Calendar No. 242

105TH CONGRESS *1st Session*	SENATE	REPORT 105–128

ENDANGERED SPECIES RECOVERY ACT OF 1997

REPORT

OF THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

together with

ADDITIONAL AND MINORITY VIEWS

TO ACCOMPANY

S. 1180

October 31, 1997.—Ordered to be printed

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C O N T E N T S

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ENDANGERED SPECIES RECOVERY ACT OF 1997

OCTOBER 31, 1997.—Ordered to be printed

Mr. CHAFEE, from the Committee on Environment and Public Works, submitted the following

REPORT

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ADDITIONAL AND MINORITY VIEWS

[To accompany S. 1180]

The Committee on Environment and Public Works, to which was referred the bill (S. 1180), to reauthorize the Endangered Species Act, having considered the same, reports favorably thereon with amendments, and an amendment to the title, and recommends that the bill, as amended, do pass.

GENERAL STATEMENT

OBJECTIVES OF THE LEGISLATION

The Endangered Species Act ("the Act") was enacted in 1973 to establish a program to identify and conserve species of fish, wildlife and plants that are declining to the point where they are now, or may be within the foreseeable future, at risk of extinction. While the Act's goal of promoting the recovery of threatened and endangered species enjoys widespread public support, implementation of the Act has been the source of controversy in many areas of the country.

This legislation has three fundamental goals: first, to maintain and improve conservation of endangered and threatened species; second, to improve and expedite recovery of those species; and third, to reduce the regulatory burden on, and uncertainty for,

property owners. Under the current law, recovery of threatened and endangered species has been an elusive goal. Only eight percent of the listed species are actually improving in status. When accomplished, the rewards of recovery are enormous: the bald eagle, our national symbol, has rebounded from a population of 417 breeding pairs in the lower 48 States in 1963 to over 5,000 breeding pairs in 1996; the American alligator and Eastern Pacific population of the grey whale have been delisted; the successful captive breeding program for the California condor has led to its reintroduction in the wild. The successes, however, are few.

In addition, existing law has not effectively protected or conserved species on non-Federal lands. This is vital for the recovery of many species that depend on those lands entirely or to a great extent. Between 1982 and 1992, only 14 permits and associated conservation plans, covering 440,000 acres of land, were approved for actions on non-Federal lands. Since then, however, the Secretary has approved over 200 additional conservation plans and several hundred more are being prepared. For the first time, proactive conservation measures are being taken on those lands in concert with economic activity.

Decisions to list the northern spotted owl in the Pacific Northwest, the Stephens kangaroo rat in Southern California, and the golden cheeked warbler and karst invertebrates in Texas, among others, increased public attention on the potential conflict between the Act and economic activity. The listing of the red-cockaded woodpecker in the Southeast had the unintended consequence of creating an incentive for some landowners to cut down trees on their land to avoid attracting the woodpecker and potential Federal regulation.

Experience with these and other listed species under the Act has demonstrated that the law can be improved to do a better job of recovering species, while at the same time addressing the legitimate concerns of property owners or others affected by the Act. To accomplish this, S. 1180, the Endangered Species Recovery Act of 1997 ("the bill"), places greater emphasis on the use of sound science throughout the Act; it significantly strengthens the recovery planning process and creates new tools to ensure that recovery plans are implemented; it increases public participation; it streamlines the consultation process; and it provides significant new incentives for property owners to preserve and restore habitat for listed and unlisted species.

The bill was the product of more than three years of hearings and extensive negotiations. The Subcommittee on Drinking Water, Fisheries and Wildlife held a series of hearings on the Act. Over 100 witnesses testified, including conservation biologists, state fish and wildlife directors, small woodlot owners, large developers, environmental advocates, commercial fishermen, and the Secretary of the Interior, identifying problems with the current law and suggesting improvements to the Act. The bill incorporates many of their suggestions, including elements from the Administration's Ten Point Plan (*Protecting America's Living Heritage: A Fair, Cooperative and Scientifically Sound Approach to Improving the Endangered Species Act* (March 6, 1995)), the Western Governors Association's proposal (endorsed by the International Association of State

Fish and Wildlife Agencies), and the Keystone Center's 1995 *Report on Incentives for Private Landowners.*

SUMMARY OF THE MAJOR PROVISIONS

The bill makes significant improvements to many of the major provisions of the Endangered Species Act:

- Throughout the bill, there is an increased emphasis on the use of sound science.
- Independent peer review is required for listing and delisting decisions, and for the establishment of a biological recovery goal in a recovery plan.
- The bill increases the emphasis on the recovery of species, requiring that recovery plans be drafted for each species within set deadlines. Recovery plans must include a biological recovery goal, recovery measures to achieve that goal in a timely and cost-effective way, and benchmarks to measure progress towards achieving recovery. When the recovery goal is met, the Secretary is required to initiate delisting procedures.
- States will have a larger role in implementing the Act. They are required to be notified and their views solicited in the listing process and in the consultation process, and they may assume responsibility for the development of draft recovery plans.
- The bill streamlines the consultation process, allowing Federal action agencies to make an initial determination that a project is not likely to adversely affect a species.
- The bill provides a broad range of incentives for private landowners, ranging from a new more streamlined conservation plan for low effect activities and habitat reserve agreements to comprehensive multiple species conservation plans for listed and unlisted species. All conservation plans are accompanied by no surprises assurances.
- The bill also includes new authority for candidate conservation agreements and State conservation agreements.

BACKGROUND

In 1973, President Richard Nixon signed the first comprehensive endangered species legislation into law, congratulating Congress for taking "this important step" and declaring that the legislation "provides the Federal Government with needed authority to protect an irreplaceable part of our national heritage threatened wildlife."

The 1973 Endangered Species Act established the basic framework for wildlife protection that is embodied in the current law. Among other things, the 1973 Act:

- Established broad authority to list and conserve "any member of the animal kingdom," and, for the first time, plants as well;
- Extended protection to species threatened with extinction, not solely those whose existence was actually endangered;
- Included several provisions to protect habitat for endangered species;
- Established the first general prohibition against the taking of endangered fish and wildlife species; and

- Created a process through section 7 to require Federal agencies to protect endangered species and threatened species and their habitat by utilizing their programs to further the purposes of the Act, and to ensure that their activities do not jeopardize the continued existence of endangered or threatened species, or destroy or adversely modify critical habitat.

Since its enactment in 1973, the Act has been amended a number of times. The basic structure and protections of the Act, however, have remained essentially intact.

OVERVIEW OF EXISTING LAW

Endangered species law and policy today are driven largely by six provisions of the statute: (1) the listing of species as threatened or endangered under section 4(a)(1); (2) the designation of habitat as critical under section 4(a)(3); (3) the development and implementation of recovery plans under section 4(f); (4) the prohibition against taking an endangered fish or wildlife species under section 9; (5) the prohibition against Federal agency actions that are likely to jeopardize the continued existence of listed species; and (6) the authorization of activities under section 10(a)(1) that would result in an incidental take of a listed fish or wildlife species.

Listing and critical habitat designation provide the starting point for the Endangered Species Act. All subsequent activities under the Act depend on the initial determinations made in these provisions. Section 4(a)(1) requires the Secretary to list species as threatened or endangered after weighing a variety of factors. The factors include the present or threatened destruction of a species' habitat; overutilization of the species; disease or predation; the inadequacy of existing regulatory mechanisms; or other natural or manmade factors. These factors are also considered in the decision to delist a species. The decision to list or delist a species must be based solely on the use of the best scientific and commercial data available.

At the same time that a species is listed, section 4(a)(3)(A) directs the Secretary to designate, to the maximum extent prudent and determinable, critical habitat for the species. Unlike the listing decision, which must be based solely on the science, any critical habitat designation must also take into consideration economic and other impacts. The designation of critical habitat is also significant because impacts to critical habitat by Federal agency actions are considered during consultation under section 7 of the Act. In practice, critical habitat is rarely designated and exists now for only approximately 11 percent of the species listed as threatened or endangered.

Section 4(f) of the Act requires the Secretary to develop a recovery plan to identify site-specific and other management actions that can be implemented to bring a species back to the point where it no longer needs the protections of the Act. There is no deadline for the development of recovery plans and currently one-third of the species listed do not have final recovery plans. Private parties have no duty to implement recovery plans.

The obligations of Federal agencies are defined in large part by section 7 of the Act. Section 7(a)(1) requires all Federal agencies, in consultation with the Secretary, to "utilize their authorities in furtherance of the purposes of the [Act] by carrying out programs

for the conservation of endangered species and threatened species," but does not impose specific duties. Section 7(a)(2) requires Federal agencies to consult with the Fish and Wildlife Service or the National Marine Fisheries Service (referred to collectively as "the Services") to ensure that their actions are not "likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical." This consultation requirement applies to any action "authorized, funded or carried out" by a Federal agency and therefore has a broad reach encompassing not only activities undertaken by the Federal agencies themselves, but also the granting of licenses, contracts, permits, easements, rights-of-way and grants. The consultation process also provides a mechanism for Federal actions that would otherwise result in the incidental take of a species to receive an incidental take statement to be excepted from the take prohibition under section 9(a).

Perhaps the most significant regulatory consequence of a listing decision is the prohibition against the taking of an endangered fish or wildlife species under section 9(a). The take prohibition does not apply to threatened species under the terms of section 9(a), but the Secretary has the authority under section 4(d) to extend all of the protections of the Act, including the take prohibition, to threatened species. A taking under the Act includes activities that "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." U.S. Fish and Wildlife Service regulations have defined the term "harm" to include "significant habitat modification where it actually kills or injures wildlife." This definition was upheld by the Supreme Court in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407 (1995).

Section 10(a)(1) of the Act provides that the Secretary may permit a taking otherwise prohibited by section 9(a) if the taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. In order to obtain an "incidental take permit," the applicant must submit a conservation plan and the Secretary must determine, among other things, that the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. This provision was added in 1982 to address the concerns of private landowners that they would not be able to proceed with otherwise lawful activities due to the section 9(a) prohibition against taking an endangered fish or wildlife species. Until recently, relatively few conservation plans had been approved under this section. Since 1992, however, the Secretary has approved over 200 conservation plans with incidental take permits.

PROBLEMS AND SOLUTIONS

The effort to protect endangered species affects the lives of many Americans. Almost 90 percent of the continental United States—2,450 counties—provides habitat for one or more listed species. Over 210 million Americans live close to at least one endangered or threatened species. There are 1,107 listed species in the United States, including 228 threatened species (113 plants and 115 ani-

mals) and 879 endangered species (542 plants and 337 animals). Only 18 species in the United States have been delisted.

Two things are clear. First, the protection of endangered and threatened species continues to be a national priority; and second, the Act must be improved to be more effective. In amending the Act, the Congress should consider the significant economic and other impacts that Federal protection of endangered and threatened species can have on the communities that contain habitat for these species and take steps to minimize those impacts while protecting the needs of species.

Administrative Reforms

On March 6, 1995, the Administration formally announced its Ten Point Plan to "carry out the Endangered Species Act in a fair, efficient and scientifically sound manner." In testimony before the Subcommittee on Drinking Water, Fisheries and Wildlife, Secretary of the Interior Bruce Babbitt explained that the "key objectives [of the Ten Point Plan] are based on a common sense approach to the Act and a concerted effort to solve legitimate problems while preserving the core goal of protecting our nation's priceless biological heritage. These objectives include, but are not limited to, expanding the role of States; reducing socio-economic effects of listing and recovery; ensuring that the best available peer-reviewed science is the basis for listing decisions; and increasing cooperation among Federal agencies."

The principles underlying the Administration's Ten Point Plan are sound and have also guided the committee's efforts in drafting this bill. They are:

1. Base endangered species decisions on sound and objective science.
2. Minimize social and economic impacts.
3. Provide quick, responsive answers and certainty to landowners.
4. Treat landowners fairly and with consideration.
5. Create incentives for landowners to conserve species.
6. Make effective use of limited public and private resources by focusing on groups of species dependent on the same habitat.
7. Prevent species from becoming endangered or threatened.
8. Promptly recover and delist threatened and endangered species.
9. Promote efficiency and consistency.
10. Provide state, tribal and local governments with opportunities to play a greater role in carrying out the Act.

Implementation of the Ten Point Plan has resulted in several significant changes in the way that the Act is administered.

In his testimony, Secretary Babbitt noted that a critical component of the Ten Point Plan deals with the issue of greater State and local government involvement in the implementation of the Act. He further stated that, "[t]he leading model for State and local government involvement in administration of the Act is the Natural Communities Conservation Planning [("NCCP")] process now underway in several Southern California counties. In a special rule under the Act, first proposed in the Spring of 1993, the Fish and Wildlife Service . . . delegated to the State and counties in south-

ern California the opportunity to use existing planning processes to protect habitat for the California gnatcatcher, as a substitute for Federal regulation." Fish and Wildlife Service Director Jamie Clark recently noted that "[t]his innovative ecosystem based management program has been successfully balancing the need to preserve the unique species of the coastal sage scrub ecosystem with the desired economic development of the area."

For non-Federal landowners, the Administration has developed a no surprises policy in habitat conservation planning under section 10 of the Act. Under the policy, a landowner who develops an approved habitat conservation plan ("HCP") for an endangered or threatened species will not be subject to later requirements of additional land or financial commitments if the landowner complies with the plan. The policy is intended to provide assurances to landowners who are engaged in development activities over a period of many years that their habitat conservation planning permits will remain valid for the life of the permits. The Administration has also implemented a policy of providing safe harbor agreements to landowners who voluntarily agree to enhance habitat on their lands by insulating them from restrictions if they later need to bring their land back to its previous condition. These agreements have been used in North Carolina to enhance habitat for the red-cockaded woodpecker.

More recently, the Administration has initiated a policy to encourage the development of candidate conservation agreements to preserve or enhance habitat for candidate species and species proposed for listing. These agreements are intended to help conserve species before they are listed and, in doing so, may avoid the need to list the species as threatened or endangered under the Act.

The Administration's initiatives reflect an important first step in the effort to improve implementation of the Act. However, the Ten Point Plan itself recognizes that additional Congressional authorization is needed to expand and improve the Administration's reforms. Additional refinements to these reforms are appropriate to enhance their effectiveness. By adding express language to the Act regarding recent endangered species administrative reforms, the bill provides further clarity regarding appropriate criteria and procedures for their implementation.

Expanding the Role of State and Local Governments

One of the criticisms of the Act is that it fails to provide adequate mechanisms to encourage State involvement in the listing, conservation and recovery processes. States possess broad trustee and police powers over fish and wildlife within their borders. To enhance implementation of the Act, it is important to take better advantage of the resources and expertise of State fish and wildlife agencies.

The Western Governors Association ("WGA") provided legislative recommendations on establishing a partnership with the Federal Government. The WGA recommendations included: making recovery of the species a central focus of the Act; providing a greater role for States in the listing process; authorizing delegation to the States of the recovery planning process; recognizing States as partners in the implementation of recovery plans; authorizing State

conservation agreements; adopting a collaborative rulemaking process; giving priority to the conservation of species and habitats that, if protected, are most likely to reduce the need to list other species dependent on the same habitats; making designation of critical habitat concurrent with drafting of a recovery plan; assessing economic impacts of recovery; and providing incentives and regulatory certainty to private property owners. To a significant degree, these recommendations have been included in the bill.

The central tenet of the bill is that recovery of species is both an objective of the Act and an underutilized planning device. If the recovery planning process can be used as a consensus building tool, it can promote recovery of species covered by plans and help avoid future conflicts under the Act. The objectives of the Act can be enhanced through State involvement in either Federally-directed recovery teams or through a State-nominated team.

State conservation agreements will involve the States in helping to avoid the listing of species by providing conservation actions that address threats to candidate and certain other species.

A more collaborative rulemaking process and consultation with the States will assure that the practical needs of the States are acknowledged and fully considered. This process is specifically required in the development of recovery plans. In addition, State input into decision making is to be actively solicited in listing, delisting, change of status of species, and consultation.

Ensuring Use of Sound Science

Public confidence in the science underlying key decisions made in implementing the Act, including listing and delisting determinations, is critical to the success of the Act. Concerns have been raised, however, that decisions may sometimes be based on information that is flawed, incomplete, or no longer current.

Lack of independent peer review has contributed to costly litigation in the case of three species of fairy shrimp in California. Changes need to be made to the listing process that will enhance public confidence in the biological integrity of listing decisions. The addition of a mandatory independent scientific review requirement for all listing and delisting proposals will ensure the use of sound science and, therefore, provide a mechanism for resolving scientific disputes during the rulemaking process.

The Services have taken steps to improve the scientific basis for listing determinations. In July 1994, the Administration announced its *Policy for Peer Review in Endangered Species Act Activities*; it has since used this policy to peer review 76 final listing determinations and 91 recovery plans. The bill builds upon the efforts of the Services, requiring independent peer review for all listing and delisting determinations, as well as for the establishment of the biological recovery goal in a draft recovery plan. This process should significantly increase public confidence in the implementation of the Act and serve to reduce litigation.

To ensure that all actions taken under the Act are based on sound science, the bill further encourages the Services and others to continue to identify and obtain additional information that will assist in the development of recovery plans, including the recovery goals. In the past, some people have perceived that the effort to

gather additional scientific information stops with the listing determination, reducing their confidence in the validity of recovery plans and the delisting process. When the Federal agencies and non-Federal parties have actively worked to expand the scientific knowledge regarding a listed species, public support for, and participation in, recovery efforts has been significantly enhanced.

Sound science should also be the basis of any enforcement action. The bill requires that an action, including an action for injunctive relief, to enforce the prohibition against the incidental taking of a species, must be based on pertinent evidence using scientifically valid principles, as recently described in the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Enhancing Recovery

The objective success of the Act must, in part, be measured by the progress achieved in recovering species to the point where they are delisted and no longer need the protections of the Act. By this measure, the recovery provisions of the current law fall short. There are 1,667 U.S. and foreign species listed as threatened or endangered. As of February 1997, only 25 species had been delisted. Of these, eight were delisted due to data error; seven were determined to be extinct; three kangaroo species were delisted as a result of changes in policy in Australia. Measured by a standard of preventing species from becoming extinct, the Act has been more successful. The most recent Fish and Wildlife Service Report to Congress, Endangered and Threatened Species Recovery Program (1994) concluded that the length of time that a species has remained under the Act's protections correlates positively with the status of the species. Specifically, of the 108 species listed between 1968 and 1973, 58 percent are stable or improving. Of the 294 species listed between 1989 and 1993, only 22 percent are stable or improving; the others were identified as in decline or in an uncertain population trend. By either measure, the numbers suggest that the existing recovery planning and implementation process can be improved.

The recovery plan is the linchpin of the effort to recover a species to the point where it may be delisted. Yet, only 487 recovery plans have been completed, leaving approximately one-third of the species listed in the United States without an effective mechanism to guide recovery. As a first step, therefore, the bill requires that recovery plans be developed, for virtually all species listed in the United States after the date of enactment, within 30 months after a listing decision is made. It also provides for the appointment of a recovery team, in most cases, to draft the plan. Encouraging participation in the planning process by those who are most affected by the listing and recovery of a species is intended both to improve the plan by including broadly representative perspectives on all aspects of recovery and, more generally, to enhance public support for recovery measures. The plans themselves are to identify concrete measures that can be taken to recover species and establish benchmarks to ensure that progress is being made towards the recovery goal. The intent is that these new recovery plans will serve as the road map to recovering species.

The second step is to ensure that the recovery measures identified in recovery plans are executed. This has been a problem in the past where recovery plans have been prepared, but in many cases have never been implemented. To make these plans an effective tool to achieve the goals of the Act, it is essential that both Federal agencies and non-Federal persons be encouraged to actively participate in carrying out specific conservation measures identified in the plan. Under the bill, Federal agencies retain primary responsibility for recovering species. Each Federal agency identified in a recovery plan will be required to enter into an agreement to carry out conservation measures for the species. States and others are encouraged to voluntarily enter into these agreements to implement measures to assist in the recovery of species.

Finally, the goal of the recovery planning and implementation process should remain the delisting of a species. Therefore, the bill provides that once the ultimate recovery goal set by the recovery plan has been achieved, the Secretary must initiate the procedures to determine whether to remove the species from the list. It is expected that achievement of the recovery goal will generally result in a delisting determination.

Improving Cooperation Between Federal Agencies

The section 7 consultation process has been perceived by some as a source of conflict between private property owners and Federal agencies. The actions of private parties have sometimes been delayed while Federal agencies engage in consultation under section 7. In some cases, consultation between Federal agencies and the Services has not been completed within the statutory deadlines. For a private party seeking a permit or authorization for a project, any delays and lack of certainty that result from the current section 7 process can present significant problems.

Although the Services have initiated efforts to improve the consultation process and have reduced the backlog of pending applications, the bill further streamlines the process by allowing a Federal action to proceed if the Federal action agency makes the initial "not likely to adversely affect" determination and the Secretary does not object within 60 days.

The bill also opens up the consultation process so that any person who has sought authorization or funding from a Federal agency for an action that is the subject of the consultation can obtain information used by the Secretary to develop the draft and final biological opinions, subject to relevant Freedom of Information Act ("FOIA") exemptions. The public may obtain a list of notices received from Federal agencies that made a determination that an action is not likely to adversely affect a species, and obtain the information received by the Secretary on which the agency based its determination, subject to relevant FOIA exemptions.

Finally, the bill addresses concerns raised by some permit applicants by requiring that reasonable and prudent measures be related in nature and extent to the effect of the proposed activity.

Providing Incentives for Property Owners

According to the Government Accounting Office ("GAO"), over 90 percent of the listed species have some or all of their habitat on

non-Federal lands; two-thirds have over 60 percent of their total habitat on non-Federal lands; and one-third are entirely dependent on non-Federal lands for their habitat. In light of these figures, it is clear that actions by non-Federal persons are critical to achieving the Act's ultimate goal of conserving threatened and endangered species. Recent efforts of property owners to develop habitat conservation plans and to enter into safe harbor agreements, among other things, indicate that property owners are willing to assist in the conservation of species given affirmative incentives to do so.

The advantage of an incentive-based approach was highlighted by the testimony of Michael J. Bean of the Environmental Defense Fund:

> In other areas of environmental policy, incentives are a commonly used tool to achieve congressional goals . . . .
>
> To achieve the goals of the Endangered Species Act, we have thus far relied almost exclusively on the "stick" of penalties and prohibitions to deter harmful conduct, and have generally neglected the "carrot" of incentives to reward beneficial conduct. The shortcomings of this "all stick and no carrot" approach are evident. The stick does not always work, and it is often resented. Moreover, even if it did always work, at best it would preserve only the status quo. Thus, ultimately, the most significant shortcoming of an all stick and no carrot approach is that it misses the opportunities to improve upon the current situation by giving landowners an incentive to create or restore habitat that will aid in the recovery of imperiled species.

In July 1995, the Keystone Center published its *Keystone Dialogue on Incentives for Private Landowners to Protect Endangered Species*. Participants in the dialogue included representatives of environmental, mining, ranching and agriculture organizations, private landowner groups, forest products companies, real estate interests, Federal and State agencies, and Congressional staff. The Keystone Report recommended a broad range of incentives for private landowners to conserve species on their lands. The recommendations included, among other things, suggestions to: (1) streamline the habitat conservation planning process; (2) increase participation in voluntary species conservation through prelisting conservation agreements, safe harbor agreements, no take agreements and recovery plan incentives; and (3) establish new financial incentives through estate tax reform, estate tax credits and tax credits for conservation measures.

Many of the recommendations of the Keystone Report are reflected in policies that are being implemented by the Administration, including safe harbor agreements and candidate conservation agreements. The bill incorporates many of the recommendations of the Keystone Report and the Administration's policies to provide a broad range of incentives for non-Federal property owners. The incentives include an expedited process for small landowner and other low effect habitat conservation plans; a statutory no surprises provision to give property owners certainty that HCPs will not be reopened with greater mitigation demands for more money or more land; safe harbor agreements to encourage the enhancement of potential habitat for a species while protecting property owners from added liability under the Act; candidate conservation agreements to encourage property owners to take proactive measures to help reduce the need to list species as threatened or endangered under the Act; and relief from section 7 consultation requirements for site-

specific activities undertaken by property owners to assist in the implementation of recovery plans. These new incentives are intended to enhance conservation of species and reduce conflicts with private landowners.

SECTION-BY-SECTION SUMMARY

Section 2: Listing and Delisting Species

SUMMARY

The bill expands section 3 of the Act to include both definitions and general provisions. Section 2(a) and section 2(d) each include an amendment to the general provisions of the Act. Section 2(a) states that, when the Act requires the Secretary to use the best scientific and commercial data available, and when evaluating comparable data, the Secretary must give greater weight to data that is empirical, field-tested or peer-reviewed. Section 2(d) allows the Secretary, and the head of any other Federal agency upon recommendation by the Secretary, to withhold or limit the availability of data otherwise to be released under FOIA if the data describe or identify the location of listed or proposed species, and release of the data would likely result in increased take of the species.

Sections 2(c)(4)-(6) of the bill amend the process to determine whether a species is endangered or threatened in several significant ways. First, a petition to list, delist or reclassify a species as threatened or endangered must contain certain minimum documentation. Second, the Secretary must notify the States that may be affected by a listing of any petition received, or any action considered by the Secretary, and consider any State assessment received within 90 days of the notification. Third, at least one public hearing in each affected State (including one hearing in each affected rural area) must be held upon the request of any person within 45 days of publication of the proposed rule, although not more than five hearings may be required. Fourth, independent peer review is required for every proposal to add or remove a species from a list, to be conducted by three scientists nominated by the National Academy of Sciences ("NAS") and selected by the Secretary.

The bill also changes the listing process with respect to other provisions of the Act. It moves the deadline for designating critical habitat from the final listing deadline to the final recovery plan deadline. Section 2(c)(3) requires that the Secretary initiate procedures for determining whether to delist a species when the recovery goal for that species has been met. Section 2(c)(7) requires certain information to be included with the publication of listing regulations. Section 2(c)(8) requires that data for recovery plans be solicited in conjunction with a proposed listing regulation, and be considered subsequently by the recovery team and the Secretary during recovery plan development. Section 2(c)(12) of the bill allows States to enter into State conservation agreements to conserve species before they need to be listed, and enumerates requirements for these agreements.

Section 2(c)(10) of the bill also requires that protective regulations for threatened species, pursuant to section 4(d) of the Act,

must be specific to that species by the date a recovery plan must be approved for the species. This applies only to species listed as threatened after the date of enactment of the bill.

DISCUSSION

The scientific underpinnings of decisions made by the Secretary in implementing the Act have often been criticized by both conservation groups and private property owners. In particular, certain listing decisions have been the subject of controversy. To ensure that decisions are scientifically sound and to enhance public confidence in the listing process, section 2 of the bill makes a series of changes to the general provisions and specifically to section 4 of the Act to place greater emphasis on the use of sound science and public participation in listing and other decisions. Under the current law, the Secretary is required to make decisions pursuant to section 4(a) solely on the basis of "the best scientific and commercial data available," and all Federal agencies are required to use "the best scientific and commercial data available" during the consultation process under section 7. While this general standard is widely accepted, concerns have been raised regarding its application in individual instances. Specifically, the existing law provides no guidance as to what constitutes the "best scientific and commercial data available."

Section 2(a) of the bill requires that, where the Act requires the Secretary to use the best scientific and commercial data available, and when evaluating comparable data, the Secretary must give greater weight to data that is empirical, field-tested, or peer-reviewed. This section is not intended to preclude the Secretary from using other data. The bill does recognize, however, that all else being equal (*i.e.*, comparable), data that are empirical, field-tested or peer-reviewed should be given greater weight than data that are not. For example, when evaluating comparable data from two studies, one of which has been peer-reviewed and the other has not, greater weight is to be given to the former. If two population viability models are conducted, and both use equally valid but different assumptions, the model that has undergone peer review or field testing is to be given greater weight, although the other model may also be considered.

Section 2(d) of the bill addresses two recent court decisions that prevented the U.S. Forest Service from withholding information on the location of nesting sites for two threatened species of birds. The Forest Service sought to withhold the information pursuant to exemption 2 of the Freedom of Information Act ("FOIA"), on the basis that disclosure would facilitate the unlawful taking of the species, but both the 9th Circuit, in *Maricopa Audubon Society v. Thomas*, and the 10th Circuit, in *Audubon Society* v. *U.S. Forest Service*, required release of the information. The bill allows for certain information to be withheld, provided that the information describes or identifies the location of a listed species or one proposed to be listed, and the release of the information would likely result in increased take of the species. Exemption 3 of FOIA (5 USC 552(b)(3)) incorporates disclosure provisions of other statutes, and this provision is to be considered under that exemption. The provision is also to be narrowly construed, such that increased take of a species

must be likely, rather than merely possible. Furthermore, the exemption may not be used to withhold information regarding the presence of a species on private land from the owner of that land.

Under existing law, the process for determining whether a species is endangered or threatened is an elaborate one. First, the Secretary must make a finding within 90 days of receipt of a petition whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. Upon making this finding, the Secretary must then conduct a status review to determine whether to propose the species as endangered or threatened. This is a resource-intensive process. To ensure that limited resources are not spent on petitions that do not include adequate information, section 2(c)(4) of the bill requires certain information to be included in a petition. This requirement does not change the standard for making the finding; it does, however, require that the person submitting the petition provide information on which the finding may be based in order to reduce the burden upon the Secretary. These minimum requirements are not intended to place excessive burdens on petitioners or bar further consideration of potentially meritorious proposals. This requirement also does not preclude the Secretary from using additional information for the finding.

Section 2(c)(4) also expands the role of State fish and wildlife agencies in the listing process. State fish and wildlife agencies have valuable expertise and biological data and other information regarding species in their jurisdiction. The bill elevates the role of the State agencies in the listing process. Section 2(c)(4) provides that, prior to publication of a determination that a petitioned action is warranted or, if no petition has been received, the issuance of a proposed regulation, State fish and wildlife agencies, in each State in which the species is believed to occur, shall have an opportunity to review and submit their views on potential proposals to list, delist, or change the status of a species.

Section 2(c)(3) requires that when the Secretary determines that the recovery plan goals for a species have been met, the Secretary must initiate the process to determine whether a species should be delisted in accordance with section 4(a)(1) of the Act. This provision is intended to address concerns that not enough emphasis has been placed on delisting, even when the recovery goals for a species established by a recovery plan have been met. It does not, however, change the standards or procedures for determining whether a species should be delisted.

Section 2(c)(8) of the bill requires that the Secretary select three referees, based on recommendations by the NAS, to provide independent peer review of proposed listing, delisting and reclassification decisions, to ensure that the decisions are based on sound science. In order to ensure the most effective peer review of any proposal to list, delist or change the status of the species, the referees should be allowed to review all the information, data, and documentation relied upon by the Secretary to make the proposed determination. In July of 1994, the Services issued a joint policy requiring independent scientific peer review of all proposed listings, 59 Fed. Reg. 34270 (1994). Section 2(c)(8) expands that policy. Prior to making a final determination, the Secretary must consider the

recommendation of the peer review panel, if the referees have made a recommendation in accordance with this section. Peer review shall not delay the determination as to whether to list the species. Both the NAS and the referees are to fulfill their commitments in a timely manner. Any delay on their part, however, does not serve to waive or extend the deadlines imposed upon the Secretary. The Federal Advisory Committee Act ("FACA") does not apply to the selection and activities of referees.

Section 4(d) of the Act requires that the Secretary promulgate regulations necessary and appropriate for the conservation of threatened species. The Secretary of the Interior published a rule, codified at 50 C.F.R 17.31, that prohibited the take of all threatened species, but allowed for special rules for individual species. Section 2(c)(10) of the bill restores the distinction between species listed as endangered or threatened by requiring the Secretary to issue a special regulation, under section 4(d) of the Act, for each species listed as threatened after the date of enactment of this bill. Specifically, section 2(c)(10) requires that, with respect to species listed as threatened in the future, regulations under section 4(d) must be specific to that species by the time the Secretary is required to approve a recovery plan for the species. Prior to that time, the general prohibitions in 50 C.F.R. 17.31 and 50 C.F.R. 17.71 may continue to apply. However, the scope of the protections for that species will be reevaluated and revised, as necessary, after the threats to the species and the actions required to recover the species have been identified. While the prohibitions may apply after the time the Secretary is required to approve a recovery plan for the species, the prohibitions must be promulgated through a special rule specifically for that species.

Existing law recognizes the role of States in protecting species before they become endangered or threatened. Section 4(b)(1)(A) of the Act requires the Secretary to make a listing determination after taking into account efforts being made by any State, or political subdivision thereof, to protect the species. Section 2(c)(12) of the bill includes a new provision expressly authorizing States to enter into State conservation agreements to protect species before they are listed. The Secretary may enter into State conservation agreements with one or more States for a species that has been proposed for listing, is a candidate for listing, or is likely to become a candidate species in the near future. The Secretary may approve a conservation agreement if, after notice and opportunity for public comment, the Secretary finds, among other things, that the actions taken under the agreement, if undertaken by all States within the range of the species, would produce a conservation benefit that would be likely to eliminate the need to list the species for the duration of the agreement. Solely for purposes of making the finding under section 4(i)(1) of the Act, as amended by this section, the Secretary is to assume that all relevant States have entered into similar conservation agreements.

By encouraging States to take active steps to address threats to a species before it is listed, these agreements will benefit species and, in doing so, may help avoid the need to list those species. For example, NMFS and the State of Oregon entered into an agreement to implement the central Oregon Coastal Salmon Restoration

Initiative to conserve the Oregon coast coho salmon population. Unlike candidate conservation agreements or habitat conservation plans, these agreements are only available to States and do not provide any specific regulatory assurances if a species covered by an agreement subsequently needs to be listed.

The conservation benefits derived from the agreement may be considered in a listing determination by the Secretary. In the case of the coho salmon, for example, the benefits of the Oregon initiative formed the basis of the Secretary's decision not to list the central Oregon coast population. These benefits may include future benefits that are reasonably certain to occur under an agreement that is being implemented at the time of the determination.

Section 3: Enhanced Recovery Planning

SUMMARY

The bill creates a new section 5 in the Endangered Species Act relating to recovery planning and implementation. Generally, the Secretary shall, in cooperation with the States and on the basis of the best scientific and commercial data available, develop and implement recovery plans for the conservation and recovery of listed species indigenous to the United States or in waters with respect to which the United States exercises sovereign rights or jurisdiction. The Secretary may also authorize a State to prepare a draft recovery plan. The bill establishes priorities and schedules for completing recovery plans, including plans not yet developed for currently listed species. For species listed after the date of enactment of this bill, under new section 5(c), draft plans must be completed 18 months after listing, and final plans 30 months after listing. For species currently listed but without recovery plans, section 3(e) of the bill requires that plans be completed for not less than one-half the species not later than 36 months after enactment, and for the remainder, not later than 60 months after enactment.

Under new section 5(d), the Secretary is required, with limited exceptions, to appoint a recovery team that is broadly representative of the constituencies with an interest in the species and in the social and economic impacts of recovery. The Secretary is not expected to appoint a recovery team in those situations in which the recovery of the species will have little, if any, impact on the public. The team is to prepare a draft plan, including recommended recovery measures and alternatives, to meet the recovery goal, and submit the plan to the Secretary. The team may assist the Secretary in reviewing, revising and implementing plans, may be reimbursed for travel expenses, and is exempt from FACA.

