

1       “(B) Any person holding any raptor or progeny de-  
 2       scribed in subparagraph (A) must be able to demonstrate that  
 3       the raptor or progeny does, in fact, qualify under the provi-  
 4       sions of this paragraph, and shall maintain and submit to the  
 5       Secretary, on request, such inventories, documentation, and  
 6       records as the Secretary may by regulation require as being  
 7       reasonably appropriate to carry out the purposes of this para-  
 8       graph. Such requirements shall not unnecessarily duplicate  
 9       the requirements of other rules and regulations promulgated  
 10      by the Secretary.”.

95TH CONGRESS  
 2d Session

**H. R. 14104**

[Report No. 95-1625]

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 18, 1978

Mr. LEGGETT (for himself, Mr. MURPHY of New York, Mr. DINGELL, Mr. RUPPE, Mr. FORSTNER, Mr. BOWEN, Mr. OBERSTAR, Mr. DE LA GARZA, Mr. YOUNG of Alaska, Mr. AUCOIN, Mr. EMERY, Mr. HUGHES, Mr. AKAKA, Mr. DOWNAN, Mr. EVANS of Delaware, Mr. TRIBL, and Mr. ROONEY) introduced the following bill; which was referred to the Committee on Merchant Marine and Fisheries

SEPTEMBER 25, 1978

Reported with amendments, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Omit the part struck through and insert the part printed in *italics*]

**A BILL**

To authorize appropriations to carry out the Endangered Species Act of 1973 through fiscal year 1981, and for other purposes.

- 1       *Be it enacted by the Senate and House of Representa-*
- 2       *tives of the United States of America in Congress assembled,*
- 3       That this Act may be cited as the “Endangered Species Act
- 4       Amendments of 1978”.

1 SEC. 2. Section 4 of the Endangered Species Act of  
2 1973 (16 U.S.C. 1533) is amended—

3 (1) by adding at the end of subsection (a)(1) the  
4 following new sentence: "At the time any such regula-  
5 tion is proposed, the Secretary shall also by regulation,  
6 to the maximum extent prudent, specify any habitat of  
7 such species which is then considered to be critical  
8 habitat. The requirement of the preceding sentence  
9 shall not apply with respect to any species which was  
10 listed prior to enactment of the Endangered Species  
11 Act Amendments of 1978";

12 (2) by adding at the end of subsection (b) the fol-  
13 lowing new paragraph:

14 "(4) In determining the critical habitat of any endan-  
15 gered or threatened invertebrate animal species, the Secre-  
16 tary shall consider the economic impact, and any other rele-  
17 vant impacts, of specifying any particular area as critical  
18 habitat, and he may exclude any such area from the critical  
19 habitat if he determines that the benefits of such exclusion  
20 outweigh the benefits of specifying the area as part of the  
21 critical habitat."

22 (3) by amending subsection (c)(1) by striking out  
23 "and shall", and by inserting immediately before the  
24 final period the following: ", and specify any critical  
25 habitat within such range";

1 (4) in subsection (c) by inserting at the end there-  
2 of the following new paragraph:

3 "(A) The Secretary shall—  
4 "(A) conduct, at least once every five years, a  
5 review of all species included in a list which is pub-  
6 lished pursuant to paragraph (1) and which is in effect  
7 at the time of such review; and

8 "(B) determine on the basis of such review whether  
9 or any such species should—

10 "(i) be removed from such list;

11 "(ii) be changed in status from an endan-  
12 gered species to a threatened species; or

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

15 Each determination under subparagraph (B) shall be made  
16 in accordance with the provisions of subsections (a) and  
17 (b)."

18 (4) (5) by amending subsection (f)—

19 (A) by amending paragraph (2)(A) to read as  
20 follows:

21 "(2)(A) In the case of any regulation proposed by the  
22 Secretary to carry out the purposes of this section with re-  
23 spect to the determination and listing of endangered or  
24 threatened species and their critical habitats in any State

1 (other than regulations to implement the Convention), the  
2 Secretary—

3 “(i) shall publish notice of the proposed regulation  
4 (including the complete text of the regulation), not less  
5 than 60 days before the effective date of the regula-  
6 tion—

7 “(i) in the Federal Register, and

8 “(ii) if the proposed regulation specifies any  
9 critical habitat, in a newspaper of general circula-  
10 tion within or adjacent to such habitat; and

11 “(ii) shall give actual notice of the proposed regu-  
12 lation (including the complete text of the regulation),  
13 and any environmental assessment or environmental  
14 impact statement prepared on the proposed regulation,  
15 not less than 60 days before the effective date of the  
16 regulation to all general local governments located  
17 within or adjacent to the proposed critical habitat;

18 “(iii) shall—

19 “(i) if the proposed regulation does not  
20 specify any critical habitat, promptly hold a public  
21 meeting on the proposed regulation, if request  
22 therefor is filed with the Secretary by any person  
23 within 45 days after the date of publication of  
24 general notice under clause (i)(i), and

1 “(ii) if the proposed regulation specifies any  
2 critical habitat, promptly hold a public meeting on  
3 the proposed regulation within the area in which  
4 such habitat is located in each State, and, if re-  
5 quested, hold a public hearing in each State.

