

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.

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

Page 3, line 1, strike out "(4)" and insert in lieu thereof "(3)".

Page 4, line 22, strike out "paragraph" and insert in lieu thereof "paragraphs".

Page 5, line 6, strike out all that follows the period.
Page 5, after line 6, insert the following:

(5) A final regulation adding a species to any list published pursuant to subsection (c) shall be published in the Federal Register not later than two years after the date of publication of notice of the regulation proposing such listing under paragraph (2) (A) (i). If a final regulation is not adopted within such two-year period, the Secretary shall withdraw the proposed regulation and shall publish notice of such withdrawal in the Federal Register not later than 30 days after the end of such period. The Secretary shall not propose a regulation adding to such a list any species for which a proposed regulation has been withdrawn under this paragraph unless he determines that sufficient new information is available to warrant the proposal of a regulation. No proposed regulation for the listing of any species published before the date of the enactment of the Endangered Species Act Amendments of 1978 shall be withdrawn under this paragraph before the end of the one-year period beginning on such date of enactment.

Page 5, line 7, strike out "(5)" and insert in lieu thereof "6".

Page 7, line 14, strike out "(2) (A)" and insert in lieu thereof "(1)".

Page 9, line 12, insert ", as determined by the Secretary," after "States".

Page 10, line 3, insert after the period the following:

If no appointment is made within such 15-day period, the Endangered Species Committee shall appoint, by a vote of a majority of the members of the Committee, one individual not later than 30 days after the end of such 15-day period.

Page 13, beginning on line 16, strike out "other Federal agencies." and insert in lieu thereof "a Federal agency".

Page 18, line 3, insert "or the permit or license applicant" after "agency".

Page 18, line 23, insert after the period the following:

Any action for review under this subsection shall receive preference over other matters before the court and shall be heard and determined as expeditiously as the court considers practicable.

Page 23, line 3, strike out "action;" and insert in lieu thereof "action" and closing quotation marks.

Page 23, line 18, strike out "(c)" and insert in lieu thereof "(c) Cooperative Agreements—"

Page 23, line 9, insert "PROGRAM—" after "(a)".

Page 28, line 16, strike out "(b)" and insert in lieu thereof "(b) SPECIES HELD IN CAPTIVITY OR CONTROLLED ENVIRONMENT—".

Page 29, after line 10, insert the following:

Sec. 11. Section 10 of the Endangered Species Act of 1973 (16 U.S.C. 1539) is amended by adding at the end thereof the following new subsection:

(h) CERTAIN ANTIQUE ARTICLES.—(1) Sections 4(d) and 9(a) do not apply to any article (other than scrimshaw) which—

(A) was made before 1830;

(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.

PURPOSE OF THE LEGISLATION

The purpose of the legislation is to authorize appropriations to carry out the Endangered Species Act, and to introduce some flexibility into the Act.

To accomplish this purpose, the legislation adopts a procedure through which Federal agencies may be considered for an exemption from the Act's mandate that they not jeopardize the continued existence of any endangered or threatened species or adversely modify the critical habitat of such species.

LEGISLATIVE BACKGROUND

H.R. 13870, the predecessor bill to H.R. 14104, was introduced on August 9, 1978, by Mr. Ikegami, following eight days of oversight hearings on the operation and administration of the Endangered Species Act by the Subcommittee on Fisheries and Wildlife Conservation and the Environment. H.R. 13807 was considered by the Subcommittee in open markup sessions on August 21, 22, and 23, and September 11 and 13. On September 13, 1978, the subcommittee unanimously adopted an amendment in the nature of a substitute to H.R. 13807 and

ordered the bill, as amended, reported to the Full Committee in the form of the clean bill, H.R. 14104.

H.R. 14104 was introduced on September 18, 1978 by Mr. Leggett and cosponsored by Mr. Murphy of New York, Mr. Dingell, Mr. Ruppe, Mr. Forsythe, Mr. Bowen, Mr. Oberstar, Mr. de la Garza, Mr. Young of Alaska, Mr. AuCoin, Mr. Emery, Mr. Hughes, Mr. Akaka, Mr. Dornan, Mr. Evans of Delaware, Mr. Tribble and Mr. Rooney.

The Committee considered H.R. 14104 in open markup session on September 19 and unanimously ordered the bill reported to the House with amendments.

H.R. 14104, in addition to a number of other provisions, authorizes appropriations to the Departments of the Interior and Commerce to carry out the Endangered Species Act through Fiscal Year 1981. To that extent the bill is identical to H.R. 10883 reported to the House by the Committee on March 31, 1978 in order to comply with Section 402 of the Congressional Budget Act.

Briefly explained H.R. 14104, as ordered reported to the House, would do the following:

1. Revise the notice procedures in the Act to improve public notice of proposals to list species as endangered or threatened and designate critical habitat;
2. Require public hearings in areas affected by a designation of critical habitat;
3. Establish a procedure whereby Federal agencies can receive exemptions from the requirements of the Act through a six member cabinet level committee;
4. Establish a grant-in-aid program for States which have developed an adequate and active program for the conservation of endangered and threatened plants;
5. Revise the penalty provisions of the Act by reducing the strict liability penalty for others than importers and exporters to \$500, making criminal violations of the Act a general rather than a specific intent crime, and subjecting importers and exporters of fish and wildlife and plants to strict liability penalties of up to \$10,000;
6. Provide the Secretary of Agriculture with authority to acquire land for the conservation of endangered and threatened species with Land and Water Conservation Funds;
7. Provide exceptions from the act's requirements for the progeny of legally held captive raptors and antique articles made before 1880;
8. Require a review of the endangered species list at least once every 5 years; and
9. Authorize appropriations of \$25.5 million in fiscal year 1979; \$28 million in fiscal year 1980; and \$30.5 million in fiscal year 1981 to carry out the purposes of the act.

BACKGROUND AND NEED FOR THE LEGISLATION

1. OVERVIEW OF THE ENDANGERED SPECIES ACT OF 1973

Congressional concern about rapidly deteriorating fish, wildlife and plant habitat, indiscriminate utilization of plants and animals and

increasing numbers of species threatened with extinction resulted in a series of legislative actions culminating in the enactment of the Endangered Species Act of 1973. The act repealed the Endangered Species Conservation Act of 1969, broadened Federal responsibilities to list species and increased the Federal authorization and programs for insuring the survival of species.

The primary purpose of the Endangered Species Act of 1973 is to prevent animal and plant species endangerment and extinction caused by man's influence on ecosystems, and to return the species to the point where they are viable components of their ecosystems. The Department of the Interior estimates that there are 20 species becoming extinct per decade in the United States and an even greater number entering the endangered category. If this rate applies worldwide an estimated 300 extinctions occur per decade.

The process of extinction, of course, is a natural phenomenon. Throughout the history of the world species of animals and plants have appeared, changed and disappeared. In recent time the "extinction experience" has changed dramatically. All available evidence suggests that the rate of extinction of many species of plants and animals has increased significantly in the post-industrial era. In many cases the process of extinction has been associated with an increase in man's ability to alter natural habitats for his own devices. The loss of habitat for many species is universally cited as the major cause for the extinction of species worldwide.

A. Listing of endangered and threatened species

The protections provided to animal and plant species threatened with extinction are activated by the listing of a species as "endangered" or "threatened." The endangered category refers to those species which are threatened with extinction through all or a significant portion of its range, while threatened species are those that are likely to become endangered within the foreseeable future. The various prohibitions provided in the Act may vary depending on whether a species is listed as "endangered" or "threatened."

Species are added to the endangered and threatened species list in two different ways. A member of the public may petition the Secretary for a listing, or the listing process may be initiated by the Department of the Interior or Commerce on the basis of the best scientific and commercial data available. If a private citizen petitions the Secretary to list a species, and presents substantial evidence in support of the petition, the Secretary is required to conduct a review of the species. Although the Department of the Interior uses a priority system to determine which of the hundreds of unlisted endangered species should be acted on first, the petitioning process interrupts the Department's priority system by requiring immediate review.

The act provides five criteria for determining whether a species is endangered or threatened. These are:

1. The present or threatened destruction, modification, or curtailment of the species habitat or range;
2. Overutilization for commercial, sporting, scientific, or educational purposes;
3. Disease or predation;

4. The inadequacy of existing regulatory mechanism; or
5. Other natural or manmade factors affecting its continued existence.

Any proposed listing, delisting, or reclassification is published in the Federal Register, and the public is given at least 60 days in which to comment. Individuals may request a public hearing on a proposed listing, but the Secretary has the discretion to deny the hearing request. The Department has held six public hearings on listing proposals, and they have denied five requests for hearings. The Director of the Fish and Wildlife Service recently announced that all future proposed designations of critical habitat would be accompanied by a hearing in the local area.

Following the review of comments and evaluation of the best available biological data the Department may publish a notice of final rule-making in the Federal Register. Regulatory proposals generally become effective 30 days after publication of the final determination in the Federal Register.

As of August 1978, the endangered and threatened species list contained 228 domestic and 457 foreign species. An additional 137 animal species and 1,850 plant species have been formally proposed for listing as endangered or threatened (See table 1).

TABLE 1

Category	Endangered and threatened species		Total
	United States	Foreign	
Mammals.....	34	245	279
Birds.....	71	144	215
Reptiles and amphibians.....	26	55	81
Fishes.....	47	10	57
Snails.....	7	1	8
Clams.....	23	2	25
Crustaceans.....	8	0	8
Insects.....	17	0	17
Plants.....			
Total.....	228	457	685

Although most of the Department's actions under the Act have involved the listing of species, the act also authorizes the Secretary to delist or reclassify species in much the same manner as the initial listing. Certain species that closely resemble listed endangered or threatened species can also be listed under the act if the Secretary finds that the listing of the physically similar species will facilitate enforcement of the act. The ultimate goal of the Endangered Species Act is to focus sufficient attention on listed species so that, in time, they can be returned to a healthy state and removed from the list.

B. Prohibited activities

Once an animal or plant species has been listed as endangered, the act prohibits a number of activities involving the listed species unless an exception applies or a permit is granted. These prohibitions include:

1. The taking of endangered animal species;
2. The importing or exporting of listed species;

3. The selling or delivering any species which are illegally taken; or
4. The sale of listed species in interstate or foreign commerce.

These prohibitions apply to live or dead species; to their parts or products; to all progeny of animals born on or after December 28, 1973; and to animals held at that time for sale or barter.

All of these prohibitions apply automatically in the case of a species which is listed as endangered. In contrast, when a species is listed as threatened, the Secretary has the discretion to proscribe actions as he deems necessary to provide for the conservation of the species.

C. Exceptions

Although the act established a number of stringent protections for animals and plants listed as endangered, it also provided for some exceptions to the general prohibitions. These include:

1. An exemption for listed animals that were in captivity or a controlled environment on December 28, 1973, and not held in the course of a commercial activity; and
2. An exception which permits Alaskan Natives to take listed species for subsistence purposes, and which permits them to sell native handicrafts fashioned from the nonedible byproducts of listed species.

The act also authorizes the Secretary to permit acts otherwise prohibited by the statute for scientific purposes or to enhance the propagation or survival of the affected species.

D. Penalties and enforcement

The act established a three-tiered civil and criminal penalty provision for violations of the statute. Any person violating the act is subject to a maximum strict liability penalty of \$1,000. If a person knowingly violates a provision of the act he can be fined up to \$10,000 for each violation; and any person who willfully commits an act which violates the statute can be fined up to \$20,000 or imprisoned up to one year.

In addition the civil and criminal penalty provisions provided already discussed, the act authorizes any person, private entity, as well as any State or Federal agency to bring suit to enjoin violations of the act.

II. SECTION 7 AND CRITICAL HABITAT

Section 7 of the Endangered Species Act requires Federal agencies to insure that any action authorized, funded or carried out by them does not jeopardize the continued existence of listed species or destroy or modify the critical habitat of any endangered or threatened species. This one small section has developed into one of the most significant portions of the entire statute.

The mandate of section 7 applies once a species is listed or once "critical habitat" is designated for any listed species. The term "critical habitat" was not defined in the 1973 act, but regulations promul-

gated pursuant to the act have defined it to include "[a]ir, land or water areas... the loss of which would appreciably decrease the likelihood of its survival and recovery of a listed species or a distinct segment of its population...."

