

Mr. Chappell with Mr. Lujan.
 Mr. Garnery with Mr. Frey.
 Mrs. Burke of California with Mr. Cohen.
 Mr. Applegate with Mr. Badham.
 Mr. LeFante with Mr. Dickson.
 Mr. Ichord with Mr. Burke of Florida.
 Mr. McBall with Mr. Teague.
 Mr. Charles H. Wilson of California with Mr. Risenhoover.
 Mr. Ammerman with Mr. Lehman.
 Mr. Diggs with Mr. Moss.
 Mr. Shipley with Mr. Armstrong.
 Mrs. Fenwick and Mr. Pursell changed their vote from "nay" to "yea."
 Ms. Holzman, Mr. Dellums, and Mr. Stark changed their vote from "yea" to "nay."
 So the bill was passed.
 The result of the vote was announced as above recorded.
 A motion to reconsider was laid on the table.

[From the Congressional Record, Oct. 14, 1973]

HOUSE CONSIDERATION AND PASSAGE OF S. 2899, WITH AMENDMENT,
 IN LIEU OF H.R. 14104

Mr. MURPHY of New York. Mr. Speaker, I ask unanimous consent to take from the Speaker's table the Senate bill (S. 2899) to amend the Endangered Species Act of 1973 to establish an Endangered Species Interagency Committee to review certain actions to determine whether exemptions from certain requirements of that Act should be granted for such action, and ask for its immediate consideration.

The Clerk read the title of the Senate bill.
 The Speaker pro tempore. Is there objection to the request of the gentleman from New York?

There was no objection.
 The Clerk read the Senate bill as follows:

S. 2899

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 Amendments of 1978".
 Sec. 2. Section 3 of the Endangered Species Act of 1973 (16 U.S.C. 1532) is amended—

(1) by inserting after paragraph (4) thereof the following new paragraphs:
 "(5) The term 'Federal agency' means any department, agency, or instrumentality of the United States.
 "(9) The term 'critical habitat' for a threatened or endangered species means:

"(A) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (1) essential to the conservation of the species and (1) which requires special management consideration or protection;

"(B) critical habitat for a threatened or endangered species may include specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, into which the species can be expected to expand naturally upon a determina-

tion by the Secretary at the time it is listed, that such areas are essential for the conservation of the species;

"(C) critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraphs (A) and (B) of this paragraph; and

"(D) except in those circumstances determined by the Secretary, critical habitat will not include the entire geographical area which can be occupied by the threatened or endangered species";

(2) by inserting after paragraph (7) thereof the following new paragraphs:

"(8) The term 'irresolvable conflict' means, with respect to any action authorized, funded, or carried out by a Federal agency, a set of circumstances under which, after consultation as required in section 7(a) of this Act, completion of such action would (A) jeopardize the continued existence of an endangered or threatened species, or (B) result in the adverse modification or destruction of a critical habitat.

"(9) For purposes of subsection 7(e)(2)(C) the term 'alternative courses of action' means all alternatives and thus is not limited to original project objectives and agency jurisdiction"; and

(3) by renumbering the paragraphs thereof, including any references thereto, as paragraphs (1) through (20), respectively.

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

"INTERAGENCY COOPERATION

"Sec. 7. (a) CONSULTATION.—The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act. Each Federal agency shall insure that any action authorized, funded, or carried out by such agency does not jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary after consultation as appropriate with the affected States, to be critical, unless such agency is granted an exemption for such action by the Committee pursuant to subsection (e) of this section.

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

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

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

"(A) The Secretary of Agriculture.

"(B) The Secretary of the Army.

"(C) The Chairman of the Council on Environmental Quality.

"(D) The Administrator of the Environmental Protection Agency.

"(E) The Secretary of the Interior.

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

"(3) The Governor of the State which is affected by the action for which an exemption is sought (or in the case of an action affecting more than one State, the Governors of all such States who shall cast collectively a single vote on the Committee as determined among such Governors).

