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Tennesee Valley Authority v. Hill: Protection of Endangered Species under Section 7 of the Endangered Species Act of 1973

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NOTES

TENNESSEE VALLEY AUTHORITY v. HILL: PROTECTION OF ENDANGERED SPECIES UNDER SECTION 7 OF THE ENDANGERED SPECIES ACT OF 1973

ENVIRONMENTAL LAW–ENDANGERED SPECIES ACT: The United States Supreme Court upholds the Sixth Circuit Court of Appeals decision construing the Endangered Species Act of 1973. The Court holds that the Act prohibits completion of the Tellico Dam since completion of the dam would jeopardize the continued existence of the snail darter, an endangered species. *Tennessee Valley Authority v. Hill,* 98 S. Ct. 2279 (1978).

On June 15, 1978, the United States Supreme Court decided *Tennessee Valley Authority v. Hill,*[1] the much-publicized case involving the multimillion dollar Tellico Dam, the snail darter, and Section 7 of the Endangered Species Act of 1973.[2] The decision is significant in three fundamental respects. First, the decision provides the long-awaited judicial interpretation of several key aspects of Section 7.[3] Second, the decision may prompt amendment of the Act, thus posing the possibility that much of the judicial interpretation of it to date could be rendered moot. Finally, the Supreme Court's resolution of the Section 7 issue invites consideration of the broader question: to what extent is the federal government willing to commit itself to the protection of vanishing species? This note considers these aspects of the decision. Also, as background to this consideration, the mandate of the Act in general, and that of Section 7 in particular, is discussed.

THE ENDANGERED SPECIES ACT AND SECTION 7

The Endangered Species Act of 1973 presents a broad endangered species preservation mandate to the entire federal government, not merely to those federal agencies traditionally associated with wildlife management. The policy statement of the Act provides that "all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act."[4] This affirmative mandate

1. 98 S. Ct. 2279 (1978).
2. 16 U.S.C. §§1531-1543 (1973).
3. 16 U.S.C. §1536 (1973).
4. 16 U.S.C. §1531(c) (1973).

is buttressed by the unqualified definition of "conserve": "to use all methods and procedures which are necessary to bring any endangered or threatened species to the point at which measures provided pursuant to this act are no longer necessary."[5] The substantive basis for insuring that this mandate is carried out is provided by Section 7.

Section 7, the section of the Act that deals specifically with interagency cooperation, is perhaps the most controversial and potentially far-reaching section of the Act. It states:

> All federal departments and agencies shall, in consultation with, and with the assistance of the Secretary . . . (take) such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered and threatened species, or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected states, to be critical.[6]

The significant aspects of this section are that (1) no provisions exist for balancing of factors: federal actions cannot destroy or modify critical habitat or jeopardize the continued existence of a species; (2) all federal agencies shall consult with the Secretary[7] regarding the effect of their activities upon critical habitat; and (3) the Secretary is responsible for the all-important designation of critical habitat.[8] These aspects of the section have resulted in its being labeled "nondiscretionary" by some. Indeed, the strict language of the section might lead to this conclusion. The Secretary is to designate critical habitat; the action-taking agency cannot destroy or modify critical

5. 16 U.S.C. §1532(2) (1973)

6. 16 U.S.C. §1536 (1973).

7. The Office of Endangered Species in the Fish and Wildlife Service of the Department of the Interior is responsible for the consultation process regarding land-dwelling species. The National Marine Fisheries Service in the Department of Commerce administers the consultation process for marine species. Throughout this note, rather than refer specifically to the relevant endangered species offices in both the Department of the Interior and the Department of Commerce, we use the term Secretary (as does the Act itself) unless more specific usage is needed. 16 U.S.C. §1532(10) (1973).

8. The Act does not define "critical habitat"; however, the Secretary of the Interior has construed the term:

> Critical habitat means any air, land, or water area (exclusive of those existing manmade structures or settlements which are not necessary to the survival or recovery of a listed species) and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. The constituent elements of critical habitat include, but are not limited to: physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water and air. Critical habitat may represent any portion of the present habitat of a listed species and may include additional areas for reasonable population expansion. 43 Fed. Reg. 874 (1978) (to be codified as 50 C.F.R. §402.02).

habitat; and the action-taking agency must consult with the Secretary to insure that its projects will not destroy or modify critical habitat. In certain circumstances Section 7, in fact, leaves very little discretion in the action-taking agency. *Tennessee Valley Authority v. Hill* provides a classic example of such a situation. However, to appreciate the context of *Tennessee Valley Authority,* it is helpful to first consider the circumstances in which substantial discretion may be left with the action-taking agency.

