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HAZARDOUS WASTE

Solid State Circuits, Inc. v. United States Environmental Protection Agency, 812 F.2d 383 (8th Cir. Feb. 18, 1987)

In an action before the Eighth Circuit, with Justice Heaney writing the opinion, the court upheld the district court's finding that the punitive damages provision of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) 42 USC §§ 9601-9657 (1980), did not violate the due process rights of appellants.

Congress introduced CERCLA on December 11, 1980. CERCLA established broad federal authority to respond to releases, or threats of releases, of hazardous substances from vessels and facilities. Before 1980 there were thousands of tons of dangerous wastes being disposed of using environmentally unsound methods.

The purpose of CERCLA is to clean up hazardous waste sites and to hold responsible parties liable for the cost of clean-up. The administrative order, authority exercised by the Environmental Protection Agency (EPA) under § 106(a), 42 USC § 9606(a) (1980), is one of the most powerful remedies that an agency has under existing environmental statutes. The agency may issue orders necessary to protect the public health and welfare after making a determination that substantial danger exists to public health. Furthermore, CERCLA § 107(c)(3), 42 USC § 9607(c)(3) (1980), authorizes the imposition of punitive damages of up to three times the cost of clean up of the site for failure to comply with § 106(a) without sufficient cause.

Once an agency discovers a hazardous waste site, the responsible parties are sent a notice telling them to clean up the site. Then the agency undertakes and completes a remedial investigation and feasibility study so that the agency can discuss clean-up options with responsible parties. The agency also assesses the extent to which the responsible party is economically able to comply with the order. If the agency and the responsible parties are successful, the terms of an agreement will be set out in a judicial consent decree. If there is no agreement, a CERCLA § 106 administrative consent order will be issued, and a party may seek judicial review to stay the order.

The Agency has several options to enforce compliance. They may enforce the order by bringing an action in federal district court to force compliance with its orders or face a contempt charge. CERCLA § 106(a), 42 U.S.C. §

9606(a) (1980). They can bring an action in federal district court imposing fines of up to \$5,000 a day for non-compliance. CERCLA § 106(b) (1980), 42 U.S.C. § 9606(b) (1980). Finally, the agency may arrange for the clean up itself utilizing Superfund money to finance the project and then file suit for reimbursement of the costs and statutory penalties for failure to comply with the order. CERCLA § 107(c)(3), 42 U.S.C. § 9607(c)(3) (1980).

In the case at hand, the EPA issued a clean-up order on March 6, 1985 to appellants Solid State Circuits, Inc. (Solid State) and Paradyne Corporation (Paradyne) pursuant to CERCLA § 106(a). Basically, the order charged Solid State and Paradyne with contaminating local soil groundwater as a result of storing used chemicals (TCE and a copper based slating solution) in an unlined pit in the basement of a building at its site of manufacturing operations. The EPA ordered Solid State and Paradyne, as the responsible parties, to obtain access to the contaminated areas and to submit a detailed clean-up plan to the EPA.

In response to the order by the EPA, Solid State and Paradyne filed suit in federal district court on a number of issues. For purposes of this case, they challenged the constitutionality of the treble damage clause and other fine provisions of CERCLA 42 U.S.C. § 9606(b) and § 9607(c)(3). The challenge was made on the ground that the provisions deprived them of their due process rights to challenge the validity and applicability of the EPA's order without facing ruinous fines and penalties. The court found that it had jurisdiction to consider the claim and that the constitutional claim was ripe for review because the issue was "purely legal" and fit for determination."¹ The court also reasoned that the claim was ripe for review due to the necessity of reporting the potential treble liability on public financial filings as required by the SEC.

The appellants, Solid State and Paradyne argue that the statutory scheme of the CERCLA violates their right to due process by depriving them of the opportunity to test the order without the possibility of incurring high penalties. Appellants argue that they are in a "Catch 22" situation. If they comply with the EPA order and are later found to have a valid defense to liability they would have to take action against the responsible parties to be reimbursed. Those "responsible parties" may never be found or may be judgment proof in which case appellants would have to

1. *Solid State Circuits, Inc. v. U.S. E.P.A.* 812 F.2d 383, 386, quoting *Abbott Laboratories v. Gardner*, 387 US 136 (1967).

bear the costs. On the other hand, if the appellants refuse to comply with the order they expose themselves to treble damages pursuant to CERCLA § 107(c)(3), 42 U.S.C. § 9607(c)(3) (1980).

Appellants also argue that *Ex Parte Young*, 209 U.S. 123 (1908) applies. In *Ex Parte Young*, the issue was whether a Minnesota statute was constitutional due to the fact that the penalties for violating the statute were so high and that there was also no opportunity for a hearing. The United States Supreme Court in *Ex Parte Young* held that statute to be unconstitutional. The Court reasoned that the statute denies due process if the penalties for disobeying it are so severe that they effectively intimidate a party into not seeking judicial review.

However, in *Ex Parte Young*, the penalty provisions were mandatory and a party could not assert a good faith challenge to the validity of the statute. *Ex Parte Young* established that a statute imposing penalties for noncompliance with an administrative order would be constitutional if it provided for a good faith defense. Therefore, it follows that a person will not be intimidated into not seeking judicial review if he or she knows that good faith opposition to an administrative order is a defense to the imposition of penalties while seeking review.

The appellants, Solid State and Paradyne, did not dispute that the constitutional requirements of *Ex Parte Young* were met if the statutory scheme of CERCLA is interpreted to mean that the challenging party may contest the validity of an administrative order. Thus, no penalty is imposed if a sufficient cause defense is met.²

However, the next question was whether the sufficient cause defense provided adequate protection against imposition of the treble damage penalty to allow a challenge to an EPA clean-up order as required by *Ex Parte Young*. It was necessary to look at the punitive damage provision of CERCLA to see if it fell within the parameters of *Ex Parte Young*.

Therefore, the question before the court, was what constitutes "sufficient cause" to disobey an order? *Aminoil, Inc. v. United States*, 646 F. Supp. 294 (C.D. Cal. 1986) is the only court which addressed the question and that court found the punitive damage provision of the CERCLA to be unconstitutional. The Court in *Aminoil* noted that a preaccrual review of the administrative order was missing. The court also reasoned that even though the penalty provision would not be applied to one who had sufficient cause for non-compliance, that defense is a very limited one.⁸

The court in *United States v. Reilly Tar and Chemical Corp.* 606 F. Supp. 412 (D. Minn. 1985) said that "sufficient cause" as applied under CERCLA is narrowly construed because it cannot be used by "responsible parties" who in good faith assert a reasonable defense if that defense is ultimately rejected by the court. The court in *Reilly* looks to the legislative history of the Act, i.e., specifically the Senate debates, where Senator Stafford, the author of the bill stated his opinion as to what would constitute "sufficient cause." He stated that, if the challenging party were not the party responsible for the release of the hazardous substance or if someone for good

reason believed him or herself not to be the responsible party, they should not have to pay.³ There would also be sufficient cause for non-compliance if the party subject to the order did not at the time have the economic or technical resources available to comply.

This seems to suggest that a subjective good faith belief that the order is invalid is justifiable. The appellants here argue for just such a standard. They argue that *Aminoil* is compelling and that the only way the court can uphold the punitive damage provision of the CERCLA is by interpreting sufficient cause to mean a good faith belief defense as the court in *Aminoil* did. Then, punitive damages may only be assessed where the government proves that challenging parties have refused to comply with the order in bad faith.

The EPA, on the other hand, argued that the court should interpret "sufficient cause" to mean an objective belief that the agency acted arbitrarily and capriciously as a rationale for non-compliance. The EPA's reasoning is that a federal agency should be presumed to act correctly. Review must be based on an arbitrary or capricious standard.⁴

Following the recent decisions in *Wagner Electric Corp. v. Thomas*, 612 F. Supp. 736 (D. Kan. 1985) and *United States v. Reilly Tar and Chemical Corp.*, this court held that there was no violation of due process rights in the application of the CERCLA statute. The court concluded that "sufficient cause" may be constitutionally interpreted to mean that treble damages may not be imposed on a party if that party had an *objectively* reasonable basis for believing that the EPA's order was either invalid or inapplicable to it. The court concludes that to pass constitutional muster, a standard must provide parties with a real and meaningful opportunity to test the validity of the order. Thus, the standard must protect the interest that the government has in making sure that responsible parties conduct clean ups or reimburse the EPA for conducting clean ups, and the standard must also be concerned with avoiding wasting money on litigation which would deplete Superfund.⁵

Under this objective standard the EPA is presumed to have acted correctly. It can only be found wrong if the agency acted arbitrarily and capriciously. The applicable provisions of CERCLA, EPA regulations, policy statements and any formal or informal hearings or guidance the EPA may provide must be shown by a party. They must give rise to an objectively reasonable belief in the invalidity and inapplicability of the clean-up order. However, the court holds that if CERCLA is silent or ambiguous and if the EPA has not issued any statements or regulations, i.e., if the parties involved would have no guidance to determine the reasonableness of a challenge to the order, then the burden rests with the EPA to show that

2. See CERCLA § 107(c)(3), 42 U.S.C. § 9607(c)(3). (1980)

3. *Solid State Circuits*, 812 F.2d at 390.

