Endangered Species Act Amendments of 1978: A Congressional Response to Tennessee Valley Authority v. Hill

I cannot tell you
How beautiful the scene is, and a little terrible, then,
when the crowded fish
Know they are caught . . .
Lately I was looking from a
night mountain-top
On a wide city, the colored splendor, galaxies of light:
how could I help but recall the seine-net
Gathering the luminous fish? I cannot tell you how beautiful the city appeared, and a little terrible.
I thought, We have geared the machines and locked all together into interdependence . . . [1]

The passage of the Endangered Species Act Amendments of 1978 (Amendments)[2] was in a large part stimulated by the judicial decision in *Tennessee Valley Authority v. Hill (Hill)*.[3] This case pitted the survival of a three inch fish, the snail darter, against the completion of a $120 million[4] federal water development and dam project, Tellico. More importantly for purposes of this article, it provided the country generally, and Congress specifically, the opportunity to reassess the balance to be drawn between environmental and economic interests. The case was brought under the

1. ROBINSON JEFFERS, THE PURSE-SEINE, NORTON ANTHOLOGY OF POETRY 991 (A. Eastman ed. 1970).

2. Pub. L. No. 95-632, CONFERENCE REPORT, ENDANGERED SPECIES ACT AMENDMENTS OF 1978, H.R. REP. NO. 1804, 95th Cong., 2d Sess. (1978) (to be codified at 16 U.S.C. §§ 1531-1543).

3. 437 U.S. 153 (1978).

4. N.Y. Times, June 16, 1978, § A, at 1, col. 5. The scope or design of the project has not been altered since 1966, though the original cost estimate was $42.5 million. Environmental Defense Fund v. TVA, 468 F.2d 1164, 1170 (6th Cir. 1972).

Endangered Species Act of 1973 (ESA)[5] which embodied the commitment of Congress to the preservation of life forms threatened with extinction. This commitment was based on the belief that all forms of fish, wildlife, and plants are of "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."[6]

This article evaluates the Amendments in two contexts—as a step in the evolution of endangered species legislation and as a specific response to the *Hill* case. Part I contains the legislative background of the ESA. Parts II and III cover the events leading up to *Hill* and the response of the judiciary. Part IV explores the alternatives that Congress considered to deal with the *Hill* dilemma, and Part V is an in depth account of the development of the Amendments, which were a product of compromise. The concluding section explores the probable effects of the Amendments.

I. LEGISLATIVE BACKGROUND

Historically, federal legislation to protect wildlife has followed one of two approaches—acts designed to protect specific species[7]

5. 16 U.S.C. §§ 1531-1543 (1976). The ESA will also be referred to as "the Act."

6. *Id.* § 1531(a)(3). In *TVA v. Hill*, the Supreme Court found that since this was the policy which Congress had enacted, it could not say "that in this case the burden on the public through the loss of millions of unrecoverable dollars would greatly outweigh the loss of the snail darter. . . . [N]either the Endangered Species Act nor Art. III of the Constitution provides federal courts with authority to make such fine utilitarian calculations." This decision remained in the province of the legislature. TVA v. Hill, 437 U.S. 153, 187 (1978).

7. The earliest act of this type was the Black Bass Act of 1926, 16 U.S.C. §§ 851-856 (1976), which makes it illegal to knowingly transport any black bass or other fish contrary to the law of the state or foreign country where the fish is found or transported, or to purchase or receive such fish. The Migratory Bird Conservation Act of 1929, 16 U.S.C. §§ 715-715r (1976), allows the Secretary of the Interior (Secretary), on the approval of the Migratory Bird Conservation Commission, to purchase or rent areas of land and water necessary for the conservation of migratory birds "for use as inviolate sanctuaries." *Id.* § 715d. Under the Bald Eagle Protection Act of 1940, civil and criminal penalties are provided for anyone who takes, possesses, sells, purchases, or transports any bald or golden eagle. 16 U.S.C. §§ 668-668d (1976).

Two recent enactments following this pattern are the Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1384 (1976), and the Wild Horses and Burros Act of 1971, 16 U.S.C. §§ 1331-1340 (1976). The first makes it unlawful to take any marine mammal on the high seas or to possess, transport, or sell such a mammal. The second allows the Secretary to "designate and maintain specific ranges on public lands as sanctuaries" for wild free-roaming horses and burros. *Id.* § 1333. It also provides criminal penalties for those who willfully remove, attempt to so remove, convert to private use, maliciously cause the death of, or sell such animals.

and acts designed to protect broad classifications of life forms. Methods typically employed by the former include allowing land acquisition by the federal government in order to protect natural habitats and providing penalties for actions deemed illegal.[8] The ESA, however, follows the second approach and represents an effort to deal comprehensively with the problem of extinction caused by human action. The following material traces the legislative roots and explores the provisions of the ESA.

The earliest act designed with a potentially broad coverage of wildlife generally was the Lacey Act of May 25, 1900.[9] This act prohibits the importation of certain species[10] which the Secretary of the Interior (Secretary) prescribes "to be injurious to human beings, to the interests of agriculture, horticulture, forestry, or to wildlife or the wildlife resources of the United States."[11] The Migratory Bird Conservation Act of 1929[12] was enacted next, but has only a tangential impact on other forms of wildlife. Migratory birds found within the sanctuaries established under its auspices are protected and, almost incidentally, so are "other species of wildlife found thereon, including species that are threatened with extinction."[13]

In 1966, Congress, for the first time, addressed the issue of endangered species in a broad and direct manner. With the passage of the Endangered Species Preservation Act of 1966 (ESPA),[14] Congress acted to conserve, protect and propagate native species of fish and wildlife, including migratory birds, which were threatened with extinction. The Secretary was given the authority to establish and carry out programs to that end and to encourage all other federal agencies to do the same. Those agencies were to seek to protect such endangered species "insofar as is practicable and consistent with the primary purposes" for which they were organized.[15]

8. Examples of such actions are possessing, removing, transporting, selling, purchasing, receiving, or killing such wildlife.

9. 16 U.S.C. §§ 677e, 701 (1976); 18 U.S.C. §§ 42-44 (1976).

10. The species covered were wild mammals, wild birds, fish (including mollusks and crustacea), amphibians, and reptiles. 16 U.S.C. §§ 667e, 701 (1976); 18 U.S.C. §§ 42-44 (1976).

11. 18 U.S.C. § 42 (1976).

12. 16 U.S.C. § 715-715r (1976).

13. *Id.* § 715i. This was amended by the ESA, Pub. L. No. 93-205, § 13(b), 87 Stat. 902 (1973). The words "threatened with extinction" were replaced by "listed . . . as endangered species or threatened species."

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

15. *Id.* at 926.

The ESPA also provided for land acquisition, where appropriate, to further its purposes.

Three years later, Congress amended the ESPA in order to strengthen federal protection of endangered species. This was accomplished by the passage of the Endangered Species Conservation Act of 1969 (ESCA).[16] There, the Secretary was given additional power to develop a list of species threatened with worldwide extinction and to prohibit their importation into the United States.[17] More money was appropriated for land acquisition.

In December 1973, Congress passed the ESA.[18] The impetus came from legislative findings that various species[19] "have been rendered extinct as a consequence of economic growth and development"[20] and that still other species "are in danger of or threatened with extinction."[21] Though "the elimination of certain species by better adapted competitors is fundamental to the evolutionary processes of natural selection,"[22] sudden extinction may upset the balanced stability of natural biological communities of many interrelated lifeforms. There is also a value in the existence of a large "gene pool" from which to draw for research and investigation in the areas of biology, medicine, behavioral science, and commercial

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

17. Since the jurisdiction of the United States would not necessarily extend to the natural habitats of all species threatened with worldwide extinction, forbidding importation which limited the possible market for such species was an indirect way of providing some protection.

18. 16 U.S.C. §§ 1532-1543 (1976). This Act repealed both the ESPA and the ESCA, except for those provisions of both dealing with the National Wildlife Refuge System. It should be noted that not all of the provisions discussed in this section are still in force, though they were throughout the entire *Hill* controversy. Part V of this article discusses the modifications made by the Amendments.

19. "Species" covers not only species, but smaller taxa, groups of plants and animals classified according to their presumed natural relationships, e.g., "in common spatial arrangement that interbreed when mature." *Id.* § 1532(11). This means that for purposes of the Act, endangered subspecies are covered under the term "endangered species." SENATE COMM. ON COMMERCE, REPORT ON THE ENDANGERED SPECIES ACT OF 1973, S. REP. NO. 307, 93d Cong., 1st Sess., [hereinafter cited as ESA SENATE REPORT] *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2989, 2995.

20. 16 U.S.C. § 1531(a)(1) (1976).

21. *Id.* § 1532(a)(2). At that time, Congress found the number of domestic species on the Secretary's list to be 109 and that the rate of extinction had increased to an average of one species per year. ESA SENATE REPORT, *supra* note 19, [1973] U.S. CODE CONG. & AD. NEWS at 2990.

22. Wood, *Section 7 of the Endangered Species Act of 1973: A Significant Restriction for All Federal Activities*, 5 ENVT'L L. REP. 50,189, 50,191 (1975).

technology.[23] The view that science does not presently know the future value of all species is reflected in the Act's stated purpose. The ESA was designed to provide a means whereby ecosystems, endangered species[24] and threatened species[25] could be conserved.[26] The inclusion of threatened species in the coverage of the Act considerably broadened the scope of its protection.