6 If a public meeting or hearing is held on any regulation, the  
7 regulation may not take effect before the 60th day after the  
8 date on which the meeting or hearing is concluded, and if  
9 more than one public meeting or hearing is held, before the  
10 60th day after the date on which the last such meeting or  
11 hearing is concluded. Any accidental failure to provide actual  
12 notice under clause (ii) to all general local governments re-  
13 quired to be given notice shall not invalidate the proposed  
14 regulation.”; and

15 “(B) by adding at the end thereof the follow-  
16 ing new paragraph: paragraphs:

17 “(4) Any proposed or final regulation which specifies  
18 any critical habitat of any endangered species or threatened  
19 species shall be based on the best scientific data available,  
20 and the publication in the Federal Register of any such regu-  
21 lation shall, to the maximum extent practicable, be accompa-  
22 nied by a brief description and evaluation of those activities  
23 (whether public or private) which, in the opinion of the Secre-  
24 tary, if undertaken may adversely modify such habitat, or  
25 may be impacted by such designation.”; and

1       “(5) A final regulation adding a species to any list pub-  
 2 lished pursuant to subsection (c) shall be published in the  
 3 Federal Register not later than two years after the date of  
 4 publication of notice of the regulation proposing such listing  
 5 under paragraph (2)(A)(i). If a final regulation is not adopt-  
 6 ed within such two-year period, the Secretary shall withdraw  
 7 the proposed regulation and shall publish notice of such with-  
 8 drawal in the Federal Register not later than 30 days after  
 9 the end of such period. The Secretary shall not propose a  
 10 regulation adding to such a list any species for which a pro-  
 11 posed regulation has been withdrawn under this paragraph  
 12 unless he determines that sufficient new information is avail-  
 13 able to warrant the proposal of a regulation. No proposed  
 14 regulation for the listing of any species published before the  
 15 date of the enactment of the Endangered Species Act Amend-  
 16 ments of 1978 shall be withdrawn under this paragraph  
 17 before the end of the one-year period beginning on such date  
 18 of enactment.”

19       (5)(6) by adding at the end thereof the following new  
 20 subsection:

21       “(g) RECOVERY PLANS.—The Secretary shall develop  
 22 and implement plans (hereinafter in this subsection referred  
 23 to as ‘recovery plans’) for the conservation or survival of en-  
 24 dangered species and threatened species listed pursuant to  
 25 this section. The Secretary, in developing and implementing

1 recovery plans, may procure the services of appropriate  
 2 public and private agencies and institutions, and other quali-  
 3 fied persons. Recovery teams appointed pursuant to this sub-  
 4 section shall not be subject to the Federal Advisory Commit-  
 5 tee Act.”

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

8                   “INTERAGENCY COOPERATION

9       “SEC. 7. (a) REVIEW BY SECRETARY.—The Secretary  
 10 shall review all other programs administered by him and uti-  
 11 lize such programs in furtherance of the purposes of this Act.

12       “(b) AGENCY CONSERVATION PROGRAMS.—Each Fed-  
 13 eral agency shall, after consultation with and with the assist-  
 14 ance of the Secretary, utilize its authorities in furtherance of  
 15 the purposes of this Act by carrying out programs for the  
 16 conservation of endangered species and threatened species  
 17 listed pursuant to section 4.

18       “(c) AGENCY ACTION.—(1) Each Federal agency shall  
 19 insure that any action authorized, funded, or carried out by  
 20 the agency (hereinafter in this section referred to as an  
 21 ‘agency action’) does not result in species or habitat degrada-  
 22 tion unless an exemption has been granted by the Endan-  
 23 gered Species Committee under subsection (f) with respect to  
 24 such agency action.

25       “(2) If any Federal agency—

1           “(A) considers that any agency action over which  
2           it has jurisdiction may result in species or habitat deg-  
3           radation; or

4           “(B) is notified by the Secretary that the Secre-  
5           tary considers that such agency action may have such  
6           a result;

7           the Federal agency and the Secretary shall undertake imme-  
8           diate consultation with respect to the matter, including, but  
9           not limited to, consultation to determine if reasonable and  
10          prudent alternatives are available. Consultation under this  
11          paragraph with respect to any agency action shall be con-  
12          cluded within 90 days after the date on which initiated or  
13          within such other period of time as is mutually agreeable to  
14          the Federal agency and the Secretary. Promptly after the  
15          conclusion of consultation, the Secretary shall provide to the  
16          Federal agency concerned a written statement setting forth  
17          the Secretary's opinion, and a summary of the information on  
18          which the opinion is based, detailing whether the agency  
19          action may result in species or habitat degradation and  
20          whether there are reasonable and prudent alternatives which  
21          would avoid species or habitat degradation which can be  
22          taken by the Federal agency in implementing the agency  
23          action.

