104TH CONGRESS
*2d Session*
HOUSE OF REPRESENTATIVES
REPT. 104–778,
Part 1

# ENDANGERED SPECIES CONSERVATION AND MANAGEMENT ACT OF 1995

SEPTEMBER 9, 1996.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. YOUNG of Alaska, from the Committee on Resources,

submitted the following

# R E P O R T

together with

## DISSENTING AND SUPPLEMENTAL VIEWS

[To accompany H.R. 2275]

[Including cost estimate of the Congressional Budget Office]

The Committee on Resources, to whom was referred the bill (H.R. 2275) to reauthorize and amend the Endangered Species Act of 1973, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

**SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

(a) SHORT TITLE.—This Act may be cited as the "Endangered Species Conservation and Management Act of 1995".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

**SEC. 2. REFERENCES TO ENDANGERED SPECIES ACT OF 1973.**

Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to such section or other provision of the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.).

**SEC. 3. FINDINGS, PURPOSES, AND POLICY OF ENDANGERED SPECIES ACT OF 1973.**

(a) FINDINGS.—Section 2(a) (16 U.S.C. 1531(a)) is amended—

(1) by amending paragraph (1) to read as follows:

"(1) various species of fish, wildlife, and plants in the United States have been rendered extinct because of inadequate conservation practices and natural processes;"; and

(2) by striking "and" after the semicolon at the end of paragraph (4)(G), by striking the period at the end of paragraph (5) and inserting "; and", and by adding at the end the following new paragraph:

"(6) the Nation's economic well-being is essential to the ability to maintain a sustainable resource base, therefore economic impacts and private property owners' rights must be considered while encouraging practices that protect species.".

(b) PURPOSES AND POLICY.—Section 2 (b) and (c) (16 U.S.C. 1531 (b), (c)) are amended to read as follows:

"(b) PURPOSES.—The purposes of this Act are the following:

"(1) To provide a feasible and practical means to conserve endangered species and threatened species consistent with protection of the rights of private property owners and ensuring economic stability.

"(2) To provide a program for the conservation and management of such endangered species and threatened species taking into account the economic and social consequences of such program.

"(3) To take such steps as may be practicable to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

"(c) POLICY.—

"(1) FEDERAL AUTHORITY.—It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve and manage endangered species and threatened species and shall, consistent with and not prevailing over their primary missions, utilize their authorities in furtherance of the purposes of this Act.

"(2) COOPERATION WITH STATES.—It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species and consistent with State and local water laws.

"(3) PROTECTION OF PRIVATE PROPERTY RIGHTS.—It is the policy of the Federal Government that agency action taken pursuant to this Act shall not use or limit the use of privately owned property when such action diminishes the value of such property without payment of fair market value to the owner of private property. Each Federal agency, officer, and employee shall exercise authority under this Act to ensure that agency action will not violate the policy established in this paragraph.".

# TITLE I—PRIVATE PROPERTY RIGHTS AND VOLUNTARY INCENTIVES FOR PRIVATE PROPERTY OWNERS

**SEC. 101. COMPENSATION FOR USE OR TAKING OF PRIVATE PROPERTY.**

The Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) is amended by adding at the end the following new section:

**"SEC. 19. RIGHT TO COMPENSATION.**

"(a) PROHIBITION.—The Federal Government shall not take an agency action affecting privately owned property or nonfederally owned property under this Act which results in diminishment of value of any portion of that property by 20 percent or more unless compensation is offered in accordance with this section.

"(b) COMPENSATION FOR USE OR LIMITATION ON USE.—The agency or agencies that take an agency action that exceeds the amount provided in subsection (a) shall compensate the private property owner for the otherwise lawful use or limitation on the otherwise lawful use in the amount of the diminution in value of the portion of that property resulting from the use or limitation on use. If the diminution in value of a portion of that property is greater than 50 percent, at the option of the owner, the agency or agencies shall buy that portion of the property and shall pay fair market value based on the value of the property before the use or limitation on use was imposed. Compensation paid shall reflect the duration of the use or limitation on use necessary to achieve the purposes of this Act.

"(c) REQUEST OF OWNER.—An owner seeking compensation under this section shall make a written request for compensation to the agency implementing the agency action. The request shall, at a minimum, identify the affected portion of the property, the nature of the use or limitation, and the amount of compensation claimed. No such request may be made later than one year after the owner receives actual notice that the use of property has been limited by an agency action.

"(d) NEGOTIATIONS.—The agency may negotiate with that owner to reach agreement on the amount of the compensation and the terms of any agreement for payment. If such an agreement is reached, the agency shall within 90 days pay the

owner the amount agreed upon. An agreement under this section may include a transfer of the title or an agreement to use the property for a limited period of time.

"(e) CHOICE OF REMEDIES.—If, not later than 180 days after the written request is made, the parties have not reached an agreement on compensation, the owner may elect binding arbitration or seek compensation due under this section in a civil action.

"(f) ARBITRATION.—The procedures that govern the arbitration shall, as nearly as practicable, be those established under title 9, United States Code, for arbitration proceedings to which that title applies. An award made in such arbitration shall include a reasonable attorney's fee and other arbitration costs, including appraisal fees. The agency shall promptly pay any award made to the owner.

"(g) CIVIL ACTION.—An owner who prevails in a civil action against the agency pursuant to this section shall be entitled to, and the agency shall be liable for, the amount of compensation awarded plus reasonable attorney's fees and other litigation costs, including appraisal fees. The court shall award interest on the amount of any compensation from the time of the limitation.

"(h) SOURCE OF PAYMENTS.—Any payment made under this section to an owner, and any judgment obtained by an owner in a civil action under this section shall, notwithstanding any other provision of law, be made from the annual appropriation of the agency that took the agency action. If the agency action resulted from a requirement imposed by another agency, then the agency making the payment or satisfying the judgment may seek partial or complete reimbursement from the appropriated funds of the other agency. For this purpose the head of the agency concerned may transfer or reprogram any appropriated funds available to the agency. If insufficient funds exist for the payment or to satisfy the judgment, it shall be the duty of the head of the agency to seek the appropriation of such funds for the next fiscal year.

"(i) AVAILABILITY OF APPROPRIATIONS.—Notwithstanding any other provision of law, any obligation of the United States to make any payment under this section shall be subject to the availability of appropriations.

"(j) DUTY OF NOTICE TO OWNERS.—An agency may not take any action limiting the use of private property unless the agency has given appropriate notice to the owners of that property directly affected explaining their rights under this section and the procedures for obtaining any compensation that may be due to them under this section.

"(k) RULES OF CONSTRUCTION.—The following rules of construction shall apply to this Act:

"(1) OTHER RIGHTS PRESERVED.—Nothing in this Act shall be construed to limit any right to compensation that exists under the Constitution or under other laws.

"(2) EXTENT OF FEDERAL AUTHORITY.—Payment of compensation under this section (other than when the property is bought by the Federal Government at the option of the owner) shall not confer any rights on the Federal Government other than the use or limitation on use resulting from the agency action for the duration so that the agency action may achieve the species conservation purposes of this Act.

"(l) DEFINITIONS.—For the purposes of this section:

"(1) AGENCY.—The term 'agency' has the meaning given that term in section 551 of title 5, United States Code.

"(2) AGENCY ACTION.—The term 'agency action'—

"(A) subject to subparagraph (B), has the meaning given that term in section 551 of title 5, United States Code, and

"(B) includes—

"(i) the loss of use of property to avoid prosecution under section 11;

"(ii) a designation pursuant to section 9(i) of privately owned property as critical habitat;

"(iii) the denial of a permit under section 10 that restricts the use of private property;

"(iv) an agency action pursuant to a biological opinion under section 7 that would cause an agency to restrict the use of private property;

"(v) an agreement under section 6 to set aside property for habitat under the terms of an easement or other contract;

"(vi) a restriction imposed on private property as part of a conservation plan adopted by the Secretary under section 5;

"(vii) any other agency action that restricts a legal right to use that property, including, the right to alter habitat; and

"(viii) the making of a grant of land or money, to a public authority or a private entity as a predicate to an agency action by the recipient that would constitute a limitation if done directly by the agency.

"(3) FAIR MARKET VALUE.—The term 'fair market value' means the most probable price at which property would change hands, in a competitive and open market under all conditions requisite to fair sale, between a willing buyer and willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts, prior to occurrence of the agency action.

"(4) LAW OF THE STATE.—The term 'law of the State' includes the law of a political subdivision of a State.

"(5) LIMITATION ON USE.—The term 'limitation on use' means only a limitation on a use which is otherwise permissible under applicable State property or nuisance laws.

"(6) PRIVATE PROPERTY, PRIVATELY OWNED PROPERTY, NON-FEDERAL PROPERTY.—The term 'private property', 'privately owned property', or 'non-Federal property' means property which is owned by a person other than any Federal entity of government.

"(7) PROPERTY.—The term 'property' means land, an interest in land, the right to use or receive water, and any personal property that is subject to use by the Federal Government or to a restriction on use.".

**SEC. 102. VOLUNTARY COOPERATIVE MANAGEMENT AGREEMENTS.**

(a) COOPERATIVE MANAGEMENT AGREEMENT DEFINED.—Section 3 (16 U.S.C. 1532) is amended—

(1) by redesignating paragraphs (2) through (21) in order as paragraphs (3), (4), (5), (7), (9), (10), (11), (12), (13), (18), (19), (20), (22), (23), (24), (25), (26), (27), and (28); and

(2) by adding after paragraph (5) (as redesignated by paragraph (1) of this section) the following new paragraph:

"(6) The term 'cooperative management agreement' means a voluntary agreement entered into under section 6(b).".

(b) VOLUNTARY COOPERATIVE MANAGEMENT AGREEMENTS.—Section 6 (16 U.S.C. 1535) is amended by striking so much as precedes subsection (c) and inserting the following:

**"SEC. 6. COOPERATION WITH NON-FEDERAL PERSONS.**

"(a) GENERALLY.—In carrying out the program authorized by this Act, the Secretary shall cooperate to the maximum extent practicable with the States and other non-Federal persons. Such cooperation shall include consultation with the States and non-Federal persons concerned before acquiring any land or water, or interest therein, for the purpose of conserving any endangered species or threatened species.

"(b) COOPERATIVE MANAGEMENT AGREEMENTS.—

"(1) IN GENERAL.—The Secretary may enter into a cooperative management agreement with any State or group of States, political subdivision of a State, local government, or non-Federal person—

"(A) for the management of a species or group of species listed as endangered species or threatened species under section 4, a species or group of species proposed to be listed under section 4, or species or group of species which are candidates for listing; or

"(B) for the management or acquisition of an area which provides habitat for a species.

"(2) SCOPE OF COOPERATIVE MANAGEMENT AGREEMENTS.—(A) A cooperative management agreement entered into under this subsection—

"(i) may provide for the management of a species or group of species on both public and private lands which are under the authority, control or ownership of a State or group of States, political subdivision of a State, local government, or non-Federal person and which are affected by a listing determination, proposed determination, or proposed candidacy for determination; and

"(ii) may include the acquisition or designation of land as habitat for species.

"(B) A cooperative management agreement may not restrict private or non-Federal property unless written consent to such restrictions by the non-Federal owner is given either to the Secretary or the State, political subdivision, local government, or non-Federal person who is a party to the agreement.

"(C) The Secretary may grant to a party to an agreement the authority to undertake programs to enhance the population or habitat of a species on federally owned lands, except that such authority shall not otherwise conflict with other

uses of such land which are approved by the Secretary or authorized by the Congress.

"(D) The Secretary is authorized, in conjunction with entering into and as a part of any agreement under this section, to provide funds to carry out the agreement to a non-Federal person, as provided in paragraph (11).

"(3) NOTIFICATION.—Not later than 30 days after submission of a request to enter into a cooperative management agreement, the party submitting the request shall provide notice of the request to any non-Federal person or Federal power marketing administration that would be subject to the proposed cooperative management agreement.

"(4) DEVELOPMENT OF PROPOSED AGREEMENT.—(A) The requesting party shall develop and submit to the Secretary a proposed cooperative management agreement.

"(B) The Secretary shall publish in the Federal Register a notice of availability and a request for public comment on any proposed cooperative management agreement between the Secretary and any governmental entity and shall hold a public hearing on such a proposed cooperative management agreement in each county or parish in which the proposed agreement would be in effect.

"(C) Before entering into a cooperative management agreement with another governmental entity or a non-Federal person for the management of federally owned land, the Secretary shall consider and weigh carefully all information received in response to the request for comment published under subparagraph (B) and testimony presented in each hearing held under subparagraph (B).

"(5) APPROVAL OF AGREEMENT.—(A) Not later than 120 days after the submission of a proposed cooperative management agreement under paragraph (4), the Secretary shall determine whether the proposed agreement is in accordance with this subsection and will promote the conservation of the species to which the proposed agreement applies.

"(B) The Secretary shall approve and enter into a proposed cooperative management agreement, if the Secretary finds that—

"(i) the requesting party has sufficient authority under law to implement and carry out the terms of the agreement;

"(ii) the agreement defines an area that serves as habitat for the species or group of species to which the agreement applies;

"(iii) the agreement adequately provides for the administration and management of the identified management area;

"(iv) the agreement promotes the conservation of the species to which the agreement applies by committing Federal or non-Federal efforts to the conservation;

"(v) the term of the agreement is of sufficient duration to accomplish the provisions of the agreement; and

"(vi) the agreement is adequately funded to carry out the agreement.

"(C) No later than 30 days after entering into a cooperative management agreement with a governmental entity, the Secretary shall publish in the Federal Register a notice of availability of the terms of such agreement and the response of the Secretary to all information received or presented with respect to the agreement pursuant to paragraph (4)(B).

"(6) ENVIRONMENTAL ASSESSMENTS.—Preparation, approval, and entering into a cooperative management agreement under this subsection shall not be subject to section 102(2) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)).

"(7) NO SURPRISES.—For any species or area that is the subject of a cooperative management agreement under this subsection, a party to the agreement shall not be required—

"(A) to make any additional payment for any purpose, or to accept any additional restriction on any parcel of land available for development or land management under the agreement, without consent of the party; or

"(B) to undertake any other measure to minimize or mitigate impacts on the species in addition to measures required by the agreement as established.

"(8) EFFECT OF LISTING OF SPECIES.—A cooperative management agreement entered into under this subsection shall remain in effect and shall not be required to be amended if a species to which the agreement does not apply is determined to be an endangered species or threatened species under section 4.

"(9) APPLICABILITY OF CERTAIN PROVISIONS.—Sections 5, 7, and 9 shall not apply to those activities of a party to a cooperative management agreement which are conducted in accordance with such agreement.

"(10) VIOLATIONS OF AGREEMENTS.—(A) If the Secretary determines that a party to a cooperative management agreement is not administering or acting in accordance with the agreement, the Secretary shall notify the party.

"(B) If a party that is notified under subparagraph (A) fails to take appropriate corrective action within a period of time determined by the Secretary to be reasonable (not to exceed 90 days after the date of the notification)—

"(i) the Secretary shall rescind the entire cooperative management agreement or the applicability of the agreement to the party that is the subject of the notification; and

"(ii) beginning on the date of the rescission—

"(I) the entire agreement shall not be effective, or the agreement shall not be effective with respect to the party, whichever is appropriate; and

"(II) sections 5, 7, and 9 shall apply to activities of the party.

"(11) FACA.—Consultation with States pursuant to this section shall not be subject to the Federal Advisory Committee Act (5 U.S.C. App.).".

**SEC. 103. GRANTS FOR IMPROVING AND CONSERVING HABITAT FOR SPECIES.**

Section 6 (16 U.S.C. 1535), as amended by section 105 of this Act, is further amended by adding at the end the following new subsection:

"(k) HABITAT CONSERVATION GRANTS.—(1) The Secretary may, from amounts in the account established by section 13 or from funds appropriated for such purpose, provide a grant to a non-Federal person (other than an officer, employee, or agent (acting in an official capacity) or a department or instrumentality of a State, municipality, or political subdivision thereof) for the purpose of conserving, preserving, or improving habitat for any species that is determined under section 4 to be an endangered species or a threatened species or for any conservation measures that enhances the survivability of such species, including predator control.

"(2) The Secretary may provide a grant under this subsection if the Secretary determines that—

"(A) the property for which the grant is provided contains habitat that significantly contributes to the protection of the population of the species;

"(B) the property has been managed for species protection for a period of time that has been sufficient to significantly contribute to the protection of the population of the species; and

"(C) the management of the habitat advances the interest of species protection.

"(3) A grant made under this subsection shall be transferable to subsequent owners of the property for which the grant is provided.".

**SEC. 104. TECHNICAL ASSISTANCE PROGRAMS.**

Section 5 (16 U.S.C. 1534), as added by section 501 of this Act and as amended by sections 502(a), 503, 504(a), and 505 of this Act, is amended by adding at the end the following new subsection:

"(m) TECHNICAL ASSISTANCE PROGRAM.—

"(1) IN GENERAL.—The Secretary shall initiate a technical assistance program to provide technical advice and assistance to non-Federal persons who wish to participate in achieving the conservation objective for a species. The technical assistance provided shall include information on habitat needs of species, optimum management of habitat for species, methods for propagation of species, feeding needs and habits, predator controls, and any other information which a non-Federal person may utilize or request for the purpose of conserving a species determined to be an endangered species or threatened species or proposed to be determined as an endangered species or threatened species.

"(2) REGULATIONS TO PROVIDE EXEMPTIONS FROM SECTION 9.—The Secretary shall promulgate regulations that establish exemptions from section 9 for any person who participates in a conservation program under this subsection.".

**SEC. 105. WATER RIGHTS.**

Section 6 (16 U.S.C. 1535) is amended by adding at the end the following:

"(j) WATER RIGHTS.—Nothing in this Act shall be construed to supersede, abrogate, or otherwise impair any right or authority of a State to allocate or administer quantities of water (including boundary waters). Nothing in this Act shall be implemented, enforced, or construed to allow any officer or agency of the United States to utilize directly or indirectly the authorities established under this Act to impose any requirement not imposed by the State which would supersede, abrogate, condition, restrict, or otherwise impair rights to the use of water resources allocated under State law, interstate water compact, or Supreme Court decree, or held by the United States for use by a State, its political subdivisions, or its citizens. The exer-

cise of authority pursuant to or in furtherance of this Act shall not be construed to create a limitation on the exercise of rights to water or constitute a cause for non-delivery of water pursuant to contract or State law.".

# TITLE II—IMPROVING ABILITY TO COMPLY WITH THE ENDANGERED SPECIES ACT OF 1973

**SEC. 201. ENFORCEMENT PROCEDURES.**

(a) IN GENERAL.—Section 9(a) (16 U.S.C. 1538(a)) is amended—

(1) in paragraph (1) by amending the matter preceding subparagraph (A) to read as follows:

"(1) Except as provided in paragraph (3), section 6(g)(2), subsections (d)(3) and (e) of section 5, section 7(a), and section 10, with respect to any endangered species of fish or wildlife listed pursuant to section 4 it is unlawful for any person subject to the jurisdiction of the United States to—";

(2) in paragraph (2) by amending the matter preceding subparagraph (A) to read as follows:

"(2) Except as provided in section 6(g)(2), subsections (d)(3) and (e) of section 5, and section 10, with respect to any endangered species of plants listed pursuant to section 4, it is unlawful for any person subject to the jurisdiction of the United States to—"; and

(3) by adding at the end the following new paragraph:

"(3) PERMITTED TAKINGS.—An activity of a non-Federal person is not a taking of a species if the activity—

"(A) is consistent with the provisions of a final conservation plan or conservation objective;

"(B) complies with the terms and conditions of an incidental take permit or a cooperative management agreement;

"(C) addresses a critical, imminent threat to public health or safety or a catastrophic natural event, or is mandated by any Federal, State, or local government agency for public health or safety purposes;

"(D) is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity that consists of—

"(i) on-going maintenance, routine operation or use, and emergency repair of existing pipelines, fire breaks, transmission and distribution lines, groundwater recharge facilities and areas, water storage facilities, water conveyance structures and channels, and appurtenant facilities;

"(ii) road and right-of-away maintenance, use, and repair; or

"(iii) emergency repair or restoration of any property or non-Federal facility to the condition in which it existed or operated immediately before an emergency or disaster, meeting current standards; or

"(E) is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity that occurs within an area of the territorial sea or exclusive economic zone established by Proclamation Numbered 5030, dated March 10, 1983, that is not designated as critical habitat under section 5(i), and the affected species is not a species of fish.".

(b) REWARDS AND INCIDENTAL EXPENSES.—Section 11 (16 U.S.C. 1540) is amended—

(1) in subsection (d)(2) by inserting after "temporary care for any" the following: "endangered species or threatened species of";

(2) in subsection (e)(3) in the fourth sentence by striking "Any fish, wildlife," and inserting "Any endangered species or threatened species of fish or wildlife,";

(3) in subsection (e)(4)(A) by inserting "endangered species or threatened species of" after "All";

(4) in subsection (e)(4)(B) by inserting "endangered species or threatened species of" after "importing of any";

(5) in subsection (f) in the first sentence by inserting "endangered species or threatened species of" after "storage of";

(6) in subsection (a)(1) by striking "knowingly" each place it appears and inserting "with specific intent";

(7) in subsection (b)(1) by striking "knowingly" each place it appears and inserting "with specific intent";

(8) in subsection (e) by adding at the end the following new paragraph:

"(7) ADOPTION OF REGULATIONS.—No interpretation, policy, guideline, finding, or other informal determination may be relied upon by the Secretary in the im-

plementation and enforcement of this Act unless such determination has been the subject of a proposed rule, subject to review by the public and comment for a period of no less than 60 days. Any proposed rule under this subparagraph must include—

"(A) a plain-language explanation of the reasons for and purpose of the proposed rule;

"(B) an analysis of the anticipated impact of the proposed rule;

"(C) an analysis showing that the restoration benefit of the proposed rule outweighs any negative conservation impact of that proposed rule;

"(D) an analysis showing that compliance with the proposed rule is reasonably within the means of the State or the range nation concerned; and

"(E) a summary of the literature reviewed and experts consulted in regard to the species involved, and a summary of the Secretary's findings based on that review and consultation.

"(8) BASIS FOR REFUSAL OF ENTRY.—No refusal of entry, seizure of evidence, or other enforcement action may take place under this Act if the action is based solely on a notification under the Convention or on a resolution of the Conference of the Parties to the Convention.

"(9) DETENTION FOR PURPOSE OF IDENTIFICATION.—The burden is on the Secretary to show that a specimen belongs to a species which is determined to be an endangered species or threatened species under this Act or is included in an Appendix to the Convention. The Secretary may not detain a specimen for longer than 30 days for the purpose of identification except where the specimen has been substantially changed from its natural appearance, in which case it may be retained for an additional 30 days for identification. If the specimen cannot be positively identified within that time, then it shall be released."; and

(9) by amending subsection (g) to read as follows:

"(g) CITIZEN SUITS.—

"(1) IN GENERAL.—Except as provided in paragraph (2), a civil suit may be commenced by any person on his or her own behalf, who satisfies the requirements of the Constitution and who has suffered or is threatened with economic or other injury resulting from the violation, regulation, application, nonapplication, or failure to act—

"(A) to enjoin the United States or any agency or official of the United States who is alleged to be in violation of any provision of this Act or regulation issued under the authority thereof, if the violation poses immediate and irreparable harm to a threatened species or endangered species;

"(B) to compel the Secretary to apply, or modify the application of, the prohibitions set forth in or authorized pursuant to section 9(a)(1)(B) or 4(d);

"(C) to compel the Secretary to apply, or modify the application of, the provisions of section 10(a); or

"(D) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 4(d) which is not discretionary with the Secretary.

The district courts shall have jurisdiction to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be.

"(2) PREREQUISITE PROCEDURES.—(A) No action may be commenced under paragraph (1)(A)—

"(i) prior to 60 days after written notice of the alleged violation has been given to the Secretary, and to any agency or official of the United States who is alleged to be in violation, except that a State may commence an action at any time;

"(ii) if the Secretary has commenced action to impose a penalty pursuant to subsection (a); 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 the alleged violation of any such provision or regulation.

"(B) No action may be commenced under paragraph (1)(B) prior to 60 days after written notice has been given to the Secretary setting forth the reasons for applying, or modifying the application of, the prohibitions with respect to the taking of a threatened species.

"(C) No action may be commenced under paragraph (1)(C) prior to 60 days after written notice has been given to the Secretary, except that such action may be brought immediately after such notification in the case of an action under this subsection respecting an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants.

"(3) VENUE.—Any suit under this subsection may be brought in the judicial district in which the violation occurs.

"(4) COSTS.—The court, in issuing any final order in any suit brought pursuant to paragraph (1), may award costs of litigation (excluding attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

"(5) INJUNCTIVE RELIEF.—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).

"(6) INTERVENTION.—Any person may intervene as a matter of right in any civil suit brought under this subsection if such suit presents a reasonable threat of economic injury to such person. Any intervenor under this paragraph shall have the same right to present argument and to accept or reject potential settlements as do the parties to the suit.".

**SEC. 202. REMOVING PUNITIVE DISINCENTIVES.**

Section 3(26) (as redesignated by section 102(a)(1) of this Act) is amended to read as follows:

"(26)(A) The term 'take' means to harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in that conduct.

"(B) In subparagraph (A), the term 'harm' means an action that proximately and foreseeably kills or physically injures an identifiable member of an endangered species.".

**SEC. 203. ALLOWING NON-FEDERAL PERSONS TO USE THE CONSULTATION PROCEDURES.**

Section 10(a) (16 U.S.C. 1539(a)), as amended by section 204(b) of this Act, is amended by adding at the end the following new paragraph:

"(3) VOLUNTARY CONSULTATION.—(A) Subject to such regulations as the Secretary may issue, any non-Federal person may initiate consultation with the Secretary on any prospective activity of the person—

"(i) to determine if the activity is consistent or inconsistent with a conservation plan or conservation objective; or

"(ii) if the person determines that the activity is inconsistent, to determine whether the activity is likely to jeopardize the continued existence of an endangered species or a threatened species, or to destroy or adversely modify the designated critical habitat of the species in a manner that is likely to jeopardize the continued existence of the species.

"(B) The voluntary consultation process for non-Federal persons authorized by subparagraph (A) shall be conducted in accordance with the procedures and requirements for consultation on agency actions set forth in section 7, except that—

"(i) the period for completion of the consultation shall be 90 days from the date on which the consultation is initiated, or not later than such other date as is mutually agreeable to the Secretary and the person initiating the consultation;

"(ii) the person initiating the consultation shall not be required to prepare a biological assessment or equivalent document;

"(iii) neither the activity for which the consultation process is sought nor the consultation process itself shall be deemed a Federal action for the purpose of compliance with section 102(2) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)) or an agency action for the purpose of compliance with the consultation requirement of section 7(a)(2);

"(iv) the Secretary shall provide the person initiating the consultation with a written opinion only, unless such person requests a permit referred to in paragraph (1)(B) and meets the requirements of clause (v); and

"(v) a permit described in clause (iv) shall be issued if the Secretary makes a finding of—

"(I) consistency pursuant to subparagraph (A)(i);

"(II) no jeopardy pursuant to subparagraph (A)(ii); or

"(III) jeopardy pursuant to subparagraph (A)(ii), but offers a reasonable and prudent alternative which the person initiating the consultation accepts.

"(C) Any person that is not an owner of property is prohibited from participating in the consultation process under this paragraph with respect to the property without written permission from the owner of the property.".

**SEC. 204. PERMITTING REQUIREMENTS FOR INCIDENTAL TAKES.**

(a) INCIDENTAL TAKE PERMIT DEFINED.—Section 3 (16 U.S.C. 1532) is amended by adding after paragraph (14) (as added by section 301(b)(3) of this Act) the following new paragraph:

"(15) The term 'incidental take permit' means a permit issued under section 10(a)(1)(B).".

(b) TAKE PERMITS.—Section 10 (16 U.S.C. 1539) is amended by striking so much as precedes subsection (b) and inserting the following:

**"SEC. 10. EXCEPTIONS.**

"(a) PERMITS.—

"(1) AUTHORITY TO ISSUE PERMITS.—The Secretary may permit, under such terms and conditions as the Secretary shall prescribe—

"(A) any act otherwise prohibited by section 9 undertaken for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to—

"(i) acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j);

"(ii) the public display or exhibition of living wildlife in a manner designed to educate, or which otherwise contributes to the education of the public about the ecological role and conservation needs of the affected species;

"(iii) in the case of foreign species, acts that are consistent with the Convention and with conservation strategies adopted by the foreign nations responsible for the conservation of the species; and

"(iv) acts necessary for the research in and carrying out of captive propagation; or

"(B) any taking otherwise prohibited by section 9(a)(1)(B) if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

"(2) SPECIES CONSERVATION PLANS.—(A) Except as provided in paragraph (3), no permit may be issued by the Secretary authorizing any taking referred to in paragraph (1)(B) unless the applicant therefor submits to the Secretary a species conservation plan that specifies—

"(i) the impact on the species which will be the likely result of the activities to be permitted;

"(ii) what steps the applicant can reasonably and economically take consistent with the purposes and objectives of the activity to minimize such impacts, and the funding that will be available to implement such steps; and

"(iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized.

"(B) If the Secretary finds, after opportunity for public comment, with respect to a permit application and the related species conservation plan that—

"(i) the taking will be incidental;

"(ii) the applicant will, to the extent reasonable and economically practicable, minimize the impacts of such taking;

"(iii) the applicant will ensure that adequate funding for the plan will be provided;

"(iv) the taking will not appreciably reduce the likelihood of the survival and conservation of the species; and

"(v) the measures specified under subparagraph (A)(ii) will be met;

and the Secretary has received such other assurances as the Secretary may require that the plan will be implemented, the Secretary shall issue the permit. The permit shall contain such reasonable and economically practicable terms and conditions consistent with the purposes and objectives of the activity as the Secretary deems necessary or appropriate to carry out the purposes of this paragraph, including, but not limited to, such reporting requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with.

"(C) The Secretary may not require the applicant, as a condition of processing the application or issuing the permit, to expand the application to include land, an interest in land, right to use or receive water, or a proprietary water right not owned by the applicant or to address a species other than the species for which the application is made.

"(D)(i) The Secretary shall complete the processing of, and approve or deny, any application for a permit under paragraph (1)(B) within 90 days of the date of submission of the application or within such other period of time after such

date of submission to which the Secretary and the permit applicant mutually agree.

"(ii) The preparation and approval of a species conservation plan and issuance of a permit under paragraph (1)(B) shall not be subject to section 102(2) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)).

"(E) No additional measures to minimize and mitigate impacts on a species that is a subject of a permit issued under paragraph (1)(B) shall be required of a permittee that is in compliance with the permit. With respect to any species that is a subject of such a permit, under no circumstance shall a permittee in compliance with the permit be required to make any additional payment for any purpose, or accept any additional restriction on any parcel of land available for development or land management or any water or water-related right under the permit, without the consent of the permittee.

"(F)(i) For such activities as the Secretary determines will not appreciably reduce the chances of survival of a species, the Secretary may issue an interim permit to any applicant for a permit under this section that provides evidence of appropriate interim measures that—

"(I) will minimize impacts of any incidental taking that may be associated with the activity proposed for permitting; and

"(II) are to be performed while the underlying permit application is being considered under this section.

"(ii) An interim permit issued under clause (i)—

"(I) shall specifically state the types of activities that are authorized to be carried out under the interim permit;

"(II) shall not create any right to the issuance of a permit under this section;

"(III) shall expire on the date of the granting or denial of the underlying permit application; and

"(IV) may be revoked by the Secretary upon failure to comply with any term of the interim permit.

"(G) The Secretary shall revoke a permit issued under this paragraph if he finds that the permittee is not complying with the terms and conditions of the permit.".

(c) MULTI-SPECIES PLANNING.—Section 10 (16 U.S.C. 1539) is amended by adding at the end the following new subsection:

"(k) MULTIPLE SPECIES CONSERVATION PLANS.—

"(1) DEVELOPMENT.—The Secretary may assist a non-Federal person in the development of a plan, to be known as a 'multiple species conservation plan', for the conservation of—

"(A) any species with respect to which a finding is made and a status review is commenced under section 4(b)(3)(B); and

"(B) any other species that—

"(i) inhabit the area covered by the plan; and

"(ii) are designated in the plan or are within a taxonomic group designated in the plan.

"(2) ISSUANCE OF PERMITS.—A non-Federal person may submit a species conservation plan prepared under this subsection for the conservation of multiple species to the Secretary for approval under subsection (a)(2). If the Secretary approves the plan, the Secretary shall issue an incidental take permit authorizing take of any threatened species subject to the plan under section 4(d). The Secretary shall also recommend terms and conditions to address species subject to the plan which have not been determined to be endangered species or threatened species.

"(3) EFFECT OF LISTING OF SPECIES.—A multiple species conservation plan developed under this subsection and a permit issued with respect to the plan shall remain in effect and shall not be required to be amended if a species to which the plan and permit apply is determined to be an endangered species or a threatened species under section 4, except that the Secretary's recommendations under paragraph (2) shall become terms and conditions of the permit. No additional restrictions or prohibitions under this Act shall be imposed upon the plan permittee for such species or geographic area beyond those provided for in the approved plan or the permit terms and conditions.

"(4) CONSIDERATION OF STATE RECOMMENDATIONS.—The Secretary shall, in cooperation with the States, develop a process whereby full consideration can be given to State recommendations regarding standards and guidelines for the development and approval of a broad range of multiple species conservation plans. To the maximum extent practicable and consistent with the conservation of the affected species, such standards and guidelines shall—

"(A) develop clear criteria by which conservation plans would be approved;

"(B) encourage the development of conservation plans which would reduce economic impacts while providing conservation of affected species;

"(C) include assurances that further conservation measures would not be required of a non-Federal person should any species dependent upon that habitat type be subsequently listed unless any additional costs are assumed by the Secretary; and

"(D) provide incentives to a non-Federal person who voluntarily agrees to manage to enhance habitat for species on their property by excluding them from restrictions if they later return their land to its previous condition or use.

"(5) TECHNICAL ASSISTANCE OR GUIDANCE.—To the maximum extent practicable, the Secretary and other Federal agencies, in cooperation with the affected States, are authorized and encouraged to provide technical assistance or guidance to any non-Federal person who is developing a multiple species conservation plan pursuant to this subsection.".

(d) FOREIGN SPECIES.—Section 10(a), as amended by subsection (b) of this section and sections 203 and 205(a) of this Act, is amended by adding at the end the following new paragraph:

"(7) FOREIGN SPECIES.—(A) In determining whether to issue a permit under subsection (a)(1)(A)(iii), there shall be a rebuttable presumption that the survival of a species is enhanced by the ordinary benefit occurring from the taking of a specimen for an inherently limited use in accordance with the laws and wildlife management policies of the nation in which it is found.

"(B) The Secretary may not refuse to issue a permit for such specimens and may not limit the number of such specimens which may be imported unless he makes and publishes in the Federal Register a finding that there is substantial evidence that the detriment resulting from the taking of such specimens outweighs the benefit derived, and subsequently promulgates regulations containing the limitation.

"(C) The Secretary shall transmit the full text and a complete description of the proposed regulation referred to in the preceding paragraph directly to the appropriate wildlife management authorities of the nations from which the specimens are exported, in the language of those countries, with at least 180 days allowed for review and comment. The 180-day period shall be counted from the date of the delivery of the materials to the wildlife management authority of each of the nations.

"(D) For the purpose of this paragraph, the term 'inherently limited use' means scientific collection, live export for captive breeding, sport hunting, and falconry.".