Largely responsible for the effectuation of the Act is the Department of the Interior,[27] and, within that Department, the Fish and Wildlife Service (FWS).[28] The main procedures provided by the ESA for protection of endangered species include land acquisition,[29] maintenance of published lists of endangered and threatened species,[30] consultation between the Secretary and other federal agencies to prevent federal actions from jeopardizing such species,[31] and the provisions for civil and criminal sanctions.[32] Congress gave the Secretary the power to carry out the listing procedure. On the basis of the best available scientific and commercial data, he or she makes a determination of endangered or threatened status.[33] This can be done on the Secretary's own motion or when any interested person, presenting substantial evidence of jeopardy to any species, petitions for such a determination.[34] The Act also

23. *Id.* It was also pointed out that technological, industrial, and agricultural uses are constantly being discovered for plant and animal species formerly ignored. Various examples have been given, such as the jojoba bean, *id.* at 50,192 n.33, and the horseshoe crab, 124 CONG. REC. S10,973 (daily ed. July 18, 1978) (remarks of Sen. Culver). It has even been suggested that the snail darter itself has a utilitarian value as an indicator of local water quality. [1978] 8 ENVIR. REP. (BNA) 1991, 1992.

24. Any species in danger of extinction throughout all or a significant portion of its range, the region where the species is currently found, is considered endangered. 16 U.S.C. § 1532(4) (1976).

25. Threatened species are those likely to become endangered within the foreseeable future. *Id.* § 1532(15).

26. Conservation includes all methods and procedures "necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this [Act] are no longer necessary." *Id.* § 1532(2).

27. *Id.* § 1532(10).

28. *Implementing § 7 of the Endangered Species Act of 1973: First Notices from the Courts*, 6 ENVT'L L. REP. 10,120 (1976).

29. 16 U.S.C. § 1534 (1976). "Often, protection of habitat is the only means of protecting endangered animals which occur on non-public lands." ESA SENATE REPORT, *supra* note 19, [1973] U.S. CODE CONG. & AD. NEWS at 2992.

30. *See* text accompanying notes 33-38 *infra*.

31. *See* text accompanying notes 40-45 *infra*.

32. *See* text accompanying notes 46-48 *infra*.

33. 16 U.S.C. § 1533(b)(1) (1976).

34. *Id.* § 1533(c)(2). Endangerment can be caused by destruction, modification, or curtailment of habitat; overutilization for commercial, sporting, scientific, or educa-

describes an expedited listing procedure, which was used in *Hill*,[35] for emergency situations posing significant risks to the well-being of any species.[36] Published lists[37] of species determined by the Secretary to be endangered or threatened must be maintained in the Federal Register.[38] Any regulations deemed necessary and advisable to provide for the conservation of such species are also to be published.[39]

The provision for interagency cooperation in section seven[40] is one of the shortest operational provisions of the Act, but it is also the focal point of much controversy. It is an unavoidable directive[41] to all federal departments and agencies to act so as to further the purposes of the Act "by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary . . . to be critical."[42] Consultation is required between the Secretary and any agency whose actions might jeopardize an endangered or threatened species. Recent regulations have explained that consultation is a three-step process.[43] First, the agency decides whether its action will affect any protected species. If so, it requests consultation with the Secretary.[44] If the Secretary determines that there

tional ends; disease or predation; inadequacy of existing regulatory mechanisms; or other natural or manmade factors. *Id.* § 1533(a)(1).

35. 40 Fed. Reg. 47,505 (1975).

36. 16 U.S.C. § 1533(f)(2)(B)(ii) (1976).

37. 16 U.S.C. § 1533(b) and the rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. § 553 (1976), collectively define the procedures which the Secretary must follow in maintaining the lists. 16 U.S.C. § 1533(f)(1) (1976).

38. 16 U.S.C. § 1533(c)(1) (1976). This provision also states that each list "shall specify with respect to each such species over what portion of its range it is endangered or threatened." *Id.* This portion of the species range is its critical habitat. Critical habitat was not defined in the original Act, but was administratively construed by 43 Fed. Reg. 870, 874 (1978) (to be codified in 50 C.F.R. § 402.02).

39. 16 U.S.C. § 1533(d) (1976).

40. *Id.* § 1536.

41. TVA v. Hill, 437 U.S. 153 (1978). There has also been much support from the commentators for a mandatory reading of section 7. Note, *Endangered Species Act: Constitutional Tensions and Regulatory Discord*, 4 COLUM. J. ENVT'L L. 97, 130 n.148 (1977); *Wildlife Protection: Section 7 of the Endangered Species Act Comes of Age*, 7 ENVT'L L. REP. 10,049, 10,051 (1977); Wood, *supra* note 22, at 50,190.

42. 16 U.S.C. § 1536 (1976).

43. 43 Fed. Reg. 870, 875 (1978) (to be codified in 50 C.F.R. § 402.04).

44. If the FWS concludes on its own that an agency's action will jeopardize an endangered or threatened species, it may initiate consultation. *Id.* at 875.

is no danger, the agency's obligations are ended. If the actions will jeopardize a covered species, the agency is so informed. Alternatively, the Secretary can decide that he or she has inadequate information and require the acting agency to make further biological studies. When the agency has done so, the Secretary will issue a biological judgment on the activity's effect. The importance of this judgment can be seen in its use by courts in subsequent suits.[45]

The final method for implementing the policy behind the ESA is prohibiting a multitude of acts, such as the taking,[46] transporting, or selling of endangered or threatened species.[47] Enforcement is procured through the use of civil and criminal penalties and through provision for citizen suits.[48] Anyone, on his or her own behalf, may bring a citizen suit "to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation" of the Act.[49] Jurisdiction is vested in the district court in the district in which the violation occurs, without regard to the amount in controversy.[50] The original Act also authorized appropriations for the enforcement of the provisions up to and through the fiscal year ending September 30, 1978.[51]

The Amendments were designed to improve this Act. For the most part, the intent was to write more flexibility into the ESA. In order to understand why this was necessary, it is helpful to know the circumstances surrounding the development of the Tellico project and the discovery of the snail darter (Part II) and, also, the courts' response to that situation (Part III).

45. *See* TVA v. Hill, 437 U.S. 153 (1978); National Wildlife Federation v. Coleman, 529 F.2d 359, 375 (5th Cir.), *cert. denied*, 429 U.S. 979 (1976). *Accord*, Note, *Endangered Species Act: Constitutional Tensions and Regulatory Discord*, *supra* note 41, at 130, 133.

46. For purposes of the ESA, the term "take" includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect. 16 U.S.C. § 1532(14) (1976).

47. Other prohibited acts include importing, exporting, possessing, delivering, carrying, shipping, receiving, or offering to sell such endangered species. *Id.* § 1538.

48. *Id.* § 1540.

49. *Id.* § 1540(g)(1).

50. *Id.* In addition, the court may award costs, including reasonable attorney and expert witness fees. *Id.* § 1540(g)(4).

51. *Id.* § 1542.

II. TELLICO AND THE SNAIL DARTER

A. *Tellico*

Tellico, first conceived in 1939,[52] was to have been the sixty-first dam[53] built by the Tennessee Valley Authority (TVA).[54] In 1966, it was proposed as a multipurpose, water resource and regional economic development project[55] to "develop navigation; control destructive floods; generate electric power; provide water supply; promote recreation, fish and wildlife use, and shoreline development; create new job opportunities; advance industrial development; and foster improved economic conditions"[56] in three Tennessee counties.[57] The plan called for the acquisition of 38,000 acres.[58] Of those, 16,000 would become a thirty-three mile long navigable reservoir behind a concrete and earthfill dam to be located near the mouth of the Little Tennessee River.[59] The remaining acres were to be used for industrial, recreational, residential and commercial development, including a planned community called Timberlake, estimated to attract 50,000 inhabitants.

From its inception, critics attacked the desirability of the project. The dam would provide only 0.1% of the electricity within the TVA system[60] and add only 1.3% to the water storage capacity

52. 124 CONG. REC. S11,028 (daily ed. July 18, 1978) (remarks of Sen. Nelson); 124 CONG. REC. S11,033 (daily ed. July 18, 1978) (remarks of Sen. Weicker).

53. Wood, *On Protecting An Endangered Statute: The Endangered Species Act of 1973*, 37 FED. B.J. 25, 30 (1978).

54. 16 U.S.C. § 831 (1976). TVA is a wholly-owned public corporation of the United States.

55. Hill v. TVA, 549 F.2d 1064, 1067 (6th Cir. 1977), *aff'd*, 437 U.S. 153 (1978).

56. Brief for Appellee at 2-3, Hill v. TVA, 549 F.2d 1064 (6th Cir. 1977), *reprinted in* Note, *The Snail Darter v. The Tennessee Valley Authority: Is The Endangered Species Act Endangered?*, 66 KY. L.J. 362, 367 (1977).

57. These were the counties of Blount, Loudon and Monroe. Hill v. TVA, 549 F.2d 1064, 1067 (6th Cir. 1977).

58. This land was mostly used for agricultural purposes before the Tellico project.

59. The Little Tennessee River originates in the mountains of North Carolina and converges with the Big Tennessee River near Knoxville. Environmental Defense Fund v. TVA, 468 F.2d 1164, 1169 (6th Cir. 1972).

