ENVIRONMENT - ENDANGERED SPECIES - EXTRATERRITORIAL APPLICATION OF THE ENDANGERED SPECIES ACT OF 1973. *Defenders of Wildlife v. Lujan*, 911 F.2d 117 (8th Cir. 1990), *cert. granted*, *Lujan v. Defenders of Wildlife*, 111 S. Ct. 2008 (1991).

I. FACTS

As first introduced in 1978, the regulation[1] implementing § 7 of the Endangered Species Act of 1973 (ESA or Act)[2] required every federal agency to consult with the Department of the Interior whenever an agency activity, foreign or domestic, threatened to jeopardize the continued existence of a species listed as endangered.[3] Later, the Secretary of the Interior (Secretary)[4] revised this regulation to eliminate the consultation requirement on foreign projects.[5] The Defenders of Wildlife (Defenders)[6] responded to this limitation of the "con-

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[1] Interagency Cooperation— Endangered Species Act, 50 C.F.R. § 402 (1978).

[2] Under § 7(a)(2) of the Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1988), a federal agency that authorizes, funds, or carries out any action must consult with the Secretary of the Interior to insure that the action is "not likely to jeopardize the continued existence of any endangered species." 16 U.S.C. § 1536(a)(2) (1988).

[3] The 1978 regulation stated: "When a federal agency identifies activities or programs that may affect listed species or their habitat, the agency shall convey a written request for consultation with available information to . . . the Director [of the United States Fish and Wildlife Service (USFWS) or the National Marine Fisheries Service (NMFS)] if foreign countries . . . are involved." 43 Fed. Reg. 875 (1978) (codified at 50 C.F.R. § 402.04(3) (1978)). The extraterritorial application of § 7 was justified by "the Act's broad, inclusive language; its legislative history; and its policy implications." Defenders of Wildlife v. Lujan, 911 F.2d 117, 124 (8th Cir. 1990), *cert. granted*, Lujan v. Defenders of Wildlife, 111 S. Ct. 2008 (1991).

[4] Donald P. Hodel.

[5] On June 3, 1986, the Secretary published a new rule which limited the "consultation provision" of the Act to those actions occurring in the United States or on the high seas. 51 Fed. Reg. 19,926 (1986) (codified at 50 C.F.R. § 402.01(a)(1986)). The limitation of the extraterritorial application of § 7 was attributed to "the apparent domestic orientation of the consultation and exemption processes resulting from the [1978] Amendments, and because of the potential for interference with the sovereignty of foreign nations." *Id.* at 19,929. *See infra* notes 49-50 and accompanying text.

[6] Defenders of Wildlife were joined by two other environmental organizations: Friends of Animals and Their Environment and the Humane Society of the United States. Defenders of Wildlife v. Hodel, 658 F. Supp. 43 (D. Minn. 1987).

sultation provision" by filing suit against the Secretary of the Interior in federal district court,[7] seeking the reinstallation of a regulation recognizing the full consultative process.[8]

The district court initially dismissed the suit for lack of standing.[9] Upon remand, however, the court granted summary judgment for Defenders and ordered the publication of a final regulation recognizing the consultative process for all agency activities regardless of location.[10] The Secretary appealed this ruling[11] arguing, *inter alia*, that the language and legislative history of the Act show that Congress did not intend for the consultation requirement to apply to federal agency projects in foreign countries.[12] Defenders disagreed, inter-

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[7] *Id.*

[8] *Id.* at 45.

[9] *Id.* at 48. The Court of Appeals for the Eighth Circuit reversed the district court's conclusion, holding that an environmental organization has standing to challenge a Department of Interior regulation providing that federal agencies with activities in foreign countries had no duty to consult with the Secretary about potential impact on endangered species. Defenders of Wildlife v. Hodel, 851 F.2d 1035 (8th Cir. 1988).

[10] In holding that the 1986 regulations were contrary to the Act, the court focused on the language of the Act and on congressional intent as evidenced by the Act's legislative history. Defenders of Wildlife v. Hodel, 707 F. Supp. 1082, 1084-86 (D. Minn. 1989). First, the court found that the language of the Act "plainly states that federal agencies are required to consult with the Secretary regarding projects in foreign countries [which may jeopardize an endangered species]." *Id.* at 1084. In support of this finding, the court noted the distinction between the all-inclusive language of § 7, which does not differentiate between localities, and the more narrow language of other sections which applies to either the United States or a foreign country, but not both. *Id.* at 1085. The court viewed § 7's all-inclusive language as, on the part of Congress, "intentional language expressing a concern that the consultation provisions be given affect wherever agency action took place." *Id.*