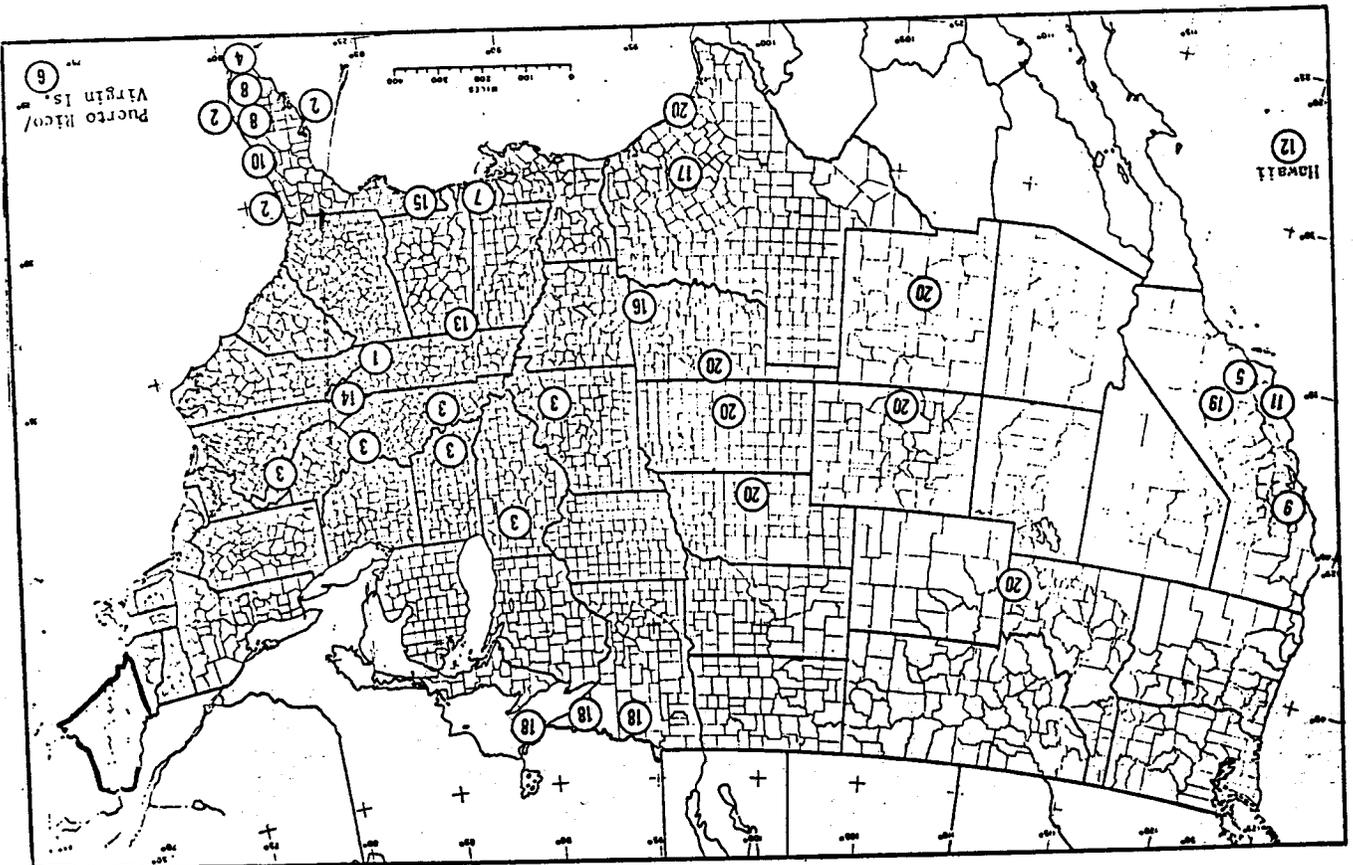
The designation of critical habitat for listed species occurs in much the same manner as the initial listing of the species as endangered or threatened. Although the Departments did not originally designate critical habitat concurrently with the listing they are not attempting to do so. As of August 1978, critical habitats had been designated for 32 separate species. The species involved and the area of the habitat are described in tables 2 and 3. An additional 56 critical habitats have been formally proposed for designation.

TABLE 2.—CRITICAL HABITAT FINALIZED, MAPS, AND DESCRIPTIONS

Species	Date of Federal Register	Estimated total acre (10 ³)	Number of areas	Notes	Map index location
Snail darter (no map available)	Apr. 1, 1976	1.3	1		1, 2, 4, 10.
Florida manatee (no map available)	Sept. 24, 1976	950	13	2	2, 4, 1.
Indiana bat (no map available)	Sept. 24, 1976	NA	9		4, 5, 19.
American crocodile	do	556	9		
California condor (no map available)	Nov. 19, 1975	22	1	3	6.
Yellow-billed blackbird	June 3, 1977	015	1		6.
St. Croix darter	July 21, 1977	25	3		7.
Giant snail sandhill crane	Aug. 8, 1977	963	5		7.
Mississippi sandhill crane	Aug. 11, 1977	12	5		8.
Everglade kite	do	271	5		8.
American peregrine falcon	do	90	4		10.
Cape Sable sparrow	do	77	2		11.
Dusky seaside sparrow	do	NA	2	2	12.
Morro Bay kangaroo rat	Sept. 9, 1977	77	2		13.
Philippine eaglefish (no map available)	do	20	2		13.
Alabama darter	do	22	2		14.
Slickwood club	do	185	2		14.
Spotted club	do	30	2		15.
Florida scrub jay	Nov. 11, 1977	1.1	6		15.
Yellow Pine Barrens treefrog	do	7.5	3		16.
Florida scrub jay	Jan. 21, 1978	8.0	3	4	16.
Leopard darter	Jan. 31, 1978	83	2		17.
Houston darter	Feb. 3, 1978	22	2	3	17.
Mona dove	do	4,600	4		18.
Mona ground iguana	Mar. 9, 1978	365	1		18.
Gray wolf - golden trout	Apr. 13, 1978	300	1		20.
Little Kern darter	May 15, 1978	0.03	1		19.
Whopping post willflower	Aug. 31, 1978	1,000	1		20.
Central Darters nesting primrose	do				
New Mexican ridgeway rattlesnake	do				
Total		9,392	110		

Notes: Estimate subject to 30-percent error, either direction.
 1. Causes, no estimate made of area.
 2. (Mona Island, P.R.) all 3 species have same critical habitat.
 3. Actual critical habitat is described as river or stream course, no actual area stated (estimated river miles converted to acres).

TABLE 3



As the Act is currently written, critical habitat is determined solely on the basis of biological factors. The Secretary has no discretion to alter a critical habitat designation on the basis of the effect that such designation may have on the area. In many cases, the designation of critical habitat may have little or no impact on activities within the area of the habitat. Whether a specific action may violate section 7 depends on a biological analysis of the impact of the activity on the listed species or its habitat.

A. *Tellico Dam and the snail darter—judicial interpretations of section 7*

As we have seen in the celebrated snail darter case, section 7 can potentially have an enormous impact on Federal activities. In June of this year, the U.S. Supreme Court affirmed the lower court decision in the *Tellico Dam* case holding that the Tennessee Valley Authority facility could not be completed as planned because it would jeopardize the existence and destroy the critical habitat of the snail darter, a member of the perch family (*Tennessee Valley Authority v. Hill et al.*, No. 76-1701). In reaching this conclusion the Court indicated that the legislative history of the act revealed that Congress intended to halt and reverse the trend toward species extinction—whatever the cost. The Court indicated that the pointed omission of any type of qualifying language in the statute revealed congressional intent to give the continued existence of endangered species priority over the primary missions of Federal agencies. The Supreme Court also dismissed the arguments that section 7 should not apply to any Federal action which is at an advanced stage of construction at the time the species is listed. The Court argued that the plain meaning of the language of section 7, read against the stated policies of the act and its legislative history, indicated that Congress did not intend agencies to be able to escape the mandate of section 7 simply on the basis of the stage of completion of the affected project or activity.

The Tennessee Valley Authority (TVA) has not conducted any further work on the *Tellico Project* since the Sixth Circuit Court of Appeals decision in January. Through February 1977 TVA had obligated about \$103 million on the *Tellico Project*. The General Accounting Office has estimated that about \$56.3 million of the \$103 million invested in the *Tellico Project* could provide some benefit if the project is not completed. The amount of benefit to be derived from the investment depends largely on the ultimate case, however, and probably will not be proportional with the original cost.

In all, Section 7 has been interpreted by the courts on three occasions. In *Sierra Club v. Froehle*, 534 F. 2d 1289 (8th Cir. 1976), the plaintiffs challenged the construction of the Corps of Engineers' Meramec Park Lake Dam in Missouri. The plaintiffs alleged that the construction of the dam would jeopardize the continued existence of the endangered Indiana bat by flooding caves in which the bats were located. The 8th Circuit Court of Appeals affirmed the District Court's finding that the existence of any adverse impact on the bats was insufficiently conclusive to preclude construction under section 7.

In *National Wildlife Federation v. Coleman*, 529 F. 2d 359 (5th Cir. 1976), the Fifth Circuit Court of Appeals considered a conflict between the Mississippi sandhill crane, a subspecies of sandhill crane, and a planned interchange for Interstate Highway 10. The Court of

Appeals enjoined the Department of Transportation from proceeding with the planned construction of the interchange until the Department could ensure that the development of adjoining lands would not be detrimental to the continued survival of the cranes and the preservation of their habitat. Subsequent to this ruling, the parties to the action agreed that the Interchange could be built if the Department would purchase the land adjacent to the interchange. The completion of the interchange has been stalled, however, as a result of the dispute between the Departments of the Interior and Transportation as to who would be responsible for acquiring the land around the interchange.

Both the Indiana bat and the sandhill crane cases illustrate the fact that there is some degree of flexibility in Section 7. In the sandhill crane case the plaintiffs did not seek, and the court did not enjoin the completion of the highway despite the fact that it bisected the sandhill crane's habitat. In the Indiana bat case the court found that the impact of the impoundment on the bats and their habitat was not sufficiently severe to amount to a violation of Section 7. The determination of whether a particular activity violates Section 7 depends on the type and degree of impact that the activity will have on the species or its habitat. These cases also make it clear, however, that the determination of whether a particular activity violates section 7 is made irrespective of the economic importance of the activity.

B. *Section 7 and the consultation process*

In addition to requiring Federal agencies to ensure that their actions do not adversely impact endangered species, the section also requires all Federal agencies to consult with the Department of the Interior (Department of Commerce in the case of marine species) when any of their actions may affect endangered species. This consultation process is central to the resolution of conflicts under the Act.

Typically the consultation process will be initiated by a Federal agency when it discovers that it may be taking an action that will have an impact on an endangered species. The agency contacts the Fish and Wildlife Service or the National Marine Fisheries Service, depending on the species involved, and requests assistance to determine whether there is a potential violation of section 7. The Service initially conducts a threshold examination in an attempt to determine that nature of any impact on a listed species. At the conclusion of the threshold examination the Service issues a biological opinion indicating whether the action is likely to jeopardize the species or adversely modify the critical habitat, and suggesting possible modification which would avoid any adverse impact.

Although section 7 has been in effect since 1973, this consultation procedure was not formally instituted until January of this year. The administration has testified that some 4500 consultations have been conducted under Section 7 since 1973. Unfortunately, until recently the Department of the Interior did not attempt to make a formal record of these consultations and the Committee has been unable to substantiate the number of successful consultations under the Act. It is assumed that a large number of the consultations amounted to informal contacts between the Federal agency and the Fish and Wildlife Service. The Department of the Interior estimates that there may be as many as 20,000 consultations during Fiscal Year

1979. In the future the Department should keep accurate records on each consultation on file regardless of whether consultation amounts to only a single inquiry such as a telephone call.

The evidence presented to the Committee suggests that in many instances good faith consultation between the acting agency and the Fish and Wildlife Service can resolve many endangered species conflicts. As an example, consultation between the Service and the Corps of Engineers on the proposed Dickey-Lincoln project in Maine appears to have resolved any potential conflict between the reservoir and the endangered furbish lousewort. In that case the Service recommended a conservation program to the Corps of Engineers which included acquisition and protection of existing habitats for relocated populations. The development of a monitoring program capable of detecting and the development of a monitoring program capable of detecting any changes in the lousewort's biological status. The consultation involving the furbish lousewort was one of the most complex conducted by the Fish and Wildlife Service. Some consultations may amount to no more than a simple inquiry whether a listed species is present in a project area.

Any determination by the Fish and Wildlife Service that the activity may jeopardize the continued existence of listed species does not necessarily mandate any particular action by the acting agency. The section 7 regulations make it clear that it is the responsibility of the acting agency to determine whether to proceed with the activity or a program as planned in light of its Section 7 obligations. The judicial decisions interpreting Section 7 indicate, however, that the biological opinion issued by the Fish and Wildlife Service will ordinarily be given great weight by the courts. Federal agencies proceeding with an action in the face of an adverse biological opinion will be doing so at their peril.