New section 5(e) establishes substantive requirements for recovery plans, including a biological recovery goal, recovery measures, benchmarks, and an identification of Federal agencies whose actions are likely to have a significant impact on recovery of the species. The biological recovery goal must be established by those members of the team with relevant scientific expertise, and undergo independent peer review. It may be advantageous to use the same scientists who conducted the peer review of the proposed listing to review the recovery goal. The goal is to be based solely on the best scientific and commercial data available. The bill requires

that the biological recovery goal, when met, would result in the determination, in accordance with the provisions of section 4, that the species be removed from the list, and when it is met, that the Secretary initiate the procedures for making this determination. Recovery measures to meet the recovery goal may be general or site-specific. The recovery measures must achieve an appropriate balance among three factors: (1) the effectiveness of the measures in meeting the recovery goal; (2) the period of time in which the recovery goal is likely to be achieved, provided that it will not pose a significant risk to recovery; and (3) the social and economic impacts of the measures. Plans must include descriptions of alternative measures, and where the measures impose significant costs, a description of the overall economic effects on public and private sectors.

New sections 5(f) and 5(h) provide for public comment, and Secretarial review and approval. After the recovery team submits the draft plan to the Secretary, the Secretary shall review the plan to determine whether it meets the requirements of the Act, and give the team an opportunity to address any concerns. The Secretary must then publish a notice of availability and request for comments in the Federal Register and in a newspaper of general circulation in each affected State, and upon request, hold at least one public hearing. In adopting a final plan, the Secretary must select recovery measures that meet the recovery goal and achieve the appropriate balance among the same factors mentioned above. The Secretary must explain why any measures recommended by the recovery team were not adopted.

Under new sections 5(i), 5(j) and 5(k), recovery plans are to be reviewed every ten years, and must be revised if the Secretary finds that substantial new information indicates that the recovery goals will not achieve the conservation and recovery of the species. Plans in existence prior to date of enactment of the bill must be reviewed by the Secretary within five years of the date of enactment. Plans approved, or for which notice and comment procedures have been initiated, or on which significant progress has been made, prior to the date of enactment of the bill, are not required to be redrafted to comply with these new provisions prior to publication.

The bill includes provisions relating to the implementation of recovery plans, to be codified as a new section 5(l). In general, the Secretary is authorized to enter into agreements with Federal agencies, States, Indian tribes, local governments, and private entities to implement conservation measures identified in an approved recovery plan. Each non-Federal party must have the legal authority and capability to carry out the agreement, the agreement must be reviewed and revised as necessary on a regular basis (but no later than every five years), the agreement must establish a mechanism for monitoring and evaluation, and the agreement must be subject to public notice and opportunity for public comment.

Federal agencies identified in the recovery plan in section 5(e)(4) must enter into an implementation agreement no later than two years after the recovery plan is approved. The substantive provisions of the agreement are within the sole discretion of the Secretary and the heads of the agencies. Consultation pursuant to sec-

tion 7 of the Act is waived for certain Federal actions specified in a recovery plan implementation agreement between the Federal agency and the Secretary that promote the recovery of the species. If a non-Federal person desires to include an action requiring Federal authorization or funding in an implementation agreement, the Federal agency must participate in the development of the agreement and identify all measures for the species that would be required under the Act. Grants of up to $25,000 may be provided by the Secretary to private landowners for carrying out implementation agreements.

Under new section 5(m), the Secretary may authorize a State agency to develop a draft recovery plan upon the request of the Governor. The State must have entered into a cooperative agreement with the Secretary and demonstrate adequate authority and capability to carry out the necessary requirements. The State agency may appoint the recovery team, which is to submit the draft plan to the Secretary, through the State agency, for review. The Secretary may withdraw the authority from a State, after an opportunity to correct any deficiencies, if the State is not in compliance with the requirements of the section; in such cases, the Secretary is to develop the recovery plan.

The bill changes the timeframe for designation of critical habitat. Generally, under new section 5(n), the Secretary must publish a proposed rule designating critical habitat no later than 18 months after a species is determined to be threatened or endangered, and a final rule no later than 30 months after the determination. The Secretary must publish proposed and final rules after consultation and in cooperation with the recovery team, if any.

DISCUSSION

The mandate to develop and implement plans for the conservation and recovery of endangered and threatened species has never been an integral component of the existing law. It wasn't until 1978 that Congress required the development of recovery plans, and it wasn't until 1988 that Congress significantly expounded on the process and contents for recovery plans. Under section 4(f) of the Act, the Secretary must develop and implement plans, and must incorporate in each plan site-specific management actions, objective and measurable criteria for delisting, and estimates of time and cost of recovery actions. Public notice and comment is required, and recovery teams may be convened, for recovery plan development.

The bill expands the provisions governing recovery planning and implementation. For example, under current law, there are no deadlines to complete plans. Nor are there specific requirements for determining the goal of recovery, criteria for choosing particular measures to achieve recovery, or parameters for participation by stakeholders or States. With respect to plan implementation, there are neither requirements nor incentives for Federal or non-Federal entities seeking to undertake conservation measures.

These shortcomings have been detrimental to the recovery of endangered and threatened species throughout the country. Since the passage of the Act in 1973, of the 25 species delisted, only 11 species have been delisted because they have recovered, and of these,

only five have resided partially or entirely in the U.S. In its most recent report to Congress in 1994, the Fish and Wildlife Service indicated that of 909 species listed at the time, 41 percent have either stabilized or are improving; of this number, however, only 8 percent are actually improving. Of the 1,107 U.S. species listed by the Fish and Wildlife Service, 69 percent are covered in one of the 487 approved final recovery plans. Fifty-six percent of those species without final recovery plans have been listed for longer than one year. Of the 25 U.S. species listed by National Marine Fisheries Service ("NMFS"), only 10 have approved recovery plans.

It is against the backdrop of these statistics that the bill amends the recovery planning provisions of the current law. Recovery must be the linchpin of the Act, so that species can reach a point at which they can be delisted and the often costly and contentious requirements of the law would no longer be necessary; in other words, the ultimate goal of the Act is to make itself obsolete, rather than self-perpetuating. The bill does this by first specifying requirements for plan development, and then specifying measures to encourage, and in some cases, require, plan implementation.

Recovery plans are to serve as blueprints for species conservation and should guide recovery actions under the Act. Plans would be generally required to be prepared by the Secretary or an authorized State. There are limited instances, however, where plans need not be prepared. Only species in United States lands or waters with respect to which the United States exercises sovereign rights or jurisdiction would require plans, given that plans would have little bearing for foreign species. Waters with respect to which the United States exercises sovereign rights or jurisdiction means those waters landward of the outer boundary of the Exclusive Economic Zone ("EEZ"). The EEZ means the zone established by Proclamation Numbered 5030, dated March 10, 1983. The exemption for plans that do not promote the recovery of species is a narrow one, to be used in instances in which plans would be detrimental to species conservation, such as by identifying locations of listed species that might encourage poaching. Additionally, only plans or strategies that have undergone similar procedural and substantive requirements could serve as functional equivalents.

The bill identifies four factors for prioritizing recovery plans, and requires the Secretary to develop a priority ranking system, based on those factors, for completing plans for species currently without plans, and for future listed species. While the Secretary must use all four factors, the Secretary would have discretion in determining how to weigh them. One factor concerns plans that address multiple species. To the extent practicable, a plan should consider not only the needs of the species for which the plan is being developed, but for other species as well that depend on the same habitat. Such plans would greatly assist overall conservation efforts, particularly for non-listed species that may be tending towards listing. Another factor concerns plans that reduce conflicts with economic activities and property rights. Plans should identify and foster conservation methods that reduce or avoid such conflicts, in order to achieve recovery in a cost-effective and efficient manner, and to promote goodwill among affected private property owners.

The current law allows for the appointment of a recovery team, although it does not enumerate the composition of the team. The bill would ensure that recovery teams are broadly representative of all stakeholders, including government officials, academics, and private individuals and organizations, such as conservation groups and members of the regulated community. It is expected that recovery teams will include persons with an interest in the species and its recovery or in the economic or social impacts of recovery. The teams should also provide a fair representation among the different groups. In addition to development of draft plans, recovery teams may provide assistance in the implementation, review, and revision of plans. The selection of teams by either the Secretary or an authorized State agency, and the teams' activities, would be exempt from FACA.

The perceived failure of plans to identify biologically defensible goals is one of the significant deficiencies in the current law. Another deficiency of existing law is that, although an estimate of costs associated with recovery measures must be made, it need not be taken into account in making planning decisions. Several witnesses during hearings in 1995 observed that recovery goals were being tempered by social, political and economic considerations. While these considerations may not be appropriate in establishing the recovery goal, they must be taken into account in the recovery planning process. The bill establishes a two-part process, in which the recovery goal is to be developed using solely the best scientific and commercial data available by those members of the recovery team with relevant scientific expertise, while the measures to achieve the recovery goal, along with the associated analyses, are to take into account a balancing of factors, and are to be developed by the team as a whole.

The appropriate recovery goal for a species is a purely biological question, and is to be expressed as objective and measurable biological criteria. These criteria may vary from species to species, and be based on the extent of available data that may include numbers of populations, numbers of individuals, rate of reproduction and habitat conditions. As a biological matter, the goal must be established so that, when met, the species can be a naturally self-sustaining one that no longer needs the protections of the Act, and could therefore be delisted. As a legal matter, when the goal is met, the Secretary must initiate the procedures for determining whether those conditions, in fact, have been met and the species can be delisted. The factors enumerated in section 4(a)(1) on which the Secretary is to base a determination whether a species is endangered or threatened are the same factors on which the Secretary is to base a determination whether a species has recovered to the point where it can be delisted.

Although the recovery goal is to be developed by those members of the recovery team with relevant scientific expertise, independently of the recovery measures, this requirement should not preclude the overall team from beginning to work on the measures in order to expedite the recovery planning process. The measures should be revised as necessary to reflect any modifications made to the recovery goal, as appropriate.

The measures can be either site-specific or general, and are to provide generally for the conservation of the species, and collectively for the recovery of the species to the point at which the species can be delisted. In requiring an appropriate balance among effectiveness, time, and social and economic impacts, the bill accomplishes two things: first, it establishes parameters that govern the selection of recovery measures; second, it gives the Secretary discretion to choose measures within those parameters, provided that the period of time for recovery will not pose a significant risk to recovery. The actual balance among the three factors will be necessarily a case-by-case determination, based on the status of the species, the nature of the threats affecting the species, and the social and economic impacts associated in addressing those threats. In measuring social and economic impacts of recovery measures, the team is to consider both negative and positive impacts.

Upon completing a draft plan, the recovery team is to submit it to the Secretary for the Secretary's review. Prior to publishing the draft plan for notice and opportunity for comment, the Secretary must make a preliminary assessment that the draft plan satisfies the requirements of section 5. In adopting a final plan, the Secretary must ensure that the plan meets the requirements of this section. The recovery measures chosen by the Secretary in the final plan must meet the recovery goal and achieve the appropriate balance among the three factors. However, if the measures chosen by the Secretary are different than those recommended by the team, then the Secretary must provide an explanation of why the team's recommendations were not selected.

The existing law contains no provisions for reviewing or revising recovery plans. The bill provides that final plans published prior to the date of enactment must be reviewed within five years. Plans approved or revised after the date of enactment must be reviewed every 10 years. The bill further requires the Secretary to revise a plan if the Secretary finds that substantial new information indicates that the recovery goal identified in the plan will not achieve recovery. It is expected that any revision to a plan will trigger a review of any implementation agreement pursuant to that plan to determine whether the agreement is consistent with the revised plan. In order to ensure efficient expenditures of scarce resources for recovery planning, the bill includes a savings clause for certain plans. Specifically, final recovery plans, draft recovery plans on which notice-and-comment procedures have been initiated, and draft recovery plans on which significant progress has been made, prior to date of enactment, need not be modified until the plans are revised in accordance with the provisions of the bill. In the case of the Department of the Interior, draft plans on which significant progress has been made are draft plans that have been completed to the point that they are under agency review. In the case of NMFS, draft plans on which significant progress has been made at this time are the draft plans for the sperm, sei, and fin whales. Any modifications of recovery plans are expected to satisfy the relevant substantive and procedural requirements of this section.

The existing law addresses recovery plan implementation less than it does plan development. This deficiency is a significant reason why recovery has been so elusive for many species. Even where

there are plans with adequately defined recovery goals, often measures to meet those goals are not implemented. In prioritizing measures according to an administrative ranking system, the Fish and Wildlife Service will often implement only those high priority tasks that address the most significant and immediate threats facing the species, due to a lack of funding for other, longer-term measures. Recovery plans have thus become merely another vehicle in the law to prevent further decline of species, rather than the foundation on which to affirmatively recover the species. Of the $39.75 million appropriated to the Fish and Wildlife Service for recovery in FY 97, 75 percent was directed towards recovery implementation. Despite this figure, the National Research Council of the NAS reported in 1995 that 50 percent of the recovery objectives have been accomplished for only 68 of the species listed, while 77 percent of the species listed had less than 25 percent of their recovery tasks completed. These statistics again underscore the need for reform.

The bill affirms the importance of implementing plans once they are developed. As a general matter, the bill authorizes the Secretary to enter into agreements with Federal agencies, States, Indian tribes and local governments, as well as private property owners, to implement specified measures identified in an approved plan. The Services currently enter into such agreements for some species for which recovery raises complex issues; at the same time however, the Services recognize that generally, no one agency or group has sufficient ability to achieve recovery alone, so that a consolidated effort is necessary. Consequently, implementation agreements are encouraged.

Federal agencies can and should provide substantial protections for listed species. A recent study by The Nature Conservancy reported that 50 percent of listed species have half of their known occurrences on Federal lands. The bill requires Federal agencies identified in recovery plans to enter into implementation agreements with the Secretary not later than two years after the plan is approved. Federal agencies should bear a greater burden than private property owners in conserving species. However, they cannot be responsible for the entire burden, nor can they be expected to implement every recovery measure identified for them in a recovery plan. The specific questions of how Federal agencies are to implement recovery plans, and which measures in particular they should carry out, are ones left to the administrative process. Consequently, the bill requires that Federal agencies enter into an agreement to undertake measures to achieve recovery, but the substantive provisions of the agreement are left to the sole discretion of the Secretary and the head of the Federal agency or agencies entering into the agreement. With the exception of the deadline for completion of recovery plan implementation agreements between the Secretary and a Federal agency, compliance of those agreements with section 5 would not be subject to judicial review under the provisions of section 11 of the Act. The agreement may be challenged as violative of other laws and other sections of the Act. This provision does not authorize Federal agencies to undertake any action that exceeds their authority under this or any other Federal law or affect their obligation to comply with State law to the extent they are otherwise required to do so.

Entering into an implementation agreement is an action for purposes of section 7(a)(2) of the Act. Consultation may therefore be required on the effects of the actions identified in the agreement. If an action covered by an implementation agreement may result in an incidental take of a listed species, the terms and conditions of the incidental take statement for the action shall be incorporated into the implementation agreement. A Federal agency that has entered into a recovery plan implementation agreement that satisfies the requirements of this section would not have to engage in any further consultation under section 7(a)(2) before authorizing, funding or carrying out the actions specified in the agreement. Provided the Federal agency that is a party to the implementation agreement, as well as any permit or license applicant involved, carries out the specified recovery action in compliance with the terms and conditions of the agreement, then there would be no liability under section 9(a)(1) of the Act for incidental take that arises from the action.

Consultation is only waived under certain conditions. Those conditions are intended to remove uncertainties as to the impacts of site-specific actions benefiting from the waiver, by requiring sufficient information on the nature, scope and duration of the action to determine its effect on listed species or critical habitat, that the action will be carried out during the term of the agreement, and that the agency is in compliance with the agreement. The most important basis for the waiver is that the action must promote the recovery of the species. Whether an action meets this standard must be supported by the record of decision by the Secretary or the action agency, as appropriate. Assuming this standard is satisfied by the record, there would be no need to further analyze the action under section 7(a)(2) for that species.

In addition to requiring Federal agencies to enter into implementation agreements, the bill encourages participation of non-Federal persons in several ways. First, it provides financial grants for conservation actions. Second, if a non-Federal person proposes to include in an agreement an action requiring Federal authorization or funding, the bill requires that each Federal agency, during the development of the agreement, identify all measures for the species that would be required under the Act. The purpose of this provision is to allow a person whose actions are subject to Federal funding or authorization to know, up front, all the requirements of the Act with which he or she will need to comply. This does not obligate the Federal agency to actually enter into the agreement. It does, however, ensure that the non-Federal person will have full knowledge of the consequences of undertaking any conservation measures at the time that person is making the decision.

The bill provides that the Secretary may authorize State agencies to develop recovery plans. In assuming this responsibility, whether individually or cooperatively, each State must have entered into a cooperative agreement that covers that species under section 6(c) of the Act, and have submitted a statement to the Secretary demonstrating authority and capability to carry out the applicable requirements. Review and approval of both draft and final plans are to be made by the Secretary. If a plan does not meet the requirements of the section, under new section 5(m)(6), the Sec-

retary is to give the State agency an opportunity to correct any deficiencies within 60 days, after which the Secretary is to withdraw State authority to develop the plan if the deficiencies have not been corrected.

Under existing law, critical habitat is required to be designated at the time of the final determination that a species is endangered or threatened. If the critical habitat is not then determinable, a one-year delay is allowed. Both the Fish and Wildlife Service and NMFS have often invoked this one year extension for one of several reasons, including: the conservation needs of a species, which are the basis for the critical habitat designation, are not known at the time of listing; or the designation also requires consideration of economic impacts, which often cannot be completed concurrently with the listing. For these reasons, the bill moves critical habitat designation to the recovery planning provisions of the Act. As with recovery plans, the requirement for critical habitat designation is limited to those species in the United States or the United States EEZ. Designation of critical habitat would generally occur concurrent with publication of a final recovery plan for the species. If a recovery plan is not developed, critical habitat is to be designated within three years of listing. In addition, the Secretary may designate critical habitat concurrent with listing if designation is essential to avoid the imminent extinction of the species. The designation of critical habitat must still take into consideration the economic impacts of the designation. Petitions and other procedural requirements to designate critical habitat have not changed.

Section 4. Interagency consultation and cooperation

SUMMARY

The bill establishes a new streamlined process for Federal agencies to comply with their obligation under section 7(a)(2) to ensure that their actions are not likely to jeopardize the continued existence of a listed species, or destroy or result in the adverse modification of critical habitat. Under section 4(c) of the bill, a Federal action agency is authorized to make the initial determination that an action funded, authorized or carried out by the agency is not likely to adversely affect a listed species or critical habitat, based on the opinion of a qualified biologist. If the Secretary does not object to the agency's determination within 60 days of notification to the Secretary, the action may proceed.

The bill directs the Secretary and the GAO to prepare reports for the Congress on the implementation and cost of consultations under section 7 of the Act. The bill also authorizes the Secretary to consolidate section 7 consultations for a number of actions within a particular geographic area.

In the event that a new listing or designation of critical habitat requires reinitiation of consultation on a land and resource management plan for a national forest or a Bureau of Land Management land use plan, the bill authorizes site-specific actions within the scope of those plans to proceed while consultation on the plan is underway, provided the site-specific actions comply with section 7(a)(2) of the Act in their own right. Consultation on the plan must

be reinitiated within 90 days of the listing or designation and be completed within one year.

The Secretary, when consulting on a Federal action, must solicit and consider information from the State fish and wildlife agency in each affected State. In addition, the Secretary is required to provide any person who has sought authorization or funding from a Federal agency on which consultation is required, access to relevant information, including the draft biological opinion, and an opportunity to respond to the same, as part of the consultation process.

Section 4 also requires Federal agencies, to the maximum extent practicable, to develop an inventory of listed, proposed, and candidate species on land or water owned or under the control of the agency and to update that inventory every ten years; includes a definition of the term "reasonable and prudent alternatives"; provides that measures to mitigate the impact of incidental taking resulting from an activity that is the subject of a consultation shall be related both in nature and extent to the effect of the proposed activity; and allows Federal agencies to defer consultation to make emergency repairs of a natural gas pipeline, hazardous liquid pipeline, or electrical transmission facility.

DISCUSSION

Section 7(a)(2) of the Act requires each Federal agency to consult with the Fish and Wildlife Service or NMFS to ensure that its actions are not likely to jeopardize the continued existence of a listed species or destroy or adversely modify its critical habitat. This consultation process is required not only for activities that may affect listed species on public lands, but also for activities authorized, funded, or carried out by Federal agencies that may affect listed species on private lands. The bill includes a number of provisions to streamline section 7 consultations and provide greater opportunities for involvement in the consultation process by interested parties.

Section 4(a) codifies the existing regulatory definition of the term "reasonable and prudent alternatives." Concerns have been raised that in some cases, reasonable and prudent alternatives have been proposed that do not satisfy the requirements of the regulatory definition. The purpose in codifying this definition is to reaffirm that definition and ensure that it is applied in all instances.

To assist species conservation efforts of Federal agencies that manage land and water, section 4(b) requires those Federal agencies to conduct, to the maximum extent practicable, inventories of listed species, proposed species, and candidate species on land or water owned or under the control of the agency. In conducting the inventory, land management agencies are encouraged to use all reasonably available tools and mechanisms. This provision does not authorize Federal agencies to require inventories on private property. Nor does this provision place a duty on the Department of Defense or the United States Navy to survey the oceans or seas in which they conduct operations. Moreover, the phrase "under the control of the agency" is to be interpreted narrowly to mean under the year round management responsibility of an agency.

Periodic updates will enable agencies to assess the status of species included in the prior inventory as well as species that have been listed, proposed to be listed, or identified as candidate species since the last inventory was completed. Because the inventories only have to be updated no more frequently than once every ten years, Federal agencies that revise resource management plans at least that often should be able to integrate the inventory into their existing planning process without any new revisions being required due solely to the inventories.

Section 4(c) creates a new streamlined consultation process. Under this process, a Federal action agency, using its own qualified biologists, may make the initial determination that a proposed action is not likely to adversely affect a listed species. The Secretary is given 60 days to review the determination. If the Secretary does not object in writing to the determination, the action may proceed. The Secretary shall object to an agency's determination if the Secretary finds that: (1) the proposed action may have an adverse effect on a listed species or critical habitat; (2) there is insufficient information in the documentation accompanying the determination to evaluate the impact of the proposed action on a listed species or critical habitat; or (3) because of the nature of the proposed action and its impact on a listed species or critical habitat, review of the determination cannot be completed in 60 days. The authority for the Secretary to object based on inadequate time for review is included to address highly complex projects or plans and not the lack of resources. If the Secretary objects to a determination, formal consultation is required.

The Secretary is also authorized to exclude certain categories of actions from this streamlined process. This exemption is intended to be applied narrowly to cover only those actions with respect to specific listed species that are likely to have an adverse effect on the species or its critical habitat.

Federal agencies are encouraged to take further steps to streamline the consultation process within the scope of their authority. For example, while the process established by the bill is available to action agencies, those agencies are not precluded from initiating formal consultation. In addition, the Secretary is not precluded from issuing a written statement that the Secretary does not object to a determination prior to the 60-day deadline so that the action may proceed sooner.

Under current regulations, formal consultation is not required if, as a result of a biological assessment or informal consultation, a Federal agency determines, with the written concurrence of the Fish and Wildlife Service or NMFS, that the proposed action is not likely to adversely affect any listed species or critical habitat. The bill amends this process so that written concurrence of either Service is no longer required, but does not alter the existing substantive standards under section 7(a)(2) of the Act.

The bill requires the Secretary to provide any person who has sought authorization or funding from a Federal agency on which consultation is required an opportunity to submit information prior to the development of a draft biological opinion, to discuss the information with the Secretary, to receive information used by the Secretary in developing the draft and final biological opinion sub-

ject to the exemptions specified in section 552(b) of title 5 of the United States Code, and to receive a copy of the draft biological opinion and submit comments on it. Information submitted to, or received from, those persons must also be made available to the public, subject to the same exemptions.

Sections 4(c) and 4(d) include two new reporting requirements with respect to this new streamlined consultation process. The first is a requirement that the Secretary report to Congress at least once every two years on the implementation of this provision. The second is a requirement that the General Accounting Office prepare two reports over the next five years for the relevant congressional committees on the cost of consultation under section 7 of the Act.

Several lawsuits have challenged the Forest Service for failure to consult on forest plans and have resulted in courts enjoining or threatening to enjoin site-specific activities that may affect newly listed species until consultation on the plans is completed. The lawsuits have focused on the issue of whether such plans are "actions" that may affect listed species, thus triggering the consultation requirement of section 7(a)(2). [1]

Section 4(e) confirms that land use plans under the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.) and land and resource management plans under the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1600 et seq.), as amended, are each an "action" for the purposes of section 7(a)(2) of the Act. This is not intended to address whether such plans should be defined as "actions" outside of the context of section 7 of the Act.

In the event that consultation must be reinitiated on a Bureau of Land Management land use plan or a national forest land and resource management plan in response to a new listing or designation of critical habitat, section 4(e) authorizes site-specific actions within the scope of the plan to proceed pending completion of consultation and issuance of a biological opinion for the plan, provided that consultation is completed on the individual action to the extent required under section 7(a)(2). Consultation on the plan must be reinitiated not later than 90 days after the new listing or critical habitat designation, and must be completed within one year.

To further streamline the consultation process, section 4(f) authorizes the Secretary to consolidate section 7 consultations or conferences for a number of actions within a particular geographic region. This provision applies to related or similar actions by one Federal agency or actions involving several Federal agencies which affect the same species. This provision is not intended to extend the statutory deadline for the completion of consultation on any individual action.

State fish and wildlife agencies have a great deal of expertise and biological data and information that should be better utilized in implementing this and other provisions of the Act. Toward that end, section 4(g) requires the Secretary, when consulting on a Federal action, to solicit and consider information from the State fish and wildlife agency in each affected State.

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[1] See *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994).

One criticism of the section 7 consultation process is that, in cases involving private citizens requiring Federal permits or approvals, the parties most affected by the consultation may not be given adequate access to the process. Although the current regulations provide persons who require formal approval or authorization from a Federal agency limited access and input to the consultation process, this section of the bill expands and codifies that requirement.

Specifically, section 4(h) requires the Secretary to provide any person who has sought authorization or funding from a Federal agency on which consultation is required an opportunity to submit information prior to the development of a draft biological opinion, to discuss the information with the Secretary, to receive certain kinds of information used by the Secretary in developing the draft and final biological opinion, and to receive a copy of the draft biological opinion and submit comments on it. Comments or other information that is exchanged under this provision between the Secretary and the person who has sought authorization or funding must also be made available to the public, subject to applicable exemptions in 5 U.S.C. 552(b).

Section 4(i) amends section 7(b)(4) of the Act to require the Secretary to specify those reasonable and prudent measures considered to be necessary or appropriate to both minimize and mitigate the impacts of any incidental taking. This amendment is consistent with the requirements under section 10(a)(2) for incidental take permits. In addition, this section of the bill clarifies that reasonable and prudent measures must be related both in nature and extent to the effect of the proposed activity that is the subject of the consultation.

Finally, section 4(j) authorizes the deferral of consultations under section 7(a)(2) to make emergency repairs of a natural gas pipeline, hazardous liquid pipeline, or electrical transmission facility. Consultation can only be deferred in response to a natural disaster or other emergency and if the repair is necessary to address an imminent threat to human lives or an imminent and significant threat to the environment. Consultation must be initiated as soon as practicable after the threat to human lives or the environment has abated. The terms "pipeline" and "facility" are intended to be interpreted to include closely related supporting facility, such as pumps and transmission lines, necessary to the operation of the pipeline or the electrical transmission facility.

Section 5. Conservation Plans

SUMMARY

The bill provides a broad range of incentives for property owners to preserve and enhance habitat for species.

Section 10(a)(2) is amended to expressly authorize property owners to develop conservation plans for multiple species, including species proposed for listing, candidate species and other unlisted species, that depend on the same habitat. For listed species, the plan must satisfy the criteria under current law. For proposed and candidate species, the bill requires that the actions taken by the applicant, if undertaken by all similarly situated persons, must be

likely to eliminate the need to list the species. For other non-listed species, the bill requires that the actions taken by the applicant, if undertaken by all similarly situated persons, must not be likely to contribute to a determination to list the species.

The bill establishes a new streamlined process to develop and approve conservation plans for activities that will have no more than a negligible effect, both cumulatively and individually, on a species. To minimize the cost to small landowners, the bill requires the Secretary, in cooperation with State fish and wildlife agencies, to develop a model permit application that can serve as the conservation plan.

The bill provides that no surprises assurances shall be included in all habitat conservation plans. Specifically, if additional mitigation measures are necessary for species covered by an HCP, the bill prohibits the Secretary from requiring the plan permittee to carry out those measures except under extraordinary circumstances. Even under extraordinary circumstances, the Secretary could not require the landowner to spend more money or to set aside additional land or adopt additional land use restrictions for conservation of species covered by the plan, unless agreed to by the permittee. No surprises assurances are also extended to unlisted species included in a conservation plan. The incidental take permit for unlisted species covered by a multiple species conservation plan takes effect at the time the species is listed.

The bill authorizes non-Federal persons, at their request, to enter into candidate conservation agreements with the Secretary for candidate and proposed species. Actions taken under the agreement, if undertaken by all similarly situated persons, must be likely to eliminate the need to list the species. Landowners who enter into candidate conservation agreements receive assurances essentially identical to those provided through the no surprises provision to a landowner who has entered into an HCP.

The bill specifically authorizes safe harbor agreements. Under this provision, the Secretary may enter into voluntary agreements with landowners to benefit conservation of listed species by assuring these landowners that their efforts to maintain, create, restore or improve habitat will not subject them to additional liability under the Act.

Finally, the bill authorizes the Secretary to enter into habitat reserve agreements with non-Federal persons to protect, manage or enhance suitable habitat for endangered or threatened species. The Secretary is authorized to make payments to a property owner to carry out the terms of the agreement.

DISCUSSION

One of the principle criticisms levied against the Act has been that there are few incentives for property owners to participate in the conservation of threatened and endangered species and their habitat. To the contrary, many have recognized that the punitive aspects of the Act, particularly the take prohibition of section 9, have in some instances had the unintended effect of encouraging property owners to destroy potential habitat for a species in order to avoid the possibility of a listed species ever occupying that habitat and triggering regulation under the Act. At the same time,

there is broad consensus that a substantial majority of threatened and endangered species will occupy or depend on private land during some portion of their life cycle. In order to achieve greater success in conserving and recovering species, therefore, it is critical that private property owners be encouraged to set aside habitat and undertake other conservation measures to benefit both listed and unlisted species.

Prior to the 1982 amendments, the take prohibition of section 9 was considered by many persons to effectively preclude a non-Federal property owner whose land was occupied by, or provided habitat for, endangered fish and wildlife species from carrying out economic or other activities on that property. The 1982 Amendments to the Act addressed this problem by creating a process through section 10 of the Act for property owners to obtain a permit authorizing the take of a species incidental to the carrying out of an otherwise legal activity (known as an "incidental take permit"). In return for obtaining the permit, and the authority to carry out activities on property occupied by a listed species, the property owner is required to submit an HCP that specifies, among other things, the impacts that are likely to result from the taking and the measures that the property owner will take to minimize and mitigate the taking of the species. Any taking of a species under an HCP must not appreciably reduce the likelihood of the survival and recovery of the species in the wild.

While the habitat conservation plan process was intended to provide a mechanism for non-Federal property owners to allow incidental take under the Act, in practice few HCPs were approved before 1995. In the first ten years, between 1982 and 1992, only 14 incidental take permits were issued under section 10.

Since 1995, the Administration has implemented several initiatives to make the HCP process work better for property owners. These initiatives include a streamlined process to review and approve HCPs, a no surprises policy to provide property owners that enter into HCPs with certainty that they will not be required to make additional land or financial commitments to benefit species covered by the plan, even if the needs of the species change, and the establishment of "safe harbor agreements" to encourage property owners to enhance habitat for species while insulating them from regulation under the Act if they subsequently return the property to its baseline condition before the enhancement. [2]

Under these new policies, the Services have now approved approximately 211 HCPs with no surprises assurances and approximately 200 more are under review. In addition, the Fish and Wildlife Service has entered into 21 safe harbor agreements with private property owners.

The bill builds upon the existing authorization for habitat conservation plans under section 10 of the Act and these recent initiatives, providing a broad range of incentives for private property owners to facilitate compliance with the law and to further voluntary measures to preserve habitat for species. The incentives include multiple species conservation plans, low effect activities per-

[2] See *Protecting America's Living Heritage: A Fair, Cooperative and Scientifically Sound Approach to Improving the Endangered Species Act*, March 6, 1995.

mits, candidate conservation agreements, safe harbor agreements, and habitat reserve agreements. In addition to confirming and expanding the statutory authority for these incentives, the bill authorizes funding to make these incentives work. A new Habitat Conservation Planning Loan Fund is created to assist property owners in the development of HCPs. In addition, the bill authorizes funding to implement safe harbor agreements, habitat reserve agreements, and a habitat conservation insurance program.

Multiple Species Conservation Plans

First, the bill clarifies and confirms authority for multiple species habitat conservation plans that may include, in addition to at least one listed species, proposed species, candidate species or other unlisted species. In extending the authority of HCPs to include unlisted species, the bill does not preempt State jurisdiction and control over those species. By considering the needs of several species at once, this approach will help address the needs of both species and private landowners.

The Act includes standards for listed species. Inclusion of standards for unlisted species covered by a conservation plan is intended to encourage property owners to include protections for unlisted species, but does not otherwise subject those species to the restrictions of the Act.

The standard for approval of the HCP with respect to listed species remains the same as under existing law. Among other things, any taking of a listed species must be incidental to the activity covered by the HCP, the property owner must minimize and mitigate the impact of the taking to the maximum extent practicable, adequate funding for the plan must be assured, and the taking cannot appreciably reduce the likelihood of the survival and recovery of the species in the wild.

The bill establishes separate standards for approval of an HCP with respect to unlisted species. Under the bill, the impact on an unlisted species must be incidental. The applicant must also agree to minimize and mitigate the impact to the unlisted species. Instead of considering whether the activities will reduce the likelihood of the survival and recovery of the species in the wild, however, the bill provides that (1) for proposed and candidate species, the actions of the applicant, if they were also undertaken by all similarly situated property owners within the range of the species, would be likely to eliminate the need to list the species for the duration of the agreement; and (2) for other unlisted species, the actions of the applicant, again if undertaken by all similarly situated property owners within the range of the species, would not be likely to contribute to a determination to list the species for the duration of the agreement.

For purposes of determining whether these standards are met by any single HCP, the assessment should be based on an assumption that all similarly situated property owners would undertake the conservation actions covered by the HCP. An individual applicant should not be not held solely responsible for eliminating the need to list a species or for eliminating all threats to unlisted species covered by a plan when that plan encompasses a portion of the habitat of the species. While the standard for proposed, candidate

and other unlisted species refers to the specific actions undertaken by all similarly situated persons, this is not intended to require that all similarly situated property owners must in fact agree to undertake the activities before an HCP for that applicant can be approved. Nor is it intended to impose any affirmative obligations on a property owner seeking approval of an HCP to survey actions being undertaken by others or to conduct biological surveys in areas outside the applicable planning area. By focusing the analysis on the impact of specific activities of similarly situated persons, the bill recognizes that an individual property owner may not have the ability to eliminate all of the threats facing a proposed or candidate species and therefore eliminate the need to list that species. Similarly, a single property owner in most cases cannot control the behavior of others to avoid contributing to the determination to list. For example, a single timber company could agree as part of an HCP to implement conservation measures that preserve habitat for bull trout, even if factors not within their control might nonetheless lead to the ultimate decision to proceed to list the species. In that case, the timber company should still be able to negotiate an HCP and receive an incidental take permit under section 10.