60. Note, *The Snail Darter v. The Tennessee Valley Authority: Is The Endangered Species Act Endangered?*, *supra* note 56, at 368 n.33. The public mind generally associates both electricity and flood control with the construction of dams. Many people viewed the Tellico project this way, 124 CONG. REC. S11,028, note 52 *supra*, even though TVA itself only attributed 13% of the benefits of the dam to flood control and another 11% to hydroelectric power. Endangered Species Committee Decision on the Application for Exemption for Tellico Dam and Reservoir Project (Feb.

above Chattanooga,[61] the principal beneficiary of the project's flood control capacity. Boeing Corporation, the builder for Timberlake, dropped out of the endeavor because of doubts regarding the project's financial viability.[62] If the land were to remain in production, it would yield an estimated value of between $38 and $52 million a year from agriculture and related activities of agribusiness.[63] In contrast, the dam would provide less that $1 million per year value in flood control and $3 million from power generation.[64] Additionally, the project had been described as "a most questionable and speculative venture into real estate development."[65] From this viewpoint, the cost-benefit ratio[66] depended on the purchase by TVA of land in the vicinity of the project, now mostly agricultural land, and its resale at a profit for commercial and industrial purposes after the reservoir was completed.

Non-economic interests would also be affected. The development of the last free-flowing stretch of the Little Tennessee River would lead to the loss of what is "acknowledged to be the largest and best trout fishing water east of the Mississippi River."[67] Additionally, several sites of historical interest would be destroyed.[68] Fort Loudon, England's southwest outpost in the French and Indian War, sits on the south side of the Little Tennessee and would be inundated by the reservoir. There are also several Indian villages

7, 1979) (Cecil D. Andrus, Chm. of Endangered Species Committee) [hereinafter cited as Decision]. The Tellico dam would have had no electric generators, but would rather have contributed hydrostatic capacity to the existing TVA system via a canal connecting the Tellico reservoir with the Fort Loudon reservoir. Hill v. TVA, 549 F.2d 1064, 1067 n.2 (6th Cir. 1977).

61. Note, *The Snail Darter v. The Tennessee Valley Authority: Is The Endangered Species Act Endangered?*, *supra* note 56, at 368 n.33. Chattanooga is 70 miles southwest of the dam site.

62. *Supreme Court Protects Snail Darter from TVA; Congress Poised to Weaken Endangered Species Act*, 8 ENVT'L L. REP. 10,154, 10,157 (1978) [hereinafter cited as *Supreme Court Protects Snail Darter*].

63. 124 CONG. REC. S11,028, note 52 *supra*.

64. *Id.* These are not the only considerations to be weighed in evaluating the financial aspects of the project, but they do serve to show the difficulty of justifying the project in terms of the traditional benefits attributed to dams.

65. 112 CONG. REC. 23,416 (1966) (remarks of Rep. Cleveland).

66. The claimed cost-benefit ratio was 1:1.4. *Id.* 23,417 (remarks of Rep. Dingell).

67. Environmental Defense Fund v. TVA, 339 F. Supp. 806, 808 (E.D. Tenn.), *aff'd*, 468 F.2d 1164 (6th Cir. 1972). This was not viewed as much of a loss by some: "it is more important to provide 7000 jobs . . . over the pleasures of a few fishermen." 112 CONG. REC. 23,416, 23,418 (1966) (remarks of Rep. Evins, (D. Tenn.)).

68. TVA v. Hill, 437 U.S. 153, 156 (1978).

nearby, whose archeological significance has yet to be fully determined.[69]

Notwithstanding such arguments, Congress gave its go ahead to TVA for Tellico by passing the Public Works Appropriations Act of 1967.[70] TVA then authorized construction[71] and began the concrete portion of the dam. Nevertheless, TVA's difficulties were just beginning. In June 1971, TVA filed a draft environmental impact statement (EIS) pursuant to the National Environmental Policy Act of 1969 (NEPA)[72] with the Council on Environmental Quality.[73] In August, a round of litigation was begun under NEPA.[74] By this time, TVA had already spent $29 million to purchase land, construct the concrete portions of the dam, and build a four lane highway over the proposed reservoir. Plaintiffs,[75] who with others, had unsuccessfully urged TVA to consider alternatives before bringing the suit, moved for an injuction against any further construction activity until TVA filed an adequate EIS.[76] The District Court granted the preliminary injuction, holding the draft statement to be mostly unsupported conclusions. Judge Taylor found "[a]s a result, the non-expert reader is denied the opportunity to intelligently evaluate TVA's conclusions. . . . [I]t is impossible to determine the thoroughness of the research . . . ."[77] The Court of

69. One Indian Village nearby is Echota, a former sacred capital of the Cherokee nation dating back to the sixteenth century. Another is the village of Tennase from which Tennessee derives its name. By the fall of 1973, TVA had arranged for Echota and Fort Loudon to be partially preserved. The latter, though, would lose its river setting. Environmental Defense Fund v. TVA, 371 F. Supp. 1004, 1008 (E.D. Tenn. 1973), *aff'd*, 492 F.2d 466 (6th Cir. 1974).

70. Pub. L. No. 89-689, 80 Stat. 1002, 1014 (1966).

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

72. 42 U.S.C. §§ 4321-4347 (1976).

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

74. The suit was originally filed in the District Court for the District of Columbia. It was dismissed on the grounds of improper venue and plaintiffs filed again in the District Court for the Northern District of Alabama. The Alabama court transferred the case to the Eastern District of Tennessee. Environmental Defense Fund v. TVA, 468 F.2d 1164, 1170-71 (6th Cir. 1972).

75. Plaintiffs were the Environmental Defense Fund, Trout Unlimited, Association for the Preservation of the Little T, and Thomas Moser, a landowner. Byrne, *Tellico: One Ball of Wax*, 24 FED'N INS. COUN. Q. 53 (1973).

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

77. *Id.* at 809.

Appeals for the Sixth Circuit affirmed,[78] notwithstanding the fact that the project had been started before the effective date of the statute and the proposed steps were only the last part of an integrated plan for economic development. The injunction was lifted in 1973, only after TVA filed a final EIS that complied with the NEPA requirements.[79]

B. *The Snail Darter*

In August 1973, a University of Tennessee ichthyologist[80] discovered the snail darter[81] in the Little Tennessee River.[82] In December, Congress passed the ESA. At that time, the Tellico project was fifty percent complete.[83] In early 1975, several residents of the area petitioned the Secretary, pursuant to section four of the ESA, to add the snail darter to the endangered species list.[84] Following appropriate procedure and despite TVA's protests, the FWS so designated the snail darter, reasoning that:

> [T]he snail darter occurs only in the swifter portions of shoals over clean gravel substrate in cool, low-turbidity water. Food of the snail darter is almost exclusively snails which require a clean gravel substrate for their survival. The proposed impoundment of water behind the proposed Tellico Dam would result in total destruction of the snail darter's habitat.[85]

The effective date of the designation was the tenth of November.[86] Pursuant to section eleven[87] of the ESA, plaintiffs[88] then notified

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

79. Environmental Defense Fund v. TVA, 371 F. Supp. 1004 (E.D. Tenn. 1973), *aff'd*, 492 F.2d 466 (6th Cir. 1974).

80. Dr. David Etnier; TVA v. Hill, 437 U.S. 153, 158 (1978).

81. Its scientific name is *Percina (Imostoma) tanasi*. 41 Fed. Reg. 13,927 (1976).

82. Hill v. TVA, 419 F. Supp. 753, 755 (E.D. Tenn. 1976), *rev'd*, 549 F.2d 1064 (6th Cir. 1977), *aff'd*, 437 U.S. 153 (1978). The snail darter is a three inch tannish bottom dwelling member of the perch family which feeds upon fresh water snails (therefore its name). When discovered, the population was estimated to be 10,000 to 15,000. Hill v. TVA, 549 F.2d at 1068. There are approximately 130 other known species of darters and new species are being constantly discovered. Eight to ten of them have been identified in the last five years. TVA v. Hill, 437 U.S. at 159.

83. Hill v. TVA, 419 F. Supp. 753, 759 (E.D. Tenn. 1976).

84. Hiram Hill, Zygmunt Plater, and Joseph Congelton requested review under the expedited emergency provisions of 16 U.S.C. § 1533(f)(2)(B)(ii). 40 Fed. Reg. 47,505 (1975).

85. *Id.* at 47,506.

86. *Id.* at 47,505.

87. 16 U.S.C. § 1540(g)(2)(A)(i) (1976).

