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The Bay's Legal Fund v. Browner: Should The Courts Allow An Agency's Poor Timing To Imperil Endangered Species?

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THE BAYS' LEGAL FUND V. BROWNER: SHOULD THE COURTS ALLOW AN AGENCY'S POOR TIMING TO IMPERIL ENDANGERED SPECIES?

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I. INTRODUCTION

The United States District Court for the District of Massachusetts recently approved the continuing construction of a $310 million tunnel and sewage outfall project in Boston Harbor.[1] The court held that the Environmental Protection Agency (EPA), the U.S. Army Corps of Engineers, and the National Marine Fisheries Service (NMFS), did not violate the Endangered Species Act (ESA), by approving the construction of the outfall tunnel.[2] The court specifically found that the evidence failed to show any harm to endangered species, that the environmental impact statements issued by the EPA were sufficient to establish compliance with the requirements of the ESA, and that the ESA does not require a biological opinion from the NMFS prior to the commencement of any construction. Judge Mazzone was the presiding judge, having overseen the outfall project since the court had ordered the cleanup of Boston Harbor in 1985, pursuant to the Clean Water Act.[3]

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1. The Bays' Legal Fund v. Browner, 828 F.Supp. 102 (D. Mass. 1993).

2. Endangered Species Act, 16 U.S.C. § 1536 (1988). The Act requires that the agencies ensure that construction is not likely to jeopardize the continued existence, nor cause the destruction or modification of the habitat, of any species listed as endangered. In addition to the court's finding that ESA had not been violated, it also held that the above listed agencies had not violated the Marine Mammal Protection Act or the National Environmental Policy Act. Allegations that these Acts had been violated were brought by Greenworld, Inc. and Richard Stahon, both of whom joined the Bays' Legal Fund in the action. These allegations were given minimal discussion by the court which focused on the violations of the ESA. The Bays' Legal Fund v. Browner, 828 F.Supp. at 108.

3. Scott Allen, *New Troubles for Sewage Outfall Tunnel*, BOSTON GLOBE, April 18, 1992, Metro/Region, at 1. Clean Water Act, 33 U.S.C. § 1251 (1988).

This case provides an example of the judicial confusion over the relationship between the EPA in approving such projects and the NMFS as the agency in charge of implementing the ESA.[4] Judge Mazzone found that halting construction while the NMFS completed its biological opinion would be an "exaltation of form over substance."[5] Clearly, his position varies substantially from that of Judge Celebrezze, who wrote the circuit court opinion in the famous case of *Hill v. Tennessee Valley Authority*.[6] In that case, the court stated that the procedural and substantive requirements of the ESA should be enforced strictly because an error on the side of permissiveness could possibly result in the extinction of a species.[7]

The major substantive issue presented in this case is whether the EPA has complied with the mandate of the ESA by allowing construction to proceed without a final biological opinion from the Department of Commerce. It is surprising that the *Browner* court believed that such compliance was unnecessary when the consequences of proceeding in such a manner are so significant. Vast public resources are invested in these kinds of projects which require federal funding and approval. These funds are at risk if a biological opinion is issued after the onset of construction which requires the discontinuation of the project because it would endanger the existence of a species.[8] In addition, an error in

4. Whenever a federal agency proposes to undertake an action that may affect an endangered species, the agency must enter into a formal consultation with either the Secretary of Commerce or the Secretary of Interior, depending upon which species is involved. In this case, the Secretary of Commerce had the responsibility for enforcing the ESA, through the NMFS, the agency within the Department of Commerce that is responsible for marine wildlife and habitat. If the endangered species is land-based, the Department of Fish and Wildlife, within the Department of Interior is consulted. 16 U.S.C. § 1536 (1988).

5. The Bays' Legal Fund v. Browner, 828 F.Supp. at 11.

6. 549 F.2d 1064 (6th Cir. 1977).

7. *Id.* at 1072. In *Hill*, the court stated that with such an error, "the most eloquent argument would be of little consequence to an extinct species," distinguishing judicial error in a NEPA case which is subject to later review and remedy before further damage is done, and judicial error in an ESA case. This decision was upheld by the Supreme Court. TVA v. Hill, 437 U.S. 151 (1978).

8. In many instances, the proper remedy for a violation of a federal law is an injunction. The Supreme Court has stated that "where the national policy objectives of a statute have been frustrated, the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief." Hecht v. Bowles, 321 U.S. 321, 331 (1944). *See also* Securities & Exchange Comm. v. Advance Growth Capital Corp., 470 F.2d 40, 53 (7th Cir. 1972). In a case such as the present one, the injunction could either close down the project permanently, as the Court did in

judgment can be irreversible when dealing with a species that is already at risk of extinction. In many cases there are no second chances.[9] Therefore, the protections that Congress has given to endangered species, through the procedures set forth in the Endangered Species Act, should be strictly complied with, even when it appears that following such procedure is merely exalting form over substance.

