

## Calendar No. 804

89TH CONGRESS  
2d Session**S. 2899**

[Report No. 95-874]

## IN THE SENATE OF THE UNITED STATES

April 12 (legislative day, February 6), 1978

Mr. CURVER (for himself, and Mr. BAKER, Mr. RANDOLPH, Mr. WALLACE, Mr. GAVIN, and Mr. HODGES) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

May 15 (legislative day, April 24), 1978

Reported by Mr. CURVER, with amendments

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

**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 Representa-*
- 2 *tives of the United States of America in Congress assembled,*
- 3 That this Act may be cited as the "Endangered Species Act
- 4 Amendments of 1978".
- 5 Sec. 2. Section 3 of the Endangered Species Act of
- 6 1973 (16 U.S.C. 1532) is amended—
- 7 (1) by inserting after paragraph (4) thereof the
- 8 following new paragraph:—

II

2

- 1 " (5) The term 'Federal agency' means any depart-
- 2 ment, agency, or instrumentality of the United States. ";
- 3 (2) by inserting after paragraph (7) thereof the
- 4 following new paragraphs:—
- 5 " (8) The term 'irresolvable conflict' means, with
- 6 respect to any action authorized, funded, or carried out
- 7 by a Federal agency, a set of circumstances under which,
- 8 *after consultation as required in section 7(a) of this Act,*
- 9 *completion of such action would (A) jeopardize the con-*
- 10 *tinued existence of an endangered or threatened species,*
- 11 *or (B) result in the adverse modification or destruction*
- 12 *of a critical habitat; and*
- 13 " (9) For purposes of subsection 7 (e) (2) (C) the
- 14 term 'alternative courses of action' means all alternatives
- 15 *and thus is not limited to original project objectives and*
- 16 *agency jurisdiction. "; and*
- 17 (3) by renumbering the paragraphs thereof, includ-
- 18 ing any references thereto, as paragraphs (1) through
- 19 ~~(19)~~ 19, respectively.
- 20 Sec. 3. Section 7 of the Endangered Species Act of 1973
- 21 (16 U.S.C. 1536) is amended to read as follows:
- 22 "INTERAGENCY COOPERATION
- 23 "Sec. 7. (a) CONSULTATION.—The Secretary shall
- 24 review other programs administered by him and utilize such
- 25 programs in furtherance of the purposes of this Act. All other

1 Federal agencies shall, in consultation with and with the  
 2 assistance of the Secretary, utilize their authorities in further-  
 3 ance of the purposes of this Act by carrying out programs for  
 4 the conservation of endangered species and threatened spe-  
 5 cies listed pursuant to section 4 of this Act. Each Federal  
 6 agency shall insure that any action authorized, funded, or  
 7 carried out by such agency does not jeopardize the continued  
 8 existence of any endangered species or threatened species or  
 9 result in the destruction or *adverse* modification of habitat of  
 10 such species which is determined by the Secretary *after*  
 11 *consultation* as appropriate with the affected States, to be  
 12 critical, unless such agency is granted an exemption for such  
 13 action by the Committee pursuant to subsection (e) of this  
 14 section.

15 “(b) (1) ESTABLISHMENT OF COMMITTEE.—There is  
 16 established a committee to be known as the Endangered  
 17 Species Committee (hereinafter in this section referred to as  
 18 the ‘Committee’).

19 “(2) The Committee shall review any application sub-  
 20 mitted to it pursuant to subsection (d) of this section and  
 21 determine in accordance with subsection (e) of this section  
 22 whether or not to grant an exemption from the requirements  
 23 of subsection (a) of this section for the action set forth in  
 24 such application.

1 “(3) The Committee shall be composed of seven mem-  
 2 bers as follows:

3 “(A) The Secretary of Agriculture.

4 “(B) The Secretary of the Army.

5 “(C) The Chairman of the Council on Environ-  
 6 mental Quality.

7 “(D) The Administrator of the Environmental  
 8 Protection Agency.

9 “(E) The Secretary of the Interior (and where  
 10 appropriate, the Secretary of the Interior in concu-  
 11 rence with the Secretary of Commerce).

12 “(F) The Secretary of the Smithsonian Institution.