(e) EXPEDITED PERMITTING PROCESS FOR LOW-IMPACT ACTIVITIES.—Section 10(a), as amended by subsections (b) and (d) of this section and sections 203, 205(a), and 401(f) of this Act, is amended by adding at the end the following new paragraph:

"(9) EXPEDITED PERMITTING PROCESS FOR LOW-IMPACT ACTIVITIES.—(A) Not later than 180 days after the date of the enactment of the Endangered Species Conservation and Management Amendments of 1995, the Secretary shall issue regulations which establish a simple, standardized application form for a permit under paragraph (1)(B) for a low-impact activity.

"(B) If a person submits an application for a permit under paragraph (1)(B) in accordance with the form established by the Secretary under subparagraph (A)—

"(i) the person shall not be required to submit any other information to obtain the permit; and

"(ii) the Secretary shall complete processing of the application, and approve or deny the permit, within 30 days after the date the Secretary receives the completed application.

"(C) The regulations under this paragraph—

"(i) shall describe classes of activities that are low-impact activities for purposes of this paragraph; and

"(ii) shall treat as a low-impact activity any activity which has no significant effect on the survival of endangered species and threatened species.

"(D) For purposes of this paragraph, the term 'low-impact activity' means an activity in a class of activities described in regulations under subparagraph (C)(i).".

**SEC. 205. GENERAL, RESEARCH, AND EDUCATIONAL PERMITS.**

(a) IN GENERAL.—Section 10(a) (16 U.S.C. 1539(a)), as amended by sections 203 and 204(b) of this Act, is amended by adding at the end the following new paragraphs:

"(4) GENERAL PERMITS.—(A) After providing notice and opportunity for public hearing, the Secretary may issue a general permit under paragraph (1)(B) on a county, parish, State, regional, or nationwide basis for any category of activities that may affect a species determined to be an endangered species or threatened species if the Secretary determines that the activities in the category are similar in nature, will cause only minimal adverse effects on the species if performed separately, and will have only minimal cumulative adverse effects on the species generally. A general permit issued under this paragraph shall specify the requirements and standards that apply to an activity authorized by the general permit.

"(B) A general permit issued under this paragraph shall be effective for a period to be specified by the Secretary, but not to exceed the 5-year period that begins on the date of issuance of the permit.

"(C) The Secretary may revoke or modify a general permit if, after providing notice and opportunity for public hearing, the Secretary determines that the activities authorized by the general permit have a greater than minimal adverse effect on a species that is included in a list published under section 4(c)(1) or that the activities are more appropriately authorized by individual permits issued under paragraph (1) or (3).

"(5) RESEARCH ON ALTERNATIVE METHODS AND TECHNOLOGIES.—Priority for issuing permits under paragraph (1)(A) shall be accorded to applications for permits to conduct research, captive breeding, or education on alternative methods and technologies, and the comparative costs of the methods and technologies, to reduce the incidental taking as described in paragraph (1)(B) of an endangered species or a threatened species for which the employment of existing methods or technologies for avoidance of the incidental taking entails significant costs for non-Federal persons.

"(6) EDUCATIONAL OR PROPAGATION PERMITS.—(A) A permit under paragraph (1)(A)(ii) or (iv) shall be issued if—

"(i)(I) the applicant holds a current and valid license as an exhibitor under the Animal Welfare Act (7 U.S.C. 2131 et seq.);

"(II) in the case of a permit under paragraph (1)(A)(ii), the applicant maintains a public display or exhibition of living wildlife described in that paragraph; and

"(III) viewing of the public display or exhibition is not limited or restricted other than by charging an admission fee; or

"(ii) in the case of a permit under paragraph (1)(A)(iv), the applicant has demonstrated the ability to use propagation techniques that result in increases in the populations of species held in captivity for eventual release into the wild, maintenance of live specimens, or falconry purposes.

"(B)(i) The Secretary shall issue an educational or propagation permit as authorized in subparagraph (A) within 30 days from the effective date of this subparagraph to any qualified organization or qualified person for educational or propagation purposes, who has demonstrated the ability to propagate, handle, or recover species for a minimum of 15 years or who had at least 10 permits in the aggregate issued pursuant to this Act or any of the laws listed in subparagraph (H).

"(ii) The Secretary shall issue a permit within 90 days of receipt of a completed application from any qualified organization or person who currently does not hold any permit but who has demonstrated the ability to handle or recover species for a minimum of 15 years of who has received at least 10 permits in the aggregate and who has not violated any terms or conditions of any permits previously issued pursuant to this Act or the laws listed in subparagraph (H).

"(C) A permit referred to in paragraph (1)(A)(ii) shall be for a term of not less than 6 years.

"(D) A permit referred to in paragraph (1)(A)(ii) shall also authorize the permittee to import, export, sell, purchase, or otherwise transfer possession of the affected species.

"(E) The Secretary shall revoke a permit referred to in paragraph (1)(A)(ii) if the Secretary determines that the permittee—

"(i) no longer meets the requirements of subparagraph (A) and is not reasonably likely to meet the requirements in the near future;

"(ii) is not complying with the terms and conditions of the permit; or

"(iii) is engaging in an activity likely to jeopardize the continued existence of the species subject to the permit.

"(F) The Secretary may require an annual report on the activities authorized by a general permit, but may not require reports more frequently than annually.

"(G) A permit authorized in this paragraph shall be the only permit required for the activities authorized therein, and may cover activities for one or more species or taxa simultaneously.

"(H) The authorizations for any activities permitted under this paragraph or permitted by the Bald Eagle Protection Act (16 U.S.C. 668–668d), the Fish and Wildlife Conservation Act of 1980 (16 U.S.C. 2901–2911), the Lacey Act Amendments of 1981 (18 U.S.C. 42; 16 U.S.C. 3371–3378), the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361–1407), the Migratory Bird Conservation Act (16 U.S.C. 715–715d), the Migratory Bird Treaty Act (16 U.S.C. 703–712), or the Wild Bird Conservation Act of 1992 (Public Law 102–440) shall be consolidated into a general permit to cover all authorized activities, notwithstanding any law or regulation to the contrary.".

(b) EXCEPTIONS FOR WILDLIFE BRED IN CAPTIVITY.—Section 10, as amended by section 204(c) of this Act, is amended by adding at the end the following new subsection:

"(l) WILDLIFE BRED IN CAPTIVITY.—For the purposes of this Act or any regulation adopted pursuant to this Act, the terms 'bred in captivity' or 'captive-bred', with respect to wildlife, means wildlife, including eggs, born or otherwise produced in captivity from parents that mated or otherwise transferred gametes in captivity if reproduction is sexual, or from parents that were in captivity when development of the progeny began, if development is asexual. Such progeny shall be considered domestic fish or wildlife for all purposes and shall not come under the provisions and prohibitions of this Act and the laws listed in subsection (a)(6)(H) unless intentionally and permanently released to the wild. Any person holding any fish or wildlife or their progeny as described in this subsection must be able to demonstrate that such fish or wildlife do, in fact, qualify under the provision of this subsection, and shall maintain and submit to the Secretary, on request, such inventories, documentation, and records as the Secretary may by regulation require as being reasonable and appropriate to carry out the purposes of this subsection. Such requirements shall not unnecessarily duplicate the requirements of other rules and regulations promulgated by the Secretary.".

**SEC. 206. MAINTENANCE OF AQUATIC HABITATS FOR LISTED SPECIES.**

The Endangered Species Act of 1973 (16 U.S.C. 1851 et seq.) is amended by adding at the end the following new section:

**"SEC. 20. RECOGNIZING NET BENEFITS TO AQUATIC SPECIES.**

"(a) ENCOURAGING NET BENEFITS.—In carrying out this Act, if the number of individual members of an endangered species or threatened species exiting an aquatic habitat area under the control, authority or ownership of a non-Federal person is equal to or greater than the number of individual members of the species entering such area, the Secretary shall not require, provide for, or recommend the imposition of any restriction or obligation on the activity of the non-Federal person in a manner which would require the non-Federal person to support the maintenance of any greater number of individual members of the species than that which enters such aquatic habitat area.

"(b) CONSIDERATION OF HATCHERY POPULATIONS.—In calculating the number of individual members of a species entering and exiting a specific aquatic habitat area pursuant to this section, the Secretary shall consider hatchery populations.

"(c) LIMITATIONS.—The Secretary shall not require, provide for, or recommend the imposition of any restriction or obligation on the activity of any non-Federal person in an aquatic habitat area to remedy adverse impacts on a species resulting from activities of individuals other than the non-Federal person.".

**SEC. 207. COMPLIANCE WITH INTERNATIONAL REQUIREMENTS AND TREATIES.**

(a) RESPECTING THE SOVEREIGNTY OF OTHER NATIONS.—Section 8 (16 U.S.C. 1537) is amended by adding at the end the following new subsection:

"(e) ENCOURAGEMENT OF FOREIGN PROGRAMS.—Any action taken by the Secretary pursuant to this Act in regard to a foreign species which occurs in a country which is a party to the Convention—

"(1) shall be done in cooperation with the wildlife conservation authorities of such country; and

"(2) shall not obstruct any wildlife conservation program of such country unless the Secretary can show, based on adequate findings supported by substan-

tial evidence, that the country's wildlife conservation program for the species in question is not consistent with the Convention.".

(b) COMPLIANCE WITH THE CONVENTION.—Section 8A (16 U.S.C. 1537a) is amended by adding at the end the following new subsections:

"(f) NONDUPLICATION OF FINDINGS.—The Secretary, in making the findings required in paragraph 3(a) of Article III of the Convention, shall limit such findings to the purpose of the importation, and shall not duplicate the findings required to be made by the exporting nation except for good cause based on adequate findings supported by substantial evidence.

"(g) RELATIONSHIP OF PROTECTIVE REGULATIONS TO THE CONVENTION.—In determining the provisions of protective regulations pursuant to section 4(d) of this Act when such regulations relate to a foreign species—

"(1) the Secretary may not prohibit any act that is permissible under the Convention, notwithstanding Article XIV of the Convention;

"(2) the Secretary shall, prior to publishing a proposal for such protective regulations in the Federal Register, transmit the full text and a complete description of the proposed regulation directly to the appropriate wildlife management authority of that country, in the language of that country, with at least 180 days allowed for review and comment, the 180 days shall be counted from the date of delivery of the materials to the wildlife authorities of the country;

"(3) such transmission must be accompanied by—

"(A) a plain-language explanation of the reasons for and purpose of the proposed regulation;

"(B) an analysis of the anticipated beneficial impact or detrimental impact of the regulation on the economic, social, and cultural utilization of the species, if any, and of the beneficial or detrimental impact on the resource management and conservation programs of that country; and

"(C) a summary of the literature reviewed and experts consulted by the Secretary in regard to the species involved, and a summary of the Secretary's findings based on that review and consultation;

"(4) the Secretary shall enter into discussions with appropriate wildlife management officials of the countries to which he has sent the transmission referred to in the previous paragraph, and if those officials feel that further studies of the species are indicated the Secretary may assist in finding funds from private sources for such studies and in carrying out the studies; and

"(5) the Secretary must obtain the written concurrence of all the nations contacted, and if such concurrence is not obtained the Secretary may not issue the proposed regulation except by an order submitted to and approved by the President.".

(c) CONSERVATION OF THREATENED SPECIES.—Section 9 (16 U.S.C. 1538), as amended by section 206 of this Act, is amended by adding at the end the following new subsection:

"(h) IMPORTATION AND EXPORTATION.—

"(1) LIMITATION ON IMPORTATION.—The prohibition on importation in subsection (a) of this section shall not apply to a specimen of a threatened species taken for an inherently limited use in accordance with the laws of a foreign nation which is a party to the Convention and accompanied by an export permit issued by that nation or an equivalent document. For the purpose of this subsection, the term 'inherently limited use' means scientific collection, live export for captive breeding, sport hunting, and falconry.

"(2) REGULATIONS FOR SHIPPING UNDER CONVENTION.—(A) The Secretary shall adopt regulations regarding the finding required by the Convention that live specimens exported from the United States will be so prepared as to minimize the risk of injury, damage to health, or cruel treatment. Such regulations shall provide clear, consistent and reliable guidance to exporters.

"(B) In any instance in which the Secretary believes that a shipment for export is not prepared in accordance with the regulations, a detailed written notice of noncompliance shall be issued to the exporter. The notice shall contain recommendations as to how future shipments should be modified in order to come into compliance with the regulations. The notice shall go into effect 30 days after receipt by the shipper, subject to appeal to an Administrative Law Judge or a court. The filing of an appeal shall toll the effectiveness of the notice. The issue of noncompliance may be appealed as well as the issue of the appropriateness of the recommendation for compliance.".

**SEC. 208. INCENTIVES FOR PROTECTION OF MARINE SPECIES.**

(a) IN GENERAL.—Section 10 (16 U.S.C. 1539), as amended by section 205(b) of this Act, is amended by adding at the end the following new subsection:

"(m) INCENTIVES.—(1) The Secretary shall exempt, under such terms and conditions as the Secretary may prescribe by regulation, any operator of a trawl vessel required to use a turtle excluder device under regulations promulgated under this Act from such requirement if such operator agrees to support a conservation program approved under paragraph (2) and such support is determined to be appropriate under paragraph (4).

"(2) No later than 180 days after the effective date of this subsection and each year thereafter, the Secretary shall—

"(A) review all those programs intended to conserve the endangered species and threatened species of sea turtles found in the Gulf of Mexico and along the Atlantic seaboard, including those programs involving protection of nesting beaches in other nations;

"(B) approve any such program determined by the Secretary to be of significant benefit to the recovery of the species of such sea turtles under this subsection; and

"(C) publish notice of such determination in the Federal Register.

"(3)(A) Any person or group of persons operating trawl vessels may submit in writing a request to the Secretary for an exemption under this subsection.

"(B) Not later than 60 days after receipt of such request the Secretary shall provide such person or group written notice of the issuance or denial of such request.

"(4) The Secretary shall determine that the support offered by an operator in a written request submitted under paragraph (3) is appropriate if the benefits provided by such support to the recovery of such species exceed any harm to the recovery of such species incurred as a result of the operator not using turtle excluder devices under an exemption provided under this subsection.

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

(b) INCIDENTAL TAKE STATEMENTS.—Section 7(b) (16 U.S.C. 1536(b)) is amended by adding at the end of paragraph (4)(C)(ii) the following: "including incentives to encourage the support of conservation programs approved under section 10(k),".

**SEC. 209. INTERNATIONAL COOPERATION TO CONSERVE SEA TURTLES.**

(a) IN GENERAL.—The Secretary of State, in consultation with the Secretary of Commerce and the Secretary of the Interior, may enter into international agreements for the conservation of sea turtles listed under section 4 of the Endangered Species Act of 1973, as amended by this Act.

(b) TERMS OF AGREEMENT.—Any international agreement entered into under this section shall—

(1) provide for the conservation of the habitat and nesting beaches of sea turtles and encourage national programs to enhance sea turtle populations;

(2) include provisions with respect to commercial fishing to ensure that—

(A) the capture, injury, and mortality of sea turtles incidental to such fishing are reduced to the extent practicable;

(B) the productivity of commercial fisheries is maintained; and

(C) measures taken by the nations concerned to reduce the capture, injury, and mortality of sea turtles incidental to such fishing are comparable to each other;

(3) create an institutional mechanism for international cooperation on a continuing basis which can take account of new developments and information, adopt measures relating to commercial fishing, and otherwise facilitate international cooperation;

(4) provide for international cooperation in scientific research on sea turtles; and

(5) provide for effective monitoring and evaluation of measures taken by each country that is party to the agreement to ensure compliance with the agreement by persons and vessels subject to its jurisdiction.

(c) ENTRY INTO FORCE.—International agreements entered into under this section shall enter into force for the United States in accordance with the procedures for governing international fishery agreements set forth in section 203 of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1823).

(d) ACCEPTANCE AND IMPLEMENTATION OF RECOMMENDATIONS.—The Secretary of State is authorized to act for the United States with respect to any international agreement entered into under this section, and to receive, on behalf of the United States, any recommendations for the conservation of sea turtles made pursuant to such agreement. Any such recommendation shall be acted on by the United States unless the Secretaries of State, Commerce, and the Interior agree otherwise. The Secretary of Commerce or the Secretary of the Interior shall promulgate such regulations as may be necessary to carry out any such agreement or recommendation

as has been accepted by the United States, except that no regulation promulgated under this Act may impose restrictions on United States commercial fishing vessels which decrease the productivity of such vessels more than provided for in an agreement or recommendation approved under this section.

(e) REPORT.—The Secretary of State shall submit to Congress, not later than May 1, 1996, and every year thereafter a report describing the efforts of the Secretary to implement this section, the results of such efforts, and any plans for further such efforts. The report shall contain a list of the countries participating effectively in and complying with agreements which have been approved pursuant to subsection (c).

(f) EFFECT ON PRIOR LAW.—Section 609(b) of the Act making appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and related agencies for the fiscal year ending September 30, 1990, and for other purposes (16 U.S.C. 1537 note) shall not apply to any country that is a party to, and is complying with, an agreement entered into under this section whose geographical scope includes the Gulf of Mexico and the Wider Caribbean Sea. The Secretary of State is encouraged to enter into international agreements under this section which include other regions not affected by that Act.

# TITLE III—IMPROVING SCIENTIFIC INTEGRITY OF LISTING DECISIONS AND PROCEDURES

**SEC. 301. IMPROVING THE VALIDITY AND CREDIBILITY OF DECISIONS.**

(a) BASING LISTINGS ON CREDIBLE SCIENCE.—

(1) LISTING DETERMINATIONS.—Section 4 (16 U.S.C. 1533) is amended—

(A) by striking so much as precedes subsection (a)(2) and inserting the following:

**"SEC. 4. DETERMINATION OF ENDANGERED SPECIES AND THREATENED SPECIES.**

"(a) GENERALLY.—(1) The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of any of the following factors:

"(A) The present or threatened loss of its habitat.

"(B) Overutilization for commercial, recreational, scientific, or educational purposes.

"(C) Disease or predation.

"(D) The inadequacy of existing Federal, State, and local government regulatory mechanisms.

"(E) Other natural or manmade factors affecting its continued existence.";

(B) by striking paragraph (3) of subsection (a); and

(C) by amending so much of subsection (b) as precedes paragraph (3) to read as follows:

"(b) SECRETARIAL DETERMINATIONS.—

"(1) BASIS FOR DETERMINATION.—(A) The Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available to the Secretary after conducting a review of the status of the species and after soliciting and fully considering the best scientific and commercial data available concerning the status of a species from any affected State or any interested non-Federal person, and taking into account those efforts being made by any State, any political subdivision of a State, or any non-Federal person or conservation organization, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas, and shall accord greater weight, consideration, and preference to empirical data rather than projections or other extrapolations developed through modeling.

"(B) In making a determination whether a species is an endangered species or a threatened species under this section, the Secretary shall fully consider populations of the species that are bred through private sector, university, and Federal, State, and local government breeding programs for release in the habitat of the species. In the case of fish species, the bred populations referred to in the preceding sentence shall include hatchery populations.

"(C) In making a determination whether a species is an endangered species or threatened species under this section, the Secretary shall consider the future conservation benefits to be provided to the species under any species conservation plans prepared pursuant to section 10 or to any cooperative management agreement entered into under section 6.

"(2) CONSIDERATION OF STATE RECOMMENDATIONS.—In making a determination pursuant to paragraph (1), the Secretary shall give consideration to species which have been identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency that is responsible for the conservation of fish or wildlife or plants.".

(2) STANDARDS FOR TAXONOMIC DECISIONS.—Section 4(b)(1) (15 U.S.C. 1533(b)(1)), as amended by paragraph (1), is further amended by adding at the end the following:

"(D) Within 18 months after the date of the enactment of the Endangered Species Conservation and Management Act of 1995, the Secretary shall promulgate scientifically valid standards for rendering taxonomic determinations of species and subspecies. The standards shall provide that to be eligible for determination as a subspecies under this Act, a subspecies must be reproductively isolated from other subspecific population units and constitute an important component in the evolutionary legacy of the species.".

(3) LISTING FOREIGN SPECIES.—Section 4(b) (16 U.S.C. 1533(b)), as amended by subsection (f) of this section, is amended by adding at the end the following new paragraph:

"(10) FOREIGN SPECIES.—(A) In determining under subsection (a) whether a foreign species is an endangered species or a threatened species, the Secretary shall not determine that a species that is listed under the Convention is endangered or threatened unless he makes an adequate finding, supported by substantial evidence, that the Convention does not provide adequate regulation.

"(B) The Secretary shall, prior to publishing a proposal in the Federal Register to determine that a foreign species is endangered or threatened, transmit the full text and a complete description of the proposed listing directly to the appropriate wildlife management authority of that nation, in the language of that nation, with at least 180 days allowed for review and comment. The 180 days shall be counted from the date of delivery of the materials supporting the proposed listing to the wildlife authorities of the country.

"(C) Such transmission must be accompanied by—

"(i) a plain-language explanation of the objective criteria for and purpose of the proposed listing;

"(ii) an analysis of the anticipated beneficial impact or detrimental impact of the listing on the economic, social, and cultural utilization of the species, if any, and of the beneficial or detrimental impact on the resource management and conservation programs of that nation; and

"(iii) a summary of the literature reviewed and experts consulted by the Secretary in regard to the species involved, and a summary of the Secretary's findings based on that review and consultation.

"(D) The Secretary shall enter into discussions with the appropriate wildlife management officials of the nations to which he has sent the transmission referred to in subparagraph (C). If those officials feel that further studies of the species are indicated, the Secretary shall assist in finding the funds for such studies and in carrying out the studies.

"(E) The Secretary must obtain the written concurrence of all the nations contacted. If such concurrence is not obtained, the Secretary may not issue the proposed regulation except by an order submitted to and approved by the President.".

(b) DEFINITIONS.—Section 3 (16 U.S.C. 1532) is amended—

(1) by adding after paragraph (1) the following new paragraph:

"(2) The term 'best scientific and commercial data available' means factual information, including but not limited to peer reviewed scientific information and genetic data, obtainable from any source, including governmental and nongovernmental sources, which has been to the maximum extent feasible verified by field testing.";

(2) by adding after paragraph (7) (as redesignated by section 102(a)(1) of this Act) the following new paragraphs:

"(8) The term 'distinct population of national interest' means a distinct population of a vertebrate species that is not otherwise an endangered species or threatened species in the United States, Canada, or Mexico, but which because of its value to the Nation as a whole has been designated by Congress as needing protection under this Act.

"(8a) The term 'foreign species' means a species naturally occurring outside the territory of the United States, but does not include any marine species, any species having a significant population occurring in the wild within the United States, or any migratory species whose migration route includes United States territory.";

(3) by adding after paragraph (13) (as redesignated by section 102(a)(1) of this Act) the following new paragraph:

"(14) The term 'imminent threat to the existence of', with respect to a species, means, as determined by the Secretary under section 4(b)(7) or the President under section 5(e)(2) solely on the basis of the best scientific and commercial data available, that there is a significant likelihood that the species will become extinct, or will be placed on an irreversible course to extinction, during the 2-year period beginning on the date of the determination that the species is an endangered species or a threatened species, unless the species is accorded fully the protection available under this Act during such period."; and

(4) by amending paragraph (23) (as redesignated by section 102(a)(1) of this Act) to read as follows:

"(23) The term 'species' includes any subspecies of fish or wildlife or plants, and any distinct population of national interest of any species or vertebrate fish or wildlife which interbreeds when mature.".

(c) SOLICITING SCIENTIFIC INFORMATION.—Section 4(b)(3) (16 U.S.C. 1533(b)(3)), as amended by sections 303(a), 304(a), 305(a), and 306 of this Act, is amended by adding at the end the following new subparagraph:

"(F) Before any further action is taken in accordance with this paragraph, the Secretary shall publish in the Federal Register a solicitation for further information regarding the status of a species which is the subject of a proposed rule to list the species as an endangered species or threatened species, including current population, populations trends, current habitat, Federal conservation lands which could provide habitat for the species, food sources, predators, breeding habits, captive breeding efforts, commercial, nonprofit, avocational, or voluntary conservation activities, or other pertinent information which may assist in making a determination under this section. The solicitation shall give a time limit within which to submit the information which shall be not less than 180 days. The time limit shall be extended for an additional 180 days at the request of any person who submits a request for such extension along with the reasons therefor. The Secretary in making the determination required in this subsection, shall give equal weight to the information submitted in accordance with this paragraph.".

(d) EMERGENCY LISTINGS.—Section 4(b)(7) (16 U.S.C. 1533(b)(7)) is amended—

(1) by striking the matter preceding subparagraph (A) and inserting the following:

"(7) EMERGENCY REGULATIONS.—Neither paragraph (4), (5), or (6) of this subsection nor section 553 of title 5, United States Code, shall apply to any regulation issued by the Secretary in regard to any emergency posing an imminent threat to the existence of any species of fish or wildlife or plants, but only if—
"; and

(2) by adding at the end the following new sentence: "The Secretary may not delegate the final decision to issue an emergency regulation under this paragraph.".

(e) USING BEST DATA.—Section 4(b)(8) (16 U.S.C. 1538(b)(8)) is amended—

(1) by striking "the data" and inserting "the best scientific and commercial data available"; and

(2) by adding at the end the following new sentence: "Each regulation proposed by the Secretary to implement a determination referred to in subsection (a)(1) shall be based only upon peer-reviewed scientific information obtainable from any source, including governmental and nongovernmental sources, which has been to the maximum extent feasible verified by field testing.".

(f) IDENTIFYING DATA USED FOR DECISIONS.—Section 4(b) (16 U.S.C. 1533(b)) is amended by adding at the end the following new paragraph:

"(9) PUBLICATION IN FEDERAL REGISTER.—(A) The Secretary shall identify and publish in the Federal Register with each proposed rule under paragraph (1) or section 5(i) a description of—

"(i) all data that are to be considered in making the determination under the subsection to which the proposed rule relates and that have yet to be collected or field verified;

"(ii) data that are necessary to make determinations and that can be collected prior to any determination; and

"(iii) data that are necessary to ensure the scientific validity of the determination, and each deadline for collecting these data.

"(B) In making a determination pursuant to paragraph (1) or section 5(i), the Secretary shall collect and consider the data identified and described pursuant to subparagraph (A)(ii).

"(C) The Secretary shall identify and publish in the Federal Register with each final rule promulgated under paragraph (1) or section 5(i)—

"(i) a description of any data that have not been collected and considered in the determination to which the rule relates and that are necessary to ensure the continued scientific validity of the determination; and

"(ii) each deadline by which the Secretary shall collect and consider the data in accordance with subparagraph (D).

"(D) Not later than the deadline published by the Secretary pursuant to subparagraph (C)(ii), the Secretary shall—

"(i) collect the data referred to in each paragraph;

"(ii) provide an opportunity for public review and comment on the data;

"(iii) consider the data after the review and comment; and

"(iv) publish in the Federal Register the results of that consideration and a description of and schedule for any actions warranted by the data.".

(g) JUDICIAL REVIEW.—Section 4 (16 U.S.C. 1533), as amended by section 302 of this Act, is amended by adding at the end the following new subsection:

"(j) JUDICIAL REVIEW OF DETERMINATIONS.—Any determination with regard to whether a species is a threatened species or endangered species shall be subject to a de novo judicial review with the court determining whether the decision is supported by a preponderance of the evidence.".

(h) ANALYSIS OF ECONOMIC AND SOCIAL EFFECTS.—Section 4(b) (16 U.S.C. 1533(b)), as amended by section 305(d) of this Act, is further amended by adding at the end the following new paragraph:

"(12) ANALYSIS OF ECONOMIC AND SOCIAL COSTS.—Concurrently with a determination that a species warrants listing as an endangered species or threatened species, the Secretary shall issue an analysis of the economic and social effects the listing may have. The analysis shall be published in the Federal Register with the listing determination and shall include an estimate of the effects the listing may have on Federal, State, and local expenditures and revenues, and the costs and benefits of the listing for the private sector, including lost opportunity costs.".

**SEC. 302. PEER REVIEW.**

Section 4 (16 U.S.C. 1533) is amended by adding after subsection (h), as redesignated by section 507(b)(2) of this Act, the following new subsection:

"(i) PEER REVIEW REQUIREMENT.—

"(1) DEFINITIONS.—In this subsection:

"(A) The term 'action' means—

"(i) the determination that a species is an endangered species or a threatened species under subsection (a);

"(ii) the determination under subsection (a) that an endangered species or a threatened species be removed from any list published under subsection (c)(1);

"(iii) the designation, or revision of the designation, of critical habitat for an endangered species or a threatened species under section 5(i); and

"(iv) the determination that a proposed action is likely to jeopardize the continued existence of a listed species and the proposal of any reasonable and prudent alternatives by the Secretary under section 7(b)(3).

"(B) The term 'qualified individual' means an individual with expertise in the biological sciences—

"(i) who is by virtue of advanced education, training, or avocational, academic, commercial, research, or other experience competent to review the adequacy of any scientific methodology supporting the action, the validity of any conclusions drawn from the supporting data, and the competency of the individual who conducted the research or prepared the data;

"(ii) who is not otherwise employed by or under contract to the Secretary or the State in which the species is located;

"(iii) who has not actively participated in the prelisting or listing processes or advocated that a listing decision be made;

"(iv) who has not been employed by or under contract to the Secretary or the State in which the species is located for work related to the action or species under consideration; and

"(v) who has no direct financial interest, and is not employed by any person with a direct financial interest, in opposing the action under consideration.

"(2) LIST OF PEER REVIEWERS.—In order to provide a substantial list of individuals who on a voluntary basis are available to participate in peer review actions, the Secretary shall, through the Federal Register, through scientific and commercial journals, and through the National Academy of Sciences and other such institutions, seek nominations of persons who agree to peer review action upon appointment by the Secretary.

"(3) APPOINTMENT OF PEER REVIEWERS.—Before any action shall become final, the Secretary shall appoint, from among the list prepared in accordance with paragraph (2), not more than 2 qualified individuals who shall review, and report to the Secretary on, the scientific information and analyses on which the proposed action is based. The Governor of each State in which the species is located that is the subject of the proposal, may appoint up to 2 qualified individuals to conduct peer review of the action. If any individual declines the appointment, the Secretary or the Governor shall appoint another individual to conduct the peer review.

"(4) DATA PROVIDED TO PEER REVIEWER.—The Secretary shall make available to each person conducting peer review all scientific information available regarding the species which is the subject of the peer review. The Secretary shall not indicate to a peer reviewer the name of any person that submitted a petition for listing or delisting that is reviewed by the reviewer.

"(5) OPINION OF PEER REVIEWERS.—The peer reviewer shall give his or her opinion with regard to any technical or scientific deficiencies in the proposal, whether the methodology and analysis supporting the petition conform to the standards of the academic and scientific community, and whether the proposal is supported by sufficient credible evidence.

"(6) PUBLICATION OF PEER REVIEW REPORT.—The Secretary shall publish with any final regulation implementing an action a summary of the report of the peer review panel noting points of disagreement between peer reviewers, if any, and the response of the Secretary to the report. The report of the peer reviewers shall be included in the official record of the proposed action and shall be available for public review prior to the close of the comment period on the regulation.".

**SEC. 303. MAKING DATA PUBLIC.**

(a) PUBLIC DATA.—Section 4(b)(3) (16 U.S.C. 1533(b)(3)), as amended by sections 304(a), 305(a), and 306 of this Act, is amended by adding at the end the following new subparagraph:

"(E)(i) All data or information considered by the Secretary in making the determination to list as provided in this section, shall be considered public information and shall be subject to section 552 of title 5, United States Code (commonly referred to as the 'Freedom of Information Act') unless the Secretary, for good cause, determines that the information must be kept confidential. The burden shall be on the Secretary to prove that such information shall be confidential and such decision shall be reviewable by a district court of competent jurisdiction, which shall review the decision in chambers. Good cause can include that the information is of a proprietary nature or that release of the location of the species may endanger the species further.

"(ii) The Secretary shall minimize releasing the identification of particular private property as habitat for a species which is determined to be an endangered species or threatened species or proposed to be determined to be an endangered species or threatened species, unless the Secretary first notifies the owner thereof and receives his or her consent, or the information is otherwise public information.".

(b) PUBLIC HEARINGS.—Section 4(b) (16 U.S.C. 1533(b)) is amended—

(1) in paragraph (5) (as amended by section 305(b) of this Act) by adding at the end the following new subparagraph:

"(E) promptly hold at least 1 hearing in each State in which the species proposed for determination as an endangered species or a threatened species is believed to occur, and in a location that is as close as possible to the center of the habitat of such species in such State, including at least one hearing in an affected rural area specified by the Governor of the State, if the Governor determines that 1 or more rural areas within the State are affected by the determination."; and

(2) in paragraph (6) by amending all that precedes subparagraph (B) to read as follows:

"(6) PUBLICATION OF DETERMINATION.—(A) Within the one-year period beginning on the date on which general notice is published in accordance with paragraph (5)(A)(i) regarding a proposed regulation, the Secretary shall publish in

the Federal Register, if a determination as to whether a species is an endangered species or a threatened species is involved, either—

"(i) a final regulation to implement such determination,

"(ii) a final regulation to implement such revision or a finding that such revision should not be made,

"(iii) notice that such one-year period is being extended under subparagraph (B)(i), or

"(iv) notice that the proposed regulation is being withdrawn under subparagraph (B)(ii), together with the finding on which such withdrawal is based.".

(c) NOTICE OF HEARINGS AND MEETINGS.—Section 14 is amended to read as follows:

**"SEC. 14. PUBLIC HEARINGS AND PUBLIC MEETINGS.**

"(a) IN GENERAL.—Except as otherwise provided by this Act, the Secretary shall provide notice of any hearing or other public meeting at which public comment is accepted under this Act by publication in the Federal Register and in a newspaper of general circulation in the location of the hearing or meeting at least 30 days prior to the hearing or meeting.

"(b) HEARINGS.—Public hearings held pursuant to this Act shall provide an opportunity for the public to make statements and receive information from the agency regarding the impact of the proposal that is the subject of the public hearing. To the maximum extent practicable, the Secretary shall ensure that members of the public are provided with the information sought at the public hearing.".

**SEC. 304. IMPROVING THE PETITION AND DESIGNATION PROCESSES.**

(a) PETITIONS TO LIST.—Section 4(b)(3) (16 U.S.C. 1533(b)(3)) is amended to read as follows:

"(3) PETITIONS.—(A) A petition submitted to the Secretary asserting that a species is a threatened species or endangered species and requesting that the Secretary make a determination to that effect shall contain at a minimum the following:

"(i) Information on the current population and range of the species.

"(ii) Any information on efforts to field test the population estimates on the species.

"(iii) If literature from scientific or other journals, dissertations or other such scientific writings of another person are submitted, they must be accompanied by an affidavit that the literature or writings have been peer reviewed.

"(iv) The qualifications of any person asserting expertise on the species or status of the species.

"(v) Information about the demonstrated habitat needs of the species, along with the known occupied habitat of the species.

"(vi) Known causes of the species decline.

"(B) Petitions to add a species to, or to remove a species from, either of the lists published under subsection (c)(1) shall be submitted in accordance with section 553(e) of title 5, United States Code. The Secretary may commence a review of the status of the species concerned consistent with the priorities set by the Secretary for the listing of species. The Secretary shall promptly publish any finding made under this subparagraph in the Federal Register.".

(b) CONFORMING AMENDMENTS.—Section 4(g), as redesignated by section 507(b)(2), is amended—

(1) by striking paragraph (2); and

(2) by redesignating paragraphs (3) and (4) in order as paragraphs (2) and (3).