By focusing on the procedural and substantive requirements of the ESA, and exploring the various judicial interpretations of those requirements, this Note will explain why the *Browner* court erred in its decision. It is imperative that the judicial system mandate strict compliance with the ESA's interagency cooperation requirements. By requiring federal agencies to cooperate under set procedures, Congress affirmatively established a system of checks and balances, affording endangered species the best possible protection. Strict compliance with these procedures allows the nation to grow and develop with minimal economic loss, while providing endangered species the protection that scientific and technological advancements can offer.

II. Legal Background

The Endangered Species Act (Act) was passed in 1973 for the purpose of providing a program for the conservation of endangered species.[10] The Act requires all federal agencies to take affirmative action for the purpose of conserving endangered species, by utilizing their authority to achieve the purpose of the Act.[11] The section of the Act relevant to this case involves the mandate for interagency cooperation.[12] That section requires each federal agency to consult with the Secretary of the Department of Commerce or the Department of Interior[13] before

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Hill v. TVA, 437 U.S. at 195, or close down the project until the alternatives set by the Department of Commerce or Department of Interior are complied with. *See* Pacific Legal Foundation v. Watt, 539 F.Supp. 841 (D.C. Cal. 1982).

9. In *Hill*, the Secretary of Interior had determined that the operation of the dam would result in the eradication of the snail darter. 437 U.S. at 173-74.

10. 16 U.S.C. § 1531(b) (1988).

11. 16 U.S.C. § 1531(c) (1988). *See also supra* note 4. If the endangered species is land-based, the Department of Interior is responsible, acting through the U.S. Fish & Wildlife Service. If the endangered species is marine, the Department of Commerce is responsible, with the National Marine Fisheries Service carrying out agency consultations.

12. 16 U.S.C. § 1536(a)(2) (1988).

13. 16 U.S.C. § 1532(15) (1988).

taking any action that may "jeopardize the continued existence of any endangered species ... or result in the destruction or adverse modification of the habitat of such species."[14] During the consultation process, each agency must use the "best scientific and commercial data available."[15] If, after the consultation, the Secretary concludes that there is a possible threat to any endangered species, the Secretary must provide the agency with a biological opinion, specifying the impact on the species, and any measures that the agency may take to minimize that impact.[16]

To comply with the requirements of the ESA, the agency must initially request that the Secretary furnish information to it about the existence of any endangered species that may inhabit the area of the proposed action. If any such species is present, the agency must then prepare a biological assessment. These steps must take place prior to the commencement of construction.[17] After the agency initiates a consultation, it may not "make any irreversible or irretrievable commitment of resources ... which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures."[18]

The Endangered Species Act merely outlines these procedures. Regulations published in the Code of Federal Regulations provide more guidance as to the proper procedure and substance of the Act.[19] The regulations provide working definitions for both the biological assessment prepared by the agency considering the action, and the biological opinion prepared by the Secretary responsible under the ESA.[20] The biological assessment contains information concerning the endangered species and its habitat, and evaluates potential effect or modification of the habitat.[21] The biological opinion states the view of the responsible service as to whether the proposed action will have the likely effect of jeopardizing the continued existence of the species, or result in destruction or modifica-

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14. 16 U.S.C. § 1536(a)(2) (1988).

15. *Id.*

16. 16 U.S.C. § 1536(b)(4) (1988). In its application, the Act, in using the term "Secretary," is referring to the service within either the Department of Commerce or the Department of Interior that is responsible for implementing the policies of the ESA. The C.F.R. uses the term "Service" when discussing the consultation process. 50 C.F.R. 402.10 (1992).

17. 16 U.S.C. § 1536(c) (1988).

18. 16 U.S.C. § 1536(d) (1988).

19. 50 C.F.R. 402 (1992).

20. 50 C.F.R. 402.02 (1992).

21. *Id.*

tion of the habitat.[22] The agency, which in this case would be the EPA, provides the essential information from the best available scientific and commercial data. The Secretary, which in this case would be the NMFS, studies the EPA's assessment and then issues its opinion as to the effect of the proposed action on the endangered species. The assessment is for informational purposes, and the opinion is designed to interpret and render an expert evaluation.