Although Section 7 requires that critical habitat not be destroyed or modified and provides for an interagency consultation process to insure that it is not, the final decision as to whether a project will modify critical habitat is left with the action-taking agency. The consultation process is implemented pursuant to Guidelines on Interagency Cooperation, which provide primarily procedural guidance.[9] They require that each federal agency consult with the Fish and Wildlife Service in the Department of the Interior.[10] After consultation, the Service is to issue an opinion regarding the effect of the project on critical habit.[11] Procedural guideposts for the process are presented by the guidelines. Yet, the substantive basis upon which a decision as to any given project is to be made is not provided by the guidelines and probably cannot be provided. Consequently, Section 7 can potentially leave much discretion in the action-taking agency. When the opinions of Fish and Wildlife Service and the action-taking agency differ, the fundamental consideration is not whether consultation is mandatory, or whether the language of Section 7 states that agencies "shall not" modify or destroy critical habitat. The important consideration is, rather, who makes the final decision as to whether a given action will jeopardize the continued existence of a species or will destroy or modify critical habitat. That decision is made by the action-taking agency. Since, under the guidelines, it is the perogative of the Fish and Wildlife Service only to advise, an agency may well decide to proceed with a project against the recommendation of the Fish and Wildlife Service. If an agency so decides, the ultimate resolution of the conflict may be in the judicial process.

TENNESSEE VALLEY AUTHORITY v. HILL

Under the citizen suit provision of the Endangered Species Act, anyone may sue to (1) enjoin any violator of the Act (including the action-taking agencies of the U.S. Government) or (2) compel the

9. 43 Fed. Reg. 870 (1978) (to be codified in 50 C.F.R. §402).
10. 43 Fed. Reg. 875 (1978) (to be codified in 50 C.F.R. §402.04).
11. 43 Fed. Reg. 875-876 (1978) (to be codified in 50 C.F.R. §402.04).

administering agencies to enforce the prohibitions of the Act or to take certain actions pursuant to administrative authority.[12] The provision regarding the second type of suit limits the otherwise broad discretion of the Secretary. Challenge to the discretion of the Secretary under this provision provides substantial potential for suit under the Act, but the most noted type of suit is that listed first above—suits challenging the discretion of action-taking agencies in their project decisions regarding destruction or modification of critical habitat.

Any action taken by any federal agency that under Section 7 might jeopardize the continued existence of a species or contribute to the destruction of critical habitat may be subject to suit. We have alluded to suit as a means of resolving a dispute involving conflicting opinions of the Fish and Wildlife Service and the action-taking agencies. Such suits involve the questions of what judicial deference is to be given a Fish and Wildlife opinion and whether critical habitat will be destroyed or modified.[13] Although these questions are quite significant in the overall interpretation of Section 7, they are not raised by *Tennessee Valley Authority v. Hill,* and they are not analyzed in this note. In *Tennessee Valley Authority,* the question is not whether critical habitat will be destroyed or modified if the project were completed; all parties agree that it would.[14] The question is whether other considerations justify the potential destruction or modification of critical habitat.

In *Hill v. Tennessee Valley Authority,* the Association of Southeastern Biologists and certain other parties sought to enjoin the completion of the Tellico Dam and impoundment of the Little Tennessee River pursuant to the Endangered Species Act. After much of the dam had been completed, a species of fish, the snail darter, was discovered in the Little Tennessee. The snail darter is a small, tannish-colored fish which feeds on snails and thrives in the stretch of the river that would be impounded by the dam. This stretch is the only known habitat in the world where the darter exists naturally.[15] Consequently, the snail darter was listed as an endangered species.[16] The snail darter requires high levels of oxygen in the waters it inhabits and derives the necessary oxygen from the flowing waters of the Little Tennessee. It also requires a gravel substrate, like that found on the bottom of the Little Tennessee, to reproduce. The