Although consultation can be a valuable tool for resolving conflicts between endangered species and Federally authorized activities, the committee is concerned that the volume of consultations expected under section 7 may ultimately overwhelm the Fish and Wildlife Service. The committee is especially alarmed that, because additional full-time personnel ceilings have not been provided by the Administration, many of these all-important consultations will be performed by part-time personnel. The efficient operation of the Department's consultation teams is vital if future conflicts between endangered species and Federal development projects are to be avoided. The committee does not believe that part-time personnel can adequately perform the difficult task of consulting with other Federal agencies on projects which may result in species or habitat degradation.

III. THE POTENTIAL FOR FUTURE ENDANGERED SPECIES CONFLICTS

Before determining the need for any amendment to the Endangered Species Act, the Subcommittee on Fisheries and Wildlife Conservation and the Environment conducted the most extensive set of oversight hearings ever held on the operation of the Endangered Species Act. These hearings attempted to determine the nature and extent of current conflicts under the act, and the likelihood of future conflicts between listed species and federally authorized activities.

The evidence developed at these hearings suggests that the consultation process can resolve many if not most of the conflicts that might develop under the Act. The committee believes that the popular press has grossly exaggerated the potential for conflict under the Act. It is clear, nevertheless, that there will continue to be some Federally authorized activities which cannot be modified in a manner which will avoid a conflict with a listed species. For example, the Tennessee Valley Authority Columbia Dam project appears to pose a serious threat to several listed species. The likelihood of future conflicts will increase as more species are added to the Endangered Species List and as more critical habitats are designated for listed species. As we have already mentioned, there are currently 137 animals and 1850 plants proposed for listing as endangered and threatened and 56 critical habitats proposed for designation. The Department of the Interior anticipates listing some 414 domestic species and designating 293 critical habitats before 1980.

Numbers alone, nevertheless, can never tell the entire endangered species story. Many of the plant species, for example, are located in isolated areas of California and Hawaii. It is very unlikely that the listing of these plant species will precipitate conflicts with Federal activities. If a conflict develops, it will be a simple matter to relocate populations of these species to avoid a violation of section 7. On the other hand, the amount of biological information about any particular endangered species can be very limited. And as a result, it may be quite difficult for the Fish and Wildlife Service to know with any certainty at the consultation stage whether an activity will "jeopardize the existence" of a particular species.

All of these facts, considered together, convinced the committee that some flexibility is needed in the act to allow consideration of those cases where a Federal action cannot be completed or its objectives cannot be met without directly conflicting with the requirements of Section 7. The committee believes that an amendment of the Act is further justified in light of allegations by the General Accounting Office that the Fish and Wildlife Service has deliberately refrained from listing two species of insects which appear to pose a serious conflict with the New Melones Dam in California. The Fish and Wildlife Service has allegedly omitted these species from the list for fear of provoking the Congress into major revisions of the Endangered Species Act.

The committee considers these allegations to be extremely serious. Those individuals charged with the administration of the act do not have the legal authority to weigh the political importance of an endangered species. The fact that the very administrators of the act have apparently determined that the act is insufficiently flexible is evidence itself of the necessity for amendment.

IV. H.R. 14140—GENERAL DISCUSSION

A. *Compromise*

The Endangered Species Act amendments were subjected to a vigorous debate in both the Subcommittee and full committee. At one point, no less than five separate amendment proposals were considered by the committee in its markup session. H.R. 14104 represents a compromise

between these disparate points of view. The bill attempts to retain the basic integrity of the Endangered Species Act, while introducing some flexibility which will permit exemptions from the Act's stringent requirements. At the same time, the legislation aims to improve the listing process and the public notice process of proposed listing and designations. These improvements will insure that all listing and designations are made by the Department of the Interior only after a thorough survey of all of the available data, and only after notice to the local communities that will be most affected by any listing or designation. In addition, the compromise amendment contains provisions allowing for the enhancement of existing critical habitat of endangered and threatened species.

B. Exemption procedure

H.R. 14104 would establish a procedure through which Federal activities could be exempted from the requirements of section 7 of the act. The exemption procedure could be initiated once the Secretary issues a biological opinion indicating that the agency action may jeopardize the continued existence of a listed species or adversely modify its critical habitat. The application would initially be considered by a three member review board which would make recommendations to a six member cabinet level committee. The procedure outlined here is very similar to that regularly utilized by Federal agencies under the terms of the Administrative Procedure Act. In this case, the review board would be acting in much the same capacity as an administrative hearing examiner who makes recommendations to a Federal agency on a pending regulatory proposal.

The review board would be composed of an appointee of the Secretary of the Interior (the Secretary of Commerce in the case of marine species), an appointee of the Governor of the affected State, and an individual appointed by the two appointees.

Before proceeding to review the merits of granting an exemption for the agency action, the review board would be required to make an initial determination that the agency has made a good faith effort to consult with the Fish and Wildlife Service and attempt to resolve the conflict with the endangered species. This step is crucial in order to insure that all Federal agencies fully comply with the consultation requirements of section 7.

Once the review board determined that the agency had consulted in good faith, it could proceed to consider the merits of the application. The review board would determine, on the basis of the evidence presented at a formal adjudicatory hearing, whether—

- A. There are no feasible and prudent alternatives to the agency action;
- B. The benefits of the agency action clearly outweigh the benefits of alternative courses of action consistent with the conservation of the species; and
- C. The action is of national or regional significance.

At the conclusion of the formal hearing the review board would forward its recommendation, including a recommendation of the necessary mitigation and enhancement measures to be taken, to the Endangered Species Committee composed of the following members:

1. The Secretary of Agriculture;
2. The Secretary of the Army;

3. The Secretary of the Interior;
4. The Administrator of the National Oceanic and Atmospheric Administration;
5. The Chairman of the Council on Environmental Quality; and
6. The Governor of the State in which the agency action will occur.

The Endangered Species Committee would review the recommendations of the review board and the evidence on which it is based and would decide whether or not to grant an exemption from section 7 of the act. Four out of the six committee members would have to vote for an exemption in order for an exemption to be granted. If such an exemption is granted, the committee would be required to establish the necessary mitigation and enhancement measures.

The Committee on Merchant Marine and Fisheries adopted the exemption procedure with the firm belief that it offers the best potential for fairly evaluating and balancing the benefits of the agency action against the benefits of alternatives which will insure the conservation of the species. The membership of the Endangered Species Committee has been deliberately structured to take advantage of a broad array of experience and expertise and to balance all possible points of view.

The committee would like to point out, in response to the additional views of several members of the Committee, that the review board does not duplicate the duties of the Endangered Species Committee. The review board merely makes recommendations to the Endangered Species Committee. In this sense, the review board will be acting as a hearing examiner for the committee. Even if the bill did not include a review board, the committee would undoubtedly have to hire a hearing examiner to conduct the Federal adjudicatory hearing. The exemption procedure provided in H.R. 14104 will assure that all of the evidence will be reviewed by highly competent and professional appointees of the Secretary and Governor.

Although the exemption procedures involve a two-step process, the bill includes specific timetables to insure that an exemption application will receive immediate consideration. The review board is required to complete its hearings and make its recommendation within 180 days. The committee in turn is required to decide whether to grant an exemption within 90 days of receiving the recommendation of the review board.

C. Amendments to the listing process

H.R. 14104 includes several amendments to the endangered species listing process. These amendments were added to the legislation in order to correct a number of deficiencies that were highlighted in the course of the oversight hearings. The committee discovered that, all too often, the listing of a species or the designation of critical habitat occurs in a regulatory vacuum. There has been little or no effort made to publicize the regulatory proposal in the affected area or give the people most directly impacted by the proposed regulation an opportunity to effectively comment on it. Under the existing Act an individual would have to spot the regulatory proposal in the Federal Register in order to be aware of any potential listing or designation of habitat in his area.

The committee believes that the listing of a species or the designation of critical habitat is important enough to require the administering agencies to expand their notice procedures. H.R. 14104 would alleviate this problem by requiring actual notice of regulatory proposals to general units of government. In addition, the bill requires that any proposed designation of critical habitat be published in a local newspaper in the affected area. Finally, the bill would require informal public meetings on proposed critical habitat designations in the area of the habitat and more formalized hearings in the State. Added together, these provisions will insure that the Department of the Interior is not listing species and designating critical habitat without consulting the views of the people of the affected area. In addition, these provisions will serve to alert the Fish and Wildlife Service to possible conflicts between listed species and human activities. The committee believes that it is in everybody's interest for conflicts between the presence of endangered species and development activities to be discovered and resolved at the earliest possible opportunity.

D. Evaluation of economic impact of the designation of critical habitat for invertebrates

The ultimate goal of the Endangered Species Act is the conservation of the ecosystem on which all species, whether endangered or not, depend for survival. For this reason the Endangered Species Act protects all endangered and threatened members of the animal kingdom, not merely the so-called higher forms of life. Nevertheless, the committee recognizes that the large number of species and subspecies within the 21 nonvertebrate phyla could ultimately present serious conflicts with many Federal activities. The committee adopted a provision, which while continuing full protection for all listed species, does give the Secretary the discretion to alter a critical habitat designation for an invertebrate species if he determines that the economic benefits of excluding a portion of the critical habitat outweigh the benefits of designating the area as part of the critical habitat.

This provision is not intended to downgrade the status of invertebrate species. Rather, it is intended to avoid conflicts between invertebrate species and Federal activities at an early stage, without having to resort to the full exemption procedure.

SECTION-BY-SECTION ANALYSIS

Section 1 of H.R. 14104 contains the short title and enacting clause. Section 2 of H.R. 14104 contains amendments to section 4 of the Endangered Species Act of 1973 (16 U.S.C. 1533).

Section 4(a)(1) of the Endangered Species Act of 1973 requires that the listing of any species as threatened or endangered is to be carried out by regulation published in the Federal Register. Paragraph 1 of section 2 of the bill has the additional requirement that the Secretary "to the maximum extent prudent" specify critical habitat at the same time as he publishes a regulation listing a species. The phrase "to the maximum extent prudent" is intended to give the Secretary the discretion to decide not to designate critical habitat concurrently with the listing where it would not be in the best interests of the species to do so.

As an example, the designation of critical habitat for some endangered plants may only encourage individuals to collect these plants to the species ultimate detriment. The committee intends that in most situations the Secretary will, in fact, designate critical habitat at the same time that a species is listed as either endangered or threatened. It is only in rare circumstances where the specification of critical habitat concurrently with the listing would not be beneficial to the species.

Section 4(b) of the act is amended by the addition of a new paragraph which specifies the way in which the critical habitat of invertebrate animal species is to be determined by the Secretary. In the new paragraph, the Secretary is directed to consider the economic and other relevant impacts of the inclusion of areas within a proposed critical habitat. The Secretary may exclude any area from a proposed critical habitat if he determines that the benefits of such an exclusion outweigh the benefits of specifying the area as part of the critical habitat.

Up until this time, the determination of critical habitat has been a purely biological question. With the addition of this new paragraph, the determination of critical habitat for invertebrate takes on significant added dimensions. Economics and any other relevant impact shall be considered by the Secretary in setting the limits of critical habitat for such a species. The Secretary is not required to give economics or any other "relevant impact" predominant consideration in his specification of critical habitat for invertebrates. The consideration and weight given to any particular impact is completely within the Secretary's discretion.

In directly addressing the question of the specification of critical habitat for invertebrates, the committee was motivated by its knowledge of the large number of species and subspecies of invertebrates, their usually high rate of reproduction, and their relatively small critical habitat requirements. The result of the committee's proposed amendment would be increased flexibility on the part of the Secretary in determining critical habitat for invertebrates. Factors of recognized or potential importance to human activities in an area will be considered by the Secretary in deciding whether or not all or part of that area should be included in the critical habitat of an invertebrate species. The committee expects that in some situations, the resultant critical habitat will be different from that which would have been established using solely biological criteria. In some situations, no critical habitat would be specified. In such situations, the act would still be in force to prevent any taking or other prohibited act described in 16 U.S.C. 1538. In addition, agencies would still be prohibited from taking an action which would jeopardize the existence of the invertebrate species.

The committee amended H.R. 14104 to require a review of the Endangered and Threatened Species List at least once every 5 years. On the basis of this review, the Secretary would determine whether to: (1) remove any species from the list; (2) change the status of any listed species from endangered to threatened or threatened to endangered. Any determinations made pursuant to this review must be made in accordance with the criteria described in section 4(a) of the act and pursuant to the listing procedure described in section 4(b). The com-

mittee anticipates that the Secretary may decide to conduct the required review in increments. Any failure to review all of the species on the list would not invalidate the listing of any species.

Section 2 of H.R. 14104 also amends section 4(c)(1) of the act which presently requires the Secretary to publish a list of endangered or threatened species which also specifies the portion of its range in which the species is endangered or threatened.

The committee bill would amend section 4(c)(1) to require the Secretary to include critical habitat designations on the Endangered and Threatened Species List. The term "range" is used in the general sense, and refers to the historical range of the species. The committee believes, nonetheless, that the Secretary should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species.