24          “(3) To facilitate compliance with the requirements of  
25          paragraph (9)(A), (7), each Federal agency shall, with re-

1          spect to any action of such agency for which no contract for  
2          construction has been entered into and for which no construc-  
3          tion has begun on the date of enactment of the Endangered  
4          Species Act Amendments of 1978, request of the Secretary  
5          information whether any listed species may be present in the  
6          area of such proposed action. If the Secretary advises, based  
7          on the best scientific and commercial data available, that  
8          such species may be present, such agency shall conduct a  
9          biological assessment for the purpose of identifying any en-  
10         dangered species or threatened species which is likely to be  
11         affected by such action. Such assessment shall be completed  
12         before any contract for construction is entered into and before  
13         construction is begun with respect to such action. Such as-  
14         sessment may be undertaken as part of a Federal agency's  
15         compliance with the requirements of section 102 of the Na-  
16         tional Environmental Policy Act of 1969 (42 U.S.C. 4332).

17         “(4) After initiation of consultation required under para-  
18         graph (2), the Federal agency shall not make any irreversible  
19         or irretrievable commitment of resources with respect to the  
20         agency action which has the effect of foreclosing the formu-  
21         lation or implementation of any reasonable and prudent  
22         alternative measures which would avoid species or habitat  
23         degradation.

24         “(d) APPLICATION FOR EXEMPTION AND CONSIDERA-  
25         TION BY REVIEW BOARD.—(1) A Federal agency, the Gov-

1 error of the State in which the Federal agency action will  
 2 occur, or a permit or license applicant may apply to the Sec-  
 3 retary for an exemption for an agency action of such agency  
 4 if after consultation under subsection (c)(2) the Secretary's  
 5 opinion indicates that the agency action may result in species  
 6 or habitat degradation. An application for an exemption shall  
 7 be considered initially by a review board in the manner pro-  
 8 vided in this subsection, and shall be considered by the En-  
 9 dangered Species Committee for a final determination under  
 10 subsection (f) after a recommendation is made by the review  
 11 board.

12 "(2)(A) Any Federal agency, Governor, or permit or li-  
 13 cense applicant seeking an exemption under this subsection  
 14 shall submit a written application to the Secretary, in a form  
 15 prescribed by the Secretary, not later than 90 days after the  
 16 completion of the consultation process. Such application shall  
 17 set forth the reasons why the Federal agency, Governor, or  
 18 permit or license applicant considers that the agency action  
 19 meets the requirements for an exemption under this  
 20 subsection.

21 "(B) Upon receipt of the application for exemption re-  
 22 ferred to in paragraph (1), the Secretary shall promptly notify  
 23 the Governor or Governors of the affected States, as deter-  
 24 mined by the Secretary, and request that they appoint a  
 25 member of the review board to be established under para-

1 graph (3) in accordance with the provisions of such para-  
 2 graph.

3 "(3)(A) A review board consisting of three members  
 4 shall be established for purposes of considering an application  
 5 for exemption and making recommendations to the Endan-  
 6 gered Species Committee under this subsection as follows:

7 "(i) The Secretary and the Governor of the affect-  
 8 ed State shall each appoint one individual to the board  
 9 not later than 15 days after a request is submitted pur-  
 10 suant to paragraph (2). If more than one State is  
 11 affected by the agency action, the Governors of such  
 12 States shall appoint one individual collectively.

13 "(ii) The two individuals appointed under clause  
 14 (i) shall appoint one individual not later than 15 days  
 15 after both of them have been appointed. If no appoint-  
 16 ment is made within such 15-day period, the Endan-  
 17 gered Species Committee shall appoint, by a vote of a  
 18 majority of the members of the Committee, one individ-  
 19 ual not later than 30 days after the end of such 15-day  
 20 period.

21 "(B) Members of a review board who are full-time offi-  
 22 cers or employees of the United States shall receive no addi-  
 23 tional pay on account of their service on the board. All other  
 24 members shall be entitled to receive an amount not to exceed

1 the daily equivalent of the annual rate of basic pay in effect  
 2 for grade GS-18 of the General Schedule for each day during  
 3 which they are engaged in the actual performance of duties  
 4 vested in the board. While away from their homes or regular  
 5 places of business in the performance of services for a review  
 6 board, members of the board shall be allowed travel ex-  
 7 penses, including per diem in lieu of subsistence, in the same  
 8 manner as persons employed intermittently in the Govern-  
 9 ment service are allowed expenses under section 5703 of title  
 10 5 of the United States Code.

11 “(4) The Secretary shall submit the application to the  
 12 review board immediately after its appointment under para-  
 13 graph (3), and the Secretary shall submit to the review  
 14 board, in writing, his views and recommendations with re-  
 15 spect to the application within 60 days after receiving a copy  
 16 of any application under paragraph (2).