4. *Id.* at 390.

5. *Id.* at 391 - 392.

the challenging party lacked an objectively reasonable belief in the validity of the clean-up order.⁶

This court agrees with the *Wagner Electric* court. *Wagner*, suggests that the EPA could greatly limit sufficient cause defenses by issuing regulations and policy statements and by providing for informal hearings that would enable a party to determine the validity and applicability of an EPA order prior to the time it must decide whether to comply with a clean-up order or risk treble damages. In this way, the interests of the parties will be protected and liability will remain with those who are responsible parties. The court affirmed the lower court decision which refused to enjoin the EPA from seeking to assess treble damages against the plaintiffs.⁷

Author's Comment: The court makes its holding and, to some extent, explains the requirements of the standard it adopts, but does not tell how those requirements were fulfilled in this case. The result in the case seems just, given the facts of the case. However, the court's analysis is very weak. It is questionable whether this standard will be adopted elsewhere due to the fact that it has no support in the CERCLA's legislative history or in prior case law.

On the other hand, it may be adopted because it protects the purposes behind the Act, i.e., to quickly clean up hazardous waste sites and to hold responsible parties liable for their wrongs. The objective standard adopted by this court may compel the EPA to come forth with guidelines and regulations. Therefore, this may end up being just the solution for a very difficult problem.

Shelly Sheetz, '88

NUCLEAR PLANT SAFETY

Union of Concerned Scientists v. United States Nuclear Regulatory Commission, 824 F.2d 108 (D.C. Cir. Aug. 4, 1987)

Recently, the scientific community raised a popular and recurring concern about the safety standards of our nuclear plants. The Union of Concerned Scientists (UCS) challenged a new rule promulgated by the Nuclear Regulatory Commission (NRC or Commission). This new rule addressed the specific safety needs of previously licensed nuclear plants.

The instant case was heard before the District of Columbia Court of Appeals. Appellant's (USC) primary challenge was that appellee's (NRC) new backfitting rule violated § 182(a) (1982) of the Atomic Energy Act (AEA), 42 U.S.C. § 2011 by allowing a cost-benefit analysis for safety measures in determining the standard of "adequate protection." Under § 182(a) "adequate protection" of the public health and safety is mandated and there is no explicit reference to cost consideration. Moreover, appellant contended that the NRC is precluded from ever developing

a cost-benefit analysis for modifications with respect to nuclear plants. The court found that certain circumstances allow a cost-benefit analysis. However, such an analysis cannot be used to determine the "adequate protection" standard. Thus, the court vacated appellee's new backfitting rule.

The new final rule provides:

The commission shall require the backfitting of a facility only when it determines ... that there is a substantial increase in the overall protection of the public health and safety or the common defense and security to be derived from the backfit and that the direct and indirect costs of implementation for that facility are justified in view of this increased protection.

10 C.F.R. § 50.109(a) (3) (1986)

The term "backfitting" applies to the improvements and modifications necessary for nuclear plants to meet the everchanging requirements for nuclear safety. The new backfitting rule included nine factors to be used as guidelines. Other relevant information concerning the backfitting decision was contained in the guidelines. There were also three exceptions to cost considerations with regard to backfitting. These exceptions were to be used when: (1) a backfit was necessary for a plant to meet adequate safety level protection (2) undue risk threatened public health and safety and (3) when the Commission found a substantial risk, regardless of the standards met in the past.

The exceptions outlined above appear to provide backfitting without cost to any situation regarding adequate safety protection. However, the accompanying Statement of Considerations provided that "there is no intent on the part of the Commission to include within the scope of the(se) exception(s) new or modified interpretations of what constitutes no undue risk to the public health and safety. In such case the rule applies." 50 Fed. Reg. 38,103 (1985). This statement indicated that the NRC could apply a cost-benefit analysis at its discretion, even when the "adequate protection" standard would seem to require imposing new safety measures on previously licensed plants.

The court looked at the new rule based on the Statement of Considerations. It then used a number of sources to resolve the issue of whether the NRC's backfitting rule could consider a cost-benefit analysis in determining the standard of "adequate protection." First, the court determined the standard of review applicable to the rule making of the NRC. It also paid careful examination to relevant Supreme Court decisions and §§ 182(a) and 161 of the AEA which interpret safety levels. Finally, the court addressed the Commission's prior analysis of "adequate protection" standards for public health and safety measures when cost consideration was an option.

In determining the standard of review the court first looked to the Administrative Procedure Act 5 U.S.C. § 706(2)(a) (1982) which holds that an unlawful agency action is one which is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." The

6. *Id.* at 392.

7. *Id.* at 392.

court discussed two Supreme Court decisions in determining whether deference should be given to the NRC in its own organic statute. See *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1983) (*Chevron*); *Immigration and Naturalization Services v. Cardoza-Fonseca*, 107 S.Ct. 1207 (1987) (*Immigration*). *Chevron* used a two part test to decide what if any, agency interpretation is needed. It reasoned that if Congress directly spoke on an issue, no agency interpretation is needed. However, if Congress were ambiguous, then the question would be whether the agency's action was permissible under the statute.

This court also considered a most recent case which addressed the issue. It analyzed *Immigration* as interpreting the *Chevron* test to be applicable in situations which warrant an agency "to apply a legal standard to a particular set of facts" *Union of Concerned Scientists*, 824 F.2d at 113. In other situations the appropriate standard of review would be statutory construction. Thus, even if the agency's action is permissible under the statute, the court does not have to defer to it if the agency action is not being applied to a particular set of facts.

In the present case the agency action at issue does not apply to a particular set of facts. Rather the rule was promulgated to apply to backfitting generically in the nuclear industry. Thus, the appropriate standard of review is whether the backfitting rule is consistent with the interpretation of §§ 182(a) and 161 using statutory construction. Interestingly, even though the court found the *Chevron* test inapplicable, the standard of review arrived at was identical to that which would have been used under *Chevron*. The rationale for this is premised upon the court's determination that the statutory construction clearly evinced that Congress did not intend for a cost-benefit analysis to be used in a backfitting decision.

When the court interpreted relevant statutory provisions it looked at §§ 182(a) and 161 of the AEA. None of the wording in § 182(a) referred to economic costs. Instead a specific safety level was described. Section 182(a) defined the standard for "adequate protection" of the public health and safety. Therefore, the court concluded that basic safety measures would not allow cost considerations.

The court next had to interpret § 161. Here an absolute level of safety for nuclear plants is required. The rule mandates extra protection over and above the basic level defined in § 182(a). The court determined that the additional protection articulated in § 161 was optional rather than mandatory. Under § 161 a cost-benefit analysis could, if warranted, be utilized.

The court also paid careful attention to a Supreme Court decision which fully supported its interpretation of the "adequate protection" standard. See *Power Reactor Development Co. v. International Union of Electrical, Radio, and Machine Workers*, 367 U.S. 396 (1961) (*Power Reactor*). In *Power Reactor*, the court ruled that the NRC could not consider previous capital investment of a plant when deciding whether the operation of the plant would meet the "adequate protection" standard. That court took a strong stance in supporting public safety

regardless of previous cost by stating "... no license to operate may be issued to [the company] until a full hazard report has been filed ... it may be that an operating license will never be issued ..." *Id.* at 415-16. While the court concedes that *Power Reactor* did not explicitly hold that the NRC cannot conduct a cost-benefit analysis with regard to an adequate safety level, nevertheless it confirms that this case supported its view of the statute. After finding support in the Supreme Court decisions, the court turned to one final case which strengthened its conclusion. See *Maine Yankee Atomic Power Co.*, 6 A.E.C. 1003(1973) (*Maine Yankee*). In *Maine Yankee* the NRC was requested to conduct a cost-benefit analysis with regard to adequate protection of the public health and safety. It flatly refused to do so and used legislative history, statutory language and *Power Reactor* as its support. As evinced by this decision, the NRC itself supported the court's final analysis of its new rule.

Author's Comments: Previously licensed nuclear plants must always meet progressive safety standards. Therefore, backfitting is an important consideration for a regulatory agency. This case determined the extent the NRC could consider cost with respect to backfitting decisions. The court conducted a careful analysis which resolved that the "adequate protection" standard cannot be determined by economic cost considerations. Thus, it concluded that the NRC impermissibly used a cost-benefit analysis in its backfitting rule.

Andrea Phoenix, '89

PESTICIDES

National Coalition Against the Misuse of Pesticides v. Thomas, 815 F.2d 1579 (D.C. Cir. April 17, 1987) (NCAMP II)

The issue in this case was whether the Environmental Protection Agency (EPA) had authority under the Food, Drug and Cosmetic Act, to postpone a ban on the pesticide ethylene dibromide (EDB) solely because the ban would adversely affect the economies of some foreign countries. The Food, Drug and Cosmetic Act requires the EPA to establish pesticide residue standards on raw agricultural products; it requires the agency to "give appropriate consideration" when setting the standards to a number of enumerated factors, including an "adequate, wholesome, and economical food supply." 21 U.S.C. § 346a(b) (1982).