88. *See* note 102 and accompanying text *infra*.

both the Department of the Interior and TVA that continued work on Tellico, then seventy to eighty percent complete, would violate section seven of the ESA.[89]

In June of 1975, TVA had begun its own investigation. This included a search for other populations of the fish and an attempt to transplant over 700 fish into the Hiwassee River,[90] a habitat similar to that of the Little Tennessee.[91] Its search of sixty to seventy other watercourses in Alabama and Tennessee and the upper reaches of the Little Tennessee proved to be of no avail, and doubt was also cast on the probable success of the transplant.[92] The FWS commented that the snail darter's absence from the Hiwassee River, "despite the fact that the fish has had access to it in the past, is a strong indication that there may be biological and other factors in this river that negate a successful transplant."[93] A five to fifteen years wait might be necessary in order to determine whether the transplant would prove to successful.[94] Some events which could jeopardize the survival of the transplants occur infrequently, such as a very severe winter or a particularly bad drought.[95]

In December of 1975, the FWS proposed miles .5 to 17 of the Little Tennessee River[96] as the snail darter's critical habitat.[97] This stretch of the river was slated to be covered by the reservoir. Fewer than seventy of the fish had been found below the dam, and none had been found above river mile 18.[98] Since reservoirs tend to have more silt and less oxygen than flowing rivers, it would be

89. Hill v. TVA, 419 F. Supp. 753, 756 (E.D. Tenn. 1976).

90. The Hiwassee is about 45 miles south of the Little Tennessee. It also runs into the Big Tennessee River.

91. Hill v. TVA, 419 F. Supp. 753, 757-58 (E.D. Tenn. 1976).

92. It is difficult to tell what the current status is of TVA's transplants into the Hiwassee. In arguing before the Supreme Court, plaintiffs alluded to evidence that only adult snail darters had been found at the transplant sites, raising doubt that successful spawning was taking place. N.Y. Times, Apr. 19, 1978, § A, at 19, col. 1. In contrast, during the House debates on the Amendments, Representative Duncan of Tennessee indicated that the 700 transplanted fish had increased to 3,700, while the number in the Little Tennessee had dropped to only 500. 124 CONG. REC. H12,891 (daily ed. Oct. 14, 1978).

93. 40 Fed. Reg. 47,505, 47,506 (1975).

94. Note, *The Snail Darter v. The Tennessee Valley Authority: Is The Endangered Species Act Endangered?*, *supra* note 56, at 385 n.145.

95. Wood, *supra* note 53, at 33.

96. Mile 0 is the mouth of the Little Tennessee. Mile .5 is right above the dam.

97. 40 Fed. Reg. 58,308 (1975).

98. Hill v. TVA, 549 F.2d. 1064, 1068 n.6 (6th Cir. 1977).

more likely that the darter eggs would smother, that the adult population would find the reservoir unsuitable for spawning, and that their primary food source, the fresh water snail, would not survive if the dam were closed.[99] In April, the FWS designated miles .5 to 17 as the snail darter's critical habitat with an effective date of May 3, 1976.[100]

In February of 1976, a suit for a permanent injunction[101] against the Tellico project was begun by citizens and users of the Little Tennessee Valley area, the Association of Southeastern Biologists and the Audubon Council of Tennessee.[102]

III. Tennessee Valley Authority v. Hill: Judicial Response

A large part of the public outcry to enact the Amendments and add flexibility to the ESA was a result of the decision in *Hill*. In that case, the Supreme Court found that protection of an endangered species, from the adverse effect of any action taken to further any federal project, was an affirmative command to the acting federal agency,[103] even at the expense of the entire project.[104] In enacting the ESA, Congress, said the Court, had already performed all the balancing between competing environmental and economic interests and had decided in favor of endangered species in all instances.[105]

Plaintiffs in *Hill* sought a permanent injunction against TVA's completion of the Tellico dam project as the only means to accomplish the purpose of the ESA, *i.e.*, the conservation of an endangered species. The Supreme Court accepted the premise, in accordance with the findings of the District Court for the Eastern District of Tennessee,[106] that closure and operation of the dam would either eradicate the known population of snail darters or destroy their critical habitat.[107] The question, therefore, was whether such closure of the dam would bring TVA into violation of the

99. Hill v. TVA, 419 F. Supp. 753, 756 (E.D. Tenn. 1976).
100. 41 Fed. Reg. 13,926-28 (1976).
101. Injunctive relief is provided for in 16 U.S.C. § 1540(g)(1)(A) (1976).
102. Hill v. TVA, 419 F. Supp. 753, 754 (E.D. Tenn. 1976).
103. TVA v. Hill, 437 U.S. 153, 173 (1978).
104. *Id.*
105. *Id.* at 184-88.
106. Hill v. TVA, 419 F. Supp. 753, 757 (E.D. Tenn. 1976).
107. TVA v. Hill, 437 U.S. 153, 171 (1978).

Act.[108] This turned on the interpretation of section seven which states that:

> All other Federal departments and agencies shall . . . utilize their authorities in furtherance of the purposes of [the Act] . . . by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary . . . to be critical.[109]

This language, said Chief Justice Burger, "admits of no exception,"[110] the focus being on the use of "shall" and "to insure."

In finding this mandatory directive, the Court not only looked at the actual language of section seven, but also examined both of the earlier legislative acts which the ESA superseded[111] and the specific legislative history of the ESA itself.[112] Particularly significant, in considering the responsibility of federal agencies, was the absence of such qualifying language as "insofar as is practicable and consistent with the[ir] primary purposes."[113] Such language had appeared both in the predecessor act, the ESPA,[114] and in *all* bills introduced in 1973,[115] the session which ultimately resulted in the passage of the ESA. Chief Justice Burger also pointed out that "Congress was also aware of certain instances in which exceptions to the statute's broad sweep would be necessary."[116] This was shown by the exceptions the Act provided, "none of which would even remotely apply to the Tellico Project."[117] It should be noted that the District Court never directly faced the mandatory language and character of section seven. Its discussion was almost exclusively focused on balancing the equities.[118]

108. *Id.* at 172. After deciding this question in the affirmative, the Court then dealt briefly with the issue of the appropriateness of injunctive relief. Because of Congress' mandatory formulation of the protection to be given endangered species, the majority decided that the granting of the injunction was not discretionary. *Id.* at 193-95. This issue is the focus of Justice Rehnquist's dissent. *Id.* at 211-13.

109. 16 U.S.C. § 1536 (1976). *See also* text accompanying notes 40-45 *supra*.

110. TVA v. Hill, 437 U.S. 153, 173 (1978).

111. *Id.* at 174-76. *See also* text accompanying notes 14-17 *supra*.

112. TVA v. Hill, 437 U.S. 153, 176-80 (1978).

113. *Id.* at 181-83.

114. *See* text accompanying note 15 *supra*.

115. TVA v. Hill, 437 U.S. 153, 181 (1978).

116. *Id.* at 188.

117. *Id.* Such exceptions are codified in 16 U.S.C. § 1539 (1976).

118. What the District Court *said* and what it *did* were not always easily recon-

The majority opinion relegated to two footnotes the arguments that "actions" in section seven meant only prospective actions,[119] not projects already substantially funded and completed,[120] and that preventing the closure of the Tellico dam would give the ESA retroactive effect.[121] It discussed, in considerably more detail, the suggestion that Congress had approved the completion of Tellico by authorizing appropriations for the project even after the discovery of the snail darter and its inclusion on the list of endangered species.[122] In the final analysis, however, the Court stated that re-

cilable. It acknowledged that it was a legislative and not a judicial function to balance the importance of any endangered species against a major federal project. Hill v. TVA, 419 F. Supp. 753, 763 (E.D. Tenn. 1976). Nevertheless, the court said:

> This case must be viewed in the context of its particular facts and circumstances. We go no further than to hold that the Act does not operate in such a manner as to halt the completion of this particular project. *A far different situation would be presented if* the project were capable of reasonable modifications . . . or if the project had not been under way for nearly a decade.

Id. (Emphasis added).

In his dissent, Justice Powell would have followed the District Court. He said:

> It is not our province to rectify policy or political judgments by the Legislative Branch, however egregiously they may disserve the public interest. But where the statutory language and legislative history, as in this case, need not be construed to reach such a result, I view it as the duty of this Court to adopt a permissible construction that accords with some modicum of common sense and the public weal.

TVA v. Hill, 437 U.S. 153, 196 (1978) (Powell, J., dissenting).

119. Justice Powell said that the meaning of "actions" is "far from 'plain.' " He would have it mean not *all* actions an agency is capable of taking, but only those "actions that the agency is *deciding whether* to authorize, to fund, or to carry out." (Emphasis in original.) TVA v. Hill, 437 U.S. 153, 205 (1978) (Powell, J., dissenting). Chief Justice Burger's response was that, under this reading, the inclusion of "or carry out" would be superfluous. Additionally, he said that if Congress had meant that an agency must comply only in the planning stage, it would have said so, as it did in NEPA. *Id.* at 173 n.18.

120. The critical date of this determination could either be the effective date of the ESA or the listing date for the particular endangered or threatened species. *See also* text accompanying notes 138-42 *infra*.

121. Chief Justice Burger stated that "under the Act there could be no 'retroactive' application since, by definition, any *prior* action of a federal agency which *would* have come under the scope of the Act must have already *resulted* in the destruction of an endangered species or its critical habitat." (Emphasis in original.) TVA v. Hill, 437 U.S. 153, 186 n.32 (1978). ***But see id.*** at 202 (Powell, J., dissenting).