Furthermore, the court found congressional approval of the extraterritorial scope of the regulations in the interplay between the statute and the federal regulations which occurred during the 1978 ESA amendment process. *Id.* The 1978 revisions to the ESA occurred after promulgation of the original regulations. *See* Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751, 1978 U.S.C.C.A.N. 9453. Even though the revisions yielded no substantive changes to the Act, the court reasoned that by retaining the existing law Congress gave its "stamp of approval" on the law and its accompanying regulations. *Id.* at 1086. *See also* Palila v. Hawaii Dep't of Land & Natural Resources, 852 F.2d 1106 (9th Cir. 1988), where the court in interpreting the Endangered Species Act relied on the rule of statutory construction that Congress is "aware of an administrative or judicial interpretation of a statute and [adopts] that interpretation when it reenacts a statute without change." *Id.* at 1109 n.6 (citing Lindahl v. Office of Personnel Management, 470 U.S. 768, 782 n.15 (1985)).

[11] Defenders of Wildlife v. Lujan, 911 F.2d 117 (8th Cir. 1990). Manual Lujan replaced Donald P. Hodel as Secretary of Interior in 1989.

[12] *Id.* at 122.

preting the language of the Act and its legislative history as contrary to the 1986 revised regulations.[13] In affirming the lower court's ruling, the appellate court *held*, the consultation requirement of the Endangered Species Act was applicable to all federal agency actions, including activities in foreign nations, whenever such actions are likely to jeopardize the continued existence of an endangered species. *Defenders of Wildlife v. Lujan*, 911 F.2d 117 (8th Cir. 1990), *cert. granted, Lujan v. Defenders of Wildlife*, 111 S. Ct. 2008 (1991) (argued Dec. 3, 1991).

II. LEGAL BACKGROUND

A. Legislative Background

With the enactment of the Endangered Species Act of 1973,[14] Congress, for the first time, extended federal protection over all species "endangered"[15] or "threatened"[16] with extinction. Prior to this time, two wildlife conservation acts had been passed—the Endangered Species Act of 1966[17] and the Endangered Species Conservation Act of 1969[18]—but neither had produced notable practical impact.[19] Both Acts were hampered by two fatal flaws: (1) neither contained meaningful enforcement provisions; and (2) neither ad-

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[13] *Id.*

[14] Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 885 (1973) (current version at 16 U.S.C. §§ 1531-1543 (1988)).

[15] "Endangered species" means "any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta." 16 U.S.C. § 1532(6) (1988). "Endangered species" are listed at 50 C.F.R. § 17.11 (1990).

[16] "Threatened species" means "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20) (1988). "Threatened species" are listed at 50 C.F.R. § 17.11 (1990).

[17] Endangered Species Act of 1966, Pub. L. No. 89-669, 80 Stat. 926 (1966) (repealed 1973).

[18] Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275 (1969) (repealed 1973).

[19] The Endangered Species Act of 1966, for instance, established an endangered species program, which though meritorious in principle, lacked substance as it only applied "insofar as is practicable and consistent with the primary purposes" of federal agencies. 80 Stat. at 926 (1966). Compare with the Supreme Court's interpretation of the 1973 ESA that "endangered species [are given] priority over the primary missions of the federal agencies." TVA v. Hill, 437 U.S. 153, 185 (1978). The Endangered Species Conservation Act of 1969 extended protection to foreign species and prohibited their importation, but it likewise failed to address the issue of regulation of federal agency actions. 83 Stat. at 275 (1969).

dressed the greatest threat to endangered species, habitat destruction.[20] Notwithstanding this limited practical impact, the Endangered Species Acts of 1966 and 1969 did establish the principle that the federal government has a legitimate interest in the global protection of wildlife threatened with extinction.

With this framework in mind and sensing the need for tougher environmental laws,[21] Congress enacted the Endangered Species Act of 1973 "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved."[22] Thus, the Endangered Species Act as passed not only served to preserve and protect threatened wildlife, but it recognized the vital nature of the preservation of habitat. By any account, the ESA of 1973 proved to be a watershed in federal environmental law.[23]

Of the substantive portions of the Act, § 7 and § 9 are considered the most powerful.[24] Entitled "Interagency Cooperation," § 7 requires all federal agencies to use their powers in consultation with the U.S. Fish and Wildlife Service (USFWS)[25] to insure that their actions are "not likely to jeopardize the continued existence of any endangered species or threatened species."[26] Furthermore, § 7 states that an agency

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[20] *See* TVA v. Hill, 437 U.S. at 179 (citing Hearings on Endangered Species before the Subcommittee of the House Committee on Merchant Marine and Fisheries, 93d Cong. 1st Sess. 202, 236 (1973) (statement of Associate Deputy Chief for National Forest System, Department of Agriculture)).