In 1983, the EPA banned the use of EDB on domestic produce because studies indicated that EDB "increased the risks of cancer, genetic mutations, and adverse reproductive effects in humans." *National Coalition Against the Misuse of Pesticides v. Environmental Protection Agency*, 809 F.2d 875, 876 (D.C. Cir. 1987) (NCAMP I). The EPA, however, allowed foreign exporters of fruit — specifically mangos — to continue using EDB because it was the only effective way to protect against fruit flies. In January 1985, the agency, pursuant to § 346a(b) of the Food, Drug and Cosmetic Act (FDCA), set an interim tolerance level of 30 parts per billion (ppb)

which was to expire September 1, 1985. After this date a zero tolerance level would be in effect and fruit that had detectable traces of EDB would be considered "adulterated" under the FDCA, 21 U.S.C. 342(a)(2)(B) (1982), and not allowed into interstate commerce. *NCAMP I*, 809 F.2d at 876.

In late August 1985, a few days before the expiration of the interim tolerance level, the EPA sent a memo to the State Department explaining its refusal to extend the 30 ppb level. The agency argued that extending it would not push the countries to find alternatives. In addition, the agency argued that even if EDB dissipated more quickly than originally thought, an argument made by those wanting to continue the interim standard, and arrived in the U.S. with only about 10 or 15 ppb of EDB, the health risks were about the same as at 30 ppb. The memo stated that "additional exposure to EDB in the diet is not in the public interest." *NCAMP I*, 809 F.2d at 877.

After the zero tolerance went into effect in September 1985, the EPA received requests from officials at the State Department to reinstate the interim standard. These officials reiterated the argument about the negative impact the zero tolerance would have on friendly mango producing countries. *Id.*

On November 27, 1985, the agency suddenly proposed to reinstate the 30 ppb tolerance through September 1986 and indicated that it might even extend the interim tolerance for an additional year if it appeared that no alternative to EDB would be in place for the 1987-88 mango season. *Id.* Without mentioning its August memo, the EPA gave three reasons for reinstating the interim tolerance: (1) it had become more aware of the impact on foreign economies; (2) the Department of Agriculture had predicted that by 1987 or 1988 there would be an alternative to EDB; and, (3) that "the health risk of an additional year or two of EDB was ... 'acceptable ... based on the fact that residues of EDB dissipate fairly rapidly.'" *NCAMP I*, 809 F.2d at 876-7.

On February 14, 1986, the EPA reinstated the 30 ppb tolerance through September 1986, and later extended it through September 1987. As a result petitioners filed suit claiming that the EPA had acted arbitrarily and capriciously by reinstating the 30 ppb tolerance. The petitioners based their claim on two arguments: That Congress did not intend the agency to consider impacts on foreign economies when regulating pesticides under the FDCA; and that the EPA failed to provide a "reasoned analysis" to explain its reassessment of the health dangers of additional exposure to EDB. *NCAMP I*, 809 F.2d at 878.

The question of whether the FDCA authorized the EPA to consider the impact of pesticide tolerances on foreign economies revolved around section 408(b) of the FDCA which mandates that the EPA shall

give appropriate consideration, among other relevant factors, (1) to the necessity for the production of an adequate, wholesome, and economical food supply; (2) to the other ways in which the consumer may be affected by the same pesticide chemical or by other related substances that are poisonous or deleterious ...

21 U.S.C. § 346a(b) (emphasis added). Petitioners claimed that this denied the EPA authority to look at the impact on foreign economies; the agency argued that the statute gave it discretion to determine what "relevant factors" meant.

Since the court could not discern any clear congressional intent as to whether the EPA could consider the impact of pesticide tolerances on foreign economies, the court felt "obliged to uphold the agency's construction" if it were "permissible" or "reasonable," even though the court felt the construction was strained. *NCAMP I*, 809 F.2d at 882. The court did, however, find specific congressional intent indicating that "Congress intended EPA principally to attend to the specifically enumerated factors" when setting standards. *Id.* Thus, the court held that "health factors and issues of foreign impact related to the health of U.S. consumers [must] be at the forefront of EPA's deliberations," and found that EPA had "failed entirely" to take those factors into account when it reinstated the interim tolerance. *Id.*

The petitioners also argued that the agency failed to reasonably explain its reversal concerning the dangers of additional exposure to EDB. While the August memo to the State Department stated that the "public interest" would not tolerate additional exposures to EDB, the agency's November proposal to reinstate the interim tolerance level, and the February reinstatement of the interim standard, characterized the risks from additional exposure as "very low" and "acceptable." *NCAMP I*, 809 F.2d at 877-8. The court noted that "the record [was] virtually barren of reasons" for this change. *Id.* at 883. The EPA tried to supplement the record with subsequent evidence about EDB's dissipation rate, but the court rejected the evidence as "post hoc rationalizations," which are not acceptable to justify an agency's actions. *Id.* at 882. The EPA's decision was, thus, arbitrary and capricious under the "well-settled principle that an agency may not shift its position without supplying a reasoned explanation." *Id.* at 883. The court remanded the case with instructions for the EPA to justify its reinstatement of the interim standard in light of the issues raised in the opinion.

On remand, the EPA submitted an affidavit asserting that the interim tolerance was needed to assure an "adequate and wholesome food supply." *NCAMP II*, 815 F.2d at 1581. The EPA argued that efforts to ensure a safe and wholesome domestic food supply depended on a cooperative relationship with foreign countries. The agency theorized that disruption of this cooperative relationship between the U.S. and countries adversely effected by the ban might result in produce entering the U.S. with unsafe levels of pesticides or pests. *NCAMP II*, 815 F.2d at 1581. The agency concluded that this would, in fact, pose a greater health threat to Americans than extending the interim tolerance level for one or two years. *Id.*

The court held that because the EPA's reasoning "placed the public health and factors of foreign impact related to the public health at the forefront of its deliberations," the agency's decision was no longer arbitrary and capricious. *NCAMP II*, 815 F.2d at 1582.

Author's Comments: The D.C. Circuit's holding allows

foreign policy issues to dictate, at least for the short term, the levels of pesticides to which Americans will be exposed. While the EPA must make foreign impact secondary to issues of public health, the rationale supplied by the EPA is applicable in every situation where pesticides are used on produce imported into the United States. Since the EPA did not indicate that the cooperative relationship with mango-producing countries was particularly fragile, there is no reason why this rationale could not be used to postpone other tougher pesticide tolerances.

Mark A. Silberman, '90

Wildlife Preservation In The United States: The Endangered Species Act of 1973.

Introduction

The Endangered Species Act of 1973 (ESA)¹ was enacted for the purpose of conserving endangered and threatened species and the ecosystems upon which they rely for survival.² It was enacted in response to congressional findings that many species of wildlife were already extinct as a result of rapid growth that was not accompanied by concern for conservation,³ that other species were in danger of suffering a similar fate,⁴ and that the species that were threatened or endangered were of "esthetic, ecological, educational, historical, recreational and scientific value."⁵ In acting upon its findings, Congress established as its policy that all federal departments and agencies "shall work to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of [the ESA]."⁶

The ESA was not the first endangered species legislation enacted, but it became the most comprehensive wildlife preservation act known. It had been directly preceded by the Endangered Species Protection Act of 1966⁷ and the Endangered Species Conservation Act of 1969,⁸ but it forged new ground where the others had left off. Among other things, the ESA expanded the obligation of federal agencies to avoid jeopardizing the existence of endangered species,⁹ prohibited takings on all lands in the United States (including private lands), its territorial waters, and on the high seas,¹⁰ and mandated a national policy of wildlife preservation.¹¹ It also added provisions for enforcing civil

and criminal penalties upon any person found in violation of the Act.¹²

The purpose of this article is to discuss the ESA and the issues that might arise under certain sections, especially the sections that address interagency cooperation,¹³ prohibited acts under the ESA,¹⁴ and exceptions that are allowed under the ESA.¹⁵ The discussion will also include a brief description of other sections that do not raise as many questions, but which should be included for a better understanding of the ESA as a whole. The conclusion will assess the ESA today, and will suggest what might be done in order to improve its provisions to better serve its purposes.

Listing and Delisting Endangered Species

An endangered species is one that "is in danger of extinction throughout all or a significant portion of its range,"¹⁶ and a threatened species is one which is likely to become endangered "within the foreseeable future."¹⁷ A species is listed if the Secretary of the Interior (Secretary) determines, from the best scientific and commercial data available,¹⁸ that a species is endangered or threatened because of:

- "(A) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) overutilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence."¹⁹

Before listing any species, the Secretary must consider whether the particular species has been previously protected by a foreign nation, or pursuant to an international agreement,²⁰ or by any of the individual states.²¹ The implication is that if a species is already subject to certain protective restrictions, the Secretary will uphold those restrictions without necessarily expanding the existing protection controls or recovery programs that are in place for the species' survival.