**SEC. 305. GREATER STATE INVOLVEMENT.**

(a) STATE CONSULTATION ON PETITIONS.—Section 4(b)(3) (16 U.S.C. 1533(b)(3)), as amended by section 304(a) of this Act, is amended by adding after subparagraph (B) the following subparagraph:

"(C) At the time the review provided in subparagraph (B) is commenced—

"(i) the Secretary shall contact the Governor of each State in which the proposed species is located and shall solicit from the Governor information about the action requested in the petition in that State necessary to render a decision and shall solicit the advice of the Governor on whether the status of species merits the action petitioned for, and if the Governor advises that the petition action is not warranted and thereafter the Secretary proceeds with the action, the Secretary shall have the burden of showing that the

information submitted by the Governor is incorrect and that the action is warranted; and

"(ii) the Secretary shall, to the maximum extent feasible, require by field testing, the verification of the information presented regarding the status of the species.".

(b) REGULATIONS TO IMPLEMENT DETERMINATIONS.—Section 4(b)(5) (16 U.S.C. 1533(b)(5)) is amended to read as follows:

"(5) NOTICE REQUIRED.—With respect to any regulation proposed by the Secretary to implement a determination referred to in subsection (a)(1) of this section, the Secretary shall—

"(A) not less than 90 days before the effective date of the regulation—

"(i) publish a general notice and the complete text of the proposed regulation in the Federal Register, and

"(ii) give actual notice of the proposed regulation (including the complete text of the regulation) to the Governor of each State in which the species is believed to occur, and invite the determination of such State as to whether the action is warranted and if the Governor notifies the Secretary that the action is not warranted, the Secretary must provide to the Governor a record of decision for such determination, including information made available to the Secretary which did not support the determination, and the written reasons for the determination;

"(B) in cooperation with the Secretary of State, give notice of the proposed regulation to each foreign nation in which the species is believed to occur or whose citizens harvest the species on the high seas, and consult with such nation thereon;

"(C) give notice of the proposed regulation to any person who requests such notice, any person who has submitted additional data, each State and local government within which the species is believed to occur or which is likely to experience any effects of any measures to protect the species under this Act, and such professional scientific organizations as the Secretary deems appropriate;

"(D) publish a summary of the proposed regulation in a newspaper of general circulation in each area of the United States in which the species is believed to occur; and".

(c) STATE CONSULTATION ON FINAL DETERMINATION.—Section 4(h), as redesignated by section 507(b)(2) of this Act, is amended to read as follows:

"(h) SUBMISSION TO STATE AGENCY OF JUSTIFICATION FOR REGULATIONS INCONSISTENT WITH STATE AGENCY'S COMMENTS OR PETITION.—If, in the case of any regulation proposed by the Secretary under the authority of this section, a Governor who consulted with the Secretary in accordance with subsection (b)(5)(A)(ii) of this section files comments disagreeing with all or part of the proposed regulation, the Secretary shall not issue a final regulation which is in conflict with such comments until the Secretary further consults with the President. If the Secretary adopts a final regulation in conflict with comments made by the Governor of a State or fails to adopt a regulation pursuant to an action petitioned by a Governor under subsection (b)(3) of this section, the Secretary shall submit to the Governor a written justification for the failure of the Secretary to adopt regulations consistent with the comments or petition of the Governor.".

(d) FACA.—Section 4(b) (16 U.S.C. 1533(b)), as amended by section 301(a)(3) and (f) of this Act, is further amended by adding at the end the following new paragraph:

"(11) FACA.—Consultation with States regarding petitions and proposed regulations under this subsection shall not be subject to the Federal Advisory Committee Act (5 U.S.C. App.).".

**SEC. 306. MONITORING THE STATUS OF SPECIES.**

Section 4(b)(3) (16 U.S.C. 1533(b)(3)), as amended by sections 304(a) and 305(a) of this Act, is amended by adding after subparagraph (C) the following subparagraph:

"(D) The Secretary shall implement a system to monitor effectively the status of all species with respect to which a finding is made that the petitioned action is warranted but precluded by proposals to determine whether any species is an endangered species or a threatened species and progress is being made to add qualified species to the list published under subsection (c) and to remove from lists published under that subsection species for which protection of this Act is no longer necessary, and shall make prompt use of the authority under paragraph (7) to prevent an imminent threat to the existence of any such species.".

**SEC. 307. PETITIONS TO DELIST SPECIES.**

Section 4(b)(3) (16 U.S.C. 1533(b)(3)), as amended by sections 301(c), 303(a), 304(a), 305(a), and 306 of this Act, is further amended by adding at the end the following new subparagraphs:

"(G) Any person may submit to the Secretary a petition to revise a previous determination by the Secretary under this Act that a species is an endangered species or threatened species and to remove the species from a list published under subsection (c), on the basis that—

"(i) new data or a reinterpretation of prior data indicates that the previous determination was in error;

"(ii) the species is extinct;

"(iii) the population level target established for the species in a conservation plan under section 5(c)(3)(C)(vii) has been achieved; or

"(iv) the original listing of the species did not undergo adequate peer review.

"(H)(i) After receiving a petition under subparagraph (G), the Secretary shall complete a review of the species, which review shall include the solicitation of information as described in subparagraph (F).

"(ii) The determination of the Secretary with respect to such petition shall be considered an action for purposes of subsection (i).

"(iii) If the Secretary has not made a final determination by the end of the 18-month period beginning on the date of the filing of a petition under subparagraph (G), the species covered by the petition shall not be considered to be an endangered species or threatened species for the purposes of this Act and shall not be included or considered to be included in any list published under subsection (c).

"(iv) If, following review required under clause (i) of this paragraph and subsection (i) of this section, the final determination of the Secretary is to retain the species as an endangered species or threatened species on a list published under subsection (c), that decision shall be considered to be a listing determination for purposes of section 5.

"(v) This subparagraph shall not apply to a petition to delist a species for which a review, as required by this subparagraph, has been conducted by the Secretary in the preceding 10-year period.".

**SEC. 308. DETERMINATIONS BY THE SECRETARY TO DELIST.**

Section 4(c)(2) (16 U.S.C. 1533(c)(2)) is amended to read as follows:

"(2) The Secretary shall—

"(A) conduct, at least once every 5 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, which shall be proposed within 90 days of the date upon which it is determined that—

"(I) new data or a reinterpretation of prior data indicates that the previous determination was in error;

"(II) the species is extinct; or

"(III) the population level target established for the species in a conservation plan under section 5(c)(3)(C)(vii) has been achieved;

"(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) of this section.".

# TITLE IV—RECOGNIZING OTHER FEDERAL ACTION, LAWS, AND MISSIONS

**SEC. 401. BALANCE ESA WITH OTHER LAWS AND MISSIONS.**

(a) FEDERAL AGENCY ACTIONS.—Section 7 (16 U.S.C. 1536) is amended by amending the matter preceding subsection (b) to read as follows:

**"SEC. 7. INTERAGENCY COOPERATION.**

"(a) FEDERAL AGENCY ACTIONS AND CONSULTATIONS.—

"(1) PROGRAMS ADMINISTERED BY THE SECRETARY OF THE INTERIOR.—The Secretary shall review other programs administered by the Secretary and utilize

such programs in furtherance of the purposes of this Act. Except as provided in section 5(d) and (e), all other Federal agencies shall, consistent with their primary missions and 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.

"(2) PROGRAMS ADMINISTERED BY OTHER AGENCIES.—Except as provided in section 5(d) and (e), each Federal agency shall ensure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species or destroy or adversely modify any habitat that is designated by the Secretary as critical habitat of the species in a manner that is likely to jeopardize the continued existence of the species. In the case of any agency action that the agency has determined is subject to this paragraph and that is likely to significantly and adversely affect an endangered species or a threatened species, the Federal agency shall fulfill the requirements of this paragraph in consultation with and with the assistance of the Secretary. As provided in section 5(d)(2), each Federal agency may initiate consultation with the Secretary to receive guidance from the Secretary on the consistency of its action with the conservation objective or conservation plan for such species developed pursuant to section 5, with an incidental take permit for such species issued pursuant to section 10(a), or with a cooperative management agreement concerning such species executed pursuant to section 6(b). In fulfilling the requirements of this paragraph each agency shall use the best available scientific and commercial data, shall consider expert opinion and any reasonable and prudent alternatives developed under subsection (b)(3)(A), and shall render the decision of the agency in a manner consistent with the obligations and responsibilities of the agency under each applicable law and treaty.

"(3) INVOLVEMENT OF APPLICANTS FOR FEDERAL APPROVALS.—Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, with the involvement of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project, that the project is inconsistent with the conservation objective or plan for such species developed pursuant to section 5, an incidental take permit for such species issued pursuant to section 10(a), or a cooperative management agreement for such species executed pursuant to section 6(b), and that implementation of such action will likely affect such species.

"(4) CONFERRING ON SPECIES PROPOSED FOR LISTING.—Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 4 or to destroy or adversely modify any habitat that is proposed to be designated by the Secretary as critical habitat of such a species in a manner that is likely to jeopardize the continued existence of the species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d).

"(5) LIMITATIONS ON MODIFICATIONS TO LAND MANAGEMENT.—Notwithstanding any other provision of this Act, the authority in this Act shall not be construed to authorize or form the basis for any Federal agency to modify a land management plan, policy, standard, or guideline or water allocation plan unless a determination has been made under section 4 that a species is threatened or endangered. Notwithstanding any other law or regulation, management plans, practices, policies, projects, or guidelines, including management plans which, as of October 1, 1995, are subject to modification pending completion of a final environmental impact statement, shall not be amended for the purpose of maintaining viable populations of native and desired non-native species unless it is determined under this Act that current practices are likely to jeopardize the continued existence of the species.

"(6) DEMONSTRATION BY SECRETARY REQUIRED.—The Secretary shall have the responsibility of demonstrating, based on the best information available at the time of the request for consultation, that—

"(A) a threatened species or endangered species or its respective critical habitat is located in the geographic area that would be affected by the proposed action; and

"(B) such proposed action will jeopardize the continued existence of a threatened species or endangered species.

"(7) PROHIBITION ON OPINIONS BASED ON INSUFFICIENT DATA.—The Secretary shall not issue an opinion under subsection (b) that a proposed action will jeopardize the continued existence of a threatened or endangered species based on the insufficiency of available data on the impact of a proposed action on such species.".

(b) RESOLVING CONFLICTS BETWEEN FEDERAL AGENCIES.—Section 7(a), as amended by subsection (a) of this section and section 402 of this Act, is amended by adding at the end the following new paragraphs:

"(10) RELATIONSHIP TO DUTIES UNDER OTHER LAWS.—(A) The responsibilities of a Federal agency under this Act shall not supersede and shall be implemented in a manner consistent with duties assigned to the Federal agency by any other laws or by any treaties.

"(B)(i) If a Federal agency determines that the responsibilities and duties described in subparagraph (A) are in irreconcilable conflict, the action agency shall request the President to resolve the conflict.

"(ii) In determining a resolution to such a conflict, the President shall consider and choose the course of action that best meets the public interest and, to the extent possible, balances pursuit of the conservation objective or the purposes of the conservation plan with economic and social needs and pursuit of the purposes of the other laws or treaties. The authority assigned to the President by this subparagraph may not be delegated to a member of the executive branch who has not been confirmed by the Senate.

"(11) MODIFICATION OF PROJECTS AND FACILITIES.—Any consultation and conferencing required under paragraphs (2) and (4) for an agency action that consists solely of a modification of a Federal, State, local government, or private project or facility shall be limited to the consideration of the effects that result from the modification that comprises the agency action.".

(c) PROCEDURES FOR CONSULTATION.—Section 7(b) (16 U.S.C. 1536(b)) is amended by striking so much as precedes paragraph (3)(B) and inserting the following:

"(b) OPINION OF SECRETARY.—

"(1) PERIODS WITHIN WHICH CONSULTATION MUST BE COMPLETED.—(A) Consultation under subsection (a)(2) with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated by the Federal agency. The period may be extended by not more than 45 days by the Secretary or head of the Federal agency by publication of notice in the Federal Register that sets forth the reasons for the extension. Consultation on an agency action involving a permit or license applicant shall be concluded not later than the earlier of—

"(i) 1 year after the date of submission of the application to the Federal agency; or

"(ii) the end of the period established under subparagraph (B).

"(B) Subject to subparagraph (A), in the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)—

"(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth—

"(I) the reasons why a longer period is required,

"(II) the information that is required to complete the consultation, and

"(III) the estimated date on which consultation will be completed; or

"(ii) if the consultation period proposed to be agreed to will end on or after the 150th day but before the 210th day after the date on which consultation was initiated, obtains the consent of the applicant to such period.

"(C) If consultation is not concluded and the written statement of the Secretary required under paragraph (3)(A) is not provided to the Federal agency by the applicable deadline established under this paragraph, the requirements of subsection (a)(2) shall be deemed met and the Federal agency may proceed with the agency action.

"(D) A permit or license applicant shall be entitled to participate fully in any consultation or conferencing under this section with respect to any agency action required for the granting of an authorization or provision of funding to the applicant.

"(2) PROCEDURE FOR APPLICANT CONSULTATION.—Consultation under subsection (a)(3) shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

"(3) WRITTEN OPINION OF SECRETARY.—(A)(i) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a), the Secretary shall provide to the Federal agency and the applicant, if any, 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 action is consistent with the conservation objective or plan developed pursuant to section 5, an incidental taking permit issued pursuant to section 10(a), or a cooperative management agreement executed pursuant to section 6(b). If the Secretary determines that the action is likely to jeopardize the continued existence of the species as described in subsection (a), the Secretary shall suggest reasonable and prudent alternatives (considering any reasonable and prudent alternatives undertaken by other Federal agencies) that are consistent with subsection (a)(2) and that impose the least social and economic costs. In the development of a biological opinion, the Secretary shall solicit and utilize information and advice from the Governor of any State in which is located a species or land that is the subject of the Federal action requiring consultation.

"(ii) Unless required by law other than subsections (a) through (d), the Secretary, in any opinion or statement concerning an agency action made under this subsection (including any reasonable and prudent alternative suggested under clause (i) or any reasonable and prudent measure specified under clause (ii) of paragraph (4)), and the head of the Federal agency proposing the agency action, may not require, provide for, or recommend the imposition of any restriction or obligation on the activity of any person that is not authorized, funded, carried out, or otherwise subject to regulation by the Federal agency. Nothing in this clause prevents the Secretary from pursuing any appropriate remedy under section 11 for any activity prohibited by section 4(d) or 9.

"(iii) The Secretary shall not require a reasonable and prudent alternative that may or will result in a significant adverse impact upon waterfowl populations, waterfowl habitat management, or waterfowl hunting opportunities in a significant waterfowl breeding, staging, or wintering habitat area. In this clause, the term 'significant adverse impact' means any actions, proposed or in effect, which individually or cumulatively are likely to reduce the carrying capacity of habitat for waterfowl by 10 percent or more of its current capability, as determined on a local, regional, statewide or national basis. In this clause, the term 'significant waterfowl breeding, staging, or wintering habitat areas' means those private or public lands managed primarily for, or providing, waterfowl breeding, staging or wintering habitat including seasonal/permanent marsh lands or land under rice cultivation for three out of the past five years.

"(iv) Notwithstanding any other provision of law, if the Secretary renders an opinion or suggests any reasonable and prudent alternative which has general application to a group of individuals conducting a commercial operation, the Secretary may not promulgate an emergency rule without providing at least 30 days for public comment on the emergency rule.

"(v) No additional measures to minimize or mitigate impacts on a species that is a subject of an opinion issued under this paragraph shall be required of a permit applicant or licensee that is in compliance with the opinion and any agreement or permit issued to implement the opinion.".

(d) ACTIVITIES PRIOR TO COMPLETION OF CONSULTATION.—Section 7(d) (16 U.S.C. 1536(d)) is amended to read as follows:

"(d) LIMITATION ON COMMITMENT OF RESOURCES.—

"(1) IN GENERAL.—Except as provided in paragraph (2), after initiation of consultation required under subsection (a)(2), the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment 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 not violate subsection (a)(2).

"(2) RELATIONSHIP TO LAND MANAGEMENT PLANNING REQUIREMENTS.—If the listing of a species, or other procedure or decision related to a species listed under section 4(c)(1), requires consultation under subsection (a)(2) on a land use plan or land or resource management plan (or an amendment to or revision of the plan) prepared under section 202 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1712) or section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604), the land management agency implementing the plan may authorize, fund, or carry out an agency action that is consistent with the plan prior to the completion of the consultation, if, under the procedures established by this section, the head of the land management agency responsible for the action determines or has determined that the action—

"(A) is not likely to significantly and adversely affect the species; or

"(B) is likely to significantly and adversely affect the species, and the Secretary issues an opinion on the action that finds that the action—

"(i) is not likely to jeopardize the continued existence of the species; or

"(ii) is likely to jeopardize the continued existence of the species, and the agency agrees to a reasonable and prudent alternative.".

(e) DEFINITIONS.—Section 3 (16 U.S.C. 1532) is amended—

(1) by adding after paragraph (15) (as added by section 204(a) of this Act) the following new paragraph:

"(16) The term 'likely to jeopardize the continued existence of', with respect to an action or activity affecting an endangered species or a threatened species, means an action or activity that significantly diminishes the likelihood of the survival of the species by significantly reducing the numbers or distribution of the entire species.";

(2) by amending paragraph (18) (as redesignated by section 102(a)(1) of this Act) to read as follows:

"(18) The term 'permit or license applicant' means, with respect to the consultation procedures established by section 7, any person that requires authorization or funding from a Federal agency as a prerequisite to conducting an activity (including a party to a written lease, right-of-way, license, contract to purchase or provide a product or service, or other permit with a Federal agency) that requires an action from the agency to obtain the benefit of the activity."; and

(3) by adding after paragraph (20) (as redesignated by section 102(a)(1) of this Act) the following new paragraph:

"(21) The term 'reasonable and prudent alternative' means an alternative action under section 7(b)(3) during consultation on an agency action that—

"(A) can be implemented in a manner consistent with the intended purpose of the agency action or the activity of a non-Federal person under section 10;

"(B) can be implemented consistent with the scope of the legal authority and jurisdiction of the Federal agency;

"(C) is economically and technologically feasible for the applicant or non-Federal person to undertake; and

"(D) the Secretary believes would avoid being likely to jeopardize the continued existence of the species.".

(f) RESTRICTION ON NEW OR ADDITIONAL REQUIREMENTS.—

(1) COMPLIANCE WITH BIOLOGICAL OPINION.—Section 7(b) (16 U.S.C. 1536(b)) is amended by adding at the end the following new paragraph:

"(5) The Secretary shall, once a Biological Opinion has been rendered and the applicant has agreed to the terms and conditions contained in the Biological Opinion, provide to the applicant a written approval which shall guarantee that, so long as the project at issue is pursued consistent with the Biological Opinion, the applicant shall not be subject to new or additional requirements for the specific protection of any species beyond the requirements set forth in the Biological Opinion. All public entities shall be bound by the Secretary's approval.".

(2) COMPLIANCE WITH PERMIT.—Section 10(a) (16 U.S.C. 1539(a)) is further amended by adding at the end the following new paragraph:

"(8) RESTRICTION ON NEW OR ADDITIONAL REQUIREMENTS.—The Secretary shall, as part of the conservation planning process, guarantee that, so long as the permittee is complying with the terms and conditions of the permit issued under this section, the permittee shall not be subject to new or additional requirements for the specific protection of any species beyond the requirements set forth in the conservation plan. All public entities shall be bound by this guarantee.".

**SEC. 402. EXEMPTIONS FROM CONSULTATION AND CONFERENCING.**

Section 7(a), as amended by section 401(a) of this Act, is amended by adding at the end the following new paragraphs:

"(8) ACTIONS EXEMPT FROM CONSULTATION AND CONFERENCING.—Consultation and conferencing under paragraphs (2) and (4) shall not be required for any agency action that—

"(A) is consistent with the provisions of a final conservation plan under section 5(c)(5) or a conservation objective described in section 5(b)(3);

"(B) is consistent with a cooperative management agreement or an incidental taking permit;

"(C) addresses a critical, imminent threat to public health or safety or a catastrophic natural event or compliance with Federal, State, or local safety or public health requirements;

"(D) consists of routine operation, maintenance, rehabilitation, repair, or replacement to a Federal or non-Federal project or facility, including operation of a project or facility in accordance with a previously issued Federal license, permit, or other authorization; or

"(E) permits activities that occur on private land.

"(9) ACTIONS NOT PROHIBITED.—An agency action shall not constitute a taking of a species prohibited by this Act or any regulation issued under this Act if the action is consistent with—

"(A) the actions provided for in a final conservation plan under section 5(c)(5) or a conservation objective described in section 5(b)(3);

"(B) a cooperative management agreement or an incidental take permit; or

"(C) the terms and conditions specified in a written statement provided under subsection (b)(3) of this section.".

**SEC. 403. ELIMINATING THE EXEMPTION COMMITTEE (GOD COMMITTEE).**

(a) CONFORMING AMENDMENTS.—Section 7(c) (16 U.S.C. 1536(c)) is amended—

(1) in the first full sentence by striking "(1) To facilitate" and inserting "To facilitate"; and

(2) by striking paragraph (2).

(b) PRESIDENTIAL EXEMPTIONS.—Section 7(e) (16 U.S.C. 1536(e)) is amended to read as follows:

"(e) EXEMPTIONS.—Notwithstanding any other provision of this Act—

"(1) the Secretary shall grant an exemption from this Act for any activity if the Secretary of Defense determines that the exemption of the activity is necessary for reasons of national security; and

"(2) the President may grant an exemption from this Act for any area that the President has declared to be a major disaster area under The Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.) for any project for the repair or replacement of a public facility substantially as the facility existed prior to the disaster under section 405 or 406 of that Act (42 U.S.C. 5171 and 5172), if the President determines that the project—

"(A) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life; and

"(B) involves an emergency situation that does not allow the procedures of this Act (other than this subsection) to apply.".

(c) REPEAL.—Subsections (f) through (p) of section 7 (16 U.S.C. 1536(f)–(p)) are repealed.

# TITLE V—BETTER MANAGEMENT AND CONSERVATION OF LISTED SPECIES

**SEC. 501. SETTING CONSERVATION OBJECTIVES.**

Section 5 (16 U.S.C. 1534) is redesignated as section 5A, and the following new section is added after section 4:

**"SEC. 5. SPECIES CONSERVATION PLANS.**

"(a) IN GENERAL.—Except as provided in subsection (b)(3)(C), the Secretary shall publish a conservation objective and a conservation plan for each species determined to be an endangered species or a threatened species pursuant to section 4.

"(b) DEVELOPMENT OF CONSERVATION OBJECTIVE.—

"(1) ASSESSMENT AND PLANNING TEAM.—Not later than 30 days after the listing determination, the Secretary shall appoint an assessment and planning team which shall not be subject to the Federal Advisory Committee Act (5 U.S.C. App.) and shall consist of—

"(A) experts in biology or pertinent scientific fields, economics, property law and regulation, and other appropriate disciplines from the Department of the Secretary, other Federal agencies, and the private sector;

"(B) a representative nominated by the Governor of each affected State;

"(C) representatives nominated by each affected local government, if the local government agrees to the appointment of a representative; and

"(D) representatives of persons who may be directly, economically impacted by the conservation plan.

The chairman of the team shall be selected from representatives of participating States or local governments.

"(2) ASSESSMENTS.—Not later than 180 days after the listing determination, the assessment and planning team shall report to the Secretary the assessment of the following biological, economic, and intergovernmental factors with respect to the listed species:

"(A) The team shall assess—

"(i) the biological considerations necessary to carry out this Act;

"(ii) the biological significance of the species;

"(iii) the geographic range and occupied habitat of the species, and the type and amounts of habitat needed, at a minimum, to maintain the existence of the species and, at a maximum, to secure recovery of the species;

"(iv) the current population, and the population trend, of the species;

"(v) the technical practicality of recovering the species;

"(vi) the potential management measures capable of recovering, or reducing the risks to survival of, the species, including the contribution of existing or potential captive breeding programs for the species, predator control, enhancement of food sources, supplemental feeding, and other methods which enhance the survival of the young of the species; and

"(vii) where appropriate, the demonstrable commercial or medicinal value of the species.

"(B) The team shall assess the direct, indirect, and cumulative economic and social impacts on the public and private sectors, including local governments, that may result from the listing determination and any potential management measures identified under subparagraph (A)(vi), including impacts on the cost of governmental actions, tax and other revenues, employment, the use and value of property, other social, cultural, and community values, and an assessment of any commercial activity which could potentially result in a net benefit to the conservation of the species.

"(C) The team shall assess the impacts on State and local land use laws, conservation measures, and water allocation policies that may result from the listing determination and from the potential management measures identified under subparagraph (A)(vi).

"(D) The Secretary shall provide funding to the team to employ or obtain such technical assistance as necessary to fulfill its duties under this paragraph.

"(E) Upon completion of the assessment, the Secretary shall publish in the Federal Register a notice of availability of the report and allow 30 days for public comment.

"(3) SECRETARIAL REVIEW OF ASSESSMENTS AND ESTABLISHMENT OF CONSERVATION OBJECTIVE.—(A) Not later than 210 days after a listing determination, the Secretary shall review the report of the assessment and planning team prepared pursuant to paragraph (2), establish a conservation objective for the species, and publish in the Federal Register the conservation objective, along with a statement of findings on which the conservation objective was established.

"(B) The conservation objective may be, in the discretion of the Secretary—

"(i) recovery of the listed species;

"(ii) such level of conservation of the species which the Secretary determines practicable and reasonable to the extent that the benefits of the potential conservation measures outweigh the economic and social costs of such measures, including but not limited to maintenance of existing population levels;

"(iii) no Federal action other than enforcement against any person whose activity violates the prohibitions specified in section 9(a), including any activity that results in a taking of the species, unless the taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity; or

"(iv) such other objective as the Secretary may determine that does not provide a lesser level of protection than the level described in clause (iii).

"(C) If the conservation objective established by the Secretary is the objective provided in subparagraph (B)(iii), the Secretary shall not develop a conservation plan for the affected species under subsection (c).".

**SEC. 502. PREPARING A CONSERVATION PLAN.**

(a) IN GENERAL.—Section 5 (16 U.S.C. 1534), as added by section 501 of this Act, is amended by adding at the end the following new subsections:

"(c) DEVELOPMENT OF CONSERVATION PLAN.—

"(1) PRIORITIES.—In the development and implementation of a conservation plan under this subsection, the Secretary shall accord priority to—

"(A) the development of an integrated plan for 2 or more endangered species or threatened species that are likely to benefit from an integrated conservation plan;

"(B) the geographic areas where conflicts between the conservation of the affected species and development projects or other forms of economic activity exist or are likely to exist;

"(C) protection of the listed species on units of the National Biological Diversity Reserve as provided in section 5A(a);

"(D) the implementation of conservation measures that have the least economic and social costs;

"(E) nonregulatory, incentive-based conservation measures and commercial activities that provide a net benefit to the conservation of the species; and

"(F) plans in which States or private organizations or persons are the primary implementors.

"(2) PUBLICATION OF DRAFT PLAN.—Not later than 12 months after the date of a determination that a species is an endangered species or a threatened species, the assessment and planning team for the species shall publish a draft conservation plan for the species which is based on the assessments made pursuant to subsection (b)(2) and designed to achieve the conservation objective established pursuant to subsection (b)(3).

"(3) CONTENTS OF DRAFT PLAN.—Each draft conservation plan shall contain—

"(A) recommendations for Federal agency compliance with section 7(a)(1) and 7(a)(2);

"(B) recommendations for avoiding a taking of a listed species prohibited under section 9(a)(1) and a list of specific activities that would constitute a take under section 9;

"(C) alternative strategies to achieve the conservation objective for the listed species which range from a strategy requiring the least possible Federal management to achieve the conservation objective to a strategy involving more intensive Federal management to achieve the objective, each of which contains—

"(i) an estimate of the risks to the survival and recovery of the species that the alternative would entail;

"(ii) a description of any site-specific management measures recommended for the alternative;

"(iii) an analysis of the relationship of any habitat of the species proposed for designation as critical habitat to the recommended management measures;

"(iv) a description of the direct, indirect, and cumulative economic and social impacts on the public and private sectors including impacts on employment, the cost of government actions, tax and other revenues, the use and value of property, and other social, cultural, and community values;

"(v) a description of any captive breeding program recommended for the alternative;

"(vi) an analysis of whether the alternative would include any release of an experimental population outside the current range of the species and an identification of candidate geographic areas for the release;

"(vii) objective and measurable criteria, including a population level target, that, if met, would result in a determination under section 4 that the species is no longer an endangered species or threatened species;

"(viii) estimates of the time and costs required to carry out the management measures, including any intermediate steps; and

"(ix) a description of the role of each affected State, if any, in achieving the conservation objective.

"(4) PLAN PREPARATION PROCEDURES.—(A) The Secretary shall consult with the Governor of each State in which the affected species is located during the preparation of each draft and final conservation plan. Each plan shall provide for equitable treatment of affected States and other non-Federal persons.

"(B) The Secretary shall publish in the Federal Register and a newspaper of general circulation in each affected county and parish a notice of the availability and a summary of, and a request for the submission of comments on, each draft conservation plan.

"(C) The Secretary shall hold at least 1 hearing on each draft conservation plan in each State to which the plan would apply in a location that is as close as possible to the center of the habitat of the affected species in such State.

"(D) Prior to any decision to adopt a final conservation plan, the Secretary shall consider and weigh carefully all information presented during each hearing held under subparagraph (C) or received in response to a request for comments published under subparagraph (B).

"(5) PUBLICATION OF FINAL PLAN.—Not later than 18 months from the date of a determination that a species is an endangered species or a threatened species, the Secretary shall publish in the Federal Register a notice of the availability, and a summary, of a final conservation plan for the species. The notice shall include a detailed description of—

"(A) the reasons for the selection of the final conservation plan;

"(B) the reasons for not selecting each of the other alternatives included in the draft conservation plan, including, if any alternative is selected other than the alternative that would impose the least total costs on the public and private sectors, the reasons for such selection;

"(C) the effect of the priorities specified in paragraph (1) on the selection; and

"(D) the response of the Secretary to the information referred to in paragraph (4).

"(6) PARTICIPATION BY OTHER PERSONS.—In developing and implementing conservation plans, the Secretary may use the services of appropriate public and private agencies and institutions and other qualified persons.

"(7) PLAN REVISION OR AMENDMENT.—Any revision of or amendment to a conservation plan shall be made in accordance with the procedures and requirements of subsection (b) and this subsection, except that the Secretary by regulation may provide for other procedures and requirements for any amendment that does not increase the direct or indirect cost of implementation of the plan or enlarge the area to which the plan applies.

"(d) NO FURTHER PROCEDURES OR REQUIREMENTS FOR ACTIONS CONSISTENT WITH THE CONSERVATION PLAN.—If a conservation plan is prepared under subsection (c) or if a conservation objective is established under subsection (b)(3)(C)—

"(1) any Federal agency that determines that the actions of the agency are consistent with the provisions of the conservation plan or conservation objective shall be considered to comply with section 7(a)(1) for the affected species;

"(2) any agency action that the Federal agency determines is consistent with the provisions of the conservation plan or conservation objective shall not be subject to section 7(a)(2) for the affected species, except that a Federal agency may initiate consultation under section 7(a)(2) if the agency desires guidance from the Secretary on the consistency of the action of the agency with the conservation plan or conservation objective; and

"(3) any action of any person that is consistent with the provisions of the conservation plan or conservation objective shall not constitute a violation concerning the affected species of any applicable prohibition under section 9(a) or 4(d), except that a non-Federal person may initiate consultation under section 10(a)(2)—

"(A) if the person desires guidance from the Secretary on the consistency of the action with the plan or objective; or

"(B) in order to determine whether to apply for a permit under section 10 for any action that is inconsistent with the plan or objective.".

(b) CONSERVATION OBJECTIVE AND CONSERVATION RULE DEFINED.—Section 3(4) (16 U.S.C. 1532), as redesignated by section 102(a) of this Act, is amended to read as follows:

"(4) The terms 'conservation objective' and 'conservation plan' (except when modified by 'non-Federal') mean a conservation objective and a conservation plan, respectively, developed under section 5.".

**SEC. 503. INTERIM MEASURES.**

Section 5, as added by section 501 of this Act and as amended by section 502 of this Act, is amended by adding at the end the following new subsections:

"(e) MANAGEMENT PRIOR TO PUBLICATION OF CONSERVATION PLAN.—

"(1) IN GENERAL.—After a listing determination and before the publication of a final conservation plan, or, if no plan is required pursuant to subsection (b)(3)(C), a conservation objective, for the species—

"(A) the prohibitions of section 9(a) shall apply to any person, except in the case of a taking of a member of the species that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity which

incidental taking activity may include but is not limited to the routine operation, maintenance, rehabilitation, replacement, or repair of any structure, building, road, dam, airport, or any irrigation or other facility which is in operation prior to the publication of the determination under section 4(b)(6); and

"(B) no Federal agency shall be required to comply with section 7(a)(1) and no consultation shall be required on any agency action under section 7(a)(2), except that the species shall continue to be treated as a species proposed for listing under section 4 solely for purposes of section 7(a)(4).

"(2) EMERGENCY RULEMAKING PROTECTIONS.—Notwithstanding paragraph (1), sections 7(a) and 9(a) shall apply fully to the listed species during a period in which an emergency rulemaking is in effect pursuant to section 4(b)(7) or if the President declares, and advises the Secretary, that there exists an imminent threat to the existence of the species. Such declaration of the President expires upon the deadline for publication of a final conservation plan for the species pursuant to subsection (c)(5) or the publication of a conservation objective for the species provided in subsection (b)(3) or if no conservation plan is required pursuant to subsection (b)(3)(C).

"(f) SUSPENSION OF CONSERVATION PLAN OR OBJECTIVE.—If the Secretary issues an incidental take permit or enters into a cooperative management agreement under section 6, the Secretary, by publication of notice in the Federal Register, shall suspend the conservation objective or conservation plan with respect to the geographic area or action applicable to the species to which the permit or agreement applies.

"(g) NONDELEGATION OF DUTIES.—The Secretary may not delegate the authority to make the final decision to select a conservation objective, issue a conservation plan, or designate critical habitat under this section.

"(h) REVIEW OF CONSERVATION PLANS.—

"(1) DEADLINES.—The Secretary shall review each conservation plan and the conservation objective on which it is based before the end of the 5-year period that begins on the date of publication of the conservation plan, and before the end of each 5- year period thereafter.

"(2) REVISIONS.—The Secretary shall revise a conservation plan or the conservation objective on which it is based if the Secretary determines—

"(A) through a 5-year review under paragraph (1), that the conservation plan or conservation objective does not meet the requirements of this section; or

"(B) at any time—

"(i) that funding is not available for the implementation of a specific conservation measure that is integral to the conservation plan or that a more cost-effective alternative exists for a specific conservation measure that is integral to the conservation plan; or

"(ii) on the basis of scientific or commercial data that were not available during the development of the conservation objective or conservation plan, that the conservation objective is not achievable or the conservation plan will not achieve the conservation objective.

"(3) NO REOPENING OF CONSULTATIONS.—Section 7 consultations shall not be reopened as a result of modifications to a conservation plan under paragraph (2).".

**SEC. 504. CRITICAL HABITAT FOR SPECIES.**

(a) CRITICAL HABITAT DESIGNATION.—Section 5, as added by section 501 of this Act and as amended by sections 502 and 503 of this Act, is amended by adding at the end the following new subsections:

"(i) CRITICAL HABITAT DESIGNATION.—

"(1) DESIGNATION.—The Secretary—

"(A) may, by regulation and to the extent prudent and determinable, designate critical habitat of a species determined to be an endangered species or threatened species that meets the requirements of paragraph (3) utilizing the National Biodiversity Reserve established under section 5A(a) as a first priority;

"(B) may by regulation and to the extent prudent and determinable, revise a critical habitat designation on determining that the critical habitat does not meet the requirements of paragraph (3); and

"(C) shall, by regulation and upon receiving a written request from a non-Federal person requesting a review of the critical habitat designation on such person's private property, revise a critical habitat designation on such private property on determining that the critical habitat does not meet the requirements of paragraph (3).