The federal regulations also help to explain what is required in the consultation process. During the initial consultation, the agency must request a list of any endangered species in the area of the proposed action, and the appropriate service has 30 days to respond.[23] If the service determines that a species is present, the agency must prepare the biological assessment within 90 days.[24] The contents of the assessment are at the discretion of the agency.[25] The service may use the biological assessment in deciding whether or not they will request a formal consultation, or may incorporate the data into their biological opinion.[26] The formal consultation process ends when the service issues a biological opinion.[27]

According to the regulations, the biological opinion shall include all reasonable and prudent alternatives which are economically and technologically feasible, if they would avoid the likelihood of jeopardizing the continued existence of an endangered species.[28] The opinion shall also include any reasonable and prudent measures that may minimize the impact of the action on any endangered species.[29] If the agency adopts the measures or alternatives offered by the service, it has fulfilled its obligation under the ESA. If the agency fails to consider the measures and alternatives and proceeds with the project, it runs the risk of being challenged in court for noncompliance with the Act.[30]

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22. *Id.*
23. 50 C.F.R. 402.12(d) (1992).
24. *Id.*
25. 50 C.F.R. 402.12(f) (1992).
26. 50 C.F.R. 402.12(j)(2) (1992).
27. 50 C.F.R. 402.02 (1992).
28. 50 C.F.R. 402.14(g)(8) (1992).
29. *Id.*
30. *See* Village of False Pass v. Watt, 565 F.Supp. 1123 (D. Alaska 1983). The court found that the agency had not adopted the alternatives and measures proposed by the NMFS, and that in failing to do, it was in violation of the ESA. Because the agency had no justification for its failure to comply with the suggestions of the NMFS, the court found that its action was arbitrary. The proper standard for judicial review of the

Although the federal regulations offer some insight as to the exact requirements of the Act, they may not be inclusive enough to avoid substantial differences in statutory construction.[31] Unfortunately, the judicial response to the procedural ambiguities, in both the Act and corresponding regulations, has been inconsistent. The courts have been much more consistent when construing the substantive requirements of the ESA.

The Supreme Court in *Tennessee Valley Authority v. Hill*,[32] secured the priority of the provisions of the Endangered Species Act over all other agency actions. The Court granted endangered species the "highest of priorities," when it closed down the Tellico dam, after millions of dollars had been invested and the project was virtually complete. The Court stopped the project in order to save the snail darter, a small fish that was unknown prior to the initial construction of the dam, but would have been in danger of extinction had the dam been allowed to open. In that case, the Court demonstrated a judicial commitment to enforcing what it interpreted to be a Congressional mandate to protect endangered species, regardless of economic consequences.[33]

The procedural requirements are concededly less than exact, but the high priority given to endangered species is quite clear. Therefore, judicial interpretations of procedure, when the Act and regulations are ambiguous, should attempt to further the substantive requirement of protecting the species. The *Browner* court failed to do this, and in doing so, it passed over an opportunity to further the objectives of the Act. It could have helped delimit the procedural boundaries of interagency cooperation.

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agency's actions is the arbitrary and capricious standard. *See* 5 U.S.C. § 706(2)(A), and Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976 (9th Cir. 1985).

31. In its criticism of the dissent's interpretation of the interagency cooperation section of the Act, the majority quoted Lewis Carroll to describe the dissent's explanation for the interpretation; "'When I use a word,' Humpty Dumpty said, in rather a rather scornful tone, 'it means just what I choose it to mean—neither more nor less.'" TVA v. Hill, 437 U.S. at 173, n.18.

32. TVA v. Hill, 437 U.S. 151 (1978).

33. *Id.* at 174. The Supreme Court noted that its view of the Act would produce "results requiring the sacrifice of the anticipated benefits of the project and of many millions of dollars in public funds. But examination of the language, history, and structure of the legislation under review here indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities."

III. THE SUBJECT CASE

In 1985, the United States District Court for the District of Massachusetts ordered the Massachusetts Water Resources Authority (MWRA), to stop dumping sewage into Boston Harbor in violation of the Clean Water Act.[34] The MWRA's treatment plant at Deer Island had been discharging approximately 40 tons of sludge into the outgoing tide at the entrance to Boston Harbor each day for several decades.[35] This practice made Boston Harbor one of the dirtiest harbors in the nation.[36]

Pursuant to that decision, Boston has been engaged in designing, funding, and constructing both new treatment facilities on Deer Island, and an outfall tunnel with the capacity to take 500 million gallons of treated effluent 9.5 miles out to sea each day.[37] Due to the nature of the ocean currents flowing north to south from Massachusetts Bay to Cape Cod, the project will result in diverting the effluent from Boston Harbor to waters off the Cape. In 1991, a Cape Cod organization called STOP (Stop the Outfall Pipe), sent a petition to Governor Weld, urging him to stop the construction until further studies and alternatives could be researched.[38] STOP also advocated that the $310 million allocated for the construction of the tunnel be used instead for state-of-the-art secondary and tertiary treatment, so that the sewage would be clean enough for discharge closer to Boston.[39]

By March, 1991, the EPA and the Army Corps of Engineers had given the Massachusetts Water Resources Authority the go-ahead for the project, but the opposition on Cape Cod was just beginning to gather strength. STOP enlisted the aid of U.S. Representative Gerry Studds, then Chairman of the House Subcommittee on Fisheries and the Environment, which has oversight authority over the Endangered Species Act. Several endangered species inhabit the waters off the coast of Massachusetts. Of these, the North Atlantic right whale is considered to be in an extremely critical condition, with fewer than 350 still existing

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34. 33 U.S.C. § 1251 (1988).

