

"(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

"(1) 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(f) (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) 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) 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. CURTNER (for himself, and Mr. BAKER, Mr. RANDOLPH, Mr. WALTON, Mr. GAVRIL, and Mr. HOBBS) 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 *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

“(5) The term ‘Federal agency’ means any department, agency, or instrumentality of the United States.”;

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

“(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 completion of such action would (A) jeopardize the continued existence of an endangered or threatened species, or (B) result in the destruction of a critical habitat”; and

(3) by renumbering the paragraphs thereof, including any references thereto, as paragraphs (1) through (18), 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 spe-

cies 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 modification of habitat of such species which is determined by the Secretary 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.

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

3 " (E) The Secretary of the Interior.

4 " (F) The Secretary of the Smithsonian Institution.

5 " (G) The Secretary of Transportation.

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

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

15 " (5) (A) Except as provided in subparagraph (B) of  
16 this paragraph, five members of the Committee shall con-  
17 stitute a quorum for the transaction of any function of the  
18 Committee.

19 " (B) The Committee shall not grant any exemption  
20 from the requirements of subsection (a) of this section to  
21 the head of any Federal agency for any action authorized,  
22 funded, or carried out by such agency unless five members  
23 of the Committee vote to grant such exemption. The vote of  
24 the Committee members shall not be delegated to other  
25 persons.

1 " (C) The Secretary of the Interior shall be the Chair-  
2 man of the Committee.

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

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

7 " (7) The staff of the Committee may be appointed  
8 without regard to the provisions of title 5, United States  
9 Code, governing appointments in the competitive service,  
10 and may be paid without regard to the provisions of chapter  
11 51 and subchapter III of chapter 53 of such title relating  
12 to classification and General Service pay rates, except that  
13 no individual so appointed may receive pay in excess of the  
14 annual rate of basic pay in effect for grade GS-18 of the  
15 General Schedule.

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

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

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

5 " (B) When so authorized by the Committee, any mem-  
 6 ber or agent of the Commission may take any action which  
 7 the Committee is authorized to take by this paragraph.

8 " (C) Subject to the Privacy Act, the Committee may  
 9 secure directly from any Federal agency information neces-  
 10 sary to enable it to carry out its duties under this section.  
 11 Upon request of the Chairman of the Committee, the head of  
 12 such Federal agency shall furnish such information to the  
 13 Committee.

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

17 " (E) The Administrator of General Services shall pro-  
 18 vide to the Committee on a reimbursable basis such adminis-  
 19 trative support services as the Committee may request.

20 " (11) In carrying out its duties under this section, the  
 21 Committee may promulgate and amend such rules, regula-  
 22 tions, and procedures, and issue and amend such orders as it  
 23 deems necessary.

24 " (12) (A) The Committee shall have power to issue

1 subpoenas requiring the attendance and testimony of witnesses  
 2 and the production of any evidence that relates to any matter  
 3 which is the subject of any review or determination by the  
 4 Committee pursuant to subsection (e) of this section. Such  
 5 attendance of witnesses and the production of evidence may  
 6 be required from any place within the United States to any  
 7 place of hearing within the United States.

8 " (B) If a person issued a subpoena under subparagraph  
 9 (A) of this paragraph refuses to obey such subpoena or is  
 10 guilty of contempt, any court of the United States within  
 11 the judicial district within which the hearing is conducted or  
 12 within the judicial district within which such person is found  
 13 or resides or transacts business may (upon application by the  
 14 Committee) order such person to appear before the Commi-  
 15 tee to produce evidence or give testimony relating to the  
 16 matter which is the subject of the review or determination by  
 17 the Committee pursuant to subsection (e) of this section.  
 18 Any failure to obey such order of the court may be punished  
 19 by such court as a contempt thereof.

20 " (c) The subpoena of the Committee shall be served in  
 21 the manner provided for subpoenas issued by a district court of  
 22 the United States under the Federal Rules of Civil Procedure  
 23 for the district courts of the United States.

24 " (D) All process of any court to which application may

1 be made under this section may be served in the judicial dis-  
 2 trict wherein the person required to be served resides or may  
 3 be found.

4 “(13) No person shall be excused from attending and  
 5 testifying or from producing books, records, correspondence,  
 6 documents, or other evidence in obedience to a subpoena, on  
 7 the ground that the testimony or evidence required of him  
 8 may tend to incriminate him or subject him to a penalty for  
 9 forfeiture; but no individual shall be prosecuted or subjected  
 10 to any penalty or forfeiture for or on account of any trans-  
 11 action, matter, or thing concerning which he is compelled,  
 12 after having claimed his privilege against self-incrimination,  
 13 to testify or produce evidence, except that such individual so  
 14 testifying shall not be exempt from prosecution and punish-  
 15 ment for perjury committed in so testifying.

16 “(c) REGULATIONS.—Not later than ninety days after  
 17 the date of enactment of this section, the Committee shall  
 18 promulgate regulations which set forth the form and manner  
 19 in which applications by the heads of Federal agencies for  
 20 review of actions by such agencies shall be submitted to the  
 21 Committee and the information to be contained in such appli-  
 22 cations. Such regulations shall require that information sub-  
 23 mitted in an application by the head of any Federal agency  
 24 with respect to any action of such agency include, but not be  
 25 limited to—

1 “(1) a description of the consultation process  
 2 carried out pursuant to subsection (a) of this section be-  
 3 tween the head of such Federal agency and the Secre-  
 4 tary of the Interior, acting through the Director of the  
 5 United States Fish and Wildlife Service; and  
 6 “(2) a statement describing why such action can-  
 7 not be altered or modified to conform with the require-  
 8 ments of subsection (a) of this section.