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

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

"(5) (A) Five members of the Committee or their representatives shall constitute a quorum for the transaction of any function of the Committee, except that, in no case shall any representative be considered in determining the existence of a quorum for the transaction of any function of the Committee. If that function involves a vote by the Committee on any matter before the Committee, the Committee shall not grant any exemption from the requirements of subsection (a) of this section to the head of any Federal agency for any action authorized, funded, or carried out by such agency unless five members of the Committee vote to grant such exemption.

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

"(E) All meetings and records of the Committee shall be open to the public, deems desirable.

"(6) The Committee may appoint and fix the pay of such personnel as it deems desirable.

"(7) The staff of the Committee may be appointed without regard to the provisions of title 5, United States Code, governing appointments in the competitive service and may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Service pay rates, except that no individual so appointed may receive pay in excess of the annual rate of basic pay in effect for grade GS-18 of the General Schedule.

"(8) The Committee may procure temporary and intermittent services to the same extent as is authorized by section 3109 (b) of title 5 of the United States Code, but at rates for individuals not to exceed the daily equivalent of the annual rate of basic pay in effect for grade GS-18 of the General Schedule.

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

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

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

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

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

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

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

"(12) For the purpose of obtaining information necessary for the consideration of an application for an exemption under this section, the Committee may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents.

"(13) To the extent practicable within the time required for action under subsection (e) of this section, and except to the extent inconsistent with the requirements of this section, the consideration of any application for an exemption under this section and the conduct of any hearing under subsection (e) of this section shall be in accordance with sections 554, 555, and 556 of title 5, United States Code.

"(14) 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 Federal action and its potential implications, and after hearing, certifies, in writing, to the Committee within sixty days of any submission made under subsection (d) (1) of this section, that the granting of any such exemption and the carrying out of such proposed action would be in violation of an international treaty obligation or other international obligation of the United States, the Secretary of State, at the time of such certification, publish a copy thereof in the Federal Register.

"(15) Except in the case of a member designated pursuant to paragraph (3) (f) of this subsection, no member shall designate any person to serve as his or her representative unless that person is, at the time of such designation, holding a Federal office the appointment to which is subject to the advice and consent of the United States Senate. In no case shall any representative, including a representative of a member designated pursuant to paragraph (3) (g) of this subsection, be eligible to cast a vote on behalf of any member.

"(16) Notwithstanding any other provision of this Act, in any case in which the National Security Council determines that the failure of the Committee to grant an exemption from the requirement of subsection (a) of this section to the head of a Federal agency in connection with any Federal action involving a critical military installation would have an adverse effect on the security of the United States, the National Security Council is authorized to notify the Committee, in writing, and upon the receipt of such notice the Committee shall give immediate consideration to such determination.

"(C) REVISIONS.—Not later than ninety days after the date of enactment of this section, the Committee shall promulgate regulations which set forth the form and manner in which applications by the heads of the Federal agencies for review of actions by such agencies shall be submitted to the Committee and the information to be contained in such applications. Such regulations shall require that information submitted in an application by the head of any Federal agency with respect to any action of such agency include, but not be limited to—

"(1) a description of the consultation process carried out pursuant to subsection (a) of this section between the head of such Federal agency and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service; and

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

"(d) SUBMISSION OF APPLICATIONS.—(1) The head of any Federal agency may submit an application for review of any action of such agency to the Committee if, in the opinion of the head of such agency, such agency has complied with the requirements of subsection (a) of this section and that an irreparable conflict exists with respect to such action. Such application for review shall be submitted in accordance with the regulations promulgated by the Committee under subsection (c) of this section.

"(2) The Director of the Fish and Wildlife Service (or where appropriate the Administrator of the National Oceanic and Atmospheric Administration) shall prepare and submit to the Committee within thirty days of any submission made under paragraph (1) of this subsection his comments concerning such submission.

"(e) (1) REVIEW AND DETERMINATION.—After the Committee receives the application and comments submitted pursuant to subsection (d) of this section, the Committee shall review such application and comments and—

"(A) determine, with respect to the action which is the subject of such application, whether or not—

"(i) the requirements of the consultation process described in subsection (a) of this section have been met; and

"(ii) there has been a reasonable and responsible effort to resolve the conflicts which are known to exist, and the Federal agency requesting such exemption has made, subsequent to the initiation of the consultation under subsection (a) of this section, no irreversible or irretrievable commitment of resources which forecloses the consideration of modification or alternatives to such action; and

"(iii) an irreparable conflict exists; and

"(B) If it makes positive determinations under clauses (i), (ii), and (iii) of subparagraph (A), determine and publish in the Federal Register, within one hundred and eighty days after receipt of the application and response required in subsection (d) of this section and after notice and public hearing on the record, whether or not to grant an exemption from the requirements of subsection (a) of this section to the head of such Federal agency for such action.