35. Scott Allen, *Boston Harbor's Waters Have Started to Heal; Cleanup Helping to Shed Dirtiest Label*, BOSTON GLOBE, Sept. 6, 1992, Metro/Region, at 1.

36. *Id.*

37. Jeff McLaughlin, *Cape Fights Plan to Pipe Effluent Into Mass. Bay*, BOSTON GLOBE, Aug. 18, 1991, Metro/Region, at 39.

38 *Id.*

39. Ross Gelbspan, *Pressed by Cape Foes, MWRA to Study Sewage Tunnel Plan,* BOSTON GLOBE, Sept. 12, 1991, Metro/Region, at 51.

in the North Atlantic.[40] Representative Studds responded by ordering the EPA to meet the requirements of the Endangered Species Act, and engage in a formal consultation with the National Marine Fisheries Service in order to determine the impact of the project on the whales.[41]

Before Representative Studds became involved, the only consultation the EPA had entered into with the NMFS was a preliminary one in 1988. The NMFS responded to this consultation with a one page "tentative conclusion" that the project would not significantly affect endangered species.[42] Although the EPA did not prepare a biological assessment until 1993, it had prepared several environmental impact statements that examined the potential impact of the project on endangered species.[43] The formal consultation process, forced upon the EPA and the NMFS by public and political pressure, finally commenced in 1992.

STOP and Cape Cod officials organized to form a legal defense fund to raise money for what they believed was an inevitable lawsuit.[44] After

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40. Dianne Dumanoski, *Suit Aims to Halt Tunnel, Protect Whales in Bay,* BOSTON GLOBE, March 20, 1993, Metro/Region at 35. The North Atlantic right whales are considered to be near extinction. The world's leading experts on the whales know that only about 11 calves are produced each year. Recent molecular studies of the animals indicate how close they are to extinction because all of the known whales can be traced as descendants of only 3 females. Of the 300 to 350 in existence, 165 have been observed in the vicinity of Cape Cod between January and May. What scientists fear most is that the Boston Harbor project will affect the food supply of the whales. As baleen whales, they strain water through plates in their mouths, feeding on microscopic plankton. The effluent that the tunnel will be discharging contains an abundance of nitrogen and other nutrients that adversely affect plankton. *See* Jeff McLaughlin, *U.S. Studies Whether Whales Endangered by Harbor Pipe,* BOSTON GLOBE, April 7, 1992, Metro/Region, at 21.

41. McLaughlin, *supra* note 37.

42. The Bays' Legal Fund v. Browner, 828 F.Supp. at 106.

43. *Id.* at 113. In the opinion, Judge Mazzone found the environmental impact statements to be voluminous and thorough enough on the topic of endangered species, that they could serve as the EPA's biological assessment. Because the content of the statement was sufficient, the judge decided that the EPA's intent was irrelevant, even though they had not intended the environmental impact statements to serve as a biological assessment. *Id.*

44. The Cape Cod group contended that the research by the EPA and NMFS, in response to Representative Studds' requests, was being done merely to justify work that was already underway, as it had been 4 years since the EPA had approved the tunnel. The EPA claimed that the approval was merely to allow the construction of the tunnel, and the MWRA would have to prove affirmatively that the effluent would not pollute or harm endangered species before they would be allowed to discharge the treated sewage. The group from Cape Cod questioned the EPA's commitment to the protection of endangered species and the environment, and with good reason. One-hundred and ten

exhausting administrative remedies, the Bays' Legal Fund (as the group is now known) filed this suit in the U.S. district court, requesting an injunction to stop the construction of the tunnel. They alleged that the EPA and the U.S. Army Corps of Engineers authorized the construction before the NMFS had initiated its federally-mandated studies on the impact of the project on endangered species. As stated earlier, the court held that none of the federal agencies involved had violated the Endangered Species Act, either substantively or procedurally.

IV. DISCUSSION

A. The Endangered Species Act Requires a Formal Consultation Resulting in a Biological Opinion Issued by NMFS

In denying the Bays' Legal Fund's request, Judge Mazzone stated that the EPA was only required to issue a biological assessment before construction of the project could begin.[45] By looking at isolated sections of the ESA and the corresponding federal regulations, as Judge Mazzone did, this could appear to be the case.[46] However, the Act must be viewed in its entirety to get a clear picture of what Congress intended when it drafted the legislation. The Act clearly requires a formal consultation with the NMFS, if the initial consultation finds that an endangered species is present in the area of the proposed project.[47] Various courts have determined that the ESA mandates this formal procedure whenever an agency action may affect an endangered species.

