained the lower court, but stated, "we would not be cited as authority for future disregard of the notice requirement." 534 F.2d at 1303. This notice is designed to allow time for the consultation and review contemplated in section 7. The Secretary had in fact urged a moratorium on the project, 534 F.2d at 1305, and in a proposed rulemaking published after the trial indicated that critical habitat of the bat did indeed exist in the dam's basin. 40 Fed. Reg. 58311 (Dec. 16, 1975) (to be codified in 50 C.F.R. § 17.95(a)). The court's application of section 7 in this case therefore subverts its intended use as a carefully considered biological standard prerequisite to the finalization of an agency action.

162. *See* note 161 *supra*. The Eighth Circuit found that the plaintiff had not carried its burden of proof to show the Army Corps action was "arbitrary and capricious," even though that action was opposed by the Secretary. 534 F.2d at 1304-05. The court's holding does not accord with a proper interpretation of section 7. *See* text at notes 166-76 *infra*.

163. 534 F.2d at 1305. *See* note 161 *supra*.

164. 529 F.2d 359, 375 (5th Cir. 1976). *See* text at note 138 *supra*.

section 7,[165] that the impounding of water would destroy the Snail Darter's critical habitat.

The reasoning of the latter cases supports the proposition that a plaintiff may carry its burden of proof[166] by showing that the acting agency has not implemented the minimum safeguards that the Secretary deems necessary to preserve a species.[167] One factor favoring the plaintiff is that the permissible judicial scrutiny is stricter in reviewing agency actions under section 7 which are opposed by the Secretary. The language of that section is that the agency "insure" that its acts are not harmful, a positive standard which requires a high probability of safety.[168] Another reason for stricter scrutiny is that the damage would be permanent if the court "were to err on the side of permissiveness" in allowing an exemption from the Act—a species would become extinct.[169] Finally, as the *Hill* court acknowledged, the "complexity of the ecological sciences suggests that the detrimental impact of a project upon an endangered species may not always be clearly perceived," indicating that questionable projects should be halted until thorough study certifies their safety.[170]

165. 549 F.2d 1064, 1070 n.16 (6th Cir. 1977).

166. Sierra Club v. Froehlke, 534 F.2d 1289, 1305 (8th Cir. 1976); National Wildlife Federation v. Coleman, 529 F.2d 350, 372 (5th Cir.), *cert. denied*, 429 U.S. 979 (1976).

167. *See, e.g.*, *Hill*, 549 F.2d at 1070, 1074; *Coleman*, 529 F.2d at 375.

168. The court in *Coleman*, noted that several items of evidence, *i.e.*, the expert testimony at the trial, defendant's Final Environmental Impact Statement, and the Secretary's section 7 determination, each independently cast doubt on the defendant's decision to proceed with the highway despite its impact on the species. *Id.* at 373-74. The court further stated that all indirect impacts, such as growth in private development along the highway, would have to be considered as well as direct impacts. *Id.* See 40 C.F.R. § 1500.8(a)(3)(ii) (1976) for an analogous rule under NEPA.

The section 7 standard also requires that an agency not act in ignorance of the effects of its action, if a determination of the effect is possible. Decisions applying § 4(f) of the Department of Transportation Act, 49 U.S.C. § 1653 (f) (1970), which prohibits unnecessary use of "significant" parkland in building highways, have interpreted the section "to mean that land used as a public park is presumed 'significant' unless explicitly determined otherwise." Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323, 1336 (4th Cir), *cert. denied*, 409 U.S. 1000 (1972). *See* Harrisburg Coalition Against Ruining the Environment v. Volpe, 330 F. Supp. 918 (M.D. Pa. 1971). Section 7's language requires at least as strict a standard as in section 4(f) cases, and arguably requires even more care in actions of uncertain effect. *See* text at note 122 *supra*.

169. *Hill*, 549 F.2d at 1071.

170. *Id. See* note 157 *supra*. *Contra*, Sierra Club v. Froehlke, 534 F.2d 1289 (8th Cir. 1976).