H.R. 14104 amends section 4(f)(2)(A) of the act to expand present notice requirements and to require public meetings or hearings in connection with the listing of a species and the specification of its critical habitat.

Under the committee bill, notice of a proposed regulation (including a complete text of the regulation) would have to be published in the Federal Register 60 days before its effective date. Where critical habitat is specified, such notice must also be published in a newspaper of general circulation within or adjacent to such habitat. Actual notice of the regulation and any environmental assessment or environmental impact statement prepared on it is required to be given to all general local governments within or adjacent to the proposed critical habitat at least 60 days prior to its effective date. This provision does not require actual notice to special districts such as an irrigation or school district. The committee expects that the Secretary would utilize OMB Circular A-95 or some similar device for assuring effective notice to local governments.

Where critical habitat is specified in the proposed regulation, the Secretary must promptly hold a public meeting on the proposed regulation. The meeting must be held in the area in each State where such habitat would be found. The committee intends that the meetings held pursuant to this paragraph be of an informal variety that would permit a colloquy between representatives of the Department and local citizens. If a timely request is filed with the Secretary, a public hearing must be held in the State whose citizen filed the request. It is the intent of the committee that such hearings be held in accordance with appropriate sections of the Administrative Procedures Act and near or within the proposed critical habitat. The committee does not intend that either the meetings or hearings be full adversarial proceedings with all of its inherent expenses to the parties and delays in arriving at a final regulation.

In the rather rare instances where no critical habitat is proposed concurrently with the listing, a public meeting is to be held by the Secretary if a request therefore is filed within 45 days of the publication of general notice.

If, by chance, actual notice is not given to some unit of general local government, such an unintentional and unplanned failure of the notification system shall not invalidate the proposed regulation.

H.R. 14104 adds a new paragraph (5) to section 4(f) which would provide that any final regulation adding a species to the list must be published within 2 years after the notice of proposed rulemaking. Any proposed listings not finalized within 2 years must be withdrawn, and cannot again be proposed unless Secretary determines that new information is available which warrants such action. The paragraph provides that any listing which is proposed at the time of the enactment of these amendments would not have to be withdrawn until one year after the date of enactment.

The bill adds a new subsection (g) to section 4 which would require the Secretary to develop and implement recovery plans for listed species. Such plans would be designed to ensure the conservation or survival of each listed species. Recovery teams may be appointed by the Secretary, where appropriate, to aid in developing or implementing a recovery plan for a particular species. Such plans shall be as long and as detailed as is necessary and consonant with their purpose of providing a framework for actions directed at conserving or, at least, insuring the survival of the subject species. Although recovery plans are implicit in the Endangered Species Act, the Act does not specifically mandate recovery plans. As a result, recovery plans have been given a low priority within the Endangered Species Act budget.

The committee intends the Secretary to establish recovery teams to assist with: (1) the development of plans; (2) periodic amendment of plans; and (3) the implementation of the plans. The committee hopes that the Secretary will appoint full-time professionals to insure that planning and implementation proceed expeditiously.

Section 3 of H.R. 14104 contains extensive amendments to section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1536).

As under the present law, the Secretary is required to make sure that all the programs administered by him are in concert with the purposes of the Endangered Species Act. Each Federal agency is directed to consult with the Secretary and to use its authorities to further the purposes of the Endangered Species Act by carrying out conservation programs for listed species.

Under H.R. 14104, each Federal agency is required to insure that any action authorized, funded or carried out by it does not result in species or habitat degradation unless the action has been exempted under later provisions of the bill. In setting about to insure that its actions will not result in species or habitat degradation, each agency is expected to make use of all available expertise both within its own organization and by consulting with the Secretary, the Smithsonian Institution, the Marine Mammal Commission, or other qualified groups or individuals.

Section 7(c)(1) requires that Federal agencies insure that their actions do not result in: (1) jeopardy to the continued existence of an endangered or threatened species; or (2) the destruction or adverse modification of any critical habitat of any such species. It is the responsibility of each agency to review its activities or programs to identify any such activity or program that may affect listed species or their habitat. If a Federal agency determines that its activities or programs may affect listed species or their habitat, the agency should request assistance from the Secretary.

Section 7(c) (2) defines the consultation process. If the Federal action agency or the Secretary determines that a proposed action may affect a listed species or its habitat, immediate consultation shall be undertaken. The consultation will assist in the development of alternatives to the proposed action, and will result in a written biological opinion by the Secretary detailing whether the proposed action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of its critical habitat. The biological opinion will also discuss the alternatives and modifications to the proposed action which would avoid the impacts to the listed species or their habitats.

The search for alternatives in the consultation process should be limited to those that are "reasonable and prudent." The committee does not intend that the Secretary and the Federal agency should, at the consultation stage, be required to review all possible alternatives to the agency action including those inconsistent with the project's objectives and outside of the Federal agency's jurisdiction. It is the intent of the Committee that the consultation process be completed within 90 days or such time as is mutually agreed upon by the Secretary and the Federal agency.

The new Section 7(c) (3) is designed to stimulate the development of additional biological information to assist Federal agencies in complying with section 7.

It requires Federal agencies, with respect to actions for which no contract for construction has been entered into and no construction has begun on the date of enactment of this provision, to ask the Secretary whether any listed species is present in the area of any such proposed action. In responding, the Secretary is to rely on the best scientific and commercial data available. The end which this notification process is designed to accomplish is the early discovery of and elucidation of any conflicts between an agency action and a listed species.

After being notified that listed species may be present, the Federal agency is required to conduct a biological assessment. The assessment should concentrate on determining whether or not any listed species presence is likely to be adversely affected by the agency action. No contract for construction may be entered into nor may construction begin while the biological assessment process is under way. The assessment may be prepared in conjunction with the NEPA process. It is the intent of the committee that this review process take place well before the exercise of agency discretion which would result in contracts for construction, actual construction activities, or other potentially destructive activity.

The committee notes that some biological assessments may harass or harm listed species to the extent that a permit would be required to conduct the assessment. If that is the case, the Federal agency would be required to apply to the Secretary for a permit under the provisions of the Act.

The new section 7(c) (4) of the act would further strengthen the consultation process. It prohibits any Federal agency from making any irreversible or irretrievable commitment of resources once consultation has been initiated if such commitment would have the effect of foreclosing efforts to avoid the adverse impacts on the species or their critical habitat.

H.R. 14104 includes a new section 7(d) detailing the creation of a review board and setting forth the manner in which applications for a project exemption are to be processed.

The exemption process is begun by the filing of an application with the Secretary by either the Federal agency, the Governor of the State in which the agency action will occur, or an applicant for a permit or license required under Federal law. The reference to States in which the agency action is intended to apply to those States where the project, species and critical habitat are located. It is not intended to include States whose only nexus to the agency action is the issuance of a Federal permit, license or grant. An application may only be filed if, after consultation, it is the Secretary's opinion that the agency action may result in species or habitat degradation. The application must be filed within 90 days after completion of the consultation process. The application must contain a statement detailing the reasons why the agency action is qualified for an exemption.

Upon receipt of the application for exemption, the Secretary must promptly notify the Governor or Governors of any State(s) in which the agency action is being carried out and request their appointment of a member of the review board. The committee intends the Secretary to have sole discretion to determine which States are affected by the Endangered Species Act conflict and which Governors should be notified under this provision.

The review board is to consist of three members. One is appointed by the Governor or Governors, one by the Secretary, and the third is selected by the first two within 15 days of the appointment of the second. If the two appointees are unable to agree on a third member, the Endangered Species Committee is directed to select the third member.

Within 60 days of receiving the application, the Secretary is to submit to the review board his written views on the matter and his recommendations as to the final disposition of the matter.

The review board is given 60 days after the appointment of its third member to make its initial determinations. A longer period of time may be taken if agreed to between the Secretary and the agency. The board acts by majority vote in determining whether the Federal agency has met three requirements which are preconditions to further action on the exemption application. First, there must be a determination that the agency has consulted with the Secretary in good faith and has made a reasonable and responsible effort to consider modifications or alternatives which would avoid species or habitat degradation. Secondly, the agency must have conducted a biological assessment if one is required under new section 7(c) (3). Thirdly, the agency must have made no irreversible or irretrievable commitment of resources as prohibited under section 7(c) (4).

If the review board makes a positive determination on these three matters, it may proceed to conduct a hearing and forward a recommendation on the matter of whether or not an exemption should be granted. A recommendation favoring an exemption may be made to the Endangered Species Committee if a majority of the review board finds, after conducting a formal adjudicatory hearing, that: (1) there are no "feasible and prudent" alternatives to the agency action; (2)

the benefits of the agency action clearly outweigh the benefits of alternative course of action consistent with conserving the species or its critical habitat, and that such action is in the public interest; and (3) the actions of national or regional significance.

The terms "feasible and prudent" alternatives are intended to insure that the review board evaluates a wide variety of alternatives to the agency action before recommending an exemption from the act. During the consultation process, the Secretary and the Federal agency are required to evaluate a narrower range of possible alternatives to the proposed action. The committee believes that the search for alternatives before the review board should be significantly larger than during the consultation stage. Section 7 consultation is intended to focus attention on the agency action, its objectives, and the aspects of the agency action which gave rise to the problem initially. The focus of a section 7 consultation should be on solving the problem in a way which is clearly within the jurisdiction and expertise of the consulting parties.

In contrast, the review board and the Endangered Species Committee should focus on a wider variety of alternatives. Their search should not be limited to original project objectives or the acting agency's jurisdiction. The Committee does intend that the review board should only consider alternatives which are both technically capable of being constructed and prudent to implement.

The second criteria considered by the review board involves an evaluation of the benefits of the agency action and an evaluation of the benefits associated with alternatives which would avoid an adverse impact on the species or its habitat.

In the context of this provision, the committee intends that the term "benefits" shall include, but not be limited to, ecological and economic considerations. Among the economic criteria which may be examined and considered by the review board and the Endangered Species Committee are those set forth in OMB Circular A-107 and in Executive Order 11949. These include:

- (1) the cost impact on consumers, business markets, Federal, State, and local governments;
- (2) the effect on productivity of wage earners, businesses and government;
- (3) the effect on competition;
- (4) the effect on supplies of important materials, products, and services;
- (5) the effect on employment; and
- (6) the effect on energy supply and demand.

The Committee does not intend, however, that the review board and Endangered Species Committee evaluation should be limited to these criteria. They should also consider the national interest, including actions authorized, funded or carried out by the Secretary of Defense; the esthetic, ecological, educational, historical, recreational and scientific value of any endangered or threatened species; and any other factors deemed relevant.

The committee notes that the amendment requires the review board and the committee to balance the benefits associated with the agency action against the benefits associated with alternative courses of action.

They should not balance the benefits of the action against the value associated with the listed species.

To be "in the public interest," an agency action must effect some interest, right or duty of the community at large in a way which they would perceive as positive.

The third finding required before the board may recommend that an exemption be granted is that the agency action be of "national or regional significance." The term "regional significance" is not intended to refer merely to projects which affect more than one State. Rather, the committee believes that the review board and the Endangered Species Committee should evaluate the nature, as well as the scope of the project, in their determination of whether an action is nationally or regionally significant. As an example, the committee believes that an action affecting the Port of Sacramento, in California, would be regionally significant.

Unless otherwise agreed between the applicant and the Secretary, the review board has 180 days after the initiation of the hearing to submit its recommendation. The recommendation shall include the board's view on the propriety of granting an exemption as well as any reasonable mitigation and enhancement measures to be considered by the committee.

The record of the review board's proceedings is to be transmitted to the Endangered Species Committee along with the board's recommendation. The review board has the power to request on a non-reimbursable basis the assistance of agency personnel from the head of any Federal agency. This would include the power to request the services of an administrative law judge to assist in the conduct of the hearing. The review board should make maximum use of this procedure and should minimize reliance on personnel provided on a reimbursable basis by the GSA. Even if the review board procures the services of a hearing examiner, the committee intends the members of the review board to be physically present during the hearing. The committee believes that the presence of the review board during the formal hearing will assist in the development of a sound and comprehensive recommendation to the Endangered Species Committee.

The committee does not intend that either the review board or the Endangered Species Committee should be considered as Federal agencies except as provided for in the bill. The Federal Advisory Committee Act shall not be applicable to either the review boards or the Endangered Species Committee.

Section 7(e) establishes the Endangered Species Committee. The committee is to be composed of six members: The Secretary of Agriculture; the Secretary of the Army; the Secretary of the Interior; the Administrator of the National Oceanic and Atmospheric Administration; the Chairman of the Council on Environmental Quality; and the Governor or Governors of the State or States within which the agency action in question will occur.