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million dollars had already been spent on the project and it was not unreasonable to question the expenditure of these funds, especially if the EPA was not in fact fully committed to allowing the project to become operational. Scott Allen, *Outfall Pipe Opponents Begin Legal Defense Fund*, BOSTON GLOBE, Aug. 26, 1992, Metro/Region, at 27.

45. The Bays' Legal Fund v. Browner, 828 F.Supp. at 111.

46. Judge Mazzone was referring to 16 U.S.C. § 1536(c), which requires the biological assessment to be complete before construction commences, and 50 C.F.R. 402.12 (1992), which states the same.

47. 16 U.S.C. § 1536(a), (b).

For example, in *Village of False Pass v. Watt*,[48] the court emphatically stated that a formal consultation was a requirement of the Act. In addition, the court stated that the service must prepare a biological opinion outlining how the project will affect the species, including any alternatives for avoiding adverse effects. *Village of False Pass* involved oil and gas exploration leases on Alaska's outer continental shelf. The Secretary of Interior had issued the leases without incorporating any of the recommendations made by the NMFS in its biological opinion. Interestingly, one of the endangered species involved was the North Pacific right whale. The right whale, however, fared better in the Alaska federal court than it did in the Massachusetts federal court. The judge held that compliance with the Act required that the agency initiate the formal consultation process, and not issue leases until the process was complete.[49] The court also found that this process was an affirmative mandate of the Act, so that the biological opinion could be formed with the best evidence available, including information developed during the consultation.[50] Because the opinion would contain alternatives developed with this evidence, the agency should have incorporated these alternatives into its plans, and its failure to do so warranted a finding that its actions were arbitrary and capricious.[51]

Applying the court's reasoning in *Village of False Pass* to the subject case, the NMFS was required, at the time the EPA initially requested information on endangered species, to enter into the formal consultation process. Neither the NMFS nor the EPA should have waited until public

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48. 565 F.Supp. 1123, 1140 (D. Alaska 1983). In this particular case, the concern was over the effect of three distinct hazards to whales from outer continental shelf activities: 1) physical impacts caused by structures; 2) behavioral impacts caused by noise; and 3) oil spills. As to the behavioral impact from noise, the biological opinion stated that little was known about the impact on the whales from the low frequency sounds associated with oil exploration, but that such noise was known to cause stress in other marine mammals. The opinion concluded that the information was insufficient to determine if the project would be "likely to jeopardize" the whales. The opinion then offered alternatives to avoid potential stress from noise. One of these alternatives would restrict drilling during the times that the whales are in the area. This is one of the alternatives that the court decided should have been incorporated into the project. This same issue was raised by Bays' Legal Fund in the subject case, but Judge Mazzone dismissed this allegation out of hand because the noise from the tunnel boring machine is "less powerful than the noise produced by diesel tugboats." The Bays' Legal Fund v. Browner, 828 F.Supp. at 109-110.

49. Village of False Pass v. Watt, 565 F.Supp. at 1154.

50. *Id.* at 1155.

51. *Id.* at 1163.

concern and political pressure forced them into the process. From the outset, both were aware that endangered species were present in the area. This consultation should have ended only after the biological opinion was complete, not after the NMFS issued a preliminary one-page response.[52] If the court in *Village of False Pass* held that failure to incorporate alternatives contained in a biological opinion was an arbitrary and capricious action, then acting before determining which, if any, alternatives would be recommended in the biological opinion, must be considered arbitrary and capricious.

In another case, *Pacific Legal Foundation v. Watt*, the court held that because the EPA awarded a construction grant for a mechanical composting demonstration project to the City of Los Angeles, without complying with the formal consultation process required by the ESA, the EPA was in violation of the ESA.[53] The court enjoined the EPA from awarding or releasing any further funds for the project until the ESA was complied with. Judge Mazzone should also have enjoined the MWRA from further construction until the biological opinion had been issued by the NMFS. Even though the biological opinion was expected to be released within two months of the decision, not enjoining the defendants from further action set a bad precedent for future projects.

B. Project Construction Should Not Commence until The NMFS Has Issued its Biological Opinion

The most significant problem with the ESA consultation process is that the Act and the federal regulations are unclear as to when construction can commence. They distinctly require a biological assessment to be issued prior to construction, and to state that the process ends with the issuance of the biological opinion. However, they are unclear as to

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52. In another ESA case, the court found that a letter from NMFS sufficed as a proper biological opinion, but in that case the letter was intended to be a biological opinion by the authoring agency. In an affidavit, the director of the NMFS stated that the letter was so intended. The letter also referenced documents that formed the biological assessment. The court found that the documents, taken together, were a sufficient summary of the relevant data, "to satisfy the requirements of ESA." Hence, the court was indirectly stating that the opinion was a necessary requirement of the Act. *See* National Wildlife Federation v. Andrus, 642 F.2d 589, 608 (D.C. Cir. 1980). In the present case, there was no evidence that the NMFS intended its one-page letter to be the final biological opinion. To the contrary, its intent was evidenced later when it responded to public demand, and began preparation for an actual biological opinion.