The Secretary also has the duty to designate an area as the "critical habitat" of an endangered or threatened species.²² A critical habitat is a "specific area . . . within the geographical area occupied by [a] species, at the time it is listed" that contains features which might be essential to

1. 16 U.S.C. §1531-1543 (1982 & 1987 Supp.).
 2. 16 U.S.C. §1531(b).
 3. 16 U.S.C. §1531(a)(1).
 4. 16 U.S.C. §1531(a)(2).
 5. 16 U.S.C. §1531(a)(3).
 6. 16 U.S.C. §1531(c)(1).
 7. Pub. L. No. 89-669, 80 Stat. 926. (Repealed by Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §1531-1543 (1985)).
 8. Pub. L. No. 91-135 §1-6, 83 Stat. 275. (Repealed by Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §1531-1543 (1985)).
 9. 16 U.S.C. §1536(a)(2)(B).
 10. 16 U.S.C. §§1538(a)(1)(B), (C).
 11. 16 U.S.C. §1531(c)(1).

12. 16 U.S.C. §1540(a), (b).
 13. ESA §7, 16 U.S.C. §1536.
 14. ESA §9, 16 U.S.C. §1538.
 15. ESA §10, 16 U.S.C. §1539.
 16. 16 U.S.C. §1532(6).
 17. 16 U.S.C. §1532(20).
 18. 16 U.S.C. §1533(b)(1)(A). Information may come from private persons as well as governmental agencies. 16 U.S.C. §1533(b)(3).
 19. 16 U.S.C. §1533(a)(1).
 20. 16 U.S.C. §1533(b)(1)(B)(i).
 21. 16 U.S.C. §1533(b)(1)(B)(ii).
 22. 16 U.S.C. §1533(b)(2).

the species' survival.²³ The critical habitat may also include area outside the geographical area of the species when it is listed if the Secretary determines "that such areas are essential for the conservation of the species."²⁴ The Secretary has up to one year from the time a species is listed as endangered or threatened to designate such critical habitat.²⁵

There are a number of reasons why critical habitat may not be designated. First, if after a review of the "best scientific data available" the Secretary determines that the economic benefits of excluding an area outweigh the benefits of including an area as a critical habitat, he may refuse to designate it,²⁶ for such a designation may limit development potential. Second, if there are no determinable biological or physical features that are essential to the species' conservation, the habitat will not be designated as critical. Third, if a species is endangered or threatened in its entire range, and the range is extensive, it may be uneconomical to designate such a large tract.

Once a species is listed as endangered or threatened, the Secretary is responsible for developing and implementing a recovery plan, if he finds one is needed.²⁷ The recovery plans are designed "to bring any endangered species or threatened species to the point at which the measures provided [by the ESA] are no longer needed."²⁸ The plan may include acts such as critical habitat designation, predation control, protection of the endangered species' food supply,²⁹ or the reintroduction of an experimental population in a former range.³⁰ Other protection and recovery measures include complying with state regulations that further the purpose of the ESA,³¹ and listing unendangered species as endangered because they closely resemble an endangered species and because such listing will avoid the added threat of a mistaken taking of an endangered species.³²

23. 16 U.S.C. §1532(5)(A)(i).

24. 16 U.S.C. §1532(5)(A)(ii).

25. *Enos v. Marsh*, 616 F. Supp. 32 (D. Hawaii), *aff'd*, 769 F.2d 1363 (9th Cir. 1984).

26. 16 U.S.C. §1533(b)(2). Also: if the best scientific and commercial data available is insufficient to make a determination, the Secretary may withhold any such designation. *Enos v. Marsh*, 616 F. Supp. 32 (D. Hawaii), *aff'd* 769 F.2d 1363 (9th Cir. 1984).

27. 16 U.S.C. §1533(f).

28. 16 U.S.C. §1532(3).

29. 16 U.S.C. §1533(b)(1)(A). A recovery plan may include the acquisition of land or water interests pursuant to section 5, 16 U.S.C. §1534, and the subsequent designation as critical habitat.

30. Of course, experimental populations can cause as many problems as they resolve. For a discussion of the problems and solutions that are arising under such a plan, see Carey, *Who's Afraid of the Big Bad Wolf?*, 25 National Wildlife 4 (Aug.-Sept. 1987). Another such recovery plan is the Whooping Crane Recovery Plan, which has as its prime objective the upgrading of the whooping crane to unendangered status. The federal government and the state of Nebraska are cooperating to preserve the whooping crane's Platte River migratory stopover point, which has been designated as a critical habitat. For a discussion of the plan, and the struggles it faces (dam projects), see Comment, *The Whooping Crane, the Platte River, and Endangered Species Legislation*, 66 Neb. L. Rev. 175 (1987).

31. 16 U.S.C. §1533(d).

32. 16 U.S.C. §1533(e).

Similarly to listing, in order to delist a species or to change its status from endangered to threatened, the Secretary must decide, on the basis of the best scientific and commercial data available, that the species no longer needs the protection of the ESA. In such an instance, the Secretary is required to use the same provisions as he would if he were making an initial listing.³³

What Cannot Be Done?

Once a species is listed as endangered or threatened, it is subject to the protective provisions of section 9.³⁴ Under that section, it is unlawful for any person in the United States to:

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter."³⁵

These prohibitions apply to wildlife and plants alike,³⁶ subject to any exceptions or exemptions that may be allowed by the ESA.³⁷ The section also requires any person who deals in a business of importing or exporting wildlife, whether an endangered or unendangered species, to apply for necessary permits, keep detailed records of transactions, and make his records available to the Secretary.³⁸

The only real issue that arises under section 9 revolves around the definition of the term "take." To take "means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" an endangered species.³⁹ The term "harm" is defined to mean an act "which actually kills or injures wildlife. Such may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breedings, feedings, or sheltering."⁴⁰ Courts have been willing to use a broad interpretation of the term, conditioned upon a finding that the species had actually suffered losses in number.

33. 16 U.S.C. §1533(c)(2)(B).

34. 16 U.S.C. §1538.

35. 16 U.S.C. §1538(a)(1).

36. 16 U.S.C. §1538(a)(2).

37. 16 U.S.C. §§1535(g)(2), 1536(g), 1539.

38. 16 U.S.C. §1538(d).

39. 16 U.S.C. §1532(19).

40. 50 C.F.R. §17.3 (1985).

*North Slope Borough v. Andrus*⁴¹ is one of a number of cases that reinforce the aforementioned conditional willingness to use a broad interpretation. In *North Slope*, the plaintiffs sought to prevent the issuance of oil and gas drilling leases in the Beaufort Sea north of Alaska. The area is known to be part of the endangered bowhead whale's migration route. Despite a National Marine Fisheries Service letter that expressed concern that the bowhead whale could be "seriously impacted by any perturbation that increases stress on population,"⁴² the court ruled that according to the plaintiff's argument, the Secretary's actions amounted to a possible future taking at most.⁴³ The district court refused to enjoin the issuance of the leases based on any argument of future taking, holding that the leasing activity presented no threat of a taking or even habitat modifications (although the drilling stage might). It did enjoin the Secretary from accepting any offers on the bids until the Secretary supplemented the "substantially flawed" Environmental Impact Statement (EIS) that had been submitted.⁴⁴ The court also required an adequate ESA section 7(b) biological opinion be submitted as a condition precedent to the acceptance of bids and the issuance of leases.⁴⁵ "Exploration and production activities will be ripe for adjudication in this Court under the ESA at a later date."⁴⁶

Realizing that the Outer Continental Shelf Lands Act (OCSLA)⁴⁷ calls for an environmental review after each stage of development on a project (leasing being one of those stages), the court held that the ESA "do[es] not require the government to halt all activity merely because there is a possibility that the agency action will result in a 'taking' at some future time. Rather, the government must proceed with caution to ensure that agency action does not eventually violate the aforesaid laws."⁴⁸

The Court of Appeals reversed the District Court's injunction and held that the Secretary "complied in substance with all requirements and procedures The environmental protections required by NEPA and ESA as well as other statutes have been met as of [the leasing] stage of the project."⁴⁹

While the facts in *North Slope Borough v. Andrus* presented no immediate threat to an endangered species, the facts of *Palila v. Hawaii Department of Land and Natural Resources* (Palila),⁵⁰ did present an immediate danger. The palila bird had only one remaining known habitat, which was being destroyed by grazing feral sheep and goats. The sheep and goats were being maintained by the Hawaii Department of Land and Natural Resources for sport hunting.⁵¹ The animals would graze on leaves and seeds, and the trees in which the palila lived were not reproducing at an adequate enough rate to keep up its density. As a result, the palila's habitat was diminishing. The plaintiffs, who sued in the bird's name, sought to have the feral stock removed in order to allow the palilas to recover and expand. The District Court, applying a broad interpretation of the terms "take" and "harm," enjoined the defendant from keeping the feral stock, and ordered them removed.⁵²

The Ninth Circuit affirmed the decision, and upheld the lower court's interpretation of "harm."⁵³ The court reasoned that maintaining the feral sheep and goats constituted an act that was actually killing the palila because the stock's foraging habits were significantly modifying the breeding, feeding, and sheltering patterns of the palila.⁵⁴ Since the act was actually killing the palila in the court's mind, the act was also then harming the palila, and in the end it was a taking.⁵⁵

After *Palila*, there was a proposal to change the definition of harm by eliminating any mention of habitat destruction, but the proposal was withdrawn.⁵⁶ The proposal in itself shows that there may have been some objection to the *Palila* court's interpretation, but the withdrawal of the proposal evidences that the overriding congressional intent was reflected in the expansive interpretation. The question, however, remains: what will constitute a taking with respect to an endangered species? Surely, if an endangered species were shot and killed, that would be considered a taking, but what about if a person drains a marsh that lowers the water level in a critical habitat over an extended period of time? The harm would not be as evident as quickly as if the species had been killed outright, but it could eventually ruin the habitat and lead to the reduction or elimination of an endangered species population. If the interpretation pronounced by the *Palila* court prevails, courts would then be disposed to find a taking in the above example, and since there are civil penalties for negligent violation of the ESA,⁵⁷ there would be less of an issue as to whether a person knowingly modified the habitat by draining an adjacent marsh. Issues that might remain would include questions of causation,

41. 486 F. Supp. 332 (D.D.C.), *aff'd in part, rev'd in part*, 642 F.2d 589 (D.C. Cir. 1980).

