

does not result in the destruction of such species habitat. In certain instances when damage is likely to result from the action, the committee could approve the project by providing exemptions to existing standards. This review would only occur when agencies submit an application to the Endangered Species Committee. The committee's decision is likely to be supported by the courts if the proper procedural processes are followed by the committee.

In addition, authorization of \$2.5 million for fiscal year 1979, \$3.0 million for fiscal year 1980 and \$3.5 million for fiscal year 1981 is provided to the Department of Commerce for the National Oceanic and Atmospheric Administration (NOAA).

5. Cost estimate:

	<i>Millions</i>
Fiscal year 1979:	
Authorization level	28.0
Cost estimate	26.2
Fiscal year 1980:	
Authorization level	30.5
Cost estimate	30.3
Fiscal year 1981:	
Authorization level	38.0
Cost estimate	32.9
Fiscal year 1982:	
Authorization level	2.1
Cost estimate	2.1
Fiscal year 1983:	
Authorization level	2.1
Cost estimate	2.1

The costs of this bill fall within budget function 300.

6. Basis of estimate: The authorization levels are those stated in the bill and are assumed to be fully appropriated. Costs are estimated by applying a two-year outlay rate to the level of appropriation provided for NOAA, USFWS, and the Endangered Species Committee. Spend-out rates for NOAA and the USFWS were developed in consultation with agency staffs. The outlay rate for the Endangered Species Committee was estimated to be similar to the rate of the Council on Environmental Quality.

7. Estimate comparison: None.

8. Previous CBO estimate: A cost estimate was prepared on March 22, 1978 for H.R. 10883, as ordered reported by the House Committee on Merchant Marine and Fisheries. The House bill is similar to S. 2899, except it does not include the establishment of an Endangered Species Committee.

9. Estimate prepared by: James V. Manaro (225-7760).

10. Estimate approved by:

JAMES BYRN,  
*Assistant Director for Budget Analysis.*

CHANGES IN EXISTING LAW

In the opinion of the committee, it is necessary to dispense with the requirements of subsection (f) of rule XXIX of the Standing Rules of the Senate in order to expedite the business of the Senate.

[From the Congressional Record, July 17, 1978]

SENATE CONSIDERATION AND PASSAGE OF S. 2899, WITH AMENDMENTS  
ENDANGERED SPECIES ACT AMENDMENTS OF 1978

Mr. ROBERT C. BYRN. Mr. President, there seems to be nothing at this point that I can call up at the moment. I ask unanimous consent that the Senate proceed to consider the endangered species bill, with the understanding that once the title is read, I shall move to recess for a period.

The PRESIDING OFFICER. The clerk will state the bill by title. The legislative clerk read as follows:

A bill (S. 2899) to amend the Endangered Species Act of 1973 to establish an Endangered Species Interagency Committee to review certain actions to determine whether exemptions from certain requirements of that act should be granted for such actions.

The PRESIDING OFFICER. Is there objection to the present consideration of the bill.

There being no objection, the Senate proceeded to consider the bill which had been reported from the Committee on Environment and Public Works with amendments as follows:

On page 1, line 6, strike "1536" and insert "1532";

On page 2, line 7, after "which," insert "after consultation as required in section 7 (a) of this Act";

On page 2, line 11, after "the" insert "adverse modification or";

On page 2, line 12, strike "and";

On page 2, beginning with line 13, insert the following:

"(9) For purposes of subsection 7(e) (2) (C) the term 'alternative courses of action means all alternatives and thus is not limited to original project objectives and agency jurisdiction.'; and

On page 2, line 19, strike "(18)" and insert "(19)";

On page 3, line 9, after "Secretary" insert "adverse";

On page 3, line 10, after "Secretary" insert "after consultation";

On page 3, line 9, after "Interior" insert "(and where appropriate, the Secretary of the Interior in concurrence with the Secretary of Commerce)";

On page 4, line 13, strike "Secretary of Transportation" and insert "Governor of the State which is affected by the action for which an exemption is sought (or in the case of an action affecting more than one State, the Governors of all such States who shall cast collectively a single vote on the Committee as determined among such Governors)";

On page 5, line 3, strike "Except as provided in subparagraph (B) of this paragraph, five" and insert "Seven";

On page 5, line 4, after "Committee" insert "or their representatives";

On page 5, beginning with line 18, insert the following:

"(E) All meetings and records of the Committee shall be open to the public. On page 6, line 21, strike "Committee" and insert "Committee";

On page 7, beginning with line 15, strike through and including page 9, line 4, and insert in lieu thereof the following:

"(12) For the purpose of obtaining information necessary for the consideration of an application for an exemption under this section the Committee may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents.

"(13) To the extent practicable within the time required for action under subsection (e) of this section, the consideration of any application for an exemption under this section and the conduct of any hearing under subsection (e) of this section shall be in accordance with sections 654, 655, and 656 of title 5, United States Code.

On page 10, line 20, after "Service Insert "(or where appropriate the Director of the Fish and Wildlife Service in concurrence with the Director of the National Marine Fisheries Service)";

Code.

On page 10, line 20, after "Service Insert "(or where appropriate the Director of the Fish and Wildlife Service in concurrence with the Director of the National Marine Fisheries Service)";

Code.

On page 11, line 3, strike "—Not later than one hundred and eighty days after" and insert "After":

On page 11, beginning with line 18, insert the following:

"(ii) there has been a reasonable and responsible effort to resolve the conflicts which are known to exist, and the Federal agency requesting such exemption has made, subsequent to the initiation of the consultation under subsection (a) of this section, no irreversible or irretrievable commitment of resources which forecloses the consideration of modification or alternatives to such action; and

On page 11, line 21, strike "(ii)" and insert "(iii)":

On page 11, line 22, strike "both determinations in clauses (A) (i) and (ii), determining after notice and opportunity for public hearing" and insert "positive determinations under clauses (i), (ii), and (iii) of subparagraph (A), determine and publish in the Federal Register, within one hundred and eighty days after receipt of the application and response required in subsection (d) of this section and after notice and public hearing on the record";

On page 12, line 9, after "determines" insert "on the record";

On page 12, line 13, strike "project" and insert "action";

On page 12, line 16, after "or" insert "alternative courses of action consistent with":

On page 13, line 8, strike "should" and insert "an":

On page 13, line 10, strike "and the Federal agency or department shall transfer to the United States Fish and Wildlife Service out of appropriations or other funds, such money as may be necessary to implement the conservation programs or mitigation measures required by this section for endangered or threatened species or their critical habitats";

On page 14, line 2, strike "1981," and insert "1981,"; and insert the following:

On page 14, line 2, strike "1981,"

"(f) The authority granted to the Endangered Species Committee established in this section shall terminate on September 30, 1981." (16 U.S.C. 1538) is amended by inserting "(1)" after "(b)" and by adding the following new paragraph:

"(2) The provisions of this section shall not apply to any raptor legally held in captivity or in a controlled environment on the effective date of the Endangered Species Act Amendments of 1978, or the domestic captive produced progeny of any legally held raptor: Provided, That such raptor has not been intentionally returned to a wild state. Persons holding such raptors must be able to demonstrate that the raptors do, in fact, qualify under the provisions of this paragraph. Such persons shall maintain and submit to the Secretary on request such inventories, documentation, and records as are reasonable and as the Secretary may by regulation require: Provided, That such requirements shall not unnecessarily duplicate the requirements of other rules and regulations promulgated by the Secretary."

On page 14, line 28, strike "q" and insert "g":

So as to make the bill read:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Endangered Species Act Amendments of 1978".

Sec. 2. Section 3 of the Endangered Species Act of 1973 (16 U.S.C. 1532) is amended—

(1) by inserting after paragraph (4) thereof following new paragraph:

"(4) The term 'Federal agency' means any department, agency, or instrumentality of the United States.":

(2) by inserting after paragraph (7) thereof the following new paragraphs:

"(8) The term 'irresolvable conflict' means, with respect to any action authorized, funded, or carried out by a Federal agency, a set of circumstances under which, after consultation as required in section 7(a) of this Act, completion of such action would (A) jeopardize the continued existence of an endangered or threatened species or (B) result in the adverse modification or destruction of a critical habitat.

"(9) For purposes of subsection 7(e) (2) (C) the term 'alternative courses of action' means all alternatives and thus is not limited to original project objectives and agency jurisdiction"; and

(3) by renumbering the paragraphs thereof, including any references thereto, as paragraphs (1) through (19) respectively.

Sec. 3. Section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1536) is amended to read as follows:

"INTERAGENCY COOPERATION"

"Sec. 7. (a) CONSULTATION.—The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act. Each Federal agency shall insure that any action authorized, funded, or carried out by such agency does not jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary after consultation as appropriate with the affected States, to be critical, unless such agency is granted an exemption for such action by the Committee pursuant to subsection (e) of this section.

"(b) (1) ESTABLISHMENT OF COMMITTEE.—There is established a committee to be known as the Endangered Species Committee (hereinafter in this section referred to as the 'Committee').

"(2) The Committee shall review any application submitted to it pursuant to subsection (d) of this section and determine in accordance with subsection (e) of this section whether or not to grant an exemption from the requirements of subsection (a) of this section for the action set forth in such application.

"(3) The Committee shall be composed of seven members as follows:

"(A) The Secretary of Agriculture.

"(B) The Secretary of the Army.

"(C) The Chairman of the Council on Environmental Quality.

"(D) The Administrator of the Environmental Protection Agency.

"(E) The Secretary of the Interior (and where appropriate, the Secretary of the Interior in concurrence with the Secretary of Commerce).

"(F) The Secretary of the Smithsonian Institution.

"(G) The Governor of the State which is affected by the action for which an exemption is sought (or in the case of an action affecting more than one State, the Governors of all such States who shall cast collectively a single vote on the Committee as determined among such Governors)."

"(4) (A) Members of the Committee shall receive no additional pay on account of their service on the Committee.

"(B) While away from their homes or regular places of business in the performance of services for the Committee, members of the Committee shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703 of title 5 of the United States Code.

"(5) (A) Seven members of the Committee or their representatives shall constitute a quorum for the transaction of any function of the Committee.

"(B) The Committee shall not grant any exemption from the requirements of subsection (a) of this section to the head of any Federal agency for any action authorized, funded, or carried out by such agency unless five members of the Committee vote to grant such exemption. The vote of the Committee members shall not be delegated to other persons.

"(C) The Secretary of the Interior shall be the Chairman of the Committee.

"(D) The Committee shall meet at the call of the Chairman or five of its members.

"(E) All meetings and records of the Committee shall be open to the public, deems desirable.

"(6) The Committee may appoint and fix the pay of such personnel as it deems desirable.

"(7) The staff of the Committee may be appointed without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Service pay rates, except that no individual so appointed may receive pay in excess of the annual rate of basic pay in effect for grade GS-18 of the General Schedule.

"(8) The Committee may procure temporary and intermittent services to the same extent as is authorized by section 3109 (b) of title 5 of the United States

Code, but at rates for individuals not to exceed the daily equivalent of the annual rate of basic pay in effect for grade GS-18 of the General Schedule.

"(9) Upon request of the Committee, the head of any Federal agency is authorized to detail, on a reimbursable basis, any of the personnel of such agency to the Committee to assist it in carrying out its duties under this section.

"(10) (A) The Committee may for the purpose of carrying out its duties under this section hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Committee deems advisable.

"(B) When so authorized by the Committee, any member or agent of the Committee may take any action which the Committee is authorized to take by this paragraph.

"(C) Subject to the Privacy Act, the Committee may secure directly from any Federal agency information necessary to enable it to carry out its duties under this section. Upon request of the Chairman of the Committee, the head of such Federal agency shall furnish such information to the Committee.

"(D) The Committee may use the United States mails in the same manner and upon the same conditions as other Federal agencies.

"(E) The Administrator of General Services shall provide to the Committee on a reimbursable basis such administrative support services as the Committee may request.

"(11) In carrying out its duties under this section, the Committee may promulgate and amend such rules, regulations, and procedures, and issue and amend such orders as it deems necessary.

"(12) For the purpose of obtaining information necessary for the consideration of an application for an exemption under this section the Committee may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents.

"(13) To the extent practicable within the time required for action under subsection (e) of this section, and except to the extent inconsistent with the requirements of this section, the consideration of any application for an exemption under this section and the conduct of any hearing under subsection (e) of this section shall be in accordance with sections 654, 655, and 656 of title 5, United States Code.

"(c) Reservations.—Not later than ninety days after the date of enactment of this section, the Committee shall promulgate regulations which set forth the form and manner in which applications by the heads of the Federal agencies for review of actions by such agencies shall be submitted to the Committee and the information to be contained in such applications. Such regulations shall require that information submitted in an application by the head of any Federal agency with respect to any action of such agency include, but not be limited to—

"(1) a description of the consultation process carried out pursuant to subsection (a) of this section between the head of such Federal agency and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service; and

"(2) a statement describing why such action cannot be altered or modified to conform with the requirements of subsection (a) of this section.

"(d) Submitters of Applications.—(1) The head of any Federal agency may submit an application for review of any action of such agency to the Committee if, in the opinion of the head of such agency, such agency has complied with the requirements of subsection (a) of this section and that an irresolvable conflict exists with respect to such action. Such application for review shall be submitted in accordance with the regulations promulgated by the Committee under subsection (c) of this section.

"(2) The Director of the Fish and Wildlife Service (or where appropriate the Director of the Fish and Wildlife Service in concurrence with the Director of the National Marine Fisheries Service) shall prepare and submit to the Committee within thirty days of any submission made under paragraph (1) of this subsection his comments concerning such submission.

"(e) (1) REVIEW AND DETERMINATION.—After the Committee receives the application and comments submitted pursuant to subsection (d) of this section, the Committee shall review such application and comments and—

"(A) determine, with respect to the action which is the subject of such application, whether or not—

"(1) the requirements of the consultation process described in subsection (a) of this section have been met; and

"(H) there has been a reasonable and responsible effort to resolve the conflicts which are known to exist, and the Federal agency requesting such exemption has made subsequent to the initiation of the consultation under subsection (a) of this section, no irreversible or irretrievable commitment of resources which forecloses the consideration of modification or alternatives to such action; and

"(I) if it makes positive determinations under clauses (1), (11), and (11) of subparagraph (A), determine and publish in the Federal Register, within one hundred and eighty days after receipt of the application and response required in subsection (d) of this section and after notice and public hearing on the record, whether or not to grant an exemption from the requirements of subsection (a) of this section to the head of such Federal agency for such action.