13 “(G) ~~The Secretary of Transportation.~~ *The Gover-*  
 14 *nor of the State which is affected by the action for which*  
 15 *an exemption is sought (or in the case of an action*  
 16 *affecting more than one State, the Governors of all such*  
 17 *States who shall cast collectively a single vote on the*  
 18 *Committee as determined among such Governors).*

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

21 “(B) While away from their homes or regular places  
 22 of business in the performance of services for the Committee,  
 23 members of the Committee shall be allowed travel expenses,  
 24 including per diem in lieu of subsistence, in the same manner  
 25 as persons employed intermittently in the Government serv-

1 ice are allowed expenses under section 5703 of title 5 of the  
2 United States Code.

3 “(5) (A) Except as provided in subparagraph (B) of  
4 this paragraph, five Seven members of the Committee or  
5 their representatives shall constitute a quorum for the trans-  
6 action of any function of the Committee.

7 “(B) The Committee shall not grant any exemption  
8 from the requirements of subsection (a) of this section to  
9 the head of any Federal agency for any action authorized,  
10 funded, or carried out by such agency unless five members  
11 of the Committee vote to grant such exemption. The vote of  
12 the Committee members shall not be delegated to other  
13 persons.

14 “(C) The Secretary of the Interior shall be the Chair-  
15 man of the Committee.

16 “(D) The Committee shall meet at the call of the  
17 Chairman of five of its members.

18 “(E) All meetings and records of the Committee shall  
19 be open to the public.

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

22 “(7) The staff of the Committee may be appointed  
23 without regard to the provisions of title 5, United States

24 Code, governing appointments in the competitive service,  
25 and may be paid without regard to the provisions of chapter

1 51 and subchapter III of chapter 53 of such title relating  
2 to classification and General Service pay rates, except that  
3 no individual so appointed may receive pay in excess of the  
4 annual rate of basic pay in effect for grade GS-18 of the  
5 General Schedule.

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

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

16 “(10) (A) The Committee may for the purpose of carry-  
17 ing out its duties under this section hold such hearings, sit and  
18 act at such times and places, take such testimony, and receive  
19 such evidence, as the Committee deems advisable.

20 “(B) When so authorized by the Committee, any mem-  
21 ber or agent of the ~~Committee~~ Committee may take any  
22 action which the Committee is authorized to take by this  
23 paragraph.

24 “(C) Subject to the Privacy Act, the Committee may  
25 secure directly from any Federal agency information neces-

1 sary to enable it to carry out its duties under this section.  
 2 Upon request of the Chairman of the Committee, the head of  
 3 such Federal agency shall furnish such information to the  
 4 Committee.

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

8 “(E) The Administrator of General Services shall pro-  
 9 vide to the Committee on a reimbursable basis such adminis-  
 10 trative support services as the Committee may request.

11 “(11) In carrying out its duties under this section, the  
 12 Committee may promulgate and amend such rules, regula-  
 13 tions, and procedures, and issue and amend such orders as it  
 14 deems necessary.

15 “(12)(A) The Committee shall have power to issue  
 16 subpoenas requiring the attendance and testimony of witnesses  
 17 and the production of any evidence that relates to any matter  
 18 which is the subject of any review or determination by the  
 19 Committee pursuant to subsection (e) of this section. Such  
 20 attendance of witnesses and the production of evidence may  
 21 be required from any place within the United States to any  
 22 place of hearing within the United States.—

23 “(B) If a person issued a subpoena under subparagraph  
 24 (A) of this paragraph refuses to obey such subpoena or is  
 25 guilty of contempt, any court of the United States within

1 the judicial district within which the hearing is conducted or  
 2 within the judicial district within which such person is found  
 3 or resides or transacts business may (upon application by the  
 4 Committee) order such person to appear before the Commi-  
 5 tee to produce evidence or give testimony relating to the  
 6 matter which is the subject of the review or determination by  
 7 the Committee pursuant to subsection (e) of this section.  
 8 Any failure to obey such order of the court may be punished  
 9 by such court as a contempt thereof.

10 “(e) The subpoena of the Committee shall be served in  
 11 the manner provided for subpoenas issued by a district court of  
 12 the United States under the Federal Rules of Civil Procedure  
 13 for the district courts of the United States.

14 “(D) All process of any court to which application may  
 15 be made under this section may be served in the judicial dis-  
 16 trict wherein the person required to be served resides or may  
 17 be found.

18 “(13) No person shall be excused from attending and  
 19 testifying or from producing books, records, correspondence,  
 20 documents, or other evidence in obedience to a subpoena, or  
 21 the ground that the testimony or evidence required of him  
 22 may tend to incriminate him or subject him to a penalty for  
 23 forfeiture; but no individual shall be prosecuted or subjected  
 24 to any penalty or forfeiture for or on account of any trans-  
 25 action, matter, or thing concerning which he is compelled,

1 after having claimed his privilege against self-incrimination;  
 2 to testify or produce evidence; except that such individual  
 3 so testifying shall not be exempt from prosecution and pun-  
 4 ishment for perjury committed in so testifying.