53. 539 F. Supp. 849 (C.D. Cal. 1982).

whether construction can begin prior to the issuance of the biological opinion. Judge Mazzone found that this was not a procedural requirement of the ESA.[54] Other courts, however, have placed a greater emphasis on the importance of the biological opinion.

For example, in *Conservation Law Foundation v. Watt*, the court stated that not only should a project for exploration of oil and gas on the outer continental shelf await the biological opinion prior to commencement of construction, but that if the opinion, once issued, required further studies in the immediate future, the project should await the results of those studies before it commenced.[55] In *Sierra Club v. Froehlke*, the court reviewed the interagency cooperation requirements of the ESA when deciding whether the U.S. Army Corps of Engineers had violated the Act by issuing permits for the construction of a dam.[56] The court found that the Corps' actions were not arbitrary and capricious in disregarding the recommendations of the Department of Interior, although they did offer a discussion of the formal consultation process. Specifically, the court acknowledged the requirement of the consultation process and implicitly stated that the biological opinion was a necessary element.[57]

The purpose of the consultation is clear. The EPA is to consult with the NMFS in order to receive an expert opinion concerning the effect of the project on the endangered species. It would seem contradictory to the purpose of the consultation requirement to require the EPA to wait until the NMFS issued a biological assessment before it commences construction, but not require it to wait until the biological opinion has been issued. The purpose of the assessment is to provide the scientific and commercial data to the NMFS in order for it to form the best possible opinion. In its opinion, the NMFS introduces possible alternatives or modifications to reduce any adverse impact on the species. The agency is then required to consider the alternatives. The agency is not required to adopt the alternatives in the biological opinion, although

54. The Bays' Legal Fund v. Browner, 828 F.Supp. at 112.

55. 560 F.Supp. 561, 573 (D. Mass. 1983).

56. 534 F.2d 1289 (9th Cir. 1976).

57. *Id.* at 1305. In that case, the court quoted a discussion between Senators recorded in the legislative history of the Act. One Senator stated that the agencies "have to consult with the respective agencies," rather than making the decision on their own. *Id.* at 1304 (quoting 119 CONG. REC. 25688-89 (1973) (discussion between Sen. Tunney and Sen. Cook)). The court found that the Corps had fulfilled its requirement under the ESA by completing the consultation, and by waiting for the opinion of the Department of Interior to issue its opinion.

great weight is placed upon such adoption when the actions of the agency are reviewed.[58]

It is interesting to note that the above mentioned case, *Conservation Law Foundation v. Watt*, was decided by Judge Mazzone himself, ten years prior to the subject case. In that opinion he stated that when studies commissioned by the Department of Interior were on-going, an agency should not proceed without the studies being completed if an endangered species was potentially threatened.[59] In that case, Judge Mazzone was dealing with a situation where the biological opinion had been issued. The opinion stated that the impact of oil and natural gas exploration on the outer continental shelf could not be determined, and ordered further studies. Judge Mazzone was clearly advocating adherence to the language and legislative history of the Endangered Species Act by giving priority to the endangered species over the mission of the federal agency, regardless of the cost.[60]

The only input from the NMFS that occurred during the consultation process in the subject case was the one-page preliminary statement. Surely, this cannot substitute for the complete and well-informed biological opinion that Congress had in mind when it enacted the Endangered Species Act.[61] The NMFS did not offer any possible alternatives to the project, nor did it discuss any of the relevant studies

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58. *See* National Wildlife Federation v. Coleman, 359 F.2d 350, 371 (5th Cir. 1976), where the court stated that the Act does not give the Department of Interior veto power over the actions of other federal agencies, but that the agencies' decisions are subject to judicial review as to whether they considered all relevant factors.

59. Conservation Law Foundation v. Watt, 560 F.Supp. at 573.

60. One can only wonder why Judge Mazzone's position in the subject case is so substantially different from his prior decision, as only a minimal amount of funds had been invested when the action was brought before the court. In the subject case, $148 million had already been spent by the time the court heard the case. Although Judge Mazzone stated that this fact should not be weighed against the interest of preserving an endangered species, it is interesting that he felt compelled to note the amount of this investment and the cost of terminating the project. The Bays' Legal Fund v. Browner, 828 F.Supp. at 112.