122. *Id.* at 189-93. TVA first raised the issue during Congressional appropriation hearings in both Houses in April and May of 1975. Hill v. TVA, 419 F. Supp. 753, 758 (E.D. Tenn. 1976). It informed the committees that the snail darter had been discovered but that it was trying to preserve the fish and felt that the project should be completed in any event. Nevertheless, Congress approved TVA's general budget, which included a $29 million appropriation for the project. *Id.* In March of 1976, there were more appropriation hearings and, once again, TVA reported on the snail

peal by implication was a very disfavored concept, especially when the alleged repeal was contained in an appropriations measure.[123]

IV. CONGRESSIONAL REACTION

The decision in *Hill* raised a public outcry apparently based on the belief that the Act required that the interests of such obscure species as a three inch fish be put ahead of economic progress. In actuality, the passage of the ESA was a recognition that the long-term interest of human welfare was paramount to man's perceived short-term interests.[124] The criticism, however, reflected an underlying feeling that environmentalists had seized on the snail darter as a way to block a project that they were unable to halt on other grounds.[125] The ironic result seemed to be that the snail darter was now endangering the very law that had protected it. The controversy was such that, though authorization for funding under the original Act ran out September 30, 1978, an attempt in mid-

darter controversy. *Id.* at 759. It also gave an encouraging picture of the progress of the transplantation experiments. Less than a month after the District Court decision denying the injunction, both committees recommended that the full budget request of nine million dollars for continued work on Tellico be granted. The Senate Committee report included a statement that it did not view the ESA as prohibiting the completion of the project. S. REP. NO. 94-960, 94th Cong., 2d Sess. 96 (1976), *reprinted in* TVA v. Hill, 437 U.S. 153, 167 (1978). Following the Circuit Court's grant of the permanent injunction in January 1977, TVA officials again appeared before the appropriation committees. The committees recommended that the full amount requested be granted and, in addition, recommended that a supplemental two million dollars be appropriated for the transplantation project. Both recommendations were followed by the whole Congress. TVA v. Hill, 437 U.S. 153, 170-171 (1978).

123. Chief Justice Burger maintained that there was no evidence to indicate that Congress as a whole was even aware of TVA's position. TVA v. Hill, 437 U.S. 153, 192 (1978). The appropriations acts themselves did not identify the projects for which the sums had been appropriated. For that information, one must resort to their legislative histories. *Id.* at 189 n.35. The Court stressed the fact that the committee reports could only be taken to express the attitudes and understandings of the committee members themselves. *Id.* at 189. Since TVA was the only witness, the evidence presented in the committee hearings only represented one side of the issue. Furthermore, Congress reacted identically, approving the general appropriations that included funds for the Tellico project, after both the denial and the granting of the permanent injunction by the District Court and Circuit Court, respectively.

124. 124 CONG. REC. H12,871 (daily ed. Oct. 14, 1978) (remarks of Rep. Dingell).

125. On June 14, 1978, the New York Times reported that "[e]nvironmentalists have seized on the snail darter to block a project they were unable to halt on other grounds." N.Y. Times, June 14, 1978 § A, at 24, col. 1. *Accord, Wildlife Protection: Section 7 of the Endangered Species Act Comes of Age, supra* note 41, at 10,052.

October of 1978 to pass a bill solely to fund the ESA for an additional three years was unsuccessful.[126]

Reactions in Congress covered an entire spectrum. Some members supported the Court's view of the mandatory character of the protection afforded by the ESA and believed that the Act should stand as interpreted.[127] Others felt exceptions should be made for projects already significantly advanced at the time the Act was passed.[128] Still other members of Congress felt that each conflict should be determined on its own merits, though there was much dispute over who should have the authority to make such an evaluation.[129] These varying proposals are discussed below.

A. *Supporters of the Original ESA*

The most vocal advocate in the Senate for the retention of the mandatory nature of the ESA was Senator Nelson of Wisconsin. He felt that the criticism of the Act as a threat to progress was completely unfounded. In his view, the snail darter controversy did not demonstrate any deficiency in the Act because the project should never have been started in any case. In fact, he believed the ESA was working quite well.[130] In support of this position it was often reiterated that, of the 4500 consultations that had so far taken place under the Act,[131] all but 124 were successfully resolved informally,[132] and all but three were resolved administratively.[133] As one commentator wrote:

> The Supreme Court's decision in *TVA v. Hill* was a clear and simple affirmation of the congressional intent underlying the Endangered Species Act. The resulting clamor for amendment of the Act is regrettably based on the faulty premise that the Tellico decision proves that the Act is not working as intended

126. The bill was H.R. 10883, 95th Cong., 2d Sess. (1978). Time magazine attributed the defeat to the snail darter controversy. TIME, Oct. 16, 1978, at 84.

127. *See* text accompanying notes 130-35 *infra*.

128. *See* text accompanying notes 138-42 *infra*.

129. *See* text accompanying notes 144-61 *infra*.

130. 124 CONG. REC. S11,027-28 (daily ed. July 18, 1978) (comments of Sen. Nelson). *Accord*, 124 CONG. REC. S10,972 (daily ed. July 18, 1978) (comments of Sen. Leahy); 124 CONG. REC. S11,156 (daily ed. July 19, 1978) (comments of Sen. Brooke).

131. Wood, *supra* note 53, at 28.

132. Note, *The Snail Darter v. The Tennessee Valley Authority: Is The Endangered Species Act Endangered?*, *supra* note 56, at 397.

133. Wood, *supra* note 53, at 28.

> and is too rigid. The Act has worked very well indeed, but its smooth functioning depends to a high degree on the successful resolution of interagency conflicts through the statutorily mandated consultation process. This process, if carried out carefully and in good faith, has been shown to be surprisingly effective in resolving such conflicts.[134]

During the debate over the Amendments, Senator Nelson proposed an amendment geared to reinstating the ESA in its original form, but he later withdrew it.[135] No similar proposal was subsequently advocated on the floor of either House.

B. *Exemptions for Projects Already Begun*

From the start of the snail darter controversy, there were advocates supporting various versions of a grandfather clause exemption.[136] Among them was TVA, who argued before the courts that a provision exempting projects already begun[137] should be read into the existing Act.[138] Representative Beard of Tennessee introduced a series of identical bills in March and May of 1978 that would exempt any project which was "on or directly affects the navigable waters of the United States" if "construction, reconstruction, or operation" had begun before notice of the listing was published in the Federal Register.[139] Several commentators maintained that these proposals were too narrow, while still others saw them as too broad. Some found no reason to limit their scope to projects related solely to navigable waters.[140] Others argued that a

134. *Supreme Court Protects Snail Darter, supra* note 62, at 10,159.

135. Sen. Nelson introduced his amendment, 124 CONG. REC. S11,027 (daily ed. July 18, 1978), but withdrew it later, 124 CONG. REC. S11,035 (daily ed. July 18, 1978).

136. A "grandfather clause" is one which gives special consideration or rights to individuals or entities acted upon by a specific statute, solely because such individual or entity was extant on a particular date. In this case, the argument is that the Tellico project should be exempt from the ESA because it had been begun by the critical date. (The two dates that have been suggested for this purpose are the date of enactment of the ESA and the date of the proposed listing of the endangered or threatened species.)

137. The Circuit Court in *Hill* saw still another problem with this approach—that of creating a workable standard of review. The difficulty perceived was in deciding the amount of expenditures or percentage of completion necessary to warrant disregarding the danger to the species. Hill v. TVA, 549 F.2d 1064, 1071 (6th Cir. 1977).

138. Hill v. TVA, 419 F. Supp. 753, 758-60 (E.D. Tenn. 1976). *Accord*, Note, *The Snail Darter v. The Tennessee Valley Authority: Is The Endangered Species Act Endangered?*, *supra* note 56, at 402.

139. H.R. 7392, 6838, 5079, 5002, 4167, 95th Cong., 1st Sess. (1977).

140. Wood, *supra* note 53, at 35.

more narrow exemption would be sufficient. The exemption could be limited to dams, since other projects would not affect such widespread areas and could presumably be made to conform to the existing Act.[141] Yet another opinion focused on whether there had already been an irretrievable commitment of resources when the danger to the affected species was discovered.[142]

All of these proposals shared the problem of totally defeating the purpose of the Act[143] with respect to the particular endangered or threatened species found on the site of an exempted project. None of the proposals required the acting agency either to weigh the competing values of the project and the concerned species or to mitigate the damage to such species.

C. *Separate Determination of Each Conflict on Its Own Merits*

This subsection discusses the proposals of those who felt that, while the Act was working well in general, more flexibility needed to be provided for those situations where a conflict remained even after the section seven consultation provisions were exhausted. The proposals uniformly provided for individual consideration of each dispute, but differed with regard to the designation of who was to make the final determination. Under one formulation, Congress, the initiator of the policy of preservation, would also be the body capable of making exceptions to that policy.[144] Argument would take place on the floor of both Houses on the merits of a particular exemption. If granted, a bill to that effect would be passed. Supporters of this approach claimed that it would preserve the agencies' overall duty to consult under the Act[145] and that Congress would bring a broader perspective to the problem than the jurisdiction of any one agency would allow.[146] Such a bill, granting

141. Note, *Endangered Species Act: Constitutional Tensions and Regulatory Discord, supra* note 41, at 140 n.194.

142. *Wildlife Protection: Marine Mammals, Endangered Species Threatened in Congress by Economic Concerns*, 7 ENVT'L L. REP. 10,124, 10,127 (1977) [hereinafter cited as *Wildlife Protection*].

143. *See* notes 22-23 and accompanying text *supra*.

144. This approach has been used under NEPA, *e.g.*, regarding the trans-Alaska oil pipeline. Pub. L. No. 93-153, 87 Stat. 576 (1976). Support for this approach with the ESA can be found in Note, *Endangered Species Act: Constitutional Tensions and Regulatory Discord, supra* note 41, at 137-38; *Wildlife Protection, supra* note 142, at 10,127.

145. *Supreme Court Protects Snail Darter, supra* note 62, at 10,158.