Encouraging private property owners to undertake conservation measures for a species before it is listed will provide benefits to the species not otherwise available through the prohibitions of section 9 or other provisions of the Act.

One of the greatest benefits of multiple species plans is that they can be built upon principles of ecosystem management and conserve habitat used by numerous species. This, in turn, will generally provide for greater protection for larger numbers of species than would otherwise be practicable under separate single-species conservation plans.

In certain instances, regional collaborative habitat-based planning processes have been undertaken to develop plans for multiple species. The inclusion of provisions on multiple species conservation plans in the bill is not intended to create any negative inference about the authority of the Secretary to approve plans relying on regional collaborative habitat-based conservation strategies, such as those already being employed in Southern California, and under consideration for use in the lower Colorado River and the California Bay Delta.

Low Effect Activities Permits

Much of the experience with HCPs to date has been with large, complex conservation plans that may cover thousands of acres of land and extend in duration for decades. While these HCPs have allowed property owners and counties with large tracts of land to carry out economic activities with incidental take authorization, many owners of smaller tracts of land have raised legitimate concerns that these HCPs are not a viable alternative for them. In a number of instances, owners of small tracts of land have been faced with the dilemma that they need incidental take permits to carry out activities on their land, for example the expansion of an existing home or the removal of a few trees, but because they lack the resources to hire biologists and develop HCPs, they may have trou-

ble obtaining the permits they need. The low effect activity permit was intended to address these situations.

The low effect HCP provides a streamlined mechanism for a property owner to obtain an incidental take permit. Under this provision, a property owner may receive an incidental take permit if the Secretary finds that the activity planned by the property owner will have no more than a negligible impact, both cumulatively and individually, on a listed species, any taking will be incidental, and the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. In addition, the permittee must take appropriate actions, if any, to offset the effects of the activity on the species. This low effect HCP does not require the property owner to develop a complex conservation plan, but instead allows the application for the incidental take permit to serve as the plan. In addition, the Secretary is directed to develop model application forms for low effect activities to further streamline the process.

This provision addresses concerns raised by smaller landowners. However, because the low effect activity permit itself is based on the impact of the activity rather than the size of the property owner, larger landowners may also be able to take advantage of this mechanism for routine activities that have only a negligible effect on a listed species.

No Surprises

One of the greatest concerns voiced by property owners faced with potential regulation under the Act has historically been the lack of regulatory certainty. Until recently, property owners feared that they would negotiate the terms of conservation plans and carry out their planned activities in accordance with the terms of those plans, only to be told later that additional mitigation measures would be required. In many cases, this uncertainty acted as a significant disincentive for private property owners to participate in conservation plans that benefit species.

The Administration addressed this problem in its no surprises policy, issued jointly by the Department of the Interior and the Department of Commerce. Under the policy, property owners who developed a habitat conservation plan for an endangered or threatened species would receive a commitment from the Fish and Wildlife Service or NMFS that no additional land, money, or additional restrictions on lands or other natural resources released for development use would be required from that property owner for that species for the duration of the plan, even if the needs of the species were to change.

The no surprises policy has proven to be an effective incentive to encourage property owners to develop habitat conservation plans for the benefit of both listed and unlisted species. The bill, therefore, confirms and clarifies authority for no surprises assurances for both listed and unlisted species covered by multiple species HCPs and low effect activity permits.

Under the bill, as is the case under the Administration's policy, a property owner who complies with the terms of an approved HCP is assured that activities on the property can proceed without the payment of additional money or the adoption of additional manage-

ment restrictions on the use of the property, unless the property owner agrees to those measures.

The bill recognizes that under certain circumstances, conditions may change in such a way as to warrant some modification to the conservation measures under an approved HCP. The Secretary, under the terms of the plan as negotiated by the parties, may only modify the conservation program of an HCP under extraordinary circumstances, but in no instance may the modifications require the payment of additional money or the adoption of additional use, development or management restrictions without the consent of the permittee.

Candidate Conservation Agreements

As is the case with multiple species plans that include one or more unlisted species, candidate conservation agreements provide non-Federal persons an opportunity to manage their property to benefit certain species that are in decline, but are not yet listed under the Act. In most cases, the earlier conservation efforts begin, the more likely it is that a species will respond positively. Encouraging property owners to undertake beneficial management measures before a species is listed can in some cases avoid the need to list a species under the Act.

Many property owners are willing to carry out management measures to benefit species that have not yet been listed, including candidate species. Under the current law, however, there is little incentive for most property owners to do so. Even if property owners are willing to limit their activities voluntarily for the benefit of an unlisted species, if the species is subsequently listed as threatened or endangered, all of the prohibitions and restrictions of the Act automatically apply and serve to impose additional restrictions on the property owners. The bill recognizes the need to provide an incentive for property owners to participate in the conservation of candidate species. That incentive is regulatory certainty analogous to that which is available under the no surprises provision of HCPs.

The bill creates a new section 10(a)(1)(C) that authorizes the Secretary to permit incidental taking pursuant to a candidate conservation agreement. In return for agreeing to undertake conservation actions for proposed species, candidate species, or species that are likely to become candidate species in the near future, property owners receive a legal assurance comparable to the no surprises provision for HCPs. This "assurances" protection, like the no surprises protection for unlisted species in HCPs, takes effect immediately. Candidate conservation agreements, therefore, provide property owners with regulatory certainty, while at the same time achieving an important benefit for unlisted species.

The criteria for approval of a candidate conservation agreement include a requirement that the Secretary find that the actions of the property owner, if undertaken by all similarly situated property owners, would produce a conservation benefit that would be likely to eliminate the need to list the species as threatened or endangered under the Act for the duration of the agreement. This is nearly identical to the standard that is applicable to proposed and candidate species included in HCPs. As is the case with HCPs, this

standard is not intended to require that all similarly situated property owners must also agree to enter into candidate conservation agreements.

Candidate conservation agreements can play an important role in reducing the need to list species under this Act. States and private property owners are encouraged to take advantage of this important tool. The Secretary may consider the conservation benefits derived from a candidate conservation agreement in making a listing determination. These benefits may include future benefits that are reasonably certain to occur under an agreement that is being implemented at the time of the determination.

Safe Harbor Agreements

Under the current law, some property owners are reluctant to manage their property in a way that might attract or benefit endangered or threatened species because they fear that the presence of a listed species will later preclude them from using their property as they otherwise might have. As a result of that fear, some property owners may even destroy potential habitat in order to avoid attracting listed species. In 1995, the Administration developed safe harbor agreements to address this problem and remove a disincentive in the current law for property owners to enhance or restore habitat. The bill clarifies and confirms statutory authorization for these agreements.

The safe harbor agreement provides legal assurance to property owners who are willing to undertake habitat improvements that they will not be penalized for these improvements by additional restrictions. Specifically, they will be able to return the property to baseline conditions, without being subject to additional take restrictions under section 9 of the Act. Net conservation benefits to the species that may result from these agreements may include a reduction in habitat fragmentation, an increase in population numbers, and opportunities to field test innovative management techniques. For property owners, safe harbor agreements again provide some degree of certainty that they will be able to use their property in the future consistent with the terms of the agreements.

Experience with the red-cockaded woodpecker in the Sandhills, North Carolina indicates that safe harbor agreements can be an important tool for property owners to benefit species. The red-cockaded woodpecker was listed in 1970. Notwithstanding the protections provided by the Act, however, the species continued to decline in large part because the Act does not include a mechanism to restore or enhance habitat. The Fish and Wildlife Service used the safe harbor program to create a incentive for landowners, who were willing to undertake management measures to improve habitat for the woodpecker. Under these agreements, property owners were given the assurances they needed that they would be able to harvest trees on their property at the end of the agreement, in return for which they agreed to rehabilitate suitable habitat by removing hardwood understory and, in some cases, repairing entrance holes to nest cavities. The Fish and Wildlife Service, in turn, will have an opportunity to come onto the property to move any new woodpeckers that have been attracted to the property as a result of the actions taken by the landowner. The Sandhills safe har-

bor agreements currently protect 46 woodpecker groups and have already helped to increase the population of the red cockaded woodpeckers in that area.

Habitat Reserve Agreements

The bill creates a new program to encourage small property owners to preserve and manage suitable habitat for species. Using the Conservation Reserve Program under the 1985 "Farm Bill" as a model, the bill authorizes the Secretary to make payments to a property owner to carry out the terms of a habitat reserve agreement, which can include among other things, short or long-term conservation easements, modifications in farming practices, or commitments to undertake specific conservation measures to benefit listed species. The bill authorizes $40,833,333 to implement habitat reserve agreements.

The purpose of these habitat reserve agreements is to encourage small property owners, particularly farmers and small woodlot owners, many of whom have suitable habitat for a listed species, to manage that habitat to benefit the species. Many of the property owners want to preserve or enhance habitat for species on their property, but they simply cannot afford to do so. In some cases, providing even small amounts of financial assistance can be enough of an incentive for property owners to go the extra step. For example, paying an individual farmer to set aside buffer strips may be the most effective way of enhancing important riparian habitat for listed species of fish and migratory birds. The farmer, in turn, would receive financial assistance for conserving that habitat.

As is the case with safe harbor agreements, participation in a habitat reserve agreement is entirely voluntary. The terms of these agreements, including the duration of the agreements, the activities or management measures covered, and the amount of payment, are to be negotiated by the Secretary and the property owner. A property owner can use payments made under this provision to supplement payments received under other similar programs. These agreements cannot be used, however, to provide financial assistance to property owners to undertake activities otherwise required by the Act, including, for example, conservation measures to avoid taking a listed species.

Scientific Permits

The bill amends section 10(d) of the Act to allow the Secretary to issue permits under section 10(a)(1)(A) for scientific purposes or to enhance the propagation or survival of a listed species for a single transaction, a series of transactions, or a number of activities over a specified period of time. This provision is intended to address a problem that has been raised by the scientific and conservation community that permitting delays under the Act have hindered efforts to conserve these species.

In the case of scientific facilities that depend upon the importation or exportation of listed or other rare and unique species for their research and conservation efforts, permit delays may be caused only, in part, by this Act. For example, the Peregrine Fund is currently required to obtain permits under both the Endangered Species Act and Convention on International Trade in Endangered

Species of Wild Fauna and Flora ("CITES"), as well as to comply with U.S. laws, such as the Bald and Golden Eagle Protection Act, the Migratory Bird Treaty Act, the Migratory Bird Conservation Act, and the Fish and Wildlife Conservation Act of 1992. While these laws protect species, the permitting process may have the unintended effect of discouraging conservation efforts of organizations like the Peregrine Fund.

The Secretary, through the Assistant Secretary for Fish, Wildlife and Parks, and the Director of the U.S. Fish and Wildlife Service have worked to expedite permit decisions for scientific organizations. This language is intended to provide the Secretary with additional statutory authority under the Act and to further encourage active participation by the scientific community in the conservation of threatened and endangered species. The bill attempts to address the problem faced by the Peregrine Fund and other similarly qualified institutions by expressly authorizing the Secretary to issue a single permit for more than one action to be carried out over a period of time.

Section 6. Enforcement

SUMMARY

Section 6 of the bill modifies the enforcement provisions of section 11 of the Act to confirm that, in an action against any person for an incidental take of a listed species, the Secretary, Attorney General, or citizen suit plaintiff must establish, using pertinent evidence based on scientifically valid principles, that the person's acts have caused or will cause the take of the species.

DISCUSSION

Section 11 of the Act establishes the general enforcement system. Most significantly, section 11(a) establishes civil penalties for violations of the Act, section 11(b) establishes criminal penalties for violations of the Act, section 11(e)(6), authorizes the Attorney General to seek to enjoin any person who is alleged to be violating the Act, and section 11(g) authorizes citizen suits.

An important objective of the bill is to ensure that decisions under the Act are based on sound science. Accordingly, section 6 of the bill amends section 11 of the Act with respect to actions alleging an incidental take of a protected species. Subsection (a) of the bill creates a new subsection providing that any such action by the Secretary or Attorney General for civil penalties, criminal penalties, or injunctive relief "must establish, using pertinent evidence based on scientifically valid principles," that the acts of such person have caused, or will cause, the take of a listed species. Subsection (b) of the bill amends the citizen suit provision of section 11(g) of the Act to establish an identical standard for a citizen suit alleging an incidental take. Nothing in this section is intended to alter the admissibility of scientific evidence under Rule 702 of the Federal Rules of Evidence. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court stated that a court should, in making its determination on the admissibility of scientific evidence, consider a number of factors, including "whether a theory or technique is scientific knowledge that . . . can be (and

has been) tested," whether "the theory or technique has been subjected to peer review and publication," "the known or potential rate of error," and the "general acceptance" of the scientific evidence in the scientific community. [3]

The prohibition against the take of listed wildlife under section 9 of the Act has been the subject of considerable litigation in the Federal courts, and, most recently, in the United States Supreme Court. [4] Under current law, an action that "harms" an endangered or threatened fish or wildlife species constitutes a prohibited take, unless covered by a statutory exemption or authorized by permit. Fish and Wildlife Service regulations define "harm" to include habitat modification that results in actual injury or death to an endangered species or threatened species. The committee agrees with the *Sweet Home* majority opinion's analysis: under current law, when bringing an enforcement action for civil or criminal penalties for an incidental take due to harm to a listed species, ordinary requirements of proximate cause and foreseeability apply. The committee does not intend to endorse the separate concurring opinion or the dissenting opinion in *Sweet Home*.

Section 7. Education and Technical Assistance

SUMMARY

The bill provides for the development and implementation of a private property owners education and technical assistance program by the Secretary, in cooperation with the States and other Federal agencies, such as the National Resources Conservation Service. The program is to inform the public about the Act, respond to requests for technical assistance from property owners interested in conserving species, and recognize exemplary efforts to conserve species on private lands.

DISCUSSION

The Endangered Species Act—its goals, requirements and implementation—has had a contentious history. Much of the frustration expressed by private property owners stems from a perceived inability to get accurate and timely information regarding the law, how it works, how it affects them, and how they can comply with it. This program seeks to defuse much of the contentiousness and to foster goodwill towards protection of endangered and threatened species by providing information and technical assistance to those persons who are subject to the Act's requirements, and by training Federal employees how to address concerns and avoid conflicts with property owners. Furthermore, exemplary stewardship of lands for species protection is to be recognized on a national basis.

Section 8. Authorization of Appropriations

SUMMARY

The bill would authorize appropriations for implementing the Act for six years, from 1998 through 2003. Specifically, the Fish and

[3] *Id.* at 593–595.
[4] See *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407 (1995).

Wildlife Service would be authorized the following amounts: $90,000,000 in 1998; $120,000,000 in 1999; $140,000,000 in 2000; $160,000,000 in 2001; $165,000,000 in 2002 and $165,000,000 in 2003. NMFS would be authorized the following amounts: $35,000,000 in 1998; $50,000,000 in 1999; $60,000,000 in 2000; $65,000,000 in 2001; $65,000,000 in 2002 and $70,000,000 in 2003. Of the funds made available for the Fish and Wildlife Service and NMFS to carry out section 5, not less than $32,000,000 and $13,000,000, respectively, shall be made available to implement recovery actions. Of the funds made available for the Fish and Wildlife Service and NMFS to list species, not less than 10 percent shall be made available for delisting of eligible species.

Authorized funding for the Secretary to carry out the Western Convention is increased to $1,000,000 annually. Additional authorizations include $10,000,000 per year for the Fish and Wildlife Service and $5,000,000 per year for NMFS for safe harbor agreements; and $30,000,000 per year for the Fish and Wildlife Service and $15,000,000 per year for NMFS for grants for recovery implementation. Lastly, a habitat conservation insurance program is established, funded from 5 percent of the appropriations for the incentive programs, up to $10,000,000.

DISCUSSION

The Services have testified that lack of funding has been a problem. Current appropriations for FY97 are $67,385,000 for the Fish and Wildlife Service, and $21,216,000 for NMFS. The authorizations in this bill essentially double the Services' current budgets in five years' time. While these increases are high, they represent the financial commitment that is vital to conserve and recover listed species. They further recognize that the additional substantive and procedural measures in this bill to strengthen existing law will require additional funding to ensure that the measures are carried out in a timely and effective manner. At the same time, the bill gradually phases in the additional authorized funding to avoid inefficient use of funds that might accompany a sudden, sharp jump in funding levels.

In addition to general authorized appropriations, various provisions ensure funding for conservation and recovery actions. First, certain sums of general appropriations are earmarked for recovery implementation. The bill includes significant new planning requirements, and deadlines for addressing the existing backlog in plan development. Additional funds necessary to meet these requirements should not come at the expense of ongoing actions to recover species. The earmark in the bill is considered a floor, and as both the backlog is reduced and appropriations increase, the Services should increase funding for recovery plan implementation accordingly. In addition, of the funds made available for listing, no less than 10 percent is to be used for processing petitions to delist species, provided that there are such petitions being considered by the Secretary. Although the Fish and Wildlife Service currently spends approximately 10 percent of its listing budget on delisting petitions, if funding is limited, consideration of those petitions is often delayed for consideration of listing petitions. If the Act is to be considered a success, however, delisting species that are recovered

must be done in a timely manner, and this funding will ensure that.

Second, funding is specifically authorized for several new incentive programs established in the bill. The need for such programs has been expressed frequently during the hearings by the Subcommittee on Drinking Water, Fisheries, and Wildlife and Committee on Environment and Public Works, and in numerous reports and studies. The prohibitions of the Act provide a bottom-line standard for species protection; it is in the interests of both the species and property owners for the property owner to undertake additional conservation actions in order to expedite the recovery and delisting of species. Programs to encourage these actions include grants for recovery plan implementation, grants for safe harbor agreements, and interest-free loans from a HCP loan fund.

Third, a habitat conservation insurance fund is established to hold funds in reserve in the event that they are needed to provide additional mitigation or protection for species covered under an HCP. Given that the no surprises assurances for HCPs and candidate conservation agreements prohibit the Secretary from requiring the permittee to set aside additional land or to spend more money to conserve species under an approved plan, this fund would provide up to $10,000,000 for Federal funding of such mitigation.

Section 9. Other Amendments

SUMMARY

Section 9(a)(1) of the bill defines "candidate species" to mean those species for which the Secretary has on file sufficient information to support a proposal to list the species, but for which listing is precluded. Section 9(a)(2) of the bill defines "in cooperation with the States" to mean a process under which the State agency is given an opportunity to participate in a meaningful and timely manner in the development of the standards, guidelines and regulations to implement the applicable provisions of the Act, and the Secretary carefully considers all substantive concerns raised by the State agency while retaining final decision making authority. Definitions for "rural area" and "territorial sea" are added by sections 9(a)(3) and 9(a)(5), respectively, and the definition for "State" is amended by section 9(a)(4) to update an obsolete reference to the Trust Territories of the Pacific Islands. Section 9(b)(2) of the bill includes a policy to encourage Federal agencies to coordinate and collaborate to further the conservation of listed species. Lastly, section 9(c) of the bill amends section 9 of the Act to authorize the Secretary to enter into agreements with non-Federal property owners that identify activities that would not result in a violation of the take prohibitions of paragraphs (1)(B), (1)(C) and (2)(B) of subsection (a).

DISCUSSION

The bill includes several new definitions to section 3 of the Act. "Candidate species" are those species for which listing as threatened or endangered is "warranted but precluded" pursuant to section 4(b)(3)(C)(iii). While the Services have had different definitions of candidate species in the past, this amendment will require both

Services to use the same definition, with the exception that NMFS's existing list would be grandfathered. In addition, the term "territorial sea," as used in this Act, is intended to correspond to the extent of the United States' assertion of territorial sea jurisdiction under international law.

The new Congressional policy added by section 9(b)(2) of the bill recognizes that effective implementation of the Act depends greatly on efforts by the Federal Government, and encourages coordination and collaboration among all the agencies in this regard. Federal agencies are encouraged to coordinate and collaborate to further the conservation of endangered and threatened species.

Section 9(c) of the bill authorizes the Secretary to enter into agreements with property owners identifying activities that would not result in a taking of the species under section 9. They are advisory documents intended to provide some assurance to persons that their actions would not constitute a violation of law. Although the Secretary must make a determination whether a taking would occur, these agreements do not authorize, fund, or carry out an action, so they would not be subject to section 7. Similarly, they are not major Federal actions that trigger the requirements of NEPA. At the same time, however, they cannot provide a guarantee that a take will not occur, and further do not preclude the commencement of an enforcement action brought by the Federal Government or a third party. This provision is consistent with the Clinton Administration's 1994 policy to identify, at the time of listing, actions that would constitute a taking, and is further consistent with the recent decision by the Ninth Circuit in *Marbled Murrelet* v. *Babbitt*, 83 F.3d 1068 (1996).

ADDITIONAL ISSUES

WATER RIGHTS

The respective relationship of the States and the Federal Government over the use or allocation of water has never been precisely fixed. Consequently, the boundaries between State and Federal responsibility have been the subject of much discussion and debate for many decades in a variety of contexts. Principles of comity and cooperative federalism are the hallmark of the State-Federal relationship over the use and allocation of water.[5] Because of the absence of a clearly defined line between Federal and State jurisdiction over water, arguments have been advanced that the Act limits the exercise of certain water rights that are accorded priority under State water law.

It was ultimately determined that a delineation of the boundaries between the States and the Federal Government over the use or allocation of water was not possible in the context of the reauthorization of the Act. A position of neutrality on this issue is reflected in this bill.

The bill contains a number of provisions that refer to water. None of these references, nor anything else in the bill, is intended

[5] See, *e.g.*, *California v. United States*, 438 U.S. 645 (1978); *Arizona v. California*, 373 U.S. 546 (1963); *First Iowa Hydro-Elec. Co-op v. Federal Power Commission*, 328 U.S. 152 (1946); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899).

to alter the respective authorities of the States and the Federal Government over the use or allocation of water.

Further, the bill leaves in place the declaration of congressional policy in section 2(c)(2) of the Endangered Species Act, which directs Federal agencies to "cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species." It also retains the requirement in section 6(a) that "the Secretary shall cooperate to the maximum extent practicable with the States . . . . includ[ing] consultation with the States concerned before acquiring any land or water, or interest therein . . . ."

NATIONAL ENVIRONMENTAL POLICY ACT

In implementing the National Environmental Policy Act ("NEPA") in the context of this Act, the Committee urges the Federal agencies to take full advantage of regulatory mechanisms intended to ensure that all required environmental analysis is integrated with the provisions of this Act in a way that eliminates delay, duplication and paperwork.

Low effect HCPs have already been "categorically excluded" in the agencies' implementing NEPA procedures. Thus, absent extraordinary circumstance, no documentation is required under NEPA for these actions. For other HCPs, analysis at the level of an environmental assessment would generally be required. Such analysis can be fully integrated into the HCP proposal itself and requires neither separate documentation nor separate public involvement processes.

Similarly, the Committee urges the agencies to fully integrate the requirements of NEPA into the recovery process. Many elements of the planning process are consistent with the regulations promulgated by the Council on Environmental Quality. Those regulations also provide direction to eliminate any duplication between NEPA and other environmental requirements. In particular, the Committee urges that full use of the tiering process be used to avoid duplicating analysis done at the planning stage for proposed actions in the context of implementation agreements.

HEARINGS

On September 23, 1997, the Committee on Environment and Public Works held a hearing on S. 1180, the Endangered Species Recovery Act of 1997. Testimony was given by: Jamie Rappaport Clark, Director, U.S. Fish and Wildlife Service, U.S. Department of the Interior; Terry Garcia, Acting Assistant Secretary for Oceans and Atmosphere, U.S. Department of Commerce; Marc Racicot, Governor, State of Montana, on behalf of the National Governors' Association; James A. McClure, on behalf the National Endangered Species Act Reform Coalition; Michael J. Bean, Director, Wildlife Program, Environmental Defense Fund; W. Henson Moore, President and CEO, American Forest and Paper Association; Mark Van Putten, President, National Wildlife Foundation; and Duane Shroufe, Director, Arizona Department of Game and Fish, on behalf of the International Association of State Fish and Wildlife Agencies. Written testimony was submitted by two coalitions: the

Evangelical Environmental Network, Coalition on the Environment and Jewish Life, and the National Council of Churches of Christ, USA; and the Coalition on the Environment and Jewish Life, The Jewish Council for Public Affairs, and the Union of American Hebrew Congregations. –

During 1995, the Subcommittee on Drinking Water, Fisheries, and Wildlife held six hearings on the reauthorization of the Endangered Species Act. On July 13, 1995, a hearing was held on Federal administration of the Act. Testimony was given by: Bruce Babbitt, Secretary of the Interior; Michael T. Clegg, Acting Dean, College of Natural and Agricultural Sciences, University of California at Riverside; Judy DeHose, Councilwoman, White Mountain Apache Tribe, Whiteriver, AZ; Gregg Easterbrook, Arlington, VA; Douglas K. Hall, Assistant Secretary for Oceans and Atmosphere, U.S. Department of Commerce; John Harja, Chairman, Western Governors' Association Staff Working Group on Reauthorization of the Endangered Species Act; William Robert Irvin, Deputy Vice President for Marine Wildlife and Fisheries Conservation, Center for Marine Conservation; Jane Lubchenco, Professor, Department of Zoology, Oregon State University, Corvallis, OR; Dick Knox, State Representative, Winifred, MT; David F. Mazour, Assistant General Manager, Central Nebraska Public Power and Irrigation District, Holdrege, NE; Stuart Pimm, Professor of Ecology, University of Tennessee, Knoxville, TN; Mark L. Plummer, Senior Fellow, Discovery Institute; David R. Schmidt, Commissioner, Linn County, OR; and Emily Swanson, State Representative, Bozeman, MT. –

On July 20, 1995, a hearing was held on national and international species conservation. Testimony was given by: Mollie Beattie, Director, U.S. Fish and Wildlife Service, U.S. Department of the Interior; Jeff Cilek, Program Director, the Peregrine Fund, Boise, ID; Allan Egbert, Executive Director, Florida Game and Freshwater Fish Commission, Tallahassee, FL; John Grandy, Vice President, Wildlife and Habitat Protection, The Humane Society; Gerhardus J. Hanekom, Minister of Environment and Tourism, Republic of Namibia; Ginette Hemley, Director of the International Wildlife Policy, World Wildlife Fund; Stephen Kasere, Deputy Director, CAMPFIRE Association, Zimbabwe; John Lambeth, Project Manager, Fairy Shrimp Study Group, Sacramento, CA; David Langhorst, Member, Board of Directors, Idaho Wildlife Federation and affiliate representative National Wildlife Federation, Ketchum, ID; Rolland Schmitten, Assistant Administrator, National Marine Fisheries Service, U.S. Department of Commerce; Michael Scott, Research Biologist, National Biological Service, Moscow, ID; Robert Taylor, Director of Wildlife Ecology, California Forestry Association, Sacramento, CA; and Robert J. Wiese, Assistant Director of Conservation and Science, American Zoo and Aquarium Association, Bethesda, MD. –

On August 3, 1995, the subject was innovation, habitat recovery, and private property rights. Testimony was given by: Michael J. Bean, Director, Wildlife Program, Environmental Defense Fund; Sherl L. Chapman, Executive Director, Idaho Water Users Association, Inc.; Charles E. Gillilard, Associate Research Economist, Real Estate Center, Texas A&M University; Murray Lloyd, Executive Committee Member, Black Bear Conservation Committee; Brian

Loew, Executive Director, Riverside County Habitat Conservation Agency; Carl Loop, President, Florida Farm Bureau Federation, on behalf of the American Farm Bureau Federation; Lindell L. Marsh, partner, Siemon, Larsen, and Marsh; George E. Meyer, Secretary, Wisconsin Department of Natural Resources; Elliott Parks, Vice Chairman, San Diego Association of Governments; Steven P. Quarles, Counsel to the Endangered Species Coordinating Council and American Forest and Paper Association; Randy Scott, Planning Manager, San Bernardino County, CA; R.J. Smith, Senior Environmental Scholar, Competitive Enterprise Institute; James M. Sweeney, Manager, Wildlife Issues, Champion International Corporation; and Michael White, Vice President and General Counsel, Hecla Mining Company. –

The Subcommittee also held three field hearings on the reauthorization of the Act. On June 1, 1995, a hearing was held in Roseburg, Oregon. Statements were made by host Senators from the State of Oregon, Bob Packwood and Mark O. Hatfield. Testimony was given by: Bob Allen, President, Oregon Cattleman's Association, Joseph, OR; Bill Arsenault, Small Woodlands Association, Elkton, OR; Mark Birkmeier, President, Oregon Cattleman's Association, Joseph, OR; John Crawford, President, Klamath Basin Water Users, Klamath Falls, OR; Bob Doppelt, Executive Director, Pacific Rivers Council, Eugene, OR; Paul Ehinger, Ehinger and Associates, Eugene, OR; Allyn Ford, Executive Vice President, Roseburg Forest Products, Roseburg, OR; Jim Hallstrom, General Manager, Zip-O-Log Mills, Inc., Eugene, OR; Liz Hamilton, Executive Director, Northwest Sport Fishing Industry Association, Oregon City, OR; Ann Hannes, Assistant State Forester, State of Oregon; Mark Hubbard, Conservation Director, Oregon Natural Resources Council, Eugene, OR; Jim Ince, President, UMPQUA Watershed, Inc., Rod Johnson, Oregon State Senator, Salem, OR; Penny Lind, Roseburg, OR; Ernie Niemi, Eco Northwest, Eugene, OR; Merilee Peay, Coordinator, Yellow Ribbon Coalition; Doug Roberston, Douglas County Commissioner, Roseburg, OR; Rudy Rosen, Director, Oregon Department of Fish and Wildlife, Salem, OR; Jerry Rust, Lane County Commissioner, Eugene, OR; Mark Simmons, Northwest Timberworkers Resource Council, Elgin, OR; Curt Smitch, Assistant Regional Director, U.S. Fish and Wildlife Service, Olympia, WA; Glen Spain, Regional Director, Pacific Coast Federation of Fishermen's Associations, Eugene, OR; Nelson Wallulatum, Columbia River Intertribal Fish Commission, Bend, OR; Mike Wiedeman, Oregon Lands Coalition, Enterprise, OR. –

On June 3, 1995, a hearing was held in Lewiston, Idaho, where statements were made by Larry Craig, U.S. Senator from the State of Idaho, Michael D. Crapo, U.S. Representative from the State of Idaho, and Slade Gorton, U.S. Senator from the State of Washington. Testimony was given by: Bob Adams, Chamber of Commerce, Priest Lake, ID; Lenore Barrett, Idaho State Representative; Ray Brady, Grangeville, ID; Phil Church, President, Pulp and Paper Resource Workers Council Union Local, Lewiston, ID; Sherry Colyer, Local Citizens' Alliance, Bruneau, ID; Chuck Cuddy, Idaho State Representative; Bill DeVeny, Idaho Farm Bureau, Riggins, ID; Ron Gillett, Outfitter and Motel Owner, Stanley, ID; Michael A. Guerry, Idaho Wool Growers, Buhl, ID; Jim Hawkins, Custer County

Agent, Challis, ID; Ted Hoffman, Idaho Cattlemen's Association, Mountain Home, ID; Rick Johnson, Executive Director, Idaho Conservation League; Darrell Kerby, City Council President, Bonners Ferry, ID; Falma Moye, Blue Ribbon Coalition, Challis, ID; Laird Noh, Chairman, Resources and Environment Committee, Idaho State Senate; James Peek, University of Idaho Wildlife Biology Professor, Moscow, ID; Sam Penney, Chairman, Nez Perce Tribe, Lapwai, ID; Charles Ray, Idaho Rivers United, McCall, ID; Mitch Sanchotena, President, Idaho Salmon and Steelhead, Unlimited, Eagle, ID; and Dave Wilson, Idaho Homebuilders Association, Ketchum, ID. –

On August 16, 1995, a hearing was held in Casper, Wyoming. Statements were made by Barbara Cubin, U.S. Representative from the State of Wyoming, and Alan Simpson, U.S. Senator from the State of Wyoming. Testimony was given by: Larry J. Bourret, Executive Vice President, Wyoming Farm Bureau Federation, Laramie, WY; Dru Bower, National Coalition for Public Land and Natural Resources, Cheyenne, WY; Tom Christiansen, President, Wyoming Chapter, The Wildlife Society, Green River, WY; Dan Chu, Executive Director, Wyoming Wildlife Federation; George Enneking, Idaho County Commissioner, Grangeville, ID; needle; Howard Ewart, Casper, WY; the Reverend Harold R. Fray, Jr., Casper, WY; Jim Geringer, Governor, State of Wyoming; Nicky Groenewold, Newcastle, WY; Kirk Koepsel, Northern Plains Office, Sierra Club, Sheridan, WY; Marion Klaus, Sheridan, WY; Frank Philp, Wyoming State Representative, Shoshoni, WY: Michael K. Purcell, Director, Wyoming Water Development Office, Cheynne, WY; Terry Schramm, Walton Ranch Company, Jackson, WY; Herman Strand, Rancher, Casper, WY; John Talbott, Director, Wyoming Game and Fish Department, Cheyenne, WY; Leah Talbott, Albany County Commissioner, Laramie, WY; Richard Tass, Johnson County Commissioner, Buffalo, WY; Steve Thomas, Wyoming Field Representative, Greater Yellowstone Coalition, Cody, WY; Tom Throop, Executive Director, Wyoming Outdoor Council, Lander, WY; Michael Tokonczyk, Logger, Hulett, WY; Jack Turnell, Pitchfork Ranch, Meeteetse, WY; John Winter, Two Ocean Outfitters, Moran, WY; and Connie Wilbert, Chair, Northern Plains Regional Conservation Committee, Sierra Club, Laramie, WY.

ROLLCALL VOTES

Section 7(b) of rule XXVI of the Standing Rules of the Senate and the rules of the Committee on Environment and Public Works require that any rollcall votes taken during the Committee's consideration of a bill be noted in the report. The Committee met to consider S. 1180 on September 30, 1997, and it was on that day ordered reported, as amended, by a rollcall vote of 15 ayes to 3 nays, with 10 members present. Those voting in favor were Senators Chafee, Warner, Smith, Kempthorne, Inhofe, Thomas, Bond, Hutchinson, Allard, Session, Baucus, Moynihan, Reid, Graham, and Wyden. Those voting against were Senators Lautenberg, Lieberman and Boxer.

REGULATORY IMPACT

In compliance with section 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact of the bill. Generally, S.1180 is projected to increase the regulatory burden of the Fish and Wildlife Service and National Marine Fisheries Service, but to relieve the regulatory burden on non-Federal persons subject to the law's requirements. The letter from the Congressional Budget Office printed below provides further details of the regulatory impact if the bill were enacted. This bill would not affect the personal privacy of individuals.

The bill would specifically mandate that the Secretary promulgate modifications to regulations codified at 50 C.F.R. Part 402 regarding changes to section 7 not later than one year after date of enactment. In addition, guidelines must be promulgated regarding implementation of section 10, and authorization of State agencies to develop recovery plans. These provisions are not expected to have any regulatory impact.

The regulatory burden is expected to be relieved with respect to threatened species, given the requirement in the bill that regulations to protect such species be published specifically for each species. Currently, the Fish and Wildlife Service prohibits the taking of threatened species as a generic requirement upon listing; this is the maximum protection afforded a species under the law. By requiring protective regulations to be specific for each threatened species, the bill increases the flexibility that the Fish and Wildlife Service will use in developing regulations affecting private persons, which in turn relieves the regulatory burden on such persons.

Section 3 of the bill contains several provisions that reduce the regulatory burden on private persons. Specifically, consultation otherwise required under section 7 of the Act is waived for certain actions that are authorized or funded by a Federal agency. In addition, Federal agencies would be required, upon request by a person proposing to undertake certain actions for the conservation of a listed species, to identify all requirements under the Act for that species that would be relevant to that action. This would enable the person to know, at that time, the regulatory burden for that action.