5 “(12) For the purpose of obtaining information neces-  
 6 sary for the consideration of an application for an exemption  
 7 under this section the Committee may issue subpoenas for the  
 8 attendance and testimony of witnesses and the production of  
 9 relevant papers, books, and documents.

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

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

1 with respect to any action of such agency include, but not be  
 2 limited to—

3 “(1) a description of the consultation process  
 4 carried out pursuant to subsection (a) of this section be-  
 5 tween the head of such Federal agency and the Secre-  
 6 tary of the Interior, acting through the Director of the  
 7 United States Fish and Wildlife Service; and

8 “(2) a statement describing why such action can-  
 9 not be altered or modified to conform with the require-  
 10 ments of subsection (a) of this section.

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

20 “(2) The Director of the Fish and Wildlife Service (or  
 21 where appropriate the Director of the Fish and Wildlife  
 22 Service in concurrence with the Director of the National  
 23 Marine Fisheries Service) shall prepare and submit to the  
 24 Committee within thirty days of any submission made under

1 paragraph (1) of this subsection his comments concerning  
2 such submission.

3 “(e) (1) REVIEW AND DETERMINATION.—~~Not later~~  
4 ~~than one hundred and eighty days after~~ After the Committee  
5 receives the application and comments submitted pursuant to  
6 subsection (d) of this section, the Committee shall review  
7 such application and comments and—

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

10 “(i) the requirements of the consultation pro-  
11 cess described in subsection (a) of this section have  
12 been met; and

13 “(ii) there has been a reasonable and responsible  
14 effort to resolve the conflicts which are known to exist,  
15 and the Federal agency requesting such exemption  
16 has made, subsequent to the initiation of the consulta-  
17 tion under subsection (a) of this section, no irreversi-  
18 ble or irrevocable commitment of resources which  
19 forecloses the consideration of modification or alter-  
20 natives to such action; and

21 “(iii) an irresolvable conflict exists; and  
22 “(B) if it makes both determinations in clauses (A)  
23 ~~and (ii); determine after notice and opportunity for~~  
24 ~~public hearing positive determinations under clauses (i),~~  
25 ~~(ii), and (iii) of subparagraph (A), determine and~~

1 publish in the Federal Register, within one hundred and  
2 eighty days after receipt of the application and response  
3 required in subsection (d) of this section and after notice

4 and public hearing on the record, whether or not to grant  
5 an exemption from the requirements of subsection (a) of  
6 this section to the head of such Federal agency for such  
7 action.

8 “(2) The Committee may only grant an exemption for  
9 any action under subsection (e) of this section if it deter-  
10 mines on the record that—

11 “(A) there is no reasonable and prudent alterna-  
12 tive to such action; and

13 “(B) the project action is of national or regional  
14 significance; and

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

19 “(f) NATIONAL ENVIRONMENTAL POLICY ACT.—No  
20 final determination of the Committee under subsection (e)  
21 of this section shall be considered a major Federal action  
22 under the terms of the National Environmental Policy Act  
23 of 1969 (42 U.S.C. 4321 et seq.).

24 “(g) MITIGATION.—In those instances where the Com-  
25 mittee determines that an exception is warranted under sub-

1 section (e) of this section the Committee must assure that  
 2 the action approved for such exemption incorporates all rea-  
 3 sonable mitigation measures deemed necessary by the Sec-  
 4 retary to minimize adverse impacts upon the affected endan-  
 5 gered or threatened species or its critical habitat including  
 6 but not limited to live propagation, transplantation, and hab-  
 7 itat acquisition and improvement. The Federal agency or de-  
 8 partment receiving such exemption shall include the  
 9 costs of such mitigation measures within the overall costs of  
 10 continuing the proposed action. and the Federal agency or de-  
 11 partment shall transfer to the United States Fish and Wild-  
 12 life Service out of appropriations or other funds, such money  
 13 as may be necessary to implement the conservation pro-  
 14 grams or mitigation measures required by this section for  
 15 endangered or threatened species or their critical habitats.  
 16 “(h) EXCEPTION ON TAKING.—Notwithstanding sec-  
 17 tions 4 (d) and 9 (a) of this Act or any regulations promul-  
 18 gated pursuant to such sections, any action for which an  
 19 exemption is granted under subsection (e) of this section  
 20 shall not be considered a taking of any endangered or threat-  
 21 ened species with respect to any activity which is necessary  
 22 to carry out such action.  
 23 “(i) AUTHORIZATION.—There is authorized to be ap-  
 24 propriated to carry out this section not to exceed \$2,500,-  
 25 000 for fiscal year 1979, not to exceed \$2,500,000 for fiscal