61. Although the contents of the biological assessment are at the discretion of the agency, the regulations provide some suggestions for inclusion: 1) the results of an on-site inspection of the area affected by the action to determine if listed or proposed species are present or occur seasonally, 2) the views of recognized experts on the species at issue, 3) a review of the literature and other information, 4) an analysis of the effects of the action on the species and habitat, including consideration of cumulative effects, and the results of any related studies, and 5) an analysis of alternate actions considered by the federal agency for the proposed action. 50 C.F.R. 402.12 (1992).

available. This failure clearly violated the requirement of using the best scientific and commercial data available.

C. Waiting for the Biological Opinion Protects Against Economic Loss

As noted earlier, courts have adhered to the substantive requirements of the Act, without regard to any economic loss that may result.[62] The Act provides, as a preventive measure against economic loss, a provision that prohibits any "irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measure...." during the consultation process.[63] Judge Mazzone contends that this section of the Act does not prohibit the commitment of all resources, only those that have the effect of foreclosing alternatives.[64] If this phrase in the Act is to be given the very narrow interpretation of Judge Mazzone, then one can imagine that millions of dollars could be wasted, especially if projects are allowed to commence without the completion of the consultation process, and the biological opinion later states that the project will adversely affect an endangered species. The project could be shut down with large amounts of capital investment being wasted.[65] Inevitably, courts would be forced to choose between violations of the Act and economic loss.

Unfortunately, other courts have taken the same position as Judge Mazzone on this issue. In several federal court decisions, the agencies that proceeded with a project, investing substantial funds prior to completion of the consultation process, were held to be in compliance with the Act.[66] But it is important to note that in each of these cases, the court was faced with the issuance of leases for oil or gas exploration on the outer continental shelf, and as one court stated, "the oil companies are prepared for the risk of losing these resources which are at stake."[67] It appears to make a difference that the risk of loss falls upon private

62. *See also* Hill v. TVA, 549 F.2d 1064, 1072 (6th Cir. 1977), where the court stated that "the ongoing nature of a project does not preclude enforcement of § 1536."

63. 16 U.S.C. § 1536(c) (1988).

64. The Bays' Legal Fund v. Browner, 828 F.Supp. at 112.

65. *See supra* note 8 and accompanying text.

66. *See* Village of False Pass v. Watt, 565 F.Supp. at 1163; Conservation Law Foundation v. Watt, 623 F.2d at 715; and National Wildlife Federation v. Andrus, 642 F.2d at 589.

67. Conservation Law Foundation v. Watt, 623 F.2d at 715.

investors rather than the public. If this is so, then Judge Mazzone should have been more concerned with the potential loss to the taxpayers and customers of the Massachusetts Water Resources Authority.[68]

In the subject case, the court noted that the termination of the project would cost an additional $48 million. The time for the recognition of potential loss, however, is prior to any major investment, not after the project is underway.[69] It simply makes no sense to show concern for losses that would be suffered upon termination of a project, when all losses could be avoided simply by adhering to the procedural and substantive requirements of the Act before any major investment is made. By ignoring this aspect of the EPA's actions, the court was encouraging the commitment of substantial resources in future projects, without the assurance that the Endangered Species Act will not be violated.

The plaintiffs in this case contend that the $148 million already spent on the project in itself has the "effect of foreclosing" alternative discharge possibilities.[70] Judge Mazzone found that such a "rigid construction" of the Act was not justified, and that the statute calls for some judicial discretion to determine whether the commitment of resources has that effect.[71] One must ask, then, how much money would have to be spent before this judge, within his judicial discretion, would determine that alternative possibilities had been effectively foreclosed? It is completely reasonable to conclude that at some point, the magnitude of the investment would lead to agency decisions that are tainted by the potential economic loss. Even if this does not occur, public funds are at risk if alternative actions are forced upon a project at a date late in the

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68. In this case, not only was the $148 million at risk, but the residents of the city of Boston and surrounding suburbs were already experiencing rate increases for their water and sewage service, paying an average of $535 annually. Federal funding accounts for only 4% of the total cost of the project, so the balance will be paid by homeowners. Their rates are projected to increase to an average of $855 by 1998. Elizabeth Ross, *Boston Harbor Goes Clean*, THE CHRISTIAN SCIENCE MONITOR, Sept. 10, 1992, Habitat, at 10. Obviously, the residents of the Boston area will be paying the cost of the tunnel project for years to come, regardless of whether it becomes operational.

69. The Bays' Legal Fund v. Browner, 828 F.Supp. at 112, n.22.

70. *Id.* at 112. The plaintiffs argued: "The practical effect of any commitment of money is to build momentum. The more money spent on any single option ... the less likely it is that alternatives will be chosen. No single dollar ... commits completely, but complete foreclosure is not the statutory test, if an action 'has the effect of foreclosing' it meets the test..." *Id.* at n.24.

71. *Id.*

construction process.[72] A broader interpretation of the Act's requirement, as proposed by the plaintiffs in *The Bays' Legal Fund v. Browner*, would afford the public the protection that they deserve.