"(2) The Committee may only grant an exemption for any action under subsection (e) of this section if it determines on the record that—

"(A) there is no national or regional significance; and

"(B) the action is of national or regional significance; and

"(C) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and that such action is in the public interest.

"(F) NATIONAL ENVIRONMENTAL POLICY ACT.—No final determination of the Committee under subsection (e) of this section shall be considered a major Federal action under the terms of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

"(G) MITIGATION.—In those instances where the Committee determines that an exception is warranted under subsection (e) of this section the Committee must assure that the action approved for such exemption incorporates all reasonable mitigation measures deemed necessary by the Secretary to minimize adverse impacts upon the affected endangered or threatened species or its critical habitat including but not limited to live propagation, translocation, and habitat acquisition and improvement. The Federal agency or department receiving such exemption shall include the costs of such mitigation measures within the overall costs of continuing the proposed action.

"(H) EXEMPTION OR TAKING.—Notwithstanding sections 4(d) and 9(a) of this Act or any regulations promulgated pursuant to such sections, any action for which an exemption is granted under subsection (e) of this section shall not be considered a taking of any endangered or threatened species with respect to any activity which is necessary to carry out such action.

"(I) AUTHORIZATION.—There is authorized to carry out this section not to exceed \$2,500,000 for fiscal year 1979, not to exceed \$2,500,000 for fiscal year 1980, and not to exceed \$2,500,000 for fiscal year 1981.

"(J) The authority granted to the Endangered Species Committee established in this section shall terminate on September 30, 1981."

Sec. 4. Section 9(b) of the Endangered Species Act (16 U.S.C. 1539) is amended by inserting "(1)" after "(b)" and by adding the following new paragraph:

"(2) The provisions of this section shall not apply to any raptor legally held in captivity or in a controlled environment on the effective date of the Endangered Species Act Amendments of 1978, or the domestic captive produced progeny of any legally held raptor: *Provided*, That such raptor has not been intentionally returned to a wild state. Persons holding such raptors must be able to demonstrate that the raptors do, in fact, qualify under the provisions of this paragraph. Such persons shall maintain and submit to the Secretary on request such inventory, documentation, and records as are reasonable and as the Secretary may by regulation require: *Provided*, That such requirements shall not unnecessarily duplicate the requirements of other rules and regulations promulgated by the Secretary."

Sec. 5. Section 15 of the Endangered Species Act of 1973 (16 U.S.C. 1542) is amended to read as follows:

"Except as authorized in sections 6 and 7 of this Act, there are authorized to be appropriated—

"(1) not to exceed \$25,000,000 for the fiscal year ending September 30, 1977, and the fiscal year ending September 30, 1978, not to exceed \$23,000,000 for the fiscal year ending September 30, 1979, not to exceed \$25,000,000 for

the fiscal year ending September 30, 1980, and not to exceed \$27,000,000 for the fiscal year ending September 30, 1981, to enable the Department of the Interior to carry out such functions and responsibilities as it may have been given under this Act; and

"(2) not to exceed \$5,000,000 for the fiscal year ending September 30, 1977, and the fiscal year ending September 30, 1978, not to exceed \$2,500,000 for the fiscal year ending September 30, 1979, not to exceed \$3,000,000 for the fiscal year ending September 30, 1980, and not to exceed \$3,500,000 for the fiscal year ending September 30, 1981, to enable the Department of Commerce to carry out such functions and responsibilities as it may have been given under this Act."

**The PRESIDING OFFICER.** The bill before the Senate is S. 2899. Time for debate on this bill is limited to 2 hours, to be equally divided and controlled by the Senator from Iowa (Mr. Culver) and the Senator from Vermont (Mr. Stafford) with 30 minutes on any amendment except one to be offered by the Senator from Mississippi (Mr. Stennis), on which there shall be 1½ hours and with 15 minutes on any debatable motion, appeal, or point of order.

The Senate continued with the consideration of S. 2899.

**Mr. STENNIS.** Mr. President, will the Senator yield to me for a parliamentary inquiry?

**Mr. CULVER.** I am delighted to yield.

**Mr. STENNIS.** Mr. President, a parliamentary inquiry.

**The PRESIDING OFFICER.** The Senator will state it.

**Mr. STENNIS.** To refresh our recollection, Mr. President, the Senator from Iowa now is proceeding under the unanimous-consent agreement to take up the so-called endangered species bill.

**Mr. CULVER.** That is correct.

**Mr. STENNIS.** And the Senator is floor manager of the bill.

**Mr. CULVER.** Yes.

**Mr. STENNIS.** We had an understanding about amendments and amendments in the second degree, as I recall, and I had an amendment in at that time and it was treated to 1½ hours equally divided; is that correct?

**Mr. CULVER.** The Senator from Mississippi is correct. We have provision under the unanimous-consent agreement for 2 hours of general debate, with the understanding as well that the amendment of the Senator from Mississippi will be accorded 1½ hours of debate to be equally divided and any other amendments will be accorded 30 minutes of debate equally divided.

**Mr. STENNIS.** I thank the Senator from Iowa very much.

**Mr. CULVER.** Mr. President for the next few hours the Senate will be considering legislation, S. 2899, which will reauthorize and amend the Endangered Species Act which was enacted in 1972 through the wisdom of Congress. I use the term wisdom advisedly, for there is little doubt, in my judgment, that this act is one of the most significant and profound laws adopted by our Nation.

The Endangered Species Act was a recognition—and a woefully late one—that our developmental activities were responsible for destroying forms of life which were present as a result of processes which began with the first appearance of life on Earth 3½ billion years ago. All species present today have been shaped by those forces, and they have evolved and developed for ages which in contrast make the length of our own lifetimes insignificant.

This has been a continuing saga. Species and life forms appear, flourish for a time, and then disappear forever. This is a natural process, and one we must recognize as we consider this legislation today.

And yet, events shaped by our industrialization over the past few hundred years have led to a sharp acceleration in the rate of extinction, to the point where the natural process may be increased by a factor of hundreds or even thousands. The chilling tragedy of this massive loss of species from our ecosystems and biosphere will never be fully understood, because among the species irreversibly lost are some whose existence we never realized, and whose contribution to science and mankind will never be known.

The Endangered Species Act is a first, a belated, and a noble attempt to reduce these losses by requiring that our citizens and our Government be aware of threatened or endangered species, and that they plan future activities to prevent these losses. The act has without question already had a positive effect in this regard. In just 5 years, it has probably been responsible for saving several species from extinction.

Unfortunately, one provision of the law has generated considerable attention in recent months. Section 7 of the Endangered Species Act requires that all Federal agencies undertake necessary precautions to assure that actions or projects authorized, funded, or carried out by them do not jeopardize the continued existence of an endangered species or its critical habitat.

This is in every sense a rational and necessary provision, because Federal actions have done much to alter our landscape and environment. Section 7 was designed to require a new and specific analysis of these actions and to require planning so that we could avoid recognizable harm to any extremely rare species.

This section establishes a specific process of consultation which must take place between the construction agency and the U.S. Fish and Wildlife Service (FWS) which implements the Endangered Species Act. This mechanism has led to the resolution of a vast majority of the potential conflicts which have arisen since 1973.

As all my colleagues are aware, this provision of the law has been used successfully to prevent the completion of the Tellico Dam in Tennessee, and it appears likely that a growing number of other projects will not be completed, because of this section. During the past months we have heard many emotional discussions from both sides about the case of Tellico, whose reservoir would have flooded the only remaining habitat for a small species of fish not even known to exist until several years ago.

Strictly speaking, the decision of the Supreme Court in the case of Hill against the Tennessee Valley Authority was a good one, in that it correctly interpreted the purposes of the law and the intent of Congress, which was to give priority to the important value of endangered species.

During the past year the Resource Protection Subcommittee, which has jurisdiction over the Endangered Species Act, has held 6 days of hearings on the implementation of the act. The committee received persuasive testimony that there are now many other projects in the Nation where consultative resolution may not be possible under the existing arrangement.

It has also been brought to the committee's attention that the General Accounting Office suspects, but has not confirmed, that the Fish and Wildlife Service has refrained from listing species which may pose a conflict with a Federal action, for fear of provoking the Congress into weakening the protective provisions of section 7. In addition, the listing of endangered species is increasing dramatically. One thousand and eight hundred plant species have been proposed, as have 40 additional critical habitat designations. The inevitable consequence of these developments is an intensifying pressure on Congress to destroy the objective of this valuable legislation or similarly exempt various projects.

The Committee on Environment and Public Works unanimously approved—after considerable discussion—the bill before us today, S. 2889, which amends the Endangered Species Act to establish a rational and responsible mechanism for resolving future conflicts and at the same time assure maximum protection for all endangered species. It provides a general solution to these problems and is designed to avoid ad hoc exemptions or the emasculating of the act as a result of short-term pressures on Congress which overlook the importance of this law.

Briefly, the bill establishes an Endangered Species Committee, composed of seven public officials, including the heads of six Federal agencies and the Governor of the State affected by the conflict. The committee would review and arbitrate conflicts which involve Federal projects and endangered species, and it could exempt a project from compliance with section 7 of the act if it agreed that certain criteria had been met. These criteria would require the committee to evaluate social, cultural, economic, and other benefits of the project as well as the ecological, educational, and scientific and other benefits of alternatives which would conserve the species. In addition, the bill would stimulate the resolution of impasses by requiring good faith efforts in consultation between the action agency and the U.S. Fish and Wildlife Service.

Mr. President, I want to assure my colleagues that the proposal before us is one which has received serious scrutiny by our committee. It was, as I have mentioned, adopted unanimously by the committee. We are satisfied that it does preserve the integrity of the Endangered Species Act and yet provides the flexibility which will be needed in the coming years. Most importantly, it is an attempt to get ahead of foreseeable problems and be prepared for them in a rational way.

It is not possible to overstate the importance of keeping the Endangered Species Act strong. Enlightened self-interest requires that we do our best to preserve these species, which have evolved over millions and billions of years. We owe it to our children and grandchildren to pass on to them a world that is intact.

For the record, Mr. President, I would like at this time to present a more comprehensive and detailed analysis of the bill, S. 2889.

The Endangered Species Act of 1973 is the first statute to authorize a comprehensive national program for the conservation of endangered or threatened species of fish, wildlife, and plants.

The regulatory mechanism provided to achieve this goal authorizes and directs the Secretary of the Interior and, for marine species, the

Secretary of Commerce to list and to issue regulations for the protection of endangered or threatened species. The Secretary is required to enter into cooperative agreements with, and provide technical and financial assistance to, qualified States for species conservation programs.

The authorization for the act, currently \$25 million annually for the Secretary of the Interior and \$3.5 million annually for the Secretary of Commerce, expires on September 30, 1978. S. 2889 extends the budget authority for the endangered species program through fiscal year 1981 at a level of \$75 million for the Secretary of the Interior and \$9 million for the Secretary of Commerce.

As I mentioned, the bill also contains a provision which is intended to provide a mechanism for the resolution of conflicts which might arise between the Endangered Species Act's mandate to protect and manage endangered and threatened species and other legitimate national goals and priorities such as providing energy, economic development, and other benefits to the American people. Some of the objectives have clashed in recent months as construction on certain major Federal projects has been slowed, and in one instance, stopped, since completion of the proposed Federal action would adversely impact endangered or threatened species or their critical habitats.

The Tellico Dam project on the Little Tennessee River has been probably the most visible case in which the committee found a difficult conflict between project objectives and the requirements of section 7 of the Endangered Species Act. The Fish and Wildlife Service feels TVA should terminate or modify the project, because it endangers the snail darter. TVA, on the other hand, feels it has ambiguous congressional directives and that it is not at liberty to terminate the project at this time.

This case has also resulted in a court suit, which was pursued to the Supreme Court, Hiram G. Hill, Jr. et al. against Tennessee Valley Authority. The appellate court had held in this case that a lower court decision ruling that the Tellico Dam should be completed was in error and that TVA should be enjoined from completing the project. The appellate court stated that enforcement of section 7 of the act requires an injunction of all further actions by TVA which may detrimentally alter the critical habitat of the snail darter regardless of mitigating circumstances. Arguments were heard before the U.S. Supreme Court on April 18, 1978. On June 15, 1978, the Court announced its decision in the case, upholding the decision of the appellate court. Mr. President, the Court's decision is important and relevant to the consideration of this legislation, and I think the syllabus will be of interest to my colleagues.

I ask unanimous consent that the syllabus be printed in the Record. There being no objection, the syllabus was ordered to be printed in the Record, as follows:

SYLLABUS

The Endangered Species Act of 1973 (Act) authorizes the Secretary of the Interior (Secretary) in § 4 to declare a species of life "endangered." Section 7 specifies that all "Federal departments and agencies shall... with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of [the Act] by carrying out programs for the conservation of endangered species... and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered

species or result in the destruction or modification of habitat of such species which is determined by the Secretary . . . to be critical." Shortly after the Act's passage the Secretary was petitioned to list a small fish popularly known as the small darter as an endangered species under the Act. Thereafter the Secretary made the designation. Having determined that the small darter apparently lives only in that portion of the Little Tennessee River that would be completely inundated by the impoundment of the reservoir created as a consequence of the completion of the Tellico Dam, he declared that area as the small darter's "critical habitat." Notwithstanding the near completion of the multimillion-dollar dam, the Secretary issued a regulation, in which it was declared that, pursuant to § 7, "all Federal agencies must take such action as is necessary to ensure that actions authorized, funded, or carried out by them do not result in the destruction or modification of this critical habitat area." Respondents brought this suit to enjoin completion of the dam and impoundment of the reservoir, claiming that those actions would violate the Act by causing the small darter's extinction. The District Court after trial denied relief and dismissed the complaint. Though finding that the impoundment of the reservoir would probably jeopardize the small darter's continued existence, the court noted that Congress, through fully aware of the small darter problem, had continued Tellico's appropriations, and concluded that "[a]t some point in time a federal project becomes so near completion and so incapable of modification that a court of equity should not apply a statute enacted long after inception to produce an unreasonable result. . . ." The Court of Appeals reversed the District Court's judgment and permanently enjoined completion of the project "until Congress, by appropriate legislation, exempts Tellico from compliance with the Act or the small darter has been deleted from the list of endangered species or its critical habitat materially redefined." The court held that the record revealed a prima facie violation of § 7 in that TVA had failed to take necessary action to avoid jeopardizing the small darter's critical habitat by its "actions." The court thus rejected the contention that the word "actions" as used in § 7 was not intended by Congress to encompass the terminal phases of ongoing projects. At various times before, during, and after the foregoing judicial proceedings TVA represented to congressional appropriations committees that the Act did not prohibit completion of the Tellico Project and described its efforts to transplant the small darter. The committees consistently recommended appropriations for the dam, sometimes stating their views that the Act did not prohibit completion of the dam at its advanced stage, and Congress each time approved TVA's general budget, which contained funds for the dam's continued construction. *Held:*