146. Note, *Endangered Species Act: Constitutional Tensions and Regulatory Discord, supra* note 41, at 138.

TVA an exemption for Tellico, was actually introduced in the House.[147] It did not pass, but an amendment to the Amendments, granting a specific exemption for Tellico, was adopted by the House.[148] The joint conference committee eliminated it, however, in the final version of the bill.

Based on the statistics of past consultations,[149] it was argued that such impasses would occur so rarely that this method of resolution would be quite viable. There was, however, no real consensus as to how often such resolution might be required or requested. As of August 1978, an additional 137 animal species and 1,850 plant species had been formally proposed for listing.[150] The FWS estimated that, in fiscal year 1979 alone, 20,000 consultations would take place under the Act.[151] This figure should be compared to the total of 4500 consultations which took place in all previous years under the Act. Such a growth in the number of consultations suggests there might be a similar increase in the number of irresolvable conflicts through the use of the section seven consultation procedures. In addition, detractors said that Congress was already overburdened and, moreover, worked very slowly;[152] that an implementing agency would be in a better position to weigh carefully technical and environmental considerations against financial and economic factors;[153] and that allowing Congressional exemption would be a sign to some that "pet projects" could be undertaken in spite of the Act.[154] In the "parade of potential horribles" was the eventuality that Congress might not be in session when a conflict came up involving a defense project affecting national security.[155] But, it should be noted that Congress would still be the body authorizing exceptions to its own policy of protection even if it del-

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

148. 124 CONG. REC. H12,890-93 (daily ed. Oct. 14, 1978).

149. *See* text accompanying notes 131-33 *supra*.

150. HOUSE COMM. ON MERCHANT MARINE AND FISHERIES, ENDANGERED SPECIES ACT AMENDMENTS OF 1978, H. REP. NO. 1625, 95th Cong., 2d Sess. 6 (1978) [hereinafter cited as H. REP. NO. 1625].

151. SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, ENDANGERED SPECIES ACT AMENDMENTS OF 1978, S. REP. NO. 874, 95th Cong., 2d Sess. 2-3 (1978) [hereinafter cited as S. REP. NO. 874].

152. Wood, *supra* note 53, at 27.

153. *Supreme Court Protects Snail Darter*, *supra* note 62, at 10,158.

154. Note, *The Snail Darter v. The Tennessee Valley Authority: Is The Endangered Species Act Endangered?*, *supra* note 56, at 401.

155. Wood, *supra* note 53, at 36.

egated the final decision to some other body, so long as Congress promulgated the criteria for deciding.

Another proposal,[156] which called for some form of balancing, received marginal support in the House. It provided that the President could grant an exemption if the acting agency, after having consulted with the Secretary and also having lost on the merits in court, still wanted to proceed with the project.[157] This proposal had many of the same disadvantages as the previous approach. Its feasibility would be limited if it were required too often, and the decision would still be susceptible to political influences over purely technical and environmental considerations. Additionally, since the exemption could not be granted without prior judicial review, if the President had already decided to grant the exception, court time would be wasted and moot questions would be adjudicated.

One approach, which never received a strong following, might be termed the insignificant species exemption.[158] Under one of its formulations, if a species could meet the following five criteria, it would be allowed to die out. The five criteria are:

> (1) the reason for the species' disappearance is that it has not evolved appropriate adaptations to environmental changes caused by natural phenomena;
>
> (2) the species does not represent a unique genetic composition needed for study of an important biological problem (e.g. cancer research);
>
> (3) the species does not provide human beings with significant emotional enjoyment or potential practical benefits;
>
> (4) the presence, absence, or well-being of the species does not provide environmental data needed by human beings;
>
> (5) human beings do not recognize a strong moral responsibility for preserving the species.[159]

It is difficult to imagine any consensus regarding the applicability of the given tests and unlikely that many species could qualify. No one can foresee what future contributions a given species might

156. H.R. 13807, 95th Cong., 2d Sess. (1978).

157. The President would be required to find that the agency had carried out the required consultation and conducted an agency hearing, that the action in question was of national or regional significance, and that the national interest warranted the granting of the exemption. If the President so found, an executive order could be issued. This decision would not be subject to judicial review. *Id.*

158. *Wildlife Protection, supra* note 142, at 10,127; Wood, *supra* note 53, at 24.

159. Wood, *supra* note 53, at 34.

make.[160] Additionally, this approach totally denies the value of genetic variations of which the Supreme Court in *Hill* wrote:

> [T]hey are potential resources. They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask.
>
> . . .
>
> Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analysed? . . . Sheer self-interest impels us to be cautious.[161]

A balancing procedure was embodied in the enacted compromise. It recognizes that conflicts between the interests of economic development and endangered species can occur, but still promotes a consideration of the individual situation. It was developed to remove the decision from a strictly political arena and to avoid the impossible situation of attempting to valuate a particular species. The following section charts its evolution through Congress, discusses its relevant features, and points out its strengths and weaknesses.

V. THE ENDANGERED SPECIES ACT AMENDMENTS OF 1978: A COMPROMISE

A. *S. 2899*

The Senate Committee on Environment and Public Works gave its reasons for amending the Act in its report on S. 2899.[162] It wanted to provide flexibility, while insuring "that the integrity of the interagency consultation process . . . be preserved."[163] The need for flexibility was pointed out by the seemingly irresolvable conflict in the Tellico case and the position in which the TVA found itself—that is, that "it [had] ambiguous congressional directives and that it [was] not at liberty to terminate the project at [that] time."[164] Other federal actions were then underway which had elements of potentially irresolvable conflicts. In addition, the General Accounting Office (GAO) alleged that at times the FWS

160. *See* note 23 *supra*.

161. H. REP. NO. 93-412, 93d Cong., 1st Sess. 4-5 (1973), *reprinted in* TVA v. Hill, 437 U.S. 153, 178 (1978).

162. *See* note 151 *supra*.

163. *Id.* at 5.

164. *Id.* at 2.

had refrained from listing species for fear of provoking the Congress into weakening the protective provisions of section seven.[165]

The bill, as passed by the Senate,[166] was a compromise forged by Senators Culver and Baker. It also provided funding for the entire Act through September 30, 1981[167] and contained a new definition of critical habitat that included only areas essential to conservation of the species and requiring special management.[168] It specifically indicated that this definition might not cover the entire existing range of a species, but might include areas where a species was not then found. The bill also required determination of the critical habitat concurrently with the determination of species status.[169]

In revising section seven,[170] the consultation requirement between the acting agency and the Secretary was retained, but the absolute mandate that the agency not jeopardize any endangered species or their critical habitats now contained a caveat. This section created the Endangered Species Committee (ESC) which was given the power to grant exemptions. The ESC was composed of seven members: the Secretaries of Agriculture, Army, and the Interior; the Chairman of the Council on Environmental Quality; the Administrators of both the Environmental Protection Agency and the National Oceanic and Atmospheric Administration; and the Governor of any affected state.[171] Senator Culver, one of the sponsors of the bill, noted that the composition of the ESC was so weighted that "the presumption in favor of protection of the species is overwhelming."[172] Five of the seven members must vote for

165. *Id.* at 3. For a review of section seven provisions, *see* text accompanying notes 40-45 *supra*.

166. S. 2899, 95th Cong., 2d Sess., 124 CONG. REC. H12,903 (daily ed. Oct. 14, 1978) [hereinafter cited as S. 2899].

167. *Id.* § 8, 124 CONG. REC. at H12,905.

168. *Id.* § 2(1), 124 CONG. REC. at H12,903. *See* note 38 *supra* and note 185 *infra*.

169. S. 2899, *supra* note 166, at § 10, 124 CONG. REC. at H12,905. Limited exceptions to concurrent determination were provided where no critical habitat information was available or the particular species was listed prior to the ESA (*i.e.* under the ESCA).

170. *Id.* § 3, 124 CONG. REC. at H12,903-04.

171. "[I]n the case of an action affecting more than one State, the Governors of all such States . . . shall cast collectively a single vote . . . ." *Id.* As enacted, the Amendments required the President to appoint one individual from each affected State, instead of automatically including the Governor. *See* note 203 *infra*.

172. 124 CONG. REC. S10,974 (daily ed. July 18, 1978) (remarks of Sen. Culver). Some Congressmen felt the presumption was so strong that "the man-made project is

exemption for the application to succeed. Further, after an amendment by Senator Heinz was passed,[173] only permanent members and not their representatives were allowed to cast votes. Initially, the bill contained a provision that required the presence of all seven members to constitute a quorum, but, as passed, it required only five.[174]

An agency could apply for an exemption only after the required consultation with the Secretary had taken place and a finding had been made that an irresolvable conflict existed.[175] The ESC would then determine whether the case was ripe for review.[176] The issue was required to pass jurisdictional hurdles which included findings by the ESC that:

> (i) the requirements of the consultation process . . . have been met; and
>
> (ii) there has been a reasonable and responsible effort to resolve the conflicts which are known to exist, and the Federal agency requesting such exemption has made, subsequent to the initiation of the consultation . . . , no irreversible or irretrievable commitment of resources which forecloses the consideration of modification or alternatives to such action; and
>
> (iii) an irresolvable conflict exists . . . .[177]

sure to lose." 124 CONG. REC. S11,129 (daily ed. July 19, 1978) (remarks of Sen. Garn).

173. 124 CONG. REC. S11,040 (daily ed. July 18, 1978).