Designation or revision of critical habitat shall not result in reopening or reinitiation of consultations on Federal actions pursuant to section 7.

"(2) DEADLINES FOR DESIGNATION.—Any proposed regulation and any final regulation to designate or revise critical habitat shall be published not later than 12 months and 18 months, respectively, after the date on which the affected species is determined to be an endangered species or a threatened species, or on which the Secretary receives a written request to review a critical habitat designation under paragraph (1)(C).

"(3) BASIS FOR DESIGNATION.—The designation of critical habitat, and any revision of the designation, shall be made on the basis of the best available scientific and commercial data after taking into consideration the economic impact, and any other relevant impact, of designating any particular area as critical habitat and of the determination that the affected species is an endangered species or threatened species. The Secretary shall exclude any area from critical habitat—

"(A) which does not meet the definition of critical habitat set forth in section 3(7);

"(B) which is not necessary to achieve the conservation objective for the affected species established pursuant to subsection (b);

"(C) for which the Secretary determines that the benefits of the exclusion of the area from designation as critical habitat outweigh the benefits of designation, unless the Secretary determines, on the basis of the best available scientific and commercial data, that the failure to designate the area as critical habitat will result in the extinction of the affected species; or

"(D) in the case of property owned by a non-Federal person, where the owner thereof has not given written consent to the designation, has withdrawn such consent in writing, or has not been compensated as provided in section 19.

"(4) PROCEDURE FOR DESIGNATION.—In the Federal Register notice containing the proposed regulation to designate critical habitat, the Secretary shall describe the economic impacts and other relevant impacts that are to be considered, and the benefits that are to be weighed, under paragraph (3) in designating an area as critical habitat, along with maps showing the location of the area to be designated as critical habitat. The Secretary shall submit the description, and the documentation supporting the description, to the Bureau of Labor Statistics of the Department of Labor. The Commissioner of Labor Statistics shall submit written comments during the comment period on the proposed regulation. The Secretary shall hold at least one public hearing in each State on the proposed rule in which critical habitat is designated for a species. In issuing any final regulation designating critical habitat, the Secretary shall respond separately and fully to each comment.

"(5) JUDICIAL REVIEW OF CRITICAL HABITAT DESIGNATION.—The decision whether to designate critical habitat shall be subject to a de novo judicial review with the court determining whether the decision is supported by a preponderance of the evidence.

"(j) JUDICIAL REVIEW OF CONSERVATION OBJECTIVE OR PLAN.—The standard for judicial review of any decision of the Secretary, or a Federal agency pursuant to this section shall be whether the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

"(k) CONSERVATION PLANS FOR FOREIGN SPECIES.—In developing conservation objectives and conservation plans under this section, the Secretary shall, in regard to foreign species—

"(1) act consistently with the Convention; and

"(2) cooperate and support the conservation strategy adopted for that species by any foreign nation in which the species occurs.".

(b) CONFORMING AMENDMENTS.—Section 4(b)(6) (16 U.S.C. 1533(b)(6)) is amended—

(1) in subparagraph (B)(i) by striking "or revision concerned";

(2) in subparagraph (B)(iii) by striking "or revision concerned, a finding that the revision should not be made,"; and

(3) by striking subparagraph (C).

(c) CONFORMING AMENDMENT.—Section 4(b)(8) (16 U.S.C. 1533(b)(8)) is amended by striking "regulation" the third time it appears and all that follows through the end of the paragraph and inserting "regulation.".

(d) DEFINITION OF CRITICAL HABITAT.—Section 3(7), as redesignated by section 102(a) of this Act, is amended to read as follows:

"(7)(A) The term 'critical habitat' for an endangered species or a threatened species means the specific areas which are within the geographic area found to

be occupied by a species at the time the species is determined to be an endangered species or a threatened species in accordance with section 4 and which contain such physical or biological features as—

"(i) are essential to the persistence of the species over the 50-year period beginning on the date the regulation designating the critical habitat, or any revision of the regulation, is promulgated; and

"(ii) require special management considerations or protection.

"(B) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area occupied by the threatened species or endangered species.".

**SEC. 505. RECOGNITION OF CAPTIVE PROPAGATION AS MEANS OF RECOVERY.**

Section 5, as added by section 501 of this Act and as amended by sections 502, 503, and 504 of this Act, is amended by adding at the end the following new subsection:

"(l) RECOGNITION OF CAPTIVE PROPAGATION AS MEANS OF CONSERVATION.—

"(1) IN GENERAL.—In carrying out this Act, the Secretary shall recognize to the maximum extent practicable, and may utilize, captive propagation as a means of protecting or conserving an endangered species or a threatened species.

"(2) CAPTIVE PROPAGATION GRANTS.—The Secretary may, subject to appropriations therefor, provide annual grants to non-Federal persons to fund captive propagation programs for the purpose of protecting or conserving any species that is determined under section 4 to be an endangered species or a threatened species, if the Secretary determines that such a program contributes to enhancement of the population of the species.".

**SEC. 506. INTRODUCTION OF SPECIES.**

Section 10(j) (16 U.S.C. 1539(j)) is amended—

(1) by amending paragraph (2)(B) to read as follows:

"(B) Before authorizing the release of any population under subparagraph (A), the Secretary shall by regulation—

"(i) identify the population and the precise boundaries of the geographic area for the release and determine, on the basis of the best available information, whether the release is in the public interest, whether or not such population is essential to the continued existence of an endangered species or a threatened species; and

"(ii) in the case of a release of a species of predatory mammal in a unit of the National Park System or the National Wildlife Refuge System—

"(I) require that if the species enters private property, measures shall be taken to remove the species from the property and protect the safety and welfare of the public and domestic animals, including livestock; and

"(II) provide funding for such measures, including compensation for dimunition of property values pursuant to section 19 of this Act.";

(2) in paragraph (2)(C)—

(A) in clause (i) by striking "and" after the semicolon; and

(B) by striking clause (ii) and inserting the following:

"(ii) for the purposes of sections 4(d) and 9(a)(1)(B), any member of an experimental population found outside the geographic area in which the population is released shall not be treated as a threatened species if the member poses a threat to the welfare of the public; and

"(iii) critical habitat shall not be designated under this Act or if designated prior to the Endangered Species Conservation and Management Act of 1995, shall be removed from any non-Federal land, for any experimental population determined under subparagraph (B) to be not essential to the continued existence of a species.";

(3) by adding at the end of paragraph (2) the following new subparagraph:

"(D) The Secretary shall determine under subparagraph (B) that a population is not essential to the continued existence of an endangered species or threatened species, unless the Secretary determines on the basis of the best available scientific and commercial data that the loss of one or more of the members of the population will result in the extinction of the species.";

(4) by redesignating paragraph (3) as paragraph (6); and

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

"(3) REQUIREMENTS FOR RELEASES.—In authorizing the release of a population under paragraph (2), the Secretary shall require that—

"(A) to the maximum extent practicable, the release occurs only in a unit of the National Park System or the National Wildlife Refuge System;

"(B) a release outside a unit occurs only in an area that has been identified as a candidate site for release of the population in a conservation plan for the species;

"(C) in the case of a release outside a unit, measures to protect the safety and welfare of the public and domestic animals and the funding for the measures are identified in the regulations authorizing the release and are implemented;

"(D) the regulations authorizing the release identify precisely the geographic area for the release;

"(E) a release on non-Federal land occurs only with the written consent of the owner of the land;

"(F) the regulations authorizing the release include measurable reintroduction goals to restore viable populations only within the specific geographic area identified for release in the regulations;

"(G) the regulations authorizing the release obligate the Secretary to remove members of the population from non-Federal land at the written request of the landowner and within a reasonable period of time after receiving such a request, not to exceed 90 days; and

"(H) the regulations authorizing the release of a population that is determined under this paragraph to not be essential to the survival of a species shall provide that, notwithstanding any other provision of this Act, a taking of a member of such population shall not be treated as a taking if it is—

"(i) not knowing,

"(ii) not willful, or

"(iii) incidental to, and not the purpose of, otherwise lawful activity.

"(4) COMPLIANCE WITH STATE LAW.—In authorizing any release under paragraph (2), the Secretary shall ensure that the release does not conflict with the laws of affected States relating to the species to be released.

"(5) DETERMINATION REGARDING POPULATIONS AUTHORIZED BEFORE EFFECTIVE DATE OF ENDANGERED SPECIES CONSERVATION AND MANAGEMENT ACT OF 1995.—(A) For each population of a species that the Secretary, before the effective date of the Endangered Species Conservation and Management Act of 1995, authorized the release of in a geographical area separate from the other populations of the species, the Secretary shall determine by regulation whether or not the population is essential to the continued existence of the species.

"(B) If the Secretary receives a written request for the issuance of a regulation under subparagraph (A) for a population for which the Secretary has not issued such a regulation, the Secretary shall promptly issue such a regulation by not later than 180 days after receiving the request.".

**SEC. 507. CONSERVING THREATENED SPECIES.**

(a) REGULATIONS.—Section 4(d) (16 U.S.C. 1533(d)) is amended to read as follows:

"(d) REGULATIONS TO PROTECT THREATENED SPECIES.—Whenever any species is listed as a threatened species pursuant to subsection (c), the Secretary shall issue, concurrently with the regulation that provides for the listing of the species, such regulations as the Secretary deems necessary and advisable to provide for the conservation of such species. Such regulations may apply to the threatened species one or more of the prohibitions under section 9(a)(1), in the case of fish and wildlife, or section 9(a)(2) in the case of plants, with respect to endangered species. The prohibition applied to the threatened species shall address the specific circumstances of such species and may not be as restrictive as such prohibition for endangered species. 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 or delegation agreement pursuant to section 6 only to the extent that such regulations have also been adopted by such State.".

(b) CONFORMING AMENDMENTS.—Section 4 (16 U.S.C. 1533) is amended—

(1) by striking subsection (f); and

(2) by redesignating subsections (g), (h), and (i) in order as subsections (f), (g), and (h).

(c) CONSERVATION GUIDELINES.—Section 4 is amended in subsection (g), as redesignated by subsection (b)(2) of this section, by amending paragraph (3), as redesignated by section 304(b)(2) of this Act, to read as follows:

"(3) a system for developing and implementing, on a priority basis, conservation objectives and conservation plans. The Secretary shall provide to the public notice of, and opportunity to submit written comments on, any guideline (including any amendment thereto) proposed to be established under this subsection.".

**SEC. 508. DELEGATION OF AUTHORITY TO STATES.**

Section 5 is further amended by adding at the end the following new subsection:

"(n) DELEGATION TO STATE.—(1) At the request of a State, the Secretary shall delegate either under a cooperative management plan or a delegation agreement as provided in section 6, to the State the authority to develop and implement conservation objectives and plans for a species or group of species determined to be endangered species or threatened species, unless the Secretary determines that the State lacks authority and capability to carry out the requirements of this Act. If the Secretary determines that the State lacks authority and capability, the Secretary shall notify the Governor of the State of the specific concerns and specify measures necessary to address those concerns and provide the Governor with the opportunity to take the actions necessary to address those concerns.

"(2) The Secretary shall monitor the actions of the State to develop and implement a conservation objective and conservation plan. The Secretary shall assist the States in coordinating their actions with other affected States where the species may occur.

"(3) If the Secretary determines that the State is not in compliance with this Act, the cooperative management agreement, or the delegation agreement, the Secretary shall so notify the State and shall specify the areas of noncompliance. The States shall have 60 days in which to respond and in which to come into compliance. If the State fails to adequately respond or to come into compliance, the Secretary is authorized to resume responsibility for the development and implementation of the conservation objective and plan.".

# TITLE VI—HABITAT PROTECTIONS

**SEC. 601. FEDERAL BIOLOGICAL DIVERSITY RESERVE.**

Section 5A, as redesignated by section 501 of this Act, is amended to read as follows:

**"SEC. 5A. PROTECTION OF HABITAT.**

"(a) ESTABLISHMENT OF NATIONAL BIOLOGICAL DIVERSITY RESERVE.—

"(1) IN GENERAL.—There is hereby established a National Biological Diversity Reserve (hereinafter in this Act referred to as the 'Reserve'). The Reserve shall be composed of units of Federal and State lands designated in accordance with paragraph (2) and managed in accordance with paragraph (3).

"(2) DESIGNATION OF RESERVE UNITS.—(A) Not later than 18 months after the date of enactment of the Endangered Species Conservation and Management Act of 1995, the Secretary of the Interior and the Secretary of Agriculture shall designate to the Reserve by regulation those units of the national conservation systems which are within the jurisdiction of the Secretary concerned and which the Secretary determines would contribute to biological diversity in accordance with the provisions of this Act. The term 'national conservation systems' means wholly federally owned lands within the National Park System, the National Wildlife Refuge System, or the National Wilderness Preservation System, and wild segments of rivers within the National Wild and Scenic Rivers System.

"(B) The Secretary of the Interior shall—

"(i) designate to the Reserve by regulation a unit of State-owned lands if such unit is nominated for designation by the Governor of the State and is managed under State law in accordance with paragraph (3);

"(ii) designate to the Reserve by regulation privately owned land that is nominated for designation by the owner of the land, and shall remove such land from the Reserve if the owner requests removal;

"(iii) remove from the Reserve by regulation any unit designated pursuant to clause (i) which the Secretary finds is not managed under State law in accordance with paragraph (3); and

"(iv) remove from the Reserve any State-owned lands at the request of the Governor of that State.

"(C) Designation of a Reserve unit shall not affect any valid existing permit, contract, license, right, right-of-way, access, interest in land, right to use or receive water, or property right.

"(3) MANAGEMENT OF THE RESERVE.—(A) Each unit of the Reserve may have as a goal the conservation of biological diversity. Such goal shall be supplementary and secondary to other purposes established for such unit by or pursuant to any provision of law applicable to such unit. Management for biological diversity shall not be inconsistent with or diminish other unit purposes, other provisions of law applicable to such unit, and activities which occur or are authorized to occur on such unit.

"(B) The manager of each Reserve unit should consistent with paragraph (4) utilize his authority to use active management and recovery measures, including those specified in section 5(b)(2)(A)(vi), and shall conduct a survey to determine the populations of species within the Reserve.

"(C) Nothing in this section shall—

"(i) alter, establish, or affect the respective rights of the United States, the States, or any person with respect to any water or water-related right; or

"(ii) affect the laws, rules, and regulations pertaining to hunting, fishing, and other lawful wildlife harvest under existing State and Federal laws and Indian treaties.

"(D) Within 1 year of the designation of a unit to the Reserve, the manager of such unit shall complete, and the Secretary concerned shall make available to the public by notice in the Federal Register, an inventory of the species composing the biological diversity within such unit.

"(4) OTHER FEDERAL LANDS.—Nothing in this Act shall be construed as limiting the authority of the Secretary of the Interior or the Secretary of Agriculture to take such actions as are necessary and authorized by other law to protect, maintain, and enhance biological diversity on other Federal lands not designated to the Reserve except that, before taking any such action, the Secretary concerned shall make a finding based on the best available scientific and commercial data, that the biological diversity for which such action is proposed is not protected, maintained, or enhanced in whole or substantial part on any unit of the Reserve. Such finding shall be published, along with the reasons therefor in the Federal Register.".

**SEC. 602. LAND ACQUISITION.**

Section 5A, as redesignated by section 501 of this Act and as amended by section 601 of this Act, is amended by adding at the end the following new subsection:

"(b) LAND ACQUISITION.—

"(1) 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 determined to be endangered species or threatened species pursuant to section 4. To carry out such a program, the appropriate Secretary—

"(A) shall utilize the land acquisition and other authority under the Fish and Wildlife Act of 1956 (16 U.S.C. 742a et seq.), the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.), and the Migratory Bird Conservation Act (16 U.S.C. 715 et seq.), as appropriate; and

"(B) is authorized to acquire by purchase, lease, donation, or otherwise, lands, waters, or interest therein, including short- or long-term conservation easements, and such authority shall be in addition to any other land acquisition authority vested in that Secretary.

"(2) AVAILABILITY OF FUNDS FOR ACQUISITION OF LANDS, WATER, ETC.—Funds made available pursuant to the Land and Water Conservation Fund Act of 1965 (16 U.S.C. 4601–4 et seq.) and funds made available under section 13(c)(4) may be used for the purpose of acquiring or leasing lands, waters, or interests therein under this subsection.".

**SEC. 603. PROPERTY EXCHANGES.**

Section 5A, as redesignated by section 501 of this Act and as amended by sections 601 and 602 of this Act, is amended by adding at the end the following new subsections:

"(c) EXCHANGES.—

"(1) IN GENERAL.—In accordance with subsection (a), the Secretary of the Interior and the Secretary of Agriculture shall encourage exchanges of lands, waters, or interests in land or water within the jurisdiction of each Secretary (other than units of the National Park System and units of the National Wilderness Preservation System) for lands, waters, or interests in land or water that are not in Federal ownership and that are affected by this Act.

"(2) TIMING OF EXCHANGES.—An exchange under this subsection may be made if the Secretary of the Interior or the Secretary of Agriculture determines, without a formal appraisal, that the lands to be exchanged are of approximately equal value after allowing the State in which the land being exchanged is located 30 days in which to comment on the exchange.

"(3) ENVIRONMENTAL ASSESSMENT.—An environmental assessment shall be the only document under section 102(2) of the National Environmental Policy Act of 1976 (16 U.S.C. 4332(2)) that shall be prepared with respect to any exchange under this subsection.

"(4) EXPEDITIOUS EXCHANGE DECISIONS.—An exchange under this subsection shall be processed as expeditiously as practicable. The Secretary of the Interior or the Secretary of Agriculture shall periodically provide information to the non-Federal landowner on the status of the exchange.

"(5) APPLICABLE LAW.—The Secretary of the Interior and the Secretary of Agriculture shall process exchanges under this subsection in accordance with applicable laws that are consistent with this subsection.

"(d) VALUATION.—Any land, water, or interest in land or water to be acquired by the Secretary or the Secretary of Agriculture by purchase, exchange, donation, or otherwise under this section shall be valued as if the land, water, or interest in land or water were not subject to any restriction on use under this Act imposed after the date of acquisition by the current owner of the land, water, or interest in land or water.

"(e) IMPACTS ON ADJACENT PROPERTIES.—For any land or water acquired by the Secretary or the Secretary of Agriculture by purchase, exchange, lease, donation or otherwise under this section, the Secretary or Secretary of Agriculture shall ensure that such purchase, exchange, lease, donation, or other transfer shall not supersede, abrogate, or otherwise impair existing easements, rights-of-way, fencing, water sources, water delivery lines or ditches, and current uses of adjacent land.".

# TITLE VII—STATE AUTHORITY TO PROTECT ENDANGERED AND THREATENED SPECIES

**SEC. 701. STATE AUTHORITY.**

(a) IN GENERAL.—Section 6 (16 U.S.C. 1535) is amended by striking subsection (c) and all that follows through subsection (f) and inserting the following:

"(c) STATE AUTHORITY TO PROTECT ENDANGERED AND THREATENED SPECIES.—

"(1) DELEGATION OF AUTHORITY.—In furtherance of the purposes of this Act, the Secretary may delegate to a State which establishes and maintains an adequate program for the conservation of endangered species and threatened species the authority contained in this Act with respect to species that are residents in the State. Within 120 days after the Secretary receives a certified copy of such a proposed State program, the Secretary shall make a determination whether such program will be adequate to provide protections to endangered species and threatened species in such State. In order for a State program to be determined to be an adequate program for the conservation of endangered species and threatened species, the Secretary must find that under the State program—

"(A)(i) authority resides in the State agency to conserve resident species that are determined by the State agency or the Secretary to be endangered species or threatened species;

"(ii) the State agency has established acceptable conservation programs, consistent with the purposes and policies of this Act, for all resident species in the State which are determined by the Secretary to be endangered species or threatened species or for those species or taxonomic groups of species which the State proposes to cover under its program, and has furnished a copy of such plan and program together with all pertinent details, information, requested to the Secretary;

"(iii) the State agency is authorized to conduct investigations to determine the status and requirements for survival of resident endangered species and threatened species;

"(iv) an agency of the State 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;

"(v) provision is made for public participation in designating resident species as endangered species or threatened species; and

"(vi) the State agency has initiated or encouraged voluntary or incentive based programs to further the conservation objectives for the species; or

"(B)(i) the requirements set forth in clauses (iii), (iv), and (v) of subparagraph (A) are complied with, and

"(ii) plans are included under which immediate attention will be given to those resident species which are determined by the Secretary or the State agency to be endangered species or threatened species and which the Secretary and the State agency agree are most urgently in need of conservation programs.

"(2) PROHIBITIONS NOT AFFECTED.—A delegation to a State whose program is determined adequate under paragraph (1) shall not affect the applicability of prohibitions set forth in or authorized pursuant to section 4(d) or section 9(a)(1) or (2) with respect to the taking of any resident endangered species or threatened species in the State.

"(d) ALLOCATION OF FUNDS.—

"(1) FINANCIAL ASSISTANCE.—(A) The Secretary may provide financial assistance to any State, through its respective State agency, which has entered into a cooperative management agreement under subsection (b) or received authority under a delegation pursuant to subsection (c) of this section to assist in development of programs for the conservation of endangered species and threatened species or to assist in monitoring the status of candidate species pursuant to subparagraph (C) of section 4(b)(3) and recovered species pursuant to section 4(f). The Secretary shall allocate each annual appropriation made in accordance with subsection (i) to such States based on consideration of—

"(i) the international commitments of the United States to protect endangered species or threatened species;

"(ii) the readiness of a State to proceed with a conservation program consistent with the objectives and purposes of this Act;

"(iii) the number of endangered species and threatened species within a State;

"(iv) the potential for restoring endangered species and threatened species within a State;

"(v) the relative urgency to initiate a program to restore and protect an endangered species or threatened species in terms of survival of the species;

"(vi) the importance of monitoring the status of candidate species within a State to prevent a significant risk to the well-being of any such species; and

"(vii) the importance of monitoring the status of recovered species within a State to assure that such species do not return to the point at which the measures provided pursuant to this Act are again necessary.

"(B) So much of the annual appropriation made in accordance with subsection (i) allocated for obligation to any State for any fiscal year as remains unobligated at the close thereof may 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 may be made available for expenditure by the Secretary in conducting programs under this section.

"(2) CONTENTS OF DELEGATION AGREEMENT.—Such delegation 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 species 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 75 percent of the estimated program cost stated in the agreement; and

"(ii) the Federal share may be increased to 90 percent whenever two or more States having a common interest in one or more endangered species 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 the Secretary's 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.

"(3) COMPLIANCE WITH PROCEDURES.—In implementing this Act under authority delegated to a State by the Secretary, the State shall comply with all requirements, prohibitions, and procedures set forth by this Act.

"(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 intervals of 5 years.

"(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—

"(1) permit what is prohibited by this Act or by any regulation which implements 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.".

(b) CONFORMING AMENDMENT.—Section 6(g)(2)(A) (16 U.S.C. 1535(g)(2)(A)) is amended to read as follows:

"(A) to which the Secretary has delegated authority under subsection (c); or".

(c) FACA.—Section 6 (16 U.S.C. 1535), as amended by sections 103 and 105 of this Act, is further amended by adding at the end the following new subsection:

"(l) FACA.—Consultation with States regarding this section shall not be subject to the Federal Advisory Committee Act (5 U.S.C. App.).".

**SEC. 702. STATE PROGRAMS AFFECTED BY THE CONVENTION.**

Section 8A (16 U.S.C. 1537a), as amended by section 207(b) of this Act, is amended by adding at the end the following new subsection:

"(h) ISSUANCE OF PERMITS FOR EXPORT.—

"(1) COMPLIANCE WITH STATE RECOMMENDATION.—In any instance in which a State has a program for management of a native species which is the subject of a request for an export permit under the Convention, the Secretary shall act in accordance with the recommendation of the State unless the Secretary makes a finding and publishes a notice in the Federal Register that scientific evidence justifies a conclusion contrary to the advice of the State.

"(2) APPEAL.—The State which is the subject to such a finding, or any person in that State directly affected because of inability to obtain a permit, may appeal the finding to an Administrative Law Judge or a court. The burden shall be on the Secretary to show that the evidence supports a finding contrary to the recommendation of the State.".

**SEC. 703. COLLABORATIVE RULEMAKING WITH THE STATES.**

Section 6(h) (16 U.S.C. 1535(h)) is amended to read as follows:

"(h) RULEMAKING AUTHORITY AND PROCEDURES.—The Secretary is authorized to promulgate such regulations as may be appropriate to carry out the provisions of this subsection, subject to the following requirements:

"(1) The Secretary shall not propose a rule, under the authority of this Act, that has application in a State, until the Secretary and the State have consulted and the State has been given a meaningful opportunity to assist in the development of the rule, and shall seek to integrate into the proposed rule the recommendations of the State, including recommendations with regard to field practices.

"(2) The Secretary shall establish procedures for rulemaking that include the applicable State within 60 days after the effective date of the Endangered Species Conservation and Management Act of 1995. If the rule will affect more than 1 State, the rule shall provide a means by which the States or their representatives may participate in the rulemaking.

"(3) Where the term 'in cooperation with the States' is used in this Act, the requirements of this subsection shall apply.".

# TITLE VIII—FUNDING OF CONSERVATION MEASURES

**SEC. 801. AUTHORIZING INCREASED APPROPRIATIONS.**

Section 15 (16 U.S.C. 1542) is amended to read as follows:

**"SEC. 15. AUTHORIZATION OF APPROPRIATIONS.**

"(a) IN GENERAL.—In addition to the amounts authorized to be appropriated under section 6(i) and subsections (b) through (e), there are authorized to be appropriated—

"(1) to the Department of the Interior to carry out the duties of the Secretary of the Interior under this Act $110,000,000 for fiscal year 1996, $120,000,000 for fiscal year 1997, $130,000,000 for fiscal year 1998, $140,000,000 for fiscal

year 1999, $150,000,000 for fiscal year 2000, and $160,000,000 for fiscal year 2001;

"(2) to the Department of Commerce to carry out the duties of the Secretary of Commerce under this Act $15,000,000 for fiscal year 1996, $20,000,000 for fiscal year 1997, $25,000,000 for fiscal year 1998, $30,000,000 for fiscal year 1999, $35,000,000 for fiscal year 2000, and $40,000,000 for fiscal year 2001; and

"(3) to the Department of Agriculture to carry out the duties of the Secretary of Agriculture under this Act $4,000,000 for each of fiscal years 1996 through 2001.

"(b) COOPERATIVE MANAGEMENT AGREEMENTS.—There are authorized to be appropriated to the Department of the Interior to carry out section 16(b)(4), $20,000,000 for each of fiscal years 1996 through 2001, to remain available until expended.

"(c) CONVENTION IMPLEMENTATION.—There are authorized to be appropriated to the Department of the Interior to carry out section 8A(e) $1,000,000 for each of fiscal years 1996 through 2001, to remain available until expended.

"(d) NON-FEDERAL CONSERVATION PLANNING.—There are authorized to be appropriated to the Department of the Interior to carry out section 16(b)(3) $20,000,000 for each of fiscal years 1996 through 2001, to remain available until expended.

"(e) HABITAT CONSERVATION GRANTS.—There are authorized to be appropriated to the Department of the Interior to provide habitat conservation grants under section 6(k) $20,000,000 for each of fiscal years 1996 though 2001, to remain available until expended.".

**SEC. 802. FUNDING OF FEDERAL MANDATES.**

Section 16 is amended to read as follows:

**"SEC. 16. FEDERAL COST-SHARING REQUIREMENTS FOR CONSERVATION OBLIGATIONS.**

"(a) DIRECT COSTS DEFINED.—In this section, the term 'direct costs' means—

"(1) expenditures on labor, material, facilities, utilities, equipment, supplies and other resources which are necessary to undertake a specific conservation measure;

"(2) increased purchase power costs and lost revenues caused by changes in the operation of a hydropower system from which the non-Federal person or Federal power marketing administration markets power to meet a specific conservation measure; and

"(3) other reimbursable costs specifically identified by the Secretary as directly related to the performance of a specific conservation measure.

"(b) COST-SHARING.—

"(1) CONSERVATION PLANS.—For any non-Federal person or Federal power marketing administration, the Secretary shall pay 50 percent of any direct costs that result from the compliance by the person or administration mandated by a conservation plan issued under section 5 or any conservation measure that provides protection to a listed species under a plan developed under the Pacific Northwest Electric Power Planning and Conservation Act (16 U.S.C. 839 et seq.) including a plan that provides protection to a larger population unit of the same listed species.

"(2) CONSULTATION REQUIREMENTS.—For any non-Federal person or Federal power marketing administration, the Secretary shall pay 50 percent of direct costs that result solely from requirements imposed by the Secretary on the person or marketing administration under section 7.

"(3) INCIDENTAL TAKE PERMITS.—For any non-Federal person issued an incidental take permit under section 10, the Secretary shall pay to such person 50 percent of the direct costs of preparing the application for the permit and implementing the terms and conditions of the permit.

"(4) COOPERATIVE MANAGEMENT AGREEMENTS.—The Secretary shall pay 50 percent of the direct costs of preparing and implementing the terms and conditions of a cooperative management agreement under section 6(b) incurred by a party to the agreement and any costs incurred by any other non-Federal person or Federal power marketing administration subject to the terms of such agreement.

"(c) METHOD OF COST-SHARING.—

"(1) IN GENERAL.—Except as provided in paragraph (2), the Secretary may make a contribution required under subsection (b) by—

"(A) providing a habitat reserve grant under section 6(b)(14);

"(B) acquiring, from or for the party to the cost-share, land or an interest in land as provided in section 5A; or

"(C) providing appropriated funds.

"(2) COST-SHARE PAYMENT FOR FEDERAL POWER MARKETING ADMINISTRATIONS AND OTHER STATE OR LOCAL GOVERNMENTAL ENTITIES.—The Secretary shall

make a contribution under subsection (b) to a Federal power marketing administration or any other State or local governmental entity by providing appropriated funds directly to the administration or governmental entity.

"(3) APPROPRIATED FUNDS.—To the maximum extent practicable, any appropriated funds paid by the Secretary under paragraphs (1) and (2) shall be paid directly (in lieu of reimbursement) to the party, person, or administration.

"(4) LOANS.—The Secretary may not consider a loan to the party to the cost-share as a contribution or portion of a contribution under subsection (b).

"(5) RECOVERED COSTS.—The Secretary may not claim as a portion of the Federal share under subsection (b) any costs to the Federal Government that are recovered through rates for the sale or transmission of power or water.

"(6) EFFECT OF FEDERAL NONPAYMENT.—If the Secretary fails to make the contribution required under subsection (b), the application of the applicable provision of the conservation plan, requirement under section 7, term under the incidental take permit, or provision of the cooperative management agreement shall be suspended until such time as the full contribution is made. If the suspended provision or requirement includes a conservation easement or other instrument restricting title to the property of the non-Federal person, nonpayment of the full contribution shall result in the nullification of the previously granted restriction on title.

"(7) IN-KIND CONTRIBUTIONS.—A non-Federal person or Federal power marketing administration may include in-kind contributions in calculating the appropriate share of the costs of the person or administration under this section.

"(8) COSTS PAID BY THE SECRETARY.—Compensation from the Federal Government under section 19 may not cover costs incurred by a non-Federal person that were otherwise paid by the Secretary under subsection (b).

"(d) EXISTING COST-SHARING AGREEMENTS.—Any cost-sharing agreement with a non-Federal person provided in any recovery plan or other agreement in existence prior to the date of enactment of this subsection shall remain in effect unless the non-Federal person requests that the cost-sharing percentage be reconsidered.

"(e) ADJUSTMENTS TO COST-SHARING PERCENTAGE.—At the request of the non-Federal person, the Secretary may adjust the percentage of the Federal contribution to a higher share.".

**SEC. 803. NATIONAL ENDOWMENT FOR FISH AND WILDLIFE.**

Section 13 is amended to read as follows:

**"SEC. 13. NATIONAL ENDOWMENT FOR FISH AND WILDLIFE TRUST FUND.**

"(a) ESTABLISHMENT.—There is established in the general fund of the Treasury a separate account which shall be known as the 'National Endowment for Fish and Wildlife Trust Fund' (in this section referred to as the 'Fund').

"(b) CONTENTS.—The Fund shall consist of the following:

"(1) Amounts received as gifts, bequests, and devises under subsection (d).

"(2) Other amounts appropriated to or otherwise deposited in the Fund.

"(c) USE.—Amounts in the fund shall be available to the Secretary, subject to appropriations, for the following:

"(1) Payment of compensation under section 19.

"(2) Habitat conservation grants under section 6(k).

"(3) Payment of cost sharing under section 16.

"(4) Acquisition or leasing of lands, waters, or interests therein under section 5A(b).

"(d) GIFTS, BEQUESTS, AND DEVISES.—

"(1) IN GENERAL.—The Secretary may accept, use, and dispose of gifts, bequests, or devises of services or property, both real and personal, for the purpose of carrying out this Act.

"(2) DEPOSIT INTO FUND.—Gifts, bequests, or devises of money, and proceeds from sales of other property received as gifts, bequests, or devises, shall be deposited in the Fund and shall be available for disbursement upon order of the Secretary.".

# TITLE IX—MISCELLANEOUS PROVISIONS

**SEC. 901. AMENDMENTS TO DEFINITIONS.**

Section 3 (16 U.S.C. 1532) is amended—

(1) by adding after paragraph (16) (as added by section 401(e)(1) of this Act) the following new paragraph:

"(17) The term 'non-Federal person' means a person other than an officer, employee, agent, department, or instrumentality of the Federal Government or a foreign government, acting in the official capacity of the person."; and

(2) by amending paragraph (3) (as redesignated by section 102(a)(1) of this Act) to read as follows:

"(3) 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, except that it does not include exhibition of commodities or species by exhibitors licensed under the Animal Welfare Act (7 U.S.C. 2131 et seq.), museums, or similar cultural or historical organizations.".

**SEC. 902. REVIEW OF SPECIES OF NATIONAL INTEREST.**

No later than 60 days after the date of the enactment of this Act, the Secretary (as that term is defined in section 3 of the Endangered Species Act of 1973, as amended by this Act) shall identify those species which are listed under section 4 of that Act as a result of being determined to be a population segment. No later than one year after the date of the enactment of this Act, the Secretary shall review and determine whether or not it is in the national interest to continue to list each such population segment. Those population segments which the Secretary recommends for continued listing in the national interest shall be submitted to the Congress for approval. Any population segment which is not determined to be in the national interest shall be delisted within 180 days after that determination.

**SEC. 903. PREPARATION OF CONSERVATION PLANS FOR SPECIES LISTED BEFORE ENACTMENT OF THIS ACT.**

(a) LISTED SPECIES WITHOUT RECOVERY PLANS.—

(1) PRIORITY FOR DEVELOPMENT OF CONSERVATION PLANS.—Not later than 30 days after the date of enactment of this Act, the Secretary (as defined in section 3 of the Endangered Species Act of 1973, as amended by this Act) shall publish a list of all species that were determined to be endangered species or threatened species under section 4 of the Act (16 U.S.C. 1533) for which no final recovery plans were issued under section 4(f) of the Act (16 U.S.C. 1533(f)) (as in effect on the day before the date of enactment of this Act) divided equally into three tiers of priority for preparation of conservation objectives and conservation plans therefor pursuant to section 5 of the Act. Any species which is listed as an endangered species or threatened species in more than one State shall be placed in the first tier of priority.