1. The Endangered Species Act prohibits impoundment of the Little Tennessee River by the Tellico Dam. *Up. 17-97.*

(a) The language of § 7 is plain and makes no exception such as that urged by petitioner whereby the Act would not apply to a project like Tellico that was well under way when Congress passed the Act. *Pp. 17-19.*

(b) It is clear from the Act's legislative history that Congress intended to halt and reverse the trend toward species extinction—whatever the cost. The pointed omission of the type of qualified language previously included in endangered species legislation reveals a conscious congressional design to give endangered species priority over the "primary missions" of Federal agencies. Congress, moreover, foresaw that § 7 would on occasion require agencies to alter ongoing projects in order to fulfill the Act's goals. *Pp. 19-31.*

(c) None of the limited "hardship exemptions" provided in the Act would even remotely apply to the Tellico Project. *P. 32.*

(d) Though statements in appropriations committee reports reflected the view of the committees either that the Act did not apply to Tellico or that the dam should be completed regardless of the Act's provisions, nothing in the TVA appropriations measures passed by Congress stated that the Tellico Project was to be completed regardless of the Act's requirements. To find a repeal under these circumstances, as petitioner has urged, would violate the "cardinal rule . . . that repeals by implication are not favored." *Morton v. Mancusi*, 417 U.S. 535, 549. The doctrine disfavoring repeals by implication applies with full vigor when the subsequent legislation is an appropriations measure. When voting on appropriations measures, legislators are entitled to assume that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. A contrary policy would violate the express rules of both Houses of Congress, which provide that appropriations measures may not change existing substantive law. An appropriations committee's expression does not operate to repeal or modify substantive legislation. *Pp. 33-37.*

2. The Court of Appeals did not err in enjoining completion of the Tellico Dam, which would have violated the Act. Congress has spoken in the plainest words, making it clear that endangered species are to be accorded the highest priorities. Since that legislative power has been exercised, it is up to the Executive Branch to administer the law and for the judiciary to enforce it when, as here, enforcement has been sought. *Pp. 37-39.*

540 F. 2d 1064, affirmed.

Burger, C. J., delivered the opinion of the Court, in which Brennan, Stewart, White, Marshall, and Stevens, JJ., joined. Powell, J., filed a dissenting opinion, in which Blackmun, J., joined. Rehnquist, J., filed a dissenting opinion.

Mr. CURVER. While the committee found in its hearings that much controversy still surrounds the Tellico Dam case, the case is the type of Federal action which should be eligible for review by the Endangered Species Committee established by this bill and given appropriate consideration for an exemption under the new review process mandated in this legislation.

Testimony received by the committee indicates that a substantial number of Federal actions currently underway appear to have all the elements of an irresolvable conflict within the provisions of the act. This number may increase significantly in the future as the Fish and Wildlife Service continues to list additional species and critical habitats.

As I mentioned, some flexibility is needed in the act to allow consideration of those cases where a Federal action cannot be completed or its objectives cannot be met without directly conflicting with the requirements of section 7.

The bill requires that when conflicts with the Endangered Species Act are known or shown or should be known, an agency must consult immediately with the Fish and Wildlife Service and exhaust all reasonable avenues for eliminating the conflict. If this consultation process is unsuccessful in resolving the conflict, the bill provides a further review process in section 7(e) to address the conflict and resolve it.

The bill sets up a seven-member Endangered Species Committee composed of the Secretary of the Interior, the Secretary of Agriculture, the Secretary of the Army, the Secretary of the Smithsonian Institution. The Administrator of the Environmental Protection Agency, the Chairman of the Council on Environmental Quality, and the Governor of the State in which the action is located. The Marine Mammal Protection Act gives responsibility for protecting certain endangered and threatened species to the Secretary of Commerce.

For cases in which the conflict before the Endangered Species Committee involves such a species, the Secretary of Commerce is required to concur with the Secretary of the Interior before that vote is cast.

The bill was amended by the committee to add the Governor of the State affected by the proposed action as a voting member of the Endangered Species Committee. The purpose of this addition was twofold. First, it was considered important that an elected official be a member of the Endangered Species Committee. Second, there was a perceived need to have someone on the Endangered Species Committee who is in touch with and understands the needs and desires of those persons close to or dependent on the Federal activities which would be the subject of the exemption application. The State Governor met both of these requirements.

If a case should occur in which more than one State is affected by the proposed action and legitimately involved in the outcome of the review process, all appropriate Governors may take part in the Endangered Species Committee work and discussions. For purposes of the decision regarding an exemption, however, the several States shall have collectively only one vote. The Governors will therefore determine among themselves how the single State vote should be cast.

The Endangered Species Committee can carry on business only when all seven members or their designated representatives are present.

In order to grant such an exemption at least five of the seven members must agree that the criteria listed in subsection (e) of this section are met, and vote in favor of such an exemption. A member may not delegate his or her vote to any other person; in the event one of the members is unable to be present at the time a vote is taken, he or she must transmit the vote in writing to the chairman of the Endangered Species Committee.

When an agency believes it has encountered an irresolvable conflict with the act which cannot be resolved through consultation with the Fish and Wildlife Service or the National Marine Fisheries Service (NMFS), that agency may petition the Endangered Species Committee for relief. The Fish and Wildlife Service—or when appropriate the Fish and Wildlife Service in consultation with the National Marine Fisheries Service—would have 30 days to respond to the agency's petition and give its views as to whether the consultation process required by section 7 had been fully conducted.

After reviewing the response of the Fish and Wildlife Service and other relevant information, the Endangered Species Committee would decide whether or not the action should be considered for an exemption. No action could be so considered unless the Endangered Species Committee determined: First, that the requirements of the section 7 consultation process had been met; second, that there had been a reasonable and responsible effort to resolve the conflicts and that the Federal agency requesting the exemption has made, subsequent to the initiation of consultation no irreversible or irretrievable commitment of resources which forecloses the consideration of modifications or alternatives to the action; and third, that an irresolvable conflict does indeed exist. If the Endangered Species Committee makes positive determinations on each of these matters it would then conduct hearings and receive public testimony on whether an exemption is warranted.

Within 180 days after the Endangered Species Committee first received the agency's petition and the Fish and Wildlife Service's response, the Endangered Species Committee must publish in the Federal Register its decision as to whether the action should be exempted, modified, or terminated. No project could be exempted, or exempted with modifications unless the Endangered Species Committee determines that there is no reasonable and prudent alternative to such action, that it is of regional or national significance, and that its benefits clearly outweigh the benefits of alternative courses of action that are consistent with conserving the species or its critical habitat, and that the action is in the public interest.

In reviewing available alternatives to the action under review, the committee would be charged to examine the benefits of all available

alternatives, not simply those which are within the agency's jurisdiction or are consistent with the original project objectives.

After deciding that some additional provision of the Endangered Species Act, the committee considered a number of options on how to introduce this discretionary authority into the present law. Of these options an Endangered Species Committee was chosen as that one best suited to make necessary balancing decisions regarding conflicts. This committee concept was employed because it seemed to offer the involvement of the broadest array of expertise and the greatest potential for a balancing of viewpoints concerning all the alternatives to be considered.

The committee hearings indicated that the requirements of section 7 might also conflict with a number of administrative processes; for example, Federal licensing and permitting of private activities. If a Federal agency, in carrying out an administrative function of this type determines, after appropriate consultation with FWS or the National Marine Fisheries Service, that a conflict with the act is irresolvable, the agency can petition for an exemption under the provisions of section 7(e). This approach provides relief for both the party who applied for the license or permit and for the Federal agency who might, except for the requirements of the Endangered Species Act, be disposed to approve the license or permit request. This is a reasonable policy for responding to this type of Federal action which might occur on private or Federal lands.

The basic premise of S. 2899 is that the integrity of the interagency consultation process designated under section 7 of the act be preserved. Many, if not most, conflicts between the Endangered Species Act and Federal actions can be resolved by full and good faith consultation between the project agency and FWS or NMFS, as appropriate. Only in those instances where the consultation process has been exhausted and a conflict still exists should the Endangered Species Committee consider granting an exemption for a Federal action.

In order to assure this intent, S. 2899 sets up a two-step process by which Federal projects can be considered for an exemption. In the first step, the Endangered Species Committee must decide if the application is ripe for review. Specifically, it would have to find first that the requirements of the consultation process described in section 7(a) had been met. These requirements are specifically set forth in regulations promulgated by FWS and NMFS in CFR 50, chapter IV, part 402. Second, the Endangered Species Committee must determine that a reasonable and responsible effort had been made by both parties to resolve the conflict once it is known to exist and that, subsequent to the initiation of consultation, the construction agency had made no irreversible or irretrievable commitment to resources which forecloses the consideration of those modifications or alternatives to such action which are consistent with preserving the species or its critical habitat.

Under the current section 7 regulations, Federal agencies have a responsibility to identify activities or programs which they undertake that may affect listed species or their critical habitat and to request consultation with the services concerning those activities or

to reexamine its present regulations. The permit procedures in this regard badly need to be streamlined.

Large amounts of time and money have been committed to compliance with these regulations, although little may be accomplished by control of museum specimens. There is little evidence that such controls have any appreciable effect on existing populations of endangered species.

The committee believes that a distinction should be made between regulation of legitimate scientific pursuits and commercial activities involving endangered species, and that regulations should be promulgated which do not necessarily impede or obstruct legitimate scientific inquiries.

The committee requests that the Fish and Wildlife Service study upgrading the efforts of the Customs Service activities and other alternatives for monitoring and protecting endangered species and report its findings back to the committee within a reasonable time.

Mr. President, I think my colleagues will agree that the Committee on Environment and Public Works has completed a comprehensive review of this enormously complicated subject. Let us hope that the deliberations on this bill are conducted so as to resolve these issues with careful consideration of the scientific, ethical, and social implications of the decision we make.

Mr. RANDOLPH. Mr. President, I am a strong supporter of public works projects. I believe that in providing jobs, energy, water, and other life sustaining needs, they are truly beneficial to the American people. I am an equally strong supporter of environmental protection efforts. Clean air, safe drinking water, and the conservation of our fish and wildlife resources are all essential to the Nation's health and welfare.

As chairman of the Senate Committee on Environment and Public Works, I have been closely associated with legislation regarding both of these important national priorities. My experience is that economic progress and environmental protection are generally compatible.

This is the case with the Endangered Species Act. Hundreds of potential conflicts between endangered species and Federal projects, such as dams and highways, have been averted by careful planning and by diligent consultation and cooperation between project agencies and the Departments of the Interior and Commerce. However, the recent Supreme Court decision in Tennessee Valley Authority against Hill demonstrates that the 1973 law is not flexible enough to provide for a balancing of equities in those few instances where endangered species and Federal actions come into irresolvable conflict.

This is why the Committee on Environment and Public Works approved S. 2899. This legislation continues the program and creates a seven-member Endangered Species Committee to review irresolvable conflicts which develop between endangered species and Federal projects. If the project meets criteria set forth in the bill, the committee could exempt it from compliance with the act. Since this panel includes individuals with expertise in both environment and development matters, its decisions are likely to be balanced and fair. Furthermore, S. 2899 is intended to encourage agencies to work diligently toward resolving conflicts, since to qualify for an exemp-

tion an agency must demonstrate that it had made a good faith effort in this regard. This requirement will strengthen the consultative process currently mandated under the law.

I cosponsored S. 2899 when it was introduced in April, not because I supported its every provision, but because I felt that it was essential for the Senate to have a vehicle for discussing the endangered species issue. After debating it carefully and extensively and making improvements in the original text, the committee unanimously approved a bill which, in my view, provides a reasonable and practical solution to a very difficult problem.

I commend my able colleagues Senator Culver, Senator Walllop, and Senator Baker, for the leadership and knowledge they have displayed in the formulation of this measure. Their efforts have been criticized both by those who wish to see no change in the act and by those who would like to see it weakened significantly. Due to their efforts, the committee has been able to approve a bill which provides effective protection for endangered species without unduly impeding essential development activities.

Senator Stafford, our ranking minority member, also contributed to our discussions and helped us to fully understand the issues in this legislation.

Mr. President, S. 2899 has my strong support. I urge my colleagues to give it theirs as well.

Mr. CULVER. Mr. President, I ask unanimous consent that the amendments of the Committee on Environment and Public Works to S. 2899, the Endangered Species Act amendments of 1978, be agreed to en bloc, and that the bill as thus amended be considered as original text for the purpose of further amendment.

The PRESIDING OFFICER (Mr. Bayh). Is there objection? The Chair hearing none, it is so ordered.

Mr. WAJTOR. Mr. President, first I would like to thank the chairman, the Senator from Iowa (Mr. Culver) for his thorough presentation explaining the history of the Environment and Public Works Committee's recent work on the Endangered Species Act, and express to him my respect and admiration for what I thought was a responsible and rather courageous step in becoming one of the coauthors of the so-called Baker-Culver amendments that we will be speaking of here.

I think the committee, and particularly Senator Culver in his leadership, took the whole matter seriously, and took into account both the problems of endangered and threatened species and the problems of living in this workaday world, and have come up with what I think it has been a privilege to work with them on, in this whole affair.

Mr. CULVER. Mr. President, will the Senator yield?

Mr. WAJTOR. I yield.

Mr. CULVER. I was remiss in not also expressing, at the outset, my very genuine appreciation for the tireless, conscientious, and valuable contribution that the Senator from Wyoming, in his role as ranking minority member of this subcommittee, has contributed toward the formulation of this legislation; and I want him to know how very much I appreciate those efforts, and how very greatly I depend upon his continued counsel and leadership in this area. I again want to say how sorry I am that I failed to acknowledge that on the occasion of my general presentation.

Mr. WALLOR. I thank my colleague, and assure him that I had not noticed it.

Mr. RANDOLPH. Mr. President, will the able minority manager of the bill yield?

Mr. WALLOR. I am happy to yield to the chairman of the committee, the Senator from West Virginia (Mr. Randolph).

Mr. RANDOLPH. This is a serious subject, but in a lighter vein, I recall that someone asked me recently about the jurisdiction of the Environment and Public Works Committee. I explained that we had three new subjects. One is fish and wildlife, the second is a small item—nuclear regulation—and the third is endangered species.