Correlative to this increased judicial scrutiny of the acting agency's determinations are strong arguments that a court should give the "great weight" afforded administrative decisions to the determinations of the Secretary, rather than to those of the project agency. A first reason for this is that section 7 requires that all agencies act "in consultation with and with the assistance of the Secretary."[171] Additionally, as the courts in *Hill* and *Coleman* reasoned, the Secretary's expertise and "primary jurisdiction" under the ESA give him a "pivotal role" in section 7 compliance.[172] The basis for the "great deference" shown administrative interpretations by the court is the expertise and experience gained in the application of the statute by "the offices or agency charged with its administration."[173] It is the Secretary who must repeatedly apply section 7 in varying situations, and evaluate the impacts upon critical habitat. His determination should therefore be the one afforded "great deference" by reviewing courts in section 7 litigation, as was done by the courts in *Coleman* and *Hill*.

The two courts, however, differed slightly in their approach to finding project agency actions violative of section 7, as interpreted by the Secretary. In *Coleman*, the court "deferred to [the Secretary's] determination of what modifications are necessary to bring the highway project into compliance with section 7";[174] in *Hill*, the court adopted the Interior Department's regulation as to the standard to be imposed in section 7 cases, but decided itself whether the TVA's action violated the standard (though noting that the Secretary had reached the same conclusion).[175] The policy behind the APA supports the *Coleman* court's method of decision, as the Secretary's experience and expertise extends not only to interpreting the statute, but also to evaluating impacts upon critical habitat. As the Secretary himself made the initial determination of

171. 16 U.S.C. § 1536 (Supp. V 1975). *See* note 121 *supra*.

172. *See* note 167 *supra*. A similar rule has been held applicable under NEPA, with courts looking to the Council on Environmental Quality as the primary interpreter of the act. Greene Co. Planning Bd. v. FPC 455 F.2d 412, 421 (2d Cir. 1972); Sierra Club v. Froehlke, 359 F. Supp. 1289, 1347-49 (S.D. Tex. 1973).

173. Udall v. Tallman, 380 U.S. 1, 16 (1965). *See* Moog Industries v. FTC, 355 U.S. 411, 413 (1958); NLRB v. Hearst Publications, 322 U.S. 111, 130-31 (1944); Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972).

174. 529 F.2d at 375. *See also* note 168 *supra*.

175. As the Secretary's regulations were not promulgated until early 1978, the Sixth Circuit in *Hill* looked to the standards in the Secretary's Guidelines, *supra* note 122, which adopted essentially the same standards. 549 F.2d at 1070 n.16.

the critical habitat,[176] he is uniquely qualified to evaluate whether an agency action will cause sufficient destruction or modification of the habitat to render it deficient for the species' recovery.

C. *Extraordinary Cases: When Section 7 is Irreconcilable with an Agency Project*

Three elements of section 7 have been shown to reduce interagency conflict in its application. First, it is a neutral biological standard. Second, it is applied by the acting agency. Finally, it mandates only the minimum biological requirements of species survival, thereby allowing the acting agency to adapt its action in whatever manner it chooses consistent with that requirement. Section 7 therefore typically acts to compel modification of agency actions without subverting their goals. Of the 4500 consultations under section 7 to date,[177] only three have caused sufficient controversy to reach the courts.

As *Hill* demonstrates, however, intractable conflicts between section 7 and a project may occur. The Tellico Dam involved in that case was largely complete before the ESA was passed or the Snail Darter discovered, and 80 percent complete at the time of the court's injunction.[178] Completion of the dam would have destroyed all but an insignificant portion of the Snail Darter's critical habitat.[179] The Court in *Hill* properly held that the ESA resolves such conflict by requiring the project to be halted in order to save the protected species.[180] What recourse is then available to the project agency if it asserts that the importance of the project is greater than that of the species?

A first escape hatch under the ESA would be for the project agency to enable the Secretary to redesignate critical habitat[181] by implementing a successful transplant program.[182] However, trans-

176. *See* note 121 *supra*.

177. Information provided by the Office of Endangered Species, Dept. of the Interior, Washington, D.C. The Secretary estimates as many as 10-20,000 requests for consultation will be received per year. 43 Fed. Reg. 872 (1978).

178. 549 F.2d at 1067.

179. *Id.* at 1067-68.

180. "Economic exigencies . . . do not grant courts a license to rewrite a statute no matter how desirable the purpose or result might be." *Id.* at 1074.