VI. CONCLUSION

Two months after the decision in this case, the NMFS finally issued its long-awaited biological opinion. The NMFS agreed with the EPA's analysis that the existence of any endangered species would not be jeopardized by the project.[73] However, hindsight should not be used to justify the decision in this case. The opinion could have stated that the project would jeopardize the continued existence of the right whale, or adversely modify its habitat. Alternatively, the opinion could have recommended costly alternatives for the disposal of the effluent. With either hypothetical situation, the deciding court would have to choose between enforcement of the ESA, and waste or increase of public funds on the project. As noted earlier, the Supreme Court has recognized that the mandate of the ESA takes priority in such a case.[74]

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72. The Bays' Legal Fund v. Browner, 828 F.Supp. at 112-113, for a discussion of alternatives. Judge Mazzone stated that the current investment in the project ($148 million) did not preclude the development of reasonable and prudent alternatives. Except for the alternative that the discharge be reduced during periods when the risk to the species was the greatest, each of the alternatives he discussed required additional funding or wasting funds already committed to the project. For example, he found that the Massachusetts Water Resources Authority could use the existing outfalls at Deer Island, but that would waste the investment in the outfalls. The judge also discussed the possibility that the discharge could be delayed until the treatment facilities had the secondary system or even additional treatment operational. But this alternative would impose an additional cost to the public, whereas, if explored prior to commencement of the outfall construction, the facilities could have possibly been constructed without further cost. This alternative was proposed by STOP, early in the development of the project. *Id.*

73. Dolores Kong, *Sewage Outfall Tunnel Gets O.K.; Agency Downplays Danger to Whales*, BOSTON GLOBE, Sept. 16, 1993, Metro/Region, at 30. The final biological opinion stated that the tunnel may affect endangered species like the right whale, but is "unlikely to jeopardize their existence." One of the authors of the opinion stated that in NMFS' view the whales were already feeling the effects of the partially treated sewage that is flowing into Boston Harbor, and that sending the effluent out to sea probably would not make matters any worse. The opinion did propose recommendations for monitoring the effects of the project on the species, and if such monitoring shows any harm, the service could call for changes in the project.

74. Hill v. TVA, 437 U.S. at 174.

Not only did the court set a bad precedent with its decision, but it gave up the opportunity to impose binding commitments upon the Massachusetts Water Resources Authority.[75] If the court had insisted upon the issuance of the biological opinion as mandated by the ESA, and halted any further construction, it would have been in the position to enforce judicially the monitoring recommendations that the NMFS included in the opinion.[76]

The biological opinion was somewhat disconcerting, in that the NMFS seemed to take the approach that the whales, while no better off, would not be any worse off than they had previously been.[77] The service also missed an opportunity to provide alternatives that could have forced the Massachusetts Water Resource Authority to include secondary treatment as a prerequisite to disposing the effluent through the new tunnel.[78] The NMFS would be hard pressed to deny that the endangered species would be better off if the effluent were subject to secondary, and possibly tertiary treatments.

The Massachusetts Water Resource Authority was under a court order to clean up Boston Harbor. The NMFS and the EPA were in a position to ensure that whatever project was proffered in response to the court's mandate would result in the cleanest harbor that Boston could possibly enjoy. The district court was in a position to require the agencies to act in a more effective and responsible manner. Unfortu-

75. Representative Studds had been advocating judicial enforcement of some kind of monitoring since 1991. He stated that the court should place legally binding commitments for "stringent monitoring of this project all over the bays, and more than that, legally binding commitments that if any problems with nutrient loading or toxicity are uncovered, action must be taken immediately—not after litigation or lengthy adjudicatory hearing, but immediately." His position was, "no binding language, then no permit to operate the thing." Jeff McLaughlin, *Cape Fights Plan to Pipe Effluent Into Mass. Bay*, BOSTON GLOBE, Aug. 18, 1991, Metro/Region, at 39.

76. Kong, *supra* note 75, at 30.

77. *Id.*

78. *See supra* note 74, for Judge Mazzone's discussion of alternatives. There were alternatives other than those noted by Judge Mazzone. For example, a report published by the Pioneer Institute of Public Policy Research in Boston, offered an alternative that could potentially have saved $200 million. The report was coauthored by Donald Harlemann, an engineering professor at MIT. The report discussed two new treatment methods that have been used in California and other states. One method would dramatically improve the treatment facility's ability to handle the sewage by adding chemicals and polymers to the waste water. The other method, biological aerated filtration, uses less space, and could be used if tertiary treatment was required in the project. Jordana Hart, *Report Urges Recasting of Sewage Plan; Group Says Alternatives Could Save $200 m*, BOSTON GLOBE, Jan. 4, 1993, Metro/Region, at 13.

nately, the EPA, the NMFS and the court all missed the chance to improve the environmental outcome of the project.