1 year 1980, and not to exceed \$2,500,000 for fiscal year  
 2 1981.” 1981.  
 3 “(j) The authority granted to the Endangered Species  
 4 Committee established in this section shall terminate on Sep-  
 5 tember 30, 1981.”  
 6 SEC. 4. Section 9(b) of the Endangered Species Act (16  
 7 U.S.C. 1538) is amended by inserting “(1)” after “(b)”  
 8 and by adding the following new paragraph:  
 9 “(2) The provisions of this section shall not apply to  
 10 any raptor legally held in captivity or in a controlled en-  
 11 vironment on the effective date of the Endangered Species  
 12 Act Amendments of 1978, or the domestic captive produced  
 13 progeny of any legally held raptor: Provided, That such  
 14 raptor has not been intentionally returned to a wild state.  
 15 Persons holding such raptors must be able to demonstrate  
 16 that the raptors do, in fact, qualify under the provisions of  
 17 this paragraph. Such persons shall maintain and submit to  
 18 the Secretary on request such inventories, documentation,  
 19 and records as are reasonable and as the Secretary may by  
 20 regulation require: Provided, That such requirements shall  
 21 not unnecessarily duplicate the requirements of other rules  
 22 and regulations promulgated by the Secretary.”  
 23 SEC. 4. 5. Section 15 of the Endangered Species Act of  
 24 1973 (16 U.S.C. 1542) is amended to read as follows:

1 "Except as authorized in sections 6 and 7 of this Act,  
2 there are authorized to be appropriated—

- 3 " (1) not to exceed \$25,000,000 for the fiscal year  
4 ending September 30, 1977, and the fiscal year ending  
5 September 30, 1978, not to exceed \$23,000,000 for the  
6 fiscal year ending September 30, 1979, not to exceed  
7 \$25,000,000 for the fiscal year ending September 30,  
8 1980, and not to exceed \$27,000,000 for the fiscal year  
9 ending September 30, 1981, to enable the Department  
10 of the Interior to carry out such functions and responsi-  
11 bilities as it may have been given under this Act; and  
12 " (2) not to exceed \$5,000,000 for the fiscal year  
13 ending September 30, 1977, and the fiscal year ending  
14 September 30, 1978, not to exceed \$2,500,000 for the  
15 fiscal year ending September 30, 1979, not to exceed  
16 \$3,000,000 for the fiscal year ending September 30,  
17 1980, and not to exceed \$3,500,000 for the fiscal year  
18 ending September 30, 1981, to enable the Department  
19 of Commerce to carry out such functions and responsi-  
20 bilities as it may have been given under this Act."

## Calendar No. 804

95<sup>TH</sup> CONGRESS }  
2<sup>d</sup> Session }

SENATE

REPORT  
No. 95-874

### ENDANGERED SPECIES ACT AMENDMENTS OF 1978

MAY 15 (legislative day, APRIL 24), 1978.—Ordered to be printed

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

### REPORT

[To accompany S. 28991]

The Committee on Environment and Public Works, to which was referred the 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 actions having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

#### GENERAL STATEMENT

The Endangered Species Act of 1973 is the first statute to authorize a comprehensive national program for the conservation of endangered or threatened species of fish, wildlife, and plants.

The regulatory mechanism provided to achieve this goal authorizes and directs the Secretary of the Interior and, for marine species, the Secretary of Commerce to list and to issue regulations for the protection of endangered or threatened species. The Secretary is required to enter into cooperative agreements with, and provide technical and financial assistance to, qualified States for species conservation programs.

Since protection of habitat is a key element in the protection of all species, the act authorizes the Secretary to acquire land for the conservation and propagation of affected species. Furthermore, in section 7 each Federal agency is directed to assure that its actions do not adversely affect listed species or the habitat which the Secretary determines to be critical to their existence. Similarly, section 9 prohibits the taking of, or interstate commerce in, endangered or threatened species except when such use is consistent with a permit or regulations issued by the Secretary to the appropriate State authority.