181. *Id.* at 1074-75. Alternatively, the *Hill* court noted that the Secretary has discretion to delist the species in appropriate circumstances. *Id.*

182. The TVA in the Tellico Dam controversy had attempted an experimental transplant of 700 snail darter specimens to a similar river in the area. 549 F.2d at 1074.

planting an entire population is extremely difficult,[183] especially with animal species, and the Secretary, who has the sole discretion to change critical habitat,[184] has been cautious in evaluating the use of transplant programs. The ESA's stated purposes also discourage such artificial programs where the species' natural environment may be saved.[185]

More directly, the project agency may apply to Congress for an express statutory exemption from the ESA's requirements.[186] The exemption must be explicit, however, as the Sixth Circuit Court of Appeals stated in *Hill* when it rejected the TVA's contention that a general appropriation bill was a sufficient waiver of section 7, when the Snail Darter was only briefly mentioned before the appropriations committee.[187] The Court stated "it is well settled that

183. Efforts of the TVA to transplant the snail darter demonstrate the difficulty of the task. The first transplant attempt was to place the darters in the Knolichucky River, but the TVA discovered that this river was occupied by another specie of darter previously thought extinct in Tennessee, which itself could be harmed by the transplanted snail darters. The agency then transplanted 700 snail darters to the Hiwassee River, but this effort most recently resulted in the death of 98 snail darters when the nets used to capture the fish were found to have been accidentally coated with a poisonous toxin. N.Y. Times, Oct. 27, 1977, § A, at 18, col. 6. Supplemental information provided by the Tennessee Valley Authority, Knoxville, Tenn.

184. *See* note 121 *supra*.

185. The ESA's purposes, are stated: "The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b) (Supp. V 1975). The standard reflects the entire Act's aversion to artificial programs or habitat renewal where the natural environment may be saved. The Smithsonian Institution's REPORT ON ENDANGERED AND THREATENED PLANT SPECIES OF THE UNITED STATES, H.R. DOC. NO. 94-51, 94th Cong., 1st Sess. (1975), prepared pursuant to § 12 of the ESA, 16 U.S.C. § 1541 (Supp. V 1975), concludes:

> Preservation of endangered and threatened species of plants in their native habitat should be adopted as the best method of ensuring their survival. Cultivation or artificial propagation of these species is an unsatisfactory alternative to *in situ* perpetuation and should be used only as a last resort, when extinction appears certain, with the purpose of re-establishing the species in its natural habitat.

Id. at 1. To choose critical habitat by elimination would in most cases be an unscientific and probably destructive way to manage a natural resource.

186. Hill v. TVA, 549 F.2d 1064, 1069, 1074-75 (1977). Bills exempting the Columbia Dam and Tellico Dam have recently been introduced in Congress. H.R. 5879, 4557, 95th Cong., 1st Sess. (1977). *Cf.* Alaska Natural Gas Transportation System-Approval, Pub. L. No. 95-158, 91 Stat. 1268 (1977) (waiving NEPA compliance).

187. *Public Works for Water and Power Development and Energy Research Appropriations for 1977: Hearings before a Subcomm. of the Senate Comm. on Appropriations*, 94th Cong., 2d Sess. 3097 (1976) (no comment by any Senator); *Public Works for Water and Power Development and Energy Research Appropriations Bill, 1977: Hearings before the Subcomm. on Public Works of the House Comm. on Appropriations*, 94th Cong., 2d Sess. 260 (1976) (one comment by Chairman Evins,

repeal by implication is disfavored," especially when "the prior Act is to continue in its general applicability."[188] A bill explicitly exempting Tellico Dam was subsequently submitted in Congress.[189]

Congressional exemption does appear a viable means to resolve extraordinary cases such as *Hill*, largely because of their extreme rarity. Thus far, such cases have only concerned large dams, the only type of project which completely alters the environment over large areas. As the rate of dam-building is expected to decline,[190] this slight imposition upon Congress is arguably worth the preservation of section 7's present language which compels modification. A second reason supporting the practice of express congressional exemptions is the appropriateness of the congressional forum. A stalemate under section 7 creates a conflict between agencies and agency policies, which can only be resolved by a body such as Congress which may take a perspective broader than the jurisdiction of any one agency.

"[e]xplain the environmental problem with the snail darter. Give the committee a report on any litigation pending in connection with the Tellico project;" the report was printed in the record). There was no mention of the snail darter in the appropriations bill.