17 “(5) It shall be the duty of a review board appointed  
 18 under paragraph (3) to make a full review of the consultation  
 19 carried out under subsection (c)(2), and within 60 days after  
 20 its appointment or within such longer time as is mutually  
 21 agreed upon between the agency and the Secretary, to make  
 22 a determination, by a majority vote, whether such agency  
 23 has—

24 “(A) carried out its consultation responsibilities in  
 25 good faith and made a reasonable and responsible effort

1 to develop and fairly consider modifications or reason-  
 2 able and prudent alternatives to its proposed action  
 3 which will avoid species or habitat degradation;

4 “(B) conducted any biological assessment required  
 5 of it by subsection (c)(3); and

6 “(C) refrained from making any irreversible or ir-  
 7 retrievable commitment of resources prohibited by sub-  
 8 section (c)(4).

9 Any determination by the review board that the agency has  
 10 not met the requirements of subparagraph (A), (B), or (C)  
 11 shall be considered final agency action for purposes of chap-  
 12 ter 7 of title 5 of the United States Code.

13 “(6) If the review board makes positive determinations  
 14 under subparagraphs (A), (B), and (C) of paragraph (5), it  
 15 shall proceed to consider the application for exemption. In  
 16 considering any application for an exemption, a review board  
 17 shall take into account the reasons for an exemption set forth  
 18 in the application of the Federal agency, Governor, or permit  
 19 or license applicant, the views of the Secretary submitted  
 20 under paragraph (4), and the views of other Federal and  
 21 State agencies and appropriate persons. The review board  
 22 shall recommend an exemption from the requirements of sub-  
 23 section (c)(1) for any agency action if, by a majority vote, it  
 24 determines on the record after an opportunity for a hearing  
 25 held in accordance with sections 554, 555, and 556 (other

1 than subsection (b)(3) of section 556) of title 5 of the United  
2 States Code, that—

3 “(A) there are no feasible and prudent alternatives  
4 to the agency action;

5 “(B) the benefits of such action clearly outweigh  
6 the benefits of alternative courses of action consistent  
7 with conserving the species or its critical habitat, and  
8 such action is in the public interest; and

9 “(C) the action is of national or regional  
10 significance.

11 The review board shall recommend to the Endangered Spe-  
12 cies Committee whether or not to grant an exemption within  
13 180 days after the hearing described in this paragraph is ini-  
14 tiated, or within such other time as is mutually agreed upon  
15 by the applicant and a majority of the review board. If the  
16 review board recommends an exemption it shall include with  
17 its recommendation any reasonable mitigation and enhance-  
18 ment measures which should be considered by the Endan-  
19 gered Species Committee under subsection (f). The review  
20 board shall transmit the record of its proceedings and its rec-  
21 ommendation to the Committee.

22 “(7) In carrying out its duties under this subsection, a  
23 review board may, and any member of a review board if so  
24 authorized by the review board, may—

1 “(A) sit and act at such times and places, take  
2 such testimony, and receive such evidence, as the  
3 review board deems advisable;

4 “(B) subject to the Privacy Act of 1974, request  
5 of any Federal agency information necessary to enable  
6 it to carry out such duties, and upon such request the  
7 head of such Federal agency shall furnish such infor-  
8 mation to the review board; and

9 “(C) use the United States mails in the same  
10 manner and upon the same conditions as ~~other Federal~~  
11 ~~agencies or~~ Federal agency.

12 “(8) Upon request of a review board, the head of any  
13 Federal agency is authorized to detail, on a nonreimbursable  
14 basis, any of the personnel of such agency to the review  
15 board to assist it in carrying out its duties under this section.

16 “(9) The Administrator of the General Services shall  
17 provide to a review board, on a reimbursable basis, such ad-  
18 ministrative support services as the review board may  
19 request.

20 “(10) All meetings and records of review boards shall be  
21 open to the public.

22 “(e) ESTABLISHMENT OF COMMITTEE.—(1) There is  
23 established a Committee to be known as the Endangered

1 Species Committee (hereinafter in this section referred to as  
2 the 'Committee').

3 "(2) The Committee shall be composed of six members  
4 as follows:

5 "(A) The Secretary of Agriculture.

6 "(B) The Secretary of the Army.

7 "(C) The Secretary of the Interior.

8 "(D) The Administrator of the National Oceanic  
9 and Atmospheric Administration.

10 "(E) The Chairman of the Council on Environ-  
11 mental Quality.

12 "(F) The Governor of the State in which the Fed-  
13 eral agency action for which an exemption is sought  
14 under this section will occur (or in the case of any  
15 agency action which will occur in more than one State,  
16 the Governors of all such States who shall cast collec-  
17 tively a single vote on the Committee).

18 "(3) The Chairman of the Council on Environmental  
19 Quality shall be the Chairman of the Committee.

20 "(4) Members of the Committee shall receive no addi-  
21 tional pay on account of their service on the Committee;  
22 except that while away from their homes or regular places of  
23 business in the performance of services for the Committee,  
24 members of the Committee shall be allowed travel expenses,  
25 including per diem in lieu of subsistence, in the same manner

1 as persons employed intermittently in Government service  
2 are allowed expenses under section 5703 of title 5 of the  
3 United States Code.