12. 16 U.S.C. §1533(g)(1) (1973).
13. See *Sierra Club v. Froehlke,* 534 F.2d 1289 (8th Cir. 1976); *National Wildlife Federation v. Coleman,* 529 F.2d 359 (5th Cir. 1976).
14. 98 S. Ct. 2290 (1978).
15. 40 Fed. Reg. 47,505-47,506 (1975).
16. *Id.*

impoundment of the river by the Tellico Dam would effectively cease the oxygen-producing flow of the river and cause heavy siltation of the gravel stream bed. Impoundment would also eliminate the snail darter's primary food source; snail populations would most likely not survive in the reservoir. It is clear the critical habitat of the snail darter would be modified by the project.[17] For these reasons the respondent sought to enjoin the project under Section 7 of the Act.

The Eastern District Court of Tennessee heard the issues of whether the project would jeopardize the continued existence of the snail darter, and whether injunctive relief would be appropriate to force compliance with the Act if it were found that the project would jeopardize the species' survival.[18] The court found that "the preponderance of the evidence demonstrates that closure of the Tellico Dam . . . will result in the adverse modification, if not complete destruction, of the snail darter's critical habitat."[19] Yet, despite this finding, the court denied injunctive relief.[20]

The court was obviously swayed by the fact that over $35 million had already been spent on the project when the Endangered Species Act was enacted:

> The 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 that would insure compliance with the Act or if the project had not been underway for nearly a decade.
>
> If plaintiff's argument [that given the Courts' first finding it has little discretion regarding the issuance of an injunction] were taken to its logical extreme, the Act would require a court to halt impoundment of water behind a fully completed dam if an endangered species were discovered in the river on the day before such impoundment was scheduled to take place. We cannot conceive Congress intended that result.[21]

Despite the court's conception of congressional intent, there is no indication in the language of Section 7 that the degree of a project's completion should be a relevant consideration once it is determined that critical habitat will be adversely modified.

17. 98 S. Ct. 2290 (1978).
18. *Hill v. Tennessee Valley Authority*, 419 F. Supp. 753 (E.D. Tenn. 1976).
19. *Id.* at 760.
20. *Id.* at 763.
21. *Id.*

In overruling the district court, the Sixth Circuit Court of Appeals recognized the seeming inappropriateness of the district court's balancing of equities and consideration of project status:

> Were we to deem the extent of project completion relevant in determining the coverage of the Act, we would effectively defeat responsible review in those cases in which the alternatives are most sharply drawn and the required analysis most complex. . . . Courts are ill-equipped to calculate how many dollars must be invested before the value of a dam exceeds that of the endangered species.[22]

The appeals court viewed its role conservatively, as a guardian of "the status quo where endangered species are threatened, thereby guaranteeing the legislative or executive branch sufficient opportunity to grapple with the alternatives."[23] Further, the court was not persuaded by the argument that Congress did not intend the Act to apply to this project because appropriations measures for the project continued to be passed by Congress even after the darter was discovered.[24]

The court recognized the good faith effort of the Tennessee Valley Authority (TVA) to preserve the snail darter by transplanting populations into areas of river that would not be modified by the Tellico Dam project and that appear to be suitable to the continued existence of the darter.[25] Yet, such a good faith effort does not per se meet the requirements of the Act. The court recognized that as long as the snail darter is listed as endangered by the Department of the Interior, efforts by TVA to compensate for the destruction or modification of the snail darter's habitat should not have a bearing on the court's decision: "Nowhere in the Act are courts authorized to override the Secretary by arbitrarily 'reading' species out of the endangered list or by redefining the boundaries of existing critical habitats on a case by case basis."[26] TVA claimed that it had done everything possible to save the snail darter, short of abandoning work on the dam. Yet, abandoning work on the dam is not an unreasonable alternative under the Act. Rather, it seems to be the only means available to "insure" the continued existence of the snail darter. The court recognized that the abandonment of past expenditures in favor of an endangered species is within the spirit of the Act.[27]