174. 124 CONG. REC. S11,135 (daily ed. July 19, 1978) (amendment proposed by Sen. Scott).

175. S. 2899, *supra* note 166, at § 3, 124 CONG. REC. at H12,904. An amendment was proposed by Senator Stennis which would have given a wide degree of discretion to the acting agency. The agency's responsibility to insure that it did not jeopardize the species or its habitat was qualified "insofar as practicable and consistent with their primary responsibilities." 124 CONG. REC. S10,971 (daily ed. July 18, 1978). If the project or a particular part thereof was at least 50% complete based on the amount expended, the agency head was required to balance the benefits to the public when the action was completed against the "esthetic, ecological, educational, historical, recreational or scientific loss" should the species become extinct, "but in no event shall such agency be precluded by reason of this Act . . . from carrying out any such actions." *Id.* This amendment would have significantly reduced the impact of the Act had it passed since the agency was not required to consider the possible benefits from alternative actions. In addition, there were no requirements that the danger to the species be mitigated in the event that the agency did decide to go ahead with the project as planned.

176. The ESC would have to give the application immediate consideration if the National Security Council requested, whenever failure to make exception for a critical military installation would have an adverse effect on the security of the country. S. 2899, *supra* note 166, at § 3, 124 CONG. REC. at H12,904.

177. *Id.*

If all these criteria were met, the ESC would go on to make a determination on the merits. In order to grant an exemption, it must find that:

> (A) there is no reasonable and prudent alternative to such action; and
>
> (B) the action is of national or regional significance; and
>
> (C) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and that such action is in the public interest.[178]

The Senate committee further explained that these criteria were not intended as limitations on the factors that could be considered, but should be used only for guidance. "Clearly such factors as the ecological, educational, genetic, recreational, aesthetic, historic and scientific values of the affected, endangered or threatened species should be given weight in any final decision."[179]

The committee also enunciated the difference between the alternatives that the acting agency must consider in the initial consultation with the Secretary and those which the ESC was required to consider. The agency must have thoroughly reviewed all modifications and alternatives within its jurisdiction which were also consistent with the objectives of the project. On the other hand, the ESC must consider *all* available alternatives, not limited to those of the original project objectives or the acting agency's jurisdiction.[180] Furthermore, the ESC must be sure that the action incorporates all reasonable measures deemed necessary by the Secretary to minimize adverse impacts on the species or its habitat.[181]

As one commentator noted: "[i]mplicit in the Culver-Baker approach is a strong but less than absolute priority for environmental values . . . ."[182] It had the benefit of allowing a very broad review of the proposed project. Instead of considering only some aspects, the review was to take place in a cabinet-level committee. It did, however, add another layer of bureaucracy to the conflict resolution process. Some commentators have suggested that the availability of any exceptions might weaken the consultation at the earlier stages.[183] In view of the jurisdictional qualifications an agency must

178. *Id.*
179. S. REP. NO. 874, *supra* note 151, at 7.
180. *Id.* at 4.
181. S. 2899, *supra* note 166, at § 3, 124 CONG. REC. at H12,904.
182. *Supreme Court Protects Snail Darter*, *supra* note 62, at 10,158.
183. *Id.* at 10,159.

satisfy in order to receive a review on the merits by the ESC, however, the possibility of exemption is not likely to influence greatly the early consultation between the agency and the Secretary.

B. *H.R. 14104*

H.R. 14104[184] was the House version of the ESA amendments. Its basic principles were very similar to S. 2899, in which the major departure from the existing Act was the creation of an ESC. Once again, the Congressional committee responsible for the bill made the primary assumption that the consultation between the acting agency and the Secretary was central to the resolution of any conflicts. Only those provisions significantly different from S. 2899 will be discussed here.[185]

As in S. 2899, the proposed legislation provided that all federal agencies were to insure against any degradation of species or habitat, unless granted an exemption from the ESC.[186] The House ver-

184. H.R. 14104, 95th Cong., 2d Sess. (1978) (introduced Sept. 18 by Rep. Leggett) [hereinafter H.R. 14104].

185. Both Houses had believed that the definition of critical habitat should be included in the statute, instead of left to administrative determination. Previously, the designation of critical habitat had been a purely biological question. The House wanted to allow the Secretary some discretion to alter a given critical habitat so as to limit the economic impact of the designation—at least where only an invertebrate species was endangered. *Id.* § 2(2). The weight to be given these considerations was left completely to the Secretary's discretion. H. REP. NO. 1625, *supra* note 150, at 17. The bill, as reported by the committee, also excluded taxonomic categories below subspecies from the term "species" for purposes of the Act. *Id.* at 25. Both of these provisions would have been significant limitations on the scope of the Act—one potentially limited the extent of protection, the other removed entire lifeforms from the reach of the Act. Another provision, originally proposed as a committee amendment, would have required a review of the endangered species list at least once every five years. *Id.* at 1.

186. Under H.R. 14104, the ESC would have been composed of only six members. Missing from this version was the Administrator of the Environmental Protection Agency.

A vote of not less than four members, voting in person, was required to grant an exemption. H. REP. NO. 1625, *supra* note 150, at 15. The basis of such a decision was that:

> (A) there are no feasible and prudent alternatives to the agency action;
>
> (B) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest; and
>
> (C) the action is of regional or national significance.

H.R. 14104, *supra* note 184, at § 3. The ESC was required to establish reasonable mitigation measures, H. REP. NO. 1625, *supra* note 150, at 15, and judicial review of the decision was available. *Id.* at 24.

sion, however, began the exemption application process with an initial consideration by a three member review board.[187] Initially, the board had to determine whether the agency carried out its consultation in good faith, conducted any required biological assessments, and refrained from making any irreversible or irretrievable commitment of resources after the initiation of the consultation process. If the board made positive findings on these issues, it would proceed to consider the application on the merits. It would then make recommendations to the ESC on the application, which would include mitigation and enhancement measures.[188] By creating the review board, the House bill added still another layer of bureaucracy to the exemption process. Although the existence of a screening body would reduce the time required of important ESC members, the duties of the board seem somewhat duplicative of those of the ESC.

Before the House and Senate versions of the bill were sent to the joint conference committee, two significant amendments were proposed and approved on the floor of the House. One, offered by Representative Beard of Tennessee, provided that once an exemption had been granted for a particular project, it would be good even as to new species added to the lists of endangered or threatened species and as to species newly discovered within the construction area.[189] The second amendment provided a specific exemption from the Act for the Tellico project.[190]

The bill also included authorization for appropriations to take the Act through fiscal year 1981. H.R. 14104, *supra* note 184, at § 4. This was modified by amendment so that funding was authorized only through March 31, 1980 because "[p]reliminary findings by the General Accounting Office indicate[d] that the Endangered Species Act [was] incredibly mismanaged." 124 CONG. REC. H12,881-82 (daily ed. Oct. 14, 1978) (amendment offered by Rep. Beard). *See also* text accompanying notes 222-24 *infra*.

187. H. REP. NO. 1625, *supra* note 150, at 14.

> One is appointed by the Governor or Governors, one by the Secretary, and the third is selected by the first two within 15 days of the appointment of the second. If the two appointees are unable to agree on a third member, the Endangered Species Committee is directed to select the third member.

Id. at 21. As passed, the Amendments provided for one review board member to be appointed by the Secretary, one by the President after receiving recommendations from the Governors of the affected States, and the third was to be an administrative law judge selected by the Civil Service Commission. *See* note 201 *infra*.

188. H. REP. NO. 1625, *supra* note 150, at 14-15.

189. 124 CONG. REC. H12,881-82 (daily ed. Oct. 14, 1978).

190. *See* note 158 *supra*.

C. *The Endangered Species Act Amendments of 1978*

The Amendments[191] were clearly a product of compromise, containing provisions from both the House and Senate versions and funding for the Act through March 31, 1980.[192] As enacted the Amendments provide that the Secretary must consider the economic impact on areas proposed as critical habitats and exclude any such areas if the benefits of the exclusion outweigh the benefits of including them.[193] This is not limited to critical habitats of invertebrate species as in the House bill, but does contain the caveat that the Secretary cannot exclude an area from designation if failure to delineate it would result in the extinction of the species. The definition of "species" still includes lower taxonomic groups, such as subspecies, but only with respect to vertebrate fish or wildlife.[194] The Amendments include provisions requiring specification of critical habitats at the time the species are listed as endangered or threatened[195] and requiring review of such lists at least once every five years.[196]

The early consultation process between the agency and the Secretary has been modified for those situations in which no contract for construction has been entered into and no construction has been begun by the date of enactment of the Amendments. In that event, the agency shall request information from the Secretary as to whether any species listed or proposed for listing is present in the construction areas.[197] If the Secretary identifies a potential conflict, the agency is required to conduct a biological assessment for the purpose of identifying any endangered species likely to be affected.[198] After the initiation of consultation, the agency may not make any irreversible or irretrievable commitment of resources which would have the effect of foreclosing any reasonable and prudent alternative measures.[199] At the end of the consultative pro-

191. Endangered Species Act Amendments of 1978 (Amendments), Pub. L. No. 95-632, CONFERENCE REPORT, ENDANGERED SPECIES ACT AMENDMENTS OF 1978, H.R. REP. NO. 1804, 95th Cong., 2d Sess. (1978) [hereinafter CONF. REP.] (to be codified at 16 U.S.C. §§ 1531-1543).