4 "(5) The Committee shall meet at the call of the Chair-  
5 man or four of its members.

6 "(6) All meetings and records of the Committee shall be  
7 open to the public.

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

12 "(6) EXEMPTION.—The Committee shall make a final  
13 determination whether or not to grant an exemption within  
14 90 days of receiving the recommendation of the review board  
15 under subsection (d)(6). The Committee shall grant an ex-  
16 emption from the requirements of subsection (c)(1) for an  
17 agency action if, by a vote of not less than four of its mem-  
18 bers voting in person—

19 "(1) it determines on the record, based on the rec-  
20 ommendation and the record of the review board and  
21 on such other testimony or evidence as it may receive,  
22 that—

23 "(A) there are no feasible and prudent alter-  
24 natives to the agency action;

1           “(B) the benefits of such action clearly  
2 outweigh the benefits of alternative courses of  
3 action consistent with conserving the species or  
4 its critical habitat, and such action is in the public  
5 interest; and

6           “(C) the action is of regional or national sig-  
7 nificance; and

8           “(2) it establishes such reasonable mitigation and  
9 enhancement measures, including, but not limited to,  
10 live propagation, transplantation, and habitat acquisi-  
11 tion and improvement, as are necessary and appropri-  
12 ate to minimize the adverse effects of the agency  
13 action upon the endangered species, threatened species,  
14 or critical habitat concerned.

15 Any final determination by the Committee under this subsec-  
16 tion shall be considered final agency action for purposes of  
17 chapter 7 of title 5 of the United States Code.

18           “(g) REVIEW BY SECRETARY OF STATE.—Notwith-  
19 standing any other provision of this Act, the Committee shall  
20 be prohibited from considering for exemption any application  
21 made to it, if the Secretary of State, after a review of the  
22 proposed agency action and its potential implications, and  
23 after hearing, certifies, in writing, to the Committee within  
24 60 days of any application made under this section that the  
25 granting of any such exemption and the carrying out of such

1 action would be in violation of an international treaty obliga-  
2 tion or other international obligation of the United States.  
3 The Secretary of State shall, at the time of such certification,  
4 publish a copy thereof in the Federal Register.

5           “(h) COMMITTEE ORDERS.—(1) If the Committee de-  
6 termines under subsection (f) that an exemption should be  
7 granted with respect to any agency action, the Committee  
8 shall issue an order granting the exemption and specifying  
9 the mitigation and enhancement measures established pursu-  
10 ant to subsection (f) which shall be carried out and paid for by  
11 the Federal agency in implementing the agency action. All  
12 necessary mitigation and enhancement measures shall be au-  
13 thorized prior to the implementing of the agency action and  
14 funded concurrently with all other project features.

15           “(2) The Federal agency receiving such exemption shall  
16 include the costs of such mitigation and enhancement meas-  
17 ures within the overall costs of continuing the proposed  
18 action. Notwithstanding the preceding sentence the costs of  
19 such measures shall not be treated as project costs for the  
20 purpose of computing benefit-cost or other ratios for the pro-  
21 posed action. Any Federal agency may request the Secretary  
22 to carry out such mitigation measures. The costs incurred by  
23 the Secretary in carrying out any such measures shall be paid  
24 by the agency or the permit or license applicant receiving the  
25 exemption. No later than one year after the granting of an

1 exemption, the agency to which the exemption was granted  
 2 shall submit to the Council on Environmental Quality a  
 3 report describing its compliance with the mitigation and en-  
 4 hancement measures prescribed by this section. Such a report  
 5 shall be submitted annually until all such mitigation and en-  
 6 hancement measures have been completed. Notice of the  
 7 public availability of such reports shall be published in the  
 8 Federal Register by the agency preparing such reports.

9       “(g) JUDICIAL REVIEW.—Any person, as defined by  
 10 section 3(8) of this Act, may obtain judicial review, under  
 11 chapter 7 of title 5 of the United States Code, of any decision  
 12 of the Endangered Species Committee under subsection (f) in  
 13 the district court of the United States for any district wherein  
 14 the agency action concerned will be, or is being, carried out  
 15 by filing in such court within 90 days after the date of issu-  
 16 ance of the decision, a written petition for review. Attorneys  
 17 designated by the Endangered Species Committee may  
 18 appear for, and represent the Committee in, any action for  
 19 review under this subsection. *Any action for review under*  
 20 *this subsection shall receive preference over other matters*  
 21 *before the court and shall be heard and determined as expedi-*  
 22 *tiously as the court considers practicable.*

23       “(i) EXEMPTIONS IN PRESIDENTIALLY DECLARED  
 24 DISASTER AREAS.—In any area which has been declared by  
 25 the President to be a major disaster area under the Disaster

1 Relief Act of 1974, the President is authorized to make the  
 2 determinations required by subsection (f) of this section for  
 3 any project for the repair or replacement of a public facility  
 4 substantially as it existed prior to the disaster under section  
 5 401 or 402 of the Disaster Relief Act of 1974, and which the  
 6 President determines (1) is necessary to prevent the recur-  
 7 rence of such a natural disaster and to reduce the potential  
 8 loss of human life, and (2) to involve an emergency situation  
 9 which does not allow the ordinary procedures of this section  
 10 to be followed. Notwithstanding any other provision of this  
 11 section, the Committee shall accept the determinations of the  
 12 President under this subsection.