The committee is to meet at the call of its Chairman, the Chairman of the Council on Environmental Quality. It has 90 days from the date it receives the review board's recommendation to decide whether or not to grant the agency action an exemption from new subsection 7(c) (1).

An exemption may only be granted by four of the committee's members, voting in person, and after a determination is made on the record. The committee may base its determination on the record developed by the review board, but has the power to itself receive testimony and evidence. The committee does not expect the Endangered Species Committee to conduct a second final adjudicatory hearing. The criteria the committee is to use in making its determination are identical to those considered by the review board in making its recommendation. If the committee grants an exemption, it must require reasonable mitigation and enhancement measures be taken by the successful applicant. The phrase "reasonable mitigation and enhancement measures" is used in several places in the legislation to describe actions which shall be taken by an applicant which receives an exemption. The required actions must be "reasonable" in their cost, likelihood of protecting the listed species, and the availability of the technology required to make them effective, and other considerations deemed relevant by the Endangered Species Committee. The explanation of the phrase in new Section 7(f)(2) makes it clear that "reasonable mitigation and enhancement measures" are those actions by the applicant which are necessary and appropriate "to minimize the adverse effects of the agency action" on the species or habitat in question. Live propagation, transplantation, and habitat acquisition and improvement are mentioned as specific examples of actions a successful applicant might be required to take.

The Committee's final determination is subject to judicial review in the district court for any district where the agency action will be located. This refers to the location of the project where the project will be carried out, and not the district where a permit or license might be issued.

The Committee may not grant an exemption if the Secretary of State gives it written certification that the granting of the exemption and the resultant agency action would violate an international treaty or other international obligation of the United States. The certification must be made within 60 days after the Committee receives the application for exemption and must be published in the Federal Register. The phrase "other international obligation" should be understood to mean a formal, legal obligation of the United States Government. This provision would apply to the Agreement on the Conservation of Polar Bears, signed November 15, 1973; the U.S.-Japan Migratory Bird Convention; as well as the recently ratified U.S.-Russian Migratory Bird Treaty.

When the Committee formally issues its order exempting an agency action, any reasonable mitigation and enhancement measures must be spelled out in the document. New section 7(h) makes it clear that such measures are to be carried out and paid for by the party receiving the exemption. In the case of a Federal agency action, the mitigation and enhancement measures required under 7(f) must be authorized by the Congress prior to implementing the action. Such measures would also have to be funded by the Congress concurrently with all other project features. The reasonable mitigation and enhancement measures required under 7(f) must actually be funded and carried out for the exemption to be effective.

The costs of the mitigation and enhancement measures are to be considered project costs for all purposes except for the computation of benefit-cost or other ratios.

Agencies receiving an exemption are required to submit annual reports to the Council on Environmental Quality describing compliance with ordered mitigation and enhancement measures.

The bill adds a new section 7(j) which would allow the President to grant an exemption for replacement and repairs on public facilities necessary to prevent recurrence of a natural disaster which resulted in a Presidential declaration of a Federal disaster area.

H.R. 14104 adds a new Section 7(k)(1) which indicates that the granting of an exemption is not a major Federal action for the purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) if an environmental impact statement which discusses impacts on endangered or threatened species or their critical habitats has been prepared on the agency action.

The committee included section 7(k)(2) in recognition of the fact that even though a project might be exempted from the requirements of section 7, section 9 of the act would still prohibit the "taking" of any endangered animal species.

Section 4 of H.R. 14104 authorizes appropriations to the Department of Interior and Commerce to carry out the purposes of the act through fiscal year 1981.

Section 5 of H.R. 14104 defines a number of terms used in the Endangered Species Act.

The term "critical habitat" is defined for the first time. The definition is modeled after that found in present Department of the Interior regulations. Under the present regulations, critical habitat includes air, land or water areas—the loss of which would appreciably decrease the likelihood of conserving a listed species. Under the present regulations, the Secretary could designate as critical habitat all areas, the loss of which would cause any decrease in the likelihood of conserving the species so long as that decrease would be capable of being perceived or measured.

In the committee's view, the existing regulatory definition could conceivably lead to the designation of virtually all of the habitat of a listed species as its critical habitat.

Under the definition of critical habitat included in H.R. 14104, air, land or water areas would be designated critical habitat only if their loss would significantly decrease the likelihood of conserving the species in question. The committee believes that this definition narrows the scope of the term as it is defined in the existing regulations.

Section 5(2) of H.R. 14104 redefines the term "species" as it is used in the act. The existing definition of "species" in the act includes subspecies of animals and plants, taxonomic categories below subspecies in the case of animals, as well as distinct populations of animal "species." The definition included within the committee bill would exclude taxonomic categories below subspecies from the definition as well as distinct populations of invertebrates.

Section 5(4) of H.R. 14104 defines "species or habitat degradation" to include of the following effects: (1) jeopardy to the continued existence of any endangered or threatened species and/or (2) the destruction or adverse modification of any critical habitat of such species.

By inserting this new phrase, the committee does not intend to modify the definitions of these terms as presently defined by the agencies or the Supreme Court in *Tennessee Valley Authority v. Hill et al.*

Section 7 of H.R. 14104 amends section 6(c) of the Act to allow the Secretary of the Interior to enter into cooperative agreements with the States for the management and conservation of listed species of plants. This amendment will permit States which develop an adequate and active program for the conservation of listed plants to receive Federal grant-in-aid in the same manner as States now receive funds for resident species of endangered and threatened fish and wildlife.

Section 8 of H.R. 14104 amends section 11 of the Act, the penalties and enforcement section. All changes to this section have been made after extensive consultation with the Department of Justice.

The amendment reduces the strict liability penalty for others than importers and exporters to \$500, makes criminal violations of the act a general rather than a specific intent crime, and subjects importers and exporters of fish and wildlife and plants to strict liability penalties of up to \$10,000.

By deleting from the civil penalty and criminal provisions of section 11 the phrase, "commits an act which violates," the committee intends only to make it clear that the act's civil and criminal sanctions apply to violations involving an omission or failure to act as well as to violations involving the commission of a prohibited act. The committee does not intend to make knowledge of the law an element of either civil penalty or criminal violations of the Act. In furtherance of this intent, the committee has reduced the standard for criminal violations from "willfully" to "knowingly".

Under the amendment provided in H.R. 14104 a tourist who unknowingly imports a listed species into the United States could not be fined more than \$500. The committee assumes that in most cases, law enforcement officials will seek the forfeiture of the item rather than impose a civil penalty. The committee emphasizes that the strict liability provision which applies to persons engaged in the business as an importer or exporter of fish, wildlife or plants, does not apply to commercial fishing operations which may import fish products into the United States for purposes of human or animal consumption as a part of their business.

Section 9 of H.R. 14104 provides the Secretary and the Secretary of Agriculture with the authority to acquire land for the conservation of listed species including plants. The current act limits this authority to the Secretary of the Interior.

Section 10 of H.R. 14104 provides an exemption from the prohibitions in the act for the raptors legally held in captivity or in a controlled environment on the date of enactment of the Endangered Species Act, as well as the progeny of such raptors. Prohibitions contained in the present law to prevent commerce in endangered species have impeded captive breeding efforts by responsible falconers, conservationists, and biologists.

Unless specified in other laws, H.R. 14104 would exempt raptors held prior to the enactment of the Endangered Species Act of 1973 from the provisions and prohibitions of that act. The domestic captive-produced progeny of any such legally held raptor, whether produced

before, on, or after December 28, 1973, would also be exempted from the provisions and prohibitions of the Act.

In order to encourage breeding of raptors in captivity, the domestic captive-bred progeny of all raptors legally taken from the wild after December 28, 1973, shall be treated the same as those of raptors captured prior to enactment of the present law. This is designed to alleviate human pressures on wild raptor populations. It will also increase the genetic diversity of captive populations and further encourage domestic production of raptors for conservation, recreational, scientific and breeding purposes. When domestic captive-bred raptors are intentionally released and returned to a wild state for conservation and reintroduction purposes, such raptors are thereafter entitled to the full protection of the act.

The Secretary may require the owners of all exempted raptors to keep records and required bands or other permanent markings to distinguish them from wild birds. The records and inventories may be inspected by agents of the Secretary at reasonable times. These records, permanent markers and inventory procedures should not unnecessarily duplicate those now required under the Migratory Bird Treaty Act for special purpose permits and falconer permits. The Secretary may promulgate such reasonable regulations which allow for the use, exchange, movement, import or export of legally held raptors or their domestic captive-bred progeny.

Nothing in this amendment shall be construed as a diminution of the protection of wild populations of raptors under the act.

Section 11 of H.R. 14104 amends section 10 of the act by exempting certain antique articles other than scrimshaw from the application of sections 4(d) and 9(a) of the act. Such articles are exempt from those sections if they were made before 1830, are composed in whole or part of any listed species, have not been repaired or modified with any listed species part or product thereof prior to enactment of the Act (December 28, 1973), and enter the United States through a port specially designated by the Secretary of the Treasury.

The committee chose the 1830 date with the understanding that antique articles produced prior to this date can be readily distinguished from those made after 1830.

COST OF THE LEGISLATION

In the event the legislation is enacted into law, and the moneys authorized are fully appropriated, the committee estimates the maximum cost to the Federal Government—after comparing and analyzing the information supplied by the Government agencies and their representatives and the Congressional Budget Office—for the 3 year extension of the act would be \$26 million for fiscal year 1979; and \$28.5 million for fiscal year 1980; and \$31 million for fiscal year 1981.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(1)(4) of Rule XI of the Rules of the House of Representatives, the committee estimates that the enactment of H.R. 14104 would have no significant inflationary impact on the prices and costs in the national economy.

COMPLIANCE WITH CLAUSE 2(1)(3) OF RULE XI

With respect to the requirements of clause 2(1)(3) of Rule XI of the Rules of the House of Representatives—

(A) The Subcommittee on Fisheries and Wildlife Conservation and the Environment held eight days of oversight hearings on the Endangered Species Act during the 95th Congress.

(B) The requirements of section 308(a) of the Congressional Budget Act of 1974 are not applicable to this legislation.

(C) The Committee on Government Operations has sent no report to the Committee on Merchant Marine and Fisheries pursuant to clause 2(b)(2) of Rule X.

(D) A letter was received from the Director of the Congressional Budget Office pursuant to section 403 of the Congressional Budget Act of 1974 in reference to H.R. 14104 and follows herewith.

U.S. CONGRESS,

CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., September 22, 1978.

Hon. JOHN M. MURPHY,
Chairman, Committee on Merchant Marine and Fisheries,
U.S. House of Representatives,
Washington, D.C.

Dear Mr. CHAIRMAN: Pursuant to section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for H.R. 14104, the Endangered Species Act Amendments of 1978.

Should the committee so desire, we would be pleased to provide further details on the attached cost estimate.

ROBERT A. LEVINE
(For Alice M. Rivlin, Director).

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

SEPTEMBER 22, 1978.

1. Bill No.: H.R. 14104.
2. Bill title: Endangered Species Act Amendments of 1978.
3. Bill status: As ordered by the House Committee on Merchant Marine and Fisheries, September 19, 1978.
4. Bill purpose: The bill establishes an Endangered Species Committee and requires the formation of review boards to examine the decisions of the Secretary of the Interior as to whether an agency's action would be hazardous to endangered species and their critical habitat area. Such a determination by the Secretary would prohibit the agency's action. Except in special cases, such as cases relating to international treaty obligations as determined by the Secretary of State or cases pertaining to disaster are as declared by the President, the Endangered Species Committee would make the final governmental decision by either approving or disapproving the agency's action. If an agency exemption is granted for pertinent reasons, any person may obtain judicial review of the decision. This bill provides an authorization of \$500,000 in each of the fiscal years 1979, 1980, and 1981 to cover the expenses of both the Committee and the review boards.

In addition, the bill provides authorizations of \$23 million for fiscal year 1979, \$25 million for fiscal year 1980, and \$27 million for fiscal year 1981 to the U.S. Fish and Wildlife Service (USFWS) to carry out its responsibilities under the Endangered Species Act. It also authorizes the appropriation of \$2.5 million in fiscal year 1979, \$3.0 million in fiscal year 1980, and \$3.5 million in fiscal year 1981 to the Department of Commerce for the National Oceanic and Atmospheric Administration (NOAA).

5. Cost estimate:

[Fiscal years: in millions of dollars]

	Fiscal year—			
	1979	1980	1981	1982
Authorization level	25.0	28.5	31.0	1.9
Cost estimate	24.4	28.3	30.9	1.9

Note: The costs of this bill fall within budget subfunction 303.

6. Basis of estimate: The authorization levels are those stated in the bill and are assumed to be fully appropriated. Costs are estimated by applying a 2-year outlay rate to the level of appropriation authorized for NOAA, USFWS, and the expenses of the review committees. Spendout rates for NOAA and USFWS were developed in consultation with agency staffs. It was estimated that the 2-year outlay rate for the appropriation provided for the review committees would be 60 percent the first year and 40 percent the second year.