[21] The Senate Commerce Committee noted that it "had become increasingly apparent that some sort of protective measures . . . [had to] be taken to prevent the further extinction of the world's animal species." *See* S. REP. No. 307, 93d Cong., 1st Sess. 2 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2990.

[22] Endangered Species Act, 16 U.S.C. § 1531(b) (1973) (current version at 16 U.S.C. § 1531(b) (1988)).

[23] "The Endangered Species Act of 1973 represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." TVA v. Hill, 437 U.S. at 180 (quoting Chief Justice Burger).

[24] The plaintiff's allegations in this suit, however, did not include violations of § 9 and, therefore, this note will concentrate on § 7. Moreover, § 9, which forbids any person from "taking" an endangered species, only applies to actions undertaken by persons within the United States or at sea. 16 U.S.C. § 1538 (1988). In its markup session on the Endangered Species Act, the conference committee specifically rejected language that would have expanded the takings prohibition to anyone subject to U.S. jurisdiction, including takings in foreign countries. H.R. CONF. REP. No. 740, 93d Cong., 1st Sess. 27 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 3005.

[25] An agency may be required to consult with the National Marine Fisheries Service (NMFS) depending upon the species involved. 50 C.F.R. § 402.01(b) (1990).

[26] 16 U.S.C. § 1536(a)(2) (1988); *see supra* notes 16 and 17 for definitions of "endangered species" and "threatened species".

must not act in a way that is likely to have an adverse impact on a listed species habitat.[27]

When Congress first adopted the ESA,[28] it failed to realize the importance of § 7.[29] Only two sentences on § 7 were included in the legislative history of the Act.[30] The judicial and executive branches, however, quickly felt the full force behind § 7's seemingly simple language.[31]

B. Judicial Interpretation

In the courts, environmental organizations reacted swiftly to the passage of the ESA, sensing a new tool by which they could further their goals. Nine months after enactment, the Sierra Club amended its complaint in *Sierra Club v. Froehlke*,[32] a suit filed to halt construction of a dam, to allege a violation of the Act. Stressing that the ESA must be construed "reasonably," the circuit court held that an agency satisfies § 7 of the Act by consulting with the Department of the Interior even if it later disregards Interior's advice.[33] Thus, the initial judicial interpretation of the ESA favored a narrow reading of the Act's language which allowed the court to use its equitable powers to ensure a "reasonable" outcome.[34]

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[27] *Id.*

[28] The Act was adopted on December 28, 1973. Pub. L. No. 93-205, 87 Stat. 885 (1973).

[29] *See* John C. Beiers, Comment, *The International Applicability of Section 7 of the Endangered Species Act of 1973*, 29 SANTA CLARA L. REV. 171, 179 n.41 (1989).

[30] The Senate Report accompanying the proposed ESA legislation stated: "All agencies, departments, and other instrumentalities of the Federal government are directed to cooperate in the implementation of the goals of this act. Each agency shall, inter alia, take steps to 'insure that actions authorized, funded, or carried out' by it do not jeopardize the continued existence of any such species or result in the destruction of its habitat." S. Rep. No. 307, 93d Cong., 1st Sess. 2, *reprinted in* 1973 U.S.C.C.A.N. 2989, 2997; Beiers, *supra* note 29.

[31] Since enactment, 43 cases have reached trial alleging violation of the ESA of 1973. (LEXIS, Genfed Library, Courts File). Furthermore, the USFWS initiates an average of 2000 § 7 consultation processes per year. Dale Russakoff, *Losses: Endangered Species Act Stemming the Trend*, WASHINGTON POST, Jan. 1, 1984, at A1.

[32] 392 F. Supp. 130 (E.D. Mo. 1975). In this case the Sierra Club contended that the Meramac Park Lake Dam Project in Missouri, undertaken by the Army Corps of Engineers, would jeopardize the existence of the endangered Indiana bat by destroying its habitat. The Eighth Circuit Court of Appeals ruled that since only a few bats would be affected, no violation of the Act existed. 534 F.2d 1289, 1305 (1976).

[33] *Id.* at 1301.