(2) SCHEDULE FOR ADOPTION OF PLANS.—The Secretary shall publish pursuant to section 5 of the Endangered Species Act of 1973 a conservation objective, draft conservation plan, and final conservation plan (except when a conservation objective is published pursuant to section 5(b)(3)(C) of such Act) for each species within each tier of priority identified pursuant to paragraph (1) within the following periods after the date of enactment of this Act:

(A) Conservation objective: First tier, 120 days; second tier, 12 months; and third tier, 24 months.

(B) Draft conservation plan: First tier, 6 months; second tier, 18 months; and third tier, 30 months.

(C) Final conservation plan: First tier, 12 months; second tier, 24 months; and third tier, 36 months.

(b) LISTED SPECIES WITH RECOVERY PLANS.—

(1) PRIORITY FOR REVISION OF EXISTING PLANS.—Except as provided in paragraph (3), a final recovery plan issued under section 4(f) of the Endangered Species Act of 1973 (16 U.S.C. 1533(f)) (as in effect on the day before the date of enactment of this Act) shall continue in effect until the expiration of the deadline for revision thereof established under this paragraph. Within 90 days after the date of enactment of this Act, the Secretary shall publish a list of all species that were determined to be endangered species or threatened species under section 4 of such Act (16 U.S.C. 1533) and for which final recovery plans were issued under section 4(f) of such Act (16 U.S.C. 1533(f)) (as in effect on the day before the date of enactment of this Act) divided equally into three tiers of priority for preparation of conservation objectives pursuant to section 5(b) of such Act and revisions of the recovery plans consistent with the requirements for conservation plans set forth in section 5(c) of such Act. Any species which is listed as an endangered species or threatened species in more than one State shall be placed in the first tier of priority.

(2) SCHEDULE FOR REVISION OF PLANS.—The Secretary shall publish pursuant to section 5 of the Endangered Species Act of 1973 a conservation objective, draft revision of the existing recovery plan, and final revision of the existing re-

covery plan (except when a conservation objective is published pursuant to section 5(b)(3)(C) of such Act) for each species within each tier of priority identified pursuant to paragraph (1) within the following periods after the date of enactment of this Act:

(A) Conservation objective: First tier, 180 days; second tier, 18 months; and third tier, 30 months.

(B) Draft revised recovery plan: First tier, 12 months; second tier, 24 months; and third tier, 36 months.

(C) Final revised recovery plan: First tier, 18 months; second tier, 30 months; and third tier, 42 months.

(3) SPECIES FOR WHICH NO CONSERVATION PLAN IS REQUIRED.—If the Secretary publishes a conservation objective for which no conservation plan is required pursuant to section 5(b)(3)(C) of the Endangered Species Act of 1973 for any species subject to this subsection, the final recovery plan applicable to the species shall be rescinded.

(c) PROHIBITION ON ADDITIONAL REQUIREMENTS.—The Secretary or any other Federal agency may not require any increase in any measurable criterion contained in, or any site specific management action in addition to those provided in, a final recovery plan issued under section 4(f) of the Endangered Species Act of 1973 (16 U.S.C. 1533(f)) (as in effect on the day before the date of enactment of this Act) until such time as a conservation plan, or, pursuant to section 5(b)(3)(C) of such Act, a conservation objective, has been published under section 5 of such Act.

(d) EXISTING BIOLOGICAL OPINIONS.—In conjunction with the issuance of a conservation plan, or, pursuant to section 5(b)(3)(C) of the Endangered Species Act of 1973, a conservation objective under subsection (a) or (b), the Secretary (as defined in section 3 of such Act (16 U.S.C. 1532)) shall review and reissue, in accordance with section 7 of such Act, any written opinion of the Secretary that relates to the affected species and was issued after January 1, 1995, under section 7(b)(3) of such Act (16 U.S.C. 1536(b)(3)) (as in effect on the day before the date of enactment of this Act).

**SEC. 904. APPLICATION OF CONSERVATION PLANS FOR SINGLE OR MULTIPLE SPECIES TO HABITAT CONSERVATION PLANS APPROVED PRIOR TO THIS ACT.**

A single or multiple species habitat conservation plan developed and approved under the Endangered Species Act of 1973 by the Secretary (as that term is defined in that Act) before the date of the enactment of this Act and a permit issued with respect to such plan shall remain in effect and shall not be required to be amended if a species to which the plan and permit apply is determined to be an endangered species or a threatened species under section 4 that Act. No further requirements shall be made by the Secretary for such plan for any reason. A party who has agreed prior to the effective date of this Act to manage an area under a single or multiple species habitat conservation plan under that Act shall demonstrate conservation of habitat, but shall not be required to relate such conservation specifically to each species with status under section 4 of the Endangered Species Act of 1973 or to species which are candidates for listing under that section.

**SEC. 905. WASHINGTON COUNTY, UTAH, DESERT TORTOISE HABITAT CONSERVATION PLAN.**

(a) IN GENERAL.—The document entitled "WASHINGTON COUNTY, UTAH DESERT TORTOISE INCIDENTAL TAKE PERMIT APPLICATION/DOCUMENTS", dated June 1995, in this section referred to as the "Plan", is deemed to comply with all requirements applicable to conservation plans under section 10 of the Endangered Species Act of 1973, as amended by this Act. The Secretary (as that term is defined in that Act) shall promptly issue a permit under section 10(a)(1)(B) of that Act for all activities covered by the Plan.

(b) EXCHANGES OF LANDS FOR HABITAT RESERVE.—

(1) IN GENERAL.—The Secretary shall take all appropriate steps to acquire by exchange for Bureau of Land Management lands, in accordance with the Plan, lands of equivalent value that are under State or private ownership and that are offered to the Secretary for such exchange by the owner of the lands. Lands acquired by the Secretary under this subsection shall be included in the Mojave Desert habitat reserve provided for in the Plan and shall be managed in accordance with the Plan.

(2) VALUATION OF LANDS.—For purposes of exchanges of lands under this subsection, the value of lands shall be determined without regard to the presence on the lands of species that are listed under section 4(c) of the Endangered Species Act of 1973.

**SEC. 906. TAKING OF SPECIES TO CONSERVE LISTED SPECIES.**

(a) IN GENERAL.—Notwithstanding any other provision of law (other than subsection (b)), the taking of a species for the purpose of conserving any other species that is listed under section 4 of the Endangered Species Act of 1973, as amended by this Act, is not prohibited by the Endangered Species Act of 1973 (as so amended) or any other Federal law.

(b) LIMITATION.—Subsection (a) does not authorize the taking of any species that is—

(1) listed as a threatened species or endangered species under the Endangered Species Act of 1973, as amended by this Act;

(2) depleted; or

(3) a strategic stock.

(c) DEFINITIONS.—In this section:

(1) DEPLETED.—The term "depleted" means a species which the Secretary (as that term is defined in the Endangered Species Act of 1973, as amended by this Act), determines is below its optimum sustainable population.

(2) STRATEGIC STOCK.—The term "strategic stock" means a species stock—

(A) for which the level of direct human-caused mortality exceeds the potential biological removal level; or

(B) which, based on the best available scientific information, is declining and is likely to be listed as a threatened species under the Endangered Species Act of 1973 within the foreseeable future.

(3) MISCELLANEOUS TERMS.—Each of the terms "Secretary", "species", and "taking" has the meaning that term has in the Endangered Species Act of 1973, as amended by this Act.

**SEC. 907. CONFORMING AMENDMENTS.**

The Endangered Species Act of 1973, is amended by striking the material that follows the enacting clause and precedes section 2 and inserting the following:

**"SECTION 1. SHORT TITLE: TABLE OF CONTENTS.**

"(a) SHORT TITLE.—This Act may be cited as the 'Endangered Species Act of 1973'.

"(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:



**SEC. 908. APPLICATION OF PROVISIONS TO CERTIFIED APPLICATORS OF REGISTERED PESTICIDES.**

Section 1010(a) of the Act to authorize appropriations to carry out the Endangered Species Act of 1973 during fiscal years 1988, 1989, 1990, 1991, and 1992, and for other purposes (7 U.S.C. 136a note) is amended by inserting after the first sentence the following: "Nothing in this Act or the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) shall be construed as prohibiting certified applicators, as that term is defined in section 2(e) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136(e)), or persons working under their direct supervision, from applying a registered pesticide in or around a commercial facility located within the critical habitat of a listed or endangered species for the purpose of preventing, destroying, repelling, or mitigating any pest, including but not limited to rats, mice, ground squirrels, or other rodents that may pose a threat to public health or safety; nor shall anything in this Act or the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) be construed as requiring or authorizing the Administrator of the Environmental Protection Agency by means of pesticide labeling, regulation, or otherwise from prohibiting certified applicators, as that term is defined in section 2(e) of the

Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136(e)), or persons working under their direct supervision, from engaging in the activities described in the foregoing clause. The term 'commercial facility' as used in the preceding sentence means any structure or other facility that is intended for nonresidential use, including but not limited to food processing plants, food warehouses, grocery stores, feed lots, restaurants, and retail shopping malls. Neither this Act nor the Endangered Species Act of 1973 (15 U.S.C. 1531 et seq.) shall place any additional restrictions on the use of the United States Department of Agriculture registered toxicants.".

## PURPOSE OF THE BILL

The purpose of H.R. 2275 is to reauthorize and amend the Endangered Species Act of 1973.

## BACKGROUND AND NEED FOR LEGISLATION

The Federal Government has been concerned about endangered species since the Endangered Species Preservation Act was enacted in 1966. In its present form, the Endangered Species Act of 1973 (ESA, Public Law 93–205, 16 U.S.C. 1531 et seq.) has evolved into one of our Nation's strictest and most stringent environmental laws. Passed in response to a concern that various species, like bald eagles and leopards, had become or were in danger of becoming extinct, the ESA embodies a rigid and comprehensive approach to maintaining species diversity in the United States and throughout the world.

The Secretaries of the Interior and Commerce, with operational authority delegated to the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), are responsible for implementing the ESA. In addition, the Department of Agriculture's Animal and Plant Inspection Service oversees the import and export of endangered species.

Under the ESA, Federal protection is provided to species listed as endangered or threatened under Section 4 of the ESA. Any species or subspecies of fish, wildlife, or plants may be listed, as well as geographically distinct populations of vertebrate species. The appropriate Secretary must adopt regulations listing species and must rely on the "best scientific and commercial data available" after considering the status of the species and efforts being made to protect the species. A decision to list a species may be based on a recommendation made by the Secretary or by a petition filed by an interested private citizen. Denials of petitions to list are subject to judicial review, while the granting of the petition to list is not.

At the time of listing, the Secretary is directed to identify and designate areas of habitat that are critical for each species under Section 4(b)(2) of the ESA. In designating critical habitat, the Secretary is to make decisions based on the best scientific data available and must take into consideration the economic impact and other relevant impacts of specifying any area as critical habitat. The Secretary may exclude an area from the critical habitat designation if he or she determines that the benefits of exclusion outweigh the benefits of inclusion, unless the exclusion would result in the species becoming extinct.

Section 4(f) of the ESA requires the Secretary to develop a recovery plan for each species, unless the Secretary finds that such a plan will not promote the conservation of the species. When devel-

oping a recovery plan, no consideration is given to the cost, the amount of affected acreage, private property rights, or impacts on State or local municipalities.

Section 4(d) of the ESA authorizes special protective rules for threatened species. While it was intended that there be a distinction between rules for threatened species and those for endangered species, in reality, this distinction has been blurred through the regulatory process. There is little, if any, difference in the type of protections and prohibitions that have been established for these two lists of species.

Section 7 of the ESA provides that when a Federal agency takes an action, authorizes an action, or funds an action which might affect a listed species, the agency is required to consult with FWS to ensure that the action will not likely jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat of that species. This consultation requirement applies to all Federal permits and licenses, including permits under Section 404 of the Clean Water Act. Where the consultation process breaks down, there is a procedure for convening a Cabinet-level exemption committee to resolve the conflict. This process, however, is only available to the parties involved in a Federal consultation involving a Federal activity.

Section 9 of the ESA prohibits the "take" of an endangered or threatened species. The "take" prohibition has the greatest impact on private landowners. The method by which a private landowner is prevented from using property or carrying out a particular activity is usually through a warning that the activity in question may constitute a "take" of a listed species in violation of the ESA. "Take" is defined in the ESA as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." The Secretary has, by regulation, defined "take" to include habitat modification which might harm the species. Penalties for "taking" an endangered species can include both civil and criminal penalties up to $50,000 and imprisonment.

Section 11 of the ESA establishes penalties and enforcement procedures. Civil penalties can range from $500 to $25,000. Criminal fines can range from $25,000 to $50,000 and prison sentences can range between six months to one year. In addition, the ESA authorizes citizens to sue to enforce the provisions of the ESA. Citizens may sue both governmental agencies and other private citizens whom they believe to be in violation of the ESA. Citizens must give 60 days notice before a suit may be filed. The judge may award the citizen bringing the suit all costs of litigation, including reasonable attorney and expert witness fees when the judge determines the award to be appropriate. There is no requirement that the citizen must win the suit to receive attorney and expert witness fees.

In many areas of the country where wetlands are present there is a great deal of overlap between the wetlands regulatory program (Section 404 of the Clean Water Act) and the ESA. Where a wetlands permit is sought that affects habitat for an endangered species, the ESA requires that the Army Corps of Engineers, which issues the wetlands permit, consult with FWS on the impacts on en-

dangered species. The Army Corps of Engineers can require the permit applicant to mitigate the loss of the wetlands.

In 1988, the Congress enacted the Endangered Species Act Amendments (Public Law 100–478) to reauthorize appropriations for the ESA until September 30, 1992. This authorization has since expired. Since that time, funds have been routinely appropriated to allow the provisions of the ESA, such as listing decisions, recovery plans, habitat designations, and the various prohibitions, to remain in effect.

During the 103rd Congress, the Committee on Merchant Marine and Fisheries conducted several oversight hearings on the ESA. While two major pieces of legislation were pending before the Committee, no action was scheduled on either measure. The Merchant Marine and Fisheries Committee was abolished at the beginning of the 104th Congress, and its jurisdiction over the ESA transferred to the Committee on Resources.

On Thursday, February 23, 1995, the House of Representatives adopted by voice vote an amendment to H.R. 450, the Regulatory Transition Act. This Act extends the regulatory moratorium for new listings of endangered species or designation of critical habitat under the ESA until December 31, 1996, or upon the enactment of a reauthorization bill, whichever occurs first. The moratorium became effective on April 10, 1995, when the President signed Public Law 104–6 and remained in effect until April 26, 1996, when Congress enacted the Department of the Interior Appropriations Act for Fiscal Year 1996, giving the President authority to lift the moratorium. The President, by executive order, lifted the moratorium on April 26, 1996.

Also during the 104th Congress, the Committee on Resources received testimony on the escalating numbers of conflicts around the nation between the efforts of the Federal Government to protect endangered and threatened species and the economic activities important to many regional economies. As follows is a summary of testimony relating to a few high profile conflicts:

CRITICAL HABITAT FOR THE LOUISIANA BLACK BEAR—LOUISIANA

The Louisiana Black Bear is a subspecies of the common black bear found throughout the eastern United States. Its historic range includes portions of Louisiana, southern Mississippi, and eastern Texas. On January 7, 1992, FWS listed the Louisiana Black Bear as a "threatened species" within its historic range. This designation extends all the protections of the ESA to the Louisiana Black Bear.

In 1990, prior to the listing, the Black Bear Conservation Committee was organized to stabilize and manage existing bear populations and to restore the bear to suitable habitats in Mississippi, Louisiana and Texas. This coalition consists of landowners, State and Federal agencies, private conservation groups, forest products companies, agricultural interests and universities. Current membership includes over 60 organizations. Through their efforts, a special rule was developed for the bear that exempted normal forestry activities from the prohibitions of Section 9 of the ESA. This has prevented the bear from becoming a liability to private landowners covered by the rule, and makes bears welcome on private timberland in these States since there is no economic penalty for

providing bear habitat. In addition, the Committee provides educational materials, newsletters, a Black Bear Management Handbook, and a Black Bear Restoration Plan. Their efforts have been generally accepted by the citizens of the area.

Subsequent to the listing of the subspecies as "threatened," the FWS also proposed to designate an area of approximately three million acres in Louisiana, most of which is privately owned, as critical habitat for the bear. The impact of the designation as critical habitat includes the requirement that there be consultation on any Federal action, whether on public or private lands. Federal action could include the issuance of Federal authorizations, licenses, permits, or funding. An example would be the issuance of a Clean Water Act Section 404 wetlands permit. Much of the property within the proposed critical habitat is wetlands and, therefore, subject to the permitting requirements of Section 404. Private landowners expressed concerns that other unknown consequences could also flow from the designation. Private property owners in the area have expressed strong opposition to the designation, fearing new Federal restrictions on the use of and devaluation of their land.

RED-COCKADED WOODPECKER—SOUTHEASTERN UNITED STATES

Red-cockaded woodpeckers (RCWs) were listed by the FWS as endangered in 1970. Since that time, and this species' listing has had major economic impacts on the timber industry in the Southeast. According to the FWS, the RCW populations continue to decline.

One impact of the listing has been on local government revenues. By law, counties that contain national forest land annually receive 25 percent of all Forest Service timber receipts in those counties as payments in lieu of taxes that the county would have otherwise received if this property were privately owned. Half of the money goes to county roads and bridges and the other half to the various school districts.

In 1988, U.S. District Judge Robert Parker issued a ruling which prohibited clearcutting on about one-third of the Federal forest land in Texas based on the presence of the RCW. The impact of this decision on East Texas county revenues has been substantial. The peak year for revenue in East Texas was in 1983, when the Forest Service provided payments in lieu of taxes to the 12 counties of $4.2 million. Revenue has fluctuated since then but by 1992 was down to $2.3 million. Trinity County, Texas, for example, received $722,519 from the Forest Service in 1986 and $290,311 in 1992, a decrease of almost 60 percent.

Private lands have been equally affected by the RCW listing, as landowners are prevented from undertaking an activity that would "take" an RCW. In recent years, some larger companies have been able to ameliorate the effect of the listing of the RCW by signing creative agreements with the Federal Government. Smaller landowners have not been as successful. Many small landowners take preemptive action against the consequences of RCW habitation by clear cutting their private timber before RCW occupancy or managing the timberland so that is does not attract the bird. The long-term consequences of landowner fear of the ESA for the RCW are dire, and its population is currently declining. The Committee re-

ceived testimony about a lawsuit filed against the United States in the U.S. Court of Claims seeking compensation under the Fifth Amendment to the Constitution for a taking of private property under the ESA relating to the RCW.

TURTLE EXCLUDER DEVICE EXPERIENCE IN THE GULF OF MEXICO

There are five subspecies of sea turtles that have the most far-reaching impact for the shrimping community in the Gulf of Mexico and to a lesser extent in the south Atlantic. The National Marine Fisheries Service (NMFS), an agency within the National Oceanographic and Atmospheric Administration (NOAA) of the Department of Commerce, is the primary Federal agency which implements the ESA with respect to marine species, including sea turtles. The NMFS issued regulations in 1987 requiring shrimpers to install a turtle excluder device (TED) in their shrimp trawls or to limit trawling times in certain waters. This was to ensure that sea turtles do not drown if caught in the trawl. However, subsequent amendments to the regulations have extended the requirement to all waters of the Gulf of Mexico and to areas of the Atlantic on a year-round basis.

The requirement for TEDs has been criticized by the shrimping community because shrimp catch is reduced by varying percentages when trawling with a TED. Since TEDs are designed to release turtles, they also release shrimp, greatly reducing the shrimp catch of each shrimper.

In addition, NMFS and the U.S. Coast Guard have an aggressive enforcement effort in place that includes the frequent boarding of vessels during shrimping operations to ensure that TEDs are in use and are properly installed. When a vessel is boarded, shrimp trawling ceases. Shrimpers have complained of being boarded more than once in a day, increasing their down-time, reducing catch and dramatically increasing their operating costs. Fines for violation of the TEDs regulations result in both criminal and civil penalties, with fines as high as $25,000 and up to one year in jail, as well as the seizure of boats, nets, fishing gear, and shrimp catch. In addition, NMFS has reported unpaid fines to the Internal Revenue Service where the unpaid fine is considered "income" subject to additional taxes and penalties. In July 1991 the Subcommittee on Coast Guard and Navigation of the Committee on Merchant Marine and Fisheries (Committee Print No. 102-39) held a hearing on the enforcement of the ESA by NMFS and Coast Guard. The testimony revealed that although the ESA mandates a hearing before a civil penalty can be assessed, NMFS was assessing penalties without giving accused shrimpers an opportunity for a hearing after one was requested. In 1993, a Federal district court threw out an $8,000 fine against a shrimper because NMFS had not given the defendant a hearing as required by the ESA.

In September and October of 1994, Earth Island Institute and the Center for Marine Conservation filed separate lawsuits against NOAA under the ESA seeking additional relief against shrimping in the Gulf of Mexico. In November 1994, NMFS issued a jeopardy opinion under Section 7 of the ESA proposing to further increase restrictions on shrimpers, including the possibility of further fisheries closures. The litigation is pending.

FOUNTAIN DARTER—EDWARDS AQUIFER/TEXAS

The fountain darter is a small freshwater fish. According to the FWS, the species' well-being is threatened by severely reduced spring flows from the Edwards Aquifer in central Texas. Despite the hundreds of thousands of fountain darters in the Comal and San Marcos Springs, the species was listed as endangered on October 13, 1970, and critical habitat was designated on July 14, 1980.

The Sierra Club sued to obtain protection for the fountain darter and other endangered species living in the Comal and San Marcos Springs. The U.S. District Court for the Western District of Texas ruled on February 1, 1993, that under the ESA, to preserve these species, it is mandatory to maintain flows of water at these Springs at a level that would require the City of San Antonio to severely reduce, or even in an extreme drought, to stop all pumping of water from the Edwards Aquifer, which feeds the Comal and San Marcos Springs.

The Court's decision makes it an unlawful "taking" of the fountain darter for the City of San Antonio to pump water from the Edwards Aquifer at certain times of the year. Since the Edwards Aquifer is the sole source of water for the City of San Antonio and its 1.5 million citizens, the consequences of severely reducing the availability of water would be devastating. There is currently no alternative source of water to replace the Edwards Aquifer. It will take five to ten years for a significant amount of non-aquifer water to become available at a cost of $500 million to $1.5 billion.

The Honorable Nelson W. Wolff, Mayor of San Antonio, testified about the enormous adverse economic impacts that the Court's decision was having on his city. He also testified that the over $2 million in attorneys' fees in this case could have been better spent on protecting endangered species and their habitat. Attorneys' fees awarded under the citizen suit provision of the ESA are paid by the U.S. taxpayer.

GOLDEN CHEEK WARBLER—TEXAS

The golden-cheeked warbler is a small, insect-eating songbird that nests and feeds in the oak-juniper woodlands of central Texas. On May 4, 1990, the golden-cheeked warbler was emergency listed by the FWS as an endangered species, providing temporary protection under the ESA. On December 27, 1990, it was formally added to the list of endangered species. A plan to recover the golden-cheeked warbler, finalized in September 1992, outlined the steps necessary to delist the species in the future.

Texas State officials have indicated that property values have dropped nearly $400 million since the FWS listed the golden-cheeked warbler as an endangered species. As a result, local property tax assessments declined for those affected lands, meaning the State of Texas is losing $2 million in property taxes each year. Local landowners are finding it difficult, if not impossible, to sell their property because it has been, or may be, designated as critical habitat.

In addition, developers and landowners in Travis County have decided that one way to eliminate conflicts with the golden-cheeked warbler is to harvest ash junipers trees that might be used as war-

bler nesting sites in the future. While this practice is not illegal, it is likely to be counterproductive to the long-term interests of both the warbler and private property owners. Testimony was received at the Texas hearing regarding this perverse disincentive to wildlife conservation caused by the ESA's severe consequences associated with the presence of a listed species on private property.

ARKANSAS RIVER SHINER—SOUTHWEST

The Arkansas River shiner is a small fish found in the Canadian River in New Mexico, Oklahoma, and Texas, as well as in the Cimmaron River in Kansas and Oklahoma.

According to the FWS, the Arkansas River basin population is threatened by habitat destruction and modification from stream dewatering or depletion due to the diversion of surface water and excessive groundwater pumping, water quality degradation, and construction of impoundments.

On July 19, 1994, the FWS proposed to list the Arkansas River basin population of the Arkansas River shiner as an endangered species. While a final decision has not been made by the FWS, the Texas Parks and Wildlife Department has stated for the record that they do not believe the Arkansas River shiner should be listed as a threatened or endangered species. In fact, the FWS itself funded a study that indicated the Arkansas River shiner is thriving and abundant in the Canadian River in Texas.

While it was difficult for witnesses to quantify the financial impact of listing the Arkansas River shiner, testimony was received that the listing is likely to have a devastating effect on the region since the economic health of the Texas High Plains is inexplicably tied to the use of water from the Ogalla Aquifer for irrigated agriculture. There were concerns that future restrictions on water usage from the Canadian River might be the result of the listing.

RED WOLF—NORTH CAROLINA

Section 10(j) of the ESA authorizes the Secretary of the Interior to release "experimental populations" of endangered or threatened species outside the current range of the species if the Secretary determines that the release will further the conservation of the species. However, before authorizing the release, the Secretary is required to make a determination that the experimental population is essential to the continued existence of an endangered species or a threatened species. "Experimental populations" are not as stringently protected under the ESA as endangered or threatened populations.

The Red Wolf Reintroduction Program was begun in Eastern North Carolina in 1987 when 63 wolves were released. Since 1987, 70 pups have been born to the released wolves. The wolves were originally introduced into the Alligator River National Wildlife Refuge and the Pocosin Lakes National Wildlife Refuge. There are approximately 300,000 acres of Federally-owned land available as habitat for the wolves, and under various agreements with landowners, another 187,000 acres of privately-owned lands is also available.

In 1991, the FWS initiated a red wolf reintroduction project in western North Carolina in the Great Smokey Mountain National

Park. Currently there are only two wolves in the Park, but the Service intends to introduce three additional family groups.

The State of North Carolina passed a law to allow private landowners to trap and kill red wolves found on private land in Hyde and Washington Counties. It became effective on January 1, 1995. FWS opposed the State law.

Landowners have organized a citizens group to oppose reintroduction of wolves called C.R.O.W.N. (Citizens Rights Over Wolves Now). Concern was expressed for the safety of local citizens, the safety of their children and of their pets. Testimony was also received that the wolves are leaving the designated release area and are eliminating many game species from privately-owned land not in the release area.

THE NORTHERN SPOTTED OWL—PACIFIC NORTHWEST

The FWS listed the northern spotted owl (NSO) as a threatened species on June 26, 1990. In 1992, the FWS designated 190 separate areas consisting of 6.88 million acres in Washington, Oregon, and California as critical habitat for the NSO. The listing and designation of critical habitat were both proposed as a result of court orders obtained by environmental organizations seeking enforcement of the ESA. In addition, lawsuits were filed under other Federal statutes, including the National Forest Management Act, the Migratory Bird Treaty Act and the National Environmental Policy Act, which also resulted in the issuance of injunctions prohibiting the sales of timber on Federal, State and private lands. A petition was filed to delist the NSO in California, which was rejected on September 1, 1994.

In April 1993 the Clinton Administration held a "timber summit" in Portland, Oregon, to seek a resolution of the crisis in the Pacific Northwest resulting from the injunctions against timber operations. On July 1, 1993, the administration released their proposal, "The Forest Plan for a Sustainable Economy and a Sustainable Environment," which included numerous recommendations, including limited timber harvesting. Many of these recommendations have yet to be carried out.

In addition, in an attempt to ease restrictions on private lands, the Department of the Interior is proposing a new Section 4(d) rule for the NSO. Section 4(d) of the ESA gives the Secretary discretion to make less stringent rules for species that are "threatened" rather than "endangered". The reason given by the FWS for the new 4(d) rule is that it is no longer necessary and advisable to apply a blanket prohibition against the incidental take of the owl throughout its entire range. The rule will allow some increases in harvest from private lands in certain areas, but contains numerous exceptions. Therefore, current restrictions will continue to apply to many private lands.

The Administration's Forest Plan also proposed economic assistance in the form of grants to both communities and individuals dislocated by NSO restrictions. The Northwest Economic Adjustment Fund was set up as a substitute for payments in lieu of taxes. Individuals would be eligible for job retraining and other services. The Interior Department received $56,400,000 in Fiscal Year 1995 to

soften the impacts of the forest plan reductions in the Pacific Northwest.

A witness representing the Western Council of Industrial Workers, the union representing many of the timber workers in the area, testified that the President's proposal prohibits timber harvesting on 88 percent of Federal lands in the NSO habitat regions of Oregon, Washington, and northern California. She also testified that NSO restrictions also included State and private lands, resulting in over 200 mill closures and the layoff of 18,000 mill workers. She described how the ESA was destroying many small towns. Other witnesses testified about the faulty assumption that NSO can only thrive in old growth forests. One scientist also testified that efforts to preserve large blocks of forests may be having adverse effects on the biodiversity of those forests including many of the species that might thrive in more diverse stands. The Superintendent of Schools for Siskiyou County, California, described the enormous problems his schools face in providing services for the children of laid off timber workers and the impacts of job losses on his community. In his words, "Those who tell you that the ESA does not have an impact on a community could come to my town and we could show them that day in and day out."

SALMON RECOVER—PACIFIC NORTHWEST AND ALASKA

The Columbia River Basin, which includes portions of several northwestern States and Canada, is habitat for various types of Pacific Salmon, including chinook, coho, sockeye, pink and chum, and for steelhead trout. Biologists apply the names of the rivers where the salmon are found and the seasons when the adult salmon are spawning to further categorize these species. This results in hundreds of "stocks" or "runs" of the five salmon species. NMFS is the primary Federal agency with responsibility for the enforcement of the ESA with respect to Pacific salmon stocks. The Snake River sockeye salmon have been found by the NMFS to be an evolutionarily significant unit of the species and to be endangered. According to NMFS, the Snake River salmon range is from northern California to the Gulf of Alaska and into the high seas of the North Pacific.

On April 18, 1995, NMFS proposed a recovery plan for the Snake River Salmon which will have far reaching implications for the entire Columbia basin. According to NMFS, there are many causes of salmon stocks' decline, including dams, water use, overharvest, habitat destruction, hatchery impacts and other human-induced factors. NMFS has also asserted that other causes are land use activities in the Snake River watersheds, such as logging, grazing, mining, and road building. The NMFS Recovery plan has as its goal the recovery of the salmon stocks and the restoration of the Columbia and Snake River ecosystem. Because many of the actions required by the recovery plan will involve other Federal agencies, there will be a regional implementation team established to provide a framework for implementation by various Federal agencies of the recommendations. The recommendations of the recovery plan include protection of ecosystems, stricter management of salmon harvest and improvements in propagation and hatcheries. Improve-

ment of habitat will affect many sectors, but will more seriously affect water users of various types, including recreational users.

While the commercial and recreational salmon fishery is extremely important to the Pacific Northwest, testimony at the Vancouver, Washington, hearing revealed that the NMFS Recovery Plan could cost the region $600 million annually, with the potential loss of thousands of additional jobs in the aluminum industry, forestry, agriculture, and other sectors. In addition, one scientist testified that part of the cause of salmon decline could be ocean conditions over which man has little or no control. This same scientist also criticized the failure of the ESA to fully consider good science in the listing process and developing recovery measures.

The President of the Alaska Senate, Senator Drue Pearce, testified that, although Alaska has record salmon production, Alaska fishermen are being asked to take a 50 percent reduction in harvest of nonlisted salmon because of the possibility of catching one or two Snake River chinook salmon.

### THE STEPHENS KANGAROO RAT—CENTRAL CALIFORNIA

The Stephens Kangaroo Rat (SKR) was listed as an endangered species in October 1988. The SKR is found in southern California and inhabits underground burrows. The SKR's preferred habitat is in areas with annual grasses and herbaceous plants. The listing of the SKR affects activities such as construction and farming which require the disturbance of soils. Riverside County has been particularly impacted by the SKR, freezing development in 22,000 acres of Riverside County.

In an effort to avoid the stringent restrictions of the ESA, a number of cities in Riverside County joined together to form the Riverside County Habitat Conservation Agency (RCHCA) which prepared a short-term Habitat Conservation Plan (HCP) designed to protect the SKR while developing a plan for permanent preserves. The plan set up nine study areas consisting of 78,000 acres. In these study areas the "take" of the SKR was prohibited and a permit was required for development if there was a finding that the project would have no adverse effects on the study area as an eventual preserve. The plan calls for mitigation fees of $1,950 per acre which is assessed on all new construction. In return for the study area set asides, the member communities are allowed the incidental take of up to 4,400 acres of habitat outside of the study areas. For each acre taken, the RCHCA must acquire a replacement acre within the study area.

In February 1995 the RCHCA submitted a long-term HCP to the FWS and the California Department of Fish and Game. It proposes a habitat conservation plan for a 30 year period, which will include seven core preserves, including 42,000 acres, dedicated to conservation of the SKR throughout western Riverside County. Federal land trades with the Bureau of Land Management will expand these areas in the future. It will continue a mitigation fee for development outside the core reserves. Bona fide agricultural activities will not be subject to the SKR biological surveys or the mitigation fee. The RCHCA is awaiting approval from the FWS for this new HCP.

Witnesses at the Riverside, California, hearing described the enormous costs to the County of compliance with ESA requirements necessary to protect the SKR. One witness testified that local builders had paid over $30 million for mitigation and that local utilities would pay another $120 million. One farmer whose property was in the study area was precluded from farming her land for several years, losing $400,000 over three years. The County fire chief directly blamed the regulations of the FWS for losses associated with the 1993 fires that devastated homes in his County. Another witness complained about the inability of local flood control agencies to complete flood control projects due to the presence of the SKR, as well as other listed species.

THE CALIFORNIA GNATCATCHER—SOUTHERN CALIFORNIA

On March 25, 1993, the FWS declared the California Gnatcatcher a threatened species. This small bird prefers coastal scrub habitat. The range of the bird is southern California and northwestern Baja California, Mexico. In 1989, the American Ornithologists' Union recognized the California Gnatcatcher as a distinct subspecies from black-tailed gnatcatchers, which are abundant in Baja California, Mexico just below the area occupied by the California Gnatcatcher. This recent change in gnatcatcher taxonomy raised some questions about the legitimacy of the three coastal gnatcatcher subspecies. On March 16, 1993, three Southern California building industry associations sued to stop the listing of the California Gnatcatcher. In May 1994, a District of Columbia Federal district court enjoined and vacated the listing based on the failure of the FWS to obtain and make available for public review the data underlying the listing decision. The judge later allowed the FWS to comply with the Administrative Procedures Act by allowing public comment and requiring the release of the data. The plaintiffs in the lawsuit took the deposition of the single ornithologist upon whose report the listing was based and found that much of the underlying data supporting the listing had been destroyed by the ornithologist. Therefore, it was impossible for the public to have access to the public information, or to independently review or verify the data.

The Secretary of the Interior relisted the California Gnatcatcher on March 27, 1995.

THE DESERT TORTOISE—WESTERN DESERTS

The Desert Tortoise is found in the deserts of the western United States, including deserts in California, Nevada, Arizona, Utah, and parts of Mexico. The Mojave Tortoise population is listed as threatened throughout its natural range. In Arizona south and east of the Colorado River and in Mexico, the Sonoran Tortoise population is listed as threatened by similarity of appearance to the Mojave population. The FWS has identified activities such as grazing, housing, energy development, agriculture, road building, off-road-vehicle use, disease and pet collecting as the major threats to the Tortoise. Most of the lands occupied by the Desert Tortoise are Federally-owned and managed lands.