The appeals court was sympathetic to the district court's recogni-

22. *Hill v. Tennessee Valley Authority*, 549 F.2d 1064, 1070 (1977).
23. *Id.* at 1071.
24. *Id.* at 1072.
25. *Id.* at 1074.
26. *Id.*
27. *Id.*

tion of the equitable factors involved in the Tellico case, although it noted the impropriety of the lower court's weighing of these factors in reaching its decision.[28] The court suggested that were it not for its conception of the judicial function in strictly upholding the language of the Act, the equitable considerations might have been persuasive:

> ... only Congress or the Secretary of the Interior can properly exempt Tellico from compliance with the Act. The separation of powers doctrine is too fundamental a thread in our constitutional fabric for us to be tempted to preempt Congressional action in the name of equity or expediency ...[29]

Later in the analysis, we discuss the possibility of legislative or administrative action influencing not merely the Tellico Dam controversy but the Act itself.

In its decision of June 15, 1978 the Supreme Court affirmed the opinion of the Sixth Circuit Court of Appeals.[30] Like the district court and court of appeals, the Supreme Court began its analysis with the premise that the completion of the Tellico Dam would eradicate the snail darter population in the Little Tennessee or destroy its critical habitat. Given this premise, the Court discussed two issues. First, the Court asked whether TVA would be in violation of the Act if the Tellico Dam were completed and operated as planned. Second, the Court queries whether an injunction would be an appropriate remedy if indeed TVA's actions would violate the Act.[31]

The Court looked to the "ordinary meaning of the plain language" of the statute to determine that completion and operation of the dam would violate the Act:

> One would be hard pressed to find a statutory provision whose terms were any plainer than those in §7 of the Endangered Species Act. Its very words affirmatively command all federal agencies "to insure that actions authorized, *funded,* or *carried out* by them do not *jeopardize* the continued 'existence' of an endangered species or 'result in the destruction or modification of habitat of such species' " (court's emphasis). This language admits no exception.[32]

In affirming the court of appeals decision, the Supreme Court recognized what the district court did not; the Act does not provide for the balancing of benefits between dam and darter. Once a court determines that an action would destroy critical habitat of an endan-

28. *Id.*
29. *Id.*
30. *Tennessee Valley Authority v. Hill,* 96 S. Ct. 2279 (1978).
31. *Id.* at 2290.
32. *Id.* at 2291.

gered species, the action-taking agency would be in violation of the Act if the project is completed. At this point, the Act is indeed nondiscretionary. The past expenditures on the project or the benefits foregone by its abandonment are not to be considered. In this regard, the Court stated that "[i]t may seem curious to some that the survival of a relatively small number of three inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than $100 million."[33] Nonetheless, the Court concluded that the explicit provisions of the Endangered Species Act require precisely that result. It recognized that Congress viewed the value of endangered species as "incalculable."[34]

It was argued by TVA that Congress did not intend the Act to stop a project such as the Tellico Dam; millions had been spent on the project before the snail darter was discovered and it was virtually complete at the time the Supreme Court heard the case. The Court looked to the legislative history as well as the words of the statute to reject TVA's contention. The Court, in interpreting the legislative history, concluded that the "plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost."[35] Also, TVA argued once again that because appropriation measures funding continued work on the Tellico Dam passed subsequent to both the passage of the Act and discovery of the snail darter, Congress intended that the project be allowed to proceed in spite of the Act's provisions. The majority opinion was not persuaded by TVA's arguments in this regard and held that "(t)o find a repeal of the Endangered Species Act under these circumstances would surely do violence tothe 'cardinal rule . . . that repeals by implication are not favored.' "[36] Since the claim for repeal rests only with an appropriations act, the Court discerned all the more reason to reject the TVA appropriation argument. Finally, the Court rejected TVA's argument that there should be an exception to the rule of implied repealers in circumstnaces, such as those of this case, where appropriations committees expressly stated their understanding that earlier legislation would not prohibit the proposed expenditure on the dam.[37]

33. *Id.*
34. *Id.* at 2298.
35. *Id.* at 2297.
36. *Id.* at 2299.
37. It should be noted that the dissenting opinion, of Justices Powell and Blackmun, relies on the "subsequent appropriations" argument as an important element of its conclusion that the Act should not be applied to the Tellico Dam project. 98 S. Ct. 2279, 2309.