[34] *See id.*

Contemporary and subsequent courts, however, ruled that in enacting the ESA, Congress made it clear that endangered species were to be accorded the highest of priorities.[35] This broad interpretation was ultimately brought before the Supreme Court, where, in *TVA v. Hill*,[36] the Court affirmed the Sixth Circuit's holding that the plain language and the legislative history of the Act supported an expansive interpretation.[37] In his opinion, Chief Justice Burger reasoned that the "pointed omission of the type of qualifying language previously included in endangered species legislation"[38] revealed a "conscious decision by Congress to give endangered species priority over the 'primary missions' of the federal agencies."[39] The Court held that such unequivocal language required the application of the Act whenever the continued existence of an endangered species was jeopardized.[40] In so ruling, the Court emphasized that the "reasonableness" of the outcome of the Act's application was not a relevant factor when considering the application of the ESA.[41]

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[35] *See* National Wildlife Federation v. Coleman, 400 F. Supp. 705 (S.D. Miss.), *rev'd*, 529 F.2d 359 (5th Cir. 1975), *cert. denied*, 429 U.S. 979 (1976), in which an environmental organization successfully petitioned the court for an injunction to halt construction of a highway through the habitat of the endangered Mississippi sandhill crane. In granting the injunction, the court held that the plain language of the Act imposes on each federal agency a mandatory duty to insure its actions are not likely to jeopardize a listed species. 529 F.2d at 711. In Defenders of Wildlife v. Andrus, 428 F. Supp. 167, 168-69 (D.D.C. 1977), the district court held that regulations promulgated by the Secretary which allowed hunting at night could result in the shooting of endangered species of migratory birds and, therefore, was inconsistent with a broad reading of the ESA. *Id.*

[36] TVA v. Hill, 437 U.S. 153 (1978).

[37] *Id.* at 184. In this case a group of citizens sued the TVA to halt the final completion of an 80% constructed dam over the Little Tennessee River. Bolstered by the recent discovery of the snail darter—a three-inch long fish that evidently only lived in the free-flowing waters of the Little Tennessee—the group alleged that completion of the dam would stop the waters from flowing, and destroy the "critical habitat" of the snail darter, putting the continued existence of the species in jeopardy. *TVA*, 437 U.S. 153.

[38] *See supra* notes 17-19 concerning ESA precursors.

[39] *TVA*, 437 U.S. at 185.

[40] *Id.*

[41] *Id.* at 194. Recently, however, this interpretation has been challenged by those who claim that economic factors should be given more weight in the application of the ESA. Carol Bradley, *Angry Westerners to Protest Congress Over Endangered Act*, Gannett News Service, Sept. 6, 1991 *available in* LEXIS, Nexis Library, Currnt File. Moreover, a bill pending before Congress, The Human Protection Act, would amend the ESA to allow economic consequences to be considered in the listing of an endangered species. H.R. 3092, 102d Cong., 1st Sess. (1991).

TVA v. Hill represented the Supreme Court's approval of the broad interpretation given the Act by a majority of the recent judicial opinions.[42] Since this decision, the scope of the ESA of 1973 has consistently been interpreted broadly. In *North Slope Boroughs v. Andrus*,[43] native Alaskans brought an action to enjoin the Secretary of Interior from carrying out a lease of federal properties off the north shore of the Alaskan coast, claiming that such action would jeopardize the continued existence of the bowhead whale. In holding that § 7 of the Act should be interpreted broadly, the court dismissed the Secretary's argument that only the lease sale, and not prospective actions, constituted agency actions.[44] Likewise, in *Conner v. Buford*,[45] the court broadly interpreted the scope of agency action broadly to encompass all phases of such action, including post-leasing activities.[46] In *Conner*, environmental groups filed an action claiming that the sale of oil and gas leases in national forests without a biological opinion assessing the impact of leasing activities violated § 7 of the ESA. The court held that the broad scope of § 7 required the USFWS to consider all the ramifications of such a lease.[47]

C. *Regulatory Interpretations*

In contrast to the courts' shift away from a narrow interpretation of § 7, the executive branch of government has recently construed the ESA to exclude agency actions in foreign countries.[48] This narrow interpretation was revealed in the 1986 revisions of the regulations that implement § 7 of the Act.[49] In adopting these revisions, the Interior Department amended its earlier regulations which required the extraterritorial application of § 7.[50] These first regulations prom-

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[42] TVA v. Hill, 437 U.S. 153 (1978).

[43] 486 F. Supp. 332 (D.D.C. 1980) *rev'd on other grounds*, 642 F.2d 598 (D.C. Cir. 1980).

[44] 642 F.2d at 608.

[45] 848 F.2d 1441 (9th Cir. 1988).

[46] *Id.* at 1453.

[47] *Id.*

[48] 50 C.F.R. § 402.01 (1990).

[49] The 1986 regulations stated: "Section 7(a)(2) of the Act requires every Federal agency . . . to insure that any action it authorizes, funds, or carries out, *in the United States or upon the high seas*, is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat." 50 C.F.R. § 402.01(a) (1986) (emphasis added).