Similarly, the bill's provisions with respect to the role of an applicant for Federal funding or authorization for an action subject to section 7 relieves the regulatory burden on the applicant. In allowing the applicant an opportunity to receive information from, and submit comments to, the Secretary, the bill reduces the regulatory burden upon the applicant by ensuring that the applicant receives relevant information in making his or her decision regarding the action.

Section 5 of the bill amends the provisions regarding permits required to conduct activities that would result in a taking of a species that is otherwise prohibited under section 9 of the Act. Subsection (a) relieves the regulatory burden on non-Federal entities seeking to conduct such activities on the high seas, by allowing them to obtain permits for those activities, whereas under existing law, such permits could not be issued. Subsection (c) relieves the

regulatory burden on non-Federal persons by amending the permit process generally. First, a person may apply for a permit to take multiple species, including species not yet listed. For non-listed species, the permit would take effect without further action upon listing. Second, an expedited, streamlined process is established for persons engaging in low-effect activities. These activities would require less mitigation than other activities, and the Secretary must minimize the costs to the applicant of the permitting process. Third and most important, conservation plans prepared in conjunction with the permit must include a no surprises provision that ensures that a permittee will not be required to undertake additional mitigation measures if the measures would require payment of additional money or adoption of additional restrictions on land, water or water-related rights.

MANDATES ASSESSMENT

In compliance with the Unfunded Mandates Reform Act 1995 (Pub. L. 104–4), the committee makes the following evaluation of the Federal mandates contained in the bill. The bill imposes no Federal intergovernmental unfunded mandates on State, local or tribal governments. All of the bill's directives are imposed upon Federal agencies. In addition, the bill does not impose any Federal private sector mandates. The bill will have no discernible effect on the competitive balance between the public and private sectors.

COST OF LEGISLATION

Section 403 of the Congressional Budget and Impoundment Control Act requires that a statement of the cost of the reported bill, prepared by the Congressional Budget Office, be included in the report. That statement follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 31, 1997.

Hon. JOHN H. CHAFEE,
Chairman, Committee on Environment and Public Works,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the cost estimate for S. 1180, the Endangered Species Recovery Act of 1997.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Deborah Reis (for federal costs), who can be reached at 226–3220, Marjorie Miller (for the state and local impact), who can be reached at 225–3220, and Patrice Gordon (for the impact on the private sector), who can be reached at 226–2940.

Sincerely,

JAMES BLUM, FOR JUNE O'NEILL.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

Summary

S. 1180 would amend the Endangered Species Act (ESA) and authorize funding for programs carried out under the statute for each of fiscal years 1998 through 2003. A major focus of the bill is cooperation among all parties affected by the ESA, including Federal agencies (both those with primary responsibility for carrying out the Act and those that manage Federal lands or whose activities may affect protected species), State and local governments, and private property owners. The bill would enhance this cooperation by (I) providing incentives to encourage owners of nonfederal land to participate in species recovery plans, habitat conservation projects and other activities, (2) giving State and local governments a greater voice in Federal regulatory decisions, (3) streamlining the procedures by which Federal agencies consult with one another before finding or carrying out activities that may affect protected species, and (4) authorizing appropriations to provide financial and technical assistance for these purposes.

The bill would authorize specific appropriations for Federal agencies responsible for administering the ESA (the Interior, Commerce, and Agriculture Departments) and for financial assistance to State and local governments or other nonfederal entities. In aggregate, the bill would authorize specific annual appropriations of between $241 million (for fiscal year 1998) and $341 million (for 2003), for a total of about $1.9 billion over the 6-year period. In addition, section 8 of the bill would authorize the appropriation of whatever amounts arc necessary to provide financial and technical assistance to States to carry out conservation activities under the Act. (This is in addition to any grants authorized by the ESA from the Cooperative Endangered Species Conservation Fund.)

S. 1180 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act of 1995 (UMRA). Enactment of this legislation would not affect Federal receipts or direct spending; therefore, pay-as-you-go procedures would not apply.

ESTIMATED COST TO THE FEDERAL GOVERNMENT

Although authorizations for funding under the ESA expired in 1992, the Congress has continued to appropriate finds each year for programs carried out under the act. For fiscal year 1997, the Congress earmarked about $92 million for these programs. Full-year funding for fiscal year 1998 has not yet been enacted.

Assuming appropriation of the entire amounts specified for each fiscal year, the 1998 funding for ESA activities would total $241 million-an increase of $150 million over the 1997 level CBO estimates that additional indefinite authorizations (for State assistance) and implicit authorizations (for new requirements on Federal land-management agencies) would increase the authorized funding levels by an additional $10 million annually. The estimated budgetary effects of implementing S. 1180 are summarized in the following table.

By Fiscal Year, in Millions of Dollars

	1997	1998	1999	2000	2001	2002
ESA Spending Under Current Law						
Estimated Budget Authority [1] [2]	92	0	0	0	0	0
Estimated Outlays	84	2	2	0	0	0
Proposed Changes						
Authorization level	0	251	296	326	346	351
Estimated Outlays	0	138	278	295	328	350
ESA Spending Under S. 1180						
Specific Authorization Level [1]	92	241	286	316	336	341
Estimated Authorization Level	0	10	10	10	10	10
Total Estimated Authorizations	92	251	296	326	346	351
Estimated Outlays	84	140	280	295	328	350

[1] The 1997 level is the amount actually appropriated for programs authorized by this bill.
[2] Appropriations for ESA have not yet been enacted for fiscal year 1998. Senate-passed S. 1002, making appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and related agencies, would provide $32 million, and H.R. 2107, making appropriations for the Department of the Interior and related agencies (as cleared by the Congress), would provide and additional $80 million.

The costs of S. 1180 fall within budget function 300 (natural resources and environment). In addition to the amounts shown in the table, the bill would authorize appropriations of an additional $351 million for fiscal year 2003 (the same amount as shown above for 2002).

BASIS OF ESTIMATE

For purposes of this estimate, CBO has assumed that S. 1180 will be enacted during fiscal year 1998 and that the entire amounts specifically authorized or estimated to be necessary to carry out the bill will be appropriated for each fiscal year.

Authorizations of Appropriations

Section 8 of S. 1180 would authorize the appropriation of operating fiends to the three Federal agencies responsible for carrying out the ESA. In total, the funding levels specified in S. 1180 for each year are more than double the appropriations for recent years. The higher authorization levels, particularly those for operations of the Interior Department (DOI), reflect both newly authorized financial assistance programs as well as the greater costs of carrying out the ESA under the new requirements imposed by the bill These provisions would require expedited development of recovery plans for the backlog of previously listed species as well as new procedural requirements such as additional public notices and hearings and greater consultation with affected States.

Specified Authorizations. For fiscal years 1998 through 2003, the authorization levels shown in the table include specified amounts of:

- between $90 million and $165 million a year for DOI, which has primary responsibility for implementing and enforcing the Act through the U.S. Fish and Wildlife Service (USFWS),
- between $35 million and $70 million annually for the Department of Commerce, which administers ESA programs for marine species through the National Marine Fisheries Service (NMFS),

- $4 million annually for the Department of Agriculture for animal and plant inspections, and
- $1 million annually for DOI to implement CITES—the Convention on International Trade in Endangered Species and $0.6 million a year to carry out the functions of the Endangered Species Committee.

Also included are specified authorizations of between $116 million (for 1998) and $106 million (for 2003) for grants and other assistance to nonfederal entities, including:

- about $41 million annually for the habitat reserve program, under which the USFWS and NMFS would execute contracts or easements with owners of nonfederal property to preserve, manage, or improve suitable habitat for protected species,
- $15 million annually for safe harbor agreements, under which the two agencies would provide funds to nonfederal entities that create, restore, or otherwise maintain natural habitat in exchange for permits to take protected species,
- $45 million annually for grants to private landowners who agree to implement species recovery plans, and
- $10 million a year for 1998 through 2000 and $5 million a year for 2001 and 2002 for the subsidy cost of providing no-interest loans to State and local governments to finance the development of habitat conservation plans. We estimate that such appropriations, less about 10 percent for administrative costs, would support an annual loan level of about $40 million for 1998 through 2000 and about $20 million for 2001 and 2002.

Estimated Authorizations. The table also includes estimated authorizations of $10 million annually, about one-half of which is for the financial assistance to States, as authorized by section 8. CBO estimates that the balance would be needed for each of the next 5 years by Federal agencies such as the Forest Service and the Bureau of Land Management to conduct inventories of protected species required by section 4 We estimated the costs of these indefinite authorizations on the basis of information provided by the Departments of Commerce and the Interior, other affected Federal agencies, and various State agencies.

Outlays from Spending Subject to Appropriation

Outlays for administrative activities have been estimated on the basis of historical spending patterns for ongoing ESA programs. Spending rates for most new programs, such as those involving grants to property owners, reflect the time that would be required for the needed regulatory procedures to be completed. For example, payments to property owners who wish to implement recovery plans and direct loans to State or local governments for developing such plans could lag behind species listing and plan development by several years. Moreover, set-asides over the next 5 years for the habitat conservation insurance program would delay some of the outlays for a number of financial assistance programs because 5 percent of such amounts would be reserved for conservation efforts after 2002.

PAY-AS-YOU-GO CONSIDERATIONS

None.

ESTIMATED IMPACT ON STATE, LOCAL, AND TRIBAL GOVERNMENTS

S. 1180 contains no intergovernmental mandates as defined in UMRA. The bill would affect State and local governments in a number of ways, but would not require any additional spending by these governments. State and local governments would benefit from many provisions in the bill that would enhance their role in implementing the ESA. Any additional State or local costs would result hum voluntary decisions to accept greater responsibilities under the act. The bill would authorize appropriations to cover the cost of these activities.

A number of provisions in S. 1180 would offer States the opportunity to accept increased responsibilities under the ESA. For example, the bill would authorize Federal agencies to enter into State conservation agreements, under which one or more States would undertake activities to benefit candidate species. Under such agreements, States would be required to ensure adequate funding and enforcement to implement the agreement. S. 1180 would also offer States an increased role in developing and implementing recovery plans for endangered or threatened species. The bill would establish a number of other vehicles under which Federal agencies could enter into agreements with State or local agencies or private parties to carry out various activities under the ESA.

State and local governments could receive additional Federal fluids to support their activities under the ESA as a result of provisions in S. 1180. The bill would authorize appropriations totaling $40 million over the 1998–2002 period for the habitat Conservation Planning Jean Program. CBO estimates that, if appropriated, these finds would subsidize no-interest loans to State and local governments totaling $160 million over that period It also would authorize appropriations for State conservation activities not covered by existing appropriations. CBO estimates that States would use about $5 million per year to support these activities

ESTIMATED IMPACT ON THE PRIVATE SECTOR

S. 1180 contains no private-sector mandates as defined in UMRA. The bill would affect landowners in a number of ways, but would not mandate any additional spending. The bill would allow landowners who require Federal permits or approvals under GSA to have a greater role in implementing recovery plans for listed species. Further, the bill would authorize Federal grants (subject to available appropriations) for agreements with private landowners to implement conservation measures identified by approved recovery plans.

S. 1180 also includes several other incentives to encourage private landowners to participate in various ESA programs. Any additional costs incurred by the private sector would result from voluntary decisions to accept greater responsibilities under the act. The bill would authorize appropriations to cover some of the costs of these voluntary activities.

Under current law, landowners whose lands provide habitat to endangered species are prohibited from "taking" an endangered species. "Taking" is defined broadly and includes killing, harming, or harassing protected species and, in certain instances, modifying

their habitat. According to the General Accounting Office, in 1993 over 90 percent of species protected under ESA had a major share of their habitat on nonfederal land. Nonfederal lands containing habitat for protected species may be owned by private or government landowners. Over 600 species have some or all of their habitat on laid owned by private landowners and more than 500 listed species have their habitat on land owned by State and local governments. Under the ESA, a landowner whose land is occupied by threatened or endangered species may obtain "incidental take" permits in return for carrying out habitat conservation plans (HCPs) on their property. These permits, allow landowners to carry out economic activities on their property that may incidentally harm listed species.

The bill would codify several existing policies that encourage the involvement of private landowners in the conservation of protected species including the "no surprises" policy and safe harbor agreements. The "no surprises" policy protects parties participating in habitat conservation plans from being required to take additional steps to protect species in the future. Safe harbor agreements protect landowners who take voluntary steps to create or restore habitats from future liability under ESA. The bill would authorize grants to assist landowners in carrying out safe harbor agreements.

S. 1180 also would provide incentive programs to encourage small landowners to participate in conservation programs under the Endangered Species Act, including low-effect habitat conservation plans and habitat reserve agreements. The bill would require the Secretary of the Interior in cooperation with State fish and wildlife agencies, to develop a model permit application that could serve as the conservation plan and thereby provide a less expensive, streamlined process for small landowners and others whose activities will have a minor effect on listed species ("low-effect plans"). The habitat reserve program would be similar to the existing conservation reserve program and would provide a direct monetary incentive to conserve habitat, particularly for farmers.

ESTIMATE PREPARED BY: Federal costs: Deborah Reis; Impact on State, Local, and Tribal Governments: Marjorie Miller; Impact on the Private Sector: Patrice Gordon.

ESTIMATE APPROVED BY: Robert A. Sunshine, Deputy Director for Budget Analysis.

ADDITIONAL VIEWS OF SENATOR SESSIONS

I am concerned that the committee report accompanying S. 1180 does not thoroughly and adequately address several concerns that I have about this legislation. I want to take this opportunity to raise several issues that this bill fails to address, but which are, in my opinion, fundamental to successful reform. Although I did vote to allow this bill to proceed out of the Environment and Public Works Committee, I did so in the hopes that the issues I am raising will receive fair consideration should this legislation reach the Senate floor.

My chief concern with this legislation is its failure to address private property rights compensation. I believe that this issue, which is of critical importance to both large and small property owners throughout this country, should have been addressed within the legislation that is so often the source of "regulatory takings". Several amendments regarding this issue were introduced during committee markup, however they were subsequently withdrawn. We owe those upon whom we impose the often onerous burdens of Endangered Secies At provisions the benefit of a public discussion of these issues.

I am also concerned about several changes that this bill makes to current law. For example, under current law, the Secretary is required to designate critical habitat concurrently with a listing decision. This At would change this requirement, allowing the designation of critical habitat to be deferred until promulgation of a recovery plan. Under current law, if critical habitat is designated concurrently, individuals who are to be directly affected are put on notice of the At and are provided an early opportunity to make their opinions known through the public comment process. Delaying the designation of critical habitat for a significant period of time deprives individuals adversely affected of early opportunities to present their views. Similarly, although I am aware that this bill provides that critical habitat designations should consider economic impacts, I am concerned that this bill's change to the critical habitat designation process will result in greater restrictions on commercial and recreational activities.

I also believe that this bill's provisions regarding the citizen suit process do not go far enough to address a problem that exists under current law. Under current law, any person may file suit against any other person for alleged violations of the Endangered Species Act. As a result, many special interest groups use this as a weapon, threatening lawsuits in an attempt to deter conduct that may be perfectly legal in nature. I believe that it is more appropriate for the Federal Government to be responsible for law enforcement. The citizen suit process should be changed so that prospective plaintiffs may only bring suit against the Federal Government when the Federal Government has failed to enforce the law.

This bill also makes several more changes to current law, that I will address briefly here, but which I think merit more focused attention. For instance, current law makes no mention of the need to protect "candidate species", but this bill, for the first time, extends these species protection by providing for their "voluntary" protection in habitat conservation plans. As a result, species that

have never been given the scrutiny of the public notice and comment period will be linked to the receipt of incidental take permits. I am also concerned that the provisions regarding Federal agency "implementation agreements" could result in large unfunded mandates being placed on these agencies as they try to comply with the terms of these agreements, which would impose measurable costs on the taxpaying public. A further concern of mine regards the ability of the Secretary to list distinct population segments , where the remainder of a species population is not endangered or threatened. I believe that this issue could best be resolved at the State or local level, and that some consideration should be given to this matter. I also remain concerned that the language within the bill that provides for a "prohibition on assistance for required activities" could be misinterpreted to cancel out the positive, incentive based features found within the bill. Furthermore, I continue to remain concerned that, in many instances, this bill arguably provides the Secretary with too much discretionary power as he is potentially allowed veto authority over the findings of States in the development of recovery plans, or because the Secretary often is allowed to proceed even in the absence of recovery teams. Finally, during committee hearings I raised an issue concerning what I believe to be an attempt by the Environmental Protection Agency and the United States Fish and Wildlife Service to create an Edangered Secies Act consultation requirement for States that have received delegated water permitting programs under the Clean Water Act. I believe that a very strong case can be made that this represents an unjustified expansion of the statutory authority of these two agencies, and that it is an issue that merits further consideration.

These are some of the reservations I continue to have regarding this legislation, and are all issues that I would like to see more public discussion about. Therefore, even though I voted affirmatively to move this bill out of committee, I will continue to study its overall merit.

ADDITIONAL VIEWS OF SENATOR INHOFE

I am filing these additional views on the emergency access provision adopted by the committee during deliberations on S. 1180. I am concerned that the report language prepared by the committee explaining the provision does not provide adequate guidance to the Executive Branch regarding how the provision is to be interpreted and applied and may, in fact, require further textual changes to assure that the Endangered Species Act provides the necessary flexibility to address public health and safety emergencies.

I offered, and the committee adopted, the emergency access provision to address a very real and practical problem that occurs on the ground with administration of the Endangered Species Act. Today, owners and operators of natural gas pipelines, hazardous liquid pipelines, and electricity transmission facilities are caught between the need to repair damaged facilities promptly and the requirements of the Endangered Species Act to obtain Federal agency approval for their repair activities prior to undertaking the repairs if the repair activity might affect an endangered species. The emergency access provision is intended to resolve this conflict in a way that facilitates these repairs while assuring that endangered species are appropriately protected.

While I appreciate the efforts of the committee to help resolve the conflicts, I believe that the provision, without better guidance, may be inadequate to do the job. First, it does not clearly assure that all essential facilities benefit from the flexibility. Second, it only addresses facilities that are on public land, thereby leading to possible interpretations that damaged facilities located on non-federal lands—which are the majority—cannot be repaired without approval first. In most situations, immediate repair is essential for the protection of public health and safety. Finally, without better clarification by the Committee in report language, the Executive Branch may take an unduly narrow interpretation of what is meant by a threat to human lives or a imminent and significant threat to the environment, thereby delaying essential repairs.

ADDITIONAL VIEWS OF SENATORS LIEBERMAN, MOYNIHAN, GRAHAM, LAUTENBERG, WYDEN, AND BOXER

Sensible stewardship of the Earth requires active measures to protect biodiversity. Congress passed the Endangered Species Act in 1973 in recognition that species of animals and plants "are of esthetic, ecological, educational, historical, recreational, and scientific value to the nation and its people."

Diversity of species is the foundation of healthy ecosystems on which we depend for a variety of economic needs. Forty percent of all medicinal drugs in use today are synthesized from natural compounds. Of the world's estimated 80,000 edible plants, we depend on only 20 species to provide 90 percent of our food supply. Wild relatives of these common crops provide an essential genetic reservoir from which new and more pest- or disease-resistant strains are developed. Loss of species as a result of human activity should serve as a clarion call that our actions ultimately may endanger our own existence.

S. 1180 contains some provisions that may improve conservation of imperiled species. For example, the bill provides for greater public participation in the development of conservation plans for species. In addition, several measures offer financial incentives to private landowners who agree to manage their lands in a manner that will benefit species. Nevertheless, we are concerned that S. 1180 may undermine the ESA's "safety net" for endangered and threatened species if these important conservation programs are not funded adequately.

A number of provisions in the bill impose new procedural requirements on the Fish and Wildlife Service and the National Marine Fisheries Service for listing species under the ESA and for planning species' recovery efforts. Again, adequate funding is critical if the Services are to complete the complex analyses specified in this legislation on time. With tight deadlines for recovery plan completion—only five years to complete plans for over 400 plus species—limited resources for on-the-ground conservation efforts could be consumed if the law's new requirements overwhelm the staffs of the Services.

While we are pleased that the committee has increased the level of authorizations for the ESA, we have seen in other legislation, such as the 1996 Federal Agricultural Improvement and Reform Act (the Farm Bill), that appropriations for conservation incentive programs often are not sufficient. In other cases, such as the Land and Water Conservation Fund, the level of funds available for conservation has never been appropriated. If the new incentive programs under the ESA are to work, a secure source of funding is needed.

As the bill moves through the process, we plan to work with the committee leadership to find a way to address the funding issue so that the promises in this bill can be fulfilled. Funding for ESA programs is minimal; we spend more every month on military bands than we spend annually to protect our earth's species. This funding needs to be addressed adequately.

MINORITY VIEWS OF SENATOR BOXER

Our nation's long-term economic prosperity is closely linked to our ability to preserve our natural heritage. Biodiversity is key to human health and quality of life. We all know that extinction of species is a natural event over time as species evolve and give rise to other species. But today, in the United States and all over the world, human activity in the form of habitat destruction, pollution and the introduction of invasive non-native species, is resulting in the rapid depletion of our biological assets and natural resources and extinction rates that are estimated to be up to 10,000 times the natural or background level rate. We need a strong and functional Endangered Species Act now more than ever before.

The goal of the Endangered Species Act (ESA) is to achieve the recovery of endangered and threatened species. Once species recover, they are delisted resulting in the lifting of any restrictions that had been placed on the uses of the land when the species were under Federal protection. The key question is how we achieve recovery and at the same time have an effective law that minimizes social and economic impacts on local communities.

In order to achieve the conservation and the recovery of species, we need to strengthen the protection of habitat, help prevent species from becoming threatened in the first place, and provide more incentives and regulatory certainty for private landowners. While S. 1180 contains provisions that would improve current law in some respects, the bill in its current form does not achieve these goals.

Adequate funding is critical to the success of the ESA. Unfortunately, Congress has consistently underfunded the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) ESA activities. This in great part is responsible for current Federal agency delays which have in turn led to frustration and controversy about how the Act is being implemented.

Under the provisions of S. 1180, lack of funding will take an even greater toll on species protection and could seriously undermine species recovery, because S. 1180 imposes tight deadlines and many new procedural requirements in the species listing process, the recovery planning process, and other areas. While some of these provisions improve current law, they are clearly new burdens that could result in further agency delays and a reprioritization of Federal tasks and responsibilities that could significantly weaken ESA on-the-ground implementation.

For example, Federal action agencies (i.e. agencies approving Federal permits or carrying out activities such as the Bureau of Reclamation, or the Corps of Engineers) make the initial determination that a project is not likely to adversely affect a species. Under current law, permit approval cannot take place until the FWS or NMFS reviews the determination (this is commonly referred to as a Section 7 consultation). Under the provisions of S. 1180, the FWS and NMFS have 60 days to review the initial determination. If they do not meet the deadline, the initial determination will prevail. Unless FWS and NMFS are sufficiently funded, this new 60-day requirement will lead to the approval of projects

by default without adequate review by Interior and Commerce—to the detriment of protected species.

Another example is the new recovery plan requirements in S. 1180. I support many of the new requirements regarding public participation, and peer review, but they make the preparation of recovery plans significantly more complex and more expensive. Agreement among the diverse members of a recovery planning team within strict deadlines will probably require professional facilitators, especially in cases where a plan potentially affects many very different stakeholders (miners, loggers, real estate developers etc.) across state boundaries.

This ESA reauthorization effort can only succeed on the ground if we find a way to secure a reliable source of funding for ESA implementation and we provide adequate funds.

My other major concern is the lack of a clear species protection standard requirement for Habitat Conservation Plans (HCPs) and its potential effect on achieving the goal of species recovery. A strong and clear HCP standard is vitally important given the fact that many listed species occur almost exclusively on private land.

HCPs are plans agreed to by private landowners in exchange for a permit from the FWS and NMFS to "take" an endangered or threatened species. A permit to "take" a listed species allows a landowner to harass, harm, pursue, hunt, shoot, wound, trap, capture or collect a listed species. "Harm" includes the modification of habitat if it interferes with the nesting or reproduction of a listed species. The permit is granted in exchange for a commitment by a landowner to implement actions. including the minimization and mitigation of the impact of the permitted "take" activities and an agreement to conduct activities to conserve listed species habitat.

Implementation of the ESA has changed significantly since 1990 with the dramatic increase in the number and extent of HCPs being approved by the Secretaries of the Interior and Commerce. Because many recovery plans are not being implemented, HCPs are currently the primary means through which any habitat protection is being provided to listed species on nonfederal lands.

The standard in current law and in S. 1180 which applies to an HCP's "take" of a listed species is that the "take" cannot "appreciably reduce the likelihood of the survival and recovery of the species in the wild"

There has been much debate on how to interpret the "survival and recovery" standard with some arguing that it means mere short-term survival of species and others arguing that "survival and recovery" means that HCPs must not undermine and must promote long-term species recovery.

The net effect of this debate is that the standard is not being implemented consistently to mean recovery. This is of great concern given the FWS and NMFS race to approve HCPs.

Some California HCPs have clearly adopted the promotion of recovery as the species protection standard. For example, the FWS has been very clear about its intent to ensure that the San Diego Multiple Species Conservation Plan (MSCP) promotes the recovery of species. In a March 18, 1997 statement before the San Diego City Council, FWS Regional Director Mike Spear said:

"The (San Diego) MSCP will provide for the recovery of covered species within the proposed reserve—whether they be species with narrow or wide ranges. For species with restricted ranges (i.e. many of the plants), the MSCP will be the vehicle for recovery. For other species dependent on vegetation communities conserved in the plan (ie. Gnatcatchers in coastal sage scrub), the MSCP will likewise support recovery. Finally, for wide-ranging species (ie. the golden eagle), the MSCP will contribute to their overall conservation through the protection of large, interconnected blocks of habitat versus the small patches of habitat that result from project-by-project mitigation."

However, there are examples in other parts of the country where the FWS is under heavy criticism from the scientific community for only pursuing the mere "survival" of listed species. For example, HCPs being approved for the red-cockaded woodpecker allow landowners to destroy all of the habitat on their property in exchange for building artificial woodpecker cavities on public lands. This is viewed by independent scientists as being inconsistent with species recovery in the wild.

We must take this opportunity to clarify that the HCP "survival and recovery" standard means that HCPs must go beyond merely ensuring the survival of a species. The "take" approved by the FWS or the NMFS must only occur in exchange for HCP mitigation, minimization and other measures that will help the recovery of the species.

If we fail to clarify this now, we will have many HCPs that work against the goal of the ESA because they in effect undermine the recovery of species. As a result, efforts to recover species (via the implementation of recovery plans) will be more difficult, complex and expensive and in some cases may be rendered impossible.

Furthermore, I believe that the review by FWS and NMFS of Federal actions should be held to the same clear recovery standard. We can achieve this by ensuring that Section 7 consultations (where Federal agencies review how an action which they authorize, fund or carry out, may affect listed species) require recovery as a standard.

S. 1180 strengthens current law by requiring a recovery standard for candidate and other unlisted species so it is hard to fathom why this would not be applied to listed species.

If we combine S. 1180's lack of assured funding and it's weak HCP species protection standard with S. 1180's provisions on "no surprises", the web that holds a functional ESA together looks even more precarious.

Under "no surprises", a landowner participating in an HCP will not have to bear the cost of any additional actions that might be needed to ensure species survival and recovery even when new scientific and biological data shows that additional measures are needed to achieve the goals of the HCP.

"No surprises" is particularly troubling given the fact that HCP agreements cover not only listed species for which we would have sound scientific data, but also candidate and other unlisted species for which we may have little scientific information.

If the HCP standard is species recovery, and we have assured funding to cover the cost of additional mitigation measures, then

"no surprises" is a reasonable concession as long as the performance of the HCP is closely monitored for both compliance (with the HCP agreement) and biological performance (to ensure that the HCP is achieving the goal of recovery).

The other key factor is to ensure that there is a legal mechanism (not included in S. 1180) to re-open an HCP if its biological performance is low or new science indicates that additional measures are needed. The "no surprises" policy gives landowners certainty and we should ensure that it also means no surprises for species protection.

In S. 1180 HCPs have neither a clear recovery standard nor assured funding. "No surprises" could therefore spell disaster in cases where an HCP hurts species recovery, is nonfunctional, or is rendered inadequate given new science.

We are at a crossroads in the challenge to conserve our Nation's biological diversity for our generation and future generations.

I hope that we will be able to improve S. 1180 when it reaches the Senate floor on at least the two issues I have addressed—assured funding and a clear species recovery standard for HCPs and Section 7 consultations . We will otherwise continue to have a reauthorization bill that does not have the support of a single environmental organization.

CHANGES IN EXISTING LAW

In compliance with section 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill as reported are shown as follows: existing law as proposed to be omitted is enclosed between **[**bold brackets**]**; new matter proposed to be added to existing law is printed in *italic*; and existing law in which no change is proposed is shown in roman.

ENDANGERED SPECIES ACT OF 1973 [1]

[As Amended Through P.L. 104–333, Nov. 12, 1996]

AN ACT To provide for the conservation of endangered and threatened species of fish, wildlife, and plants, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Endangered Species Act of 1973".

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FINDINGS, PURPOSES, AND POLICY

SEC. 2. (a) FINDINGS.—The Congress finds and declares that—

(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;

[1] As amended by P.L. 94–325, June 30, 1976; P.L. 94–359, July 12, 1976; P.L. 95–212, December 19, 1977; P.L. 95–632, November 10, 1978; P.L. 96–159, December 28, 1979; 97–304, October 13, 1982; P.L. 98–327, June 25, 1984; and P.L. 100–478, October 7, 1988; P.L. 100–653, November 14, 1988; and P.L. 100–707, November 23, 1988.

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

(3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, *commercial,* and scientific value to the Nation and its people;

(4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to—

(A) migratory bird treaties with Canada and Mexico;

(B) the Migratory and Endangered Bird Treaty with Japan;

(C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;

(D) the International Convention for the Northwest Atlantic Fisheries;

(E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;

(F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and

(G) other international agreements; and

(5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.

(b) PURPOSES.—The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

(c) POLICY.—(1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.

(2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.

(3) AGENCY COORDINATION.—Federal agencies are encouraged to coordinate and collaborate to further the conservation of endangered species and threatened species.

(16 U.S.C. 1531)

DEFINITIONS

SEC. 3. [For the purposes of this Act—] *DEFINITIONS AND GENERAL PROVISIONS*

(a) DEFINITIONS.—In this Act:

(1) The term "alternative courses of action" means all alternatives and thus is not limited to original project objectives and agency jurisdiction.

(2) CANDIDATE SPECIES.—The term "candidate species" means a species for which the Secretary has on file sufficient information on biological vulnerability and threats to support a proposal to list the species as an endangered species or a threatened species, but for which listing is precluded because of pending proposals to list species that are of a higher priority. This paragraph shall not apply to any species defined as a candidate species by the Secretary of Commerce prior to the date of enactment of this sentence.

[(2)**]** *(3)* The term "commercial activity" means all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling: *Provided, however,* That it does not include exhibitions of commodities by museums or similar cultural or historical organizations.

[(3)**]** *(4)* The terms "conserve," "conserving," and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

[(4)**]** *(5)* The term "Convention" means the Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed on March 3, 1973, and the appendices thereto.

[(5)**]** *(6)*(A) The term "critical habitat" for a threatened or endangered species means—

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.

(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

(C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

[(6)**]** *(7)* The term "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 deter-

mined by the Secretary to constitute a pest whose protection under the provisions of this Act would present an overwhelming and overriding risk to man.

[(7)] *(8)* The term "Federal agency" means any department, agency, or instrumentality of the United States.

[(8)] *(9)* The term "fish or wildlife" means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

[(9)] *(10)* The term "foreign commerce" includes, among other things, any transaction—

(A) between persons within one foreign country;

(B) between persons in two or more foreign countries;

(C) between a person within the United States and a person in a foreign country; or

(D) between persons within the United States, where the fish and wildlife in question are moving in any country or countries outside the United States.

[(10)] *(11)* The term "import" means to land on, bring into, or introduce into or attempt to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States.

(12) IN COOPERATION WITH THE STATES.—The term "in cooperation with the States" means a process under which—

(A) the State agency in each of the affected States, or the representative of the State agency, is given an opportunity to participate in a meaningful and timely manner in the development of the standards, guidelines, and regulations to implement the applicable provisions of this Act; and

(B) the Secretary carefully considers all substantive concerns raised by the State agency, or the representative of the State agency, and, to the maximum extent practicable consistent with this Act, incorporates their suggestions and recommendations, while retaining final decision making authority.

[(12)] *(13)* The term "permit or license applicant" means, when used with respect to an action of a Federal agency for which exemption is sought under section 7, any person whose application to such agency for a permit or license has been denied primarily because of the application of section 7(a) to such agency action.

[(13)] *(14)* The term "person" means an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.

[(14)] *(15)* The term "plant" means any member of the plant kingdom, including seeds, roots and other parts thereof.

[(15)] (16) REASONABLE AND PRUDENT ALTERNATIVES.—The term "reasonable and prudent alternatives" means alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the legal authority and jurisdiction of the Federal agency, that are economically and technologically feasible, and that the Secretary believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

(17) RURAL AREA.—The term "rural area" means a county or unincorporated area that has no city or town that has a population of more than 10,000 inhabitants.

[(15)] *(18)* The term "Secretary" means, except as otherwise herein provided, the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970; except that with respect to the enforcement of the provisions of this Act and the Convention which pertain to the importation or exportation of terrestrial plants, the term also means the Secretary of Agriculture.

[(16)] *(19)* The term "species" includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species or vertebrate fish or wildlife which interbreeds when mature.

[(17)] *(20)* The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and the [Trust Territory of the Pacific Islands] *Commonwealth of the Northern Mariana Island.*

[(18)] *(21)* The term "State agency" means any State agency, department, board, commission, or other governmental entity which is responsible for the management and conservation of fish, plant, or wildlife resources within a State.

[(19)] *(22)* The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

(23) TERRITORIAL SEA.—The term "territorial sea" means the 12-nautical-mile maritime zone set forth in Presidential Proclamation 5928, dated December 27, 1988.

[(20)] *(24)* The term "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.

[(21)] *(25)* The term "United States," when used in a geographical context, includes all States.

(16 U.S.C. 1532)

(b) GENERAL PROVISIONS.—

(1) BEST SCIENTIFIC AND COMMERCIAL DATA AVAILABLE.—Where this Act requires the Secretary to use the best scientific and commercial data available, the Secretary, when evaluating comparable data, shall give greater weight to scientific or commercial data that is empirical or has been field-tested or peer-reviewed.

(2) FREEDOM OF INFORMATION ACT EXEMPTION.—The Secretary, and the head of any other Federal agency on the recommendation of the Secretary, may withhold or limit the availability of data requested to be released pursuant to section 552 of title 5, United States Code, if the data describe or identify the location of an endangered species, a threatened species, or a species that has been proposed to be listed as threatened or endangered, and release of the data would be likely to result in an increased taking of the species, except that data shall not be withheld pursuant to this paragraph in response to a request regarding the presence of those species on private land by the owner of that land.