13       “(k) SPECIAL PROVISIONS.—(1) An exemption decision  
 14 by the Committee under this section shall not be a major  
 15 Federal action for purposes of the National Environmental  
 16 Policy Act of 1969 (42 U.S.C. 4321 et seq.): *Provided*, That  
 17 an environmental impact statement which discusses the im-  
 18 pacts upon endangered species or threatened species or their  
 19 critical habitats shall have been previously prepared with re-  
 20 spect to any agency action exempted by such order.  
 21       “(2) Notwithstanding sections 4(d) and 9(a), or any reg-  
 22 ulation issued to carry out such sections, no act or activity  
 23 engaged in which is necessary to carry out any agency action  
 24 for which an exemption is granted under this section shall be

1 considered to be a taking of any endangered species or  
2 threatened species.

3 "(1) AUTHORIZATION.—There is authorized to be ap-  
4 propriated to the Secretary to assist review boards and the  
5 Committee in carrying out their functions under subsections  
6 (d), (e), and (f) of this section not to exceed \$500,000 for  
7 fiscal year 1979, not to exceed \$500,000 for fiscal year  
8 1980, and not to exceed \$500,000 in fiscal year 1981."

9 SEC. 4. Section 15 of the Endangered Species Act of  
10 1973 (16 U.S.C. 1542) is amended to read as follows:

11 "AUTHORIZATION OF APPROPRIATIONS

12 "SEC. 15. Except as authorized in section 6 of this Act,  
13 there are authorized to be appropriated—

14 "(1) not to exceed \$25,000,000 for the fiscal year  
15 ending September 30, 1977, and the fiscal year ending  
16 September 30, 1978, not to exceed \$23,000,000 for  
17 the fiscal year ending September 30, 1979, not to  
18 exceed \$25,000,000 for the fiscal year ending Septem-  
19 ber 30, 1980, and not to exceed \$27,000,000 for the  
20 fiscal year ending September 30, 1981, to enable the  
21 Department of the Interior to carry out such functions  
22 and responsibilities as it may have been given under  
23 this Act; and

24 "(2) not to exceed \$5,000,000 for the fiscal year  
25 ending September 30, 1977, and the fiscal year ending

1 September 30, 1978, not to exceed \$2,500,000 for the  
2 fiscal year ending September 30, 1979, not to exceed  
3 \$3,000,000 for the fiscal year ending September 30,  
4 1980, and not to exceed \$3,500,000 for the fiscal year  
5 ending September 30, 1981, to enable the Department  
6 of Commerce to carry out such functions and responsi-  
7 bilities as it may have been given under this Act."

8 SEC. 5. Section 3 of the Endangered Species Act of  
9 1973 (16 U.S.C. 1532) is amended—

10 (1) by inserting after paragraph (4) thereof the fol-  
11 lowing new paragraphs:

12 "(5) The term 'Federal agency' means any de-  
13 partment, agency, or instrumentality of the United  
14 States.

15 "(6) The term 'critical habitat' for an endangered  
16 species or threatened species means any air, land, or  
17 water area (exclusive of those existing manmade struc-  
18 tures or settlements which are not necessary to the  
19 survival and recovery of a listed species) and constitu-  
20 ent elements thereof, the loss of which would signifi-  
21 cantly decrease the likelihood of conserving such spe-  
22 cies"; and

23 (2) by striking out paragraph (13), as redesignated  
24 by paragraph (5) of this section, and inserting in lieu  
25 thereof the following:

"(13) The term 'species' includes any subspecies of fish or wildlife or plants, and any distinct segment of the population of any species of vertebrate fish or wildlife which interbreeds when mature.;"

(3) by striking out paragraph (15), as redesignated by paragraph (5) of this section, and inserting in lieu thereof the following:

"(15) 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.;"

(4) by inserting at the end thereof the following new paragraphs:

"(19) The term 'species or habitat degradation' means either or both of the following effects:

"(A) The placing in jeopardy of the continued existence of any endangered species or threatened species listed pursuant to section 4.

"(B) The destruction or adverse modification of any critical habitat of any endangered species or threatened species so listed.

"(20) The term 'permit or license applicant' means, when used with respect to an action of a Federal agency for which exemption is sought under sec-

tion 7, any person whose application to such agency for a permit or license has been denied because of the application of section 7(c)(1) to such agency action."

(5) by redesignating paragraphs (5) through (16) as paragraphs (7) through (18), respectively, and by redesignating any references thereto accordingly.

SEC. 6. Paragraph (3) of section 4(f) of the Endangered Species Act of 1973 (16 U.S.C. 1533) is amended to read as follows:

"(3) 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 on which such regulation is based and shall show the relationship of such data to such regulations."