7. Estimate comparison: None.

8. Previous CBO estimate: A cost estimate was prepared on March 22, 1978, for H.R. 10883, as ordered reported by the House Committee on Merchant Marine and Fisheries. This bill provided the same authorization as H.R. 14104 for the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration. The only additional cost of H.R. 14104 is related to the higher authorization of \$500,000 for the expenses of the review boards and the Endangered Species Committee.

CBO also prepared a cost estimate on May 12, 1978, for S. 2889, as ordered reported by the Senate Committee on Environment and Public Works. This bill provided higher authorizations for fiscal years 1979, 1980, and 1981. The bill also established an Endangered Species Committee.

9. Estimate prepared by James V. Manaro.
10. Estimate approved by: C. G. Nuckols for James L. Blum, Assistant Director for Budget Analysis.

DEPARTMENTAL REPORTS

H.R. 14104 was the subject of a report from the Department of Justice. This report follows:

DEPARTMENT OF JUSTICE,

Washington, D.C., September 22, 1978.

Hon. JOHN M. MURPHY,
Chairman, Committee on Merchant Marine and Fisheries,
House of Representatives, Washington, D.C.

Dear Mr. CHAIRMAN: We would like to proffer the comments of the Department of Justice on H.R. 13807, the "Endangered Species Act

Amendments of 1978," as reported by the Committee on Merchant Marine and Fisheries on September 19, 1978.

This Department takes no position on the merits of this legislation, however, we would like to discuss those portions of Section 3 of the bill which provide for the establishment of a "Review Board" and an "Endangered Species Committee." In our opinion, the procedure for establishment of these bodies raises issues of a constitutional dimension. Under that section these new entities would review and act on applications for federal project exemptions under the Endangered Species Act. Specifically, in the case of an application for exemption, the Review Board, after making certain threshold determinations informally, would make findings on the record after a formal adjudicatory hearing under the Administrative Procedure Act; and these findings would serve as a basis for the board's recommendation on the exemption question. This recommendation would then be presented to the Endangered Species Committee which would make an independent determination on the exemption question in accordance with standards set forth in the amendment. The Committee's decision would be the final action in the administrative process and would be subject to judicial review. Attorneys designated by the Committee would represent the Committee in any review proceeding.

Under the bill, the adjudicatory and ancillary powers exercised by the Committee fall clearly within the category of functions which, under *Buckley v. Valeo*, 424 U.S. 1 (1976), may be exercised only by persons who have been appointed pursuant to Article II, § 2, cl. 2 of the Constitution. Five of the six members of the Committee are to be appointed in accordance with that clause, but the sixth (the Governor of the State in which the agency action in question will occur) will not be appointed in that way. Under *Buckley v. Valeo*, supra, the constitutionality of the Committee is in substantial doubt because of this infirmity in the appointment mechanism.

We have similar concerns with regard to the Review Board. Because the Board's ultimate powers are only recommendatory, it could be argued that its powers are "sufficiently removed from the administration and enforcement of public law to allow [them] to be performed by" persons not appointed pursuant to the Appointments Clause. *Id.* at 141. But under at least one interpretation of the bill, the Board would have effective power, in some cases, to take dispositive action with respect to applications, since it need not consider an application at all unless it determines that certain preliminary requirements have been met. See Subsection (d) (5). The Review Board must consider an application on the merits before the exemption question can reach the Committee. This apparent screening function plays a central role in the administrative scheme, and for this reason we believe it difficult to argue that the Review Board is not engaged in "administration and enforcement of public law." Accordingly, we think that the mechanism for appointing Board members should conform with the Appointments Clause. Under the bill, two members of the Board (the appointee of the Governor of the affected State, and the member appointed by that appointee and the appointee of the Secretary of the Interior) are not appointed in accordance with the Appointments Clause.

These infirmities could be corrected as follows:

A. Review Board

The Review Board would be constitutionally constituted were all of its members appointed pursuant to Art. II, § 2, cl. 2, i.e., either by the President or the Secretary.*

B. The Endangered Species Committee

If voting rights were denied to the Governors of the affected States, we think that they could otherwise participate in the Committee decisions without casting doubt on those decisions. Because they hold their position by virtue of their state office, we do not believe that the formality of a Presidential "appointment" of them to the Committee would solve the constitutional problem.

Department representatives have discussed the concerns noted above with the committee staff. We will be happy to continue to work with the staff in order to obviate the problems noted.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

PATRICIA M. WALD,
Assistant Attorney General

CHANGES IN EXISTING LAW

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, as amended, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in *italics*; existing law in which no change is proposed is shown in roman):

ENDANGERED SPECIES ACT OF 1973, AS AMENDED

(16 U.S.C. 1531-1543; Pub. Law 93-205)

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".

TABLE OF CONTENTS

- Sec. 2. Findings, purposes, and policy.
- Sec. 3. Definitions.
- Sec. 4. Determination of endangered species and threatened species.
- Sec. 5. Land acquisition.
- Sec. 6. Cooperation with the States.
- Sec. 7. Interagency cooperation.
- Sec. 8. International cooperation.
- Sec. 9. Prohibited acts.
- Sec. 10. Exceptions.
- Sec. 11. Penalties and enforcement.
- Sec. 12. Endangered plants.
- Sec. 13. Conforming amendments.
- Sec. 14. Repealer.
- Sec. 15. Authorization of appropriations.
- Sec. 16. Effective date.
- Sec. 17. Marine Mammal Protection Act of 1972.

*While an appointment by the courts is technically permissible, we do not believe that would be appropriate here.

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 unimpeded by adequate concern and conservation;

(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, 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.

(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 and wildlife.

(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.—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.

DEFINITIONS

Sec. 3. For the purposes of this Act—

(1) 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 exhibition of commodities by museums or similar cultural or historical organizations.

(2) 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.

(3) 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.

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

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

(6) The term "critical habitat" for an endangered species or threatened species means any air, land, or water area (exclusive of those existing manmade structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would significantly decrease the likelihood of conserving such species.

(7) 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, proctect, egg, or offspring thereof, or the dead body or parts thereof.

(8) 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.

(9) 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.

[(8)](10) 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 or political subdivision thereof, or of any foreign government.

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

[(10)](12) 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 means the Secretary of Agriculture.

[(11)] The term "species" includes any subspecies of fish or wildlife or plants and any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature.]

[(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.]

[(12)](14) 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.

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

[(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.]

[(14)](16) 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.

[(15)](17) 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.

[(16)](18) The term "United States"; when used in a geographical context, includes all States.

[(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 section 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.]

DETERMINATION OF ENDANGERED SPECIES AND THREATENED SPECIES

Sec. 4. (a) GENERAL.—(1) The Secretary shall by regulation determine whether any species is an endangered species or a threatened species because of any of the following factors:

- (1) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (2) overutilization for commercial, sporting, scientific, or educational purposes;
- (3) disease or predation;
- (4) the inadequacy of existing regulatory mechanisms; or
- (5) other natural or manmade factors affecting its continued existence.

At the time any such regulation is proposed, the Secretary shall also by regulation, to the maximum extent prudent, specify any habitat of such species which is then considered to be critical habitat. The requirement of the preceding sentence shall not apply with respect to any species which was listed prior to enactment of the Endangered Species Act Amendments of 1978.

(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 such 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.

(b) BASIS FOR DETERMINATIONS.—(1) The Secretary shall make determinations required by subsection (a) of this section on the basis of the best scientific and commercial data available to him and after

consultation, as appropriate, with the affected States, interested persons and organizations, other interested Federal agencies, and, in cooperation with the Secretary of State, with the country or countries in which the species concerned is normally found or whose citizens harvest such species on the high seas; except that in any case in which such determinations involve resident species of fish or wildlife, the Secretary of the Interior may not add such species to, or remove such species from, any list published pursuant to subsection (c) of this section, unless the Secretary has first—

- (A) published notice in the Federal Register and notified the Governor of each State within which such species is then known to occur that such action is contemplated;
- (B) allowed each such State 90 days after notification to submit its comments and recommendations, except to the extent that such period may be shortened by agreement between the Secretary and the Governor or Governors concerned; and
- (C) published in the Federal Register a summary of all comments and recommendations received by him which relate to such proposed action.

(2) In determining whether or not any species is an endangered species or a threatened species, the Secretary shall take into consideration those efforts, if any, being made by any nation or any political subdivision of any nation to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under the jurisdiction of any such nation or political subdivision, or on the high seas.

(3) Species which have been designated as requiring protection from unrestricted commerce by any foreign country, or pursuant to any international agreement, shall receive full consideration by the Secretary to determine whether each is an endangered species or a threatened species.

(4) *In determining the critical habitat of any endangered or threatened vertebrate animal species, the Secretary shall consider the economic impact, and any other relevant impacts, of specifying and protecting an area as critical habitat, and he may exclude any such area from the critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat.*

(c) **LISTS.**—(1) The Secretary of the Interior shall publish in the Federal Register, and from time to time he may be repleated revise, 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. [and shall] specify with respect to each such species over what portion of its range it is endangered or threatened, and specify any critical habitat within such range.

(2) The Secretary shall, upon the petition of an interested person under subsection 553(c) of title 5, United States Code, conduct a review of any listed or unlisted species proposed to be removed from or added to either or the lists published pursuant to paragraph (1) of this subsection, but only if he makes and publishes a finding that such

person has presented substantial evidence which in his judgment warrants such a review.

(3) Any list in effect on the day before the date of the enactment of this Act of species of fish or wildlife determined by the Secretary of the Interior, pursuant to the Endangered Species Conservation Act of 1969, to be threatened with extinction shall be republished to conform to the classification for endangered species or threatened species, as the case may be, provided for in this Act, but until such republiation, any such species so listed shall be deemed an endangered species within the meaning of this Act. The republication of any species pursuant to this paragraph shall not require public hearing or comment under section 553 of title 5, United States Code.

(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.

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

(d) **PROTECTIVE REGULATIONS.**—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(a) of this Act only to the extent that such regulations have also been adopted by such State.

(e) **STIMULUS OF APPEARANCE CASES.**—The Secretary may, by regulation, and to the extent he deems advisable, treat any species as an endangered species or threatened species even though 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) **REVISIONS.**—(1) Except as provided in paragraphs (2) and (3) of this subsection and subsection (b) of this section, 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.

[(2) (A) In the case of any regulation proposed by the Secretary to carry out the purposes of this Act—

(i) the Secretary shall publish general notice of the proposed regulation (including the complete text of the regulation) in the Federal Register not less than 60 days before the effective date of the regulation; and

(ii) if any person who feels that he may be adversely affected by the proposed regulation files (within 45 days after the date of publication of general notice) objections thereto and requests a public hearing thereon, the Secretary may grant such request, but shall if he denies such request, publish his reasons therefor in the Federal Register.]

(2) (A) In the case of any regulation proposed by the Secretary to carry out the purposes of this section with respect to the determination and listing of endangered or threatened species and their critical habitats in any State (other than regulations to implement the Convention), the Secretary—

(i) shall publish notice of the proposed regulation (including the complete text of the regulation), not less than 60 days before the effective date of the regulation—

(I) in the Federal Register, and

(II) if the proposed regulation specifies any critical habitat, in a newspaper of general circulation within or adjacent to such habitat; and

(ii) shall give actual notice of the proposed regulation (including the complete text of the regulation), and any environmental assessment or environmental impact statement prepared on the proposed regulation, not less than 60 days before the effective date of the regulation, to all general local governments located within or adjacent to the proposed critical habitat;

(iii) shall—

(I) if the proposed regulation does not specify any critical habitat, promptly hold a public meeting on the proposed regulation, if request therefor is filed with the Secretary by any person within 45 days after the date of publication of general notice under clause (1)(I), and

(II) if the proposed regulation specifies any critical habitat, promptly hold a public meeting on the proposed regulation within the area in which such habitat is located in each State, and, if requested, hold a public hearing in each such State.

If a public meeting or hearing is held on any regulation, the regulation may not take effect before the 60th day after the date on which the meeting or hearing is concluded, and if more than one public meeting or hearing is held, before the 60th day after the date on which the last such meeting or hearing is concluded. Any accidental failure to provide actual notice under clause (i) to all general local governments required to be given notice shall not invalidate the proposed regulation.

(B) Neither subparagraph (A) of this paragraph nor section 553 of title 5, United States Code, shall apply in the case of any of the following regulations and any such regulation shall, at the discretion of the Secretary, take effect immediately upon publication of the regulation in the Federal Register:

(1) Any regulation appropriate to carry out the purposes of this Act which was originally promulgated to carry out the Endangered Species Conservation Act of 1969.