[50] The 1978 regulations stated: "[Section 7] requires every Federal agency to insure that its activities or programs *in the United States, upon the high Seas, and in foreign countries* will not jeopardize the continued existence of a listed species." 50 C.F.R. § 402.01 (1978) (emphasis added).

ulgated under § 7 required consultation whenever an agency action, foreign or domestic, was likely to jeopardize a listed species.[51] The revised 1986 regulations, however, limited the consultation provision by narrowing the term "agency action" to exclude actions in foreign countries.[52]

The Secretary of the Interior supported curtailment of the extraterritorial application of § 7 by noting two factors. First, he cited the apparent domestic orientation of the consultation and exemption processes which resulted from the 1978 amendments to the ESA.[53] Next, the Secretary cited the potential for interference with the sovereignty of foreign nations as rationale supporting a change in the regulations.[54]

Although the Department of the Interior possesses broad discretionary powers concerning enforcement of the ESA, the 1986 regulations appear to exceed the Department's authority in its implementation of ESA regulations. Moreover, the Department's interpretation is in direct conflict with the broad interpretation given the Act by the courts. This lack of uniformity in the interpretation of § 7 results in confusion about the proper interpretation and scope of the Endangered Species Act.

III. LEGAL ANALYSIS

In *Defenders of Wildlife v. Lujan*,[55] the Eighth Circuit Court of Appeals addressed the issue of the applicability of the consultation provision of the Endangered Species Act of 1973[56] to federal agency

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[51] *Id.*

[52] According to the 1986 regulations, "'Action' means all activities or programs of any kind authorized, funded or carried out, in whole or in part, by Federal agencies *in the United States or upon the high seas.*" 50 C.F.R. § 402.02 (1990) (emphasis added).

[53] 51 Fed. Reg. 19,926, 19,929 (1986). *See supra* note 5.

[54] *Id.* The Secretary made no argument supporting his conclusion that the prior regulations had the "potential for interference with the sovereignty of foreign nations." 51 Fed. Reg. 19,929 (1986). However, his conclusion appears to follow the reasoning of a 1981 Solicitor's Opinion which also concluded that § 7 does not apply to federal agency actions in foreign countries. DANIEL J. ROHLF, THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION 177 (1989) (quoting Memorandum from Assoc. Solicitor for Conservation & Wildlife, U.S. Dep't of the Interior, to Assistant Secretary of the Interior, Fish, Wildlife, and Parks Division, (Aug. 31, 1981)). The Solicitor had argued that "§ 7 consultation on federal actions abroad would interfere with foreign sovereignty with respect to foreign nations' development priorities and species conservation programs." *Id.*

[55] 911 F.2d 117 (8th Cir. 1990).

[56] 16 U.S.C. § 1536(a) (1988).

actions occurring in foreign countries.[57] The court held that § 7 of the Act imposes a duty upon all federal agencies to consult with the Department of the Interior whenever any agency action is likely to jeopardize the continued existence of an endangered or threatened species.[58] In so ruling, the court rendered invalid regulations[59] promulgated by the Secretary of Interior which required consultation only when agency actions were undertaken in the United States or on the seas.[60] Consequently, the United States Supreme Court granted certiorari to resolve the conflict between the differing interpretations given the Act by the courts and the Department of Interior.[61] The Supreme Court may, however, dismiss *Defenders of Wildlife v. Lujan* for lack of standing without considering the substantive issues raised by the case.[62]

The crux of the substantive issue turns upon the meaning of the term "action" as used by the Congress in § 7 of the Act.[63] In

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[57] *Defenders of Wildlife*, 911 F.2d at 117.

[58] *Id.* at 125.

[59] 50 C.F.R. § 402 (1990).

[60] *Id.* at § 402.02.

[61] Lujan v. Defenders of Wildlife, 111 S. Ct. 2008 (1991).

[62] The district court initially dismissed Defenders' suit for lack of standing, holding that the plaintiffs failed to meet the standing requirements of Article III of the U.S. Constitution. 658 F. Supp. at 48. The Eighth Circuit Court reversed the decision of the district court, holding that the plaintiffs had met the constitutional requirements for standing. Defenders of Wildlife v. Hodel, 851 F.2d 1035, 1043-44 (8th Cir. 1988). *See supra* note 9.

A private citizen's group can establish standing in a suit based on the ESA by satisfying two elements: (1) prudential standing limitations and (2) constitutional standing requirements. 851 F.2d at 1039. The prudential standing limitations are a reflection of self-imposed judicial restraint and may be eliminated by Congress through legislation. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979). The Eighth Circuit held that Congressional inclusion of a personal suit provision in the ESA eliminated any prudential standing limitations. 851 F.2d. at 1039.