I said, "I understand the latter, because I am a candidate for reelection."

Mr. WALLOR. The unfortunate thing is that the committee that has sway over the fate of those endangered species is a good deal larger than seven Cabinet members.

I thank the distinguished chairman.

Mr. CURVER. I appreciate the observations of the able chairman of the Committee on Environment and Public Works. I am confident, however, that the voters of the State of West Virginia are sensible and fully aware of his service to them. They will not permit him to become an extinct species.

Mr. WALLOR. Mr. President, I support this legislation as it lies before us, although, as in any legislation, nothing is engraved in marble. It is a living document, subject to amendment.

The committee held 6 days of hearings addressing many of the issues covered in the act, and spent 4 days marking it up in an effort to resolve some of the very complex and emotional issues which have arisen on this subject. I believe the final version of the committee bill, S. 2699, to be a reasonable response to some of the legitimate criticism which has been voiced over the law, but a response which will continue to afford strong and necessary protection to endangered and threatened species.

Mr. President, the committee received a considerable amount of conflicting information regarding the impacts which the act as implemented is having or might potentially have. After careful consideration of this information, the committee has made an assessment of what the facts actually are, and has designed a committee bill which addresses those impacts for which a legislative solution is deemed appropriate. However, I would like to note here that many of the problems which have been brought to the committee's attention over this law have been largely administrative problems which can and should be resolved by a more careful and reasonable administration of the act. Certainly it is no easy task to carry out the considerable mandates of this law, and I commend many of the dedicated people in the Federal agencies and especially the U.S. Fish and Wildlife Service who bring ability and common sense to this job. Nevertheless, the committee received numerous reports of various administrative decisions and policies which would not seem to be in the best interests of the endangered or threatened species, the State agencies with responsibility to manage resident wildlife, or the act itself. For example, a cattleman from Minnesota testified before the committee about how eastern

timber wolves, which were at that time classified as endangered by the U.S. Fish and Wildlife Service, were attacking his cattle on private land adjacent to national forest lands, causing him obvious economic hardship. However, the USFWS interpreted the law in such a way that this man was rendered powerless to do anything to protect his private property, even so much as to shoot away the wolves, which would constitute "harassment" under USFWS interpretation of the law. I understand that since that time the wolf has been downlisted to a threatened category, which allows for more management options.

However, it is unreasonable to suppose that a man must stand in silence while his livelihood is being devoured by any species, threatened or otherwise, particularly inasmuch as those very people had no compensation contemplated in their behalf by those of us in the process of protecting these threatened or endangered species.

Similarly, I was often disappointed to hear of many instances of less than model cooperation by the Fish and Wildlife Service in working with State game and fish agencies. The Florida Game and Fresh Water Commission testified about the problems that agency was having with alligators in southern Florida when it became apparent that alligator populations were increasing at a very rapid rate. The agency petitioned to have the alligator delisted from endangered to threatened, but experienced silly delays in the process, and in the meantime received over 10,000 complaints from private citizens concerning alligators in their swimming pools, canals, and backyards. The agency representatives testified that biologically the alligator never did qualify as endangered, but that its listing as such was an example of emotional rather than biological reason dictating the species to be listed in the first place.

In another example, the Arizona Game and Fish Department testified that passage of the 1973 act and its implementation hindered its State program for a period of time, because of the restrictions that were imposed upon the State with regard to taking and transportation of endangered species. When the act passed, the prohibitions inherent in the law put a stop to the State programs for two species of fish, the Gila topminnow and the Arizona trout. The program necessitated the capture of fish in the streams and movement to hatcheries for propagation purposes back and forth across State lines. This was not possible without permits from the Fish and Wildlife Service, and as a result the program ground to a halt until bureaucratic redtape could be sliced through. Arizona representatives also stated their concern over seeming Fish and Wildlife Service indifference to Arizona recommendations regarding listing on the International Trade in Endangered Fauna and Flora Appendices. This is, of course, one of several international treaties implemented by the passage of the 1973 act. The Arizona Game and Fish Department recommended removal of the Meaurio quail and several other Arizona species from appendix II, maintaining that there is no evidence that such species have ever featured in international trade or are even threatened at all by hunting, trade, or anything else. The department testified it had devoted some \$200,000 to a comprehensive study of the Meaurio quail, and that there had been no overall downward trend in population. Yet that department felt its recommendations to remove it from appendix II seemed to have been ignored by the Fish and Wildlife Service.

In the interest of the cooperation which the Endangered Species Act clearly calls for, and which Federal administrators have stressed is vital for effective implementation of the law, I would submit that the opinions of State game and fish agencies should be afforded the greatest consideration and respect. Furthermore, I would hope the Fish and Wildlife Service would streamline its procedures to delist as well as list species, and put strong emphasis on examining qualified supporting data. Finally, that agency should give just as much emphasis on recovery and eventual delisting of species as the initial listing again with State consultation.

I would like to address several other issues relating to this legislation which are of particular importance to me. The first is the committee's examination of the effects of the 1973 act upon certain endangered and threatened raptor populations. For years biologists, conservationists, and falconers have been working to reproduce raptors through propagation in captivity, and have been successful in breeding both endangered and nonlisted birds in captivity. It is worth noting that modern falconers were among the first to detect a significant decline in wild populations, because of pesticides in the environment and initiate captive breeding efforts to avoid extirpation of such species.

In their work emphasis has been placed on raptors which are now listed as endangered under the Endangered Species Act. However, prohibitions listed in section 9 of the law against commerce and other activities have impeded their breeding activities. Section 9 of the 1973 law allows for the exclusion from the act of species held in captivity at the time of the effective date of the act. Whether progeny of such stock would also be exempt from the prohibitions of the act has also been debated. Senator Tunney, the floor manager of the 1973 act and sponsor of this provision, wrote, in a letter to Senator Culver, that the clear intent of section 9 was to exempt the offspring of pre-act falcons from the act. Therefore, it is the intent of committee that the domestic captive-produced progeny of any raptor which was legally held prior to enactment will also be exempt from the provisions of the act, even if such progeny were produced after December 28, 1973. In order to encourage breeding of raptors in captivity, the domestic captive-produced progeny of raptors considered to be endangered, but legally taken from the wild after that date shall be considered for legal purposes in a like manner as the progeny of raptors captured below 1973. The committee believes this will alleviate some of the human pressures on wild raptor populations, will increase genetic diversity in captive populations, and will encourage captive production of raptors for conservation, scientific, and breeding purposes. If such domestic, captive-produced raptors are intentionally returned to a wild state, such raptors will be fully protected under the act. Finally, the Secretary of the Interior may require owners of exempted raptors to keep records and require banding to distinguish them from wild birds. However, such recordkeeping should not unnecessarily duplicate records already required.

On another topic, the committee has been concerned over the Fish and Wildlife Service's policy to treat areas to extend the range of an endangered species the same as areas critical for the species' survival.

Other committee members and I have been especially concerned about the implication of this policy in the case of the proposed critical grizzly bear habitat in a large area of Wyoming, Idaho, and Montana. Much of this area is not critical to the continued existence of the grizzly bear, but is instead proposed so that the population within truly critical habitat can expand. The goal of expanding existing populations of endangered species in order that they might be delisted is understandable. However, this process does greatly increase the amount of acreage in the critical habitat designation, which is, of course, subject to the regulations and prohibitions which apply to critical habitats.

The committee felt that the rationale for designating and protecting areas for range extension the same as those for truly critical habitat ought to be reexamined by the Fish and Wildlife Service, and that there is little or no reason to give both types of areas the same status with the same regulations. Therefore, the committee has directed the Fish and Wildlife Service to examine this ambiguity in its regulatory process for critical habitat designations, and to report back to this committee before a final decision on the grizzly bear designation is made.

In preparing this legislation, the committee review found that operation of the 1973 act depends principally on two important elements. The first is the process of identification and designation of endangered and threatened species. Due to shortages in personnel and funding it there have been time delays in fish and wildlife consideration of proposed designations, which have led to unnecessary expense and delay for many. The committee hopes the funding contained in this reauthorization legislation will be adequate to reduce or eliminate much delay and confusion in the future.

The second important element of the act is the consultation process mandated by section 7 of the act. The success of the consultation process seemed to be the single point on which there was most conflicting testimony in the hearings. The committee found after reviewing the facts that the consultation process has been successful in resolving many conflicts, both informal ones by phone and the approximately 200 formal consultations which have occurred. However, it appears to the committee that there may be a number of unresolved consultations which will prove to be irresolvable in the future, and it is this category of projects which became the focus of attention in the controversy involving the act. While there may not be an overwhelming flood of irresolvable cases in the future, the committee felt that the number could be sufficient in view of all facts to require including a mechanism in the law for resolving clashes between the Endangered Species Act and other conflicting national priorities which prove to be truly irresolvable. Therefore, the committee amendment created such a mechanism through an interagency review committee, the Endangered Species Committee.

Briefly, under the amendment a Federal agency believing a conflict between its activities and the act is irresolvable through the consultation process could petition this committee for relief. The Fish and Wildlife Service would have 30 days to respond to the petition. After reviewing this response and providing for formal public hear-

ings, the Endangered Species Committee has the authority to decide if the proposed activity should proceed as planned, be modified, or terminate. In order to waive the requirements of section 7, five of the seven committee members would have to determine that there is no reasonable and prudent alternative to the project, that it is of regional or national significance, and that the benefits of the project clearly outweigh alternatives to the project which are consistent with the requirements of the act.

The committee amendment should not be interpreted as creating a broad loophole through which large numbers of Federal activities can escape the requirements of the Endangered Species Act. Rather it should be viewed as an attempt to inject a modicum of flexibility into the law to see that some resolution mechanism can balance the need to protect and manage endangered species while considering other legitimate national priorities. The committee fully intends that Federal agencies continue to make every possible effort to avoid conflicts, and that the agencies participate fully in consultation processes. In those relatively few instances where an irresolvable conflict arises, the mechanism in the committee amendment should result in expeditious and reasoned resolution of the issue, so the fate of the agency's actions can be determined without long delays and increased expense.

One final point which I would address regarding the committee's amendment to section 7 of the act concerns the speed with which the Endangered Species Committee can resolve conflicts which arise. The timing of the Endangered Species Committee action depends on two factors. The first is the expediency with which the committee can reach a final decision within the administrative framework of the amendment. The second factor is the potential for lengthy litigation on the decision made by the committee.

The amendment to section 7 in S. 2899 addresses both of these factors. The amendment places a 180-day limitation on the time available for a final decision by the committee for an exemption. The Environment and Public Works Committee feels that when a Federal agency makes application for an exemption with the Endangered Species Committee, the application should contain all information pertinent to the exemption, particularly information on the Federal activity as proposed and on all the available alternatives to such proposed action. These factors, along with the rationale for why these alternatives have been rejected as viable in the formal consultation carried out between the Fish and Wildlife Service and the applying agency, should enable the Endangered Species Committee to reach a final decision within the time frame set up by the amendment.

The Environment and Public Works Committee also tried to avoid excessive litigation in such decisions. The process in the amendment contains two steps. First, the Endangered Species Committee has to determine if the Federal activity meets the basic requirements to enter the committee review procedures—principally that an "irresolvable conflict" does in fact exist. If the committee grants the review of the application, this decision is viewed by the Environment and Public Works Committee as preliminary to its final determination on whether to grant an exemption, and should be viewed as part of the final decision or the exemption, and should not be litigable except as part of litigation on the final decision to exempt.

If the Endangered Species Committee decides not to allow review of the application, this is of course a final decision by the committee and would be judicially reviewable.

The Environment and Public Works Committee is not seeking to make the decision of the Endangered Species Committee nonreviewable by those who disagree with them, but the committee is attempting to insure that litigation of the decision is carried out in a single court case covering the entire basis for a final Endangered Species Committee decision rather than in multiple litigation procedures dealing with issues relating to preliminary decisions as separate from final findings of the Committee concerning an exemption.

Mr. President, I yield to the distinguished ranking member of the committee (Mr. Stafford).

Mr. STAFFORD. Mr. President, I appreciate the distinguished Senator from Wyoming yielding to me, and I compliment him and the manager of the bill (Mr. Culver) for the work they have done on this important piece of legislation. I am, therefore, somewhat embarrassed to find myself rising in opposition to the changes which have been proposed to the Endangered Species Act.

It is true, as Senator Culver pointed out, that the vote to report the bill to the floor of the Senate was unanimous. While in opposition to the proposal for changes I felt the matter should come to the attention of the Senate and be decided here. I did oppose in committee some of the changes which are now incorporated in the bill pending before us. Mr. President, I rise in opposition to the changes being proposed to the Endangered Species Act.

The record of implementation of the present law during the last 4 years provides ample evidence that the law is working well and that there is adequate flexibility in the administrative process contained in existing law.

There have been more than 4,500 consultations covering a broad range of Federal activities carried out under the requirements of the law. In the overwhelming majority of those consultations, no conflict with the requirement of the law was found to exist. In those few cases where conflicts did arise, each of those conflicts was resolved—with the lone exception of the Tellico Dam project of the Tennessee Valley Authority.

During the extended debate and deliberations conducted by the Committee on Environment and Public Works on this matter, I often expressed my opposition to the changes that have been proposed by the committee. I do not think we should tamper with the present law. There is no need to change the law.

The present process used to implement the law is working well. It is my understanding that the most visible conflict with present law—that posed by the Tellico Dam project—was a creature of the lack of consultation, rather than a failure of the consultation.

Indeed, that conflict may be resolved by a new attitude on the part of the project's managers. That attitude, had it been expressed earlier in the life of the project, may have led to a solution of the problem, rather than to deadlock.

The Department of Interior tells us the process is working and there is no need to change the present law. Surely, as the Fish and Wildlife Service gains more experience in implementing the consultation pro-

ess and finds ways to improve the decisionmaking under section 7, there will be even less cause for conflict.

I urge my colleagues to allow the present law to stand, so that the policies and machinery designed to protect our Nation's endangered species can go ahead as they were developed by the Congress in 1973.

In conclusion, I urge my colleagues in the Senate to reject the proposed amendments offered by the committee and to allow the Endangered Species Act to remain as is—an important and effective law that protects the interests of all of us who occupy our Nation at the present, as well as those still unborn who will occupy our Nation in the future.

Mr. BAKER. Mr. President, will the distinguished Senator from Wyoming yield me 5 minutes?

Mr. WALLOP. I am happy to yield the distinguished minority leader 5 minutes.