(ii) Any regulation (including any regulation implementing section 6(g)(2)(B) (ii) of this Act) issued by the Secretary in regard to any emergency posing a significant risk to the well-being of any species of fish or wildlife, but only if (I) at the time of publication of the regulation in the Federal Register the Secretary publishes therein detailed reasons why such regulation is necessary, and (II) in the case such regulation applies to resident species of fish and wildlife, the requirements of subsection (b)(1)(A) of this section have been complied with. Any regulation promulgated under the authority of this clause (ii) shall cease to have force and effect at the close of the 120-day period following the date of publication unless, during such 120-day period, the rulemaking procedures which would apply to such regulation without regard to this subparagraph are complied with.

[(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 statement by the Secretary of the facts on which such regulation is based and the relationship of such facts to such regulation.]

(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.

(4) Any proposed or final regulation which specifies any critical habitat of any endangered species or threatened species shall be based on the best scientific data available, and the publication in the Federal Register of any such regulation shall, to the maximum extent practicable, be accompanied by 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 impacted by such designation.

(5) A final regulation adding a species to any list published pursuant to subsection (c) shall be published in the Federal Register not later than two years after the date of publication of notice of the regulation proposing such listing under paragraph (2)(A)(i). If a final regulation is not adopted within such two-year period, the Secretary shall withdraw the proposed regulation and shall publish notice of such withdrawal in the Federal Register not later than 30 days after the end of such period. The Secretary shall not propose a regulation adding to such a list any species for which a proposed regulation has been withdrawn under this paragraph unless he determines that sufficient new information is available to warrant the proposal of a regulation. No proposed regulation for the listing of any species published before the date of the enactment of the Endangered Species Act

Amendments of 1978 shall be withdrawn under this paragraph before the end of the one-year period beginning on such date of enactment.

(g) *Recovery Plans*.—The Secretary shall develop and implement plans (hereinafter in this subsection referred to as "recovery plans") for the conservation or survival of endangered species and threatened species listed pursuant to this section. 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.

LAND ACQUISITION

Sec. 5. (a) *Program*.—The Secretary of the Interior shall establish and implement a program to conserve (A) fish or wildlife which are listed as endangered species or threatened species pursuant to section 4 of this Act; or (B) plants which are concluded in Appendices to the Convention. To carry out such program, he—

(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 authority 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.

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. 715a).

(c) *Cooperative Agreements*.—(1) 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 [subsection], 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—

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

[(2)] (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;

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

[(4)] (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 species or threatened species]; [endangered or threatened species of fish or wildlife]; and

[(5)] (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—

[(A)] (i) the requirements set forth in [paragraphs (3), (4), and (5)] of this subsection [subparagraphs (C), (D), and (E)] of this paragraph are complied with, and

[(B)] (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 [subparagraph (A) and this subparagraph] 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.

(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 reconfirm such finding, 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(d)(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. The Secretary shall make an allocation of appropriated funds 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; and

(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.

So much of any appropriated funds 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 borne by the Federal Government and by the States; except that—

(i) the Federal share of such program costs shall not exceed 66 2/3 per centum of the estimated program cost stated in the agreement; and

(ii) the Federal share may be increased to 75 per centum 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 an 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 species or threatened species is void to the extent that it may effectively implement 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 legislature 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.**—For the purposes of this section, there are authorized to be appropriated not to exceed the following sums:

(1) \$10,000,000 through the period ending September 30, 1977.

(2) \$16,000,000 for the period beginning October 1, 1977, and ending September 30, 1981.

INTERAGENCY COOPERATION

Sec. 7. The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal departments and 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 and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and

threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.]

INTERAGENCY COOPERATION

Sec. 7. (a) REVIEW BY SECRETARY.—The Secretary shall review all other programs administered by him and utilize such programs in furtherance of the purposes of this Act.

(b) **AGENCY CONSERVATION PROGRAMS.**—Each Federal agency shall, after consultation with and with the assistance of the Secretary, utilize its 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.

(c) **AGENCY ACTION.**—(1) Each Federal agency shall insure that any action authorized, funded, or carried out by the agency (hereinafter in this section referred to as an "agency action") does not result in species or habitat degradation unless an exemption has been granted by the Endangered Species Committee under subsection (f) with respect to such agency action.

(2) If any Federal agency—

(A) considers that any agency action over which it has jurisdiction may result in species or habitat degradation; or

(B) is notified by the Secretary that the Secretary considers that such agency action may have such a result;

the Federal agency and the Secretary shall undertake immediate consultation with respect to the matter, including, but not limited to, consultation to determine if reasonable and prudent alternatives are available. Consultation under this paragraph with respect to any agency action shall be concluded within 90 days after the date on which initiated or within such other period of time as is mutually agreeable to the Federal agency and the Secretary. Promptly after the conclusion of consultation, the Secretary shall provide to the Federal agency concerned a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing whether the agency may result in species or habitat degradation and whether there are reasonable and prudent alternatives which would avoid species or habitat degradation which can be taken by the Federal agency in implementing the agency action.

(3) To facilitate compliance with the requirements of paragraph (1), each Federal agency shall, with respect to any 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 listed species 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 before any contract for construction is entered into and before construction is begun with respect to such action. Such assess-

ment 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).

(4) After initiation of consultation required under paragraph (2), the Federal agency shall not make any irreversible or irretrievable commitments 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 avoid species or habitat degradation.

(d) APPLICATION FOR EXEMPTION AND CONSIDERATION BY REVIEW BOARD.—(1) A Federal agency, the Governor of the State in which the Federal agency action will occur, 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 (c) (2) the Secretary's opinion indicates that the agency action may result in species or habitat degradation. An application for an exemption shall be considered initially by a review board in the manner provided in this subsection, and shall be considered by the Endangered Species Committee for a final determination under subsection (f) after a recommendation is made by the review board.

(2) (A) Any Federal agency, Governor, or permit or license applicant seeking an exemption under this subsection shall submit a written application to the Secretary, in a form prescribed by the Secretary, not later than 90 days after the completion of the consultation process. Such application shall set forth the reasons why the Federal agency, Governor, or permit or license applicant considers that this subsection meets the requirements for an exemption referred to in paragraph (1), the Secretary shall promptly notify the Governor or Governor of the affected States, as determined by the Secretary, and request that they appoint a member of the review board to be established under paragraph (3) in accordance with the provisions of such paragraph.

(3) (A) A review board consisting of three members shall be established for purposes of considering an application for examination and making recommendations to the Endangered Species Committee under this subsection as follows:

(i) The Secretary and the Governor of the affected State shall each appoint one individual to the board not later than 15 days after a request is submitted pursuant to paragraph (2). If more than one State is affected by the agency action, the Governors of such States shall appoint one individual collectively.

(ii) The two individuals appointed under clause (i) shall appoint one individual not later than 15 days after both of them have been appointed. If no appointment is made within such 15-day period, the Endangered Species Committee shall appoint, by a vote of a majority of the members of the Committee, one individual not later than 30 days after the end of such 15-day period.

(B) Members of a review board who are full-time officers or employees of the United States shall receive no additional pay on account of their service on the board. All other members shall be entitled to

receive an amount not to exceed the daily equivalent of the annual rate of basic pay in effect for grade GS-18 of the General Schedule for each day during which they are engaged in the actual performance of duties vested in the board. While away from their homes or regular places of business in the performance of services for a review board, members of the board 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.

(4) The Secretary shall submit the application to the review board immediately after its appointment under paragraph (3), and the Secretary shall submit to the review board in writing, his views and recommendations with respect to the application within 60 days after receiving a copy of any application under paragraph (2).

(5) It shall be the duty of a review board appointed under paragraph (3) to make a full review of the consultation carried out under such longer time as is mutually agreed upon between the agency and the Secretary, to make a determination, by a majority vote, whether such agency has—

(A) carried out its consultation responsibilities in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to its proposed action which will avoid species or habitat degradation;

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

(C) refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (c) (4).

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

(6) If the review board makes positive determinations under subparagraphs (A), (B), and (C) of paragraph (5), it shall proceed to consider the application for exemption. In considering any application for an exemption, a review board shall take into account the reasons for an exemption set forth in the application of the Federal agency, Governor, or permit or license applicant, the views of the Secretary submitted under paragraph (4), and the views of other Federal and State agencies and appropriate persons. The review board shall recommend an exemption from the requirements of subsection (c) (1) for any agency action if, by a majority vote, it determines on the record after an opportunity for a hearing held in accordance with sections 554, 555, and 556 (other than subsection (b) (3) of section 556) of title 5 of the United States Code, that—

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

(B) 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; and

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

The review board shall recommend to the Endangered Species Committee whether or not to grant an exemption within 180 days after the hearing described in this paragraph is initiated, or within such other time as is mutually agreed upon by the applicant and a majority of the review board. If the review board recommends an exemption it shall include with its recommendation any reasonable mitigation and enhancement measures which should be considered by the Endangered Species Committee under subsection (f). The review board shall transmit the record of its proceedings and its recommendation to the Committee.

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

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

(B) subject to the Privacy Act of 1974, request of any Federal agency information necessary to enable it to carry out such duties, and upon such request the head of such Federal agency shall furnish such information to the review board; and

(C) use the United States mails in the same manner and upon the same conditions as a Federal agency.

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

(9) The Administrator of the General Services shall provide to a review board, on a reimbursable basis, such administrative support services as the review board may request.

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

(e) 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 be composed of six members as follows:

(A) The Secretary of Agriculture.

(B) The Secretary of the Army.

(C) The Secretary of the Interior.

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

(E) The Chairman of the Council on Environmental Quality.

(F) The Governor of the State in which the Federal agency action for which an exemption is sought under this section will occur (or in the case of any agency action which will occur in more than one State, the Governors of all such States who shall cast collectively a single vote on the Committee).

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

(4) Members of the Committee shall receive no additional pay on account of their service on the Committee; except that 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 Government service are allowed expenses under section 5703 of title 5 of the United States Code.

(5) The Committee shall meet at the call of the Chairman or four of its members.

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

(7) 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 desirable.

(f) EXEMPTION.—The Committee shall make a final determination whether or not to grant an exemption within 90 days of receiving the recommendation of the review board under subsection (d) (6). The Committee shall grant an exemption from the requirements of subsection (c) (1) for an agency action if, by a vote of not less than four of its members voting in person—

(1) it determines on the record, based on the recommendation and the record of the review board and on such other testimony or evidence as it may receive, that—

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

(B) 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; and

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

(2) 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 the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of title 5 of the United States Code.

(g) 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 of the United States. The Secretary of State shall, at the time of such certification, publish a copy thereof in the Federal Register.

(h) COMMITTEE ORDERS.—(1) If the Committee determines under subsection (f) that an exemption should be granted with respect to any agency action, the Committee shall issue an order granting the exemp-

tion and specifying the mitigation and enhancement measures established pursuant to subsection (f) which shall be carried out and paid for by the Federal agency 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 Federal agency 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 Federal agency may request the Secretary to carry out such mitigation measures. The costs incurred by the Secretary in carrying out any such measures shall be paid by the agency or the permit or license applicant receiving the exemption. No later than one year after the granting of an exemption, the agency to which the exemption was granted shall submit to the Council on Environmental Quality a report describing its compliance with the mitigation and enhancement measures prescribed by this section. Such a 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 agency preparing such reports.

(i) *JUDICIAL REVIEW.*—Any person, as defined by section 3(8) 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 (f) in the district court of the United States for any district wherein the agency action concerned will be, or is being, carried out by filing in such court within 90 days after the date of issuance of the decision, a written petition for review. Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in, any action for review under this subsection. Any action for review under this subsection shall receive preference over other matters before the court and shall be heard and determined as expeditiously as the court considers practicable.

(j) *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 Act of 1974, the President is authorized to make the determinations required by subsection (f) 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 401 or 402 of the Disaster Relief Act of 1974, 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.

(k) *SPECIAL PROVISIONS.*—(1) 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.

(2) Notwithstanding sections 4(d) and 9(a), or any regulation issued to carry out such sections, no act or activity engaged in which is necessary to carry out any agency action for which an exemption is granted under this section shall be considered to be a taking of any endangered species or threatened species.

(b) *AUTHORIZATION.*—There is authorized to be appropriated to the Secretary to assist review boards and the Committee in carrying out their functions under subsections (d), (e), and (f) of this section not to exceed \$500,000 for fiscal year 1979, not to exceed \$600,000 for fiscal year 1980, and not to exceed \$500,000 in fiscal year 1981.

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 country (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 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 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 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; 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.