Although the Supreme Court may address prudential standing limitations, it will more likely focus on the more demanding constitutional standing requirements. The Court has stated that the constitutional standing requirements are: (1) that the party have suffered actual or threatened injury— injury in fact; (2) that the injury be caused by the challenged action— traceability; and (3) that the relief sought redress the actual or threatened injury— redressability. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982). Although the Eighth Circuit Court held that Defenders had satisfied this test, a recent Supreme Court decision narrowly construing constitutional standing requirements in environmental cases will undoubtedly subject the Defenders' case to intensive scrutiny. *See* Lujan v. National Wildlife Federation, 108 S. Ct. 3177 (1990).

[63] 16 U.S.C. § 1536(a)(2) (1988).

concluding that "action" encompasses all federal agency actions, the court in *Defenders of Wildlife* focused on the language, structure and legislative history of the Act.[64] The court noted that the simple, all-inclusive nature of the language manifests a broad interpretation of the term "action."[65] Section 7 states that "[e]ach federal agency shall, in consultation with . . . the Secretary, insure that *any* action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species . . . ."[66] Echoing the Supreme Court's holding in *TVA v. Hill*,[67] the court concluded that this language "admits to no exceptions."[68] The court also ruled that the purpose and structure of the ESA demonstrate congressional intent that the Act be applied to all federal agency actions.[69] Specifically, the court noted that many of the Act's sections require interaction with foreign countries which, in the court's view, suggested a global rather than regional commitment to wildlife conservation.[70] Finally, the court noted that the Act's legislative history supports the conclusion that Congress intended for the ESA to apply extraterritorially.[71] The court was particularly impressed by Congress' tacit approval of the 1978 Interior regulations which, at the time, required consultation for foreign agency actions.[72]

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[64] 911 F.2d at 125.

[65] *Id.* at 122.

[66] 16 U.S.C. § 1536(a)(2) (emphasis added).

[67] 437 U.S. 153 (1978).

[68] *Defenders of Wildlife*, 911 F.2d at 122.

[69] *Id.* at 123.

[70] *Id.* The ESA of 1973 is replete with references evidencing the international scope of its purpose. Congress declared the Act to be a pledge of commitment by the United States for the preservation of species throughout the world. 16 U.S.C § 1531(4). The Act lists various international agreements to guide this pledge, 16 U.S.C. § 1531(a)(4)(F) (1988), such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 995 U.N.T.S. 243 (*see infra* note 101). Section 1537, entitled "International Cooperation," declares that this commitment to worldwide protection of endangered species will be backed by financial assistance, personnel assignments, investigations, and by encouraging foreign nations to develop their own conservation programs. 16 U.S.C. § 1537 (1988 & Supp. I 1989); *see also* 16 U.S.C. § 1531(a)(5) (1988). Moreover, in listing an endangered species, the Secretary must not only take into account "those efforts being made by . . . a foreign nation . . . to protect such species," but he is also required to give actual notice and invite comment from each foreign nation in which a species proposed for listing as endangered is found. 16 U.S.C. § 1533(b)(1)(A), (b)(5)(B) (1988).

[71] *Defenders of Wildlife*, 911 F.2d at 123.

[72] *Id.* at 124; *see supra* note 10 for discussion of the 1978 amendment process.

The Secretary argued that Congress, in amending the ESA, had not implicitly approved the 1978 regulations; rather, Congress had shifted the overall scope of the Act further towards a domestic orientation.[73] The revised regulations were a response to this shift, according to the Secretary.[74] Specifically, the Secretary contended that since the exemption of § 7, added by the 1978 amendments, only applied to agency actions within the United States, the consultation requirements were necessarily limited as well.[75] The court dismissed this argument, however, by noting that the language cited by the Secretary— "the Governor of the State in which an agency action will occur, *if any* . . . may apply to the Secretary for an exemption"— did not necessarily mean that the exemption provisions limit the consultation requirement geographically.[76] Finally, the Secretary argued that the revised regulations were necessary to avoid potential interference with the sovereignty of foreign nations. The court responded that the Act was directed at federal agencies and not at sovereign nations.[77] Moreover, the court felt powerless to decide whether the United States' concern for foreign relations outweighed its concern for foreign wildlife.[78] Such a decision was best left to the legislature.[79]

In reaching its conclusion, the Eighth Circuit Court of Appeals adopted reasoning similar to that of the Supreme Court in *TVA v. Hill*.[80] The issue in both cases was the proper interpretation of the term "action" as used in the ESA of 1973. Citing the language, structure, and legislative history of the Act, the Supreme Court and the Eighth Circuit Court gave "action" a broad interpretation.[81] In each case, the courts held that to interpret "action" narrowly would run the risk of undermining the separation of powers as mandated by the Constitution.[82] The courts were concerned that such an in-

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[73] *Defenders of Wildlife*, 911 F.2d at 124.

[74] *Id.*

[75] *Id.* at 125.

[76] *Id.* at 127 (emphasis supplied by the court).

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] 437 U.S. 153 (1978).