In 1993, several environmental organizations sued the FWS for failure to designate critical habitat for the Desert Tortoise. The

court ordered the FWS to propose critical habitat by August 1, 1993, and required that habitat be designated by January 1, 1994. Critical habitat designation would then trigger consultation by the Bureau of Land Management when developing livestock Range Management Plans to ensure that these plans do not negatively affect critical habitat. Concerns have been expressed that cattle grazing may be eliminated or greatly reduced in areas where the Desert Tortoise may be present, including Bureau of Land Management lands that have been leased for grazing in the past.

THE FAIRY SHRIMP—CENTRAL CALIFORNIA

In September 1994, the FWS listed three subspecies of Fairy Shrimp as endangered and one subspecies as threatened. Fairy Shrimp are crustacea typically associated with highly saline waters or seasonal ponds. They produce "resting eggs" which may remain dormant for long periods of time, hatching in response to changes in water chemistry and climate. Their life cycle varies from a few weeks to a year. In California, Fairy Shrimp are found throughout the entire Central Valley and are typically found in vernal pools. Vernal pools are ephemeral in nature, typically being wet only during the spring or wettest times of the year in California.

This listing has been highly criticized because of the dearth of data on the Fairy Shrimp and because the original study on which the listing was based was later found to have serious flaws. In addition, another study on Fairy Shrimp habitat grossly underestimated the extent of acreage containing such habitat. The consequences for the Central Valley have been that many projects currently under consideration have either been stopped, delayed, or the costs of mitigation for the Fairy Shrimp have sharply driven up the costs of the projects. In addition, testimony before the Committee indicated that Fairy Shrimp are found in areas such as tire ruts, ditches, and man-made quarries. One expert witness involved in the Fairy Shrimp listing testified before the Committee that the vernal pool Fairy Shrimp should be considered for delisting because of information on significant populations developed since the listing. He also testified that at the time he reviewed the listing, he did not have all the information given to him that was available to the FWS. Another scientist testified that the more they look for Fairy Shrimp the more they find. The scientific data upon which this listing was based were simply insufficient. There were criticisms of the current standard for listing, which is "best available data".

PREDICTIONS OF EXTINCTIONS

The primary goal of both the Endangered Species Preservation Act enacted in 1966 and the ESA is the prevention of extinctions. The current ESA requires the Secretary of the Interior or Secretary of Commerce to list all species that are either in danger of becoming extinct or may be threatened with extinction. However, since enactment seven species have, in spite of our efforts, become extinct and therefore delisted.

The ESA seeks to protect "species" from extinction. However, since the definition of "species" includes subspecies and regional populations, many of the species on the list are in actuality sub-

species and isolated populations where there are substantial populations in other areas. Many species that have been listed are not threatened with extinction but may simply be declining in numbers from some historic population estimate. The Committee heard substantial testimony on the policy question of whether we should be focusing our efforts on preventing species from becoming extinct, or protecting isolated populations which occur in other areas of the continent in abundance. In addition, the Committee heard testimony about the use of the ESA to prevent declines in populations, where extinction is not now nor in the future a foreseeable possibility.

The Committee also heard from a representative of an environmental organization that "there are estimates that the current extinction rate in the tropical rainforests is somewhere between 1,000 to 10,000 times the rate that would exist without human disturbances of the environment." He further testified that "This rapid loss of biodiversity is occurring not just in the tropical rainforests. In the nearly 400 years since the Pilgrims arrived to settle in North America, roughly 500 extinctions of plant and animal species and subspecies have occurred" and that "over the next five to ten years another 4,000 species in the U.S. alone could become extinct."

If true, these figures are alarming. However, many of these claims are simply unsupported by factual data. The prediction that we are undergoing mass extinctions is based on the work of scientists such as E.O. Wilson (Harvard University), Paul Ehrlich (Stanford University) and Norman Myers (Oxford University and World Wildlife Fund). However, even the work of these eminent scientists present numerous uncertainties. The total number of species in existence is a matter of speculation.

The methods used to derive these relationships are probably not generally reliable in most ecosystems. Widely used habitat loss relationships have been deduced from studies which determined the number of species living on islands of differing sizes. Whether or not the impact on species from habitat losses on mainlands mimics that found on islands is highly debatable. Evidence to date does not indicate that there is a parallel between the two differing environments.

In addition, the Committee is faced with applying extinction theories developed and applicable in the tropics of equatorial nations in Africa and South America on conservation policies in the United States. One scientist testified that these extinction rates are likely exaggerated and concluded that basing our conservation efforts on extinction rates is not the best way to approach our conservation efforts. No evidence was submitted to the Committee to support claims of mass extinctions or even substantial numbers of extinctions in North America, much less in the United States, since passage of the ESA. Therefore, the mass extinction theory may not serve as a suitable basis for U.S. policy for conservation and management of domestic endangered and threatened species.

### PROTECTION OF PLANTS THAT MAY HAVE VALUE TO MEDICINE

One of the most emotional and appealing claims in support of the current ESA is that it protects plants that may provide the basis for future medicines or agricultural products. While the goal of the

ESA is to protect endangered and threatened species, there is no stated mission to make plants available for medical research or other such uses. In an earlier Congressional hearing on the medicinal uses of plants, a number of witnesses testified about their programs to survey, sample and test plants and bring to market those drugs that might be produced from plants (House Committee on Merchant Marine and Fisheries, Report No. 103–74). Under the ESA, the Section 9 prohibitions which serve to protect plants are not as stringent and prohibitions on private lands are not as extensive.

At hearings conducted by the Committee, witnesses testified about the potential uses of plants for medicinal purposes and the implications of biodiversity for future discoveries with regard to the medicinal value of plants. Testimony revealed that privately-funded efforts have been completed to survey all flora in the U.S. However, there was a hesitancy to sample and test those plants protected under the ESA. There was also some concern that the current prohibitions applicable to plants in the ESA are an impediment to further research.

Testimony was received about the current successful program by Weyerhauser Corporation, a privately-owned timber company, to propagate the Pacific Yew tree. The Pacific Yew is currently used in the production of the anti-cancer drug taxol. It is found primarily in Pacific Northwest forests, a substantial portion of which are Federally owned. Although it was at one time proposed for listing, the Pacific Yew is not listed under the ESA as either endangered or threatened. Since the discovery of its anti-cancer properties, it has been propagated and harvested in substantial numbers and is no longer harvested from the wild. If the Pacific Yew had been listed under the ESA, there would have been many new regulatory obstacles to impede the production of taxol.

In addition to drug manufacturers, a number of universities and private institutions are involved in research and development of plants that may contain medicinal properties. The Committee made no proposal to change the prohibitions applicable to listed plants contained in the current ESA. However, in enacting programs to encourage propagation of endangered or threatened plants, programs and funding for propagation may provide a better solution to preventing extinctions of plant species.

### CAPTIVE PROPAGATION OF ENDANGERED AND THREATENED SPECIES

The role of captive propagation programs has been the subject of much debate in previous Congresses. The current ESA recognizes propagation, live trapping, and transplantation as tools for conservation of species. There have been numerous programs to propagate endangered or threatened species with some being more successful than others. One such program worthy of mention is the efforts of the Peregrine Fund, founded by Dr. Tom Cade, and currently located in Boise, Idaho. The Peregrine Fund has been instrumental in the recovery of a number of birds, including the Peregrine Falcon, eagles, hawks, falcons, owls, and the California Condor.

The ESA does not have any special provisions authorizing the "take" of species for scientific or research purposes or for propaga-

tion. An organization that wishes to take members of a species for captive breeding purposes must go through the Section 10 permit process. There have been many complaints about the difficulty, expense and slowness of obtaining Section 10 permits to take not only members of the species, but also blood samples, sperm, and other body tissues to be used in captive breeding programs.

In an effort to save those species throughout the world that are nearing extinction, the American Zoo and Aquarium Association established a Species Survival Plan (SSP) in 1981. The SSP states five ways that zoos are able to strengthen and coordinate captive breeding programs, including: reinforcing natural populations which may be so small that they are no longer genetically or demographically viable; repopulation of original habitats when practical; serving as refuges for species destined for extinction in nature; maintaining repositories of germ plasm in addition to populations of wild animals; and conducting research and developing techniques of animal husbandry.

Several zoos have already established outstanding captive breeding facilities. The Smithsonian National Zoological Park has operated a Conservation and Research Center at Front Royal, Virginia for over 20 years. They are responsible for saving a number of species from extinction including the black-footed ferret and Pere David's deer. The Center also works with other zoos around the world to foster the same type of research and sustainable conservation programs.

The Audubon Zoo in New Orleans recently opened the Freeport-McMoran Audubon Species Survival Center which includes a 1,500 acre breeding and research center. Other zoos are making similar contributions to insuring the survival of the rarest of species.

The Committee concluded that propagation efforts should be encouraged, not only through grants, but by providing special permits and streamlined permitting processes so that they act quickly when necessary to save rare species from extinction. Captive propagation and reintroduction into the habitat of the species have been instrumental in a number of recovery successes including the Peregrine Falcon, Blackfooted Ferret, California Condor and others.

### THE CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES

In the 1966 Endangered Species Preservation Act, Congress limited the protections of the ESA to "native fish and wildlife". In 1969, Congress broadened the law to forbid the importation from a foreign country of any species threatened with worldwide extinction. It was felt that the 1969 extension of the law to foreign species was needed because at that time there was no international organization working to ensure the worldwide conservation of endangered species. Congress directed the Secretary of State to convene a meeting of the world's nations for the purpose of creating an international convention on the conservation of endangered species. The Convention on International Trade in Endangered Species of Wild Flora and Fauna (known as CITES) entered into force on July, 1975. Currently 128 nations are parties to CITES.

The purpose of CITES is to regulate the trade in animals and plants that may be in danger of extinction due to trade. CITES

works on a permit system, the type of permit depending on which of three appendices the species is listed. In the United States the ESA is the implementing legislation for CITES. To trade in a species listed in one of the appendices requires either a permit or certificate of exemption. Permits are issued if there is a finding that the trade will not be detrimental to the survival of the species.

Each member nation must appoint a Scientific and Management Authority to carry out the requirements of CITES. Under the ESA, the Secretary of the Interior is the Management Authority and the Scientific Authority implementing CITES for the United States. The Secretary lists species found in foreign countries as endangered or threatened under the ESA and implements the permitting requirements for importing or exporting species on both the U.S. list and the CITES appendices.

The Committee heard testimony from representatives of several African countries urging the Congress to direct the Secretary of the Interior to cooperate and refrain from interfering in the wildlife conservation programs of nations that are members of and are in compliance with CITES. These nations testified that their wildlife management programs are wholly dependent on their ability to use their wildlife resources both to generate funds for the governmental programs and to provide a source of revenues to local communities. Without these types of sustainable programs, many citizens of these countries begin to see wildlife as competition for scarce land and food supplies. Viewed in this light, many well meaning U.S. conservation decisions may well become a hindrance to effective long-term conservation programs. It is important that countries with good conservation programs be given substantial support from the United States to continue these programs.

## CONCLUSION

In conclusion, while the ESA has helped to prevent extinction of several high profile species like alligators, bald eagles, and whooping cranes, only a few species have been removed from the list, impacts on human needs are not considered, no compensation has been provided to private property owners whose property has been used as habitat, and there are many Americans who believe that the ESA is being used as a pretext to limit or stop legitimate use of land. The ESA has not lived up to the expectations of most Americans while imposing unequal and arbitrary burdens on those who have done the most to maintain habitat for wildlife and plants.

## COMMITTEE ACTION

On February 9, 1995, the Chairman of the Committee on Resources, Congressman Don Young of Alaska appointed an ad hoc task force to hold oversight hearings into the implementation of the ESA. The Endangered Species Act Task Force was chaired by Congressman Richard W. Pombo of California. Under the auspices of the Committee, the Task Force conducted field hearings in the following seven locations: Belle Chasse, Louisiana (Printed Hearing No. 104–6); Boerne, Texas (Printed Hearing No. 104–6); New Bern, North Carolina (Printed Hearing No. 104–7); Bakersfield, California (Printed Hearing No. 104–13); Vancouver, Washington (Printed

Hearing No. 104–15); Riverside, California (Printed Hearing No. 104–11); and Stockton, California (Printed Hearing No. 104–16). In addition, three hearings were conducted in Washington, D.C. on May 10, 1995 (Printed Hearing No. 104–10), May 18, 1995 (Printed Hearing No. 104–14) and May 25, 1995 (Printed Hearing No. 104–18). The Task Force heard oral testimony from approximately 150 individuals and received hundreds of written comments and letters. Witnesses represented many diverse viewpoints and presented recommendations for changes to the ESA and to the implementation of the ESA.

The Task Force identified a number of concerns to be addressed in legislation, based on the testimony received from the witnesses. The major areas of concern are:

Reform the ESA to balance the methods by which endangered or threatened species are protected while protecting rights of private property owners and workers, meeting public safety and health needs, and achieving species conservation and recovery.

Provide protection for private property rights and provide incentives that would encourage private landowners to protect species. Compensate private property owners, through short- or long-term contracts, when their property must be used by the public for habitat for endangered or threatened species.

Give the States a greater role in Federal decision making processes and encourage more delegation of the ESA to the States.

Encourage voluntary measures that protect species.

Streamline and simplify the process for obtaining permits or for using the consultation process to obtain approvals for activities in areas where species might be present.

Authorize general permits for routine activities with minimal impacts.

Require the Federal Government to share the costs of expensive ESA-mandated mitigation measures.

Limit the application of the "take" prohibition on private property to only those actions that proximately and foreseeably kill or physically injure an identifiable member of an endangered species rather than the broader prohibition on modification of potential, as well as, actual habitat.

Provide sufficient funds to pay for the programs authorized in the ESA.

Improve the credibility of the scientific decisionmaking processes, particularly the listing decision.

Protect endangered species and subspecies but limit the listing of "distinct population segments" to those of national interest as determined by Congress.

Clarify the distinction between regulations to protect "endangered species" and those for "threatened species".

Give the Secretary more flexibility after listing to set achievable conservation objectives for the species and develop conservation plans that consider economic impacts, relying heavily on the advice and assistance of a special assessment team.

Make better use of Federal lands already in conservation status through the establishment of the National Biological Diversity Reserve system.

Ensure that the ESA would not preempt other Federal laws and is implemented consistently with other important Federal missions.

Discourage unnecessary and frivolous litigation and ensure that all parties have equal access to judicial review.

H.R. 2275 was introduced on September 7, 1995, by the Congressman Don Young, Chairman of the Committee on Resources, Congressman Richard W. Pombo, Chairman of the ESA Task Force, Congressman Billy Tauzin, Congressman Bill K. Brewster and 91 other cosponsors. The bill was referred to the Committee on Resources and the Committee on Agriculture. On September 20, 1995, the Resources Committee held a hearing on H.R. 2275, where testimony was received both in support of and in opposition to the bill from numerous individuals, trade associations, and representatives of the Administration and State governments (Printed Hearing 104–37).

On September 12, 1995, the Full Resources Committee met to consider H.R. 2275. Chairman Young and Congressman Pombo offered an amendment in the nature of a substitute to the bill. The following amendments were then offered to the Young/Pombo amendment:

1. Congressman Wayne Gilchrest offered a substitute amendment based on the text of H.R. 2374, which failed on a roll-call vote of 17 yeas/28 nays, as follows:

COMMITTEE ON RESOURCES—ROLL NO. 1

Bill No.: H.R. 2275.
Short title: Endangered Species Act of 1973.
Amendment or matter voted on: Gilchrest substitute.

| Representative | Yea | Nay | Present | Representative | Yea | Nay | Present |
|---|---|---|---|---|---|---|---|
| Mr. Young, Chairman | | X | | Mr. Miller | X | | |
| Mr. Tauzin | | X | | Mr. Rahall | | | |
| Mr. Hansen | | X | | Mr. Vento | X | | |
| Mr. Saxton | X | | | Mr. Kildee | X | | |
| Mr. Gallegly | | X | | Mr. Williams | X | | |
| Mr. Duncan | | X | | Mr. Gejdenson | X | | |
| Mr. Hefley | | X | | Mr. Richardson | X | | |
| Mr. Doolittle | | X | | Mr. DeFazio | X | | |
| Mr. Allard | | | | Mr. Faleomavaega | X | | |
| Mr. Gilchrest | X | | | Mr. Johnson | X | | |
| Mr. Calvert | | X | | Mr. Abercrombie | X | | |
| Mr. Pombo | | X | | Mr. Studds | X | | |
| Mr. Torkildsen | X | | | Mr. Ortiz | | X | |
| Mr. Hayworth | | X | | Mr. Pickett | | X | |
| Mr. Cremeans | | X | | Mr. Pallone | X | | |
| Mrs. Cubin | | X | | Mr. Dooley | | X | |
| Mr. Cooley | | X | | Mr. Romero-Barceló | | X | |
| Mrs. Chenoweth | | X | | Mr. Hinchey | X | | |
| Mrs. Smith | | X | | Mr. Underwood | | X | |
| Mr. Radanovich | | X | | Mr. Farr | X | | |
| Mr. Jones | | X | | | | | |
| Mr. Thornberry | | X | | | | | |
| Mr. Hastings | | X | | | | | |
| Mr. Metcalf | | X | | | | | |
| Mr. Longley | | X | | | | | |

| Representative | Yea | Nay | Present | Representative | Yea | Nay | Present |
|---|---|---|---|---|---|---|---|
| Mr. Shadegg | | X | | | | | |
| Mr. Ensign | | X | | | | | |

2. Congressman Jim Saxton offered a substitute amendment based on the text of H.R. 2444. The amendment was withdrawn.

3. Congresswoman Helen Chenoweth offered an amendment to Section 101 amending Section 19(i) of the ESA to clarify that agencies may not proceed with restrictions on property without compensation due to unavailability of appropriations. The amendment was amended for a technical change by unanimous consent. The amendment was withdrawn.

4. Congressman John B. Shadegg offered an amendment to clarify that Federal agencies shall seek to conserve and manage endangered and threatened species consistent with and not prevailing over their other primary missions. The amendment was adopted by a rollcall of 25 yeas/10 nays/1 present as follows:

COMMITTEE ON RESOURCES—ROLL NO. 2

Bill No.: H.R. 2275.
Short title: Endangered Species Act of 1973.
Amendment or matter voted on: Shadegg Amendment to Title I.

| Representative | Yea | Nay | Present | Representative | Yea | Nay | Present |
|---|---|---|---|---|---|---|---|
| Mr. Young, Chairman | X | | | Mr. Miller | | | X |
| Mr. Tauzin | X | | | Mr. Rahall | | | |
| Mr. Hansen | X | | | Mr. Vento | | X | |
| Mr. Saxton | | X | | Mr. Kildee | | X | |
| Mr. Gallegly | | | | Mr. Williams | | | |
| Mr. Duncan | | | | Mr. Gejdenson | | X | |
| Mr. Hefley | X | | | Mr. Richardson | | | |
| Mr. Doolittle | | | | Mr. DeFazio | | | |
| Mr. Allard | | | | Mr. Faleomavaega | X | | |
| Mr. Gilchrest | | X | | Mr. Johnson | | X | |
| Mr. Calvert | X | | | Mr. Abercrombie | | X | |
| Mr. Pombo | X | | | Mr. Studds | | X | |
| Mr. Torkildsen | X | | | Mr. Ortiz | X | | |
| Mr. Hayworth | X | | | Mr. Pickett | X | | |
| Mr. Cremeans | X | | | Mr. Pallone | | X | |
| Mrs. Cubin | X | | | Mr. Dooley | X | | |
| Mr. Cooley | X | | | Mr. Romero-Barceló | | | |
| Mrs. Chenoweth | X | | | Mr. Hinchey | | | |
| Mrs. Smith | X | | | Mr. Underwood | | X | |
| Mr. Radanovich | X | | | Mr. Farr | | | |
| Mr. Jones | X | | | | | | |
| Mr. Thornberry | X | | | | | | |
| Mr. Hastings | X | | | | | | |
| Mr. Metcalf | X | | | | | | |
| Mr. Longley | X | | | | | | |
| Mr. Shadegg | X | | | | | | |
| Mr. Ensign | X | | | | | | |

5. Congressman John B. Shadegg offered an amendment to Section 101 regarding the right to compensation to require the government to make the payment within 90 days after an agreement has been reached to pay compensation. The amendment was adopted by a voice vote.

6. Congressman John B. Shadegg offered an amendment to Section 101 specifying that an agency may not take action limiting use

of private property until the agency has given the property owner notice of his or her right to seek compensation and the procedures for doing so. The amendment was adopted by a voice vote.

7. Congressman Sam Gejdenson offered an amendment to Section 207(c) to delete the limitation on importation of specimens of threatened species from foreign countries taken for an inherently limited use. The amendment failed by a vote of 16 yeas/23 nays, as follows:

COMMITTEE ON RESOURCES—ROLL NO. 3

Bill No.: H.R. 2275.

Short title: Endangered Species Act of 1973.

Amendment or matter voted on: Gejdenson Amendment to Title II.

| Representative | Yea | Nay | Present | Representative | Yea | Nay | Present |
|---|---|---|---|---|---|---|---|
| Mr. Young, Chairman | | X | | Mr. Miller | | | |
| Mr. Tauzin | | X | | Mr. Rahall | | | |
| Mr. Hansen | | X | | Mr. Vento | X | | |
| Mr. Saxton | | X | | Mr. Kildee | X | | |
| Mr. Gallegly | | | | Mr. Williams | X | | |
| Mr. Duncan | | | | Mr. Mr. Gejdenson | X | | |
| Mr. Hefley | X | | | Mr. Richardson | | | |
| Mr. Doolittle | | X | | Mr. DeFazio | X | | |
| Mr. Allard | | | | Mr. Faleomavaega | X | | |
| Mr. Gilchrest | | X | | Mr. Johnson | | | |
| Mr. Calvert | | X | | Mr. Abercrombie | X | | |
| Mr. Pombo | | X | | Mr. Studds | X | | |
| Mr. Torkildsen | | X | | Mr. Ortiz | | X | |
| Mr. Hayworth | | X | | Mr. Pickett | | X | |
| Mr. Cremeans | | X | | Mr. Pallone | X | | |
| Mrs. Cubin | | X | | Mr. Dooley | | | |
| Mr. Cooley | | X | | Mr. Romero-Barceló | X | | |
| Mrs. Chenoweth | | X | | Mr. Hinchey | X | | |
| Mrs. Smith | | X | | Mr. Underwood | X | | |
| Mr. Radanovich | | X | | Mr. Farr | X | | |
| Mr. Jones | | X | | | | | |
| Mr. Thornberry | | X | | | | | |
| Mr. Hastings | | X | | | | | |
| Mr. Metcalf | | X | | | | | |
| Mr. Longley | X | | | | | | |
| Mr. Shadegg | | | | | | | |
| Mr. Ensign | | X | | | | | |

8. Congressman Billy Tauzin offered an amendment to Section 207, which specify that importations are not prohibited if the species is taken for an inherently limited use, to clarify that it applies only to those countries that are parties to CITES. The amendment was adopted by a voice vote.

9. Congressman Calvin M. Dooley offered an amendment to Section 201 to provide that those activities incidental to and for ongoing maintenance, routine operation and emergency repairs of certain public facilities and utilities, roads, emergency repairs as a result of a disaster are not a "take" under the ESA. The amendment was adopted by a voice vote.

10. Congresswoman Helen Chenoweth offered an amendment to Section 203 regarding the use of consultation procedures by nonfederal persons to prohibit anyone who is not an owner of the property that is the subject of the consultation from participating in the

consultation without the consent of the owner. The amendment was adopted by a voice vote.

11. Congressman Sam Farr offered an amendment to Section 201 to strike the specification that certain activities in the territorial sea or the exclusive economic zone are not a "take" under Section 9 of the ESA, to strike Section 208 authorizing the Secretary to exempt trawls from certain regulations under a program developed by the Secretary to provide incentives for protection of marine species, and to amend Section 305 to strike the requirement that the Secretary consult with foreign nations when listing a foreign species. The amendment failed on a rollcall vote of 14 yeas/23 nays, as follows:

COMMITTEE ON RESOURCES—ROLL NO. 4

Bill No: H.R. 2275.
Short title: Endangered Species Act of 1973.
Amendment or matter voted on: Farr Amendment to Title II.

| Representative | Yea | Nay | Present | Representative | Yea | Nay | Present |
|---|---|---|---|---|---|---|---|
| Mr. Young, Chairman | | X | | Mr. Miller | X | | |
| Mr. Tauzin | | X | | Mr. Rahall | | | |
| Mr. Hansen | | X | | Mr. Vento | X | | |
| Mr. Saxton | | | | Mr. Kildee | X | | |
| Mr. Gallegly | | | | Mr. Williams | | | |
| Mr. Duncan | | X | | Mr. Gejdenson | X | | |
| Mr. Hefley | | X | | Mr. Richardson | | | |
| Mr. Doolittle | | | | Mr. DeFazio | X | | |
| Mr. Allard | | | | Mr. Faleomavaega | | | |
| Mr. Gilchrest | X | | | Mr. Johnson | | | |
| Mr. Calvert | | X | | Mr. Abercrombie | X | | |
| Mr. Pombo | | X | | Mr. Studds | X | | |
| Mr. Torkildsen | X | | | Mr. Ortiz | | X | |
| Mr. Hayworth | | X | | Mr. Pickett | | X | |
| Mr. Cremeans | | X | | Mr. Pallone | X | | |
| Mrs. Cubin | | X | | Mr. Dooley | | X | |
| Mr. Cooley | | X | | Mr. Romero-Barceló | | X | |
| Mrs. Chenoweth | | X | | Mr. Hinchey | X | | |
| Mrs. Smith | | X | | Mr. Underwood | X | | |
| Mr. Radanovich | | X | | Mr. Farr | X | | |
| Mr. Jones | | X | | | | | |
| Mr. Thornberry | | X | | | | | |
| Mr. Hastings | | X | | | | | |
| Mr. Metcalf | | X | | | | | |
| Mr. Longley | | X | | | | | |
| Mr. Shadegg | | | | | | | |
| Mr. Ensign | X | | | | | | |

12. Congressman James B. Longley and Congressman Jack Metcalf offered an amendment to Section 202 to clarify the definition of "harm" to mean an action that proximately and foreseeably kills or physically injures an identifiable member of an endangered species. The amendment was adopted by a voice vote.

13. Congresswoman Helen Chenoweth offered an amendment to Section 207 regarding compliance with international requirements and treaties to clarify that the Secretary in seeking to find funding for further studies should seek to find private funding, rather than public funding. After the amendment was amended for technical reasons by unanimous consent, the amendment was adopted by a voice vote.

14. Congresswoman Linda Smith offered an amendment to Section 204 to require the Secretary to develop a permit form and expedited process for low-impact activities. The amendment was adopted by a voice vote.

15. Congressman James V. Hansen offered an amendment to Section 301 to require the Secretary to prepare an analysis of the economic and social impacts of listing a species. The amendment was adopted by unanimous consent.

16. Congressman Bruce F. Vento offered an amendment to require the National Academy of Sciences to report to the House Committee on Resources and the Senate Committee on Environment and Public Works on the certain affects of the bill and to establish the effective date of certain sections of the bill. The amendment failed by a voice vote of 11 yeas/21 nays, as follows:

COMMITTEE ON RESOURCES—ROLL NO. 5

Bill No.: H.R. 2275.
Short title: Endangered Species Act of 1973.
Amendment or matter voted on: Vento Amendment to Title III.

| Representative | Yea | Nay | Present | Representative | Yea | Nay | Present |
|---|---|---|---|---|---|---|---|
| Mr. Young, Chairman | | X | | Mr. Miller | X | | |
| Mr. Tauzin | | X | | Mr. Rahall | | | |
| Mr. Hansen | | X | | Mr. Vento | X | | |
| Mr. Saxton | X | | | Mr. Kildee | X | | |
| Mr. Gallegly | | | | Mr. Williams | | | |
| Mr. Duncan | | | | Mr. Gejdenson | X | | |
| Mr. Hefley | | X | | Mr. Richardson | | | |
| Mr. Doolittle | | X | | Mr. DeFazio | X | | |
| Mr. Allard | | | | Mr. Faleomavaega | X | | |
| Mr. Gilchrest | X | | | Mr. Johnson | | | |
| Mr. Calvert | | | | Mr. Abercrombie | X | | |
| Mr. Pombo | | X | | Mr. Studds | | | |
| Mr. Torkildsen | X | | | Mr. Ortiz | | X | |
| Mr. Hayworth | | X | | Mr. Pickett | | X | |
| Mr. Cremeans | | X | | Mr. Pallone | | | |
| Mrs. Cubin | | | | Mr. Dooley | | X | |
| Mr. Cooley | | X | | Mr. Romero-Barceló | | | |
| Mrs. Chenoweth | | X | | Mr. Hinchey | | | |
| Mrs. Smith | | X | | Mr. Underwood | | | |
| Mr. Radanovich | | | | Mr. Farr | X | | |
| Mr. Jones | | X | | | | | |
| Mr. Thornberry | | X | | | | | |
| Mr. Hastings | | X | | | | | |
| Mr. Metcalf | | X | | | | | |
| Mr. Longley | | X | | | | | |
| Mr. Shadegg | | X | | | | | |
| Mr. Ensign | | X | | | | | |

17. Congressman Calvin M. Dooley offered an amendment to Section 307 to require specific procedures for the review of petitions to change the status of, or delist, a species listed as endangered or threatened. The amendment was adopted by a voice vote.

18. Congressman Richard (Doc) Hastings offered an amendment to require that when public hearings on proposed listings are held, at least one hearing must be held, at the request of the Governor, in a rural area. The amendment was adopted by voice vote.

19. Congresswoman Helen Chenoweth offered an amendment to strike Title IV. The amendment was withdrawn.

20. Congressman John T. Doolittle offered an amendment to Section 401 to require that during consultation and before issuing a jeopardy opinion, the Secretary must demonstrate that a listed species is in the geographic area and that the proposed action will jeopardize the continued existence of the species. The amendment was adopted by voice vote.

21. Congresswoman Barbara Cubin offered an amendment (which was further amended by Congressman Jim Saxton) to require that where a predatory mammal is released as an experimental population into a Federal wildlife refuge or park and the animal leaves the Federal property and goes onto private property, the Secretary must provide for its removal and must provide for compensation for damage to personal property. The amendment was adopted by a voice vote.

22. Congresswoman Helen Chenoweth offered an amendment to Section 506 regarding release of experimental populations requiring the Secretary to comply with State law. The amendment was adopted by a voice vote.

23. Congressman Richard W. Pombo offered an amendment to Section 504 to provide for review of previously designated critical habitat areas, and amendments to Section 506 to require the Secretary to propose regulations for experimental populations, and remove experimental populations from private lands upon request. The amendment was adopted by a voice vote.

24. Congresswoman Helen Chenoweth offered an amendment striking Title VI. The amendment was withdrawn.

25. Congressman James V. Hansen offered an amendment to recognize the habitat conservation plan proposed for Washington County, Utah, as final and require the issuance of a permit. The amendment was adopted by voice vote.

26. Congressman Jack Metcalf offered an amendment to provide that the taking of a nonlisted species to conserve a listed species is not prohibited. The amendment was adopted by a rollcall vote of 23 yeas/17 nays, as follows:

COMMITTEE ON RESOURCES—ROLL NO. 6

Bill No.: H.R. 2275.
Short title: Endangered Species Act of 1973.
Amendment or matter voted on: Metcalf Amendment to Title IX.

| Representative | Yea | Nay | Present | Representative | Yea | Nay | Present |
|---|---|---|---|---|---|---|---|
| Mr. Young, Chairman | X | | | Mr. Miller | | X | |
| Mr. Tauzin | X | | | Mr. Rahall | | X | |
| Mr. Hansen | X | | | Mr. Vento | | X | |
| Mr. Saxton | X | | | Mr. Kildee | | X | |
| Mr. Gallegly | X | | | Mr. Williams | | X | |
| Mr. Duncan | X | | | Mr. Gejdenson | | X | |
| Mr. Hefley | X | | | Mr. Richardson | | X | |
| Mr. Doolittle | X | | | Mr. DeFazio | | | |
| Mr. Allard | | | | Mr. Faleomavaego | | X | |
| Mr. Gilchrest | X | | | Mr. Johnson | | | |
| Mr. Calvert | X | | | Mr. Abercrombie | | X | |
| Mr. Pombo | X | | | Mr. Studds | | | |
| Mr. Torkildsen | | X | | Mr. Ortiz | | X | |
| Mr. Hayworth | X | | | Mr. Pickett | X | | |
| Mr. Cremeans | X | | | Mr. Pallone | | X | |
| Mrs. Cubin | X | | | Mr. Dooley | X | | |

| Representative | Yea | Nay | Present | Representative | Yea | Nay | Present |
|---|---|---|---|---|---|---|---|
| Mr Cooley | X | | | Mr. Romero-Barceló | | X | |
| Mrs. Chenoweth | X | | | Mr. Hinchey | | X | |
| Mrs. Smith | X | | | Mr. Underwood | | X | |
| Mr. Radanovich | | | | Mr. Farr | | | |
| Mr. Jones | X | | | | | | |
| Mr. Thornberry | X | | | | | | |
| Mr. Hastings | X | | | | | | |
| Mr. Metcalf | X | | | | | | |
| Mr. Longley | X | | | | | | |
| Mr. Shadegg | | | | | | | |
| Mr. Ensign | | X | | | | | |

27. Congressman Richard W. Pombo offered an amendment to Section 201 to require specific intent to assess civil penalties over $500 or to be found guilty of a criminal offense. The amendment was adopted by a voice vote.

The Young-Pombo amendment in the nature of a substitute, as amended, was then adopted by voice vote. The bill, as amended, was then ordered favorably reported to the House of Representatives, in a rollcall vote of 27 yeas/17 nays, as follows:

COMMITTEE ON RESOURCES—ROLL NO. 7

Bill No.: H.R. 2275.

Short title: Endangered Species Act of 1973.

Amendment or matter voted on: Final Passage—Young/Pombo Substitute.

| Representative | Yea | Nay | Present | Representative | Yea | Nay | Present |
|---|---|---|---|---|---|---|---|
| Mr. Young, Chairman | X | | | Mr. Miller | | X | |
| Mr. Tauzin | X | | | Mr. Rahall | | X | |
| Mr. Hansen | X | | | Mr. Vento | | X | |
| Mr. Saxton | | X | | Mr. Kildee | | X | |
| Mr. Gallegly | | | | Mr. Williams | | X | |
| Mr. Duncan | X | | | Mr. Gejdenson | | X | |
| Mr. Hefley | X | | | Mr. Richardson | | X | |
| Mr. Doolittle | X | | | Mr. DeFazio | | X | |
| Mr. Allard | | | | Mr. Faleomavaega | | X | |
| Mr. Gilchrest | | X | | Mr. Johnson | | X | |
| Mr. Calvert | X | | | Mr. Abercrombie | | X | |
| Mr. Pombo | X | | | Mr. Studds | | | |
| Mr. Torkildsen | | X | | Mr. Ortiz | X | | |
| Mr. Hayworth | X | | | Mr. Pickett | X | | |
| Mr. Cremeans | X | | | Mr. Pallone | | X | |
| Mrs. Cubin | X | | | Mr. Dooley | X | | |
| Mr. Cooley | X | | | Mr. Romero-Barceló | X | | |
| Mrs. Chenoweth | X | | | Mr. Hinchey | | X | |
| Mrs. Smith | X | | | Mr. Underwood | X | | |
| Mr. Radanovich | X | | | Mr. Farr | | X | |
| Mr. Jones | X | | | | | | |
| Mr. Thornberry | X | | | | | | |
| Mr. Hastings | X | | | | | | |
| Mr. Metcalf | X | | | | | | |
| Mr. Longley | X | | | | | | |
| Mr. Shadegg | X | | | | | | |
| Mr. Ensign | X | | | | | | |

## SECTION-BY-SECTION ANALYSIS

*Section 1. Short title; table of contents*

Section 1 indicates that the Act may be cited as the "Endangered Species Conservation and Management Act of 1995".