Having decided that completion and operation of the dam would constitute a violation of Section 7 of the Act, the Court then considered whether an injunction would be the appropriate remedy. The Court recognized that "a Federal judge sitting as a chancellor is not mechanically obligated to grant an injunction for every violation of the law,"[38] yet it views its role conservatively in fashioning a remedy. In granting an injunction the Court stated:

> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by Congress is to be put aside in the process of interpreting the statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.[39]

In so construing its function, the Court precluded judicially created modification of or flexibility with regard to Section 7.

In sum, the *Tennessee Valley Authority* decision clarifies two aspects of Section 7. First, it confirms that Section 7 does not allow for balancing of considerations in deciding whether to proceed with an action that will destroy or modify critical habitat or that will jeopardize the continued existence of a species. Endangered species are to be given undeniable priority over such action, regardless of the seeming insignificance of the species or the significance of the project. The stage of the project's completion or the appropriations of Congress regarding the action should not provide justification for continuing a project that will violate the Act. Second, just as a balancing of considerations cannot be used to justify proceeding with a project that will jeopardize the continued existence of an endangered species, so is it improper for the courts to balance the equities of a case arising under Section 7 in fashioning a remedy to achieve a result that it, as a court, considers to be fair. Congress has made the determination that once a project is found to be in violation of the Act, it should not proceed; flexibility in the statutory mandate will come, if at all, not from the courts, but from the administrators of the Act or Congress itself.

IMPLICATIONS OF THE SUPREME COURT DECISION

As a result of the *Tennessee Valley Authority* decision a number of amendments to the Act have been proposed. Indeed, this effect of the decision may be its greatest significance. The general thrust of

38. *Id.* at 2301.
39. *Id.* at 2302.

the amendments proposed is to lessen the rigidity of the Section 7 mandate. The means by which this general objective can be accomplished vary from use of the administrative process in providing for more consideration of traditional factors in decision-making to strict legislative or administrative exclusion of projects or species from the Act's coverage.[40] Whatever the form a potential amendment of the Act may take, the process of modifying the Endangered Species Act necessitates a reconsideration of national priorities with regard to endangered species protection.

Although balancing of competing factors is contrary to the language, legislative history, and policy of the Act, the value of such a procedure should not be discarded. It represents what is perhaps a pragmatic approach the problem. The provisions of the Endangered Species Act notwithstanding, is it really a desirable allocation of resources to halt construction of a dam that is virtually completed so that the snail darter can continue to thrive in the waters of the Little Tennessee?[41] In the eyes of many it is not, and consequently, the result of *Tennessee Valley Authority* casts a questioning shadow upon the Act.

The Tellico Dam controversy highlights the extremes of the Act's provisions. It involves a project, the planning and construction of which is so far advanced that the project itself cannot be modified to avoid destruction of critical habitat. It involves a species that, absent its symbolic significance, has attracted little national concern; the

40. At the time this note goes to press, amendment of the Act seems likely. Because the precise substance of the potential amendment cannot be predicted with accuracy, we discuss the possible amendments in no greater detail than to mention the proposed legislation here. The Senate has passed a bill (S 2899) that would provide funding for the Act through 1981. The bill amends the Endangered Species Act of 1973 so that a seven-member cabinet-level committee would be created to decide cases in which there exists irreconcilable conflict as to whether a given project should be exempt from the Act. The House has not yet taken any similar actions. Greater flexibility in the administrative consultation process may also provide action-taking agencies with a greater range of potential alternatives than was exercised by TVA prior to the Supreme Court decision. For example, the Department of the Interior has recommended a conservation program pursuant to the consultation process with the Corps of Engineers that would allow co-existence of the Dickey-Lincoln School Lakes Dams and the endangered plant species, the Furbish lousewort (1978) 9 Envir. Rep. (BNA) 446-447.