Congress may amend or repeal a statute "by an . . . appropriation bill, or otherwise." United States v. Dickerson, 310 U.S. 554, 555 (1940). However, the excepting provision must be explicit given the general rule disfavoring repeals by implication. "The intention of the legislature to repeal 'must be clear and manifest.' " Morton v. Mancari, 417 U.S. 535, 551 (1974). *Compare* Committee for Nuclear Responsib. v. Seaborg, 463 F.2d 783, 785-86 (D.C. Cir. 1971) *with* Environmental Defense Fund v. Corps of Eng'rs., 492 F.2d 1123, 1140-41 (5th Cir. 1974).

188. 549 F.2d at 1072-73. *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 549-51 (1974); Posadas v. National City Bank, 296 U.S. 497 (1936). Given the specific application and conflict-resolving nature of section 7, it should be interpreted as a congressional rule setting the standard for resolving conflicting directives to federal agencies. *See* text at note 180 *supra*. It appears fallacious to assign to other congressional acts any intent to overrule section 7 by implication when the legislative enactment occurs long *before* the crucial biological determinations and consultations provided for in section 7. "Where there is no clear intent otherwise, a specific statute will not be controlled or nullified by a general one regardless of the priority of enactment." Morton v. Mancari, 417 U.S. 535, 550-51 (1974). *Accord*, Bulova Watch Co. v. United States, 365 U.S. 753, 758 (1961).

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

190. U.S. NATIONAL WATER COMMISSION, NEW DIRECTIONS IN U.S. WATER POLICY 3-10 (1973) (summary, conclusions and recommendations from the final report of the National Water Commission). The National Water Commission, created by act of Congress in 1968, completed a five year study of national water policy in 1973. It concluded "most of the best dam sites have now been developed," and recommended a fundamental shift in national water policy away from water project development to "reappraising existing policies and programs in the light of changed conditions and demands." *Id.* at 5, 7.

Legislative discretion and a possible avenue of administrative modification therefore exist to resolve otherwise intractable conflicts under section 7. The *Hill* decision, however, prompted several members of Congress to propose bills providing additional means of circumventing the section's requirements. One type of bill has already been discussed—those which exempt certain projects from section 7's requirements altogether.[191] The other form of bill amends section 7 to mitigate its stiff retroactivity rule. It provides that any project which is "on or directly affects the navigable waters of the United States" is exempt from section 7's twin mandates if its construction was commenced before the affected species was proposed to be listed as protected.[192] The bill substitutes for such

191. H.R. 4557, 95th Cong., 1st Sess. (1977) (exempting Tellico Dam). H.R. 5879, 95th Cong., 1st Sess. (1977) (exempting Columbia Dam).

192. This bill appears in identical form at H.R. 7392, 6838, 5079, 5002, 4167, 95th Cong., 1st Sess. (1977). It would add onto the present language of section 7 the following provision:

> (c) (1) In applying [section 7's mandatory provisions] no Federal public works project shall, if such project is on, or directly affects, the navigable waters of the United States, be deemed—
>
> (A) to jeopardize the continued existence of an endangered species or threatened species; or
>
> (B) to result in the destruction or modification of habitat of such species which is determined by the Secretary to be critical if the construction, reconstruction, or operation of the Federal public works project was commenced before the date on which the notice required under section 4(b)(1)(A) of this Act regarding such species was published in the Federal Register.
>
> (2) With respect to any Federal public works project to which paragraph (1) of this subsection applies, the Secretary—
>
> (A) may, after consultation with the Federal department or agency concerned, and with the affected States, by regulation prescribe such requirements regarding the construction, reconstruction, or operation of such project as may be necessary and appropriate to minimize the adverse effects, if any, which such construction, reconstruction, or operation may have on any endangered species or threatened species, and on any critical habitat of such species, within the geographic area directly affected by such projects; and
>
> (B) shall implement such protective measures (including, but not limited to, transplantation) with respect to the endangered species and threatened species in such area as he deems necessary and appropriate.
>
> (3) The harassment, harm, killing, or wounding of any endangered species or threatened species within the geographical area directly affected by any Federal public works project to which paragraph (1) of this subsection applies shall, if such harassment, harm, killing, or wounding is—
>
> (A) directly attributable to the construction, reconstruction, or operation of such project; and
>
> (B) not in violation of any requirement imposed by the Secretary pursuant to paragraph (2)(A) of this subsection not deemed to be a taking of any [protected species] within the meaning of . . . this Act.