*Section 2. References to Endangered Species Act of 1973*

All amendments or repeals are references to the Endangered Species Act of 1973.

*Section 3. Findings, purposes, and policy of Endangered Species Act of 1973*

Section 3 specifically amends the findings, purposes, and policies of the ESA to state that economic impacts and private property rights are to be given much greater consideration while protecting species. This section also places greater emphasis on balancing the use of Federal authorities to conserve and manage endangered species with other Federal missions; greater emphasis on State involvement and cooperation with States; and an increase in emphasis on properly conserving and managing endangered and threatened species.

The amendments made by this section are intended to set forth the principle that Federal agency action taken pursuant to the ESA shall not use or limit the use of privately owned property when the action diminishes the value of the property without payment of fair market value to the owner of private property.

## TITLE I. PRIVATE PROPERTY RIGHTS AND VOLUNTARY INCENTIVES FOR PRIVATE PROPERTY OWNERS

*Section 101. Compensation for use or taking of private property*

Protecting private property rights was identified by a majority of those testifying before the ESA Task Force as a top priority for reform of the ESA. Many witnesses, including industries, landowners, and environmental organizations also voiced support for compensating private property owners when their property must be used as habitat for wildlife.

Section 101 sets forth a prohibition that the Federal Government should not take an agency action that diminishes the value of any portion of private or nonfederally owned property by 20 percent or more unless compensation is paid for an otherwise lawful use. If the reduction in value exceeds 50 percent, the agency must buy the property, at the option of the property owner.

This section sets forth the procedures for seeking compensation and for payment of compensation. The owner must request compensation in writing within one year of actual notice of the limit on the use of property and the agency is authorized to negotiate compensation. If no agreement is reached within 180 days of the request, the owner may seek binding arbitration or proceed with a civil action. Arbitration would be conducted under the procedures in Title 9 of the U.S. Code, which govern arbitration by the U.S. Government, and shall include attorneys' fees and arbitration costs. Where an owner prevails in court, the agency must pay compensa-

tion, along with attorneys' fees and costs, from the agency's annual appropriation.

Under new ESA Section 19(j) an agency may not take an action that limits the use of private property, unless the agency has given the owner notice of the right to seek compensation. Subsection 19(l) illustrates those agency actions that are considered to use or restrict use of property, but is not intended to be an exclusive list. Other actions may also constitute an agency action if the impact is to use or restrict the use of private property for a public benefit and reduces the value of any portion of the property by 20 percent or more. An agency action would not result in compensation under this Title unless it also reduces the property value of any affected portion of the property by 20 percent or more.

Property is defined to include land, an interest in land, the right to use or receive water, and personal property subject to the use or restriction on use. Whether certain rights are property is intended to be governed by applicable State property laws.

The Committee intends that only the portion of the property subject to use or restriction by the ESA be considered in determining whether the property has been reduced in value. It is not intended that the entire property owned by the nonfederal person be used in calculating whether the property has been reduced in value by 20 percent or more.

It is intended that this section be used to negotiate contracts of varying lengths and terms, depending on the conservation needs of the species, and that land acquisition be used only as a last resort when other voluntary incentives and contractual arrangements are not acceptable to the parties. Contractual arrangements could include rentals, leases, short- or long-term conservation easements, or use agreements. Land exchanges may also be used as a form of compensation. It is the view of the Committee that these types of agreements would provide maximum conservation benefits at the least cost to the government, while protecting the rights of the property owners.

The Committee was also concerned that property owners not be required to file lawsuits to receive compensation, but that such cases be handled administratively and arbitrated to reach an expeditious and inexpensive resolution. The preferred resolution recommended by the Committee is that the agency work with property owners to minimize the impacts of agency actions on private property and utilize, where possible, the other provisions of the ESA which provide technical assistance, grants, and incentives to private property owners to use good conservation practices. Where negotiation, arbitration and compromise are used to resolve these disputes, both the private party and the government benefit from reduced expenses relating to litigation.

Some criticize this section as going beyond the minimal requirements of the Fifth Amendment of the Constitution. Without debating the standard required by the Fifth Amendment, the Committee takes note that this provision is intended to provide fair treatment of landowners above any minimal standard provided by the Fifth Amendment. It is not intended to restate or preempt the Fifth Amendment or to prevent any person from asserting any legal right or privilege under the Constitution or Federal, State, or local

law. While the Committee set the trigger for the use of this remedy at the 20 percent devaluation level on an affected portion, the Committee intends that compensation to the nonfederal property owner be for the "use" of his property by the public and at an amount equal to the lost value of the property. Contrary to many other environmental enactments, the ESA is not intended to prevent harmful activities, but is intended to derive a public benefit from the use of private property. The ESA has been most frequently used to stop activities that are not in themselves harmful but provide a general benefit to the public, such as farming, timber harvesting, cattle grazing, homebuilding, and other such lawful and beneficial uses.

*Section 102. Voluntary cooperative management agreements*

Section 102 amends Section 6 of the ESA to require the Secretary to cooperate with States and other nonfederal persons to the maximum extent possible to attain the goals of the ESA. The Secretary is authorized to enter into voluntary cooperative management agreements (CMAs) with a State, a group of States, local governments, or individuals for the management of species listed as either threatened, endangered, as candidates for these designations, or for the management or acquisition of habitat. The CMA may cover species on both public and private lands and may include acquisition or designation of habitat for such species. A CMA may not place restrictions on private property without the written consent of the owner. The Secretary is authorized to allow a party to a CMA to enhance populations or habitats of species on Federally-owned lands, but such authority may not conflict with other uses authorized by the Secretary or Congress. The Secretary is authorized to fund CMAs out of appropriations or from the National Endowment for Fish and Wildlife created under Section 803 of the bill.

This section sets forth the procedures for submission of a CMA to the Secretary and the procedures for review and approval by the Secretary. It is intended that the processes for entering into a CMA are to be as simple and expeditious as possible and, therefore, are not subject to the requirements of the National Environmental Policy Act (NEPA). During the term of the CMA, for either the species or the area covered by it, a party shall not be required to make additional payments for any purpose or accept additional restrictions or to undertake other measures to minimize or mitigate impacts not covered by the CMA. This is intended to codify the Clinton Administration's "deal is a deal" concept to ensure certainty for landowners and the States. The CMA is binding even when new species are listed. Once CMAs are entered into, the conservation planning requirements of Section 5 of the ESA, the consultation requirement of Section 7, and the prohibition on take in Section 9 do not apply to actions or activities consistent with the CMA. If there are violations, the Secretary must first notify the party. If the party fails to take corrective action, the Secretary may rescind the CMA, and other provisions of the law regarding conservation planning, consultation, and the "take" prohibition would then apply to the area. It is intended that the CMA would govern all conservation practices within the area covered by the CMA.

CMAs that cover large areas and multiple species are encouraged. An example that the Committee found appealing is the Louisiana Black Bear Conservation Committee. This Committee model brought together many diverse interests to propose reasonable and broadly supported measures to increase the populations of the Louisiana Black Bear.

*Section 103. Grants for improving and conserving habitat for species*

Section 103 authorizes the Secretary to use funds in the National Endowment for Fish and Wildlife Trust Fund created under Section 803 of the bill or other funds appropriated for the purpose, to make grants to a private person, a State, or a local government for the purpose of conserving, preserving, or improving habitat for a listed species or other conservation measures that enhance the survivability of the species.

It is intended that these grants could be used for conservation measures on private property or State property that the person undertaking the conservation might not otherwise be able to fund. This could include food supplementation, predator control, conservation easements or tree planting.

*Section 104. Technical assistance programs*

Section 104 requires the Secretary to initiate a technical assistance program to provide advice and assistance to either private persons or State or local governments to help achieve the conservation goal of the species. The assistance includes information on the habitat needs, optimum management, methods of propagation, feeding needs, predator controls of the species and any other pertinent information. The Secretary is to establish certain "take" exemptions for those persons who participate in conservation programs under this provision.

The Committee intends that this program be used in conjunction with other incentives and programs to provide helpful conservation information to private landowners and to the States to optimize the use of CMAs and other such agreements.

*Section 105. Water rights*

Section 105 makes it clear that 103 years of Congressional intent to defer to the States in matters of water administration and allocation and the creation of water rights under State law is not to be usurped by the implementation of the ESA. Similar language was adopted by the House Public Works Committee in H.R. 961, the Clean Water Act Reauthorization bill.

While it is clear that the intent of Congress has previously been to respect State primacy over water matters, the Committee has become increasingly concerned about attempts by Federal agencies to circumvent State jurisdiction by either (1) asserting erroneous Federal water rights claims without pursuing adjudications of such claims under the McCarran Act; or (2) usurping the exercise of existing water rights as a condition of permits for existing water facilities; and (3) utilizing Federal acts to take water from existing water rights to serve other purposes.

The language in Section 105 is intended to prevent the Federal Government and its agencies under the authority of ESA from diminishing or interfering in any way with a State's authority to allocate and administer water and protect water rights within its borders. Failure to respect the water rights systems of the individual States would result in chaos and most likely a taking of private property.

Section 105 makes it clear that Federal agencies shall not use their authority granted by this Act to: (1) usurp State authority over water allocation and administration; (2) damage, take or harm the water rights of any water rights holder including individual citizens, or public districts and municipalities; (3) impair or alter interstate water compacts or equitable apportionment decrees; or (4) abrogate contract rights to water.

Water needed for species conservation should be acquired pursuant to State law, and administered under State law. Federal agencies cannot summarily demand water from sponsors of existing or new water projects as a condition of a permit, license, or other Federal action without compensation. In cases where Federal water projects are re-operated to benefit endangered species, re-operation must not interfere with contract deliveries of water that are consistent with the authorized purposes of the project.

## TITLE II. IMPROVING ABILITY TO COMPLY WITH THE ENDANGERED SPECIES ACT OF 1973

### *Section 201. Enforcement procedures*

Section 201 makes it clear that the "take" prohibition of Section 9 of the ESA is not applicable to those activities in compliance with CMAs under Section 6, approved conservation plans under Section 5, consultation opinions under Section 7, or incidental take permits under Section 10. These types of agreements and permit planning activities are to be encouraged. In return, the landowner or State is given future certainty as to what activities can be conducted without the risk of being in violation of the take prohibition. In exchange for these activities, the public receives the benefit of activities or measures that contribute to the short- or long-term conservation of the species.

Section 201(a) amends Section 9 of the ESA to clarify those activities which are not to be considered a "take" punishable under Section 11 of the ESA. These activities include those that are necessary to address a situation in which important public health or safety needs must be met, as well as activities which are routine in nature and necessary to operate and maintain facilities used to bring utility and utility-type services to the public. The Committee particularly intends that local government entities should be able to maintain facilities to serve the public without fear of penalty for a de minimis taking. In addition, in those portions of the territorial sea or the exclusive economic zone (EEZ) of the U.S. which have not been designated as critical habitat by the Secretary, the accidental take of a nonfish species, such as a sea turtle, when trawling and when not in violation of any other law, would not be considered an incidental take. The Committee takes note of the intensive efforts by the U.S. Coast Guard and the National Marine Fish-

eries Service to ensure compliance with the ESA by the shrimping community and the extensive efforts of the shrimping community to achieve compliance. The Coast Guard has reported a high degree of compliance with TEDs regulations by shrimpers. However, sea turtle strandings have continued to occur in spite of the very high degree of compliance. In addition, due to better protections for nesting beaches, sea turtle populations are rebounding. Therefore, there is concern that individual shrimpers who are in compliance with law should not be penalized for the accidental catch of a sea turtle. This, however, does not mean that a person may violate any other law, including but not limited to, the Marine Mammal Protection Act (Public Law 92–552, 86 Stat. 1027), the Migratory Bird Treaty Act (40 Stat. 755), the Oil Pollution Act of 1990 (Public Law 101–380, 104 Stat. 514), or any other statute. An activity that is in violation of one of those laws or any other applicable law, that results in the take of a listed species would be a violation of the ESA. In addition, activities requiring Federal approval in the territorial sea or EEZ must still meet the Section 7 "jeopardy standard." The new incentives and requirements of Section 208 and 209 of the bill will provide opportunity to improve the status and protections afforded to sea turtles and other similar marine species.

Section 201(b) amends Section 11 of the ESA to require intentional acts for assessments of civil penalties in excess of $500 and criminal prosecutions. The standard for such a prosecution under the ESA is that it be a "knowing" violation. The Committee is concerned that since many listed species are difficult to detect in an area, an accidental violation may occur without an intent to affect a listed species, but a person may be held liable because he or she "knowingly" conducted the activity that had the unintended effect. This result has been that, in most cases, actions being regulated which are common, beneficial activities, such as standard agricultural or construction practices, and have no connection with culpable behavior apart from the remote potential that such routine activities may, in a particular instance, appear to violate the ESA. The ESA is not intended to impose a strict liability standard. Therefore, the Committee intends that penalties should only be imposed where it can be shown that the violator intended to violate the ESA.

The Committee is concerned that the ESA is wrongly interpreted to require that the Secretary need only establish that an individual generally knew that it was unlawful to take an endangered species. Therefore, the Committee believes that a greater distinction is necessary between an act intentionally committed and one where no intention to violate the ESA is demonstrated.

Section 201(b)(8) of the bill requires that policies, guidelines, interpretations or other such determinations may not be relied upon in enforcement of the ESA unless the Secretary promulgates a rule subject to review and comment. This section clarifies that no refusal of entry into the United States, seizure of evidence, or other enforcement action can be based solely on a notification under the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) or on a resolution of the parties to CITES. The Committee intends that the Secretary promulgate rules through the Administrative Procedure Act so that the general

public has an opportunity to comment on, and be aware of, the requirements with regard to imports and exports. This section places the burden of proof on the Secretary to show that a particular specimen is listed as endangered or threatened if an enforcement action is taken. This provision is intended to prevent abuses in the form of detention of property for unreasonable periods without having made an identification upon which a determination that a violation of law may have occurred. The provision is not intended to limit the power of the Secretary to detain property if the detention is for some legal purpose other than identification.

Section 201(b)(9) modifies the citizen suit provision of ESA Section 11 in several important respects. In light of a number of cases denying standing, this section clarifies that those persons who suffer or are threatened with economic or other injury have standing to sue under Section 11. It is the intent of the Committee that those who are harmed economically by any action of the Secretary under the authority of the ESA have standing to sue without regard to whether the violation may harm a species protected by the ESA. It is intended that the case of *Bennett, et al* v. *Plenert, et al,* Docket No. 94–35008, decided by the U.S. Court of Appeals for the Ninth Circuit on August 24, 1995, be overturned by the language adopted here. The Committee believes that unnecessary and excessive litigation should not be encouraged. The bill therefore, removes the "private attorney general" authority that encourages citizens to sue other citizens, but retains the authority for citizens to sue the Federal Government. This section prohibits the award of attorneys fees and expert witness fees under the authority of the ESA. It also gives persons who may suffer economic injury the right to intervene in citizen suits and to accept or reject a settlement of the suit. Suit may be filed against the United States for violation of the ESA, to compel enforcement of the take prohibitions, to compel the Secretary to apply or modify permitting requirements, and to compel the Secretary to list or delist a species where the action is not discretionary.

*Section 202. Removing punitive disincentives*

Section 202 defines the term "take", as used in Section 9 of the ESA, to mean harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in that conduct. The term "harm" is further defined to mean an action that proximately and foreseeably kills or physically injures an identifiable member of an endangered species.

The definition of "harm" is intended to clarify the scope of prohibited activities under Section 9 of the ESA, particularly as it relates to the modification of habitat. The definition requires the death of, or physical injury to, a specific endangered animal. Generalized impacts as a whole do not fall within the definition of "harm".

The Committee based its definition on the reasoning of Justice O'Connor in her concurring opinion in *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon,* 94 U.S. 859 (1995) decided by the U.S. Supreme Court on June 29, 1995, stating that "private parties should be held liable under Section 1540(1) only if their habitat-modifying actions proximately cause death or injury

to protected animals. " Justice O'Connor further stated that "proximate cause principles inject a foreseeability element into the statute." The majority opinion also twice states that liability for "harm" is limited by "ordinary requirements of proximate causation and foreseeability" and requires "injury to particular animals." In summary, the Committee agrees with the view of Justice O'Connor, supporting the majority, that "the 'harm' regulation applies where significant habitat modification, by impairing essential behaviors, proximately (foreseeably) causes actual death or injury to identifiable animals that are protected under the Endangered Species Act."

The Committee does not intend that the "take" definition be used to prohibit modification of areas where there is no physical impact on a member of a protected species. Modification of areas not currently used by a species for essential life functions will not result in harm as defined in the bill. In addition, the death or injury must be proximately caused by the action and must be foreseeable. This is intended to clarify that individuals are not to be held liable for taking an endangered animal if the injury is remote in time, place or causation. "But for" causation is an essential element for establishing liability for harm. In this connection, the Committee is sensitive to concerns that otherwise ordinary behavior could result in liability for violations of the ESA, and therefore provides that such actions must result in foreseeable physical injury to a specific, identifiable endangered animal to constitute "harm".

One result of the new "harm" definition, as noted by Justice O'Connor in her opinion, would be to overturn the holdings of the U.S. Court of Appeals for the Ninth Circuit in *Palila* v. *Hawaii Department of Land and Natural Resources,* 639 F. 2d 495 (9th Cir., 1981) and 852 F.2d 1106 (9th Cir., 1988), which found a take through inaction and without any injury to identifiable members of the species, and also *Sierra Club* v. *Yeutter,* 926 F.2d 429 (5th Cir. 1991). Both of these cases go well beyond the intent of Congress.

Some object to the Committee's adoption of the Supreme Court's majority and concurring opinions and would go further in restricting and using private property for a public use—habitat for endangered species. However, it is the Committee majority view that the "take" definition is not the only tool in the government's substantial arsenal for providing habitat for wildlife. There are numerous other statutory tools in the ESA and a host of additional Federal and State laws for achieving protection of necessary habitat. In answers to questions submitted to the Department of the Interior by the Committee as to the total acreage in the United States available for habitat on Federal lands, the Department responded that there are 706 million acres of Federally-owned land that could be used for habitat purposes. The General Accounting Office has estimated that there are 280 million acres that are in a designated conservation status. In addition, the Land and Water Conservation Fund is used to add to the millions of acres already owned by the Federal Government each year. These figures do not include efforts being made by States, local governments, and private organizations to provide habitat for wildlife and plants.

The "take" definition will continue to provide a means by which essential habitat will be protected as a consequence of avoiding

harm to a member of an endangered species. However, if that habitat is on nonfederal lands, the department cannot "use" that land for a public benefit, wildlife habitat, without the payment of compensation to the nonfederal owner. The National Endowment for Fish and Wildlife as proposed in Section 803 of the bill and other appropriations, along with the Land and Water Conservation Fund and other legal authorities should be used to provide funds for the acquisition of such "use" rights as are necessary to protect habitat for species on private lands.

Some have ignored all other provisions of the ESA and all other Federal, State, and local environmental and land use laws, in their view these changes would allow for wholesale destruction of various types of habitat. The majority of the Committee takes strong exception to these views.

The Committee also recognizes that this provision, as well as others in the ESA, are very similar to provisions contained in other wildlife conservation statutes, including the Marine Mammal Protection Act. In light of these similarities, it is the Committee's intention that the agencies responsible for implementing such other programs would do so in a manner which is consistent with Section 202 of the bill and other relevant provisions of H.R. 2275.

*Section 203. Allowing non-Federal persons to use the consultation procedures*

Consultation is only available to Federal agencies or those who may be applicants for Federal approvals. Private parties must seek relief under the time-consuming and expensive incidental take permit provisions of Section 10 of the ESA. Section 203 of the bill allows a nonfederal person to take advantage of the less cumbersome consultation procedures provided in ESA Section 7 to determine whether their activities would violate the ESA. This section prohibits someone who is not an owner of property subject to the consultation from participating in the consultation without the consent of the property owner. This is intended to be a voluntary procedural option available to those who might not otherwise be subject to Section 7.

*Section 204. Permitting requirements for incidental takes*

Section 204 amends Section 10 of the ESA, which authorizes the Secretary to issue an "incidental take permit" for any activity which is otherwise prohibited but which is for scientific purposes, to enhance the propagation or survival of the species, or for any taking which is incidental to and not the purpose of a lawful activity. Section 10 requires the submission of a permit application along with a conservation plan that specifies the impact of the activities on the species covered by the permit, how the impacts will be minimized, the alternatives considered and why they cannot be used, and requires the Secretary to make certain findings before a permit can be issued.

Section 10 of the ESA provides a means whereby activities and projects that might otherwise be stopped because of the presence of a listed species, may proceed under certain terms and conditions. However, the Committee notes that Section 10 permits have been

very difficult to obtain, require expensive and time-consuming habitat conservation plans and have not been very useful.

Under Subsection 204(b) of the bill the Secretary cannot require the application to include land or water that the applicant does not own or to address a species other than the one for which the application is made. To encourage the use of conservation plans and to reduce expense and delay, the preparation and approval of the plan and the issuance of the permit are not subject to NEPA. Once the permit is issued, no additional measures shall be required nor any additional payments or additional restrictions imposed as long as the applicant is in compliance with the permit. This codifies the "deal is a deal" concept also proposed by the Administration. Subsection 204(e) requires the Secretary to develop an expedited process and a simple form for permits for low impact activities. The purpose of this requirement is to reduce the complexity of obtaining permits for most private property owners who minimally impact listed species.

Subsection 204(c) authorizes the Secretary to assist in the development of multiple species conservation plans and authorizes the Secretary to issue incidental take permits for such plans. Both the multiple species plan and the permit remain in effect and are not amendable if a species to which the plan applies is thereafter listed.

The Secretary is required to work with the States to develop procedures for multiple species planning, giving full consideration to State recommendations for standards and guidelines for multi-species plans. The Secretary is to develop criteria for approval of plans, encourage plans that reduce economic impacts while conserving species, provide assurances that further measures will not be required if a species covered by the plan is listed, and provide incentives for voluntary agreements and provide technical assistance.

Subsection 204(d) requires the Secretary in permitting foreign species to recognize the benefit that occurs from takings for limited uses, such as scientific collecting, captive breeding, sport hunting, and falconry, in accordance with the laws of the nation in which it is found. The Secretary may not refuse a permit or limit imports unless the Secretary finds that the detriment from the taking outweighs the benefit and promulgates a regulation containing the limitation. The Secretary must send the regulation to the affected nation and allow that nation to comment on it.

*Section 205. General, research and educational permits*

Section 205 amends Section 10 of the ESA to authorize "general permits" for categories of activities that are similar in nature, cause only minimal adverse impacts on the species, have only minimal cumulative adverse effects on the species, and which are effective for not more than five years. A general permit may be implemented by a regulation authorizing broad categories of activities that affect small landowners, farmers, public agencies or other categories of activities.

This section also authorizes research, captive breeding, or educational permits and accords them priority for issuance if the research is to develop alternative technologies to reduce takings of

listed species. Testimony before the Committee indicated that although many scientists and researchers are trying to improve methods for conserving listed species, they frequently must overcome the same bureaucratic hurdles in obtaining permits that are applicable to commercial activities. The Committee wishes to encourage scientific research and propagation that leads to recovery or increases in populations of listed species. Therefore, the agency should attempt to expedite and facilitate the issuance of scientific and propagation permits and should provide for consolidation of all necessary permits into one consolidated permit as required under section 10(a)(6)(H) of the ESA. The Committee recognizes that such methods are not a substitute for species conservation, but an important tool in the enhancement of conservation planning.

*Section 206. Maintenance of aquatic habitats for listed species*

Section 206 provides that if the number of listed species exiting an aquatic habitat area, which is under the control or ownership of a person, is equal to or greater than the number entering that area, the Secretary cannot impose restrictions or obligations on the activities of that person that would require that person to support the maintenance of a greater number of the species than that entering the habitat. Calculations would include hatchery populations. The Secretary may not impose restrictions or obligations on a person in an aquatic habitat to remedy adverse impacts resulting from activities of some other party.

This provision is applicable only to aquatic habitat under the control or ownership of a particular person along a river or stream. It would not be applicable to restrictions on nonfederal persons in areas under Federal control or ownership. It is intended to prevent mitigation measures being required of a person to offset losses over which that person has no control.

*Section 207. Compliance with international requirements and treaties*

Section 207 requires that actions taken by the Secretary regarding foreign species in a country that is a party to CITES must be done in cooperation with the wildlife authorities of that country and shall not obstruct the wildlife conservation programs of that country, assuming such programs are consistent with CITES. The Secretary in making findings under CITES whether the purposes of an importation of a foreign species is detrimental to the survival of the species must not duplicate the findings of the exporting nation. With regard to regulations to protect foreign species listed as threatened (but not endangered), the Secretary may not prohibit any act that is permissible under CITES and must publish regulations to protect threatened foreign species, transmit the text of the regulation to the foreign country and provide for review and comment by that country. The Secretary must discuss the regulations with the affected country and if further studies of the species are needed shall assist in finding private funding for the studies. The Secretary must obtain the written concurrence of the nation to the regulations, and if not obtained, the President may order that the regulation be approved.

Subsection 207(c) makes the prohibitions on importation of species inapplicable to those listed as threatened (as opposed to endangered) where the species is taken for an inherently limited use, which is defined as either scientific collection, live export for captive breeding, sport hunting, or falconry. In addition, the species must be "taken" in accordance with the laws of the foreign nation where the species was "taken" (and the nation must be a party to CITES) and accompanied by a valid export permit or equivalent document. The Secretary is required to adopt regulations for the shipment of live specimens and procedures to be followed when shipments are not in compliance with regulations. This is intended to ensure that the public may participate in the development of the rules on shipments.

The purpose of these provisions are to support the conservation efforts of range countries. In many developing countries, particularly those in southern Africa, wildlife is their most valuable economic resource. The economic use of these resources may provide the only source of funding for programs to protect wildlife from poaching or to support habitat management. The flexibility to use wildlife to improve their economic well being, while fully complying with CITES, should in the long term improve both the protection of wildlife populations and their habitat, and serve as a source of economic stability for the citizens who inhabit the same area and are impoverished, as is the case in many countries.

Some have criticized Section 207, but the Committee majority notes that it is only applicable to threatened species and that the authority to ban the importation of endangered species remains. The Secretary must respect the position of other countries with respect to the best conservation of their wildlife. If the President chooses, however, he may proceed with a regulation limiting the import of a species. This provision would allow the President to do so, thereby elevating the decision to the President in cases where the range country disagrees with the Secretary of the Interior.

*Section 208. Incentives for protection of marine species*

Section 208 authorizes the Secretary to exempt an operator of a trawl vessel required to use a turtle excluder device (TED) if the operator agrees to support certain conservation activities specified by the Secretary. The Secretary is to review programs to conserve listed sea turtles, approve programs determined to be of significant benefit to the recovery of sea turtles and publish a notice of the determination in the Federal Register. Persons or groups of persons may request an exemption and the Secretary shall determine that the support is appropriate if the benefits outweigh any harm to the recovery of the species as a result of not using a turtle excluder device.

This provision gives incentives for participation in programs designed to achieve a net benefit to sea turtle populations; however, participation may involve the expenditure of additional funds or commitment of resources. The exemption from the TEDs regulations would only be available if the program involves a significant benefit to recovery of sea turtles.

*Section 209. International cooperation to conserve sea turtles*

Section 209 authorizes the Secretary of State, in consultation with the Secretaries of Commerce and the Interior, to enter into international agreements for the conservation of sea turtles. These agreements should provide for habitat and nesting beaches, and encourage national programs to enhance sea turtle populations. These programs should also seek to reduce the capture, injury and mortality of sea turtles incidental to fishing to the extent practicable, ensure productivity of commercial fisheries, and ensure that comparable measures to reduce mortality of sea turtles are taken by other countries. The agreement shall institute a mechanism for international cooperation for adopting measures related to commercial fishing, scientific research and effective monitoring. The Secretary of State is authorized to act for the U.S. with respect to the agreements, but the Secretaries of Commerce or Interior would promulgate the regulations necessary to carry out the agreement. An annual report to Congress is required, describing the efforts to implement this provision, along with a list of participating countries.

The Committee recognizes that many activities which cause sea turtle mortality occur in international waters over which the U.S. has no control. At present, U.S. fishermen bear most of the regulatory burden for protecting sea turtles. It is intended that the Secretary of State negotiate international sea turtle agreements that protect and conserve the sea turtles that migrate through the waters of many countries so that the citizens of those countries do not have a substantial competitive advantage over the U.S. citizens who are currently being required to use turtle excluder devices.

TITLE III. IMPROVING SCIENTIFIC INTEGRITY OF LISTING DECISIONS AND PROCEDURES

*Section 301. Improving the validity and credibility of decisions*

Section 301 amends Section 4 of the ESA to require substantial improvements in the processes for listing species as endangered or threatened.

The number of species protected under the ESA as of June 30, 1995, were:

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| Species on list | 1,524 |
| U.S. species | 962 |
| Endangered | 759 |
| Threatened | 203 |
| Foreign species | 562 |
| Endangered | 521 |
| Threatened | 41 |

There are approximately 4,000 species that are candidates and species of concern for listing.

The Committee identified as a priority improving the scientific credibility of the listing process. This Title of the bill is intended to ensure that the process of listing is credible, is open to the public, and is better supported by the public in general.

Section 301 authorizes the Secretary of the Interior to determine whether a species is endangered or threatened, except that the Secretary of Commerce retains jurisdiction over marine species. Under this section, the Secretary is to make decisions on the basis of the

best scientific and commercial data available. This term is defined to require factual information, including peer-reviewed scientific information. The definition of "best available data" and Subsection 301(c) require the Secretary to make a determination after soliciting and fully considering all data available from any affected State or nonfederal person and taking into account efforts being made by others to protect the species. In making a determination, the Secretary is to consider populations that are bred for release in the habitat of the species. The Secretary is also required within 18 months to promulgate standards for making taxonomic determinations of species and subspecies.

Under subsection 301(a)(3), the Secretary is not authorized to list a foreign species that is listed under CITES, unless the Secretary finds that CITES does not provide adequate protection. If the Secretary lists a foreign species, the Secretary must transmit a description of the proposal and enter into discussions with the foreign nation. If the foreign nation fails to concur in the findings of the Secretary, the President may propose the listing of the species.

This section retains the current definition of species, except that a "distinct population of national interest" is defined to include vertebrate species that are not endangered or threatened in North America, but because of the national value of the population segment, Congress invokes the protections of the ESA. The Committee acknowledges that certain population segments have special national importance, such as the bald eagle, which is protected by the Bald Eagle and Golden Eagle Protection Act (16 U.S.C. 668-668(d)). However, the Committee also recognizes that those population segments limited to one State may be best protected under the laws of that State, if the State determines that the species warrants such protection. The Committee received testimony about the enormous economic and social impacts of protecting population segments that are not otherwise endangered or threatened in other parts of the U.S., Mexico or Canada. The Committee believes that the public support for the ESA will further erode if the public is asked to make sacrifices to protect a population segment in a given area, where the subspecies or species simply is not in any danger of becoming extinct throughout the remainder of its North American range. This concern was identified by the witness representing the National Research Council of the National Academy of Sciences. He stated: "What I mean by this is that although there may be persuasive reasons unrelated to science to protect certain plants and animals, there might not be scientific reasons for listing them as evolutionary units. For example, bald eagles in the lower 48 United States and in Canada intermix and are not biologically distinct, so there is no scientific justification for identifying the U.S. population as an evolutionary unit" (May 25, 1995, Report No. 104-18).

Subsection 301(c) adds a new subparagraph (F) to ESA Section 4(b)(3) to require the Secretary to publish a solicitation in the Federal Register for information regarding a species before it is proposed for listing and give equal weight to the information submitted. The Secretary is required to publish in the Federal Register, along with each rule listing a species, a description of the data considered in making the decision, data that has yet to be collected

and is needed in making the final determination, and data necessary to ensure scientific validity of the decision. Determinations of the Secretary are subject to a de novo judicial review with the court determining whether the decision is supported by a preponderance of the evidence. The Committee intends that the court will review all evidence regarding the status of a species and that the Secretary will have the burden of demonstrating that the determination is supported by a preponderance of the evidence.

This section requires the Secretary, in conducting a listing determination, to issue an analysis of the economic and social effects the listing may have and to publish the analysis in the Federal Register with the listing determination. The analysis is to inform the public and in no way requires the Secretary to refuse to list because of this analysis.

Section 301(d) retains the authority of the Secretary to list a species as endangered or threatened on an emergency basis where there is an imminent threat to the existence of any species, which is defined as a significant likelihood that the species will become extinct or be placed on an irreversible course to extinction during a two-year period. This subsection is intended to restrict the use of the Secretary's emergency listing authority to situations in which there is a genuine crisis concerning the continued existence of a species. Since an emergency listing is done without any notice or opportunity for public comment, it must be considered an extraordinary remedy that should be used only in extraordinary circumstances. The Committee is aware of instances in which it has not been clear that a real emergency existed. In particular, the emergency listing of the golden-cheeked warbler based on imminent clearing of habitat on a single tract when the species' habitat covers a wide area of central Texas has raised questions regarding the appropriate use of the emergency listing authority. The amendment clarifies this authority, requiring an imminent threat to the existence of a species rather than a threat to the "well-being" of a species, a less precise standard that is more subject to misinterpretation. The Committee strongly supports the full rule-making process required by the Administrative Procedure Act for the listing of species.

Section 301(f) amends ESA Section 4(b) to add a new provision to require the Secretary to identify, along with the publication of a proposed rule to list a species or designate critical habitat, a description of all data on which the Secretary will rely to make the decision and the data that has not yet been collected or field verified, necessary data that can be collected prior to making the decision, and other data that are necessary to ensure the scientific validity of the determination and any deadlines for collection of the data. With respect to a listing determination, such data should include data regarding population status and trends, current range, habitat needs, minimum viable population and threats to the species. The data should be field verified to the maximum extent practicable. The Committee expects that the Secretary will attempt to collect this data as early in the process as possible, including prior to a listing proposal where practicable. All such data should be made available to the public as expeditiously as possible. While the Secretary ultimately must make the determination on the basis of

the best scientific data available, the Committee believes that early and comprehensive collection of data will minimize the likelihood of listing species based on assumptions regarding species population and range that prove to be seriously flawed.

*Section 302. Peer review*

Section 302 amends ESA Section 4 to add a new Subsection (I) to mandate that scientific peer review of certain actions by the Secretary be conducted. Actions to be reviewed include listing and delisting decisions, designation of critical habitat, a determination that an action is likely to jeopardize the continued existence of a species and any reasonable and prudent alternatives proposed by the Secretary. Peer review must be conducted by "qualified individuals" which includes persons with advanced scientific training or experience, someone not otherwise employed or under contract with the Secretary, someone who has not participated in the listing decision and who has no direct financial interest in the decision. The Secretary is required to solicit names of peer reviewers through general publication of the solicitation. The Secretary may appoint from the list of qualified peer reviewers two individuals and the Governor of each State in which the species is located may appoint two individuals. The peer reviewers are required to give opinions regarding the procedures used and whether the proposal is supported by scientific evidence.

The Secretary should seek to include on peer review panels experts in statistical science such as biometricians. The panel should always include its view whether the Secretary's conclusion is warranted by the data. The panels should also be wary of accepting "peer review" conducted for published articles, particularly articles which form a significant basis for the Secretary's conclusion without examining how the peer review was conducted.

*Section 303. Making data public*

To ensure that the listing process is fully open to the public, Section 303 amends ESA Section 4(b)(3) to require that all data used is considered public data unless the Secretary shows good cause for keeping the data confidential. The burden is on the Secretary to prove good cause. The Secretary is required to minimize the release of identification of private property as habitat for species, unless the Secretary first notifies the owner thereof and receives his or her consent or the information is otherwise public information.