DETERMINATION OF ENDANGERED SPECIES AND THREATENED SPECIES

SEC. 4. (a) GENERAL.—(1) The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) *introduced species, competition,* disease or predation;

(D) the inadequacy of existing *Federal, State, and local government and international* regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

(2) With respect to any species over which program responsibilities have been vested in the Secretary of Commerce pursuant to Reorganization Plan Numbered 4 of 1970—

(A) in any case in which the Secretary of Commerce determines that such species should—

(i) be listed as an endangered species or a threatened species, or

(ii) be changed in status from a threatened species to an endangered species, he shall so inform the Secretary of the Interior, who shall list such species in accordance with this section;

(B) in any case in which the Secretary of Commerce determines that such species should—

(i) be removed from any list published pursuant to subsection (c) of this section, or

(ii) be changed in status from an endangered species to a threatened species, he shall recommend such action to the Secretary of the Interior, and the Secretary of the Interior, if he concurs in the recommendation, shall implement such action; and

(C) the Secretary of the Interior may not list or remove from any list any such species, and may not change the status of any such species which are listed, without a prior favorable determination made pursuant to this section by the Secretary of Commerce.

[(3) The Secretary, by regulation promulgated in accordance with subsection (b) and to the maximum extent prudent and determinable—

[(A) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

[(B) may, from time-to-time thereafter as appropriate, revise such designation.]

(b) BASIS FOR DETERMINATIONS.—(1)(A) The Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

(B) In carrying out this section, the Secretary shall give consideration to species which have been—

(i) designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement; or

(ii) identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish or wildlife or plants.

(2) [The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweight the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.]

(2) DELISTING.—The Secretary shall, in accordance with section 5 and on a determination that the goals of the recovery plan for a species have been met, initiate the procedures for determining, in accordance with subsection (a)(1), whether to remove the species from a list published under subsection (c).

[(3)(A) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of title 5, United States Code, to add a species to, or to remove a species from, either of the lists published under subsection (c), the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If such a petition is found to present such information, the Secretary shall promptly commence a review of the status of the species concerned. The Secretary shall promptly publish each finding made under this subparagraph in the Federal Register.

[(B) Within 12 months after receiving a petition that is found under subparagraph (A) to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings:

[(i) The petitioned action is not warranted, in which case the Secretary shall promptly publish such finding in the Federal Register.

[(ii) The petitioned action is warranted in which case the Secretary shall promptly publish in the Federal Register a general notice and the complete text of a proposed regulation to implement such action in accordance with paragraph (5).

[(iii) The petitioned action is warranted but that—

[(I) the immediate proposal and timely promulgation of a final regulation implementing the petitioned action in accordance with paragraphs (5) and (6) is precluded by pending proposals to determine whether any species is an endangered species or a threatened species, and

[(II) expeditious progress is being made to add qualified species to either of the lists published under subsection (c) and to remove from such lists species for which the protections of the Act are no longer necessary.

in which case the Secretary shall promptly publish such finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based.

[(C)(i) A petition with respect to which a finding is made under subparagraph (B)(iii) shall be treated as a petition that is resubmitted to the Secretary under subparagraph (A) on the date of such finding and that presents substantial scientific or commercial information that the petitioned action may be warranted.

[(ii) Any negative finding described in subparagraph (A) and any finding described in subparagraph (B)(i) or (iii) shall be subject to judicial review.

[(iii) The Secretary shall implement a system to monitor effectively the status of all species with respect to which a finding is made under subparagraph (B)(iii) and shall make prompt use of the authority under paragraph 7 to prevent a significant risk to the well being of any such species.

[(D)(i) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of title 5, United States Code, to revise a critical habitat designation, the Secretary shall make a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted. The Secretary shall promptly publish such finding in the Federal Register.

[(ii) Within 12 months after receiving a petition that is found under clause (i) to present substantial information indicating that the requested revision may be warranted, the Secretary shall determine how he intends to proceed with the requested revision, and shall promptly publish notice of such intention in the Federal Register.]

(3) RESPONSE TO PETITIONS.—

(A) ACTION MAY BE WARRANTED.—

(i) IN GENERAL.—To the maximum extent practicable, not later than 90 days after receiving the petition of an interested person under section 553(e) of title 5, United States Code, to—

(I) add a species to;

(II) remove a species from; or

(III) change the status of a species from a previous determination with respect to;

either of the lists published under subsection (c), the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If a petition is found to present such information, the Secretary shall promptly commence a review of the status of the species concerned. The Secretary shall promptly publish each finding made under this subparagraph in the Federal Register.

(ii) MINIMUM DOCUMENTATION.—A finding that the petition presents the information described in clause (i) shall not be made unless the petition provides—

(I) documentation that the fish, wildlife, or plant that is the subject of the petition is a species;

(II) a description of the available data on the historical and current range and distribution of the species;

(III) an appraisal of the available data on the status and trends of populations of the species;

(IV) an appraisal of the available data on the threats to the species; and

(V) an identification of the information contained or referred to in the petition that has been peer-reviewed or field-tested.

(iii) NOTIFICATION TO THE STATES.—

(I) PETITIONED ACTIONS.—If the petition is found to present the information described in clause (i), the Secretary shall notify and provide a copy of the petition to the State agency in each State in which the species is believed to occur and solicit the assessment of the agency, to be submitted to the Secretary not later than 90 days after the notification, as to whether the petitioned action is warranted.

(II) OTHER ACTIONS.—If the Secretary has not received a petition for a species and the Secretary is considering proposing to list such species as either threatened or endangered under subsection (a), the Secretary shall notify the State agency in each State in which the species is believed to occur and solicit the assessment of the agency, to be submitted to the Secretary not later than 90 days after the notification, as to whether the listing would be in accordance with subsection (a).

(III) CONSIDERATION OF STATE ASSESSMENTS.—Prior to publication of a determination that a petitioned action is warranted or the issuance of a proposed regulation, the Secretary shall consider any

State assessments submitted within the comment period established by subclause (I) or (II).

(B) PETITION TO CHANGE STATUS OR DELIST.—A petition may be submitted to the Secretary under subparagraph (A) to change the status of a species or to remove a species from either of the lists published under subsection (c) in accordance with subsection (a)(1), if—

(i) the current listing is no longer appropriate because of a change in the factors identified under subsection (a)(1); or

(ii) with respect to a petition to remove a species from either of the lists—

(I) new data or a reinterpretation of prior data indicate that removal is appropriate;

(II) the species is extinct; or

(III) the recovery goals established for the species in a recovery plan approved under section 5(h) have been achieved.

(C) DETERMINATION.—Not later than one year after receiving a petition that is found under subparagraph (A)(i) to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings:

(i) NOT WARRANTED.—The petitioned action is not warranted, in which case the Secretary shall promptly publish the finding in the Federal Register.

(ii) WARRANTED.—The petitioned action is warranted, in which case the Secretary shall promptly publish in the Federal Register a general notice and the complete text of a proposed regulation to implement the action in accordance with paragraph (5).

(iii) WARRANTED BUT PRECLUDED.—The petitioned action is warranted, but—

(I) the immediate proposal and timely promulgation of a final regulation implementing the petitioned action in accordance with paragraphs (5) and (6) is precluded by pending proposals to determine whether any species is an endangered species or a threatened species; and

(II) expeditious progress is being made to add qualified species to either of the lists published under subsection (c) and to remove from the lists species for which the protections of this Act are no longer necessary;

in which case the Secretary shall promptly publish the finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based.

(D) SUBSEQUENT DETERMINATION.—A petition with respect to which a finding is made under subparagraph (C)(iii) shall be treated as a petition that is resubmitted to the Secretary under subparagraph (A) on the date of the finding and that presents substantial scientific or commercial information that the petitioned action may be warranted.

(E) JUDICIAL REVIEW.—Any negative finding described in subparagraph (A)(i) and any finding described in clause (i) or (iii) of subparagraph (C) shall be subject to judicial review.

(F) MONITORING AND EMERGENCY LISTING.—The Secretary shall implement a system to monitor effectively the status of each species with respect to which a finding is made under subparagraph (C)(iii) and shall make prompt use of the authority under paragraph (7) to prevent a significant risk to the well-being of the species.

(4) Except as provided in paragraphs (5) and (6) of this subsection, the provisions of section 553 of title 5, United States Code (relating to rulemaking procedures), shall apply to any regulation promulgated to carry out the purposes of this Act.

[(5) With respect to any regulation**]** *(5) PROPOSED REGULATIONS AND REVIEW.—With respect to any regulation* proposed by the Secretary to implement **[**a determination, designation, or revision**]** *a determination or change in status* referred to in subsection **[**(a)(1) or (3),**]** *(a)(1),* the Secretary shall—

(A) not less than 90 days before the effective date of the regulation—

(i) publish a general notice and the complete text of the proposed regulation **[**in the Federal Register,**]** *in the Federal Register as provided by paragraph (8),* and

(ii) give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, and to each county or equivalent jurisdiction in which the species is believed to occur, and invite the comment of such agency, and each such jurisdiction, thereon;

(B) insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to each foreign nation in which the species is believed to occur or whose citizens harvest the species on the high seas, and invite the comment of such nation thereon;

(C) give notice of the proposed regulation to such professional scientific organizations as he deems appropriate;

(D) publish a summary of the proposed regulation in a newspaper of general circulation in each area of the United States in which the species is believed to occur; and

[(E) promptly hold one public hearing on the proposed regulation if any person files a request for such a hearing within 45 days after the date of publication of general notice.**]**

(E) at the request of any person not later than 45 days after the date of publication of general notice, promptly hold at least one public hearing in each State that would be affected by the proposed regulation (including at least one hearing in an affected rural area, if any) except that the Secretary shall not be required to hold more than five hearings under this subparagraph.

[(6)(A) Within the one-year period beginning on the date on which general notice is published in accordance with paragraph (5)(A)(i) regarding a proposed regulation, the Secretary shall publish in the Federal Register—

(i) if a determination as to whether a species is an endangered species or a threatened species, or a revision of critical habitat, is involved, either—

(I) a final regulation to implement such determination,

(II) a final regulation to implement such revision or a finding that such revision should not be made,

(III) notice that such one-year period is being extended under subparagraph (B)(i), or

(IV) notice that the proposed regulation is being withdrawn under subparagraph (B)(ii), together with the finding on which such withdrawal is based; or

(ii) subject to subparagraph (C), if a designation of critical habitat is involved, either—

(I) a final regulation to implement such designation, or

(II) notice that such one-year period is being extended under such subparagraph.]

(6) FINAL REGULATIONS.—

(A) IN GENERAL.—Within the one-year period beginning on the date on which general notice is published in accordance with paragraph (5)(A)(i) regarding a proposed regulation, the Secretary shall publish in the Federal Register—

(i) a final regulation to implement the determination;

(ii) notice that the one-year period is being extended under subparagraph (B)(i); or

(iii) notice that the proposed regulation is being withdrawn under subparagraph (B)(ii), together with the finding on which the withdrawal is based.

(B)(i) If the Secretary finds with respect to a proposed regulation referred to in subparagraph (A)(i) that there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination [or revision] concerned, the Secretary may extend the one-year period specified in subparagraph (A) for not more than six months for purposes of soliciting additional data.

(ii) If a proposed regulation referred to in subparagraph (A)(i) is not promulgated as a final regulation within such one-year period (or longer period if extension under clause (i) applies) because the Secretary finds that there is not sufficient evidence to justify the action proposed by the regulation, the Secretary shall immediately withdraw the regulation. The finding on which a withdrawal is based shall be subject to judicial review. The Secretary may not propose a regulation that has previously been withdrawn under this clause unless he determines that sufficient new information is available to warrant such proposal.

(iii) If the one-year period specified in subparagraph (A) is extended under clause (i) with respect to a proposed regulation, then before the close of such extended period the Secretary shall publish in the Federal Register either a final regulation to implement the determination [or revision concerned, a finding that the revision should not be made,] or a notice of withdrawal of the regulation under clause (ii), together with the finding on which the withdrawal is based.

(C) A final regulation designating critical habitat of an endangered species or a threatened species shall be published concur-

rently with the final regulation implementing the determination that such species is endangered or threatened, unless the Secretary deems that—

(i) it is essential to the conservation of such species that the regulation implementing such determination be promptly published; or

(ii) critical habitat of such species is not then determinable, in which case the Secretary, with respect to the proposed regulation to designate such habitat, may extend the one-year period specified in subparagraph (A) by not more than one additional year, but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.

(7) Neither paragraph (4), (5), or (6) of this subsection nor section 553 of title 5, United States Code, shall apply to any regulation issued by the Secretary in regard to any emergency posing a significant risk to the well-being of any species of fish and wildlife or plants, but only if—

(A) at the time of publication of the regulation in the Federal Register the Secretary publishes therein detailed reasons why such regulation is necessary; and

(B) in the case such regulation applies to resident species of fish or wildlife, or plants, the Secretary gives actual notice of such regulation to the State agency in each State in which such species is believed to occur.

Such regulation shall, at the discretion of the Secretary, take effect immediately upon the publication of the regulation in the Federal Register. Any regulation promulgated under the authority of this paragraph shall cease to have force and effect at the close of the 240-day period following the date of publication unless, during such 240-day period, the rulemaking procedures which would apply to such regulation without regard to this paragraph are complied with. If at any time after issuing an emergency regulation the Secretary determines, on the basis of the best appropriate data available to him, that substantial evidence does not exist to warrant such regulation, he shall withdraw it.

(8) The publication in the Federal Register of any proposed or final regulation which is necessary or appropriate to carry out the purposes of this Act shall include **[**a summary by the Secretary of the data**]** *a summary by the Secretary of the best scientific and commercial data available* on which such regulation **[**is based and shall**]** *is based, shall* show the relationship of such data to such **[**regulation; and if such regulation designates or revises critical habitat, such summary shall, to the maximum extent practicable, also include a brief description and evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify such habitat, or may be affected by such designation.**]** *regulation, and shall provide, to the degree that it is relevant and available, information regarding the status of the affected species, including current population, population trends, current habitat, food sources, predators, breeding habits, captive breeding efforts, governmental and nongovernmental conservation efforts, or other pertinent information.*

(9) ADDITIONAL DATA.—

(A) IN GENERAL.—The Secretary shall identify and publish in the Federal Register with the notice of a proposed regulation pursuant to paragraph (5)(A)(i) a description of additional scientific and commercial data that would assist in the preparation of a recovery plan and—

(i) invite any person to submit the data to the Secretary; and

(ii) describe the steps that the Secretary plans to take for acquiring additional data.

(B) RECOVERY PLANNING.—Data identified and obtained under subparagraph (A) shall be considered by the recovery team and the Secretary in the preparation of the recovery plan in accordance with section 5.

(C) NO DELAY AUTHORIZED.—Nothing in this paragraph waives or extends any deadline for publishing a final rule to implement a determination (except for the extension provided in paragraph (6)(B)(i)) or any deadline under section 5.

(10) INDEPENDENT SCIENTIFIC REVIEW.—

(A) IN GENERAL.—In the case of a regulation proposed by the Secretary to implement a determination under subsection (a)(1) that any species is an endangered species or a threatened species or that any species currently listed as an endangered species or a threatened species should be removed from any list published pursuant to subsection (c), the Secretary shall provide for independent scientific peer review by—

(i) selecting independent referees pursuant to subparagraph (B); and

(ii) requesting the referees to conduct the review, considering all relevant information, and make a recommendation to the Secretary in accordance with this paragraph not later than 150 days after the general notice is published pursuant to paragraph (5)(A)(i).

(B) SELECTION OF REFEREES.—For each independent scientific review to be conducted pursuant to subparagraph (A), the Secretary shall select three independent referees from a list provided by the National Academy of Sciences, who—

(i) through publication of peer-reviewed scientific literature or other means, have demonstrated scientific expertise on the species or a similar species or other scientific expertise relevant to the decision of the Secretary under subsection (a);

(ii) do not have, or represent any person with, a conflict of interest with respect to the determination that is the subject of the review; and

(iii) are not participants in a petition to list, change the status of, or remove the species under paragraph (3)(A)(i), the assessment of a State for the species under paragraph (3)(A)(iii), or the proposed or final determination of the Secretary.

(C) FINAL DETERMINATION.—The Secretary shall take one of the actions under paragraph (6)(A) not later than one year after the date of publication of the general notice of the proposed determination. If the referees have made a recommendation in ac-

cordance with subparagraph (A)(ii), the Secretary shall evaluate and consider the information that results from the independent scientific review and include in the final determination—

(i) a summary of the results of the independent scientific review; and

(ii) in a case in which the recommendation of a majority of the referees who conducted the independent scientific review under subparagraph (A) is not followed, an explanation as to why the recommendation was not followed.

(D) FEDERAL ADVISORY COMMITTEE ACT.—The selection and activities of referees selected pursuant to this Act shall not be subject to the Federal Advisory Committee Act (5 U.S.C. App.).

(c) LISTS.—(1) The Secretary of the Interior shall publish in the Federal Register a list of all species determined by him or the Secretary of Commerce to be endangered species and a list of all species determined by him or the Secretary of Commerce to be threatened species. Each list shall refer to the species contained therein by scientific and common name or names, if any, specify with respect to such species over what portion of its range it is endangered or threatened, and specify any *designated* critical habitat within such range. The Secretary shall from time to time revise each list published under the authority of this subsection to reflect recent **[**determinations, designations, and revisions**]** *determinations* made in accordance with subsections (a) and (b).

(2) The Secretary shall—

(A) conduct, at least once every five years, a review of all species included in a list which is published pursuant to paragraph (1) and which is in effect at the time of such review; and

(B) determine on the basis of such review whether any such species should—

(i) be removed from such list;

(ii) be changed in status from an endangered species to a threatened species; or

(iii) be changed in status from a threatened species to an endangered species.

Each determination under subparagraph (B) shall be made in accordance with the provisions of subsection (a) and (b).

(d) PROTECTIVE REGULATIONS.—**[**Whenever any species is listed**]**

(1) IN GENERAL.—Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish or wildlife, or section 9(a)(2) in the case of plants, with respect to endangered species; except that with respect to the taking of resident species of fish or wildlife, such, regulations shall apply in any State which has entered into a cooperative agreement pursuant to section 6(c) of this Act only to the extent that such regulations have also been adopted by such State.

(2) NEW LISTINGS.—With respect to each species listed as a threatened species after the date of enactment of this paragraph,

regulations applicable under paragraph (1) to the species shall be specific to that species by the date on which the Secretary is required to approve a recovery plan for the species pursuant to section 5(c) and may be subsequently revised.

(e) SIMILARITY OF APPEARANCE CASES.—The Secretary may, by regulation of commerce or taking, and to the extent he deems advisable, treat any species as an endangered species or threatened species even through it is not listed pursuant to section 4 of this Act if he finds that—

(A) such species so closely resembles in appearance, at the point in question, a species which has been listed pursuant to such section that enforcement personnel would have substantial difficulty in attempting to differentiate between the listed and unlisted species;

(B) the effect of this substantial difficulty is an additional threat to an endangered or threatened species; and

(C) such treatment of an unlisted species will substantially facilitate the enforcement and further the policy of this Act.

[(f)(1) RECOVERY PLANS.—The Secretary shall develop and implement plans (hereinafter in this subsection referred to as "recovery plans") for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species. The Secretary, in development and implementing recovery plans, shall, to the maximum extent practicable—

[(A) give priority to those endangered species or threatened species, without regard to taxonomic classification, that are most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity;

[(B) incorporate in each plan—

[(i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;

[(ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and

[(iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.

[(2) The Secretary, in developing and implementing recovery plans, may procure the services of appropriate public and private agencies and institutions and other qualified persons. Recovery teams appointed pursuant to this subsection shall not be subject to the Federal Advisory Committee Act.

[(3) The Secretary shall report every two years to the Committee on Environment and Public Works of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives on the status of efforts to develop and implement recovery plans for all species listed pursuant to this section and on the status of all species for which such plans have been developed.

[(4) The Secretary shall, prior to final approval of a new or revised recovery plan, provide public notice and an opportunity for

public review and comment on such plan. The Secretary shall consider all information presented during the public comment period prior to approval of the plan.

[(5) Each Federal agency shall, prior to implementation of a new or revised recovery plan, consider all information presented during the public comment period under paragraph (4).]

[(g)] *(f)* MONITORING.—(1) The Secretary shall implement a system in cooperation with the States to monitor effectively for not less than five years the status of all species which have recovered to the point at which the measures provided pursuant to this Act are no longer necessary and which, in accordance with the provisions of this section, have been removed from either of the lists published under subsection (c).

(2) The Secretary shall make prompt use of the authority under paragraph 7 [1] of subsection (b) of this section to prevent a significant risk to the well being of any such recovered species.

[(h)] *(g)* AGENCY GUIDELINES.—The Secretary shall establish, and publish in the Federal Register, agency guidelines to insure that the purposes of this section are achieved efficiently and effectively. Such guidelines shall include, but are not limited to—

(1) procedures for recording the receipt and the disposition of petitions submitted under subsection (b)(3) of this section;

(2) criteria for making the findings required under such subsection with respect to petitions;

(3) a ranking system to assist in the identification of species that should receive priority review under subsection (a)(1) of the section; and

(4) a system for developing and implementing, on a priority basis, recovery plans under [subsection (f) of this section] *section 5*. The Secretary shall provide to the public notice of, and opportunity to submit written comments on, any guideline (including any amendment thereto) proposed to be established under this subsection.

[(i)] *(h)* If, in the case of any regulation proposed by the Secretary under the authority of this section, a State agency to which notice thereof was given in accordance with subsection (b)(5)(A)(ii) files comments disagreeing with all or part of the proposed regulation, and the Secretary issues a final regulation which is in conflict with such comments, or if the Secretary fails to adopt a regulation pursuant to an action petitioned by a State agency under subsection (b)(3), the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency's comments or petition.

(i) STATE CONSERVATION AGREEMENTS.—The Secretary may enter into a conservation agreement with one or more States for a species that has been proposed for listing, is a candidate species, or is likely to become a candidate species in the near future within the State. The Secretary may approve an agreement if, after notice and opportunity for public comment, the Secretary finds that—

(1) for species covered by the agreement, the actions taken under the agreement, if undertaken by all States within the range of the species, would produce a conservation benefit that

[1] So in original. Probably should be paragraph "(7)".

would be likely to eliminate the need to list the species as threatened or endangered under this section for the duration of the agreement;

(2) the actions taken under the agreement will not adversely affect an endangered species or a threatened species;

(3) the agreement contains such other measures as the Secretary may require as being necessary or appropriate for the purposes of the agreement;

(4) the State will ensure adequate funding and enforcement to implement the agreement; and

(5) the agreement includes such monitoring and reporting requirements as the Secretary considers necessary for determining whether the terms and conditions of the agreement are being complied with.

(16 U.S.C. 1533)

RECOVERY PLANS

Sec. 5. (a) *IN GENERAL.—The Secretary, in cooperation with the States, and on the basis of the best scientific and commercial data available, shall develop and implement plans (referred to in this Act as "recovery plans") for the conservation and recovery of endangered species and threatened species that are indigenous to the United States or in waters with respect to which the United States exercises sovereign rights or jurisdiction, in accordance with the requirements and schedules described in this section, unless the Secretary finds, after notice and opportunity for public comment, that a plan will not promote the conservation of the species or because an existing plan or strategy to conserve the species already serves as the functional equivalent to a recovery plan. The Secretary may authorize a State agency to develop recovery plans pursuant to subsection (m).*

(b) PRIORITIES.—

(1) CRITERIA.—To the maximum extent practicable, the Secretary, in developing recovery plans, shall give priority, without regard to taxonomic classification, to recovery plans that—

(A) address significant and immediate threats to the survival of an endangered species or a threatened species, have the greatest likelihood of achieving recovery of the endangered species or the threatened species, and will benefit species that are more taxonomically distinct;

(B) address multiple species including (i) endangered species, (ii) threatened species, or (iii) species that the Secretary has identified as candidates or proposed for listing under section 4 and that are dependent on the same habitat as the endangered species or threatened species covered by the plan;

(C) reduce conflicts with construction, development projects, jobs, private property, or other economic activities; and

(D) reduce conflicts with military training and operations.

(2) PRIORITY SYSTEM.—To carry out subsection (c) of this section and section 3(e) of the Endangered Species Recovery Act of 1997 in the most efficient and effective manner practicable,

the Secretary shall develop and implement a priority ranking system for the preparation of recovery plans based on all of the factors described in subparagraphs (A) through (D) of paragraph (1).

(c) SCHEDULE.—For each species determined to be an endangered species or a threatened species after the date of enactment of this subsection for which the Secretary is required to develop a recovery plan under subsection (a), the Secretary shall publish—

(1) not later than 18 months after the date of the publication under section 4 of the final regulation containing the listing determination, a draft recovery plan; and

(2) not later than 30 months after the date of publication under section 4 of the final regulation containing the listing determination, a final recovery plan.

(d) APPOINTMENT AND ROLE OF RECOVERY TEAM.—

(1) IN GENERAL.—Not later than 60 days after the date of the publication under section 4 of the final regulation containing the listing determination for a species, the Secretary, in cooperation with the affected States, shall either appoint a recovery team to develop a recovery plan for the species or publish a notice pursuant to paragraph (3) that a recovery team shall not be appointed. Recovery teams shall include the Secretary and at least one representative from the State agency of each of the affected States choosing to participate and be broadly representative of the constituencies with an interest in the species and its recovery and in the economic or social impacts of recovery including representatives of Federal agencies, tribal governments, local governments, academic institutions, private individuals and organizations, and commercial enterprises. The recovery team members shall be selected for their knowledge of the species or for their expertise in the elements of the recovery plan or its implementation.

(2) DUTIES OF THE RECOVERY TEAM.—Each recovery team shall prepare and submit to the Secretary the draft recovery plan that shall include recovery measures recommended by the team and alternatives, if any, to meet the recovery goal under subsection (e)(1). The recovery team may also be called on by the Secretary to assist in the implementation, review, and revision of recovery plans. The recovery team shall also advise the Secretary concerning the designation of critical habitat, if any.

(3) EXCEPTION.—

(A) IN GENERAL.—Notwithstanding paragraph (1), the Secretary may, after notice and opportunity for public comment, establish criteria to identify species for which the appointment of a recovery team would not be required under this subsection, taking into account the availability of resources for recovery planning, the extent and complexity of the expected recovery activities, and the degree of scientific uncertainty associated with the threats to the species.

(B) STATE OPTION.—If the Secretary elects not to appoint a recovery team, the Secretary shall provide notice to each affected State and shall provide the affected States the opportunity to appoint a recovery team and develop a recovery plan, in accordance with subsection (m).

(C) SECRETARIAL DUTY.—If a recovery team is not appointed, the Secretary shall perform all duties of the recovery team required by this section.

(4) TRAVEL EXPENSES.—The Secretary is authorized to provide travel expenses (including per diem in lieu of subsistence at the same level as authorized by section 5703 of title 5, United States Code) to recovery team members.

(5) FEDERAL ADVISORY COMMITTEE ACT.—The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the selection or activities of a recovery team appointed pursuant to this subsection or subsection (m).

(e) CONTENTS OF RECOVERY PLANS.—Each recovery plan shall contain:

(1) BIOLOGICAL RECOVERY GOAL.—

(A) IN GENERAL.—Not later than 180 days after the appointment of a recovery team under this section, those members of the recovery team with relevant scientific expertise shall establish and submit to the Secretary a recommended biological recovery goal to conserve and recover the species that, when met, would result in the determination, in accordance with section 4, that the species be removed from the list. The goal shall be based solely on the best scientific and commercial data available. The recovery goal shall be expressed as objective and measurable biological criteria. When the goal is met, the Secretary shall initiate the procedures for determining whether, in accordance with section 4(a)(1), to remove the species from the list.

(B) PEER REVIEW.—The recovery team shall promptly obtain independent scientific review of the recommended biological recovery goal.

(2) RECOVERY MEASURES.—The recovery plan shall incorporate recovery measures that will meet the recovery goal.

(A) MEASURES.—The recovery measures may incorporate general and site-specific measures for the conservation and recovery of the species such as—

(i) actions to protect and restore habitat;

(ii) research;

(iii) establishment of refugia, captive breeding, and releases of experimental populations;

(iv) actions that may be taken by Federal agencies, including actions that use, to the maximum extent practicable, Federal lands; and

(v) opportunities to cooperate with State and local governments and other persons to recover species, including through the development and implementation of conservation plans under section 10.

(B) DRAFT RECOVERY PLANS.—

(i) IN GENERAL.—In developing a draft recovery plan, the recovery team or, if there is no recovery team, the Secretary, shall consider alternative measures and recommend measures to meet the recovery goal and the benchmarks. The recovery measures shall achieve an appropriate balance among the following factors—

(I) the effectiveness of the measures in meeting the recovery goal;

(II) the period of time in which the recovery goal is likely to be achieved, provided that the time period within which the recovery goal is to be achieved will not pose a significant risk to recovery of the species; and

(III) the social and economic impacts (both quantitative and qualitative) of the measures and the distribution of the impacts across regions and industries.

(ii) DESCRIPTION OF ALTERNATIVES.—The draft plan shall include a description of any alternative recovery measures considered, but not included in the recommended measures, and an explanation of how any such measures considered were assessed and the reasons for their selection or rejection.

(iii) DESCRIPTION OF ECONOMIC EFFECTS.—If the recommended recovery measures identified in clause (i) would impose significant costs on a municipality, county, region, or industry, the recovery team shall prepare a description of the overall economic effects on the public and private sectors including, as appropriate, effects on employment, public revenues, and value of property as a result of the implementation of the recovery plan.

(3) BENCHMARKS.—The recovery plan shall include objective, measurable benchmarks expected to be achieved over the course of the recovery plan to determine whether progress is being made toward the recovery goal. To the extent possible, current and historical population estimates, along with other relevant factors, should be considered in determining whether progress is being made toward meeting the recovery goal.

(4) FEDERAL AGENCIES.—Each recovery plan for an endangered species or a threatened species shall identify Federal agencies that authorize, fund, or carry out actions that are likely to have a significant impact on recovery of the species.

(f) PUBLIC NOTICE AND COMMENT.—

(1) IN GENERAL.—If the Secretary makes a preliminary determination that the draft recovery plan meets the requirements of this section, the Secretary shall publish in the Federal Register and a newspaper of general circulation in each affected State a notice of availability and a summary of, and a request for public comment on, the draft recovery plan including a description of the economic effects prepared under subsection (e)(2)(B)(iii) and the recommendations of the independent referees on the recovery goal.

(2) HEARINGS.—At the request of any person, the Secretary shall hold at least one public hearing on each draft recovery plan in each State to which the plan would apply (including at least one hearing in an affected rural area, if any), except that the Secretary may not be required to hold more than five hearings under this paragraph.

(g) PROCUREMENT AUTHORITY.—In developing and implementing recovery plans, the Secretary may procure the services of appro-

priate public and private agencies and institutions and other qualified persons.

(h) REVIEW AND SELECTION BY THE SECRETARY.—

(1) REVIEW AND APPROVAL.—The Secretary shall review each plan submitted by a recovery team, including a recovery team appointed by a State pursuant to the authority of subsection (m), to determine whether the plan was developed in accordance with the requirements of this section. If the Secretary determines that the plan does not satisfy such requirements, the Secretary shall notify the recovery team and give the team an opportunity to address the concerns of the Secretary and resubmit a plan that satisfies the requirements of this section. After notice and opportunity for public comment on the recommendations of the recovery team, the Secretary shall adopt a final recovery plan that is consistent with the requirements of this section.

(2) SELECTION OF RECOVERY MEASURES.—In each final plan the Secretary shall select recovery measures that meet the recovery goal and the benchmarks. The recovery measures shall achieve an appropriate balance among the factors described in subclauses (I) through (III) of subsection (e)(2)(B)(i).

(3) MEASURES RECOMMENDED BY RECOVERY TEAM.—If the Secretary selects measures other than the measures recommended by the recovery team, the Secretary shall publish with the final plan an explanation of why the measures recommended by the recovery team were not selected for the final recovery plan.

(4) PUBLICATION OF NOTICE ON FINAL PLANS.—The Secretary shall publish in the Federal Register a notice of availability, and a summary, of the final recovery plan, and include in the final recovery plan a response to significant comments that the Secretary received on the draft recovery plan.

(i) REVIEW.—

(1) EXISTING PLANS.—Not later than five years after date of enactment of this subsection, the Secretary shall review recovery plans published prior to such date.

(2) SUBSEQUENT PLANS.—The Secretary shall review each recovery plan first approved or revised under this section after the date of enactment of this subsection, not later than ten years after the date of approval or revision of the plan and every ten years thereafter.

(j) REVISION OF RECOVERY PLANS.—Notwithstanding any other provision of this section, the Secretary shall revise a recovery plan if the Secretary finds that substantial new information, which may include failure to meet the benchmarks included in the plan, based on the best scientific and commercial data available, indicates that the recovery goal contained in the recovery plan will not achieve the conservation and recovery of the endangered species or threatened species covered by the plan. The Secretary shall convene a recovery team to develop the revisions required by this subsection, unless the Secretary has established an exception for the species pursuant to subsection (d)(3).

(k) EXISTING PLANS.—Nothing in this section shall require the modification of—

(1) a recovery plan approved;

(2) a recovery plan on which public notice and comment has been initiated; or

(3) a draft recovery plan on which significant progress has been made;

prior to the date of enactment of this subsection until the recovery plan is revised by the Secretary in accordance with this section.

(l) IMPLEMENTATION OF RECOVERY PLANS.—

(1) IMPLEMENTATION AGREEMENTS.—The Secretary is authorized to enter into agreements with Federal agencies, affected States, Indian tribes, local governments, private landowners, and organizations to implement specified conservation measures identified by an approved recovery plan that promote the recovery of the species with respect to land or water owned by, or within the jurisdiction of, each such party. The Secretary may enter into such agreements, if the Secretary, after notice and opportunity for public comment, determines that—

(A) each non-Federal party to the agreement has the legal authority and capability to carry out the agreement;

(B) the agreement will be reviewed and revised as necessary on a regular basis (which shall be not less often than every five years) by the parties to the agreement to ensure that it meets the requirements of this section; and

(C) the agreement establishes a mechanism for the Secretary to monitor and evaluate implementation of the agreement.

(2) DUTY OF FEDERAL AGENCIES.—Each Federal agency identified under subsection (e)(4) shall enter into an implementation agreement with the Secretary not later than two years after the date on which the Secretary approves the recovery plan for the species. For purposes of satisfying this section, the substantive provisions of the agreement shall be within the sole discretion of the Secretary and the head of the Federal agency entering into the agreement.

(3) OTHER REQUIREMENTS.—

(A) AGENCY ACTIONS.—Any action authorized, funded, or carried out by a Federal agency that is specified in a recovery plan implementation agreement between the Federal agency and the Secretary to promote the recovery of the species and for which the agreement provides sufficient information on the nature, scope, and duration of the action to determine the effect of the action on any endangered species, threatened species, or critical habitat shall not be subject to the requirements of section 7(a)(2) for that species, if the action is to be carried out during the term of the agreement and the Federal agency is in compliance with the agreement.

(B) COMPREHENSIVE AGREEMENTS.—If a non-Federal person proposes to include in an implementation agreement a site-specific action that the Secretary determines meets the requirements of subparagraph (A) and that action would require authorization or funding by one or more Federal agencies, the agencies authorizing or funding the action shall participate in the development of the agreement

and shall identify, at that time, all measures for the species that would be required under this Act as a condition of the authorization or funding.

(4) FINANCIAL ASSISTANCE.—

(A) IN GENERAL.—In cooperation with the States and subject to the availability of appropriations under section 15(f), the Secretary may provide a grant of up to $25,000 to a private landowner to assist the landowner in carrying out a recovery plan implementation agreement under this subsection.

(B) PROHIBITION ON ASSISTANCE FOR REQUIRED ACTIVITIES.—The Secretary may not provide assistance under this paragraph for any action that is required by a permit issued under this Act or that is otherwise required under this Act or other Federal law.