42. 486 F. Supp. at 353.

43. *Id.* at 362.

44. *Id.* at 363.

45. *Id.*

46. *Id.* The plaintiff sought to prevent leasing rather than actual drilling and exploring activities. When the drilling stage arrives, the plaintiffs could return to court and argue the endangered species taking issue again. *Id.*

47. 43 U.S.C. §1331-1356 (1982).

48. *North Slope*, 486 F. Supp. at 362.

49. *North Slope Borough v. Andrus*, 642 F.2d at 598. An interesting aspect of reading these two decisions involves the apparently divergent leanings of the two courts. The District Court leaned more toward the ESA mandate that all contemplated agency actions are subject to ESA scrutiny. 486 F. Supp. at 351 (citing *T.V.A. v. Hill*) and the policy goals enunciated in the ESA purport. The Court of Appeals, however, took a position that the proposed agency acts were more important to the public than was the preservation of endangered species, as is evidenced by the statement that "expedition [is] vitally necessary in the development of natural oil resources, [it is] consistent with the will of Congress and mindful of the environment." 642 F.2d at 598.

50. 471 F. Supp. 985 (D. Hawaii 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981).

51. 471 F. Supp. at 988-90. A feral animal is a descendant of domesticated animals that had been allowed to return to the wild after being domesticated.

52. 471 F. Supp. at 990.

53. *Palila*, 639 F.2d 495, 497.

54. *Id.*

55. *Id.*

56. 46 Fed. Reg. 29,490 (1981).

57. 16 U.S.C. §1540(a)(1).

multiple actors, and whether the harm could have been avoided.

Interagency Cooperation And The Duty To Conserve Under Section 7

ESA section 7 mandates that "(a)ll other Federal agencies shall, in consultation with and with the assistance of the Secretary utilize their authorities in the furtherance of the purposes of (the ESA) by carrying out programs for the conservation of endangered species and threatened species."⁵⁸ Under section 7, every federal agency must insure that any action authorized, funded, or carried out by it is "not likely to jeopardize" any endangered or threatened species or result in the destruction or adverse modification of critical habitat.⁵⁹ Section 7 imposes an affirmative duty upon all federal agencies to further the policy of the Act, such that all agencies "shall seek to conserve endangered species and threatened species."⁶⁰

The agencies must consult with the Secretary.⁶¹ After the consultation has ended, the Secretary will decide whether the action will violate the ESA. If the agency action will not violate the ESA, or if it offers "reasonable and prudent alternatives," and if the taking of an endangered species is incidental to the action and will not violate the ESA, then the proposed action will be approved.⁶² Although it is not actually spelled out, it appears that if the action will violate the ESA and no reasonable and prudent alternatives are offered, or if the alternatives offered will result in a taking that may be substantial, then proposed action will not be authorized. The Secretary himself is required to suggest reasonable and prudent alternatives if he believes the action will result in jeopardy or adverse modification of habitat.⁶³

The major case that interprets the affirmative duty provision of ESA section 7 is *T.V.A. v. Hill*⁶⁴, the infamous "snail darter" case. In that case the Supreme Court affirmed a Court of Appeals decision to enjoin the completion of the Tellico Dam in Tennessee.⁶⁵

The salient facts, as determined by the Court, are as follows: the Tennessee Valley Authority (TVA) began construction on the Tellico Dam and Reservoir Project in 1967 in an area that contained great historical significance for both residents of the area and native Americans. The area was also known for its natural beauty and its recreational offerings. The purpose of the dam was to stimulate shoreline development, generate electrical power, and provide recreational facilities and flood

control. When fully operational, the dam would impound water covering 16,500 acres of "valuable and productive farmland", and would change the nature of the river from a fast-flowing, low-turbidity river to a reservoir thirty miles in length.⁶⁶

Local citizens, conservation groups and native Americans opposed the project from its inception.⁶⁷ All arguments failed, and it appeared that the dam would be completed. Then a University of Tennessee ichthyologist discovered a previously unknown species of perch, the snail darter, while he was exploring the Little Tennessee River near the dam site.⁶⁸ Four months later Congress passed the Endangered Species Act of 1973.⁶⁹ In 1975 the Secretary of the Interior designated the snail darter an endangered species,⁷⁰ and the section of the river that was affected by the Tellico Dam was designated as the snail darter's critical habitat.⁷¹ Plaintiffs filed suit, seeking to enjoin the dam's completion, based on the snail darter's designation as an endangered species pursuant to the provisions of section 7.

Despite the fact that the dam was nearly completed, the Secretary of the Interior declared that "all Federal agencies must take such action as is necessary to insure that actions authorized, funded, or carried out by them do not result in the destruction or modification of this critical habitat area."⁷² The TVA argued that the ESA did not prohibit the completion of the project because it was authorized, and construction began, before the ESA was enacted in 1973. The TVA also argued that the continued appropriation of funds for the dam's construction implied a repeal of the ESA at least to the extent that it might apply to the Tellico Dam Project.⁷³

The Supreme Court, based on unchallenged findings that "(t)he proposed impoundment of water behind the

66. Id. at 156-57.

67. For a history of the many legal battles waged over Tellico Dam, see *Environmental Defense Fund v. T.V.A.*, 339 F. Supp. 806 (E.D. Tenn.), *aff'd*, 468 F.2d 1164 (6th Cir. 1972) (District Court enjoined construction on the dam pending filing of an Environmental Impact Statement (EIS) as required by the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §4321 et. seq.); *Environmental Defense Fund v. T.V.A.*, 371 F. Supp. 1004 (E.D. Tenn. 1973), *aff'd*, 492 F.2d 466 (6th Cir. 1974) (District Court found TVA's final EIS complied with NEPA stipulations); *Sequoyah v. T.V.A.*, 480 F. Supp. 608 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980). See also, Plater, *Reflected in a River: Agency Accountability and the Tellico Dam Case*, 49 Tenn. L. Rev. 747 (1982); Plater, *In the Wake of the Snail Darter: An Environmental Law Paradigm and its Consequences*, 19 U. Mich. J.L. Ref. 805 (1986); Coggins & Russell, *Beyond Shooting Snail Darters in a Pork Barrel: Endangered Species and Land Use in America*, 70 Geo. L.J. 1433 (1982).

68. *T.V.A. v. Hill*, 437 U.S. at 158.

69. Id. at 159. The ESA, as stated before, can be found at 16 U.S.C. §§1531-1542 (1985).

70. 40 Fed. Reg. 47,505-47,406. See also, 50 C.F.R. §17:11(1) (1976).

71. 41 Fed. Reg. 13,926-13,928. See also, 50 C.F.R. §17:81 (1976).

72. 41 Fed. Reg. 13, 928.

73. *T.V.A. v. Hill*, 437 U.S. at 163-64.

58. 16 U.S.C. §1536(a)(1).

59. 16 U.S.C. §1536(a)(2).

60. 16 U.S.C. §1531(c)(1).

61. See note 58, *supra*.

62. 16 U.S.C. §1536(b)(4).

63. 16 U.S.C. §1536(b)(3)(A). This provision raises many questions. First, how far does the Secretary have to go in suggesting alternatives? Does he have to suggest all "reasonable and prudent" alternatives? How can he know what alternatives are reasonable and prudent unless he conducts a biological assessment? How far does the applicant have to go before the Secretary starts doing the work for him?

64. 437 U.S. 153 (1978).