SEC. 7. Section 6(c) of the Endangered Species Act of 1973 (16 U.S.C. 1535(c)) is amended—

(1) by inserting "(1)" after "(a)"; "(c) COOPERATIVE AGREEMENTS.—";

(2) by redesignating paragraphs (1) through (5) as subparagraphs (A) through (E), respectively;

(3) by redesignating subparagraphs (A) and (B) as clauses (i) and (ii), respectively;

1 (4) by striking out "subsection" in the matter pre-  
 2 ceding subparagraph (A) (as so redesignated) and in-  
 3 serting in lieu thereof "paragraph";  
 4 (5) by striking out "endangered species or threat-  
 5 ened species" in subparagraph (D) (as so redesignated)  
 6 and inserting in lieu thereof "endangered or threatened  
 7 species of fish or wildlife";  
 8 (6) by striking out "paragraphs (3), (4), and (5) of  
 9 this subsection" in clause (i) (as so redesignated) and  
 10 inserting in lieu thereof "subparagraphs (C), (D), and  
 11 (E) of this paragraph";  
 12 (7) by striking out "subparagraph (A) and this  
 13 subparagraph" in clause (ii) (as so redesignated) and  
 14 inserting in lieu thereof "clause (i) and this clause";  
 15 and  
 16 (8) by adding at the end thereof the following new  
 17 paragraph:  
 18 "(2) In furtherance of the purposes of this Act, the Sec-  
 19 retary is authorized to enter into a cooperative agreement in  
 20 accordance with this section with any State which establishes  
 21 and maintains an adequate and active program for the con-  
 22 servation of endangered species and threatened species of  
 23 plants. Within one hundred and twenty days after the Secre-  
 24 tary receives a certified copy of such a proposed State pro-  
 25 gram, he shall make a determination whether such program

1 is in accordance with this Act. Unless he determines, pursu-  
 2 ant to this paragraph, that the State program is not in ac-  
 3 cordance with this Act, he shall enter into a cooperative  
 4 agreement with the State for the purpose of assisting in im-  
 5 plementation of the State program. In order for a State pro-  
 6 gram to be deemed an adequate and active program for the  
 7 conservation of endangered species of plants and threatened  
 8 species of plants, the Secretary must find, and annually  
 9 thereafter reconfirm such finding, that under the State  
 10 program—  
 11 "(A) authority resides in the State agency to con-  
 12 serve resident species of plants determined by the  
 13 State agency or the Secretary to be endangered or  
 14 threatened;  
 15 "(B) the State agency has established acceptable  
 16 conservation programs, consistent with the purposes  
 17 and policies of this Act, for all resident species of  
 18 plants in the State which are deemed by the Secretary  
 19 to be endangered or threatened, and has furnished a  
 20 copy of such plan and program together with all perti-  
 21 nent details, information, and data requested to the  
 22 Secretary;  
 23 "(C) the State agency is authorized to conduct in-  
 24 vestigations to determine the status and requirements  
 25 for survival of resident species of plants; and

1 “(D) provision is made for public participation in  
 2 designating resident species of plants as endangered or  
 3 threatened; or

4 that under the State program—

5 “(i) the requirements set forth in subparagraphs  
 6 (C) and (D) of this paragraph are compiled with, and

7 “(ii) plans are included under which immediate at-

8 tention will be given to those resident species of plants  
 9 which are determined by the Secretary or the State  
 10 agency to be endangered or threatened and which the

11 Secretary and the State agency agree are most urgent-  
 12 ly in need of conservation programs; except that a co-  
 13 operative agreement entered into with a State whose

14 program is deemed adequate and active pursuant to  
 15 clause (i) and this clause shall not affect the applicabil-  
 16 ity of prohibitions set forth in or authorized pursuant to

17 section 4(d) or section 9(a)(1) with respect to the  
 18 taking of any resident endangered or threatened  
 19 species.”

20 Sec. 8. Section 11 of the Endangered Species Act of  
 21 1973 (16 U.S.C. 1540) is amended—

22 (1) in the first and second sentences of subsection

23 (a)(1) by striking out “or who knowingly commits an

24 act in the course of a commercial activity which vio-

25 lates” each place it appears and inserting in lieu

1 thereof “and any person engaged in business as an im-  
 2 porter or exporter of fish, wildlife, or plants who  
 3 violates”;

4 (2) in the third sentence of subsection (a)(1) by  
 5 striking out “\$1,000” and inserting in lieu thereof  
 6 “\$500”;

7 (3) in subsection (b)(1) by striking out “willfully  
 8 commits an act which” each place it appears and in-  
 9 serting in lieu thereof “knowingly”;

10 (4) in subsection (b)(2) by inserting “a person to  
 11 import or export fish, wildlife, or plants, or to operate  
 12 a quarantine station for imported wildlife, or authoriz-  
 13 ing” after “authorizing”;