(C) OTHER PAYMENTS.—A grant provided to an individual private landowner under this paragraph shall be in addition to, and not affect, the total amount of payments the landowner is otherwise eligible to receive under the conservation reserve program established under subchapter B of chapter 1 of subtitle D of title XII of the Food Security Act of 1985 (16 U.S.C. 3831 et seq.), the wetlands reserve program established under subchapter C of that chapter (16 U.S.C. 3837 et seq.), or the Wildlife Habitat Incentives Program established under section 387 of the Federal Agriculture Improvement and Reform Act of 1996 (16 U.S.C. 3836a).

(m) STATE AUTHORITY FOR RECOVERY PLANNING.—

(1) IN GENERAL.—At the request of the Governor of a State, or the Governors of several States in cooperation, the Secretary may authorize the respective State agency to develop the recovery plan for an endangered species or a threatened species in accordance with the requirements and schedules of subsections (c), (d)(1), (d)(2), and (e) and this subsection if the Secretary finds that—

(A) the State or States have entered into a cooperative agreement with the Secretary pursuant to section 6(c); and

(B) the State agency has submitted a statement to the Secretary demonstrating adequate authority and capability to carry out the requirements and schedules of subsections (c), (d)(1), (d)(2), and (e) and this subsection.

(2) STANDARDS AND GUIDELINES.—The Secretary, in cooperation with the States, shall publish standards and guidelines for the development of recovery plans by a State agency under this subsection, including standards and guidelines for interstate cooperation and for the grant and withdrawal of authorization by the Secretary under this subsection.

(3) DUTIES OF RECOVERY TEAM.—The recovery team shall prepare a draft recovery plan in accordance with this section and shall transmit the draft plan to the Secretary through the State agency authorized to develop the recovery plan.

(4) REVIEW OF DRAFT PLANS.—Prior to publication of a notice of availability of a draft recovery plan, the Secretary shall review each draft recovery plan developed pursuant to this sub-

section to determine whether the plan meets the requirements of this section. If the Secretary determines that the plan does not meet such requirements, the Secretary shall notify the State agency and, in cooperation with the State agency, develop a recovery plan in accordance with this section.

(5) REVIEW AND APPROVAL OF FINAL PLANS.—On receipt of a draft recovery plan transmitted by a State agency, the Secretary shall review and approve the plan in accordance with subsection (h).

(6) WITHDRAWAL OF AUTHORITY.—

(A) IN GENERAL.—The Secretary may withdraw the authority from a State that has been authorized to develop a recovery plan pursuant to this subsection if the actions of the State agency are not in accordance with the substantive and procedural requirements of subsections (c), (d)(1), (d)(2), and (e) and this subsection. The Secretary shall give the State agency an opportunity to correct any deficiencies identified by the Secretary and shall withdraw the authority from the State unless the State agency within 60 days has corrected the deficiencies identified by the Secretary. On withdrawal of State authority pursuant to this subsection, the Secretary shall have an additional 18 months to publish a draft recovery plan and an additional 12 months to publish a final recovery plan under subsection 5(c).

(B) PETITIONS TO WITHDRAW.—Any person may submit a petition requesting the Secretary to withdraw the authority from a State on the basis that the actions of the State agency are not in accordance with the substantive and procedural requirements described in subparagraph (A). If the Secretary has not acted on the petition pursuant to subparagraph (A) within 90 days, the petition shall be deemed to be denied and the denial shall be a final agency action for the purposes of judicial review.

(7) DEFINITION OF STATE AGENCY.—For purposes of this subsection, the term "State agency" means—

(A) a State agency (as defined in section 3) of each State entering into a cooperative request under paragraph (1); and

(B) for fish and wildlife, including related spawning grounds and habitat, on the Columbia River and its tributaries, the Pacific Northwest Electric Power and Conservation Planning Council established under the Pacific Northwest Electric Power Planning and Conservation Act (16 U.S.C. 839 et seq.).

(n) CRITICAL HABITAT DESIGNATION.—

(1) RECOMMENDATION OF THE RECOVERY TEAM.—Not later than nine months after the date of publication under section 4 of a final regulation containing a listing determination for a species, the recovery team appointed for the species shall provide the Secretary with a description of any habitat of the species that is recommended for designation as critical habitat pursuant to this subsection and any recommendations for spe-

cial management considerations or protection that are specific to the habitat.

(2) DESIGNATION BY THE SECRETARY.—The Secretary, to the maximum extent prudent and determinable, shall by regulation designate any habitat that is considered to be critical habitat of an endangered species or a threatened species that is indigenous to the United States or waters with respect to which the United States exercises sovereign rights or jurisdiction.

(A) DESIGNATION.—

(i) PROPOSAL.—Not later than 18 months after the date on which a final listing determination is made under section 4 for a species, the Secretary, after consultation and in cooperation with the recovery team, shall publish in the Federal Register a proposed regulation designating critical habitat for the species.

(ii) PROMULGATION.—The Secretary shall, after consultation and in cooperation with the recovery team, publish a final regulation designating critical habitat for a species not later than 30 months after the date on which a final listing determination is made under section 4 for the species.

(B) OTHER DESIGNATIONS.—If a recovery plan is not developed under this section for an endangered species or a threatened species, the Secretary shall publish a final critical habitat determination for the endangered species or threatened species not later than three years after making a determination that the species is an endangered species or a threatened species.

(C) ADDITIONAL AUTHORITY.—The Secretary may publish a regulation designating critical habitat for an endangered species or a threatened species concurrently with the final regulation implementing the determination that the species is endangered or threatened if the Secretary determines that designation of such habitat at the time of listing is essential to avoid the imminent extinction of the species.

(3) FACTORS TO BE CONSIDERED.—The designation of critical habitat shall be made on the basis of the best scientific and commercial data available and after taking into consideration the economic impact, impacts to military training and operations, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary shall describe the economic impacts and other relevant impacts that are to be considered under this subsection in the publication of any proposed regulation designating critical habitat.

(4) EXCLUSIONS.—The Secretary may exclude any area from critical habitat for a species if the Secretary determines that the benefits of the exclusion outweigh the benefits of designating the area as part of the critical habitat, unless the Secretary determines that the failure to designate the area as critical habitat will result in the extinction of the species.

(5) REVISIONS.—The Secretary may, from time-to-time and as appropriate, revise a designation. Each area designated as critical habitat before the date of enactment of this subsection

shall continue to be considered so designated, until the designation is revised in accordance with this subsection.

(6) PETITIONS.—

(A) DETERMINATION THAT REVISION MAY BE WARRANTED.—To the maximum extent practicable, not later than 90 days after receiving the petition of an interested person under section 553(e) of title 5, United States Code, to revise a critical habitat designation, the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the revision may be warranted. The Secretary shall promptly publish the finding in the Federal Register.

(B) NOTICE OF PROPOSED ACTION.—Not later than one year after receiving a petition that is found under subparagraph (A) to present substantial information indicating that the requested revision may be warranted, the Secretary shall determine how to proceed with the requested revision, and shall promptly publish notice of the intention in the Federal Register.

(7) PROPOSED AND FINAL REGULATIONS.—Any regulation to designate critical habitat or implement a requested revision shall be proposed and promulgated in accordance with paragraphs (4), (5), and (6) of section 4(b) in the same manner as a regulation to implement a determination with respect to listing a species.

(o) REPORTS.—The Secretary shall report every two years to the Committee on Environment and Public Works of the Senate and the Committee on Resources of the House of Representatives on the status of efforts to develop and implement recovery plans for all species listed pursuant to section 4 and on the status of all species for which the plans have been developed.

LAND ACQUISITION

SEC. [5] *5A*. (a) PROGRAM.—The Secretary, and the Secretary of Agriculture with respect to the National Forest System, shall establish and implement a program to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species pursuant to section 4 of this Act. To carry out such a program, the appropriate Secretary—

(1) shall utilize the land acquisition and other authority under the Fish and Wildlife Act of 1956, as amended, the Fish and Wildlife Coordination Act, as amended, and the Migratory Bird Conservation Act, as appropriate; and

(2) is authorized to acquire by purchase, donation, or otherwise, lands, waters, or interest therein, and such authority shall be in addition to any other land acquisition vested in him.

(b) ACQUISITIONS.—Funds made available pursuant to the Land and Water Conservation Fund Act of 1965, as amended, may be used for the purpose of acquiring lands, waters, or interests therein under subsection (a) of this section.

(16 U.S.C. 1534)

COOPERATION WITH THE STATES

SEC. 6. (a) GENERAL.—In carrying out the program authorized by this Act, the Secretary shall cooperate to the maximum extent practicable with the States. Such cooperation shall include consultation with the States concerned before acquiring any land or water, or interest therein, for the purpose of conserving any endangered species or threatened species.

(b) MANAGEMENT AGREEMENTS.—The Secretary may enter into agreements with any State for the administration and management of any area established for the conservation of endangered species or threatened species. Any revenues derived from the administration of such areas under these agreements shall be subject to the provisions of section 401 of the Act of June 15, 1935 (49 Stat. 383; 16 U.S.C. 715s).

(c)(1) COOPERATIVE AGREEMENTS.—In furtherance of the purposes of this Act, the Secretary is authorized to enter into a cooperative agreement in accordance with this section with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species. Within one hundred and twenty days after the Secretary receives a certified copy of such a proposed State program, he shall make a determination whether such program is in accordance with this Act. Unless he determines, pursuant to this paragraph, that the State program is not in accordance with this Act, he shall enter into a cooperative agreement with the State for the purpose of assisting in implementation of the State program. In order for a State program to be deemed an adequate and active program for the conservation of endangered species and threatened species, the Secretary must find, and annually thereafter reconfirm such finding, that under the State program—

(A) authority resides in the State agency of conserve resident species of fish or wildlife determined by the State agency or the Secretary to be endangered or threatened;

(B) the State agency has established acceptable conservation programs, consistent with the purposes and policies of this Act, for all resident species of fish or wildlife in the State which are deemed by the Secretary to be endangered or threatened, and has furnished a copy of such plan and program together with all pertinent details, information, and data requested to the Secretary;

(C) the State agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of fish and wildlife;

(D) the State agency is authorized to establish programs, including the acquisition of land or aquatic habitat or interests therein, for the conservation of resident endangered or threatened species of fish or wildlife; and

(E) provision is made for public participation in designating resident species of fish or wildlife as endangered or threatened, or that under the State program—

(i) the requirements set forth in paragraph (3), (4), and (5) of this subsection are complied with, and

(ii) plans are included under which immediate attention will be given to those resident species of fish and wildlife which are determined by the Secretary or the State agency to be endangered or threatened and which the Secretary and the State agency agree are most urgently in need of conservation programs; except that a cooperative agreement entered into with a State whose program is deemed adequate and active pursuant to clause (i) and this subparagraph shall not affect the applicability of prohibitions set forth in or authorized pursuant to section 4(d) or section 9(a)(1) with respect to the taking of any resident endangered or threatened species.

(2) In furtherance of the purposes of this Act, the Secretary is authorized to enter into a cooperative agreement in accordance with this section with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species of plants. Within one hundred and twenty days after the Secretary receives a certified copy of such a proposed State program, he shall make a determination whether such program is in accordance with this Act. Unless he determines, pursuant to this paragraph, that the State program is not in accordance with this Act, he shall enter into a cooperative agreement with the State for the purpose of assisting in implementation of the State program. In order for a State program to be deemed an adequate and active program for the conservation of endangered species of plants and threatened species of plants, the Secretary must find, and annually thereafter reconfirm such findings, that under the State program—

(A) authority resides in the State agency to conserve resident species of plants determined by the State agency or the Secretary to be endangered or threatened;

(B) the State agency has established acceptable conservation programs, consistent with the purposes and policies of this Act, for all resident species of plants in the State which are deemed by the Secretary to be endangered or threatened, and has furnished a copy of such plan and program together with all pertinent details, information, and data requested to the Secretary;

(C) the State agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of plants; and

(D) provision is made for public participation in designating resident species of plants as endangered or threatened; or that under the State program—

(i) the requirements set forth in subparagraphs (C) and (D) of this paragraph are complied with, and

(ii) plans are included under which immediate attention will be given to those resident species of plants which are determined by the Secretary or the State agency to be endangered or threatened and which the Secretary and the State agency agree are most urgently in need of conservation programs; except that a cooperative agreement entered into with a State whose program is deemed adequate and active pursuant to clause (i) and this clause shall not

affect the applicability of prohibitions set forth in or authorized pursuant to section 4(d) or section 9(a)(1) with respect to the taking of any resident endangered or threatened species.

(d) ALLOCATION OF FUNDS.—(1) The Secretary is authorized to provide financial assistance to any State, through its respective State agency, which has entered into a cooperative agreement pursuant to subsection (c) of this section to assist in development of programs for the conservation of endangered and threatened species or to assist in monitoring the status of candidate species pursuant to [subparagraph (C)] *subparagraph (F)* of section 4(b)(3) and recovered species pursuant to [section 4(g)] *section 4(f)*. The Secretary shall allocate each annual appropriation made in accordance with the provisions of subsection (i) of this section to such States based on consideration of—

(A) the international commitments of the United States to protect endangered species or threatened species;

(B) the readiness of a State to proceed with a conservation program consistent with the objectives and purposes of this Act;

(C) the number of endangered species and threatened species within a State;

(D) the potential for restoring endangered species and threatened species within a State;

(E) the relative urgency to initiate a program to restore and protect an endangered species or threatened species in terms of survival of the species;

(F) the importance of monitoring the status of candidate species within a State to prevent a significant risk to the well being of any such species; and

(G) the importance of monitoring the status of recovered species within a State to assure that such species do not return to the point at which the measures provided pursuant to this Act are again necessary.

So much of the annual appropriation made in accordance with provisions of subsection (i) of this section allocated for obligation to any State for any fiscal year as remains unobligated at the close thereof is authorized to be made available to that State until the close of the succeeding fiscal year. Any amount allocated to any State which is unobligated at the end of the period during which it is available for expenditure is authorized to be made available for expenditure by the Secretary in conducting programs under this section.

(2) Such cooperative agreements shall provide for (A) the actions to be taken by the Secretary and the States; (B) the benefits that are expected to be derived in connection with the conservation of endangered or threatened species; (C) the estimated cost of these actions; and (D) the share of such costs to be bore by the Federal Government and by the States; except that—

(i) the Federal share of such program costs shall not exceed 75 percent of the estimated program cost stated in the agreement; and

(ii) the Federal share may be increased to 90 percent whenever two or more States having a common interest in one

or more endangered or threatened species, the conservation of which may be enhanced by cooperation of such States, enter jointly into agreement with the Secretary.

The Secretary may, in his discretion, and under such rules and regulations as he may prescribe, advance funds to the State for financing the United States pro rata share agreed upon in the cooperative agreement. For the purposes of this section, the non-Federal share may, in the discretion of the Secretary, be in the form of money or real property, the value of which will be determined by the Secretary whose decision shall be final.

(e) REVIEW OF STATE PROGRAMS.—Any action taken by the Secretary under this section shall be subject to his periodic review at no greater than annual intervals.

(f) CONFLICTS BETWEEN FEDERAL AND STATE LAWS.—Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered specie or threatened species is void to the extent that it may effectively (1) permit what is prohibited by this Act of by any regulation which implements this Act, or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this Act or in any regulation which implements this Act. This Act shall not otherwise be construed to void any State law or regulation which is intended to conserve migratory, resident, or introduced fish or wildlife, or to permit or prohibit sale of such fish or wildlife. Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this Act or in any regulation which implements this Act but not less restrictive than the prohibitions so defined.

(g) TRANSITION.—(1) For purposes of this subsection, the term "establishment period" means, with respect to any State, the period beginning on the date of enactment of this Act and ending on whichever of the following dates first occurs: (A) the date of the close of the 120-day period following the adjournment of the first regular session of the legislative of such State which commences after such date of enactment, or (B) the date of the close of the 15-month period following such date of enactment.

(2) The prohibitions set forth in or authorized pursuant to sections 4(d) and 9(a)(1)(B) of this Act shall not apply with respect to the taking of any resident endangered species or threatened species (other than species listed in Appendix I to the Convention or otherwise specifically covered by any other treaty or Federal law) within any State—

(A) which is then a party to a cooperative agreement with the Secretary pursuant to section 6(c) of this Act (except to the extent that the taking of any such species is contrary to the law of such State); or

(B) except for any time within the establishment period when—

(i) the Secretary applies such prohibition to such species at the request of the State, or

(ii) the Secretary applies such prohibition after he finds, and publishes his finding, that an emergency exists posing a significant risk to the well-being of such species

and that the prohibition must be applied to protect such species. The Secretary's finding and publication may be made without regard to the public hearing or comment provisions of section 553 of title 5, United States Code, or any other provision of this Act; but such prohibition shall expire 90 days after the date of its imposition unless the Secretary further extends such prohibition by publishing notice and a statement of justification of such extension.

(h) REGULATIONS.—The Secretary is authorized to promulgate such regulations as may be appropriate to carry out the provisions of this section relating to financial assistance to States.

(i) APPROPRIATIONS.—(1) To carry out the provisions of this section for fiscal years after September 30, 1988, there shall be deposited into a special fund known as the cooperative endangered species conservation fund, to be administered by the Secretary, an amount equal to five percent of the combined amounts covered each fiscal year into the Federal aid to wildlife restoration fund under section 3 of the Act of September 2, 1937, and paid, transferred, or otherwise credited each fiscal year to the Sport Fishing Restoration Account established under 1016 of the Act of July 18, 1984.

(2) Amounts deposited into the special fund are authorized to be appropriated annually and allocated in accordance with subsection (d) of this section.

(3) ASSISTANCE TO STATES FOR CONSERVATION ACTIVITIES.—There are authorized to be appropriated to the Secretary such sums as are necessary for each of fiscal years 1998 through 2003 to provide financial assistance to State agencies to carry out conservation activities under other sections of this Act, including the provision of technical assistance for the development and implementation of recovery plans.

(16 U.S.C. 1535)

INTERAGENCY COOPERATION

SEC. 7. (a) FEDERAL AGENCY ACTIONS AND [CONSULTATIONS.—(1) The] *CONSULTATIONS.—*

(1) IN GENERAL.—

(A) OTHER PROGRAMS.—The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act.

(B) INVENTORY OF SPECIES ON FEDERAL LANDS.—The head of each Federal agency that is responsible for the management of land and water—

(i) shall, to the maximum extent practicable, by not later than December 31, 2003, prepare and provide to the Secretary an inventory of the presence or occurrence of endangered species, threatened species, species that have been proposed for listing, and species that the Secretary has identified as candidates for listing under section 4, that are

located on land or water owned or under the control of the agency; and

(ii) shall, at least once every ten years thereafter, update the inventory required by clause (i) including newly listed species, species proposed for listing, and candidate species.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

[(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.**]**

(3) CONSULTATION.—

(A) NOTIFICATION OF ACTIONS.—Prior to commencing any action, each Federal agency shall notify the Secretary if the agency determines that the action may affect an endangered species or a threatened species, or critical habitat.

(B) AGENCY DETERMINATION.—

(i) IN GENERAL.—Each Federal agency shall consult with the Secretary as required by paragraph (2) on each action for which notification is required under subparagraph (A) unless—

(I) the Federal agency makes a determination based on the opinion of a qualified biologist that the action is not likely to adversely affect an endangered species, a threatened species, or critical habitat;

(II) the Federal agency notifies the Secretary that it has determined that the action is not likely to adversely affect any listed species or critical habitat and provides the Secretary, along with the notice, a copy of the information on which the agency based the determination; and

(III) the Secretary does not object in writing to the agency's determination within 60 days after the date such notice is received.

(ii) PUBLIC ACCESS TO INFORMATION.—The Secretary shall maintain a list of notices received from Federal agencies under clause (i)(II) and shall make available to the public the list and, on request (subject to the exemptions specified in section 552(b) of title 5, United States Code),

the information received by the Secretary on which the agency based its determination.

(iii) ACTIONS EXCLUDED.—The Secretary may by regulation identify categories of actions with respect to specific endangered species or threatened species that the Secretary determines are likely to have an adverse effect on the species or its critical habitat and, for which, the procedures of clause (i) shall not apply.

(iv) BASIS FOR OBJECTION.—The Secretary shall object to a determination made by a Federal agency pursuant to clause (i), if—

(I) the Secretary determines that the action may have an adverse effect on an endangered species, a threatened species or critical habitat;

(II) the Secretary finds that there is insufficient information in the documentation accompanying the determination to evaluate the impact of the proposed action on endangered species, threatened species, or critical habitat; or

(III) the Secretary finds that, because of the nature of the action and its potential impact on an endangered species, a threatened species, or critical habitat, review cannot be completed in 60 days.

(v) REPORTS.—The Secretary shall report to the Congress not less often than biennially with respect to the implementation of this subparagraph including in the report information on the circumstances that resulted in the Secretary making any objection to a determination made by a Federal agency under clause (i) and the availability of resources to carry out this section.

(C) CONSULTATION AT REQUEST OF APPLICANT.—Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by the applicant's project and that implementation of the action will likely affect the species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 4 or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d).

(5) EFFECT OF LISTING ON EXISTING PLANS.—

(A) DEFINITION OF ACTION.—For the purposes of paragraph (2) and this paragraph, the term "action" includes land use plans under the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.) and land and resource management plans under the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1600 et seq.), as amended by the National Forest Management Act of 1976 (16 U.S.C. 472a et seq.).

(B) REINITIATION OF CONSULTATION.—Whenever a determination to list a species as an endangered species or a threatened species or designation of critical habitat requires reinitiation of consultation under paragraph (2) on an already approved action as defined under subparagraph (A), the consultation shall commence promptly, but not later than 90 days after the date of the determination or designation, and shall be completed not later than one year after the date on which the consultation is commenced.

(C) SITE-SPECIFIC ACTIONS DURING CONSULTATION.—Notwithstanding subsection (d), the Federal agency implementing the land use plan or land and resource management plan under subparagraph (B) may authorize, fund, or carry out a site-specific ongoing or previously scheduled action within the scope of the plan on the lands prior to completing consultation on the plan under subparagraph (B) pursuant to the consultation procedures of this section and related regulations, if—

(i) no consultation on the action is required; or

(ii) consultation on the action is required, the Secretary issues a biological opinion and the action satisfies the requirements of this section.

(6) CONSOLIDATION OF CONSULTATION AND CONFERENCING.—

(A) CONSULTATION WITH A SINGLE AGENCY.—Consultation and conferencing under this subsection between the Secretary and a Federal agency may, with the approval of the Secretary, encompass a number of related or similar actions by the agency to be carried out within a particular geographic area.

(B) CONSULTATION WITH SEVERAL AGENCIES.—The Secretary may consolidate requests for consultation or conferencing from various Federal agencies the proposed actions of which may affect the same endangered species, threatened species, or species that have been proposed for listing under section 4, within a particular geographic area.

(C) USE OF STATE INFORMATION.—In conducting a consultation under subsection (a)(2), the Secretary shall actively solicit and consider information from the State agency in each affected State.

(D) OPPORTUNITY TO PARTICIPATE IN CONSULTATIONS.—

(i) IN GENERAL.—In conducting a consultation under subsection (a)(2), the Secretary shall provide any person who has sought authorization or funding from a Federal agency for an action that is the subject of the consultation, the opportunity to—

(I) prior to the development of a draft biological opinion, submit and discuss with the Secretary and the Federal agency information relevant to the effect of the proposed action on the species and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the Federal agency and the person can take to avoid violation of subsection (a)(2);

(II) receive information, on request, subject to the exemptions specified in section 552(b) of title 5, United States Code, on the status of the species, threats to the species, and conservation measures, used by the Sec-

retary to develop the draft biological opinion and the final biological opinion, including the associated incidental taking statements; and

(III) receive a copy of the draft biological opinion from the Federal agency and, prior to issuance of the final biological opinion, submit comments on the draft biological opinion and discuss with the Secretary and the Federal agency the basis for any finding in the draft biological opinion.

(ii) EXPLANATION.—If reasonable and prudent alternatives are proposed by a person under clause (i) and the Secretary does not include the alternatives in the final biological opinion, the Secretary shall explain to the person why those alternatives were not included in the opinion.

(iii) PUBLIC ACCESS TO INFORMATION.—Comments and other information submitted to, or received from, any person (pursuant to clause (i)) who seeks authorization or funding for an action shall be maintained in a file for that action by the Secretary and shall be made available to the public (subject to the exemptions specified in section 552(b) of title 5, United States Code).

(b) OPINION OF SECRETARY.—(1)(A) Consultation under subsection (a)(2) with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)—

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth—

(I) the reasons why a longer period is required;

(II) the information that is required to complete the consultation; and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period. The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a), the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the informa-

tion on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3), and an opinion based by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2), and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972.

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize *and mitigate* such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii). *For purposes of this subsection, reasonable and prudent measures shall be related both in nature and extent to the effect of the proposed activity that is the subject of the consultation.*

(c) BIOLOGICAL ASSESSMENT.—(1) To facilitate compliance with the requirements of subsection (a)(2) each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on the date of enactment of the Endangered Species Act Amendments of 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data

available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as in mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

(d) LIMITATION ON COMMITMENT OF RESOURCES.—After initiation of consultation required under subsection (a)(2), the Federal agency and the permit or license applicant shall not make any irreversible or 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 measures which would not violate subsection (a)(2).

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

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

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

(A) The Secretary of Agriculture.

(B) The Secretary of the Army.

(C) The Chairman of the Council of Economic Advisors.

(D) The Administrator of the Environmental Protection Agency. Agency. [1]

(E) The Secretary of the Interior.

(F) The Administrator of the National Oceanic and Atmospheric Administration.

(G) The President, after consideration of any recommendations received pursuant to subsection (g)(2)(B) shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consider-

[1] So in law. At the end of section 7(e)(3)(D) of the Endangered Species Act of 1973, the second "Agency." should had been stricken.

ation of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

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

(B) While away from their homes or regular places of business in the performance of services for the Committee, members of the Committee shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703 of title 5 of the United States Code [2]

(5)(A) Five members of the Committee or their representatives shall constitute a quorum for the transaction of any function of the Committee, except that, in no case shall any representative be considered in determining the existence of a quorum for the transaction of any function of the Committee if that function involves a vote by the Committee on any matter before the Committee.

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

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

(D) All meetings and records of the Committee shall be open to the public.

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

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

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

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

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

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

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

(9) For the purpose of obtaining information necessary for the consideration of an application for an exemption under this section the Committee may issue subpoenas for the attendance and testi-

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[2] So in law. At the end of section 7(e)(4)(B) of the Endangered Species Act of 1973, the period at end of the paragraph was omitted.

mony of witnesses and the production of relevant papers, books, and documents.

(10) In no case shall any representative, including a representative of a member designated pursuant to paragraph (3)(G) of this subsection, be eligible to cast a vote on behalf of any member.

(f) REGULATIONS.—Not later than 90 days after the date of enactment of the Endangered Species Act Amendments of 1978, the Secretary shall promulgate regulations which set forth the form and manner in which applications for exemption shall be submitted to the Secretary and the information to be contained in such applications. Such regulations shall require that information submitted in an application by the head of any Federal agency with respect to any agency action include but not be limited to—

(1) a description of the consultation process carried out pursuant to subsection (a)(2) of this section between the head of the Federal agency and the Secretary; and

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

(g) APPLICATION FOR EXEMPTION AND REPORT TO THE COMMITTEE.—(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption for an agency action of such agency if, after consultation under subsection (a)(2), the Secretary's opinion under subsection (b) indicates that the agency action would violate subsection (a)(2). An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be considered by the Committee for a final determination under subsection (h) after a report is made pursuant to paragraph (5). The applicant for an exemption shall be referred to as the "exemption applicant" in this section.

(2)(A) An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f), not later than 90 days after the completion of the consultation process; except that, in the case of any agency action involving a permit or license applicant, such application shall be submitted not later than 90 days after the date on which the Federal agency concerned takes final agency action with respect to the issuance of the permit or license. For purposes of the preceding sentence, the term "final agency action" means (i) a disposition by an agency with respect to the issuance of a permit or license that is subject to administrative review, whether or not such disposition is subject to judicial review; or (ii) if administrative review is sought with respect to such disposition, the decision resulting after such review. Such application shall set forth the reasons why the exemption applicant considers that the agency action meets the requirements for an exemption under this subsection.

(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly (i) notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governors so notified to recommend individuals to be appointed to the Endangered Species Committee for consideration of such application; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of

the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.

(3) The Secretary shall within 20 days after the receipt of an application for exemption, or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary—

(A) determine that the Federal agency concerned and the exemption applicant have—

(i) carried out the consultation responsibilities described in subsection (a) in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2);

(ii) conducted any biological assessment required by subsection (c); and

(iii) to the extent determinable within the time provided herein, refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d); or

(B) deny the application for exemption because the Federal agency concerned or the exemption applicant have not met the requirements set forth in subparagraph (A)(i), (ii), and (iii).

The denial of an application under subparagraph (B) shall be considered final agency action for purposes of chapter 7 of title 5, United States Code.

(4) If the Secretary determines that the Federal agency concerned and the exemption applicant have met the requirements set forth in paragraph (3)(A) (i), (ii) and (iii) he shall, in consultation with the Members of the Committee, hold a hearing on the application for exemption in accordance with sections 554, 555, and 556 (other than subsection (b) (1) and (2) thereof) of title 5, United States Code, and prepare the report to be submitted pursuant to paragraph (5).

(5) Within 140 days after making the determinations under paragraph (3) or within such other period of time as in mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing—

(A) the availability and reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative courses of action consistent with conserving the species of the critical habitat;

(B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;

(C) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee; and

(D) whether the Federal agency concerned and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d).

(6) To the extent practicable within the time required for action under subsection (g) of this section, and except to the extent

inconsistent with the requirements of this section, the consideration of any application for an exemption under this section and the conduct of any hearing under this subsection shall be in accordance with sections 554, 555, and 556 (other than subsection (b)(3) of section 556) of title 5, United States Code.

(7) Upon request of the Secretary, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Secretary to assist him in carrying out his duties under this section.

(8) All meetings and records resulting from activities pursuant to this subsection shall be open to the public.

(h) EXEMPTION.—(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g)(5). The Committee shall grant an exemption from the requirements of subsection (a)(2) for an agency action if, by a vote of not less than five of its members voting in person—

(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g)(4), and on such other testimony or evidence as it may receive, that—

(i) there are no reasonable and prudent alternatives to the agency action;

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

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

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d); and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by Committee under this subsection shall be considered final agency action for purposes of chapter 7 of title 5 of the United States Code.

(2)(A) Except as provided in subparagraph (B), an exemption for an agency action granted under paragraph (1) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action—

(i) regardless whether the species was identified in the biological assessment; and

(ii) only if a biological assessment has been conducted under subsection (c) with respect to such agency action.

(B) An exemption shall be permanent under subparagraph (A) unless—

(i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of a species that was not the subject of con-

sultation under subsection (a)(2) or was not identified in any biological assessment conducted under subsection (c), and

(ii) the Committee determines within 60 days after the date of the Secretary's finding that the exemption should not be permanent.

If the Secretary makes a finding described in clause (i), the Committee shall meet with respect to the matter within 30 days after the date of the finding.

(i) REVIEW BY SECRETARY OF STATE.—Notwithstanding any other provision of this Act, the Committee shall be prohibited from considering for exemption any application made to it, if the Secretary of State, after a review of the proposed agency action and its potential implications, and after hearing, certifies, in writing, to the Committee within 60 days of any application made under this section that the granting of any such exemption and the carrying out of such action would be in violation of an international treaty obligation or other international obligation of the United States. The Secretary of State shall, at the time of such certification, publish a copy thereof in the Federal Register.

(j) Notwithstanding any other provision of this Act, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.

(k) SPECIAL PROVISIONS.—An exemption decision by the Committee under this section shall not be a major Federal action for purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.): *Provided,* That an environmental impact statement which discusses the impacts upon endangered species or threatened species or their critical habitats shall have been previously prepared with respect to any agency action exempted by such order.

(l) COMMITTEE ORDERS.—(1) If the Committee determines under subsection (h) that an exemption should be granted with respect to any agency action, the Committee shall issue an order granting the exemption and specifying the mitigation and enhancement measures established pursuant to subsection (h) which shall be carried out and paid for by the exemption applicant in implementing the agency action. All necessary mitigation and enhancement measures shall be authorized prior to the implementing of the agency action and funded concurrently with all other project features.

(2) The applicant receiving such exemption shall include the costs of such mitigation and enhancement measures within the overall costs of continuing the proposed action. Notwithstanding the preceding sentence the costs of such measures shall not be treated as project costs for the purpose of computing benefit-cost or other ratios for the proposed action. Any applicant may request the Secretary to carry out such mitigation and enhancement measures. The costs incurred by the Secretary in carrying out any such measures shall be paid by the applicant receiving the exemption. No later than one year after the granting of an exemption, the exemption applicant shall submit to the Council on Environmental Quality a report describing its compliance with the mitigation and enhancement measures prescribed by this section. Such report shall

be submitted annually until all such mitigation and enhancement measures have been completed. Notice of the public availability of such reports shall be published in the Federal Register by the Council on Environmental Quality.

(m) NOTICE.—The 60-day notice requirement of section 11(g) of this Act shall not apply with respect to review of any final determination of the Committee under subsection (h) of this section granting an exemption from the requirements of subsection (a)(2) of this section.

(n) JUDICIAL REVIEW.—Any person, [as defined by section 3(13) of this Act,] may obtain judicial review, under chapter 7 of title 5 of the United States Code, of any decision of the Endangered Species Committee under subsection (h) in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review. A copy of such petition shall be transmitted by the clerk of the court to the Committee and the Committee shall file in the court the record in the proceeding, as provided in section 2112, of title 28, United States Code. Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.

(o) EXEMPTION AS PROVIDING EXCEPTION ON TAKING OF ENDANGERED SPECIES.—Notwithstanding sections 4(d) and 9(a)(1)(B) and (C) of this Act, sections 101 and 102 of the Marine Mammal Protection Act of 1972, or any regulation promulgated to implement any such section—

(1) any action for which an exemption is granted under subsection (h) of this section shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and

(2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) of this section shall not be considered to be a prohibited taking of the species concerned.

(p) EXEMPTIONS IN PRESIDENTIALLY DECLARED DISASTER AREAS.—In any area which has been declared by the President to be a major disaster area under the Disaster Relief and Emergency Assistance Act, the President is authorized to make the determinations required by subsections (g) and (h) of this section for any project for the repair or replacement of a public facility substantially as it existed prior to the disaster under section 405 or 406 of the Disaster Relief and Emergency Assistance Act, and which the President determines (1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures of this section to be followed. Notwithstanding any other provision of this section, the Committee shall accept the determinations of the President under this subsection.

(q) EMERGENCY CONSULTATIONS.—In response to a natural disaster or other emergency, consultation under subsection (a)(2) may be deferred by a Federal agency for the emergency repair of a natural gas pipeline, hazardous liquid pipeline, or electrical transmission facility, if the repair is necessary to address an imminent threat to human lives or an imminent and significant threat to the environment. Consultation shall be initiated as soon as practicable after the threat to human lives or the environment has abated.