65. Id. at 195.

proposed Tellico Dam would result in the total destruction of the snail darter's habitat,"⁷⁴ and that the dam's completion would result in the "eradication of an endangered species,"⁷⁵ upheld the injunction against the TVA. The court reasoned that the Secretary's declaration to insure against habitat modification or destruction was aimed directly at the TVA and was for the purpose of halting the dam's completion.⁷⁶ The court further determined that the ESA section 7 language was plain, made no exception for projects that were under way before the ESA was enacted,⁷⁷ and found, through the legislative history, that Congress foresaw that section 7 would "require agencies to alter ongoing projects in order to fulfill the goals of the Act."⁷⁸ Furthermore, the court found that the plain intent of Congress was to "halt and reverse the trend toward species extinction, whatever the cost," and that endangered species preservation was to take priority over the "primary missions" of federal agencies.⁷⁹

As to TVA's second argument, the court held that congressional funding through appropriations did not implicitly repeal the ESA, and to find an implicit repeal would violate a "cardinal rule... that repeals by implication are not favored."⁸⁰ The court concluded that an injunction was the proper remedy to insure that the extinction-causing condition would not occur, and despite the fact that over \$100 million had been spent on the dam, its construction and operation should not continue.

The decision in *T.V.A. v. Hill* showed a willingness on the part of the courts to broadly interpret the ESA's provisions, and it put federal agencies on notice that proposed projects would have to be modified or dropped in order to avoid jeopardizing a listed species.⁸¹

Despite the fact that Congress enacted a provision which ultimately led to the completion of the Tellico Dam

Project,⁸² *T.V.A. v. Hill* was a very important case because the Supreme Court laid the groundwork for subsequent interpretations of the duty to conserve provision of ESA section 7. After *T.V.A. v. Hill*, Congress amended the ESA.⁸³ The amendments incorporated a limited mechanism for circumventing section 7's jeopardy prohibition,⁸⁴ but no amendments were added to abridge the conservation duty imposed by the ESA on federal agencies, as interpreted by the Supreme Court in *T.V.A. v. Hill*.

Subsequent cases have shown the courts' willingness to judicially expand the duty to conserve. One such case was *Defenders of Wildlife v. Andrus*.⁸⁵ In that case, the plaintiffs sought to have the Department of Interior found in violation of the ESA because the Secretary was allowing the hunting of migratory birds one-half hour before sunrise and one-half hour after sunset. The plaintiffs argued that the poor lighting at dawn and dusk increased the chances that endangered species would be mistaken for unlisted species; therefore, the endangered birds would be shot, thus reducing their numbers. The Department of Interior argued that the ESA required that hunting not jeopardize listed species, and that the loss of habitat, not the incidental taking of endangered birds, was the critical issue in determining jeopardy.⁸⁶ Writing for the District Court, Judge Gesell held that the "Fish and Wildlife Service, as part of Interior, must do more than merely avoid the elimination of protected species. It must bring these species back from the brink so that they may be removed from the protected class, and it must use all methods to do so."⁸⁷ The court overturned the hunting regulations because "(u)nder the (ESA) the agency has an affirmative duty to increase the population of the protected species."⁸⁸

A second case that reinforces the conservation duty provision of ESA section 7 is *Carson-Truckee Water Conservancy District v. Clark*.⁸⁹ The facts leading up to the case were that Interior Secretary Watt had devised an operating plan for the Stampede Dam in Nevada. The plan included releasing water into the Truckee River to supply the river with cold running water so the Lahontan cutthroat trout and the cui-ui, two endangered fish, could have a

74. *Id.* at 162 (emphasis added).

75. *Id.* at 174.

76. *Id.* at 162.

77. *Id.* at 172-74. 16 U.S.C. §§1536(g) & (h) were added in 1978, after the *Hill* decision, in order to give agency actions, including actions that may have already been initiated, the opportunity to apply for and receive an exemption permit. The permit would allow an action to proceed even if it would be halted by section 9(a)(2). See, note 97 and accompanying text.

78. 437 U.S. at 186.

79. *Id.* at 184-85.

80. *Id.* at 189 (citing quote in *Morton v. Mancari*, 417 U.S. 535, 549 (1974)).

81. See, e.g., *Cabinet Mountain Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 510 F. Supp. 1186 (D.D.C. 1981), *aff'd*, 685 F.2d 678 (D.C. Cir. 1982). In that case the Fish and Wildlife Service (FWS) determined that a mineral exploration program would affect key grizzly bear habitat in the Kootenai Forest in Montana, thereby jeopardizing the bears. In its opinion, the FWS listed an alternative proposal that restricted seasonal access, eliminated a nearby timber sale and closed roads. The rationale was that these mitigating factors would counterbalance the impact of the drilling program, and the bears would not be jeopardized. The court upheld the permit, as modified, because the Forest Service "reasonably concluded that the [altered] project ... would not jeopardize the continued existence of the grizzly bear." 685 F.2d at 687. See also, *Riverside Irrigation Dist. v. Andrews*, 568 F. Supp. 583 (D. Colo. 1983), *aff'd*, 758 F.2d 508 (10th Cir. 1985); *North Slope Borough v. Andrus*, 486 F. Supp. 332 (D.D.C.), *aff'd in part, rev'd in part*, 642 F.2d 589 (D.C. Cir. 1980).

82. Energy and Water Development Act of 1979, Pub. L. No. 96-69, Sept. 25, 1979, 93 Stat. 437. The Act authorized the TVA to impound the Tellico Dam reservoir notwithstanding the ESA or "any other law." 93 Stat. 437, 449. The Tellico provision, one paragraph long, was buried on the second to last page of the text. For an in-depth discussion of how the law was passed without anyone realizing what was being approved, see Plater, *Reflected in a River: Agency Accountability and the Tellico Dam Case*, 49 Tenn. L. Rev. 747 (1982).

83. Endangered Species Act Amendments of 1982, 16 U.S.C. §§1531-1542 (1985).

84. 16 U.S.C. §1536(g).

85. 428 F. Supp. 167 (D.D.C. 1977).

86. *Id.* at 168-69.

87. *Id.* at 170.

88. *Id. Cf., Conner v. Andrus*, 453 F. Supp. 1037 (W.D. Tex. 1978) (although there is an affirmative duty to conserve endangered species, a ban on hunting would not increase the Mexican duck population).

89. 549 F. Supp. 704 (D. Nev. 1982), *aff'd in part, vacated in part*, 741 F.2d 257 (9th Cir.), *cert. denied*, 471 U.S. 1065 (1985).

spawning habitat. The plaintiffs argued that the Secretary was only obligated "to avoid jeopardizing the bare survival of the species,"⁹⁰ and sought to have the Secretary compelled to divert water to the plaintiffs for municipal and industrial use. The Secretary used section 7 as an affirmative defense, arguing that he had an obligation to give priority to the survival of the endangered fish.⁹¹ The district court agreed with the Secretary of the Interior and, citing *T.V.A. v. Hill*, held that the ESA gives endangered species the highest priority of all federal projects.⁹² By so concluding, the court dismissed the complaint and allowed the Secretary's plan to continue. The Ninth Circuit, in affirming the lower court's decision, held that the Secretary is mandated to pursue action for the conservation of endangered species.⁹³

If the courts continue to impose the duty to conserve on federal agencies in ever-widening situations, the federal agencies will become more aware of their duty. The strength of section 7 depends on the interpretation that courts are currently ascribing to it. Congress has amended section 7 five times since *T.V.A. v. Hill*,⁹⁴ yet not once has the duty to conserve provision been limited. This implies that the judiciary branch is interpreting section 7 the way Congress intended, namely, to make federal agencies realize that the preservation of wildlife is tantamount to preserving our environment and our own well-being.

Section 7 also includes a provision whereby an agency action may be exempted from the prohibitions of the ESA.⁹⁵ In order to be considered for an exemption, the applicant must have consulted with the Secretary, conducted any biological assessment as the Secretary required, and refrained from making an "irreversible and irretrievable commitment of resources."⁹⁶ The exemption will be granted by the Endangered Species Committee⁹⁷ if the committee determines that there are no reasonable and prudent alternatives to the action, the benefits of the action outweigh the benefits of alternative courses of action

consistent with conserving endangered species (such as scuttling the action completely), is of regional or national significance, and no irreversible or irretrievable commitment of resources was made.⁹⁸ In addition, the approved exemption application must include reasonable mitigating measures that are designed to improve the species' chance of survival.⁹⁹ The implication is that if any one of the requirements is not met, the exemption will not be granted. It seems ironic that if an "irretrievable" amount of resources are committed prior to applying for the exemption, the exemption will not be granted, yet if a "retrievable" amount is committed, the exemption may be granted. The sound reason for such a provision, however is to insure against having an applicant go out and spend tremendous amounts of money and resources in an attempt to force the Committee to grant an exemption. The way that the provision is now, applicants are put on notice that they will not be able to override the exemption process just because they expended large amounts of resources that they will not be able to recover.

To date, there is no case law interpreting the exemption provision, but it is apparent that there are issues that may arise. For example, at what amount is a commitment "irretrievable and irreversible?" What are reasonable mitigating measures? What factors should be included in the cost/benefit analysis? When do the benefits of the action "clearly" outweigh the "incalculable" costs? What happens if the exemption is granted and the mitigating measures fail? What if, after all this, the species becomes extinct? These and many other questions may eventually be answered by the courts, but as of now there is no clear indication of how any of them may be answered. Based on the prevailing disposition of the courts to interpret the policy and purposes of the ESA literally and to give conservation the highest priority, it appears that the ESA will remain a strong piece of legislation despite the presence of the exemption process contained in section 7. The process is rather stringent, so it appears unlikely that it will undermine the purposes of the ESA.