[81] *Id.* at 186; *Defenders of Wildlife*, 911 F.2d at 125. The *TVA* Court held "action" to mean all agency actions and did not limit the term to only prospective actions as was advanced by TVA. The court in *Defenders of Wildlife* similarly interpreted "action" broadly to include all agency actions, including those in foreign countries. 911 F.2d at 125.

[82] *TVA*, 437 U.S. at 194-95; *Defenders of Wildlife*, 911 F.2d at 125.

terpretation would result in a balancing between policy positions, thereby intruding upon the exclusive province of Congress.[83] The *TVA* Court noted that its appraisal of the wisdom of a particular course of action selected by Congress was to be put aside in the process of interpreting a statute.[84] Furthermore, the Court emphasized that the plain language of the statute makes it clear that the particular course of action selected by Congress was, in this instance, a policy struck in favor of affording endangered species the highest priorities.[85]

Similarly, the court in *Defenders of Wildlife* concluded that the Secretary's interpretation that "action" excludes agency activities in foreign countries would, if adopted, preempt the constitutional requirement of separation of powers.[86] Stating that the Act would not produce the adverse foreign relations feared by the Secretary,[87] the court held that it had not been asked to juggle between policy positions.[88] Its job, the court reasoned, was the interpretation of the statute. The court held that the correct interpretation of the term "action" encompassed all actions by federal agencies, including those in foreign countries.[89]

The court's holding in *Defenders of Wildlife* is significant in that it resolves the issue of whether § 7 of the ESA is extraterritorial in scope. The court ruled that, subject to a successful appeal to the Supreme Court, the Interior Department must issue new regulations which recognize the extraterritorial application of § 7.[90] Such regulations, if promulgated, will once again require federal agencies taking actions in foreign countries to investigate the potential effects those activities may have on endangered and threatened species. In essence, the new regulations will reestablish the Endangered Species Act's emphasis on the worldwide conservation of endangered species.

The renewed extraterritorial scope of § 7 will not, however, likely result in practical problems for federal agencies. In the 1982 ESA amendment process, the House Merchant Marine and Fisheries Committee (Committee) observed that compliance with § 7 consultation

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[83] *TVA*, 437 U.S. at 194-95; *Defenders of Wildlife*, 911 F.2d at 125.

[84] *TVA*, 437 U.S. at 194-95.

[85] *Id.*

[86] *Defenders of Wildlife*, 911 F.2d at 125.

[87] "We note initially that the Act is directed at the actions of federal agencies, and not at the actions of sovereign nations." *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.* at 118, 125.

requirements had not been overly burdensome on the federal agencies.[91] At that time, Interior regulations called for the extraterritorial application of § 7.[92] The Committee noted that the consultation provisions actually could ease the work of federal agencies by serving as a way to avoid conflicts between species conservation and federal agency action.[93] It is likely that renewed extraterritorial application of the ESA will again result in a similiar positive outcome.

Unaddressed by the court and still at issue, however, are the ramifications of the court's holding on such multilateral financial institutions as the International Bank for Reconstruction and Development (World Bank) and the Inter-American Development Bank.[94] United States delegates sit on the boards of these institutions and whether their actions—such as voting to approve funding for a project in a developing nation—constitute "action" as defined under the ESA remains to be resolved.

Although the court in *Defenders of Wildlife* affirmed a broad interpretation of "action" under the ESA, § 7 only applies to federal agencies. The term "federal agency" is defined by the Act to mean "any department, agency, or instrumentality of the United States."[95] The issue then turns upon whether such a delegate is considered an "instrumentality" of the United States.

In defining "instrumentality", the Supreme Court has generally focused on the extent to which the agency or agent involved is incorporated into the governmental structure.[96] A delegate to the World Bank may fall within this definition as he or she performs a function within the United States governmental structure. Moreover,

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[91] H.R. REP. No. 567, 97th Cong., 2d. Sess. 24 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2824.

[92] *See supra* note 50 and accompanying text.

[93] H.R. REP. No. 567, 97th Cong., 2d. Sess. 24 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2824.

[94] The World Bank is a specialized agency of the United Nations responsible for promoting the economic development of United Nations countries primarily through the use of loans. UNION OF INT'L ASS'N, 1 YEARBOOK OF INTERNATIONAL ORGANIZATIONS at FF1393 (28th ed. 1991). The Inter-American Development Bank is comprised of members of the Organization of American States and is responsible for accelerating the process of economic and social development of regional developing member states through the use of loans and technical assistance. *Id.* at FF1069. *See also* Patrick A. Parenteau, *Exporting Extinctions— or Building a Future*, LEGAL TIMES, Mar. 4, 1991, at 28. [hereinafter *Exporting Extinctions*].