(16 U.S.C. 1536)

INTERNATIONAL COOPERATION

SEC. 8. (a) FINANCIAL ASSISTANCE.—As a demonstration of the commitment of the United States to the worldwide protection of endangered species and threatened species, the President may, subject to the provisions of section 1415 of the Supplemental Appropriation Act, 1953 (31 U.S.C. 724), use foreign currencies accruing to the United States Government under the Agricultural Trade Development and Assistance Act of 1954 or any other law to provide to any foreign county (with its consent) assistance in the development and management of programs in that country which the Secretary determines to be necessary or useful for the conservation of any endangered species or threatened species listed by the Secretary pursuant to section 4 of this Act. The President shall provide assistance (which includes, but is not limited to, the acquisition, by lease or otherwise, of lands, waters, or interests therein) to foreign countries under this section under such terms and conditions as he deems appropriate. Whenever foreign currencies are available for the provision of assistance under this section, such currencies shall be used in preference to funds appropriated under the authority of section 15 of this Act.

(b) ENCOURAGEMENT OF FOREIGN PROGRAMS.—In order to carry out further the provisions of this Act, the Secretary, through the Secretary of State shall encourage—

(1) foreign countries to provide for the conservation of fish or wildlife and plants including endangered species and threatened species listed pursuant to section 4 of this Act;

(2) the entering into of bilateral or multilateral agreements with foreign countries to provide for such conservation; and

(3) foreign persons who directly or indirectly take fish or wildlife or plants in foreign countries or on the high seas for importation into the United States for commercial or other purposes to develop and carry out with such assistance as he may provide, conservation practices designed to enhance such fish or wildlife or plants and their habitat.

(c) PERSONNEL.—After consultation with the Secretary of State, the Secretary may—

(1) assign or otherwise make available any officer or employee of his department for the purpose of cooperating with foreign countries and international organizations in developing personnel resources and programs which promote the conservation of fish or wildlife or plants, and

(2) conduct or provide financial assistance for the educational training of foreign personnel, in this country or

abroad, in fish, wildlife, or plant management, research and law enforcement and to render professional assistance abroad in such matters.

(d) INVESTIGATIONS.—After consultation with the Secretary of State and the Secretary of the Treasury, as appropriate, the Secretary may conduct or cause to be conducted such law enforcement investigations and research abroad as he deems necessary to carry out the purposes of this Act.

(16 U.S.C. 1537)

CONVENTION IMPLEMENTATION

SEC. 8A. (a) MANAGEMENT AUTHORITY AND SCIENTIFIC AUTHORITY.—The Secretary of the Interior (hereinafter in this section referred to as the "Secretary") is designated as the Management Authority and the Scientific Authority for purposes of the Convention and the respective functions of each such Authority shall be carried out through the United States Fish and Wildlife Service.

(b) MANAGEMENT AUTHORITY FUNCTIONS.—The Secretary shall do all things necessary and appropriate to carry out the functions of the Management Authority under the Convention.

(c) SCIENTIFIC AUTHORITY FUNCTIONS.—(1) The Secretary shall do all things necessary and appropriate to carry out the functions of the Scientific Authority under the Convention.

(2) The Secretary shall base the determinations and advice given by him under Article IV of the Convention with respect to wildlife upon the best available biological information derived from professionally accepted wildlife management practices; but is not required to make, or require any State to make, estimates of population size in making such determinations or giving such advice.

(d) RESERVATIONS BY THE UNITED STATES UNDER CONVENTION.—If the United States votes against including any species in Appendix I or II of the Convention and does not enter a reservation pursuant to paragraph (3) of Article XV of the Convention with respect to that species, the Secretary of State, before the 90th day after the last day on which such a reservation could be entered, shall submit to the Committee on Merchant Marine and Fisheries of the House of Representatives, and to the Committee on the Environment and Public Works of the Senate, a written report setting forth the reasons why such a reservation was not entered.

(e) WILDLIFE PRESERVATION IN WESTERN HEMISPHERE.—(1) The Secretary of the Interior (hereinafter in this subsection referred to as the "Secretary"), in cooperation with the Secretary of State, shall act on behalf of, and represent, the United States in all regards as required by the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (56 Stat. 1354, T.S. 982, hereinafter in this subsection referred to as the "Western Convention"). In the discharge of these responsibilities, the Secretary and the Secretary of State shall consult with the Secretary of Agriculture, the Secretary of Commerce, and the heads of other agencies with respect to matters relating to or affecting their areas of responsibility.

(2) The Secretary and the Secretary of State shall, in cooperation with the contracting parties to the Western Convention and,

to the extent feasible and appropriate, with the participation of State agencies, take such steps as are necessary to implement the Western Convention. Such steps shall include, but not be limited to—

(A) cooperation with contracting parties and international organizations for the purpose of developing personnel resources and programs that will facilitate implementation of the Western Convention;

(B) identification of those species of birds that migrate between the United States and other contracting parties, and the habitats upon which those species depend, and the implementation of cooperative measures to ensure that such species will not become endangered or threatened; and

(C) identification of measures that are necessary and appropriate to implement those provisions of the Western Convention which address the protection of wild plants.

(3) No later than September 30, 1985, the Secretary and the Secretary of State shall submit a report to Congress describing those steps taken in accordance with the requirements of this subsection and identifying the principal remaining actions yet necessary for comprehensive and effective implementation of the Western Convention.

(4) The provisions of this subsection shall not be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate resident fish or wildlife under State law or regulations.

(16 U.S.C. 1537a)

PROHIBITED ACTS

SEC. 9. (a) GENERAL.—(1) Except as provided in sections 6(g)(2) and 10 of this Act, with respect to any endangered species of fish or wildlife listed pursuant to section 4 of this Act it is unlawful for any person subject to the jurisdiction of the United States to—

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

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

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

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

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

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

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 4 of this Act and promulgated by the Secretary pursuant to authority provided by this Act.

(2) Except as provided in sections 6(g)(2) and 10 of this Act, with respect to any endangered species of plants listed pursuant to

section 4 of this Act, it is unlawful for any person subject to the jurisdiction of the United States to—

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

(B) remove and reduce to possession any such species from areas under Federal jurisdiction; maliciously damage or destroy any such species on any such area; or remove cut, dig up, or damage or destroy any such species on any other area in knowing violation of any law or regulation of any state or in the course of any violation of a state criminal trespass law;

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

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

(E) violate any regulation pertaining to such species or to any threatened species of plants listed pursuant to section 4 of this Act and promulgated by the Secretary pursuant to authority provided by this Act.

(b)(1) SPECIES HELD IN CAPTIVITY OR CONTROLLED ENVIRONMENT.—The provisions of subsections (a)(1)(A) and (a)(1)(G) of this section shall not apply to any fish or wildlife which was held in captivity or in a controlled environment on (A) December 28, 1973, or (B) the date of the publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to subsection (c) of section 4 of this Act: *Provided,* That such holding and any subsequent holding or use of the fish or wildlife as not in the course of a commercial activity. With respect to any act prohibited by subsections (a)(1)(A) and (a)(1)(G) of this section which occurs after a period of 180 days from (i) December 28, 1973, or (ii) the date of publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to subsection (c) of section 4 of this Act, there shall be a rebuttable presumption that the fish or wildlife involved in such act is not entitled to the exemption contained in this subsection.

(2)(A) The provisions of subsections (a)(1) shall not apply to—

(i) any raptor legally held in captivity or in a controlled environment on the effective date of the Endangered Species Act Amendments of 1978; or

(ii) any progeny of any raptor described in clause (i); until such time as any such raptor or progeny is intentionally returned to a wild state.

(B) Any person holding any raptor or progeny described in subparagraph (A) must be able to demonstrate that the raptor or progeny does, in fact, qualify under the provisions of this paragraph, and shall maintain and submit to the Secretary, on request, such inventories, documentation, and records as the Secretary may by regulation require as being reasonably appropriate to carry out the purposes of this paragraph. Such requirements shall not unnecessarily duplicate the requirements of other rules and regulations promulgated by the Secretary.

(c) VIOLATION OF CONVENTION.—(1) It is unlawful for any person subject to the jurisdiction of the United States to engage in any

trade in any specimens contrary to the provisions of the Convention, or to possess any specimens traded contrary to the provisions of the Convention, including the definitions of terms in article I thereof.

(2) Any importation into the United States of fish or wildlife shall, if—

(A) such fish or wildlife is not an endangered species listed pursuant to section 4 of this Act but is listed in Appendix II of the Convention;

(B) the taking and exportation of such fish or wildlife is not contrary to the provisions of the Convention and all other applicable requirements of the Convention have been satisfied;

(C) the applicable requirements of subsection (d), (e), and (f) of this section have been satisfied; and

(D) such importation is not made in the course of a commercial activity;

be presumed to be an important not in violation of any provision of this Act or any regulation issued pursuant to this Act.

(d) IMPORTS AND EXPORTS.—

(1) IN GENERAL.—It is unlawful for any person, without first having obtained permission from the Secretary, to engage in business—

(A) as an importer or exporter of fish or wildlife (other than shellfish and fishery products which (i) are not listed pursuant to section 4 of this Act as endangered species or threatened species, and (ii) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants; or

(B) as an importer or exporter of any amount of raw or worked African elephant ivory.

(2) REQUIREMENTS.—Any person required to obtain permission under paragraph (1) of this subsection shall—

(A) keep such records as will fully and correctly disclose each importation or exportation of fish, wildlife, plants, or African elephant ivory made by him and the subsequent disposition, made by him with respect to such fish, wildlife, plants, or ivory;

(B) at all reasonable times upon notice by a duly authorized representative of the Secretary, afford such representative access to his place of business, an opportunity to examine his inventory of imported fish, wildlife, plants, or African elephant ivory and the records required to be kept under subparagraph (A) of this paragraph, and to copy such records; and

(C) file such reports as the Secretary may require.

(3) REGULATIONS.—The Secretary shall prescribe such regulations as are necessary and appropriate to carry out the purposes of this subsection.

(4) RESTRICTION ON CONSIDERATION OF VALUE OF AMOUNT OF AFRICAN ELEPHANT IVORY IMPORTED OR EXPORTED.—In granting permission under this subsection for importation or exportation of African elephant ivory, the Secretary shall not vary the requirements for obtaining such permission on the

basis of the value or amount of ivory imported or exported under such permission.

(e) REPORTS.—It is unlawful for any person importing or exporting fish or wildlife (other than shellfish and fishery products which (1) are not listed pursuant to section 4 of this Act as endangered or threatened species, and (2) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants to fail to file any declaration or report as the Secretary deems necessary to facilitate enforcement of this Act or to meet the obligations of the Convention.

(f) DESIGNATION OF PORTS.—(1) It is unlawful for any person subject to the jurisdiction of the United States to import into or export from the United States any fish or wildlife (other than shellfish and fishery products which (A) are not listed pursuant to section 4 of this Act as endangered species or threatened species, and (B) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants, except at a port of ports designated by the Secretary of the Interior. For the purposes of facilitating enforcement of this Act and reducing the costs thereof, the Secretary of the Interior, with approval of the Secretary of the Treasury and after notice and opportunity for public hearing, may, by regulation, designate ports and change such designations. The Secretary of the Interior, under such terms and conditions as he may prescribe, may permit the importation or exportation at nondesignated ports in the interest of the health or safety of the fish or wildlife or plants, or for other reasons if, in his discretion, he deems it appropriate and consistent with the purpose of this subsection.

(2) Any port designated by the Secretary of the Interior under the authority of section 4(d) of the Act of December 5, 1969 (16 U.S.C. 666cc–4(d), shall, if such designation is in effect on the day before the date of the enactment of this Act, be deemed to be a port designated by the Secretary under paragraph (1) of this subsection until such time as the Secretary otherwise provides.

(g) VIOLATIONS.—It is unlawful for any person subject to the jurisdiction of the United States to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in this section.

(h) NO TAKING AGREEMENTS.—The Secretary and a non-Federal property owner may, at the request of the property owner, enter into an agreement identifying activities of the property owner that, based on a determination of the Secretary, will not result in a violation of the prohibitions of paragraphs (1)(B), (1)(C), and (2)(B) of subsection (a). The Secretary shall respond to a request for an agreement submitted by a property owner within 90 days after receipt. Nothing in this subsection prevents the Secretary, the Attorney General, or any other person from commencing an enforcement action under section 11.

(16 U.S.C. 1538)

[EXCEPTIONS] *CONSERVATION MEASURES AND EXCEPTIONS*

SEC. 10. (a) PERMITS.—(1) The Secretary may permit, under such terms and conditions as he shall prescribe—

(A) any act otherwise prohibited by section 9 for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant subsection (j); [or]

(B) any taking otherwise prohibited by [section 9(a)(1)(B)] *subparagraph (B) or (C) of section 9(a)(1)* if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity[.] *; or*

(C) any taking incidental to, and not the purpose of, the carrying out of an otherwise lawful activity pursuant to a candidate conservation agreement entered into under subsection (k).

(2)(A) No permit may be issued by the Secretary authorizing any taking referred to in paragraph (1)(B) unless the applicant therefor submits to the Secretary a conservation plan that specifies—

(i) the impact which will likely result from such taking;

(ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;

(iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and

(iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

(B) If the Secretary finds, after opportunity for public comment, with respect to a permit application and the related conservation plan that—

(i) the taking will be incidental;

(ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;

(iii) the applicant will ensure that adequate funding for the plan will be provided;

(iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and

(v) the measures, if any, required under subparagraph (A)(iv) will be met;

and he has received such other assurances as he may require that the plan will be implemented, the Secretary shall issue the permit. The permit shall contain such terms and conditions as the Secretary deems necessary or appropriate to carry out the purposes of this paragraph, including, but not limited to, such [reporting] *monitoring and reporting* requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with.

[(C) The Secretary shall revoke a permit issued under this paragraph if he finds that the permittee is not complying with the terms and conditions of the permit.]

(3) MULTIPLE SPECIES CONSERVATION PLANS.—

(A) IN GENERAL.—In addition to one or more listed species, a conservation plan developed under paragraph (2) may, at the request of the applicant, include species proposed for listing under section 4(c), candidate species, or other species found on lands or waters owned or within the jurisdiction of the applicant covered by the plan.

(B) APPROVAL CRITERIA.—The Secretary shall approve an application for a permit under paragraph (1)(B) that includes species other than species listed as endangered species or threatened species if, after notice and opportunity for public comment, the Secretary finds that the permit application and the related conservation plan satisfy the criteria of subparagraphs (A) and (B) of paragraph (2) with respect to listed species, and that the permit application and the related conservation plan with respect to other species satisfy the following requirements—

(i) the impact on non-listed species included in the plan will be incidental;

(ii) the applicant will, to the maximum extent practicable, minimize and mitigate such impacts;

(iii) the actions taken by the applicant with respect to species proposed for listing or candidates for listing included in the plan, if undertaken by all similarly situated persons within the range of such species, are likely to eliminate the need to list the species as an endangered species or a threatened species for the duration of the agreement as a result of the activities conducted by those persons;

(iv) the actions taken by the applicant with respect to other non-listed species included in the plan, if undertaken by all similarly situated persons within the range of such species, would not be likely to contribute to a determination to list the species as an endangered species or a threatened species for the duration of the agreement; and

(v) the criteria of subparagraphs (A)(iv), (B)(iii), and (B)(v) of paragraph (2);

and the Secretary has received such other assurances as the Secretary may require that the plan will be implemented. The permit shall contain such terms and conditions as the Secretary deems necessary or appropriate to carry out the purposes of this paragraph, including such monitoring and reporting requirements as the Secretary deems necessary for determining whether the terms and conditions are being complied with.

(C) TECHNICAL ASSISTANCE AND GUIDANCE.—To the maximum extent practicable, the Secretary and the heads of other Federal agencies, in cooperation with the States, are authorized and encouraged to provide technical assistance or guidance to any State or person that is developing a multiple species conservation plan under this paragraph. In providing technical assistance or guidance, priority shall be given to landowners that might otherwise encounter difficulty in developing such a plan.

(D) DEADLINES.—A conservation plan developed under this paragraph shall be reviewed and approved or disapproved by the Secretary not later than one year after the date of submission, or within such other period of time as is mutually agreeable to the Secretary and the applicant.

(E) STATE AND LOCAL LAW.—

(i) OTHER SPECIES.—Nothing in this paragraph shall limit the authority of a State or local government with respect to fish, wildlife, or plants that have not been listed as an endangered species or a threatened species under section 4.

(ii) COMPLIANCE.—An action by the Secretary, the Attorney General, or a person under section 11(g) to ensure compliance with a multiple species conservation plan and permit under this paragraph may be brought only against a permittee or the Secretary.

(F) EFFECTIVE DATE OF PERMIT FOR NON-LISTED SPECIES.—In the case of any species not listed as an endangered species or a threatened species, but covered by an approved multiple species conservation plan, the permit issued under paragraph (1)(B) shall take effect without further action by the Secretary at the time the species is listed pursuant to section 4(c), and to the extent that the taking is otherwise prohibited by subparagraph (B) or (C) of section 9(a)(1).

(4) LOW EFFECT ACTIVITIES.—

(A) IN GENERAL.—Notwithstanding paragraph (2)(A), the Secretary may issue a permit for a low effect activity authorizing any taking referred to in paragraph (1)(B), if the Secretary determines that the activity will have no more than a negligible effect, both individually and cumulatively, on the species, any taking associated with the activity will be incidental, and the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. The permit shall require, to the extent appropriate, actions to be taken by the permittee to offset the effects of the activity on the species.

(B) APPLICATIONS.—The Secretary shall minimize the costs of permitting to the applicant by developing, in cooperation with the States, model permit applications that will constitute conservation plans for low effect activities.

(C) PUBLIC COMMENT; EFFECTIVE DATE.—On receipt of a permit application for an activity that meets the requirements of subparagraph (A), the Secretary shall provide notice in a newspaper of general circulation in the area of the activity not later than 30 days after receipt and provide an opportunity for comment on the permit. If the Secretary does not receive significant adverse comment by the date that is 30 days after the notice is published, the permit shall take effect without further action by the Secretary 60 days after the notice is published.

(5) NO SURPRISES.—

(A) IN GENERAL.—Each conservation plan developed under this subsection shall include a no surprises provision, as described in this paragraph.

(B) NO SURPRISES.—A person who has entered into, and is in compliance with, a conservation plan under this subsection may not be required to undertake any additional mitigation measures for species covered by such plan if such measures would require the payment of additional money, or the adoption of additional use, development, or management restrictions on any land, waters, or water-related rights that would otherwise

be available under the terms of the plan without the consent of the permittee. The Secretary and the applicant, by the terms of the conservation plan, shall identify—

(i) other modifications to the plan; or

(ii) other additional measures;

if any, that the Secretary may require under extraordinary circumstances.

(6) PERMIT REVOCATION.—After notice and an opportunity for correction, as appropriate, the Secretary shall revoke a permit issued under this subsection if the Secretary finds that the permittee is not complying with the terms and conditions of the permit or the conservation plan.

(7) HABITAT CONSERVATION PLANNING LOAN PROGRAM.—

(A) ESTABLISHMENT.—There is established a "Habitat Conservation Planning Loan Program" (referred to in this paragraph as the "Program") under which the Secretary may make no-interest loans to assist in the development of a conservation plan under this section.

(B) ELIGIBILITY.—Any State, county, municipality, or other political subdivision of a State shall be eligible to receive a loan under the Program.

(C) LOAN LIMITS.—The amount of any loan may not exceed the total financial contribution of the other parties participating in the development of the plan.

(D) CRITERIA.—In determining whether to make a loan, the Secretary shall consider—

(i) the number of species covered by the plan;

(ii) the extent to which there is a commitment to participate in the planning process from a diversity of interests (including local governmental, business, environmental, and landowner interests);

(iii) the likely benefits of the plan; and

(iv) such other factors as the Secretary considers appropriate.

(E) TERM OF THE LOAN.—

(i) IN GENERAL.—Except as provided in clause (ii), a loan made under this paragraph shall be for a term of ten years.

(ii) ADVANCED REPAYMENTS.—If no conservation plan is developed within three years after the date of the loan, the loan shall be for a term of four years. If no permit is issued under paragraph (1)(B) with respect to the conservation plan within four years after the date of the loan, the loan shall be for a term of five years.

(b) HARDSHIP EXEMPTIONS.—(1) If any person enters into a contract with respect to a species of fish or wildlife or plant before the date of the publication in the Federal Register of notice of consideration of that species as an endangered species and the subsequent listing of that species as an endangered species pursuant to section 4 of this Act will cause undue hardship to such person under the contract, the Secretary, in order to minimize such hardship, may exempt such person from the application of section 9(a) of this Act to the extent the Secretary deems appropriate if such person applies to him for such exemption and includes with such

application such information as the Secretary may require to prove such hardship; except that (A) no such exemption shall be for a duration of more than one year from the date of publication in the Federal Register of notice of consideration of the species concerned, or shall apply to a quantity of fish or wildlife or plants in excess of that specified by the Secretary; (B) the one-year period for those species of fish or wildlife listed by the Secretary as endangered prior to the effective date of this Act shall expire in accordance with the terms of section 3 of the Act of December 5, 1969 (83 Stat. 275); and (C) no such exemption may be granted for the importation or exportation of a specimen listed in Appendix I of the Convention which is to be used in a commercial activity.

(2) As used in this subsection, the term "undue economic hardship" shall include, but not be limited to:

(A) substantial economic loss resulting from inability caused by this Act to perform contracts with respect to species of fish and wildlife entered into prior to the date of publication in the Federal Register of a notice of consideration of such species as an endangered species;

(B) substantial economic loss to persons who, for the year prior to the notice of consideration of such species as an endangered species, derived a substantial portion of their income from the lawful taking of any listed species, which taking would be made unlawful under this Act; or

(C) curtailment of subsistence taking made unlawful under this Act by persons (i) not reasonably able to secure other sources of subsistence; and (ii) dependent to a substantial extent upon hunting and fishing for subsistence; and (iii) who must engage in such curtailed taking for subsistence purposes.

(3) The Secretary may make further requirements for a showing of undue economic hardship as he deems fit. Exceptions granted under this section may be limited by the Secretary in his discretion as to time, area, or other factor of applicability.

(c) NOTICE AND REVIEW.—The Secretary shall publish notice in the Federal Register of each application for an exemption or permit which is made under this section. Each notice shall invite the submission from interested parties, within [thirty] *60* days after the date of the notice, of written data, views, or arguments with respect to the application; except that such [thirty]*60*-day period may be waived by the Secretary in an emergency situation where the health or life of an endangered animal is threatened and no reasonable alternative is available to the applicant, but notice of any such waiver shall be published by the Secretary in the Federal Register within ten days following the issuance of the exemption or permit. *The Secretary may, with approval of the applicant, provide an opportunity, as early as practicable, for public participation in the development of a multiple species conservation plan and permit application. If a multiple species conservation plan and permit application have been developed without an opportunity for public participation, the Secretary shall extend the public comment period for an additional 30 days for interested parties to submit written data, views, or arguments on the plan and application.* Information received by the Secretary as part of any application shall be avail-

able to the public as a matter of public record at every stage of the proceeding.

(d) PERMIT AND EXEMPTION [POLICY.—The] *POLICY.*—

(1) IN GENERAL.—The Secretary may grant exceptions under subsections (a)(1)(A) and (b) of this section only if he finds and publishes his finding in the Federal Register that (1) such exceptions were applied for in good faith, (2) if granted and exercised will not operate to the disadvantage of such endangered species, and (3) will be consistent with the purposes and policy set forth in section 2 of this Act.

(2) SCIENTIFIC PERMITS.—In granting permits for scientific purposes or to enhance the propagation or survival of an endangered species or a threatened species listed under section 4(c), the Secretary may authorize a single transaction, a series of transactions, or a number of activities over a specific period of time. In issuing or modifying such a permit, the Secretary shall take into consideration the expertise and facilities of the permit applicant and, consistent with the conservation of the affected species, maximize the efficiency of the permitting process.

(e) ALASKA NATIVES.—(1) Except as provided in paragraph (4) of this subsection the provisions of this Act shall not apply with respect to the taking of any endangered species or threatened species, or the importation of any such species taken pursuant to this section, by—

(A) any Indian, Aleut, or Eskimo who is an Alaskan Native who resides in Alaska; or

(B) any non-native permanent resident of an Alaska native village;

if such taking is primarily for subsistence purposes. Non-edible byproducts of species taken pursuant to this section may be sold in interstate commerce when made into authentic native articles of handicrafts and clothing; except that the provisions of this subsection shall not apply to any non-native resident of an Alaskan native village found by the Secretary to be not primarily dependent upon the taking of fish and wildlife for consumption or for the creation and sale of authentic native articles of handicrafts and clothing.

(2) Any taking under this subsection may not be accomplished in a wasteful manner.

(3) As used in this subsection—

(i) The term "subsistence" includes selling any edible portion of fish or wildlife in native villages and towns in Alaska for native consumption within native villages or towns; and

[1](ii) The term "authentic native articles of handicrafts and clothing" means items composed wholly or in some significant respect to natural materials, and which are produced, decorated or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or other mass copying devices. Traditional native handicrafts include, but are not limited to, weaving, carving, stitching, sewing, lacing, beading, drawing, and painting.

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[1] So in law. Section 10(e)(3)(ii) of the Endangered Species Act of 1973 paragraph indention is incorrect. Indention should be same as 10(e)(3)(i)

(4) Notwithstanding the provisions of paragraph (l) of this subsection, whenever the Secretary determines that any species of fish or wildlife which is subject to taking under the provisions of this subsection is an endangered species or threatened species, and that such taking materially and negatively affects the threatened or endangered species, he may prescribe regulations upon the taking of such species by any such Indian, Aleut, Eskimo, or non-native Alaskan resident of an Alaskan native village. Such regulations may be established with reference to species, geographical description of the area included, the season for taking, or any other factors related to the reason for establishing such regulations and consistent with the policy of this Act. Such regulations shall be prescribed after a notice and hearings in the affected judicial districts of Alaska and as otherwise required by section 103 of the Marine Mammal Protection Act of 1972, and shall be removed as soon as the Secretary determines that the need for their impositions has disappeared.

(f)(1) As used in this subsection—

(A) The term "pre-Act endangered species part" means—

(i) any sperm whale oil, including derivatives thereof, which was lawfully held within the United States on December 28, 1973, in the course of a commercial activity; or

(ii) any finished scrimshaw product, if such product or the raw material for such product was lawfully held within the United States on December 28, 1973, in the course of a commercial activity.

(B) The term "scrimshaw product" means any art form which involves the substantial etching or engraving of designs upon, or the substantial carving of figures, patterns, or designs from, any bone or tooth of any marine mammal of the order Cetacea. For purposes of this subsection, polishing or the adding of minor superficial markings does not constitute substantial etching, engraving, or carving.

(2) The Secretary, pursuant to the provisions of this subsection, may exempt, if such exemption is not in violation of the Convention, any pre-Act endangered species part from one or more of the following prohibitions.

(A) The prohibition on exportation from the United States set forth in section 9(a)(1)(A) of this Act.

(B) Any prohibition set forth in section 9(a)(1) (E) or (F) of this Act.

(3) Any person seeking an exemption described in paragraph (2) of this subsection shall make application therefor to the Secretary in such form and manner as he shall prescribe, but no such application may be considered by the Secretary unless the application—

(A) is received by the Secretary before the close of the one-year period beginning on the date on which regulations promulgated by the Secretary to carry out this subsection first take effect;

(B) contains a complete and detailed inventory of all pre-Act endangered species parts for which the applicant seeks exemption;

(C) is accompanied by such documentation as the Secretary may require to prove that any endangered species part or product claimed by the applicant to a pre-Act endangered species part is in fact such a part; and

(D) contains such other information as the Secretary deems necessary and appropriate to carry out the purposes of this subsection.

(4) If the Secretary approves any application for exemption made under this subsection, he shall issue to the applicant a certificate of exemption which shall specify—

(A) any prohibition in section 9(a) of this Act which is exempted;

(B) the pre-Act endangered species parts to which the exemption applies;

(C) the period of time during which the exemption is in effect, but no exemption made under this subsection shall have force and effect after the close of the three-year period beginning on the date of issuance of the certificate unless such exemption is renewed under paragraph (8); and

(D) any term or condition prescribed pursuant to paragraph (5) (A) or (B), or both, which the Secretary deems necessary or appropriate.

(5) The Secretary shall prescribe such regulations as he deems necessary and appropriate to carry out the purposes of this subsection. [Such regulations may set forth—

(A) terms and conditions which may be imposed on applicants for exemptions under this subsection (including, but not limited to, requirements that applicants register, inventories, keep complete sales records, permit duly authorized agents of the Secretary to inspect such inventories and records, and periodically file appropriate reports with the Secretary); and

(B) terms and conditions which may be imposed on any subsequent purchaser of any pre-Act endangered species part covered by an exemption granted under this subsection;

to insure that any such part so exempted is adequately accounted for and not disposed of contrary to the provisions of this Act. No regulation prescribed by the Secretary to carry out the purposes of this subsection shall be subject to section 4(f)(2)(A)(i) of this Act.]

(6)(A) Any contract for the sale of pre-Act endangered species parts which is entered into by the Administrator of General Services prior to the effective date of this subsection and pursuant to the notice published in the Federal Register on January 9, 1973, shall not be rendered invalid by virtue of the fact that fulfillment of such contract may be prohibited under section 9(a)(1)(F).

(B) In the event that this paragraph is held invalid, the validity of the remainder of the Act, including the remainder of this subsection, shall not be affected.

(7) Nothing in this subsection shall be construed to—

(A) exonerate any person from any act committed in violation of paragraphs (1)(A), (1)(E), or (1)(F) of section 9(a) prior to the date of enactment of this subsection; or

(B) immunize any person from prosecution for any such act.

(8)(A)(i) Any valid certificate of exemption which was renewed after October 13, 1982, and was in effect on March 31, 1988, shall be deemed to be renewed for a 6-month period beginning on the date of enactment of the Endangered Species Act Amendments of 1988. Any person holding such a certificate may apply to the Secretary for one additional renewal of such certificate for a period not to exceed 5 years beginning on the date of such enactment.

(B) If the Secretary approves any application for renewal of an exemption under this paragraph, he shall issue to the applicant a certificate of renewal of such exemption which shall provide that all terms, conditions, prohibitions, and other regulations made applicable by the previous certificate shall remain in effect during the period of the renewal.

(C) No exemption or renewal of such exemption made under this subsection shall have force and effect after the expiration date of the certificate of renewal of such exemption issued under this paragraph.

(D) No person may, after January 31, 1984, sell or offer for sale in interstate or foreign commerce, and pre-Act finished scrimshaw product unless such person holds a valid certificate of exemption issued by the Secretary under this subsection, and unless such product or the raw material for such product was held by such person on October 13, 1982.

(g) In connection with any action alleging a violation of section 9, any person claiming the benefit of any exemption or permit under this Act shall have the burden of proving that the exemption or permit is applicable, has been granted, and was valid and in force at the time of the alleged violation.

(h) CERTAIN ANTIQUE ARTICLES.—(1) Sections 4(d), 9(a), and 9(c) do not apply to any article which—

(A) is not less than 100 years of age;

(B) is composed in whole or in part of any endangered species or threatened species listed under section 4;

(C) has not been repaired or modified with any part of any such species on or after the date of the enactment of this Act; and

(D) is entered at a port designated under paragraph (3).

(2) Any person who wishes to import an article under the exception provided by this subsection shall submit to the customs officer concerned at the time of entry of the article such documentation as the Secretary of the Treasury, after consultation with the Secretary of the Interior, shall by regulation require as being necessary to establish that the article meets the requirements set forth in paragraph (1) (A), (B), and (C).

(3) the Secretary of the Treasury, after consultation with the Secretary of the Interior, shall designate one port within each customs region at which articles described in paragraph (1) (A), (B), and (C) must be entered into the customs territory of the United States.

(4) Any person who imported, after December 27, 1973, and on or before the date of the enactment of the Endangered Species Act Amendments of 1978, any article described in paragraph (1) which—

(A) was not repaired or modified after the date of importation with any part of any endangered species or threatened species listed under section 4;

(B) was forfeited to the United States before such date of the enactment, or is subject to forfeiture to the United States on such date of enactment, pursuant to the assessment of a civil penalty under section 11; and

(C) is in the custody of the United States on such date of enactment;

may, before the close of the one-year period beginning on such date of enactment make application to the Secretary for return of the article. Application shall be made in such form and manner, and contain such documentation, as the Secretary prescribes. If on the basis of any such application which is timely filed, the Secretary is satisfied that the requirements of this paragraph are met with respect to the article concerned, the Secretary shall return the article to the applicant and the importation of such article shall, on and after the date of return, be deemed to be a lawful importation under this Act.

(i) NONCOMMERCIAL TRANSSHIPMENTS.—Any importation into the United States of fish or wildlife shall, if—

(1) such fish or wildlife was lawfully taken and exported from the country of origin and country of reexport, if any;

(2) such fish or wildlife is in transit or transshipment through any place subject to the jurisdiction of the United States en route to a country where such fish or wildlife may be lawfully imported and received;

(3) the exporter or owner of such fish or wildlife gave explicit instructions not to ship such fish or wildlife through any place subject to the jurisdiction of the United States, or did all that could have reasonably been done to prevent transshipment, and the circumstances leading to the transshipment were beyond the exporter's or owner's control;

(4) the applicable requirements of the Convention have been satisfied; and

(5) such importation is not made in the course of a commercial activity,

be an importation not in violation of any provision of this Act or any regulation issued pursuant to this Act while such fish or wildlife remains in the control of the United States Customs Service.

(j) EXPERIMENTAL POPULATIONS.—(1) For purposes of this subsection, the term "experimental population" means any population (including any offspring arising solely therefrom) authorized by the Secretary for release under paragraph (2), but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species.

(2)(A) The Secretary may authorize the release (and the related transportation) of any population (including eggs, propagules, or individuals) of an endangered species or a threatened species outside the current range of such species if the Secretary determines that such release will further the conservation of such species.

(B) Before authorizing the release of any population under subparagraph (A), the Secretary shall by regulation identify the population and determine, on the basis of the best available informa-

tion, whether or not such population is essential to the continued existence of an endangered species or a threatened species.

(C) For the purposes of this Act, each member of an experimental population shall be treated as a threatened species; except that—

(i) solely for purposes of section 7 (other than subsection (a)(1) thereof), an experimental population determined under subparagraph (B) to be not essential to the continued existence of a species shall be treated, except when it occurs in an area within the National Wildlife Refuge System or the National Park System, as a species proposed to be listed under section 4; and

(ii) critical habitat shall not be designated under this Act for any experimental population determined under subparagraph (B) to be not essential to the continued existence of a species.

(3) The Secretary, with respect to population of endangered species or threatened species that the Secretary authorized, before the date of the enactment of this subsection, for release in geographical areas separate from the other populations of such species, shall determine by regulation which of such populations are an experimental population for the purposes of this subsection and whether or not each is essential to the continued existence of an endangered species or a threatened species.

(k) CANDIDATE CONSERVATION AGREEMENTS.—

(1) IN GENERAL.—At the request of any non-Federal person, the Secretary may enter into a candidate conservation agreement with the person for a species that has been proposed for listing under section 4(c)(1), is a candidate species, or is likely to become a candidate species in the near future on property owned or under the jurisdiction of the person requesting such an agreement.

(2) REVIEW BY THE SECRETARY.—

(A) SUBMISSION TO THE SECRETARY.—A non-Federal person may submit a candidate conservation agreement developed under paragraph (1) to the Secretary for review at any time prior to the listing described in section 4(c)(1) of a species that is the subject of the agreement.

(B) CRITERIA FOR APPROVAL.—The Secretary may approve an agreement and issue a permit under subsection (a)(1)(C) for the agreement if, after notice and opportunity for public comment, the Secretary finds that—

(i) for species proposed for listing, candidates for listing, or species that are likely to become a candidate species in the near future, that are included in the agreement, the actions taken under the agreement, if undertaken by all similarly situated persons, would produce a conservation benefit that would be likely to eliminate the need to list the species under section 4(c) as a result of the activities of those persons during the duration of the agreement;

(ii) the actions taken under the agreement will not adversely affect an endangered species or a threatened species;

(iii) the agreement contains such other measures that the Secretary may require as being necessary or appropriate for the purposes of the agreement;

(iv) the person will ensure adequate funding to implement the agreement; and

(v) the agreement includes such monitoring and reporting requirements as the Secretary deems necessary for determining whether the terms and conditions of the agreement are being complied with.