192. *Id.* § 9, CONF. REP. at 12.

193. *Id.* § 11, CONF. REP. at 16.

194. *Id.* § 2, CONF. REP. at 2.

195. *Id.* § 11, CONF. REP. at 13.

196. *Id.* § 11, CONF. REP. at 14.

197. *Id.* § 3, CONF. REP. at 3.

198. *Id.*

199. *Id.*

cess, the Secretary must issue a written opinion containing suggestions of reasonable and prudent alternatives.[200]

In the case of an irresolvable conflict, an application for exemption shall be considered initially by a review board.[201] Rather than making recommendations to the ESC, the review board prepares a report discussng the availability of reasonable and prudent alternatives, the nature and extent of benefits of the action and any alternatives, whether the action is in the public interest and of national or regional significance, and, finally, an appropriate reasonable mitigation and enhancement measures available to the ESC.[202]

Under the Amendments, the ESC is composed of seven members.[203] The presence of five, appearing in person, is required to constitute a quorum. An exemption can be granted only by the vote of five of those members.[204] The basis of its decision to grant an application must be that there are no reasonable and prudent alternatives, that the benefits of the action clearly outweigh the benefits of any alternatives and the action is in the public interest,[205] that such action is of regional or national significance, and that the ESC has provided reasonable mitigation and enhancement measures.[206] Once granted, an exemption will be permanent with respect to that project, even as to species later listed or discovered within the construction area, unless it would result in the extinction of the species.[207]

200. *Id.*

201. *Id.* § 3, CONF. REP. at 5-7.

202. CONF. REP., *supra* note 191, at 19, 21. (Due to printing errors, pages 19-21 of the Conference Report should be read in the order: 19, 21, 20.)

203. Amendments § 3, *supra* note 191, CONF. REP. at 4.

204. Members must vote in person. *Id.* § 3, CONF. REP., at 8.

205. The Conference Committee stressed that the ESC should *not* "balance the benefits of the action against the value associated with the listed species." CONF. REP., *supra* note 191, at 20. This caution has been overlooked in reports by the press. N.Y. Times, *supra* note 125; N.Y. Times, Jan. 24, 1979, § A, at 21, col. 3.

206. These measures should be reasonable in cost, likely to protect the listed species, and technologically possible. Their provisions must be spelled out in the document granting the exemption, authorized by Congress prior to implementing the exempted project, and funded by Congress concurrently with all of the other project features. CONF. REP., *supra* note 191, at 22.

Notwithstanding the other provisions of the Act and the Amendments, the ESC must grant an exemption if the Secretary of Defense finds it necessary for reasons of national security. Amendments § 3, *supra* note 191, CONF. REP. at 8.

207. Amendments § 3, *supra* note 191, CONF. REP. at 8. Judicial review of the ESC's decision is available. *Id.* § 3, CONF. REP. at 9.

The House had specifically exempted Tellico from the provisions of the Act, but the Senate had rejected this approach. In the version which emerged from the conference committee, TVA was granted a telescoped procedural review, omitting the consideration of the application by the review board.[208] Additionally, the ESC was not required to find that the project was of national or regional significance[209] and was required to decide the merits of the case within ninety days after the date of enactment.[210] Lest others believe that this abbreviated review would be available for other projects, the conference committee stated their view that "these are the last instances when any project should receive special consideration in the exemption process."[211]

VI. CONCLUSION

A. *Tellico and the Snail Darter Revisited*

On January 23, 1979, the ESC voted unanimously not to grant TVA an exemption from the ESA for the Tellico project.[212] This decision was based on the findings of the ESC that there was a reasonable and prudent alternative and that the benefits of completing the project[213] did not clearly outweigh the benefits of alternative courses of action.[214] The primary alternative[215] called for removal of a portion of the earthen dam and development of the site as a

208. CONF. REP., *supra* note 191, at 24-25.

209. *Id.*

210. If no decision had been forthcoming in that time, the project would have been automatically exempted. *Id.*

211. The Grayrocks Dam and Reservoir in Wyoming was also granted special consideration by the Amendments. *Id.*

212. Endangered Species Committee Transcript on the Application for Exemption for Tellico Dam and Reservoir Project (Jan. 23, 1979) (Cecil D. Andrus, Chm. of Endangered Species Committee) [hereinafter cited as Transcript].

213. As the ESC viewed it, the benefits of completing the dam and filling the reservoir included power production, flood control, recreation, navigation and water supply. Decision, *supra* note 60, at 3.

214. *Id.* at 2.

215. The ESC also discussed two other project alternatives. One involved the construction of a 2500 acre reservoir on the Tellico River, a tributary of the Little Tennessee River. TVA had found this alternative infeasible, though according to the Decision some commentators found it to be reasonable and prudent. *Id.* The last suggestion involved leaving the reservoir areas unflooded, but keeping the dam intact for flood control. There was, however, no assurance that this alternative would permit continued viability of the snail darter population. *Id.* at 2-3.

free flowing river.[216] The ESC found the river development scheme to be technically feasible and prudent to implement.[217] This plan involved some unquantifiable benefits from preservation of archaeological, cultural, and historic sites; customary fish and wildlife values (*e.g.*, trout fishing); and ecological, aesthetic and scenic values associated with the preservation of the snail darter.[218] The net measured benefits, as found by the ESC, would be about one half million dollars more for the reservoir than for the river development alternative.[219] This was not enough to clearly outweigh the benefits of this alternative, as required by the Amendments, particularly when the unquantifiable benefits were considered. In spite of this, late in the summer of 1979 Congress passed a $10.8 billion energy and water development bill which included an appropriation for the completion of the Tellico Dam. The President signed the bill on September 25, 1979 and on the following day the New York Times reported that "one reason the President had agreed to the bill was to avoid the possibility that Congress would weaken or abolish the Endangered Species Act in the future."

B. *An Evaluation*

The Amendments should add more flexibility to the original ESA, but at a cost, the extent of which will not be known until the Amendments are enforced. The scope of the ESA has been limited somewhat by the new definitions of species and critical habitat, though in real numbers, the exclusion of lower taxonomic groups of invertebrate species and the additional discretion over the designation of critical habitats given to the Secretary may not be too significant. Neither of these changes would have affected the outcome of the Tellico controversy. The requirement that all agencies check with the Secretary at the planning stage on all projects begun after the enacting date of the Amendments provides an additional layer of insurance. Again, had this provision been part of the original act, the Tellico controversy still would not have been averted.

216. Its quantifiable benefits included agricultural and forestry production and recreation. *Id.* at 3.

217. *Id.* at 2.

218. *Id.* at 3. According to one source, these measures may have come too late because silting and other construction problems have already decreased the number of snail darters in the Little Tennessee to about 500. [1978] 9 ENVIR. REP. (BNA) 664.

219. Transcript, *supra* note 212, at 18.

The value of the review board will need to be reexamined after its operative provisions have been utilized in the resolution process, as it is questionable whether its screening function is worth the added layer of bureaucracy. The first two controversies resolved by the ESC did not utilize this procedure and seemed to be none the worse for it. The same function could probably be performed adequately by the ESC's own staff, as in the Tellico decision.

Commentators have noted at least two other problems with the original Act. The first occurs when the Act is seemingly misused:

> Some mechanism needs to be found to keep special interest groups from using the Endangered Species Act cynically, for their own purposes. . . . [A] number of "environmentalists" . . . do not care about some of these endangered species at all. They are using the act as a way to attack the construction of dams, grazing, drilling, mining, and any other activity they think is undesirable.[220]

The answer has already been provided:

> [T]hough relatively few lawsuits are filed *solely* to protect endangered species, many environmental suits attempt to preserve natural ecosystems from the burgeoning "development" which threatens the habitats needed by endangered species and other wildlife. . . . [S]urely there is nothing dishonorable about enforcing a valid statute to the full extent allowed by its plain meaning.[221]

The final problem concerns the manner in which the FWS is allegedly administering the listing procedures.[222] To the extent that political pressures prevent the FWS from listing a species out of "fear of provoking the Congress into weakening the protective provisions of section 7,"[223] the flexibility added to section seven by the Amendments should eliminate the difficulty. To this end, the new provisions regarding the scope of the meaning of "species" and the discretion granted with regard to the desgination of critical habitats should also help. Full consideration of this problem must wait, however, for more information on the extent of the problem from the forthcoming GAO report.[224]

220. 124 CONG. REC. S11,017 (daily ed. July 18, 1978) (remarks of Sen. Garn). This criticism has also been made of NEPA.

221. Emphasis added. Wood, *supra* note 53, at 31-32.

222. H. REP. NO. 1625, *supra* note 150, at 13.

223. S. REP. NO. 874, *supra* note 151, at 3.

224. 124 CONG. REC. H13,358 (daily ed. Oct. 13, 1978) (remarks of Rep. Lott).

In passing the 1978 Amendments, Congress has largely reaffirmed its stance on the value and importance of protecting endangered and threatened species. The greatest difficulty remaining with the Act is its implementation by the FWS, and not the conflict resolution process. The requirements for consideration by the ESC have been made strict enough to maintain the integrity of the consultative process between the acting agency and the Secretary, leaving the bulk of the responsibility for protecting endangered and threatened species with those whose actions create the danger to the species. If an irresolvable conflict does arise, the Act now clearly indicates what body will do the final weighing and what standards will guide the decision.

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