Mr. BAKER. Mr. President, I rise in support of the provisions of S. 2899 as reported.

My fellow members of the Committee on Environment and Public Works are to be congratulated for their diligent efforts to design the responsible legislation which is before us today. It addresses each of the difficult and controversial issues which have arisen concerning the implementation of the Endangered Species Act. I would particularly like to compliment the distinguished Senator from Iowa (Mr. Culver) and the distinguished Senator from Wyoming (Mr. Wallop), the chairman and ranking member of the Resource Protection Subcommittee, for their leadership during consideration of these issues.

As I am sure most of my colleagues are aware, the landmark case concerning the act's implementation occurred within my home State of Tennessee. On January 31 of last year, the Tellico Dam, located on the Little Tennessee River, was halted at an advanced stage of construction by the decision of the Sixth Circuit Court of Appeals in Hiram Hill et. al., against TVA. The court's decision interpreted section 7 of the act such that this multipurpose water project, which is over 90 percent complete, must be stopped if the small darter or its critical habitat were to be harmed. Mr. President, I feel that this is certainly not what Congress intended and hope that our efforts here today will result in a clear mandate that other national important interests must be balanced within the decisionmaking process in the act.

The sixth circuit's decision prompted many in Congress, including myself, to request a review of the act's implementation. The Subcommittee on Resource Protection accepted these requests and responded by holding 4 days of hearings on the Endangered Species Act during July of last year. While these hearings covered a broad range of topics concerning the act, the impacts which the act had had or will have on Federal agency activities quickly became the focal point of the subcommittee's attention.

The hearings generated some interesting findings on this issue. It became clear that, with regard to Tellico, the act as written was, indeed, inflexible and would not permit completion of this project despite the commitment of resources and potential benefits to the public that might be derived from such project. More interesting, however, was the subcommittee's finding that there were a number of other major Federal activities in the same situation as Tellico and that this number would likely increase as implementation of the act proceeded.

The recent decision of the U.S. Supreme Court concerning Tellico underscores the need for the Congress to address the issue and inject some additional flexibility into the act.

After lengthy consideration of these facts, the subcommittee has proposed a legislative alternative for resolution of conflicts between the Endangered Species Act and Federal activities. Of all the options reviewed, the approach taken in S. 2899 seemed best to meet the objective of the subcommittee: Providing a broad, flexible process for reviewing the impact of Federal activities on endangered species. The process has the ability to reasonably balance other legitimate national objectives with the need to protect and manage the Nation's endangered species. I agree with the choice made by the Committee on Environment and Public Works on this matter and urge each of my colleagues to support this act in essentially the form in which it was reported.

Mr. SCOTT. Mr. President, it appears that the Endangered Species Act has been brought more acutely to the public view, as suggested by the distinguished Senator from Tennessee just a moment ago, by the recent Supreme Court decision in the Tennessee Valley Authority against Hill. I have read both the decision of the court and the dissenting views.

It appears from a reading of the case that the Court has found that the present law is rigid; but under our system of government, in which the three branches have differing functions, any changes in the law must be brought about by the Congress and whether the law is good or bad is not for the Court to say.

Let me quote the final short paragraph of the Court decision:

"We agree with the Court of Appeals that in our constitutional system the commitment to the separation of powers is too fundamental for us to preempt a congressional action by judicially decreeing what accords with 'commonsense and public weal.' Our Constitution vests such responsibilities in the political branches.

Mr. President, the Court having put the onus directly upon the Congress to change the law, if any changes are necessary, I believe we should look very carefully at the existing law and the Committee bill. The measure before us is an apparent effort to reduce the inflexibility of the act to some extent by constituting a Cabinet-level endangered species committee that would have the power to review an application submitted to it to grant an exception from the act in instances of national or regional significance where there is no reasonable or prudent alternative and the benefits of such action clearly outweigh the benefits of alternative courses.

It does not appear, however, that the proposal grants any relief in local situations or gives any discretion to those in the executive branch charged with the responsibility of administering the present act. It would seem reasonable, therefore, to amend portions of the 1973 act to permit the general welfare of mankind to be considered along with the protection of species of fish, wildlife, and plants.

During the Independence Day recess, my wife and I visited the Natural Bridge of Virginia. We spent the night there and observed what is said to be one of the seven natural wonders of the world—a natural bridge 215 feet high, 40 feet thick, an arch with a span of 90 feet between its walls; certainly a wonder of nature regardless of its ranking

among other works of nature. During the evening, we sat beneath the bridge and listened to a drama based upon the Book of Genesis regarding the creation. It might be pertinent to read a portion of the story of creation included in the drama, beginning at verse 26, chapter 1 of the Book of Genesis:

And God said, let us make man in our image, after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth. So God created man in his own image, in the image of God he created him; male and female created he them. And God blessed them, and God said unto them, be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.

Now, Mr. President, some will accept the biblical story of the creation, while others will find it in conflict with scientific knowledge and the theory of evolution but everyone listening to this drama must have been awed by the presentation taken from Genesis while sitting beneath this natural phenomenon.

After reading the 1973 Endangered Species Act, it seems apparent that the Congress concentrated upon the protection of fish, wildlife, and plants in a most general and constructive manner. However, it also seems apparent that we—I say "we," because I was a Member of the Senate and this passed on a rollcall unanimous vote—neglected to give sufficient emphasis to our own welfare, to the fact that mankind is superior to animal and plant life, that both are under the dominion of man. Of course we should protect fish and wildlife in every proper way, and I would not suggest any other course, but in our stewardship over fish, wildlife, and plants, it does not appear reasonable to jeopardize the welfare of mankind, the society we have created, the economic, social, political, and cultural system we have developed over the years.

Let me read and share with my colleagues a small, short editorial from *Grit* newspaper.

I know that many of us are familiar with this paper that has existed for a long period of years. I am told by the Library of Congress that it has a national circulation of 1,259,458.

The editorial comment is entitled, "Excessive U.S. Regulation":

Unreasonable federal regulations stifle progress. How many times has that been said? How many more times must it be said before the government begins to listen?

Look what has happened to the over-regulated railroads. Look what is happening to the businesses and industries which must conform to rigid environmental safety rules even where no hazards exist. Look what is happening to private individuals who cannot even drive their cars three feet without being affected by a government regulation.

Now comes one of the most ridiculous examples of over-regulation to date. A three-inch fish called a small darter is presenting a new \$119,000,000 dam in Tennessee from going into operation. Although the dam holds great potential for public benefit, Tennessee must yield to the small darter because it is protected under the 1973 Endangered Species Act. It seems that a scientist discovered the presence of the fish after much of the construction on the dam had been completed. A Supreme Court ruling upheld the "rights" of the fish over the rights of Tennesseans.

Blame Congress for this absurd situation. In its zeal to protect the environment and wildlife, it went too far. One can only be thankful that dinosaurs don't exist today, for Congress would probably seek to protect them too.

The time is long past for Congress to begin rescinding unreasonable rules and regulations which limit, rather than enhance, constitutional freedoms. Its time Congress began thinking first of the people it represents, instead of small darters or ivory-billed woodpeckers.

Mr. President, I will read in the dissenting views by Mr. Justice Powell in the TVA against Hill case, a footnote on page 8, and I would like to share it:

Although the small darter is a distinct species, it is hardly an extraordinary one. Even ichthyologists—

Those who make a study of fish—

familiar with the small darter have difficulty distinguishing it from several related species.

This is obtained from the record of the trial court, pages 107 and 131:

Moreover, new species of darters are discovered in Tennessee at the rate of about one a year; eight to ten have been discovered in the last five years.

That is also in the report of the trial in the district court:

All told, there are some 130 species of darters. Eighty-five to ninety of which are found in Tennessee, 40 to 45 in the Tennessee River system, and 11 in the little Tennessee itself.

Since the Endangered Species Act attempts to preserve from extinction what the Supreme Court in the TVA case indicates covers every animal and plant species, subspecies, and population in the world needing protection—approximately 1.4 million full species of animals, 600,000 full species of plants, with some 200,000 that may need to be listed as endangered or threatened, with these figures increasing three to five times that number when subspecies and individual populations are counted. It would appear that the Congress has overextended itself and is endeavoring to perform an impossible task.

I requested the Congressional Research Service of the Library of Congress to provide information regarding what would happen to fish, wildlife, and plants in their natural state without the intervention of mankind.

It sometimes has been said that our industrial world has brought about jeopardy to our wildlife.

The memorandum refers to an article regarding the Shenandoah National Park by Napier Shelton and quotes in some detail the changes made in the area over a period of many millions of years. Then, Mr. William C. Jolly, analyst in the Environment and Natural Resources Policy Division, Library of Congress, states that:

The changes in landforms and in biological species and communities which occur naturally over time, are continuing ones. They are sometimes aided, sometimes directed to various degrees by the planned and the inadvertent actions of man. One need not go back millennia to detect significant changes, of course. Ecological conditions have changed markedly over the last few centuries.

He refers to other authorities, examines the question in more detail, again refers to the instructive booklet, "The Nature of Shenandoah," and concludes:

Shelton mused of the future of the Shenandoah:

"Taking a geological perspective, we can imagine all sorts of possibilities. The Blue Ridge may erode to virtually nothing and be covered again with water. Or it may be pressured upward into craggy peaks. Perhaps there is a long chance

that lava will once again flow from great cracks in the rock. And changing climate may put entirely different vegetative clothes on the land. A warming trend could once again bring tropical forests, or cooling could bring glaciers from the north—perhaps this time to bury the Blue Ridge and wipe its biological slate clean. And who knows what new forms of life will evolve in response to the ever-changing environments?"

Similarly we may muse of the futures of any or all other regions. We can be sure of but one thing: Change is natural and inevitable even if we may not know the exact nature or even direction of the changes which will occur.

The writer refers to an article entitled "Should We Save All Endangered Species?" appearing in an issue of the Academy of Natural Science of Philadelphia's Frontiers, written by George Constantz, in which he notes that some species are rare or may disappear because they "cannot evolve appropriate adaptations to an environment which is changing through natural courses." He then expresses the opinion that "man should not bear the moral burden to preserve species which will not evolve at an adequate rate or in the appropriate direction to keep pace with an evolving environment."

Mr. President, the purpose, of course, is to show that neither plants nor wildlife continue over the years in their identical form. There is an evolutionary change made which should not stop us from attempting to protect or delay the extinction of desirable fish, wildlife, or plants, but cause us to recognize that an absolute preservation in its present state of the more than 2 million species of plants and animals is not possible, and we should consider the welfare of people in determining the species to preserve.

Moreover, if we look at the act from the political or governmental point of view, we again find that it gives undue consideration to fish, wildlife, and plants over the welfare of people. Not only from the biblical, or evolutionary point of view is mankind superior but also from the political point of view. Our own Government exists to serve people. I do not believe anyone in this body would suggest that the equal protection clause of the 14th amendment applies to fish, wildlife, and plants, but even if it should be so applied, human species would be entitled to the protection now denied them under the Endangered Species Act. It does not appear reasonable that anyone would quarrel with the statement that people should have dominion, as Genesis provides, over the fish of the sea, the fowl of the air, and every living thing that moves upon the Earth. Government exists only for the purpose of serving people and apparently this basic fact was not considered fully when we enacted the Endangered Species Act of 1973.

The major action bringing the Endangered Species Act to public attention, of course, was the TVA case involving the Tellico Dam project and the snail darter fish. However, the Endangered Species Act has caused concern in many other States, including Virginia. During both 1977 and 1978 in the southwestern part of our State, there was heavy rainfall within the three-fork tributary system of the Holston River that empties into the Tennessee Valley system. As a result, the river flooded on all forks and exceeded by several feet the projected 100 year flood plan established by the Tennessee Valley Authority. When we speak of a 100-year flood plan, we are thinking of the highest elevation that water will rise even once within a hundred years. There were two major floods last year and one this year in the same area, resulting in approximately \$275 million worth of property damage and the death of four persons—not snail darters but people.

President Carter declared the Holston watershed a Federal disaster area on two of the three occasions, and funds were made available for emergency repairs, necessary cleanup, and removal of debris. It is understood that emergency work was designed to protect private homes, the majority of the manufacturers in a 16-county area—this is a rural area—and to minimize the consequences of future floods. The only work approved was that deemed necessary to protect private and public property. Representatives of the Federal Disaster Assistance Administration, Army Corps of Engineers, Virginia Office of Emergency Services, and the Virginia Commission of Game and Inland Fisheries were all in agreement that this work needed to be performed on an emergency basis.

However, the Fish and Wildlife Service of the Department of the Interior advised the Corps of Engineers that the Holston tributary was the habitat of several endangered and threatened species and on June 19 of this year, the corps issued a directive tentatively stopping work. Thereafter, the corps arranged for a meeting of representatives of the State and county governments, the Federal Disaster Assistance Administration, EPA, and Fish and Wildlife Service to discuss future action and to furnish their recommendations. While the meeting has been held the corps is currently waiting reports before determining whether work can be done to prevent future floodings and other disasters.

Mr. President, this is happening in a somewhat rural and mountainous section of western Virginia, but it could happen in your State. Other disasters could occur in any State of the Union and aid could be halted to protect the habitat of species of animals or plants. Is the protection of their habitats more important than the protection of the habitats of mankind? I just do not believe the American people want all species of plant and animal life preserved, even if it is possible, regardless of the cost, in terms of money, regardless of the cost to our standard of living or regardless of the cost to human life itself. And there were four people killed in these floods.

Of course, in every reasonable way we want to protect fish, wildlife and plants as provided in the Endangered Species Act, but the law we passed was rigid—so rigid that the Supreme Court indicated the courts have no discretion under the act and appeared to invite Congress to make amendments. Had the question been raised, there is a possibility that an act with such rigidity could have been declared void, the entire act, by the Court on the basis of due process. If, as the Court suggests, this is a rigid law, protecting animals but denying protection to the human species, it seems reasonable that it should be amended to provide for consideration of human factors.

The committee has addressed this point in the bill before us insofar as projects of a national or regional scale are conserved by the establishment of a cabinet-level commission. But, it would appear difficult to get seven individuals of cabinet level together to pass upon any substantial number of issues that might arise under the act and the bill does not relieve the rigidity in other than national or regional situations.