14 (5) in subsection (a) by adding at the end thereof  
 15 the following new paragraph:

16 “(3) Notwithstanding any other provision of this Act, no  
 17 civil penalty shall be imposed if it can be shown by a prepon-  
 18 derance of the evidence that the defendant committed an act  
 19 based on a good-faith belief that he was acting to protect  
 20 himself or herself, a member of his or her family, or any other  
 21 individual from bodily harm, from any endangered or threat-  
 22 ened species.”;

23 (6) in subsection (b) by adding at the end thereof  
 24 the following new paragraph:

1       “(3) Notwithstanding any other provision of this Act, it  
 2 shall be a defense to prosecution if the defendant committed  
 3 the offense based on a good-faith belief that he was acting to  
 4 protect himself or herself, a member of his or her family, or  
 5 any other individual from bodily harm, from any endangered  
 6 or threatened species.”; and  
 7       (7) in paragraph (4) of subsection (g) by striking  
 8 out “any party” and inserting in lieu thereof “the pre-  
 9 vailing party”.

10       Sec. 9. That portion of subsection (a) of section 5 of the  
 11 Endangered Species Act of 1973 (16 U.S.C. 1534) which  
 12 precedes paragraph (1) is amended to read as follows:

13       “(a) *PROGRAM*.—The Secretary, and the Secretary of  
 14 Agriculture with respect to the National Forest System, shall  
 15 establish and implement a program to conserve fish, wildlife,  
 16 and plants including those which are listed as endangered  
 17 species or threatened species pursuant to section 4 of this  
 18 Act. To carry out such a program, the appropriate Secre-  
 19 tary—”.

20       Sec. 10. Section 9(b) of the Endangered Species Act  
 21 (16 U.S.C. 1538) is amended by inserting “(1)” after “(4)”  
 22 “(b) *SPECIES HELD IN CAPTIVITY OR CONTROLLED EN-  
 23 VIRONMENT*.—” and by adding the following new paragraph:  
 24       “(2)(A) This section shall not apply to—

1       “(i) any raptor legally held in captivity or in a  
 2 controlled environment on the effective date of the En-  
 3 dangered Species Act Amendments of 1978; or  
 4       “(ii) any progeny of any raptor described in clause  
 5       (i);  
 6 until such time as any such raptor or progeny is intentionally  
 7 returned to a wild state.

8       “(B) Any person holding any raptor or progeny de-  
 9 scribed in subparagraph (A) must be able to demonstrate that  
 10 the raptor or progeny does, in fact, qualify under the provi-  
 11 sions of this paragraph, and shall maintain and submit to the  
 12 Secretary, on request, such inventories, documentation, and  
 13 records as the Secretary may by regulation require as being  
 14 reasonably appropriate to carry out the purposes of this para-  
 15 graph. Such requirements shall not unnecessarily duplicate  
 16 the requirements of other rules and regulations promulgated  
 17 by the Secretary.”.

18       Sec. 11. Section 10 of the Endangered Species Act of  
 19 1973 (16 U.S.C. 1539) is amended by adding at the end  
 20 thereof the following new subsection:  
 21       “(b) *CERTAIN ANTIQUE ARTICLES*.—(1) Sections  
 22 4(d) and 9(a) do not apply to any article (other than scrim-  
 23shaw) which—  
 24       “(A) was made before 1830;

1           “(B) is composed in whole or in part of any en-  
2           dangered species or threatened species listed under sec-  
3           tion 4;  
4           “(C) has not been repaired or modified with any  
5           part of any such species on or after the date of the en-  
6           actment of this Act; and  
7           “(D) is entered at a port designated under para-  
8           graph (3).  
9           “(2) Any person who wishes to import an article under  
10          the exception provided by this subsection shall submit to the  
11          customs officer concerned at the time of entry of the article  
12          such documentation as the Secretary of the Treasury, after  
13          consultation with the Secretary of the Interior, shall by regu-  
14          lation require as being necessary to establish that the article  
15          meets the requirements set forth in paragraph (1)(A), (B),  
16          and (C).  
17          “(3) The Secretary of the Treasury, after consultation  
18          with the Secretary of the Interior, shall designate one port  
19          within each customs region at which articles described in  
20          paragraph (1)(A), (B), and (C) must be entered into the cus-  
21          toms territory of the United States.”

ENDANGERED SPECIES ACT AMENDMENTS OF 1978

SEPTEMBER 25, 1978.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. MURPHY of New York, from the Committee on Merchant Marine and Fisheries, submitted the following

REPORT  
together with

ADDITIONAL VIEWS

[To accompany H.R. 14104]

[Including cost estimate of the Congressional Budget Office]

The Committee on Merchant Marine and Fisheries, to whom was referred the bill (H.R. 14104) to authorize appropriations to carry out the Endangered Species Act of 1973 through fiscal year 1981, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:  
Page 2, line 23, insert “final” after “the”.  
Page 2, after line 25, insert the following:  
(4) in subsection (c) by inserting at the end thereof the following new paragraph:

- (4) 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.