"(2) The Committee may only grant an exemption for any action under subsection (e) of this section if it determines on the record that—

"(A) there is no reasonable and prudent alternative to such action; and

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

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

"(1) NATIONAL ENVIRONMENTAL POLICY ACT.—No final determination of the Committee under subsection (e) of this section shall be considered a major Federal action under the terms 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 and threatened species or their critical habitat shall have previously been prepared with respect to any Federal action exempted from the requirements of subsection (e) of this section by such final determination of the Committee.

"(g) MITIGATION.—In those instances where the Committee determines that an exception is warranted under subsection (e) of this section the Committee must assure that the action approved for such exemption incorporates all reasonable mitigation measures deemed necessary by the Secretary to minimize adverse impacts upon the affected endangered or threatened species or its critical habitat including but not limited to live propagation, transplantation, and habitat acquisition and improvement. The Federal agency or department receiving such exemption shall include the costs of such mitigation measures within the overall costs of continuing the proposed action.

"(h) NOTICE.—The sixty-day notice requirement of section 11(g) of this Act shall not apply with respect to review of any final determination of the Committee under subsection (e) of this section granting an exemption from the requirements of subsection (a) of this section.

"(1) EXCEPTION ON TAKING.—Notwithstanding sections 4(d) and 9(a) of this Act or any regulations promulgated pursuant to such sections, any action for which an exemption is granted under subsection (e) of this section shall not be considered a taking of any endangered or threatened species with respect to any activity which is necessary to carry out such action.

"(1) 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 subsections (e) (2) and (g) 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 or for any authorized Federal project, and which the President determines (1) is necessary to prevent the recurrence of such a natural disaster and to mitigate 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) AUTHORIZATION.—There is authorized to be appropriated to carry out this section not to exceed \$750,000 for fiscal year 1979, not to exceed \$750,000 for fiscal year 1980, and not to exceed \$750,000 for fiscal year 1981. The Chairman of the Committee shall furnish a report to the Congress at the end of fiscal year 1979. The report shall speak to the adequacy of the budget authority contained in this subsection.

"(1) The authority granted to the Endangered Species Committee established in this section shall terminate on September 30, 1981."

Sec. 4. Section 9(b) of the Endangered Species Act (16 U.S.C. 1538) is amended by inserting "(1)" after "(b)" and by adding the following new paragraph:

"(2) The provisions of this section shall not apply to any raptor legally held in captivity or in a controlled environment on the effective date of the Endangered Species Act Amendments of 1978, or the domestic captive produced progeny of any legally held raptor: *Provided*, That such raptor has not been intentionally returned to a wild state. Persons holding such raptors must be able to demonstrate that the raptors do, in fact, qualify under the provisions of this paragraph. Such persons shall maintain and submit to the Secretary on request such inventories, documentation, and records as are reasonable and as the Secretary may by regulation require: *Provided*, That such requirements shall not unnecessarily duplicate the requirements of other rules and regulations promulgated by the Secretary."

Sec. 5. The third sentence of section 11(a) (1) is amended by inserting the word "knowingly" after the word "otherwise".

Sec. 6. Section 11(a) is amended by adding a new subsection at the end thereof as follows:

"(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."

Sec. 7. Section 11(b) is amended by adding a new subsection at the end thereof as follows:

"(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."

Sec. 8. Section 15 of the Endangered Species Act of 1973 (16 U.S.C. 1542) is amended to read as follows:

"Except as authorized in sections 6 and 7 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 \$23,000,000 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."