(e) CONVENTION IMPLEMENTATION.—The President is authorized and directed to designate appropriate agencies to act as the Management Authority or Authorities and the Scientific Authority or Authorities pursuant to the Convention. The agencies so designated shall thereafter be authorized to do all things assigned to them under the Convention, including the issuance of permits and certificates. The Convention, including the issuance of permits and certificates, shall be authorized by the President to communicate with other parties to the Convention and with the Secretariat shall also be empowered, where appropriate, in consultation with the State Department, to act on behalf of and represent the United States in all regards as required by the Convention. The President shall also designate those agencies which 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.

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 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) 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;

(C) sell or offer for sale in interstate or foreign commerce any such species; or

(D) 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) SPECIES HELD IN CAPTIVITY OR CONTROLLED ENVIRONMENT.—

(1) The provisions of this section shall not apply to any fish or wildlife held in captivity or in a controlled environment on the effective date of this Act if the purposes of such holding are not contrary to the purposes of this Act; except that this subsection shall not apply in the case of any fish or wildlife held in the course of a commercial activity. With respect to any act prohibited by this section which occurs after a period of 180 days from the effective date of this Act, there shall be a rebuttable presumption that the fish or wildlife involved in such act was not held in captivity or in a controlled environment on such effective date.

(2) (A) This section 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 to 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 subsections (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 importation not in violation of any provision of this Act or any regulation issued pursuant to this Act.

(d) IMPORTS AND EXPORTS.—(1) It is unlawful for any person to engage in business as an importer or exporter of 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 without first having obtained permission from the Secretary.

(2) 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, or plants made by him and the subsequent disposition made by him with respect to such fish, wildlife, or plants;

(B) at all reasonable times upon notice by a duly authorized representative of the Secretary, afford such representative access to his places of business, an opportunity to examine his inventory of imported fish, wildlife, or plants 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, and appropriate to carry out the purposes of this subsection.

(3) The Secretary shall prescribe such regulations as are necessary and appropriate to carry out the purposes of this subsection.

(e) RETURNS.—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 or ports designated by the Secretary of the Interior. For the purpose 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. 666c-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.

EXCEPTIONS

Sec. 10. (a) PERMITS.—The Secretary may permit, under such terms and conditions as he may prescribe, any act otherwise prohibited by section 9 of this Act for scientific purposes or to enhance the propagation or survival of the affected species.

(b) HARDSHIP EXCEPTIONS.—(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 economic 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 days after the date of the notice, written data, views, or arguments with respect to the application, except that such thirty-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. Information received by the Secretary as a part of any application shall be available to the public as a matter of public record at every stage of the proceeding.

(d) PERMIT AND EXEMPTION POLICY.—The Secretary may grant exceptions under subsections (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.

(e) ALASKA NATIVES.—(1) Except as provided in paragraph (4) of this subsection the provisions of this Act shall not apply with respect to importation of any such species taken pursuant to this section, or the

(A) any Indian, Aleut, or Eskimo who is an Alaskan Native who resides in Alaska; or

(B) any non-native permanent resident of an Alaskan native village;

if such taking is primarily for subsistence purposes. Non-edible by-products 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

(ii) The term "authentic native articles of handicrafts and clothing" means items composed wholly or in some significant

respect of 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.

(4) Notwithstanding the provisions of paragraph (1) 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 Alaska 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 108 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 etching or engraving of designs upon, or the carving of figures, patterns, or designs from, any bone or tooth of any marine mammal of the order Cetacea.

(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 be 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; 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, (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) and 9(a) do not apply to any article (other than scrimshaw) which—

(A) was made before 1830;

(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.

PENALTIES AND ENFORCEMENT

Sec. 11. (a) CIVIL PENALTIES.—(1) Any person who knowingly violates, [or who knowingly commits an act in the course of a commercial activity which 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), or (C), (c), (d) (other than regulation relating to recordkeeping or filing of reports), (f) or (g) of section 9 of this Act, may be assessed a civil penalty by the Secretary of not more than \$10,000 for each violation. Any person who knowingly violates, [or who knowingly commits an act in the course of a commercial activity which 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 \$5,000 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 \$1,000, \$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. Upon any 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 authorized 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 willfully commits an act which knowingly violates any provision of this Act, or 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), or (C) (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 \$20,000 or imprisoned for not more than one year, or both. Any person who willfully commits an act which knowingly violates any provision of any other regulation issued under this Act shall, upon conviction, be fined not more than \$10,000 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 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, and*

(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 with in the judicial district of the District Court of the United States for the District of Hawaii.

(d) **REWARDS.**—Upon the recommendation of the Secretary, the Secretary of the Treasury is authorized to pay an amount equal to one-half of the civil penalty or fine paid, but not to exceed \$2,500, to any person who furnishes information which leads to a finding of civil violation or a conviction of a criminal violation of any provision of this Act or any regulation or permit issued thereunder. Any officer or employee of the United States or of any State or local government who furnishes information or renders service in the performance of his official duties shall not be eligible for payment under this section.

(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 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 containers, including its contents, and all accompanying documents, upon importation or exportation. Such person 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 this 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, possessing, delivering, receiving, carrying, shipping, exporting, or importing, 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.

(3) 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 for inconsistent with the 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.

(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) CRITZEN STUTTS.—(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.

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, 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.

(3) (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) 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,] the prevailing party, whenever the court determines such award is appropriate.

(5) 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).

(b) 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, the 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.

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.

CONFORMING AMENDMENTS

Sec. 13. (a) Subsection 4(c) of the Act of October 15, 1966 (80 Stat. 929, 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 and 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, as 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 such 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".

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. Except as authorized in section 6 of this Act, there are authorized to be appropriated—

【(1) not to exceed \$10,000,000 for the fiscal year ending June 30, 1976, not to exceed \$1,800,000 for the fiscal transitional period ending September 30, 1976, and not to exceed a total of \$25,000,000 for the fiscal year ending September 30, 1977 and the fiscal year ending September 30, 1978, to enable the Department of the Interior to carry out such functions and responsibilities as it may have been given under this Act; and

【(2) not to exceed \$2,000,000 for the fiscal year ending June 30, 1976, not to exceed \$500,000 for the fiscal transitional period ending September 30, 1976, and not to exceed a total of \$5,000,000 for the fiscal year ending September 30, 1977 and the fiscal year ending September 30, 1978, to enable the Department of Commerce to carry out such functions and responsibilities as it may have been given under this Act.】

AUTHORIZATION OF APPROPRIATIONS

Sec. 15. Except as authorized in section 6 of this Act, there are authorized to be appropriated—

(1) not to exceed \$25,000,000 for the fiscal year ending September 30, 1977, and the fiscal year ending September 30, 1978, not to exceed \$3,000,000 for the fiscal year ending September 30, 1979, not to exceed \$25,000,000 for the fiscal year ending September 30, 1980, and not to exceed \$27,000,000 for the fiscal year ending September 30, 1981, to enable the Department of the Interior to carry out such functions and responsibilities as it may have been given under this Act; and

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

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.

ADDITIONAL VIEWS

The Merchant Marine and Fisheries Committee approved a bill which was designed primarily to assure its speedy passage on the House floor. It consists of a compromise which fully satisfies no single member of the committee, but which was approved because of the urgent need to authorize the continued enforcement of the Endangered Species Act during the coming year.

Representatives John Dingell and Edwin Forsythe deserve particular credit, we feel, for their efforts to maintain the basic integrity and strength of the original Endangered Species Act. If the committee had had more time to consider this bill, we are confident that the leadership of these two members would have produced a bill superior in many respects to the compromise product which did emerge.

The views which we express here are not meant to express opposition to, or condemnation of, the overall committee bill. They are, however, intended to suggest alternative solutions to some of the issues raised in the bill in case the compromise should be challenged on the floor, or if changes are considered in conference negotiations with the Senate.

The role of the Review Board

The committee bill requires that both the Review Board and the Endangered Species Committee make the following subjective policy judgments when deciding whether or not to recommend an exemption to the Endangered Species Act:

1. There are no feasible and prudent alternatives to the agency action;
2. 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; and,
3. The action is of regional or national significance.

We believe that these judgments should be made solely by the Endangered Species Committee. The requirement that a Review Board also make these determinations is duplicative, it assumes that the members of this Board will be qualified to make informed, expert judgments of this type, and it allows a political judgment to be made by a group not subject to public scrutiny. The decision to condemn a form of life to extinction should not be made by three temporary employees of the Federal Government.

Since the exemption committee is granted the final word in any case, there is no need for the review board to cover the same ground. The major function of these boards should be to screen from committee consideration those exemption applications which are obviously without merit, or which concern projects about which the original consultation process has not been satisfactorily completed.

These goals can be met by limiting the three member Review Boards to examining the efforts at consultation between the Secretary and

the relevant Federal agency, and to insuring that an adequate biological assessment has been conducted. The goals can also be met—in a more efficient manner—by giving the same functions to a single consultation examiner as suggested during committee deliberations by Congressman Dingell. This option would serve the desirable purposes of encouraging full consultation, screening the Endangered Species Committee from needless work, and streamlining the exemption mechanism in the committee bill.

The application for an exemption

The proposed new section 7(d) to the Endangered Species Act contained in section 3 of the committee bill gives the relevant Federal agency, the affected State Governor, and the particular permit or license applicant the ability to seek an exemption from the Endangered Species Act. We question the wisdom of allowing the permit or license applicant the right to request such an exemption.

Under the committee plan, a request for an exemption would set in motion a year long bureaucratic exercise involving six or seven Federal Government agencies, State and local officials, public hearings, exhaustive staff work, and the possibility of judicial review. Since there will exist a tremendous incentive for license applicants to seek an exemption, we think it reasonable to require that such a request have the support at least of the affected State Governor or the Federal agency involved.

As currently drafted, we fear that the exemption process—which was intended to handle only those very rare cases of true conflict under the act—will be flooded with cases of dubious merit. This will result in a squandering of time and resources in a manner not intended by the proponents of the compromise proposal.

Standards for an exemption

The committee bill provides that one of the criteria for an exemption is that the project is of "regional significance." This criteria is significantly less stringent than that which was proposed in the original Dingell-Forsythe proposal—that the project is "required in the national interest." In addition, it should be recognized that the Endangered Species Act was written to protect the national interest in preserving various species of plants and animals. One of the findings of the act specifically states that, "these (endangered) species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational and scientific value to the nation and its people."

Although we agree that an exemption procedure should be established for very special situations, we believe that any exemption criteria should be narrowly drawn and should allow exemptions to occur only when the national interest clearly requires that this should occur.

Membership of the Endangered Species Committee

One of the changes made at the time the subcommittee agreed to the compromise was the decision to eliminate the Administrator of the Environmental Protection Agency from the exemption committee. We believe that this was an error.

Clearly, the Administrator of the EPA is qualified to serve on the committee. We see no justification for excluding his scientific and environmental expertise from committee deliberations.

Specification of critical habitat

Critical habitat is defined as that air, land, or water area the loss of which would significantly decrease the likelihood of conserving a particular endangered or threatened species. Such habitat, if any, is specified at the time the Secretary of Interior proposes to list a new species as endangered or threatened, a matter which is the subject of public notification, meetings and an opportunity for a hearing under the current bill.

By definition, the designation of critical habitat requires an objective, scientific assessment on the part of the Secretary of Interior. The committee bill, unfortunately, ignores this fact by requiring the Secretary to consider economic impacts when designating critical habitat for invertebrate species, and by empowering him to exclude all or part of a biologically critical area on purely economic grounds.

In effect, then, the Secretary is given broad power to grant exemptions to the Endangered Species Act through a simple, unilateral administrative determination of his or her own. This is a process which stands in sharp contrast to the laboriously constructed exemption process, with its clear standards and procedural safeguards, which makes up the heart of the committee bill.

We want to emphasize that we do believe that economic considerations should be considered when weighing the desirability of granting an exemption to the Endangered Species Act. We simply believe that such consideration should be included in the basic exemption process, rather than singled out in a separate procedure where it does not logically belong.

As currently written, the critical habitat provision is a startling section which is wholly inconsistent with the rest of the legislation. It constitutes a loophole which could readily be abused by any Secretary of the Interior who is vulnerable to political pressure, or who is not sympathetic to the basic purposes of the Endangered Species Act.

A sunset provision

The exemption process established by this bill is unwieldy, at best, and virtually everyone agrees that it has potential problems. Committee hearings, moreover, produced considerable evidence that no exemption process may be needed at all.

Accordingly, we would prefer to see a sunset provision for the committee and review board exemption process included in the final bill. Our experience has shown time and time again how difficult it is to abolish a bureaucratic structure once it has been established. We do not intend, by making this suggestion, to prejudge the worth of the exemption procedures established by this bill. We simply point out that its successful functioning is by no means assured, and that a sunset provision would force the Congress to reexamine the work it has been forced to produce so hurriedly this year.

GERRY E. STRUBS,
NORMAN D'AMOURS,
DON BONKER,
JOEL PRITCHARD,
DAVID E. BONIOR,
BARBARA MIKUTSKI.