What I will attempt to do through a series of printed amendments, all of which are on your desk, is to have the welfare of mankind considered along with the welfare of the lower animals in day-to-day

administrative regulations and decisions. This act relates to governmental actions at all levels but it also relates to private actions by the individual citizen. Civil penalties up to \$10,000 can be imposed by the Secretary for each violation and criminal penalties up to \$50,000 and a year in jail for each violation. Our country has vast resources but they will be greatly limited if no activity is permitted to interfere with the retention of any species of fish, wildlife or plant. Court testimony has indicated that the act applies to complete projects, functioning projects, serving vital needs of society. The Grand Coulee Dam was mentioned as an example of a project that could be shut down should it be found at this time that in some manner the project was endangering some endangered species. And it applies as well to those under contemplation or those under construction.

I hope the managers of the bill and, in fact, that each Senator will give careful consideration to these amendments and a bill can be enacted acceptable not only to the Members of the Senate but agreeable to the vast majority of the American people.

Mr. President, let me conclude merely by saying that if some amendments are not adopted that take into consideration the human factor, I propose to move to recommit the bill to the Committee on Environment and Public Works with instructions to the committee to consider such amendments thereto as will give priority to the welfare of mankind over the protection of fish, wildlife, and plants.

Mr. President, I reserve the remainder of my time.

The Presiding Officer. The Senator from Wisconsin.

Mr. Nelson. Mr. President, on June 15 the Supreme Court ruled that the snail darter is protected by the Endangered Species Act (ESA) of 1973 and that the Tellico project in Tennessee may not be completed and put in operation because it would destroy the habitat of the snail darter, an endangered species.

The decision has caused a national uproar over the Endangered Species Act. A spate of editorials have assailed the act as unnecessarily inflexible—a kind of national straitjacket. Politicians, industrial developers, and all manner of alarmists have joined in a clamor to strike down this monster that is stifling progress, threatening economic growth, and frustrating our national purpose.

As some anonymous wit so aptly put it, one would think that the little 3-inch snail darter had suddenly loomed on the horizon as Jaws III and was about to devour us all unless we marshal the full resources of the Republic to strike him down.

One hardly knows whether to laugh or cry or both.

What, really, is all the fuss about? Is it because the 1973 law is not working as Congress intended? Is the law cumbersome or ineffective or too difficult to administer or too rigidly inflexible? The answer to each of these questions is an emphatic "No." The law is working very well indeed. Much better, in fact, than any of its broad spectrum of proponents could have hoped.

What has been the results of almost 5 years' experience under the law? In that period there have been 260 proposed Federal actions which posed a potential and serious threat to an endangered species. Every single case, save one, was resolved pursuant to the law in a way that did not threaten the habitat or survival of any endangered species.

The law has achieved exactly what Congress intended. What other law can we think of that has so faithfully followed the legislative intent and so effectively carried out its objective? I can think of none.

In short, not a single event, not a single episode, not a single problem has arisen during the 5-year experience under this law that furnishes a valid basis for compromising or weakening the Endangered Species Act.

It is instructive to note that those who administer the law are satisfied with it and oppose any change.

Now, what about that one case, the Tellico Dam and the snail darter?

There are several things to be said about the Tellico Dam which was conceived of 40 years ago under circumstances, conditions and laws which no longer exist. In sum, when all objective factors are weighed, apart from any consideration of the Endangered Species Act or the snail darter, the public interest would have been better served if the project had never been started and will be better served at this time if the project is not completed.

This conclusion is based upon an evaluation of the costs and benefits of a dam with an impoundment compared to the costs and benefits of a dam and a free-flowing river. This point is discussed later in my remarks.

Thus when all the smoke has cleared we are left with the Tellico project as the sole basis for a sweeping attack on this landmark legislation which spelled out in the law our specific recognition of the vital importance of curbing man's recklessness against the natural world of which man himself is a part.

In this legislation we finally recognized that we do not have the wisdom to decide what species shall live and what species shall die. In the last analysis this act was addressed much more to our concern over the future of man than to our concern over anything else.

The Endangered Species Act of 1973 evolved from 8 years of experience with other legislation that spoke to but did not adequately address the endangered species question. By the 1950's there was widespread recognition that species of wildlife and flora were vanishing at an alarming rate due to the activities and intrusions of man. Legislation directed at a reversal of this trend was enacted in 1965 and in 1966. While a step in the right direction, these laws, however, did not adequately resolve the very serious problem. By 1973, there was general agreement that a new and more comprehensive statute was required if species of life that were threatened with extinction were to be saved.

Thus, in a special environmental message to the Nation in February of 1973, former President Nixon stated that the existing law "simply does not provide the kind of management tools needed to act early enough to save a vanishing species."

What emerged was a soundly drafted statute that had almost unanimous support in Congress. The law, the Endangered Species Act of 1973, provided a means "whereby the ecosystems upon which endangered species and threatened species depend may be conserved." The law declared that it was "the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species."

The heart of the 1973 act is section 7. Simply put, this section requires that "all other Federal departments and agencies shall \* \* \* (take) such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the modification of habitat of such species which is determined by the Secretary \* \* \* to be critical."

The law is clear and the intent of the Congress is unmistakable: the highest priority is given to the protection of species of flora, fauna, and habitat listed by the Secretary of Interior or Commerce as endangered or threatened. Actions in conflict with this policy would have to be modified. The legislative history on this point is overwhelming and conclusive.

S. 2899 would change a basically scientific process and insert in lieu thereof a political decisionmaking procedure. I have read S. 2899 and committee report 95-874 and I have searched for one reason to support it on the merits of the issue. I have not found one because one does not exist. There are a large number of political reasons to change the law but the fact of the matter is, the law is reasonable and is working well.

#### THE LEGISLATIVE HISTORY

The legislative intent of the Congress was clear in 1973 when it passed the Endangered Species Act. Congress mandated that changes in on-going Federal programs would have to be made where conflicts with the ESA surfaced. Moreover, almost unanimous support of this legislation was received both in the Congress and in the administration, and it strengthened the view that the nation was united and committed to taking whatever action would be necessary to protect our vanishing wildlife and to reverse the trend toward extinction. The Senate passed S. 1983 on a rollcall vote of 92 to 0, the conference report passed on a voice vote. In the House the conference report was agreed to 355 to 4.

The requirement in the 1973 act that affected Federal departments and agencies must modify their project or actions once a conflict arises between an endangered or threatened species and a developmental project is clear and explicit in both the language of the act and the legislative history.

On December 20, 1973 the House considered and passed 355 to 4, the conference report on the Endangered Species Act of 1973. Page H42913 of the Record contains a discussion by Congressman Dingell, the floor manager of the bill, on just this point. Congressman Dingell called to the attention of the House a recent Washington Post story about the bombing by the Air Force of the nesting grounds of the Sandhill Cranes along the gulf coast of Texas. The cranes were one of our most endangered species. Representative Dingell clearly stated:

Under existing law, the Secretary of Defense has some discretion as to whether or not he will take the necessary action to see that this threat disappears . . . but the point that I wish to make is that once this bill is enacted, he or any subsequent Secretary of Defense would be required to take the proper steps.

A further example of clear legislative intent is contained on page 14 of the House Report 93-412. This page deals with a discussion of

the grizzly bear. Briefly, the House told the Park Service and the National Forest Service that both agencies would have to adjust their management programs under the provisions of this new act to insure that the bears are not further endangered. Nothing could be more clear and concise.

The Supreme Court's June 15, 1978 decision in the case of Tennessee Valley Authority against Hill et al. contains an extensive explanation of the legislative history of the law on this very point. I ask unanimous consent that pages 19-31 of the Court's opinion be printed in the Record at the end of my remarks.

It is not necessary to read statement after statement into the Record from Republicans and Democrats alike to make the point that the ESA had strong support on both sides of the aisles. It seems to me that the discussion thus far has clearly defined three issues:

First, Congress was rightly alarmed at the rapid rate that various forms of life were disappearing from the planet; second, Congress and the administration were determining to do something about it, something that would have continuing force, an approach that was long-range and comprehensive in nature; and third, Congress created a program which required all Federal departments and agencies to take whatever action was needed to resolve conflicts with this new law.

Congress neither moved in haste in drafting this approach, nor did it underestimate the importance of this law and the need for the legislation before it was placed on the statute books. In fact, just the opposite is true. The ESA of 1973 was enacted because the 1965 and 1966 laws were ineffective. There was universal agreement on this point. The Endangered Species Act of 1973 is fair, it is flexible, it works, and it is vitally needed. There is no compelling reason to modify it.

#### HOW THE LAW WORKS

To demonstrate the flexibility of the law one only needs to look at how the law has worked since enactment.

Over 4,500 consultations have been conducted pursuant to the Endangered Species Act. A "consultation" is defined as any question on, communication about, review or investigation of any Federal activity that might affect any endangered or threatened species or its critical habitat. Consultations may be a simple 5-minute phone call requesting information on the location of an endangered species or its critical habitat in relation to a proposed or planned Federal project or a full-blown investigation requiring many person-days of effort on a complicated Federal action that involves a dozen or more endangered species.

The Interior Department estimates that 90 percent of the consultations require only an hour or less and may not result in a permanent record. There are the phone calls and personal discussions that occur daily, even hourly, at the lowest field levels of the service.

About 5 percent of the consultations are more complicated and take about one person-day to complete. These require minor analysis and will usually result in a written report, letter or other communication.

The last 5 percent of the consultations are the most difficult. They embody complex Federal activities that usually impact several endangered or threatened species and their critical habitats. These consultations require anywhere from 2 or 3 to 200 or 300 person-day and effort

and always result in an official "biological opinion" signed by a member of the Service's directorate.

Approximately 260 consultations have occurred where a major Federal action would adversely affect a listed species. In all but one case, the Tellico Dam, the consultation requirement of section 7 worked. Two other cases were litigated. The second case was National Wildlife Federation et. al. against William Coleman, Secretary of Transportation. An out of court settlement was reached. The DOT was funding a project in Mississippi, Interstate 10, which would have disturbed the nesting area of the sandhill crane. The interchange that would have caused the problem was relocated. The final case was Sierra Club against Robert Froehle, Secretary of the Army, the so-called Indiana Bat case. The court in this instance held that the planned construction of the Meramec Park Lake Dam by the Corps of Engineers would not have harmed the population of the Indiana Bat.

By negotiations involving 260 major actions, the ESA has blocked only one project, the Tellico Dam in Tennessee, a project that should never have been started in the first place. According to the Fish and Wildlife Service there are no Tellicos in the future of the 1973 Act. There are no irresolvable conflicts that cannot be settled pursuant to section 7 of the law. One bad project is too little of a reason to justify such a massive change in the law.

#### THE COMMITTEE REPORT

The committee report makes two arguments why an inter-agency committee is needed to resolve possible conflicts between the purposes of the Endangered Species Act and other federally authorized programs, projects, and actions.

First, the committee states on pages two and three of the report that "(T)estimony received by the Committee indicates that a substantial number of Federal actions underway appear to have all the elements of an irresolvable conflict." When pressed, the committee staff will produce a list of 121 actions only 12, less than 11 percent, involve possible conflicts. This is the "substantial number" the committee report mentions. However, Assistant Secretary of Interior for Fish, Wildlife and Parks Robert Herbst in a June 12, 1978 letter to me refutes this list and allegations of conflict. The letter reads:

Dear SENATOR NELSON: Earlier this year a list of 12 Federal projects (attached) that may pose "potential consultation problems" was prepared for the Senate Subcommittee on the Environment at the request of key subcommittee aides. It was not intended then nor is it accurate now to state that these potential consultation problems represent insurmountable obstacles that will result in "Tellico-like" situations after the consultations are completed. In fact, consultations have now been completed on three of these projects (Miami Jettport—Florida, Dickey Lincoln—Maine, and Osceola phosphate mining—Florida) and no jeopardy to the concerned endangered species was found providing reasonable precautions are taken as outlined in the Biological Opinions concerned.

We are confident and hopeful that no major controversy will develop with the other projects either so long as the consultation is conducted by open-minded people with an honest desire to accomplish the concerned project while minimizing adverse effects on the critical habitats of endangered or threatened species. We can assure the U.S. Congress that the Department of the Interior will always approach the consultation table with this point of view.

Sincerely yours,

BOB HENNST,

Assistant Secretary for Fish and Wildlife and Parks.

Second, the committee report on page 3 indicates that 20,000 consultations are expected in fiscal year 1979 alone. The impression is given that the system will be swamped with paperwork, that decisions will not be made on a timely basis, that a review procedure is necessary.

It is important to note that the managers of the system are satisfied and confident that the additional consultations can be handled in an efficient and speedy manner. Furthermore, all these consultations would have to take place under Culver-Baker just to satisfy the requirement that good faith negotiations have occurred before any project would be considered for an exemption from the act.

#### THE PROCESS OF LISTING

Currently there are 619 endangered species—439 foreign and 180 native, and 43 threatened species—17 foreign, and 26 native.

Section 4 of the act spells out the process. A species can only be listed as threatened or endangered for any of the following reasons: First, the present or threatened destruction, modifications, or curtailment of its habitat or range; second, overutilization for commercial, sporting, scientific, or educational purposes; third, disease or predation; fourth, the inadequacy of existing regulatory mechanisms; or fifth, other natural or manmade factors affecting its continued existence. These determinations must, by law, be made "on the basis of the best scientific and commercial data."

Furthermore, before listing a species the Secretary must consult with: First, the affected State(s); second, interested persons or organizations, and other interested Federal agencies, and cooperate with the Secretary of State and with the country or countries where the species is normally found. Before listing a native species the Secretary must publish notice in the Federal Register and notify the Governor of each State where the species is found. The Secretary must then allow the State 90 days to comment on the proposed listing. A summary and explanation of all comments received must then be placed in the Federal Register.

#### TELLICO VERSUS THE SNAIL DARTER

There appears to be widespread misunderstanding about the Tellico Dam project. Contrary to popular opinion, the major purpose of the project is neither flood control, nor navigation improvement, nor even electric power generation. It is real estate speculation. Tellico is a gigantic, hundred-million-dollar-plus, Government owned and operated recreational and industrial land development scheme. According to recent figures released by the TVA, more than 57 percent of all the project benefits would be derived directly from recreation and industrial shoreline development. Not very many people realize this; it has been a well-kept secret.

Of the \$109 million invested thus far only \$22.5 million has been spent on construction of the dam; \$8.9 million of this amount is labor costs.\* Other expenses for the Tellico project include:

\*By far the most important purpose of the Tellico project is recreational and industrial development not flood control, hydroelectric generation, etc.