Sec. 9. (a) Section 16(c) of the Endangered Species Act of 1963 (16 U.S.C. 1535(c)) is amended—

(1) by inserting "(1)" after "(c)";

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

(3) by redesignating subparagraphs (A) and (B) as clauses (1) and (11), respectively;

(4) by striking out "subsection" in the matter preceding subparagraphs (A) (as so redesignated) and inserting in lieu thereof "paragraph";

(5) by striking out "endangered species or threatened species" in subparagraph (D) (as so redesignated) and inserting in lieu thereof "endangered or threatened species of fish or wildlife";

(6) by striking out "paragraphs (3), (4), and (5) of this subsection" in clause (1) (as so redesignated) and inserting in lieu thereof "subparagraphs (C), (D), and (E) of this paragraph";

(7) by striking out "subparagraph (A) and this subparagraph" in clause (11) (as so redesignated) and inserting in lieu thereof "clause (1) and this clause"; and

(8) by adding at the end thereof the following new paragraph:

"(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 purposes of assisting in implementation of the State program. In order for a State program to be deemed an adequate and active program for the conservation of endangered species of plants and threatened species of plants, the Secretary must find, and annually thereafter reconfirm such 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—

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

"(2) 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 (1) 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."

(b) Paragraph (16) of section 3 of the Endangered Species Act of 1973 (16 U.S.C. 1532) (formerly paragraph (13) and redesignated paragraph (16) by section 2 of this Act) is amended by striking out "fish or wildlife" and inserting in lieu thereof "fish, wildlife, or plant".

Sec. 10. Section 4(a) of the Endangered Species Act of 1973 (16 U.S.C. 1533) is amended by adding a new subsection as follows:

"(3) Critical habitat of an endangered or threatened species shall be designated concurrently with determination of that species' status except in those cases when—

"(A) an emergency exists because no critical habitat information is available or there are other contingencies;

"(B) there are species listed before enactment of the Endangered Species Act of 1973."

Sec. 11. Section 4(1) (2) (A) of the Endangered Species Act of 1973 (16 U.S.C. 1533) is amended by adding a new paragraph (11) as follows, and renumbering as appropriate:

"(11) the Secretary shall offer for publication in appropriate scientific journals the substance of the Federal Register notice referred to in (1) above; and"

Sec. 12. Section 3(4) of the Endangered Species Act of 1973 (16 U.S.C. 1532 (4)) is amended as follows: strike the words, "a significant portion", and insert "the essential portion"

Sec. 13. Section 3(15) of the Endangered Species Act of 1973 (16 U.S.C. 1532 (15)) is amended as follows: strike the words, "significant portion", and insert "the essential portion".

MOTION OFFERED BY MR. MURPHY OF NEW YORK

Mr. MURPHY of New York. Mr. Speaker, I offer a motion.

The Clerk read as follows:

Mr. MURPHY of New York moves to strike out all after the enacting clause of S. 2899 and insert in lieu thereof the provisions of H.R. 14104, as passed.

The motion was agreed to.

The Senate bill was ordered to be read a third time, was read the third time, and passed.

The title was amended so as to read: "A bill to authorize appropriations to carry out the Endangered Species Act of 1973 through fiscal year 1981, and for other purposes."

A motion to reconsider was laid on the table.

A similar House bill (H.R. 14104) was laid on the table.

95TH CONGRESS
2d Session

S. 2899

IN THE SENATE OF THE UNITED STATES

APRIL 12 (legislative day, FEBRUARY 6), 1978

Mr. CURVER (for himself, and Mr. BAKER, Mr. RAYBOLLETT, Mr. WALTON, Mr. GAVVER, and Mr. HOPPE) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

A BILL

To amend the Endangered Species Act of 1973 to establish an Endangered Species Interagency Committee to review certain actions to determine whether exemptions from certain requirements of that Act should be granted for such actions.

- 1 *Be it enacted by the Senate and House of Representatives*
 - 2 *in full power of the United States of America in Congress assembled,*
 - 3 That this Act may be cited as the "Endangered Species Act
 - 4 Amendments of 1978".
 - 5 SEC. 2. Section 3 of the Endangered Species Act of
 - 6 1973 (16 U.S.C. 1536) is amended—
 - 7 (1) by inserting after paragraph (4) thereof the
 - 8 following new paragraph:
- II