41. The benefits lost by abandonment of the Tellico Dam project may not be as substantial as dam expenditures and stage of completion might indicate. Testifying before a House subcommittee on June 23, 1978 TVA Chairman, S. David Freeman stated that "the real waste of the taxpayers' money may be in flooding the land." (1978) 9 Envir. Rep. (BNA) 364. TVA's reevaluation of traditional cost benefit analysis used in the original planning of the project may lead to the conclusion that the benefits produced by the dam may, in fact, be minimal. The utility of the dam, of course, is not a relevant consideration under the Court's reading of Section 7. Moreover, the fact that the actual benefits of the dam may not be substantial should not minimize the significance of the Tennessee Valley Authority case as an illustration of the potential for conflict under the Act.

snail darter hardly generates the wide-spread sympathy or enthusiasm aroused for such "glamorous" species as the whooping crane, the peregrin falcon, or the grizzly bear. It is a situation such as that surrounding the *Tennessee Valley Authority* case that can precipitate efforts to weaken the Act so that the traditional values that rank dams above darters can govern once again. Through the Endangered Species Act, Congress has determined the management priorities of federal agencies with regard to endangered species. The wisdom of this sweeping decision may be questioned not only for the result it dictates in certain projects, but also for its restriction of administrative authority of action-taking agencies to set priorities and make decisions.

On the other hand, it is important to recognize that it was the failure of traditional decision-making values to protect endangered species adequately that led to passage of the Endangered Species Act of 1973. Therefore, something more is needed than a mere grant of authority to federal agencies to consider endangered species protection in decision-making. Traditional resource management perspectives focus on benefit/cost analysis, utilitarian concepts of the greatest good for the greatest number for the longest period of time, and more recently, environmental protection considerations. The worth of endangered species is not easily measured by such criteria. To a degree, endangered species protection is contemplated by established environmental protection considerations; when the species diversity of an ecosystem is significantly reduced, as can occur with the extinction of a key species, the dynamic balance of the ecosystem can be severely altered. Yet, the probability of causing substantial ecological harm by the elimination of certain endangered species is at worst unknowable, and in many instances may be slight. Absent some specific endangered species mandate, more visible aspects of environmental protection or resource management may consistently receive administrative priority over endangered species. Consequently, even a general environmental protection mandate is likely not sufficient to assure significant administrative progress in endangered species protection.

The failure of the equation of traditional management objectives to yield satisfactory protection of endangered species does not indicate unworthiness of the endangered species protection objective. Rather, it illustrates the fact that something more than traditional management perspectives must be considered in the protective efforts. Perhaps more than anything else, conservation of endangered species is an ethical responsibility. Concern for protection of endangered species can exist even if their extinction might not have severe

ecological or environmental consequences. It has been estimated that during the past 150 years, the rate of extinction of mammals has increased 55-fold, and the activities of man are the cause of this increase.[42] The sense of ethical responsibility elicited by this situation is fundamental to the effort to protect endangered species and to the realization that there is something more that inspires the protection of endangered species than their potential material benefit to man. Because the particular bases for a general ethical standard can and do vary, legislation that addresses a general ethical concern may not be consistent with all these various bases for that concern. Legislation or administrative action based upon ethical value preferences can be imprecise and prone to pleasing few in the effort to please many.

Despite the fact that a fundamental philosophy of endangered species conservation is to value species using indicia other than the species' utility for man, and despite the ideological incompatibility of benefit/cost and endangered species, it may be necessary in some situations to allow a project to continue despite its potential modification or destruction of critical habitat. The ethical considerations that precipitate endangered species protection efforts may not always require that these efforts be carried out to the exclusion of all other interests. Just as certain other resource policies with scientific or economic justifications may sometimes be altered by competing factors, so it is that the ethical basis for endangered species conservation may not always be determinative of the endangered species issue. The important consideration is that all components, including the ethical component, of endangered species protection be recognized as viable factors to be used in giving endangered species substantial priority, although not necessarily paramount priority, in federal decisions.

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*Editor's Note–Passed on October 15, 1978, HR 14104 amends the Endangered Species Act of 1973. The amendment establishes a seven-member interagency committee to review disputed projects involving endangered species. The committee is to review the Supreme Court decision in *Tennessee Valley Authority v. Hill.* If the committee does not make a final decision within 90 days, the Tellico Dam project would be exempted from the Act. The interagency review committee may also review other controversial projects after initial review by a three-member review board. The reviewing bodies are to balance economic considerations against environmental goals in making their decisions. Consequently, the "nondiscretionary" aspects of Section 7 are weakened substantially by the recent amendment.

42. L. R. REGENSTEIN, THE POLITICS OF EXTINCTION (1975).