Land (all of which was acquired under threat of eminent domain) .....	\$25.7
Road construction through valley and project area adjustments .....	42.5
Overall project administration and supervision .....	15.4
Channel work on canal, public use facilities .....	12.1
Other expenses—miscellaneous .....	12.9

The Federal Government has now condemned from private landowners 38,000 acres of land, the majority of which is prime agricultural farmland. TVA is the largest real estate firm in Tennessee. Tellico was never formally authorized by Congress. TVA, operating under emergency authority dating back to the New Deal planned the project for completion before World War II. It got sidetracked for a while but the plans were never changed. It is interesting to note that TVA is also the only Federal water resources development agency that can condemn more land than it actually needs for a project, speculate with the value of that land, and then resell the land they have condemned to the public at a vast profit from the Government. This is not sound management, it is a "legalized" grand theft of the public.

Only the estimated \$700,010 per year from the sale of 22,000 acres of land over the project's 50-year economic life keeps the Tellico program marginally afloat. A cost-benefit ratio has not been updated for over a decade. This again is unique to TVA because the Corps of Engineers, for example, updates their cost-benefit ratios annually.

The fact of the matter is that the land, the 38,000 acres already acquired by the Federal Government, and the value of the agricultural productivity of the farmland is worth more today than all of the estimated benefits of the Tellico project.

Tellico simply is a water resources dinosaur that Congress should have made extinct years ago. It is one species that unfortunately is not threatened or endangered, but nonetheless, it is a species that Congress should wipe out.

The absurdity of this project just goes on and on. In order to add 200 million kilowatts of additional generating capacity, to produce \$3 million in additional revenue to a system TVA proposed to destroy farm production estimated by the TVA to yield between \$29.5 and \$52 million a year. In order to create a 14,000-acre lake for flat water recreation, TVA proposed to flood this prime agricultural land despite the fact that, according to the GAO, there are right now 22 major, underutilized lakes within a 60-mile radius of the Tellico site.

TVA proposed to do all this in the name of progress. The key word in this sentence is "proposed"—past tense. TVA no longer advocates completing this boondoggle. Under the chairmanship of Dave Freeman, reason has been restored. TVA is now working with the Interior Department and is negotiating pursuant to section 7 of the 1973 act. TVA now realizes that the Tellico lands are worth more dry than if they were inundated under approximately 18 feet of water. Tellico, including the sunk costs in the dam which are minimal is worth more to the Federal Government, worth more to the people of Tennessee, the way it is today.

The strong tradition of pork-barrel politics has raised the battle cry, "Amend the Endangered Species Act." The battle cry shouted in return ought to be something along the lines of, "You have got to be kidding." Unfortunately, they are not kidding. The proponents of

these highly capital-intensive, environmentally destructive, and economically wasteful projects have seized upon the Tellico and the snail darter to attempt to deal the Endangered Species Act a crippling, if not fatal, blow.

The Interior Department has stated publicly that there are no more Tellicos in the future of the Endangered Species Act. There is not one project that might have a conflict with the act whose importance to the Nation is so overwhelming that this great country would suffer if it were not built as presently designed. The "horrible hypothesis" painted by opponents of the ESA and the media does not exist. It is popular with the media to repeat that the law is too rigid, too inflexible but they cannot present one case where the law, in practice, has proven to be rigid. They cannot cite one example where a change may be justified.

The great irony of this issue is that a careful reading of the Culver-Baker amendment and S. 2899 leaves one with the conclusion that Tellico is not even eligible for consideration by the committee S. 2899 would create.

Tellico fails on two grounds. First, TVA has not, until very recently, conducted any negotiations with Interior. The consultation process will have to be carried on in good faith before Tellico becomes an "irresolvable conflict."

Second, the committee report clearly states that:

The criteria expressly mandate that the balancing . . . is between benefits of proposed Federal actions and benefits of alternative courses of action.

Given David Freeman's testimony before the House Subcommittee on Fisheries, Wildlife Conservation, and the Environment on June 23, 1978, the benefits of modifying the project clearly outweigh the benefits of the proposed action, the completing of the dam and the filling of the reservoir.

Progress has not been halted and we can thank the snail darter for saying this Government and its hard-pressed taxpayers tens of millions of dollars. It is fear and ignorance that are the driving forces behind this change in law, not fact and reason.

#### THE CULVER-BAKER AMENDMENT

A careful review of the 4½-year history of the Endangered Species Act of 1973 demonstrates beyond any doubt that, on the merits of the issue, there is no basis for a change in the law. In fact, the arguments that support a straight 3-year reauthorization are overwhelming and conclusive.

Those who have authored and support S. 2899 are perfectly sincere in their concern about the reckless and irresponsible attacks on the 1973 law that are now being made by groups like the chamber of commerce. These organizations simply wish to destroy this vital program. The supporters of S. 2899 perceive that the politics of the issue, rather than the merits of the argument, require a modification of the law in order to secure reauthorization of the act. If they are correct, then the law will have to be amended. And, S. 2899 is a better and more carefully drafted modification than any other approach introduced thus far.

However, it seems to me, that if the politics are going to force a change in the act, some alteration of Culver-Baker, modifications that lessen the degree of violence S. 2899 imposes on the law, are required.

First, S. 2899 will encourage rather than discourage Federal agencies and departments to float the basic purposes of the act, the protection of endangered species. The fact that the present law requires modification or termination of an action as the only alternative when a species or its habitat are endangered is a compelling inducement to work out a solution. That is the history of the act. If, however, an agency believes it can persuade the committee to grant an exemption, the consultation process becomes a charade. Yes, they will talk to one another, but as long as there is an opportunity for business as usual, there will be a desire to fight for one's project.

Second, S. 2899 only requires a simple majority decision on the question of whether or not the consultation process has been carried on in good faith. This decision must be made before a project is eligible to be considered for an exemption. Since the heart of the bill is the consultation process and since a 4-3 vote on this point triggers the review, a change in the Culver-Baker amendment is necessary to insure that the consultation process is not undermined. Such a change is required by amendment No. 3132 which requires a unanimous decision by the committee on whether the consultation process has been carried on in good faith.

Third, the exemption program under S. 2899 is available to all projects regardless of their stage of planning, design, or construction. I believe that an exemption should only be available to actions for which a "substantial and irretrievable" commitment of resources has been made prior to the listing of a species which causes a conflict as endangered or threatened. All other projects or actions in their feasibility or design stages ought to be required to comply with section 7 of the law as currently enacted. Amendment No. 3132 makes this change.

Fourth, one of the grounds for granting an exemption would be if the committee determined that there was no "reasonable and prudent" alternative to the proposed action. This terminology has no legal meaning and the committee report makes no attempt to define what is "reasonable and prudent." On the other hand, the term "feasible and prudent" has been construed by the Supreme Court to mean "consistent with sound engineering." This definition grew out of the Overton Park against Volpe case. "Feasible and prudent" is a known standard and if S. 2899 is adopted, as drafted, the Congress will be telling the courts that it is establishing a new standard for review, a standard that, in my judgment, is far more vague and weaker than the known legal definition of "feasible and prudent." Moreover, a very large majority of the key terms in S. 2899 are undefined and will certainly invite litigation. In considering the grounds for an exemption, I believe the Congress must be very careful and it, not the courts, should decide what are the ground rules. Amendment No. 3132 makes the change to a known standard of law.

Fifth, an action may also qualify under S. 2899 for an exemption if it is of "national or regional significance." Again, the term "regional" is not defined by the committee. What does it mean? No one knows.

Regardless of intent, it seems to me that if we are to grant exemptions, then actions or projects that are of national significance should qualify.

Almost anything can be construed to be of "regional" importance. The Congress, in drafting the ESA, wisely decided to give the protection of endangered species and habitat the highest national priority. It makes no sense to undermine a national program with regional actions. The words "or regional" should be dropped. This would be accomplished by amendment No. 3132.

Sixth, S. 2899 imposes an unfair and unreasonable limitation on citizen suits by requiring that parties wanting to file litigation to challenge decisions made under S. 2899 give 60 days notice. If this language is enacted, a decision to exempt an action could not be stopped by the issuance of an injunction for 60 days. This is more than enough time to allow an agency to complete the action before judicial review of the decision can take place. Amendment No. 3132 would correct this problem by waiving the 60-day notice requirement for all suits that challenge the decision of the interagency committee.

We as a nation have made a fundamental, commitment to environmental quality. We are investing tens of billions of dollars to improve and enhance our environment. The programs are broad and widely supported by the public. Finally, we have a President who understands the problem and has proposed a constructive series of water policy reforms. We have a Secretary of the Interior who says that the days of "rape, ruin, and run" are over. And yet, we seem to be prepared, as a Congress representing the entire Nation, to substantially weaken a vital program because one or two States have projects that they want completed regardless of the consequences.

So, what we are really left with is a political argument that a good law, a law that is working well, doing the job Congress and the President intended, should not be changed because some Members of Congress believe that some day, something unknown may occur, something that no one can point to now may happen that may threaten a pork barrel project or an action by the Federal Government that, judging from the history of the act, can be avoided in the first place.

It is for this argument, and this argument alone, that the Senate is today debating S. 2899.

Mr. STENNIS. I shall not offer an amendment nor seek disposition of my amendment tonight.

Mr. President, I filed last week amendment No. 3097 to this pending matter and now for the purpose of clarification and some modification I wish to change that amendment and modify to the extent as reflected by this amendment that I hold in my hand and may send to the desk, if that is in order.

The PRESIDING OFFICER. Without objection, the amendment will be so modified.

Mr. STENNIS. Mr. President, this does not disturb the order previously granted for an hour and a half of debate on this amendment; is that correct?

The PRESIDING OFFICER. That is correct.

Mr. STENNIS. Mr. President, I thank the Chair.

Mr. President, this amendment, as numbered, is proposed on behalf of myself and Senators Eastland, Garn, Hatch, Laxalt, Young, Curtis and Goldwater.

This amendment differs but slightly from amendment No. 3097 which I offered on June 28, and I would like to explain those differences.

First, the amendment would substitute for the words "to the extent feasible" proposed by my previous amendment the words "insofar as practicable and consistent with their primary responsibilities."

Second, I propose to add a new subsection (c) to make it clear beyond question that any action carried out in compliance with subsection (a) of the proposed amendment to section 7 shall not be deemed to be a violation of either section 4(d) or 9(a) of the act. Both of these subsections contain prohibitory language and I think it is wise to add this new provision.

Finally, this amendment makes certain technical corrections to assure that the amendment is keyed to pages and lines of the bill reported by the committee which is now before the Senate rather than the bill as introduced.

The basic purpose and thrust of my amendment No. 3097. In that respect, there is no change.

Mr. President, before I discuss my amendment I want to point out that the committee and I are in agreement on the proposition that an amendment to the Endangered Species Act is needed to provide some flexibility in its administration. We disagree as to how this should be done and as to the degree of flexibility needed. I will briefly discuss why I believe that the committee proposal is not the answer to the very real problems with which we are confronted.

The committee bill proposes to set up a seven-member Endangered Species Committee with the power to grant exemptions to the protection afforded to endangered species when an irresolvable conflict exists between the sponsoring agency and the Fish and Wildlife Service, or the National Marine Fisheries Service. The committee would be composed of the Secretary of the Interior, the Secretary of Agriculture, the Secretary of the Army, the Secretary of the Smithsonian Institution, the Administrator of the Environmental Protection Agency, the Chairman of the Council on Environmental Quality, and the Governor of the State involved. In order to grant an exemption at least five of the seven members would have to agree.

This committee process is cumbersome and unwieldy, and promises delay on its face. These are high level officials and it would be difficult to assemble all of them, or even all of their designees, and this is what the bill requires. The committee process which the pending bill proposes could mean a slow and lingering death to many worthwhile and needed projects. A very pertinent consideration is that the committee could be absolutely overwhelmed by the number and variety of cases presented to it. This could very well prevent it from making a decision within 180 days as the bill would require.

Equally important are the stringent requirements laid down before a proposed action could be exempted. For one thing an exemption must be approved by at least five of the seven members. As a prerequisite to granting an exemption these five members must find: First, that there is no reasonable or prudent alternative to the proposed action; second, the action is of regional or national significance; and third, the benefits of the proposed action clearly outweigh the benefits

of alternative courses of action that are consistent with conserving the species or its critical habitat.

There are very heavy burdens of proof to be carried by a sponsoring agency. They are particularly heavy when the requirement of five affirmative votes and the composition of the committee is added. The Administrator of the Environmental Protection Agency and the Chairman of the Council on Environmental Quality are professional environmentalists. It is hard to conceive of them voting for an exemption. The same thing would apply to the Secretary of Interior since in most cases he would be asked to override one of his own agencies. Even if all other committee members voted for an exemption, and this is highly doubtful under the stiff requirements laid down, the exemption would be denied by one vote. The committee setup appears to me to be an institutional veto.

What my amendment proposes to do, by contrast, is to put into the law precisely what the Senate was told was its purpose and intent when it passed the act in 1973. At that time former Senator Tunney, the sponsor of the bill, said:

(A) s I understand it, after the consultation process took place, the Bureau of Public Roads, or the Corps of Engineers, would not be prohibited from building a road if they deemed it necessary to do so.

He also told the Senate:

(A) s I read the language there has to be consultation. However, the Bureau of Public Roads or any other agency would have the final decision as to whether a road should be built. That is my interpretation of the legislation at any rate.

My amendment puts explicitly into the law just what Senator Tunney in 1973 said the law meant. Indeed, it goes further by setting down standards for the sponsoring agency to follow with respect to projects involving the protection of endangered species. It provides that the sponsoring agency "shall balance the social, cultural, economic, and other benefits to the public if such action is carried out as planned against the esthetic, ecological, educational, historical, recreational, or scientific loss to the public which would occur if such species were to become extinct." It seems to me that these are the appropriate and pertinent factors to be balanced by the agency in determining whether a planned action should be modified, delayed, or terminated.

There is nothing radical or unusual about this proposal, Mr. President. It is parallel to the procedure followed under the National Environmental Protection Act of 1969. Under that legislation the sponsoring agency makes its own study and investigation and, after receiving the comments of other agencies and interested parties, makes a decision on whether to proceed with the project, to modify it or to abandon it. In so doing, it must balance the need for and worth of the project against the environmental consequences which would result if the project was completed.

In addition, my amendment contains two grandfather provisions while the committee bill contains none. The first would prohibit a project from being halted if it was more than 50 percent complete based upon the amount expended. The second would provide that the act should not apply to any project under contract or for which construction funds had been appropriated as of the date of enactment of the original law.

I am not going to discuss the Tellico Dam case in detail again. I do want to point out that, under the Supreme Court's decision, the closure and operation of the dam was halted even though it was more than one-half completed when the Endangered Species Act was passed in 1973 and more than \$105 million had been invested in it at the time of the injunction by the Circuit Court of Appeals.