exempted projects a different and more limited requirement, merely authorizing the Secretary to prescribe modifications and protective measures "necessary and appropriate to minimize the adverse effects" of the project.[193]

This bill creates a narrow exception to section 7, as it only affects dams and other[194] waterworks projects. This narrowness is apt, as dams have been the only type of project where section 7 has created an intractable conflict,[195] instead of operating in its usual way to compel modifications. While it is then appropriate to create some special rules for dams, the proposed amendment goes to the opposite extreme from the present statute. Although the bill provides reasonably strict mitigation requirements, the very failure of section 7 to reconcile the conflict means that the project cannot be mitigated, and the choice is between the dam or the species. The bill therefore requires that in situations such as that in *Hill*, regardless of the balance between the importance of the particular species and of the dam, the dam always be constructed rather than the species be saved.

The key element missing in the bill is an ability to weigh the dam's benefits with those in saving the species. Both the present statute and the proposed amendment leave Congress as the only forum available for such balancing, when it considers whether or not to specially exempt individual projects. Under the present section 7, the project agency must lobby for an exemption permitting it to build the dam.[196] The proposed amendment would allow the dam's construction and so shift the burden to the Secretary or an environmental group to achieve legislation halting the dam.

An alternate route would be to authorize the Secretary to make special exemptions for dams under a balancing test encompassing the factors deemed relevant by Congress. To do so effectively, the Secretary should be authorized to consider and choose alternative and less destructive means by which to attain the *goals* for which

193. *See* § (c)(2) of the proposed amendment in note 192 *supra*.

194. The bill appears unduly broad in including waterwork projects other than dams, as many such projects may not have the disruptive effects of dams, and so could be modified to comport with section 7's provisions. For instance, a canal project could be similar to the highway project at issue in *Coleman* where the court allowed the highway to go forward provided that certain modifications were implemented. *See* text at note 138 *supra*.

195. Of the 4500 section 7 consultations, only 3 have had to go to court for settlement, two of which involved dams. *See* text at notes 126, 159, 177 *supra*.

196. *See* text at notes 186-89 *supra*.

the dam is being built, such as economic development or energy production.[197] A proper balance could then be made between the interests of the project and of the species, if the present section 7 is deemed not to do so.

III. Conclusion

The ESA imposes substantial restrictions on the states and federal agencies when their actions affect protected species, thereby intruding federal environmental concerns into both state and federal activity. The regulated governmental entities are, however, afforded substantial control in complying with the ESA's mandate, so long as they comply with the broad outlines established by the Act. The states exercise an initial choice whether to participate in the Cooperative Agreement program and thereby gain management control over resident protected species and federal funds for their activities. They are then free to formulate their own conservation and enforcement programs, subject to annual review by the Secretary. This double flexibility afforded the states insures that the Cooperative Agreement program is constitutional: the governmental immunity doctrine only prohibits the coercive imposition of federal law upon the states. Further, given the extent of state control under the ESA, the Secretary may constitutionally take a hard line at an annual review of a Cooperative Agreement and condition the federal funds on improvements in the state's program.

Federal agencies may also exercise independent decisional authority under section 7 of the Act, which requires them to modify their activities to insure the survival of a protected species. Whether, and how, they are to do so is left to the discretion of the agency, so long as they consult with the Secretary in reaching a decision. The opinion of the Secretary will not be binding, but will weigh heavily with the courts if the project agency is sued by a private party to enjoin its action. Under the principles of the Administrative Procedure Act, a court should give great weight to the decisions of the agency with expertise in the field, here the Secretary.

The ESA's scheme, therefore, decentralizes environmental decision-making to give substantial flexibility and control to the state

197. *Hill*, 549 F.2d at 1067.

and federal agencies acting in the field. The Secretary retains certain powers of review over both of these government entities, however, thereby exerting an ultimate check on their action. Practically, this system enhances flexibility and cooperation in carrying out the ESA; it also alleviates the constitutional problems which arise when the ESA forces change in the traditionally state-dominated field of wildlife management.

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