(3) EFFECTIVE DATE OF PERMIT.—A permit issued under subsection (a)(1)(C) shall take effect at the time the species is listed pursuant to section 4(c), if the permittee is in full compliance with the terms and conditions of the agreement.

(4) ASSURANCES.—A person who has entered into a candidate conservation agreement under this subsection, and is in compliance with the agreement, may not be required to undertake any additional measures for species covered by such agreement if the measures would require the payment of additional money, or the adoption of additional use, development, or management restrictions on any land, waters, or water-related rights that would otherwise be available under the terms of the agreement without the consent of the person entering into the agreement. The Secretary and the person entering into a candidate conservation agreement, by the terms of the agreement, shall identify—

(A) other modifications to the agreement; or

(B) other additional measures;

if any, that the Secretary may require under extraordinary circumstances.

(l) SAFE HARBOR AGREEMENTS.—

(1) AGREEMENTS.—

(A) IN GENERAL.—The Secretary may enter into agreements with non-Federal persons to benefit the conservation of endangered species or threatened species by creating, restoring, or improving habitat or by maintaining currently unoccupied habitat for endangered species or threatened species. Under an agreement, the Secretary shall permit the person to take endangered species or threatened species included under the agreement on lands or waters that are subject to the agreement if the taking is incidental to, and not the purpose of, carrying out of an otherwise lawful activity, except that the Secretary may not permit through an agreement any incidental taking below the baseline requirement specified pursuant to subparagraph (B).

(B) BASELINE.—For each agreement under this subsection, the Secretary shall establish a baseline requirement that is mutually agreed on by the applicant and the Secretary at the time of the agreement that will, at a minimum, maintain existing conditions for the species covered by the agreement on lands and waters that are subject to the agreement. The baseline may be expressed in terms of the abundance or distribution of endangered or threatened species, quantity or quality of habitat, or such other indicators as appropriate.

(2) STANDARDS AND GUIDELINES.—The Secretary shall issue standards and guidelines for the development and approval of safe harbor agreements in accordance with this subsection.

(3) FINANCIAL ASSISTANCE.—

(A) IN GENERAL.—In cooperation with the States and subject to the availability of appropriations under section 15(d), the Secretary may provide a grant of up to $10,000 to any individual private landowner to assist the landowner in carrying out a safe harbor agreement under this subsection.

(B) PROHIBITION ON ASSISTANCE FOR REQUIRED ACTIVITIES.—The Secretary may not provide assistance under this paragraph for any action that is required by a permit issued under this Act or that is otherwise required under this Act or other Federal law.

(C) OTHER PAYMENTS.—A grant provided to an individual private landowner under this paragraph shall be in addition to, and not affect, the total amount of payments that the landowner is otherwise eligible to receive under the conservation reserve program established under subchapter B of chapter 1 of subtitle D of title XII of the Food Security Act of 1985 (16 U.S.C. 3831 et seq.), the wetlands reserve program established under subchapter C of that chapter (16 U.S.C. 3837 et seq.), or the Wildlife Habitat Incentives Program established under section 387 of the Federal Agriculture Improvement and Reform Act of 1996 (16 U.S.C. 3836a).

(m) HABITAT RESERVE AGREEMENTS.—

(1) PROGRAM.—The Secretary shall establish a habitat reserve program to be implemented through contracts or easements of a mutually agreed on duration to assist non-Federal property owners to preserve and manage suitable habitat for endangered species and threatened species.

(2) AGREEMENTS.—The Secretary may enter into a habitat reserve agreement with a non-Federal property owner to protect, manage, or enhance suitable habitat on private property for the benefit of endangered species or threatened species. Under an agreement, the Secretary shall make payments in an agreed on amount to the property owner for carrying out the terms of the habitat reserve agreement, if the activities undertaken pursuant to the agreement are not otherwise required by this Act.

(3) STANDARDS AND GUIDELINES.—The Secretary shall issue standards and guidelines for the development and approval of habitat reserve agreements in accordance with this subsection. Agreements shall, at a minimum, specify the management measures, if any, that the property owner will implement for the benefit of endangered species or threatened species, the conditions under which the property may be used, the nature and schedule for any payments agreed on by the parties to the agreement, and the duration of the agreement.

(4) PAYMENTS.—Any payment received by a property owner under a habitat reserve agreement shall be in addition to and shall not affect the total amount of payments that the property owner is otherwise entitled to receive under the Agricultural

Market Transition Act (7 U.S.C. 7201 et seq.) or the Agricultural Act of 1949 (7 U.S.C. 1421 et seq.).

(5) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the Secretary of the Interior $27,500,000 and the Secretary of Commerce $13,333,333 for each of fiscal years 1998 through 2003 to assist non-Federal property owners to carry out the terms of habitat reserve programs under this subsection.

(n) HABITAT CONSERVATION INSURANCE PROGRAM.—

(1) ESTABLISHMENT.—There is established a Habitat Conservation Insurance Program.

(2) USE.—The Program shall be used to pay the cost of additional mitigation measures not otherwise required under an existing conservation plan under subsection (a) or a candidate conservation agreement under subsection (k) to minimize or mitigate adverse effects to a species covered by the plan or agreement, to the extent that the adverse effects were not anticipated and addressed at the time the plan or agreement was approved by the Secretary.

(3) GRANTS.—In carrying out the Program, the Secretary may make grants to any person who is a party to a conservation plan under subsection (a) or a candidate conservation agreement under subsection (k).

(16 U.S.C. 1539)

PENALTIES AND ENFORCEMENT

SEC. 11. (a) CIVIL PENALTIES.—(1) Any person who knowingly violates, and any person engaged in business as an importer or exporter of fish, wildlife, or plants who violates, any provision of this Act, or any provision of any permit or certificate issued hereunder, or of any regulation issued in order to implement subsection (a)(1)(A), (B), (C), (D), (E), or (F), (a)(2(A), (B), (C), or (D), (c), (d), (other than regulation relating to recordkeeping or filing or reports), (f), or (g) of section 9 of this Act, may be assessed a civil penalty by the Secretary of not more than $25,000 for each violation. Any person who knowingly violates, and any person engaged in business as an importer or exporter of fish, wildlife, or plants who violates, any provision of any other regulation issued under this Act may be assessed a civil penalty by the Secretary of not more than $12,000 for each such violation. Any person who otherwise violates any provision of this Act, or any regulation, permit, or certificate issued hereunder, may be assessed a civil penalty by the Secretary of not more than $500 for each such violation. No penalty may be assessed under this subsection unless such person is given notice and opportunity for a hearing with respect to such violation. Each violation shall be a separate offense. Any such civil penalty may be remitted or mitigated by the Secretary. Upon any failure to pay a penalty assessed under this subsection, the Secretary may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found, resides, or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action. The court shall hear such action on the record

made before the Secretary and shall sustain his action if it is supported by substantial evidence on the record considered as a whole.

(2) Hearings held during proceedings for the assessment of civil penalties by paragraph (1) of this subsection shall be conducted in accordance with section 554 of title 5, United States Code. The Secretary may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and administer oaths. Witnesses summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpoena served upon any person pursuant to this paragraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Secretary or to appear and produce documents before the Secretary, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(3) Notwithstanding any other provision of this Act, no civil penalty shall be imposed if it can be shown by a preponderance of the evidence that the defendant committed an act based on a good faith belief that he was acting to protect himself or herself, a member of his or her family, or any other individual from bodily harm, from any endangered or threatened species.

(b) CRIMINAL VIOLATIONS.—(1) Any person who knowingly violates any provision of this Act, of any permit or certificate issued hereunder, or of any regulation issued in order to implement subsection (a)(1)(A), (B), (C), (D), (E), or (F); (a)(2)(A), (B), (C), or (D), (c), (d) (other than a regulation relating to recordkeeping, or filing of reports), (f), or (g) of section 9 of this Act shall, upon conviction, be fined not more than $50,000 or imprisoned for not more than one year, or both. Any person who knowingly violates any provision of any other regulation issued under this Act shall, upon conviction, be fined not more than $25,000 or imprisoned for not more than six months, or both.

(2) The head of any Federal agency which has issued a lease, license, permit, or other agreement authorizing a person to import or export fish, wildlife, or plants, or to operate a quarantine station for imported wildlife, or authorizing the use of Federal lands, including grazing of domestic livestock, to any person who is convicted of a criminal violation of this Act or any regulation, permit, or certificate issued hereunder may immediately modify, suspend, or revoke each lease, license, permit, or other agreement. The Secretary shall also suspend for a period of up to one year, or cancel, any Federal hunting or fishing permits or stamps issued to any person who is convicted of a criminal violation of any provision of this Act or any regulation, permit, or certificate issued hereunder. The United States shall not be liable for the payments of any compensation, reimbursement, or damages in connection with the modification, suspension, or revocation of any leases, licenses permits stamps, or other agreements pursuant to this section.

(3) Notwithstanding any other provision of this Act, it shall be a defense to prosecution under this subsection if the defendant

committed the offense based on a good faith belief that he was acting to protect himself or herself, a member of his or her family, or any other individual, from bodily harm from any endangered or threatened species.

(c) DISTRICT COURT JURISDICTION.—The several district courts of the United States; including the courts enumerated in section 460 of title 28, United States Code, shall have jurisdiction over any actions arising under this Act. For the purpose of this Act, American Samoa shall be included within the judicial district of the District Court of the United States for the District of Hawaii.

(d) REWARDS AND CERTAIN INCIDENTAL EXPENSES.—The Secretary or the Secretary of the Treasury shall pay, from sums received as penalties, fines, or forfeitures of property for any violations of this chapter or any regulation issued hereunder (1) a reward to any person who furnishes information which leads to an arrest, a criminal conviction, civil penalty assessment, or forfeiture of property for any violation of this chapter or any regulation issued hereunder, and (2) the reasonable and necessary costs incurred by any person in providing temporary care for any fish, wildlife, or plant pending the disposition of any civil or criminal proceeding alleging a violation of this chapter with respect to that fish, wildlife, or plant. The amount of the reward, if any, is to be designated by the Secretary or the Secretary of the Treasury, as appropriate. Any officer or employee of the United States or any State or local government who furnishes information or renders service in the performance of his official duties is ineligible for payment under this subsection. Whenever the balance of sums received under this section and section 6(d) of the Act of November 16, 1981 (16 U.S.C. 3375(d)) as penalties or fines, or from forfeitures of property, exceed $500,000, the Secretary of the Treasury shall deposit an amount equal to such excess balance in the cooperative endangered species conservation fund established under section 6(i) of this Act.

(e) ENFORCEMENT.—(1) The provisions of this Act and any regulations or permits issued pursuant thereto shall be enforced by the Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating, or all such Secretaries. Each such Secretary may utilize by agreement, with or without reimbursement, the personnel, services, and facilities of any other Federal agency or any State agency for purposes of enforcing this Act.

(2) The judges of the district courts of the United States and the United States magistrates may within their respective jurisdictions, upon proper oath or affirmation showing probable cause, issue such warrants or other process as may be required for enforcement of this Act and any regulation issued thereunder.

(3) Any person authorized by the Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating, to enforce this Act may detain for inspection and inspect any package, crate, or other container, including its contents, and all accompanying documents, upon importation or exportation. Such persons may make arrests without a warrant for any violation of this Act if he has reasonable grounds to believe that the person to be arrested is committing the violation in his

presence or view and may execute and serve any arrest warrant, search warrant, or other warrant or civil or criminal process issued by any officer or court of competent jurisdiction for enforcement of this Act. Such person so authorized may search and seize, with or without a warrant, as authorized by law. Any fish, wildlife, property, or item so seized shall be held by any person authorized by the Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating pending disposition of civil or criminal proceedings, or the institution of an action in rem for forfeiture of such fish, wildlife, property, or item pursuant to paragraph (4) of the subsection; except that the Secretary may, in lieu of holding such fish, wildlife, property, or item, permit the owner or consignee to post a bond or other surety satisfactory to the Secretary, but upon forfeiture of any such property to the United States, or the abandonment or waiver of any claim to any such property, it shall be disposed of (other than by sale to the general public) by the Secretary in such a manner, consistent with the purposes of this Act, as the Secretary shall by regulation prescribe.

(4)(A) All fish or wildlife or plants taken, possessed, sold, purchased, offered for sale or purchase, transported, delivered, received, carried, shipped, exported, or imported contrary to the provisions of this Act, any regulation made pursuant thereto, or any permit or certificate issued hereunder shall be subject to forfeiture to the United States.

(B) All guns, traps, nets, and other equipment, vessels, vehicles, aircraft, and other means of transportation used to aid the taking, possessing, selling, purchasing, offering for sale or purchase, transporting, delivering, receiving, carrying, shipping, exporting, or importing of any fish or wildlife or plants in violation of this Act, any regulation made pursuant thereto, or any permit or certificate issued thereunder shall be subject to forfeiture to the United States upon conviction of a criminal violation pursuant to section 11(b)(1) of this Act.

(5) All provisions of law relating to the seizure, forfeiture, and condemnation of a vessel for violation of the customs laws, the disposition of such vessel or the proceeds from the sale thereof, and the remission or mitigation of such forfeiture, shall apply to the seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this Act, insofar as such provisions of law are applicable and not inconsistent with the provisions of this Act; except that all powers, rights, and duties conferred or imposed by the customs laws upon any officer or employee of the Treasury Department shall, for the purposes of this Act, be exercised or performed by the Secretary or by such persons as he may designate.

(6) The Attorney General of the United States may seek to enjoin any person who is alleged to be in violation of any provision of this Act or regulation issued under authority thereof.

(f) REGULATIONS.—The Secretary, the Secretary of the Treasury, and the Secretary of the Department in which the Coast Guard is operating, are authorized to promulgate such regulations as may be appropriate to enforce this Act, and charge reasonable fees for expenses to the Government connected with permits or certificates authorized by this Act including processing applications

and reasonable inspections, and with the transfer, board, handling, or storage of fish or wildlife or plants and evidentiary items seized and forfeited under this Act. All such fees collected pursuant to this subsection shall be deposited in the Treasury to the credit of the appropriation which is current and chargeable for the cost of furnishing the services. Appropriated funds may be expended pending reimbursement from parties in interest.

(g) CITIZEN SUITS.—(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this Act or regulation issued under the authority thereof; or

(B) to compel the Secretary to apply, pursuant to section 6(g)(2)(B)(ii) of this Act, the prohibitions set forth in or authorized pursuant to section 4(d) or section 9(a)(1)(B) of this Act with respect to the taking of any resident endangered species or threatened species within any State; or

(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 4 *or section 5* which is not discretionary with the Secretary.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation or to order the Secretary to perform such act or duty, as the case may be. In any civil suit commenced under subparagraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.

(2)(A) No action may be commenced under subparagraph (1)(A) of this section—

(i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation;

(ii) if the Secretary has commenced action to impose a penalty pursuant to subsection (a) of this section; or

(iii) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of any such provision or regulation.

(B) No action may be commenced under subparagraph (1)(B) of this section—

(i) prior to sixty days after written notice has been given to the Secretary setting forth the reasons why an emergency is thought to exist with respect to an endangered species or a threatened species in the State concerned; or

(ii) if the Secretary has commenced and is diligently prosecuting action under section 6(g)(2)(B)(ii) of this Act to determine whether any such emergency exists.

(C) No action may be commenced under subparagraph (1)(C) of this section prior to sixty days after written notice has been given to the Secretary; except that such action may be brought imme-

diately after such notification in the case of an action under this section respecting an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants.

(3) INCIDENTAL TAKING.—In any action under this subsection against any person for an alleged taking incidental to the carrying out of an otherwise lawful activity, the person commencing the action must establish, using pertinent evidence based on scientifically valid principles, that the acts of the person alleged to be in violation of section 9(a)(1) have caused, or will cause, the taking, of—

(A) an endangered species; or

(B) a threatened species the taking of which is prohibited pursuant to a regulation issued under section 4(d).

[(3)**]***(4)*(A) Any suit under this subsection may be brought in the judicial district in which the violation occurs.

(B) In any such suit under this subsection in which the United States is not a party, the Attorney General, at the request of the Secretary, may intervene on behalf of the United States as a matter of right.

[(4)**]***(5)* The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

[(5)**]***(6)* The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Secretary or a State agency).

(h) INCIDENTAL TAKING.—In any action under subsection (a), (b), or (e)(6) against any person for an alleged taking incidental to the carrying out of an otherwise lawful activity, the Secretary or the Attorney General must establish, using pertinent evidence based on scientifically valid principles, that the acts of such person have caused, or will cause, the taking, of—

(1) an endangered species; or

(2) a threatened species the taking of which is prohibited pursuant to a regulation issued under section 4(d).

[(h)**]** *(i)* COORDINATION WITH OTHER LAWS.—The Secretary of Agriculture and the Secretary shall provide for appropriate coordination of the administration of this Act with the administration of the animal quarantine laws (21 U.S.C. 101–105, 111–135b, and 612–614) and section 306 of the Tariff Act of 1930 (19 U.S.C. 1306). Nothing in this Act or any amendment made by this Act shall be construed as superseding or limiting in any manner the functions of the Secretary of Agriculture under any other law relating to prohibited or restricted importations or possession of animals and other articles and no proceeding or determination under this Act shall preclude any proceeding or be considered determinative of any issue of fact or law in any proceeding under any Act administered by the Secretary of Agriculture. Nothing in this Act shall be construed as superseding or limiting in any manner the functions and responsibilities of the Secretary of the Treasury under the Tariff Act of 1930, including, without limitation, section 527 of that Act (19 U.S.C. 1527), relating to the importation of wildlife taken,

killed, possessed, or exported to the United States in violation of the laws or regulations of a foreign country.

(16 U.S.C. 1540)

ENDANGERED PLANTS

SEC. 12. The Secretary of the Smithsonian Institution, in conjunction with other affected agencies, is authorized and directed to review (1) species of plants which are now or may become endangered, or threatened and (2) methods of adequately conserving such species, and to report to Congress, within one year after the date of the enactment of this Act, the results of such review including recommendations for new legislation or the amendment of existing legislation.

(16 U.S.C. 1541)

[CONFORMING AMENDMENTS

[SEC. 13. (a) Subsection 4(c) of the Act of October 15, 1966 (80 Stat. 928, 16 U.S.C. 668dd(c)), is further amended by revising the second sentence thereof to read as follows: "With the exception of endangered species and threatened species listed by the Secretary pursuant to section 4 of the Endangered Species Act of 1973 in States wherein a cooperative agreement does not exist pursuant to section 6(c) of that Act, nothing in this Act, shall be construed to authorize the Secretary to control or regulate hunting or fishing of resident fish and wildlife on lands not within the system."

[(b) Subsection 10(a) of the Migratory Bird Conservation Act (45 Stat. 1224, 16 U.S.C. 715i(a)) and subsection 401(a) of the Act of June 15, 1935 (49 Stat. 383, 16 U.S.C. 715s(a)) are each amended by striking out "threatened with extinction," and inserting in lieu thereof the following: "listed pursuant to section 4 of the Endangered Species Act of 1973 as endangered species or threatened species."

[(c) Section 7(a)(1) of the Land and Water Conservation Fund Act of 1965 (16 U.S.C. 4601–9(a)(1)) is amended by striking out:

["THREATENED SPECIES.—For any national area which may be authorized for the preservation of species of fish or wildlife that are threatened with extinction." and inserting in lieu thereof the following:

["ENDANGERED SPECIES AND THREATENED SPECIES.—For lands, waters, or interests therein, the acquisition of which is authorized under section 5(a) of the Endangered Species Act of 1973, needed for the purpose of conserving endangered or threatened species of fish or wildlife or plants."

[(d) The first sentence of section 2 of the Act of September 28, 1962, amended (76 Stat. 653, 16 U.S.C. 460k–1), is amended to read as follows:

["The Secretary is authorized to acquire areas of land, or interests therein, which are suitable for—

["(1) incidental fish and wildlife-oriented recreational development;

["(2) the protection of natural resources;

[“(3) the conservation of endangered species or threatened species listed by the Secretary pursuant to section 4 of the Endangered Species Act of 1973; or

[“(4) carrying out two or more of the purposes set forth in paragraphs (1) through (3) of this section, and are adjacent to, or within, the said conservation areas, except that the acquisition of any land or interest therein pursuant to this section shall be accomplished only with such funds as may be appropriated therefor by the Congress or donated for such purposes, but such property shall not be acquired with funds obtained from the sale of Federal migratory bird hunting stamps.”

[(e) The Marine Mammal Protection Act of 1972 (16 U.S.C. 1361–1407) is amended—

[(1) by striking out “Endangered Species Conservation Act of 1969” in section 3(1)(B) thereof and inserting in lieu thereof the following: “Endangered Species Act of 1973”;

[(2) by striking out “pursuant to the Endangered Species Conservation Act of 1969” in section 101(a)(3)(B) thereof and inserting in lieu thereof the following: “or threatened species pursuant to the Endangered Species Act of 1973”.

[(3) by striking out “endangered under the Endangered Species Conservation Act of 1969” in section 102(b)(3) thereof and inserting in lieu thereof the following: “an endangered species or threatened species pursuant to the Endangered Species Act of 1973”; and

[(4) by striking out “of the Interior and revisions of the Endangered Species List, authorized by the Endangered Species Conservation Act of 1969,” in section 202(a)(6) thereof and inserting in lieu thereof the following: “such revisions of the endangered species list and threatened species list published pursuant to section 4(c)(1) of the Endangered Species Act of 1973”.

[(f) Section 2(1) of the Federal Environmental Pesticide Control Act of 1972 (Public Law 92–516) is amended by striking out the words “by the Secretary of the Interior under Public Law 91–135” and inserting in lieu thereof the words “or threatened by the Secretary pursuant to the Endangered Species Act of 1973”.]

PRIVATE PROPERTY OWNERS EDUCATION AND TECHNICAL ASSISTANCE PROGRAM

SEC. 13. (a) *IN GENERAL.—In cooperation with the States and other Federal agencies, the Secretary shall develop and implement a private property owners education and technical assistance program to—*

(1) inform the public about this Act;

(2) respond to requests for technical assistance from the private property owners interested in conserving species listed or proposed for listing under section 4(c)(1) and candidate species on the property of the property owners; and

(3) recognize exemplary efforts to conserve species on private land.

(b) ELEMENTS OF THE PROGRAM.—Under the program, the Secretary shall—

(1) publish educational materials and conduct workshops for private property owners and other members of the public on the role of this Act in conserving endangered species and threatened species, the principal mechanisms of this Act for achieving species recovery, and potential sources of technical and financial assistance;

(2) assist field offices in providing timely advice to property owners on how to comply with this Act;

(3) provide technical assistance to State and local governments and private property owners interested in developing and implementing recovery plan implementation agreements, conservation plans, and safe harbor agreements;

(4) serve as a focal point for questions, requests, and suggestions from property owners and local governments concerning policies and actions of the Secretary in the implementation of this Act;

(5) provide training for Federal personnel responsible for implementing this Act on concerns of private property owners, to avoid unnecessary conflicts, and improving implementation of this Act on private property; and

(6) nominate for national recognition by the Secretary property owners that are exemplary managers of land for the benefit of species listed or proposed for listing under section 4(c)(1) or candidate species.

REPEALER

SEC. 14. The Endangered Species Conservation Act of 1969 (sections 1 through 3 of the Act of October 15, 1966, and sections 1 through 6 of the Act of December 5, 1969; 16 U.S.C. 668aa—668cc–6), is repealed.

AUTHORIZATION OF APPROPRIATIONS

SEC. 15. (a) IN GENERAL.—Except as provided in subsection (b), (c), and (d), there are authorized to be appropriated—

(1) not to exceed $35,000,000 for fiscal year 1988, $36,500,000 for fiscal year 1989, $38,000,000 for fiscal year 1990, $39,500,000 for fiscal year 1991, [and $41,500,000 for fiscal year 1992] *$41,500,000 for fiscal year 1992, $90,000,000 for fiscal year 1998, $120,000,000 for fiscal year 1999, $140,000,000 for fiscal year 2000, $160,000,000 for fiscal year 2001, $165,000,000 for fiscal year 2002, and $165,000,000 for fiscal year 2003* to enable the Department of the Interior to carry out such functions and responsibilities as it may have been given under this Act;

(2) not to exceed $5,750,000 for fiscal year 1988, $6,250,000 for each of fiscal years 1989 and 1990, [and $6,750,000] *$6,750,000* for each of fiscal year 1991 and 1992*, $35,000,000 for fiscal year 1998, $50,000,000 for fiscal year 1999, $60,000,000 for fiscal year 2000, $65,000,000 for fiscal year 2001, $65,000,000 for fiscal year 2002, and $70,000,000 for fiscal year 2003* to enable the Department of Commerce to carry out such functions and responsibilities as it may have been given under this Act; and

(3) not to exceed $2,200,000 for fiscal year 1988, $2,400,000 for each of fiscal years 1989 and 1990, [and $2,600,000] *$2,600,000* for each of fiscal years 1991 and 1992*, and $4,000,000 for each of fiscal years 1998 through 2003* to enable the Department of Agriculture to carry out its functions and responsibilities with respect to the enforcement of this Act and the Convention which pertain to the importation or exportation of plants.

(b) EXEMPTIONS FROM ACT.—There are authorized to be appropriated to the Secretary to assist him and the Endangered Species Committee in carrying out their functions under sections [1] 7 (e), (g), and (h) not to exceed $600,000 for each of fiscal year 1988, 1989, 1990, 1991, and 1992*, and $625,000 for each of fiscal years 1998 through 2003*.

(c) CONVENTION IMPLEMENTATION.—There are authorized to be appropriated to the Department of the Interior for purposes of carrying out section 8A(e) not to exceed $400,000 for each of fiscal years 1988, 1989, and 1990, [and $500,000] *$500,000* for each of fiscal years 1991 and 1992*, and $1,000,000 for each fiscal year 1998 through 2003* and such sums shall remain available until expended.

(d) FINANCIAL ASSISTANCE FOR SAFE HARBOR AGREEMENTS.—There are authorized to be appropriated to the Secretary of the Interior $10,000,000 and the Secretary of Commerce $5,000,000 for each of fiscal years 1998 through 2003 to carry out section 10(l).

(e) HABITAT CONSERVATION PLANNING LOAN PROGRAM.—There are authorized to be appropriated to the Habitat Conservation Planning Loan Program established by section 10(a)(7) $10,000,000 for each of fiscal years 1998 through 2000 and $5,000,000 for each of fiscal years 2001 and 2002 to assist in the development of conservation plans.

(f) FINANCIAL ASSISTANCE FOR RECOVERY PLAN IMPLEMENTATION.—There are authorized to be appropriated to the Secretary of the Interior $30,000,000 and the Secretary of Commerce $15,000,000 for each of the fiscal years 1998 through 2003 to carry out section 5(l)(4).

(g) HABITAT CONSERVATION INSURANCE PROGRAM.—

(1) IN GENERAL.—Of the amounts appropriated for a fiscal year under subsections (d), (e), and (f), five percent shall be available for the Habitat Conservation Insurance Program established under section 10(n).

(2) LIMITATION.—If, at the end of any fiscal year, the balance allocated for the Habitat Conservation Insurance Program exceeds $10,000,000, paragraph (1) shall not apply during the subsequent fiscal year.

(h) AVAILABILITY.—Amounts made available under this section shall remain available until expended.

(i) LIMITATION ON USE OF FUNDS.—Of the funds made available to carry out section 5 for any fiscal year, not less than $32,000,000 shall be available to the Secretary of the Interior and not less than $13,500,000 to the Secretary of Commerce to implement actions to recover listed species. Of the funds made available

[1] So in original. Probably should be "section".

to the Secretary of the Interior and the Secretary of Commerce in each fiscal year to list species, the Secretary of the Interior and the Secretary of Commerce shall use not less than ten percent of those funds in each fiscal year for delisting species. If any of the funds made available by the previous sentence are not needed in that fiscal year for delisting eligible species, those funds shall be available for listing.

(j) ACCOUNTING AND STRATEGIC MANAGEMENT PLAN.—Not later than November 30, 1998, the Secretary of the Interior and the Secretary of Commerce shall each submit to the Committee on Environment and Public Works of the Senate and the Committee on Resources of the House of Representatives—

(1) an accounting for fiscal year 1998 of funds expended by the Department of the Interior and the Department of Commerce, respectively, to carry out the Department's functions and responsibilities under this Act; and

(2) a management plan describing the projected future uses by the respective Department of authorized funds for fiscal years 1999 through 2003.

(16 U.S.C. 1542)

EFFECTIVE DATE

SEC. 16. This Act shall take effect on the date of its enactment.

MARINE MAMMAL PROTECTION ACT OF 1972

SEC. 17. Except as otherwise provided in this Act, no provision of this Act shall take precedence over any more restrictive conflicting provision of the Marine Mammal Protection Act of 1972.

(16 U.S.C. 1543)

SEC. 18. On or before January 15, 1990, and each January 15 thereafter, the Secretary of the Interior, acting through the Fish and Wildlife Service, shall submit to the Congress an annual report covering the preceding fiscal year which shall contain—

(1) an accounting on a species by species basis of all reasonably unidentifiable Federal expenditures made primarily for the conservation of endangered or threatened species pursuant to this Act; and

(2) an accounting on a species by species basis for all reasonably identifiable expenditures made primarily for the conservation of endangered or threatened species pursuant to this Act by states receiving grants under section 6.

(16 U.S.C. 1544)

* * * * * * *

LAND AND WATER CONSERVATION FUND ACT OF 1965 [1]

[As amended through December 31, 1996, Public Law 104–333]

AN ACT To establish a land and water conservation fund to assist the States and Federal agencies in meeting present and future outdoor recreation demands and needs of the American people, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—LAND AND WATER CONSERVATION PROVISIONS

SHORT TITLE AND STATEMENT OF PURPOSES

SECTION 1. * * *

* * * * * * *

ALLOCATION OF MONEYS FOR FEDERAL PURPOSES

SEC. 7. [16 U.S.C 460l–9] (a) Moneys appropriated from the fund for Federal purposes shall, unless otherwise allotted in the appropriation Act making them available, be allotted by the President to the following purposes and subpurposes:

(1) For the acquisition of land, waters, or interests in land or waters as follows:

NATIONAL PARK SYSTEM; RECREATION AREAS.—Within the exterior boundaries of areas of the National Park System now or hereafter authorized or established and of areas now or hereafter authorized to be administered by the Secretary of the Interior for outdoor recreation purposes.

NATIONAL FOREST SYSTEM.—Inholdings within (a) wilderness areas of the National Forest System, and (b) other areas of national forests as the boundaries of those forests exist on the effective date of this Act, or purchase units approved by the National Forest Reservation Commission subsequent to the date of this Act, all of which other areas are primarily of value for outdoor recreation purposes: *Provided,* That lands outside of but adjacent to an existing national forest boundary, not to exceed three thousand acres in the case of any one forest, which would comprise an integral part of a forest recreational management area may also be acquired with moneys appropriated from this fund: *Provided further,* That except for areas specifically authorized by Act of Congress, not more than 15 per centum of the acreage added to the National Forest System pursuant to this section shall be west of the 100th meridian.

NATIONAL WILDLIFE REFUGE SYSTEM.—Acquisition for (a) endangered species and threatened species authorized under [section 5(a)] *section 5A(a)* of the Endangered Species Act of 1973; (b) areas authorized by section 2 of the Act of September 28, 1962, as amended (16 U.S.C. 460k–1); (c) national wildlife

[1] The Land and Water Conservation Fund Act of 1965 (16 U.S.C. 460*l*–4—460*l*–11), as set forth herein, consists of Public Law 88–578 (Sept. 3, 1964) and amendments thereto. Pursuant to section 2(b) of the Act of August 8, 1953 (16 U.S.C. 1c(b)), the provisions of the Land and Water Conservation Fund Act of 1965 apply to all areas of the National Park System to the extent the provisions are not in conflict with specific provisions applicable to a particular unit of the National Park System.

refuge areas under section 7(a)(5) of the Fish and Wildlife Act of 1956 (16 U.S.C. 742f(a)(4)) and wetlands acquired under section 304 of the Emergency Wetlands Resources Act of 1986; (d) any areas authorized for the National Wildlife Refuge System by specific Acts.

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THE MARINE MAMMAL PROTECTION ACT OF 1972

[As Amended Through P.L. 105–42, August 15, 1997]

AN ACT To protect marine mammals; to establish a Marine Mammal Commission; for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act, with the following table of contents, may be cited as the "Marine Mammal Protection Act of 1972".

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SEC. 104. (a) * * *

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(c)(1) * * *

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(4)(A) A permit may be issued for enhancing the survival or recovery of a species or stock only with respect to a species or stock for which the Secretary, after consultation with the Marine Mammal Commission and after notice and opportunity for public comment, has first determined that—

(i) taking or importation is likely to contribute significantly to maintaining or increasing distribution or numbers necessary to ensure the survival or recovery of the species or stock; and

(ii) taking or importation is consistent (I) with any conservation plan adopted by the Secretary under section 115(b) of this title or any recovery plan developed under [section 4(f)]

section 5 of the Endangered Species Act of 1973 for the species or stock, or (II) if there is no conservation or recovery plan in place, with the Secretary's evaluation of actions required to enhance the survival or recovery of the species or stock in light to the factors that would be addressed in a conservation plan or a recovery plan.

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SEC. 115. (a)(1) * * *

* * * * * * *

(b)(1) The Secretary shall prepare conservation plans—

(A) by December 31, 1989, for North Pacific fur seals;

(B) by December 31, 1990, for Steller sea lions; and

(C) as soon as possible, for any species or stock designated as depleted under this title, except that a conservation plan need not be prepared if the Secretary determines that it will not promote the conservation of the species or stock.

(2) Each plan shall have the purpose of conserving and restoring the species or stock to its optimum sustainable population. The Secretary shall model such plans on recovery plans required under ⟦section 4(f)⟧ *section 5* of the Endangered Species Act of 1973 ⟦(16 U.S.C. 1533(f))⟧.

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SEC. 118. TAKING OF MARINE MAMMALS INCIDENTAL TO COMMERCIAL FISHING OPERATIONS.

(a) IN GENERAL.—(1) * * *

* * * * * * *

(f) TAKE REDUCTION PLANS.—(1) * * *

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(11) Take reduction plans developed under this section for a species or stock listed as a threatened species or endangered species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et

seq.) shall be consistent with any recovery plan developed for such species or stock under [section 4] *section 5* of such Act.

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[Public Law 103–64]

AN ACT To establish the Snake River Birds of Prey National Conservation Area in teh State of Idaho, and other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. FINDINGS.

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SEC. 5. ADDITIONS.

(a) ACQUISITIONS.—(1) * * *

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(b) PURCHASE OF LANDS.—In addition to the authority in section 318(d) of the Fedeal Land Policy and Management Act of 1976 (43 U.S.C. 1748) and notwithstanding section 7(a) of the Land and Water Conservation Fund Act of 1964 (16 U.S.C. 4601–9(a)), monies appropriated from the Land and Water Conservation Fund may be used as authorized in [section 5(b) of the Endangered Species Act of 1973 (16 U.S.C. 1534(b))] *section 5A(b) of the Endangered Species Act of 1973*, for purposes of acquiring lands or interests therein within the conservation area for administration as public lands as part of the conservation area.

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