I understand also that the Dickey-Lincoln Dam, a Corps of Engineers project in Maine, was and perhaps still is threatened because of the existence of a useless plant known as the Turkish lousewort.

The Florida Everglades Jetport is in an uncertain status because, after a tentative site selection and the expenditure of well over \$1 million in studies and environmental monitoring, the nomadic Florida Everglade Kite, an endangered species, migrated into the area.

There are many other cases that could be cited. I mention these because they illustrate the absurd and unreasonable results which can come about under the existing law as construed by the Supreme Court. The same results would be both possible and probable under the committee system recommended by the pending bill and that is why I believe my approach is far more preferable.

Let me emphasize, so that we do not lose sight of it, that this law and its potential impact is not limited to Federal projects. It applies to any project, Federal, State, municipal, or private, which is supported by Federal funds, including grants or loans, or which requires Federal approval by licensing, permitting or otherwise. The scope of the reach of the law must be recognized before its potential impact is fully understood.

As the law now stands, any Federal project, or any project involving Federal action, even though it involved the highest national interest, could be stopped cold if it impacted on the most insignificant, most obscure and most worthless plant or vertebrate. This would still be entirely possible under the bill reported by the committee.

The Fish and Wildlife Service has estimated that there may be as many as 1 million species and subspecies of animals and plants entitled to protection under the law. It is conceivable then that virtually every river, stream, hillside, and field may contain a unique species or subspecies of life. Therefore, it is possible that virtually any project could be stopped in its tracks if the opponents just look hard enough for a unique animal or plant in the area. You may be sure that they will do so.

There is some suggestion that the Endangered Species Act is being used, not primarily to protect plants or animals, but to stop controversial projects which cannot be stopped in any other way. There is also a suggestion that the act's supporters are deliberately keeping a low profile for the time being. The committee report states:

It has also been brought to the committee's attention that the General Accounting Office suspects, but has not confirmed, that the Fish and Wildlife Service has refrained from listing species which may pose a conflict with a Federal action, for fear of provoking Congress into weakening the protective provisions of Section 7.

I fully support legitimate ecological and environmental concerns. However, I believe that in passing the Endangered Species Act we inadvertently unbalanced the scales unduly. We must redress the sit-

nation and enact legislation which does not unnecessarily and unreasonably hamper progress, growth, and development. We must accommodate people and their needs as well as the environment and its needs. What is needed is a balanced and flexible decisionmaking process under which all important and relevant factors are weighed before the final decision. My amendment provides this. I urge the Senate to adopt it.

Mr. President, let me point out here that this is a grave and far-reaching matter. For several years it has been my privilege to serve as chairman of the Appropriations Committee on Public Works throughout the 50 States, and this matter and the question of added costs has arisen time and time and time again just on these items.

Mr. President, may we have order, if not in the Senate at least down here at the bar.

I warn now that the carrying out of this proposal already in the law, and confirmed by the Supreme Court of the United States, is heading for the expenditure of hundreds of millions of dollars, and I will give some illustrations of that when I address this Chamber later on this amendment.

So we have just begun to hear, Mr. President, what the potential of this amendment carries. I am not seeking the repeal of the law. I am not critical of the Supreme Court of the United States for its decision on the law as written by Congress. I think the Court was exactly right. They did give it a very rigid interpretation, but they were totally right in their interpretation of the meaning of the words that Congress used.

If there ever has been anything thrown back into the laps of Congress with force, it is this opinion of the Supreme Court of the United States. I can hear the bells ringing now that we had better do something about this, and we can do something about it without repealing the original purposes of the act, just provide a more reasonable way of reaching an opinion or conclusion on the merits of the facts, whatever they may be, in these hundreds of cases that are involving, just as certain as we are here, billions of dollars, and not just Federal dollars, and we have none to spare, but in the field of private enterprise, construction of most any kind.

I believe with the already accumulated list of what I understand are several thousand endangered species that have been found by the official authorities, that many, many, many more of them will be found, and the tenor of a great deal of these challenges is very obviously not concerned about the endangered species but to stop the project.

It has been a long, long time since Congress intentionally stepped in and deliberately killed and cut off and discontinued one of its own projects, this Tellico Dam, where we had already spent more than \$105 million.

I thank the Senator from Iowa for yielding me the time.

Mr. CHAFFE: Mr. President, no species, not even man, exists independently of all other species. The value of a healthy, balanced ecosystem should be obvious, but sometimes it is overlooked until it is too late. I am talking about the need we have to preserve a diversity of species.

With this in mind, I must enthusiastically rise in support and defense of the Endangered Species Act. This landmark legislation was Congress first attempt to recognize and deal with the threat posed by man's activities on a growing number of species. The legislation was enacted to first, protect ecosystems upon which endangered and threatened species depend and second, to provide a program for the conservation of such species themselves.

The many forms of life on our planet represent millions of years of evolution and diversification. These species have each gone through an evolution process in which they have established intricate interdependent relationships which can be of critical importance to their survival.

The act recognizes that it is only through the ability to provide protection to a full spectrum of plant and animal life that we are able to provide protection to any particular species. In other words, if we want to preserve species such as the peregrine falcon, the bald eagle, and the grizzly bear, we must also preserve the network of life upon which they depend.

At the same time that we have started to appreciate the potential value of species and the complex life support systems they provide, we have also witnessed an accelerating rate of their extinction or disruption. Widespread disturbance of habitats and overexploitation of the environment are the major causes of this problem. But we can avoid many of these extinctions and endangerments by protecting a relatively small area of critical habitat and by careful development of land and water-use projects.

Mr. President, in the committee I fought to preserve the act as it was originally enacted, but I was not successful. I support efforts to preserve that act here. But, Mr. President, I cannot refrain from commenting on one particular amendment that concerns me. That is the amendment that is supported by the distinguished Senator from Mississippi (Mr. Stennis). That amendment, I believe, would prevent the Endangered Species Act from achieving either of its principal purposes. I say this because Senator Stennis' amendment would preempt the consultation process created under section 7 of the act.

Section 7 requires that Federal agencies consult with the Fish and Wildlife Service when their proposed activities or programs may affect a listed endangered species. This does not mean that flexibility is thrown to the winds. The new regulations published by Fish and Wildlife Service for section 7 recognize that consultation procedures must be sufficiently flexible to accommodate the myriad of activities that are authorized, funded or carried out by the Federal Government.

Conflicts between the Endangered Species Act and other Federal activities are being resolved through this administrative process. The result of consultation is that in almost all cases Federal agencies have found that for both proposed and ongoing projects, modifications or alternatives can be designed which avoid conflict with the Act. Senator Stennis' amendment fails in my judgment to recognize this fact. It seeks to avoid conflicts by outright exemptions from the act for large classes of projects. This appears to me to be stopping the consultation effort before it even has a chance to begin.

Senator Stennis' approach has a number of shortcomings which will most certainly result in unnecessary destruction of endangered species and habitats critical to their existence.

First, the amendment changes present law by providing that in cases where conflict between the Endangered Species Act and a Federal activity occurs, that the construction agency itself should decide if the project should be modified or terminated. Mr. President, each one of my colleagues is fully aware of the commitment that many line agencies have to the completion of proposed projects, in many instances with less than appropriate attention to other important factors such as endangered species. They want to get the projects built. To allow a single agency head to determine the advisability of destroying a species or completing the agency's project as proposed, seems a bit like putting the fox in charge of the henhouse.

The amendment also contains two grandfather clauses. The first would exempt any project at the 50 percent stage of completion from having to meet any of the requirements of the act. The second would exempt any project which was under contract or otherwise underway as of the date of enactment of the law.

It might be noted first that grandfathering of any sort makes no distinction between species. Thus, grandfathering, I believe, would be an unacceptable approach to resolving conflicts under the Endangered Species Act for those critics of the act who believe that values can be placed on different species. Under the grandfathering clauses of the Stennis amendment, eagles, wolves, whooping cranes—in other words, all those beautiful species that seem to draw people's attention—are just as much in jeopardy as are some of the lower life forms. Even the act's most vocal critics, I do not believe can possibly intend such a result. This is too high a price to pay for a Federal project in the minds of almost everyone.

The exemption of all activities that are 50 percent complete seems to completely ignore the history of the consultation process. If a project can be modified to avoid harm to an endangered species or the critical habitat necessary to the species' survival, then the modification should be given every opportunity to succeed. The consultation process has indeed been successful in helping agencies design and carry out modifications in a number of ongoing projects. An outright exemption of projects through grandfathering provisions is a path that the Senate ought to avoid in this legislation.

The second type of grandfathering that is proposed in the Stennis amendment is perhaps perilous as bad as the first. This approach would exempt from the act any project which was in any way ongoing in 1973. The language in the amendment is "or otherwise underway."

What exactly does "otherwise underway" mean? It could be defined by the courts to signify congressional intent that all the thousands of Federal activities, good or bad, that have been proposed over the years, are above the Endangered Species Act requirements. The sheer number of Federal activities involved in this type of exemption is staggering.

Even if an objective analysis shows the benefits of saving the species, Senator Stennis' amendment would deny the act's application to a broad range of activities that by any reasonable criteria ought to give consideration to the protections provided by the act.

The Stennis amendment jeopardizes the workability of the Endangered Species Act. The amendment should be opposed. It undermines one, if not the most important, aspect of the act \* \* \* the consultation process. In addition, the grandfathering provisions do no less than insure that endangered species considerations will not be brought to light in the vast majority of Federal activities.

For these reasons, Mr. President, I oppose the amendment which is being proposed by Senator Stennis and would ask each of my colleagues to oppose it.

[From the Congressional Record, July 18, 1973]

SENATE CONSIDERATION AND PASSAGE OF S. 2899, WITH AMENDMENTS  
(Continued)

ENDANGERED SPECIES ACT AMENDMENTS OF 1978

The PRESIDING OFFICER. Under the previous order, the Senate will now resume the consideration of legislative business, and proceed to the consideration of S. 2899, which the clerk will state.

The assistant legislative clerk read as follows:

A bill (S. 2899) to amend the Endangered Species Act of 1973 to establish an Endangered Species Interagency Committee to review certain actions to determine exemptions from certain requirements of that act should be granted for such actions.

The PRESIDING OFFICER. The bill is under a time limitation. Who yields time?

Mr. STENNIS. Mr. President, I yield myself 2 minutes.

The PRESIDING OFFICER. The Senator from Mississippi.

Mr. STENNIS. Mr. President, I seek recognition for the purpose of calling up an amendment.

Mr. President, what is the pending business before the Senate? The PRESIDING OFFICER. The pending question is S. 2899.

AMENDMENT NO. 8097, AS MODIFIED

(Purpose: To require that social, cultural, economic, and other benefits to the public be considered prior to stopping certain Federal actions)

Mr. STENNIS. Mr. President, I call up my amendment which was offered yesterday in modified form, and which had some debate thereon. There is an agreed time on the amendment, Mr. President.

The PRESIDING OFFICER. The amendment will be stated.  
The assistant legislative clerk read as follows:

The Senator from Mississippi (Mr. Stennis), for himself, Mr. Eastland, Mr. Garn, Mr. Hatch, Mr. Laxalt, Mr. Young, Mr. Curtis, and Mr. Goldwater, proposes amendment No. 8097, as modified:

On the first page, beginning with line 5, strike out all through line 5 on page 14 and insert in lieu thereof the following:

"Sec. 2. (a) Section 7 of the Endangered Species Act of 1973 is amended (1) by inserting immediately after 'insure,' comma and 'insure' as practicable and consistent with their primary responsibilities, and (2) by adding immediately after the period at the end thereof the following: 'In any case involving a determination by an agency head as to what extent, if any, such action authorized, funded, or to be carried out should be modified, delayed,

or terminated in order to assure, to the extent feasible, that such actions do not jeopardize the continued existence of such endangered or threatened species or result in such destruction or modification of such critical habitat of such species, such agency head shall balance the social, cultural, economic, and other benefits to the public if such action is carried out as planned against the aesthetic, ecological, educational, historical, recreational, or scientific loss to the public which would occur if such species were to become extinct, but in no event shall such agency be precluded by reason of this Act or any other law from carrying out any such actions involving the construction or other establishment of any project or part thereof, without regard to whether or not such action jeopardizes the continued existence of endangered or threatened species or would result in the destruction or modification of critical habitat of such species, if such project or part is at least 50 per centum completed based upon the amount expended.

"(b) The provisions of Endangered Species Act of 1973 shall not be applicable to any project under contract or for which construction had been appropriated as of the date of the enactment of such Act.

"(c) No action authorized, funded, or carried out in compliance with subsection (a) by a Federal department or agency shall be deemed to be a violation of section 4(d) or 9(a)."

On page 14, line 6, strike out "Sec. 4" and insert "Sec. 3."

On page 14, line 23, strike out "Sec. 5" and insert "Sec. 4."

On page 15, line 1, strike out "sections 6 and 7" and insert "section 6".

The PRESIDING OFFICER. The Senator from Mississippi.  
Mr. STENNIS. Mr. President, I yield myself 10 minutes, and I may yield myself more time before I yield the floor.

Mr. President, as the Senator from Iowa has said, this is an important amendment. The basic proposal is a committee amendment that would not only extend the operation of the law, which would otherwise expire in September of this year, but the committee amendment proposes to modify the substance of the law and set up a special committee to pass upon questions relating to endangered species. My amendment is really directed to the committee amendment and proposes to amend it along these lines, it being based on the Supreme Court decision, as well as the present law, in the Tellico Dam case in Tennessee. Even though it was 90 percent complete, a \$116 million dam project, with about \$100 million having been spent on it, and it being half completed when the original law was passed, nevertheless the Court held that, under the language of the present law, which the committee would propose to extend, with some modification, such action would be brought to a complete halt and stopped. Under the language of the law, the Court had no alternative.

Mr. President, in spite of the facts in that case being contrary, it seems to me, with all deference, to the rule of practical commonsense, I think the conclusion reached by the Court is the only one it could have reached under the wording of the law. It left no discretion and no practical alternative, really, once the facts about critical habitat of endangered species being destroyed were developed. This magnifies the situation and demands that despite the good purposes and the high motives of preserving endangered species—animal life, plant life, whatever it is—in spite of all the good points in favor of it, the law, as a practical matter, is just impossible and must be amended.

The committee agrees that there must be a modification, but I respectfully believe it does not go far enough.

The amendment that I propose would leave intact the idea of having a law in this field for regulation, but it would modify the law to the extent that the head of the sponsoring agency would have to make