Habitat Conservation Plans and Other Exceptions To The Endangered Species Act Under Section 10

Whereas section 7 regulates the effect that government-affiliated projects will have on endangered species, section 10¹⁰⁰ regulates private projects. One of the major criticisms of the ESA was that prior to 1982 private development projects did not have access to the consultation process embodied in section 7. While projects that were "lucky" enough to need a government permit had the benefits of a section 7 consultation, private enterprise did not. The unfair aspect was that government-affiliated projects, after consulting with the Secretary, could devise alternative actions that would meet with the Secretary's approval or they could apply for an exemption from the prohibitions of the ESA. Private developers did not have this benefit, but they were still subject to the proscriptions and penalties

90. 549 F. Supp. at 709.

91. *Id.* at 708. There was also an issue regarding Indian rights to the water and its fish under the agreement that established the Pyramid Lake Paiute Indian Reservation in 1859.

92. 549 F. Supp. at 709.

93. 741 F.2d 257. *See also, National Wildlife Federation v. Hodel*, 23 ERC 1089 (E.D. Cal. 1985) (not only does the Department of Interior have a duty to consider appropriate conservation measures, it is also required to clearly document why any such measures are rejected); *Sierra Club v. Clark*, 577 F. Supp. 783 (D. Minn. 1984), *aff'd in part, rev'd in part*, 775 F.2d 608 (8th Cir. 1985).

94. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (codified at 16 U.S.C. §§1532-1542 (1982)); Act of December 28, 1979, Pub. L. No. 96-159, 93 Stat. 1225; Act of May 23, 1980, Pub. L. No. 96-246, 94 Stat. 343; Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, 96 Stat. 1411 (codified at 16 U.S.C. §§1531-1543 (1982)); Act of November 14, 1986, Pub. L. No. 99-659, 100 Stat. 3742.

95. 16 U.S.C. §1536(g), (h).

96. 16 U.S.C. §1536(g)(3)(A).

97. 16 U.S.C. §1536(e). The Committee was formed according to the 1978 amendments for the purpose of reviewing exemption applications. Not surprisingly, the TVA applied to the Committee for an exemption but was turned down. For a discussion of the proceedings, see Plater, *supra*, note 79.

98. 16 U.S.C. §1536(h)(1)(A).

99. 16 U.S.C. §1536(h)(1)(B).

100. 16 U.S.C. §1539.

imposed by the ESA.¹⁰¹

In 1982 Congress amended and expanded section 10¹⁰² in order to alleviate the inequality between private landowners and government agencies. The amendment was designed to make section 10 the same as section 7,¹⁰³ and to give private projects the same opportunity for permits and exemptions as government-affiliated projects have.

Under the amended Section 10, the Secretary may permit "any taking prohibited by section [9(a)(1)(B)] if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."¹⁰⁴ In order for an applicant to qualify for a permit, he must submit a Habitat Conservation Plan (HCP) that delineates:

- (i) the impact which will likely result from the taking;
- (ii) what steps the applicant will take to minimize and mitigate that impact, and the funding that will be available to implement such steps;
- (iii) what alternative actions to such taking were considered and why those alternatives are not being used; and
- (iv) such other measures that the Secretary may require as being necessary or appropriate for the purposes of the ESA.¹⁰⁵

If the Secretary determines, after reviewing the application and allowing for public comment, that the taking will be incidental¹⁰⁶ and "will not appreciably reduce the likelihood of the survival and recovery of the species in the wild,"¹⁰⁷ he will issue the permit. The Secretary also has the authority to include any terms or conditions that he deems necessary to insure that the applicant will carry out the HCP.¹⁰⁸ The permit may be revoked at any time if the

applicant does not comply with its stipulations.¹⁰⁹

Major provisions to section 10 parallel those in section 7,¹¹⁰ but there are a few major differences. First, in section 7, the applicant must use the best scientific and commercial data available when consulting with the Secretary in reference to the impact of an agency action.¹¹¹ Section 10 imposes no requirement as to the sufficiency of the information beyond providing that it must be what "the Secretary may require."¹¹² Second, section 10 authorizes the Secretary, with input from any interested parties, to review and decide on the adequacy of an HCP,¹¹³ whereas section 7 authorizes the Endangered Species Committee to review exemption applications submitted by federal agencies.¹¹⁴ Third, section 7 provides that once an exemption is granted, all mitigating measures must be carried out and the agency must report back to the Secretary when the measures have been completed.¹¹⁵ In addition, if an agency wishes to change the terms of the exemption (to possibly allow more development or more incidental takings), it must go through the submission process again.¹¹⁶ On the other hand, section 10 does not have such a prohibitive provision. A discussion of the first HCP submitted,¹¹⁷ and the ensuing litigation will show that the Secretary has much more leeway with regard to a section 10 HCP than with a section 7 application for exemption.

The San Bruno Mountain HCP¹¹⁸ was designed to allow for the development of a section of San Bruno Mountain, while preserving a section for the endangered Mission Blue butterfly. The San Bruno Mountain HCP Steering Committee (Committee) conducted a biological study into the habits of the Mission Blue butterfly in order to determine where its habitat was.¹¹⁹ After a two year study, the Committee applied for a permit pursuant to section

101. 16 U.S.C. §§1538(a), 1540.

102. Endangered Species Act Amendments of 1982, 16 U.S.C. §1539 (1982).

103. The House Report on the proposed amendment included the following statement:

There are also situations where the unintentional taking may occur on private lands owned by a developer who has no need for a Federal permit. These individuals have no access to the consultation and exemption provisions of the Act since they do not apply for any Federal permit or license to conduct their activities but, nevertheless, they are subject to the taking prohibitions of Section 9. In order to meet these [] concerns, the Committee tailored two similar provisions. For the applicant who consults with the Secretary under the Section 7 process, the Secretary shall provide him with a written statement on what permissible incidental takings may occur. For private landowners, the Committee designed a solution through the permit provisions of Section 10 by authorizing the Secretary to issue permits to individuals who demonstrate that taking of an endangered species will be incidental to, but not the purpose of, the lawful activity they will perform.

H. Rep. No. 567, 97th Cong., 2d Sess. 15, reprinted in 1982 U.S. Code Cong. & Admin. News 2807, 2815.

104. 16 U.S.C. §1539(a)(1)(B).

105. 16 U.S.C. §1539(a)(2)(A).

106. 16 U.S.C. §1539(a)(2)(B)(i).

107. 16 U.S.C. §1539(a)(2)(B)(iv).

108. 16 U.S.C. §1539(a)(2)(B).

109. 16 U.S.C. §1539(a)(2)(C).

110. Provisions in sections 7 and 10 compare as follows:

	Section 7	Section 10
Must specify impact of taking	(b)(4)(B)(i)	(a)(2)(A)(i)
Use mitigating measures	(b)(4)(B)(ii)	(a)(2)(A)(ii)
Alternative action considered	(h)(1)(A)(i)	(a)(2)(A)(iii)
Taking is incidental	(b)(4)(B)	(a)(2)(B)(i)
Survival & recovery not jeopardized	(a)(2)	(a)(2)(B)(iv)

Adapted from Note, *Habitat Conservation Plan Under the Endangered Species Act*, 24 San Diego L. Rev. 243, 247-8, n.29 (1987).

111. 16 U.S.C. §1536(a)(2).

112. 16 U.S.C. §1539(a)(2)(A)(iv).

113. 16 U.S.C. §1539(c).

114. 16 U.S.C. §1536(e).

115. 16 U.S.C. §1536(1).

116. 16 U.S.C. §1536(h)(2).

117. San Bruno Mountain Habitat Conservation Plan Steering Committee, San Bruno Mountain HCP, San Mateo County Planning Division, Redwood City, California.

118. Id.

119. See, *Friends of Endangered Species v. Jantzen*, 760 F.2d 976 (9th Cir. 1985).

10(a).¹²⁰ In March 1983, the FWS issued a Biological Opinion which concluded that "the planned development under the Permit would not jeopardize the continued existence of various species on the Mountain, including the Mission Blue butterfly."¹²¹ The permit was issued, contingent upon the stipulations in the HCP, and the incidental taking was allowed.

The plaintiffs in the action filed suit, alleging, in part, that the FWS based its findings on "methodologically flawed" studies, that its findings were arbitrary and capricious, and that its approval of the permit was an abuse of the agency's discretion.¹²² The District Court granted a summary judgment for the FWS, and the Ninth Circuit affirmed, concluding that the FWS complied with the provisions of the ESA.¹²³

This case is important in understanding the ESA because it shows that section 10 is a weak link in the Act. The FWS complied with the letter of the section, but there was an opportunity for the Committee to amend the HCP to take donated land back from the Mission Blue's habitat. Subsequent to the litigation, the Committee twice amended the HCP, both times the Secretary approved the revised Plan. Both times land that had been set aside as habitat was diverted to development.¹²⁴

Section 10 does have some good points. First, it gets the private sector involved in the preservation movement, hopefully aiding in educating the public that wildlife preservation is not solely a governmental task. Second, it reduces the monetary burden incurred by the government because the HCP applicants must provide funding for the implementation of any mitigating measures that they will undertake. Third, those mitigating measures may include the donation of land or water interests that can in turn be designated as critical habitat for endangered or threatened species.