[95] 16 U.S.C. § 1532(7) (1988).

[96] *See, e.g.*, United States v. Boyd, 378 U.S. 40, 47-48 (1963) (contractors to a federal agency are not considered "instrumentalities" of the United States).

the Interior regulations implementing § 7 are applicable to "all actions in which there is discretionary federal involvement or control."[97] Certainly, under this definition, a delegate's representation of the United States at a multilateral financial institution could be considered within the definition of "instrumentality".[98]

Such an interpretation would produce the remarkable result that the World Bank could be held to provisions of the Endangered Species Act. The consequences of this could produce significant complications for an institution which finances major projects in developing countries.[99] Although such consequences appear unrealistic, it must be noted that the Supreme Court rejected "reasonableness" of the outcome of the Act's application as a criterion in interpreting the scope of the ESA.[100]

From the foregoing, it should be evident that the Supreme Court's pending decision in *Lujan v. Defenders of Wildlife* should involve more than the mere interpretation of the term "actions" as used in the ESA. The potential application of the ESA to actions by United States delegates to multilateral financial institutions requires, at the very least, an examination of the scope of "instrumentalities" as used in the ESA.

Moreover, other issues remain unresolved and may require investigation. Whether United States participation in multilateral treaties requires the application of the ESA to United States activities in foreign countries continues to be at issue.[101] Also at issue is whether

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[97] 50 C.F.R. § 402.03 (1990).

[98] However, compare this interpretation of the breadth of the ESA with President Carter's proclamation that the National Environmental Policy Act, the most expansive United States environmental law, does not apply to United States participation in international conferences and organizations. Exec. Order No. 12,114, 44 Fed. Reg. 1957, 1959 (1979).

[99] India's Narmada Valley Project, funded by the World Bank, calls for the construction of over 3,000 dams which will inundate up to 90,000 hectares of prime forest habitat. A preliminary study indicates that 11 species protected under the ESA are found within the project area and another 10 such species will likely be affected. *Exporting Extinctions*, *supra* note 94, at 28.

[100] *TVA v. Hill*, 437 U.S. at 194. *See supra* note 41 for discussion of pending amendments to ESA which would require a "reasonable" outcome of the Act's application.

[101] Congress, through the ESA, pledged United States commitment to at least six international environmental treaties. 16 U.S.C. § 1531(a)(4) (1988). None of these treaties require the application of United States endangered species laws to United States actions in foreign countries. In particular, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which is the most

international custom could compel the ESA's application to United States activities in foreign countries.[102]

By holding the ESA applicable to federal agency actions in foreign countries, the Eighth Circuit Court of Appeals has raised dormant issues concerning the international application of United States conservation laws. Although the ruling will likely have little effect on the domestic activities of federal agencies, the court's broad interpretation of the ESA will likely affect United States activities in foreign countries. Moreover, depending on the Supreme Court's ultimate ruling, the ESA may be poised to encompass the activities of those global organizations in which the United States participates.

IV. CONCLUSION

Since its passage in 1973, the Endangered Species Act has been repeatedly praised as the most comprehensive legislation on the conservation of wildlife and plants ever enacted by any nation. Between 1986 and 1990, however, the ESA was stripped of the global scope originally given it by Congress. This broad scope is evident from an examination of the language, structure, and legislative history of the Act. In *Defenders of Wildlife v. Lujan*, the court correctly interpreted the ESA by holding that § 7 of the Act imposes a duty upon all federal agencies to consult with the Department of Interior whenever

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widely recognized of the six, concerns the illegal trade and transportation of endangered species as opposed to the destruction of their habitat. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243. *See supra* note 70.

[102] International environmental legal custom is, however, a rare creature. Customary law is evidenced by similar legal understandings throughout a majority of the world. Moreover, the state of a country's environmental law is largely based on the overall economic development of that country. The more developed a country, the less that country needs to spur its economy by haphazardly utilizing its natural resources, e.g., cutting down rain forests, selling the wood, and thereby creating land capable of cultivation. Consequently, the wide economic disparity between the nations of the world has led to a similar disparity in their environmental laws.

Moreover, the generally accepted codification of customary international environmental law which influences United States policy does not require application of the ESA to federal agency actions abroad. The Restatement of Foreign Relations Law states: (1) that each nation is to ensure that activities within its control do not cause significant injury to the environment of another state and (2) that each nation is to conform to generally accepted rules concerning the preservation of the environment. RESTATEMENT (THIRD) OF THE FOREIGN RELATION LAW OF THE UNITED STATES § 601 (Am. Law Inst. 1986) (State Obligations with Respect to Environment of Other States and the Common Environment).

any agency action is likely to jeopardize the continued existence of an endangered or threatened species.

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