9 “(d) SUBMISSION OF APPLICATIONS.—(1) The head  
 10 of any Federal agency may submit an application for review  
 11 of any action of such agency to the Committee if, in the opin-  
 12 ion of the head of such agency, such agency has complied  
 13 with the requirements of subsection (a) of this section and  
 14 that an irresolvable conflict exists with respect to such action.  
 15 Such application for review shall be submitted in accordance  
 16 with the regulations promulgated by the Committee under  
 17 subsection (c) of this section.

18 (2) The Director of the Fish and Wildlife Service shall  
 19 prepare and submit to the Committee within thirty days of  
 20 any submission made under paragraph (1) of this subsec-  
 21 tion his comments concerning such submission.

22 “(e) (1) REVIEW AND DETERMINATION.—Not later  
 23 than one hundred and eighty days after the Committee  
 24 receives the application and comments submitted pursuant

1 to subsection (d) of this section, the Committee shall review  
 2 such application and comments and—  
 3       “(A) determine, with respect to the action which  
 4 is the subject of such application, whether or not—  
 5       “(i) the requirements of the consultation pro-  
 6 cess described in subsection (a) of this section have  
 7 been met; and  
 8       “(ii) an irresolvable conflict exists; and  
 9       “(B) if it makes both determinations in clauses  
 10 (A) (i) and (ii), determine after notice and oppor-  
 11 tunity for public hearing whether or not to grant an ex-  
 12 emption from the requirements of subsection (a) of this  
 13 section to the head of such Federal agency for such  
 14 action.  
 15       “(2) The Committee may only grant an exemption for  
 16 any action under subsection (e) of this section if it deter-  
 17 mines that—  
 18       “(A) there is no reasonable and prudent alterna-  
 19 tive to such action; and  
 20       “(B) the project is of national or regional signifi-  
 21 cance; and  
 22       “(C) the benefits of such action clearly outweigh  
 23 the benefits of conserving the species or its critical habi-  
 24 tat, and that such action is in the public interest.  
 25       “(f) NATIONAL ENVIRONMENTAL POLICY ACT.—No

1 final determination of the Committee under subsection (e)  
 2 of this section shall be considered a major Federal action  
 3 under the terms of the National Environmental Policy Act  
 4 of 1969 (42 U.S.C. 4321 et seq.).  
 5       “(g) MITIGATION.—In those instances where the Com-  
 6 mittee determines that an exception is warranted under sub-  
 7 section (e) of this section the Committee must assure that  
 8 the action approved for such exemption incorporates all rea-  
 9 sonable mitigation measures deemed necessary by the Sec-  
 10 retary to minimize adverse impacts upon the affected endan-  
 11 gered or threatened species or its critical habitat including  
 12 but not limited to live propagation, transplantation, and habi-  
 13 tat acquisition and improvement. The Federal agency or de-  
 14 partment receiving such exemption should include the costs  
 15 of such mitigation measures within the overall costs of con-  
 16 fining the proposed action and the Federal agency or de-  
 17 partment shall transfer to the United States Fish and Wild-  
 18 life Service out of appropriations or other funds, such money  
 19 as may be necessary to implement the conservation pro-  
 20 grams or mitigation measures required by this section for  
 21 endangered or threatened species or their critical habitats.  
 22       “(h) EXCEPTION ON TAKING.—Notwithstanding sec-  
 23 tions 4 (d) and 9 (a) of this Act or any regulations promul-  
 24 gated pursuant to such sections, any action for which an  
 25 exemption is granted under subsection (e) of this section

1 shall not be considered a taking of any endangered or threat-  
 2 ened species with respect to any activity which is necessary  
 3 to carry out such action.

4 “(i) AUTHORIZATION.—There is authorized to be ap-  
 5 propriated to carry out this section not to exceed \$2,500,-  
 6 000 for fiscal year 1979, not to exceed \$2,500,000 for fiscal  
 7 year 1980, and not to exceed \$2,500,000 for fiscal year  
 8 1981.”

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

11 “Except as authorized in sections 6 and 7 of this Act,  
 12 there are authorized to be appropriated—

13 “(1) not to exceed \$25,000,000 for the fiscal year  
 14 ending September 30, 1977, and the fiscal year ending  
 15 September 30, 1978, not to exceed \$23,000,000 for the  
 16 fiscal year ending September 30, 1979, not to exceed  
 17 \$25,000,000 for the fiscal year ending September 30,  
 18 1980, and not to exceed \$27,000,000 for the fiscal year  
 19 ending September 30, 1981, to enable the Department  
 20 of the Interior to carry out such functions and responsi-  
 21 bilities as it may have been given under this Act; and  
 22 “(2) not to exceed \$5,000,000 for the fiscal year  
 23 ending September 30, 1977, and the fiscal year ending  
 24 September 30, 1978, not to exceed \$2,500,000 for the  
 25 fiscal year ending September 30, 1979, not to exceed

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