The HCP process under section 10(a) also has some weaknesses. First, as the San Bruno Mountain HCP points out, amendments can be made to the HCP that can further reduce the area that was designated for the endangered species. In this respect, the private developer now has an advantage over the federal agency because the agency has to reapply in order to change any terms in its permit. Small reductions may result in allowable incidental takings, but how many incidental takings comprise a substantial danger

to the species' survival and recovery?¹²⁵ Finally, the Secretary can allow an incidental taking if the taking will not "appreciably reduce the likelihood of the survival and recovery of the species."¹²⁶ How far can a species' range be diminished before the purpose of the ESA can no longer be met, that purpose being the implementation of actions to insure the recovery of an endangered species to a point where it no longer needs the protections of the ESA?¹²⁷

These issues need to be addressed and rectified in order for the ESA to remain as a strong preservation vehicle. One way to make section 10 reflect section 7, as intended, would be to merge the two sections. Of course, one difficulty in that is that if a private landowner donates a parcel of land pursuant to an HCP, and then decides that he wants to reclaim part of it, he may not be able to if he is not allowed to amend the HCP. That may have a detrimental effect on subsequent HCP proposals, as private developers may decide to donate less area, or none at all. It may also raise issues as to what alternatives may be considered. Another way to reflect the intent to make section 7 and 10 parallel would be for Congress to amend the ESA so it reads that sections 7 and 10 should have no discrepancies whatsoever between them. In this way, the ESA will then subject private landowners to the same stringent provisions as are faced by federal agency actions, private individuals will be forced to use the best scientific and commercial data available when compiling their HCPs, and the application for the section 10 permit will go through the more rigid review of the Endangered Species Committee. If such measures are taken, section 10 will no longer be the weak link of the ESA.

Cooperation With States

Under section 6¹²⁸ the Secretary is authorized to enter into a cooperative agreement "with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species."¹²⁹ The purpose of the agreement is to assist the implementation of the state plan, but the proposed state plan must meet certain requirements.¹³⁰ In order for a state to have an adequate plan, it must be able to show that the plan authorizes the state agency to conserve resident species that the state or the Secretary determine to be

120. 760 F.2d at 980. See also, 48 Fed. Reg. 3,663 (1983); 48 Fed. Reg. 10,136 (1983).

121. 760 F.2d at 980-81.

122. Id. at 981.

123. Id. at 989. The lower court also dismissed plaintiffs' argument that was based on the National Environmental Policy Act of 1969, §102, 42 U.S.C. §4332, which the Court of Appeals also affirmed. The Ninth Circuit also concluded that since the argument of inadequate biological information was not brought up at the administrative stage of the process, it should not be the focal point of the plaintiffs' argument in the court action. Id. So even if the studies were flawed the FWS did not abuse its discretion by relying on it because it had followed the letter of the law.

124. See, Note, *Habitat Conservation Plans Under the Endangered Species Act*, 24 San Diego L. Rev. 243, 264, n. 114 (1987).

125. For a complete discussion of the San Bruno Mountain HCP and two subsequent HCPs that further point up section 10's weakness, see Id. at 243-71. See also, Note, *Where Have All The Butterflies Gone? Ninth Circuit Allows Incidental Taking*, 16 Golden Gate U. L. Rev. 93 (1986).

126. 16 U.S.C. §1539(a)(2)(B)(iv) (emphasis added).

127. Subsequent to the San Bruno Mountain HCP, the Riverside County, California, Planning Department filed the Coachella Fringe-toed Lizard HCP. Under the plan the fringe-toed lizard, which was a threatened species, would be reduced to one-quarter of its remaining existing range. This seventy-five percent reduction could very well ruin any chance that the lizard has to survive or recover to where it would not longer need the protections of the ESA. For a more in-depth discussion of this HCP, see Note, *Habitat Conservation Plans Under the Endangered Species Act*, 24 San Diego L. Rev. 243 (1987).

128. 16 U.S.C. §1535.

129. 16 U.S.C. §1535(c)(1).

130. Id.

131. 16 U.S.C. §1535(c)(1)(A).

endangered or threatened.¹³¹ The state must also show that it has established conservation plans that are consistent with the ESA's purpose,¹³² that the state agency is authorized to conduct investigations to determine the status of any resident species,¹³³ and that it is authorized to establish any new programs for wildlife conservation purposes.¹³⁴ Finally, the state plan must include a provision allowing for public participation in designating a species as endangered or threatened.¹³⁵

The ESA also has a provision that addresses the inevitable conflicts that are bound to arise between state laws and the ESA.¹³⁶ Under the provision, the ESA will void any state law if the state law permits an act that is prohibited by the ESA, or if it prohibits an act that is authorized by the ESA pursuant to an exemption or HCP permit. The state law will control if it is more restrictive than any ESA provision, but it may not relax any prohibition.¹³⁷

State plans are desirable for many reasons. First, because state officials may be authorized to administer it, the state plan reduces the management burden that the Secretary faces. Second, if a species is not threatened or endangered throughout its entire range (if it does not need the protection of the ESA), but numbers have dwindled within a particular state, the state may institute a plan for the species' protection and recovery within that state. Third, if a state establishes a conservation plan, it will reduce the cost incurred by the federal government, and the plan will further the ESA's purpose by decentralizing some aspects of control and expanding the scope and range of the Act.¹³⁸

Conclusion

The ESA remains a strong tool for wildlife and habitat preservation. By imposing civil and criminal sanctions against those who violate the ESA's provisions, Congress has dried up markets for products that are made from endangered or threatened species. The ESA also imposes an affirmative duty on federal agencies to make wildlife preservation their highest priority. In addition, the section 10 HCP permit provisions, along with federal/state cooperative agreements, extend the preservation movement to state, municipal, and private levels.

There are a few important measures, however, that must be taken in order to keep the ESA strong. First, courts must

continue to reflect legislative intent by interpreting the ESA's provisions broadly, both with respect to the section 7 duty to conserve that is imposed on federal agencies, and the section 9 definition of "taking." These two issues are the cornerstones of the ESA, and a narrowing of their meaning and affect would substantially weaken the ESA.

Second, congressional additional action should be taken to guide the courts. Section 10 must be amended in order to make the HCP permit procedure more stringent and more in line with section 7's provisions. It is needed because all projects should be afforded equal treatment under the ESA, and currently there is a disparity between the restrictions that are in place on private landowners as opposed to government agencies. Section 10 must also be amended to impose the same standards on private development projects and government-affiliated projects alike, especially with regard to the accuracy of scientific information that is submitted with the HCP. A more rigid HCP amendment review process must be written into section 10 to alleviate the current provision that allows serial "incidental" takings which imperil the species' chances of survival and recovery.

Third, Congress should author regulations to aid the Secretary in resolving such issues as what factors should be considered in the cost/benefit analysis that is used to determine whether an area is to be designated as critical habitat. Congress should also give more insight as to when the benefits will "clearly" outweigh the costs of exempting agency actions from ESA prohibitions.

Finally, Congress should write two more sections into the ESA to address issues that will eventually arise. One of the issues is what will happen when, after a section 7 exemption is granted, the endangered or threatened species becomes extinct who will be held accountable, and to what extent? Such a provision may make potentially responsible entities more willing to collect more reliable scientific data, propose farther-reaching mitigating measures, and insure that those mitigating measures are fully implemented.

A second issue that needs to be more clearly explained is that of recovery and survival. When is a species deemed to be recovered to the point where it can survive, thereby necessitating its delisting? How much of the recovered population may be taken, and at what rate? What protections, if any, extend to delisted species? These questions must be answered by Congress in order to insure that delisted species will be able to survive without the ESA's protections. They must also be answered to insure against an uncontrolled eradication of the species, which would result in the species having to be relisted.¹³⁹

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132. 16 U.S.C. §1535(c)(1)(B). If the state does not have an established plan, it must include a provision to immediately establish a plan to conserve endangered or threatened species. *Id.*, §1535(c)(1)(E)(ii).

133. 16 U.S.C. §1535(c)(1)(C).

134. 16 U.S.C. §1535(c)(1)(D).

135. 16 U.S.C. §1535(c)(1)(E).

136. 16 U.S.C. §1535(f).

137. *Id.*

138. Under section 1535(d)(1), the Secretary is authorized to allocate funds to any state with which it has a cooperative agreement. With the current administration's budgetary cutbacks in environmental programs, this funding is nominal at best. However, if states add their own funds to those received from the federal government, the wildlife preservation movement will extend to the state level. In addition, the ESA will have farther reaching effects with the extra funding provided by the states.

139. For a discussion of these various issues, as well as others, as they pertain to the growing grizzly bear population in the northwest, see Robbins, *When Species Collide*, 26 Natl. Wildlife 20 (Feb.-Mar. 1988).

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