The Secretary is to hold at least one public hearing in each State in which the species to be listed is believed to occur in a geographic area as close to the center of the habitat of the species as possible, including but not limited to a rural area specified by the Governor.

Subsection (c) adds a new section to the ESA to set forth required procedures to be followed when the Secretary holds a public hearing or meeting. The Committee intends that public hearings and meetings held by the Secretary provide not only an opportunity for the presentation of testimony by the public, but also a meaningful opportunity for questions by the public and answers from the Secretary regarding the proposed action and its impacts. There should be a permanent record of the hearing either through recordings or transcripts. The Committee believes that the current imple-

mentation of the ESA does not provide adequate opportunity for public participation in the listing process. In order to improve the integrity of this process, those citizens who will be most impacted by a listing decision should be directly involved, or at least should have an ample opportunity to comment on and review the listing of a threatened or endangered species in that area.

*Section 304. Improving the petition and designation processes*

Section 304 retains the authority to submit private petitions asking the Secretary to list a species but amends ESA Section (4)(b)(3) to require that the petition must contain: (1) information on the current population of the species; (2) information on efforts to field test the population estimates on the species; (3) peer-reviewed literature; (4) the qualification of any person asserting expertise on the species; (5) information on the habitat needs of the species; and (6) known causes of the species' decline. The Secretary may review the status of the species that is the subject of the petition, consistent with the priorities set by the Secretary for the listing of species, and must promptly publish any finding regarding the petition.

The Committee is aware of the increase in litigation based on petitions to list species and is concerned that such litigation derails efforts by the Secretary to prioritize the listing process based on the scientific data and identification of those species most in need of listing. A comprehensive approach to setting of national priorities is much needed and would use public funds in a more effective and efficient manner.

*Section 305. Greater State involvement*

Section 305 amends ESA Section 4(b)(3) which requires the Secretary, at the time the review of a petition is commenced or the Secretary initiates listing, to contact the Governor of each State where the species is located and solicit information about the proposed listing. If the Governor advises that the listing is not warranted and the Secretary proceeds with the listing, the Secretary bears the burden of proving that the Governor is incorrect and must provide the Governor with a record of the decision.

For each final regulation to list, the Secretary is required to: (1) publish a notice and the text of the regulation in the Federal Register; (2) give actual notice of the regulation to the Governor of each State where the species is believed to occur; (3) in cooperation with the Secretary of State, give notice to each foreign nation where a listed species occurs; (4) give notice to each person who requested such notice, each State and local government where the species occurs or which is likely to experience effects of measures to protect the species and such scientific organizations as the Secretary deems appropriate; and (5) publish a summary of the rule in a newspaper of general circulation where the species occurs.

*Section 306. Monitoring the status of species*

Section 306 requires the Secretary to implement a system to monitor the status of species where a petition to list a species is warranted but precluded and thereby removed from protection.

*Section 307. Petitions to delist species*

Section 307 amends Section 4(b)(3) to authorize petitions to delist a species where new data or a reinterpretation of prior data indicates that the species was listed in error, the species is extinct, the population target set by the conservation plan has been achieved, or the original listing did not undergo adequate peer review. If the Secretary has not made a final determination on the petition within 18 months, the species is not considered endangered or threatened. If the Secretary completes the review and determines to retain the species on a list, the conservation objective and plan for the species must be developed pursuant to the ESA. When the Secretary makes a determination to remove a species from a list the Secretary should include in the rule a statement specifying the measures or actions that resulted in the determination.

*Section 308. Determinations by the Secretary to delist*

Section 308 requires the Secretary, in conducting a five year review of the status of a species under ESA Section 4(c)(2), to determine whether to remove a species from a list as either endangered or threatened. This section requires such removal to occur within 90 days if new data or reinterpretation of prior data indicate that the prior listing was in error, the species is extinct, or the population targets in the conservation plan have been achieved.

TITLE IV. RECOGNIZING OTHER FEDERAL ACTION, LAWS AND MISSIONS

*Section 401. Balance ESA with other laws and missions*

Section 401 maintains the requirement of Section 7 of the ESA that the Secretary review programs administered by the Secretary and that they be used to further the purposes of the ESA. This section also requires all other agencies to use their authorities to further the ESA but such use of their authority must be consistent with their primary missions established by law and must be consistent with any conservation plan developed for the species. This section amends ESA Section 7(a) (2) and (4) to clarify the standard against which Federal actions are to be measured. Federal agencies are required to ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a species or adversely modify critical habitat of a species in a manner likely to jeopardize the continued existence of a species ("the jeopardy standard"). Currently, the ESA provides no criterion by which to determine when an action has adversely modified critical habitat. The criterion for adverse modification of critical habitat should be unified with that of the "jeopardy standard" to provide a single, clear criterion.

Section 401 requires a Federal agency that determines that it's action is likely to significantly and adversely affect the species to consult with the Secretary to ensure that the action is not likely to jeopardize the continued existence of the species. The current ESA provides no threshold for the commencement of consultation, causing confusion and controversy among the agencies and public. This section emphasizes that all decisions by agencies under ESA Section 7(a)(2) must be consistent with the obligations and responsibilities of the agency under all applicable laws and treaties.

This section also allows Federal agencies to voluntarily consult with the Secretary to determine whether their programs are consistent with the conservation objective or plan established by the Secretary, with an incidental take permit, or with a CMA. If the actions are consistent, Section 402 provides that no further consultation is necessary. However, if actions are not consistent, then the agency must determine whether the action will significantly and adversely affect the species. If so, the agency must consult with the Secretary to ensure that the action is not likely to jeopardize the continued existence of the species.

Consultations may be at the request of, and must be with the involvement of and in cooperation with, the private applicant. Federal agencies are required to confer on proposed species if the action is likely to violate the "jeopardy standard." The ESA is not to be used to require the modification of a land management plan, unless the species has been listed as endangered or threatened. Management plans are not to be amended to maintain viable populations of species unless it is determined by the Secretary that current practices would violate the "jeopardy standard." The Secretary must demonstrate during consultation that a listed species, or its critical habitat, is in the area affected by the proposed action and that the action would likely jeopardize the continued existence of the species.

Subsection 401(b) requires that the ESA be implemented consistently with other laws or treaties. If there is an irreconcilable conflict between the ESA and the requirements of other laws, the agency is to request the President to resolve the conflict. The President is to choose the course of action that best balances the conservation objective with economic and social needs. Any consultation or conferencing that involves a modification of a project should consider the effects of the modification only. Consultation is required to be concluded within 90 days, although it can be extended for 45 days. Applicants for permits or licenses are entitled to participate fully in the consultation involving their application.

Subsection 401(c) provides that, after consultation is concluded, the Secretary is required to render an opinion whether the action is consistent with the conservation objective or plan for the species, an incidental take permit, or a CMA. If there is a finding that the activity is inconsistent, the Secretary must apply the "jeopardy standard." If the Secretary determines that the action violates the "jeopardy standard," the Secretary must suggest reasonable and prudent alternatives that impose the least social and economic costs. The Secretary is required to use information on species from the States in developing a biological opinion after a consultation process. Unless otherwise required by law, the Secretary may not impose restrictions under ESA Section 7 on the activities of a person if not authorized by, funded by, or carried out by the agency or subject to regulation by that agency. This does not prevent enforcement under other provisions of the ESA. The Secretary may not require an alternative that results in significant adverse impacts on waterfowl populations, habitat, or waterfowl hunting opportunities. In promulgating an emergency rule under ESA Section 7, the Secretary must allow 30 days for public comment.

Subsection 401(d) maintains the requirement that private persons and Federal agencies may not make an irreversible or irretrievable commitment of resources before consultation is completed that would foreclose a reasonable and prudent alternative. This subsection provides that if a listing or other decision requires consultation for a land use plan prepared under the Federal Land Policy and Management Act or the Forest and Rangeland Renewable Resources Planning Act, the implementing agency may carry out an action that is consistent with the plan prior to completion of consultation on the plan if the agency determines that, in an individual consultation on the specific action, there is no violation of the "jeopardy standard." This section defines the terms "likely to jeopardize the continued existence of," "permit or license applicant," and "reasonable and prudent alternatives."

*Section 402. Exemptions from consultation and conferencing*

Section 402 amends ESA Section 7 to exempt the following actions from consultation: (1) actions consistent with a conservation plan or objective; (2) actions consistent with a CMA or an incidental take permit; (3) actions that address a critical, imminent threat to public safety or health or a catastrophic natural event; (4) actions consisting of a routine nature on facilities in accord with a previously issued permit; or (5) activities on private lands. An agency action is not to be considered the taking of a species if the action is consistent with a final conservation plan or objective, a CMA, or an incidental take permit.

*Section 403. Eliminating the exemption committee*

Section 403 repeals the Cabinet level committee established to grant exemptions from the ESA for agency actions subject to the consultation requirement of ESA Section 7. However, the Secretary may grant an exemption if the Secretary of the Department of Defense determines that the activity is necessary for reasons of national security and the President may grant an exemption where the President declares a disaster to replace certain facilities.

TITLE V. BETTER MANAGEMENT AND CONSERVATION OF LISTED SPECIES

*Section 501. Setting conservation objectives*

When developing a recovery plan under the ESA, no consideration is given to the cost, the amount of affected acreage, private property rights, or impacts on State or local municipalities. As of June 30, 1995, 513 recovery plans had been completed for the 962 domestic species listed as endangered or threatened. In the 23 years since ESA enactment, no species has been fully recovered solely due to an ESA recovery plan. However, the Committee believes that setting conservation goals and planning to reach those goals through better management of species is essential to prevent species extinctions and to improving the status of listed species. The purpose of this Title is to use conservation planning to prevent extinctions and where possible, recover species so that they no longer need the protections of the ESA. Therefore, it is the Committee's view that the Secretary may not select "extinction" as a

conservation objective. However, there have been some cases in which species have gone extinct since the passage of the ESA in spite of efforts by the Secretary. It is recognized that there may be species in the future that will reach extinction because of natural, evolutionary, or other factors beyond human control.

Section 501 substitutes a new Section 5 of the ESA to require the Secretary to develop and publish a conservation objective and conservation plan for each listed species. Within 30 days of the listing, the Secretary must appoint an assessment and planning team consisting of experts in various disciplines, and representatives of State government, local governments, and those economically impacted by the plan. The team is required within 180 days to report to the Secretary on: (1) the biological considerations necessary to carry out the ESA; (2) the biological significance of the species; (3) the range and habitat of the species; (4) the populations of the species; (5) the technical practicality of recovering the species; (6) potential management measures capable of recovering or reducing the risk to survival of the species; and (7) where appropriate, the demonstrable commercial or medicinal value of the species. The team is to assess the economic and social impacts that result from the listing and analyze any potential management measures they identify. They are also required to assess the impacts on State and local land use laws, conservation measures, and water allocation policies.

The Secretary is required within 210 days after listing to review the team report and establish a conservation objective, and publish it in the Federal Register. It is the intent of the Committee that the Secretary will give great weight to the recommendations of the assessment and planning team. The conservation objective may include: (1) recovery of the species; (2) conservation levels at which the Secretary determines that the benefits of the conservation measures to the species outweigh the economic and social costs of the measures; (3) imposition of the take prohibition only; or (4) such other objective as the Secretary determines does not provide lesser protection than the "no take" prohibition. If the Secretary determines that the only conservation objective shall be to prohibit a take of the species, the Secretary is not required to develop a conservation plan. The Committee takes note of the inadequacies of the current ESA to best utilize conservation or recovery plans based upon the available resources of the agency. The Committee also notes that the number of currently listed species without a recovery plan is an indication of the failure of the recovery planning process.

*Section 502. Preparing a conservation plan*

Under Section 502, the Secretary is required to set priorities for the development of conservation plans. The priorities are: (1) plans for two or more species; (2) plans in areas where there are conflicts between the conservation of the species and economic activities; (3) protection of species in a Biodiversity Reserve; (4) conservation measures that have the least economic and social costs; (5) incentive-based conservation measures that provide a net benefit to the species; and (6) plans in which the primary implementing party is a nonfederal person.

The draft conservation plan must be published within 12 months after a listing. Each draft plan must contain: (1) recommendations for compliance by Federal agencies with the consultation requirements of ESA Section 7, (2) recommendations for avoiding a "take" and a list of activities that would constitute a "take" of a species, and (3) alternative strategies to achieve the conservation goal. This provision contains a list of issues to be addressed in each alternative. It is important that all of these issues be addressed and considered. The conservation plan is the appropriate vehicle by which to seek a balance between consideration of socioeconomic impacts and measures designed to conserve species.

The Secretary shall consult with the Governor of each State where the species is located in the preparation of the draft and final plan. The plan must also provide for the equitable treatment of States and other nonfederal persons. The Secretary must publish a summary of the draft plan and seek comments. The Secretary must hold at least one public hearing in each affected State.

Not later than 18 months after a listing, the Secretary must select and publish the summary of a final conservation plan along with: (1) the reasons for selection of the final plan; (2) the reasons for not selecting other alternatives; (3) the effect of the priorities on the selection of the plan; and (4) the response of the Secretary to the comments received.

Federal actions that are consistent with the conservation plan (or a conservation objective, where no plan is published) are to be considered in compliance with the "take" prohibition, except that an agency may seek guidance from the Secretary on consistency.

FWS has estimated that under the ESA for each recovery plan, it will cost $2 million and at least 10 years to delist a species. Plans should be as cost effective and realistic as possible while achieving the conservation goal for the species.

*Section 503. Interim measures*

Section 503 sets forth protection measures during the interim period between listing and the final conservation plan. During that period the "take" prohibitions apply except for those considered to be incidental takes, and Federal agencies are required to confer with the Secretary in the same manner as required for proposed species.

Where an incidental take permit has been issued or a CMA applies, the Secretary is to suspend the conservation objective or plan for the area covered by the permit or CMA. The Secretary is required to review each conservation plan or objective once every five years. The Secretary must revise a plan or objective if the Secretary makes certain findings.

*Section 504. Critical habitat for species*

Section 504 retains authority to designate critical habitat for a listed species but moves the authority from Section 4 to Section 5 of the ESA. Section 504 also moves the timing of the designation from the date of listing to the date of publication of the conservation plan. The Secretary must first consider land in a National Biodiversity Reserve as a first priority in designating critical habitat for a listed species. The Secretary must also revise a critical habi-

tat designation established before the effective date of H.R. 2275, if it does not meet the new requirements for designation of critical habitat provided in the bill. The proposed rule to designate critical habitat must be published within 12 months of listing and the final rule within 18 months of listing. The decision must be based on best available scientific and commercial data after considering economic impacts of the critical habitat designation and the listing of the species. The Committee intends that this economic analysis be cumulative in nature. The Secretary is to exclude from designation as critical habitat an area that: (1) does not meet the definition of critical habitat; (2) is not necessary to achieve the conservation objective of the species; (3) where the benefits of exclusion outweigh the benefits of designation unless the failure to designate will result in extinction of the species; and (4) in the case of nonfederally-owned property, where the owner has not given written permission or has not been compensated. The Secretary must publish the proposed rule and include a description of the economic impacts and benefits, along with a map showing the area designated.

Conservation plans and objectives are subject to judicial review based on whether the decision is arbitrary, capricious or an abuse of discretion. In developing a conservation plan or objective for a foreign species, the Secretary must act consistent with the CITES treaty and cooperate and support the conservation program in the foreign nation for that species.

*Section 505. Recognition of captive propagation as means of recovery*

Under Section 505, the Secretary is required to recognize and utilize, to the maximum extent possible captive propagation as a means of protecting and conserving a listed species. The Secretary may award a grant for a captive propagation program to a nonfederal person if the program contributes to the enhancement of the population of a listed species. Captive breeding has played an important role in saving numerous species from extinction. It also has played an important role in increasing populations of species by substantial numbers to the point that the species achieved viable levels leading to recovery. The Committee intends that captive propagation, which has been an important tool in recovery of many species, shall be recognized and encouraged.

*Section 506. Introduction of species*

Section 506 retains ESA Section 10(j) which gives the Secretary authority to release experimental populations of listed species, and retains the provision that they are to be generally treated as though they are listed as a "threatened species". This section requires the Secretary, before releasing an experimental population, to publish a rule identifying the population and the boundaries of the area for the release. The Secretary must determine whether the release is in the public interest and whether the population is essential to the continued existence of the species. Section 506 amends Section 10(j) to require the Secretary to adopt regulations regarding the release of predatory mammals to national parks or wildlife refuges. If the species enters private lands, the regulation must provide for removal back to the park or refuge, measures for

public safety, and for compensation for damage to property. For the purposes of the protective regulations for threatened species and for the "take" prohibition, members of the experimental population found outside the area of the release are not treated as threatened species if the member poses a threat to the welfare of the public, and critical habitat is not to be designated or, if designated prior to passage of H.R. 2275, shall be removed from private property for an experimental population unless determined to be essential to the continued existence of the species. The Secretary must determine those experimental populations that are essential and those that are nonessential populations.

Releases should be done to the maximum extent practicable only in units of a national park or wildlife refuge. If outside a unit, releases must be in areas identified as a candidate site for releases in a conservation plan. Where the release is outside a unit, measures must be taken to protect the safety and welfare of the public and domestic animals. The rule authorizing the release must identify the area for release. Releases on nonfederal lands require the consent of the owners. The rule authorizing the release must include measurable goals to restore viable populations within the area of the release. The Secretary must remove a member of an experimental population from private land at the request of the landowner. The regulations must define what action would constitute a take of a member of an experimental population.

A number of States in which there have been releases of experimental populations have expressed by various legislative enactments opposition to the releases. The Committee has adopted specific language that the Secretary shall comply with the laws of affected States relating to the species to be released. Therefore, if a State enacts legislation opposing the release of a specific species, the Secretary must not proceed with the release in opposition to the State's expressed legislative will.

*Section 507. Conserving threatened species*

While the ESA provides that there be a legal distinction between regulations to protect a threatened species and regulations to protect an endangered species, this distinction has been blurred through the regulatory process. There is little, if any, difference in the type of protections and prohibitions that have been established for these two lists of species. The practical impact for the regulated community has been that in many cases extremely restrictive measures that may be appropriate to prevent extinction are imposed on species which are not in danger of extinction and where less restrictive and more flexible approaches might work as well, if not better, while accomplishing the goal of preventing further endangerment.

Section 507 amends Section 4(d) of the ESA, to require that when a species is listed as "threatened" the Secretary must publish concurrent with the listing regulations applicable to the species. The regulation may include the prohibitions contained in ESA Section 9, including the "take" prohibition. The prohibitions applied to threatened species may not be as restrictive as those for endangered species. A rule to protect threatened species applies only to the extent the State has adopted the rule, where the State is work-

ing to conserve the species under a cooperative management agreement or delegation agreement.

*Section 508. Delegation of authority to States*

Section 508 adds a provision to ESA Section 5 to authorize the Secretary to delegate to a State the authority to develop and implement conservation objectives and conservation plans for a species or group of species, unless the Secretary determines the State lacks authority and capability to carry out the requirements of the law with respect to conservation planning. The Secretary is required, if the Secretary finds the State lacks authority, to give the State notice of specific concerns and specify measures to address those concerns. This section requires the Secretary to monitor the actions of the State and to assist the State in coordinating its actions with other States. The Secretary must first notify the State of any noncompliance and give the State 60 days in which to respond and come into compliance. If the State fails to comply, the Secretary may resume authority for the conservation objective and plan. The Committee strongly encourages State involvement in the conservation of species. The Committee encourages the Secretary to facilitate the delegation of authority to the States for the development and implementation of conservation objectives.

TITLE VI. HABITAT PROTECTIONS

*Section 601. Federal biological diversity reserve*

The Federal Government owns more than one-third of all land in the United States, and more than 280 million acres of land is currently in a legal status that is primarily dedicated to conservation according to the General Accounting Office. While these lands are in some type of conservation status, they do not have as a primary use, the proactive protection of endangered or threatened species. The provisions of this Title are intended to be the primary means by which habitat for listed species is acquired.

Section 601 establishes a National Biological Diversity Reserve to be composed of units of Federal and State lands, to be designated by the Secretary of the Interior and the Secretary of Agriculture, from those units of national conservation systems that would contribute to the protection, maintenance, and enhancement of biological diversity. The lands eligible would include Federally-owned lands within the National Park System, the National Wildlife Refuge System, the National Wilderness Preservation System, and wild segments of rivers within the National Wild and Scenic Rivers System. The designation to the Reserve of any particular unit must be done under the Administrative Procedure Act and shall provide for full and meaningful public comment.

The Secretary may also designate State lands if the unit is nominated by the Governor and managed under State law. Privately-owned land can also be designated if nominated by the owner of the land, but the owner may request its immediate removal. Designation is not to affect any valid existing legal rights or interests.

The Reserve may have as a management goal for units of the reserve the conservation of biological diversity. This goal is to be supplementary to other objectives established in the law applicable to

each unit and the purpose for which the unit was established. The Committee does not intend that these lands be restricted to all other uses. In fact, those uses stated in any legislative authorization should continue to be allowed and encouraged as long as they can be conducted consistent with this section. The burden should be on the Secretary to demonstrate that any of those uses cannot be conducted consistent with this section.

The manager of each reserve unit is to use his or her authority for active management and recovery and must survey the land to determine the populations of species in the Reserve. This section is not to be construed to alter existing water-related rights or to affect any laws related to hunting, fishing, trapping or other lawful wildlife harvest. The species inventory is to be conducted within one year of the designation of the unit to the Reserve. Nothing in this section may be construed to prevent land managers of land not located in the Reserve from protecting biological diversity on those lands, but the Secretary must first find that the biological diversity for which the action is to be taken is not protected on any unit of the Reserve.

*Section 602. Land acquisition*

Section 602 provides the Secretary of the Interior and the Secretary of Agriculture with authority to acquire land, including by way of short- or long-term conservation easements, as part of a program to conserve fish, wildlife, and plants, including listed species. Funds available from the Land and Water Conservation Fund may be used for that purpose.

This section should be used in conjunction with Title I to ensure that, where necessary to provide permanent habitat for species, the acquisition authority is used rather than placing the burden on private landowners to provide such habitat without compensation.

*Section 603. Property exchanges*

Section 603 authorizes and encourages the Secretary of the Interior and the Secretary of Agriculture to exchange land or water for land or water not under Federal jurisdiction. The exchanges may be made if the Secretary determines that the lands are of approximately equal value. An environmental assessment would be the only document under NEPA that would be required for the exchange. Any property to be purchased, exchanged, donated, or otherwise transferred is to be valued as though not subject to the restrictions of the ESA. The Secretary is to ensure that such transfers do not impair existing legal rights of adjacent landowners.

Exchanges are intended to be another method for compensation of private property owners under Title I, where permanent habitat must be provided for species.

TITLE VII. STATE AUTHORITY TO PROTECT ENDANGERED AND THREATENED SPECIES

*Section 701. State authority*

Section 701 authorizes the Secretary to delegate to a State which has an adequate program for the conservation of endangered or threatened species the authority to implement the ESA. This sec-

tion provides for a more comprehensive delegation of authority than delegations under ESA Section 508, which are limited to conservation objectives and plans. For the program to be adequate the Secretary must find that: (1) the State has the authority to conserve resident endangered or threatened species; (2) the State has acceptable conservation programs that are consistent with the ESA and has submitted copies of such plans to the Secretary; (3) the State is authorized to conduct investigations to determine the status for survival of resident species; (4) the State has programs to acquire land or habitat for the conservation of species; (5) provision is made for public participation in the designation of species as endangered or threatened; and (6) the State has voluntary or incentive-based programs to further conservation objectives of the species.

The delegation to a State of the program does not affect the applicability of the take prohibition or the taking of threatened species.

This section authorizes the Secretary to provide financial assistance to a delegated State. Allocations of funds are to be based on: (1) international commitments of the U.S. to protect listed species; (2) the readiness of a State to proceed consistently with the ESA; (3) the number of listed species in a State; (4) the potential for restoring listed species in a State; (4) the urgency to initiate a program in terms of survival of the species; (5) the importance of monitoring candidate species to prevent significant risk to the well being of any such species; and (6) the importance of monitoring the status of recovered species to ensure they do not require listing again.

Delegation agreements must provide: (1) the action to be taken; (2) the benefits to be derived; (3) the estimated costs; and (4) the share of costs to be borne by the U.S. and by the State, except that the Federal share shall not exceed 75 percent. However, the Federal share may be increased to 90 percent whenever two or more States with a common interest in one or more species enters into a joint agreement with the Secretary. State delegation agreements are to be reviewed every five years.

The Committee urges the Secretary to delegate the implementation of the ESA to those States which seek delegation. States have demonstrated that they have the knowledge and expertise to operate good programs for the conservation and management of wildlife and plants.

*Section 702. State programs affected by the convention*

Section 702 provides that if a State has a program for management of a native species which is the subject of an export permit request under CITES, the Secretary shall act in accordance with the State recommendation, unless the Secretary finds that scientific evidence supports a conclusion contrary to the advice of the State. The decision is appealable to an administrative law judge or a court and the burden is on the Secretary to show that the evidence supports a finding contrary to the State.

*Section 703. Collaborative rulemaking with the States*

Section 703 precludes the Secretary of the Interior from proposing a rule that has application in a State until the Secretary and the State have consulted and the State has been given a meaningful opportunity to assist in the development of the rule. The Secretary is required to develop procedures to carry out this requirement within 60 days of the effective date of the Act.

TITLE VIII. FUNDING OF CONSERVATION MEASURES

*Section 801. Authorizing increased authorizations*

The authorization for the ESA expired on September 30, 1992. Since that time, funds have been routinely appropriated to allow the provisions of the ESA, such as listing decisions, recovery plans, habitat designations, and the various prohibitions, to remain in effect.

Section 801 authorizes appropriations to the Secretary of the Interior of $110 million for Fiscal Year 1996; $120 million for Fiscal Year 1997; $130 million for Fiscal Year 1998; $140 million for Fiscal Year 1999; $150 million for Fiscal Year 2000; and $160 million for Fiscal Year 2001. Authorization of appropriations for the Secretary of Commerce are $15 million for Fiscal Year 1996; $20 million for Fiscal Year 1997; $25 million for Fiscal Year 1998; $30 million for Fiscal Year 1999; $35 million for Fiscal Year 2000; and $40 million for Fiscal Year 2001. The Secretary of Agriculture is authorized to be appropriated $4 million for each of Fiscal Years 1996 through 2001.

For each of Fiscal Years 1996 through 2001, the section also authorizes $20 million for cooperative management agreements, $1 million for the implementation of CITES, $20 million for species conservation planning under ESA Section 10 and $20 million for habitat conservation grants.

*Section 802. Funding of Federal mandates*

Section 802 requires the Federal Government to share 50 percent of those direct costs which must be undertaken because of a Federal mandate under the ESA. This section provides for various methods of meeting the cost share requirements.

*Section 803. National endowment for fish and wildlife*

Section 803 establishes a trust fund to be used for payment of compensation to nonfederal property owners including habitat acquisition, habitat conservation grants, and costs sharing requirements. The Secretary may receive and deposit gifts into the trust fund. This section provides a means whereby private organizations and individuals may contribute through private donations to programs that conserve and protect wildlife and plants listed as endangered or threatened. The Committee encourages public participation in the funding of conservation programs.

TITLE IX. MISCELLANEOUS PROVISIONS

*Section 901. Amendments to definitions*

Section 901 defines general terms used throughout the bill.

*Section 902. Review of species of national interest*

Section 902 provides for transition for population segments and requires the Secretary, within 60 days of enactment, to review and identify those species which are listed as population segments and determine whether it is in the national interest to continue to list those population segments. The Secretary would then make recommendations to Congress. Any population segment not determined by Congress to be in the national interest must be delisted within 180 days of the Secretary's submission.

*Section 903. Preparation of conservation plans for species listed before enactment of this act*

Section 903 is transitional and sets up a priority system for insuring that conservation objectives and plans are developed for species already listed and sets forth a schedule for the development of conservation plans and objectives.

*Section 904. Application of conservation plans for single or multiple species to habitat conservation plans approved prior to this act*

Section 904 provides that conservation plans approved prior to the effective date of this bill remain in effect if a species to which it applies is listed as endangered or threatened.

*Section 905. Washington County, Utah, Desert Tortoise Habitat Conservation Plan*

Section 905 deems the Washington County Utah Desert Tortoise Incidental Take Permit Habitat Conservation Plan dated June 1995 in compliance with Section 10 of the ESA and requires the Secretary to promptly issue a permit for activities covered by that document.

*Section 906. Taking of species to conserve listed species*

Section 906 provides that the taking of a nonlisted species to conserve a listed species is not a violation of any other Federal law, unless the species is listed as endangered or threatened, depleted, or a strategic stock, as those terms are defined in this section.

*Section 907. Conforming amendments*

This section makes conforming amendments to the table of contents of the ESA reflecting changes to that Act made by H.R. 2275.

*Section 908. Application of provisions to certified applicators of registered pesticides*

Section 908 clarifies that nothing in the bill is to be construed to prohibit a certified applicator from applying a registered pesticide at a commercial facility located in critical habitat to prevent, destroy, or repel pests that may pose a public health or safety threat. Commercial facility means food processing plants, food warehouses, grocery stores, restaurants and shopping malls.

The Committee is aware of potential situations in which public health and safety may be compromised to protect endangered species. The concern is that food processing or handling plants located in critical habitat areas be able to apply a rodenticide around the facility to prevent rodent infestations. This could result in the

spread of rodent-borne diseases and serious public health consequences. This provision is intended to allow these diseases to be prevented by allowing certified applicators or persons under their direct supervision to apply pesticides or rodenticides in or around commercial food establishments in critical habitat areas.

## COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

With respect to the requirements of clause 2(l)(3) of rule XI of the Rules of the House of Representatives, and clause 2(b)(1) of Rule X of the Rules of the House of Representatives, the Committee on Resources' oversight findings and recommendations are reflected in the body of this report.

## INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that the enactment of H.R. 2275 will have no significant inflationary impact on prices and costs in the operation of the national economy.

## COST OF THE LEGISLATION

Clause 7(a) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out H.R. 2275. However, clause 7(d) of that Rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under Section 403 of the Congressional Budget Act of 1974.

## COMPLIANCE WITH HOUSE RULE XI

1. With respect to the requirement of clause 2(l)(3)(B) of rule XI of the Rules of the House of Representatives and Section 308(a) of the Congressional Budget Act of 1974, H.R. 2275 does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in tax expenditures. Section 802 of H.R. 2275 will reduce offsetting receipts to the Treasury by approximately $1.5 million in 1997; however, beginning in 1998, section 802 will result in an estimated net reduction in direct spending of $3.5 million a year. In addition, under section 201, direct spending will be further reduced by less than $500,000 per year.

2. With respect to the requirement of clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives, the Committee has received no report of oversight findings and recommendations from the Committee on Government Reform and Oversight on the subject of H.R. 2275.

3. With respect to the requirement of clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives and Section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 2275 from the Director of the Congressional Budget Office.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
*Washington, DC, March 7, 1996.*

Hon. DON YOUNG,
*Chairman, Committee on Resources,*
*House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2275, the Endangered Species Conservation and Management Act of 1995.

Enactment of H.R. 2275 would affect direct spending. Therefore, pay-as-you-go procedures would apply to the bill. H.R. 2275 contains no intergovernmental or private sector mandates, as defined in Public Law 104–4.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

JUNE E. O'NEILL, *Director.*

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: H.R. 2275.

2. Bill title: Endangered Species Conservation and Management Act of 1995.

3. Bill status: As ordered reported by the House Committee on Resources on October 12, 1995.

4. Bill purpose: H.R. 2275 would amend the Endangered Species Act (ESA) and authorize funding for programs carried out under the statute. A major focus of the bill is the protection of property rights, which the legislation would address by granting local property owners a greater role in planning and conservation activities, by authorizing agencies to provide technical and financial assistance to landowners who wish to participate in conservation projects, and by requiring federal agencies to compensate nonfederal property owners whenever actions by the agencies reduce property values by 20 percent or more. Other provisions of the bill would give states a greater voice in federal regulatory decisions and would encourage states and localities to participate in endangered species conservation efforts by authorizing additional funds for grants to nonfederal entities.

Title VIII of the bill would address the financing of conservation measures by providing for appropriations from a combination of sources. In particular:

Section 801 would authorize specific appropriations for federal agencies responsible for administering the ESA (the Interior, Commerce, and Agriculture Departments) and for financial assistance to state and local governments or other nonfederal entities. In aggregate, the bill would authorize annual appropriations of between $190 million (for fiscal year 1996) and $265 million (for 2001), for a total of about $1.4 billion over a six-year period. These authorizations are in addition to any grants authorized by the ESA from the Cooperative Endangered Species Conservation Fund or any amounts authorized under section 802.

Section 802 would establish federal cost-sharing requirements for conservation activities carried out by nonfederal entities (including government agencies and private persons) and by federal power marketing administrations (PMAs). This section would require the Secretary of the Interior to pay 50 percent of all direct costs of conservation measures required under ESA, including expenses related to applying for permits and complying with habitat conservation plans or other conservation requirements imposed by the federal government. For PMAs, direct costs also would include the effects of operational changes made to comply with conservation measures, such as revenue losses and increases in purchases of power from other sources. The Secretary would have to make direct payments from appropriated funds directly to PMAs, states, and local governments for the entire federal share of their eligible costs but could satisfy the federal government's 50 percent matching requirement for costs incurred by other parties, such as local landowners, by providing habitat conservation grants or by acquiring their property. If the Secretary fails to provide the federal share or such costs, the terms and provisions of any related permits, conservation plans, management agreements or other requirements imposed under the ESA would be suspended until payment is made. Finally, section 802 would provide that the Interior Department's share of conservation expenditures would be considered a nonreimbursable cost for purposes of setting PMA electricity rates.

Section 803 would establish the National Endowment for Fish and Wildlife Trust Fund, consisting of contributions received by the Secretary and any amounts that may be appropriated from other federal funds. Amounts in the fund would be used for habitat conservation grants to private persons or organizations, compensation payments to landowners under Title I, and federal cost-sharing obligations under section 802. Section 803 also would authorize the Secretary to accept and use amounts contributed by the public in support of endangered species programs.

Finally, section 201 would amend section 11 of the ESA, which addresses lawsuits brought against the federal government by private citizens. As amended, section 11 would continue to allow suits to compel the government to carry out certain duties, but under more limited circumstances. Other amendments to section 11 would clarify the rights of persons who may suffer economic harm as a result of agency actions to carry out the ESA, including the right to intervene in citizen suits. Finally, the bill would remove a provision currently in section 11 that authorizes federal courts to award attorney and expert witness fees to any party in a citizen suit.

Other provisions of the bill would have no significant impact on federal spending.

5. Estimated cost to the Federal Government: Although authorizations for funding under the ESA expired in 1992, the Congress has continued to appropriate funds each year for programs carried out under the act. For fiscal year 1995, the Congress earmarked about $80 million for these programs. The Congress has not yet enacted full-year funding for fiscal year 1996, but funding to date has been at an annualized level of roughly $73 million—higher than the 1992 authorization level of about $51 million but considerably

less than the annual amounts authorized by H.R. 2275. Assuming appropriation of the entire amounts authorized by section 802 for each fiscal year, 1996 funding for ESA activities would total $190 million—an increase of $110 million over the 1995 level. The budgetary effects of the new authorization amounts and of the implicit authorizations of funds to satisfy the new federal cost-sharing requirements of section 802 are summarized in the following table, along with small estimated changes in mandatory spending.

[By fiscal year, in millions of dollars]

| | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 |
|---|---|---|---|---|---|---|
| Spending subject to appropriations: | | | | | | |
| Spending under current law: | | | | | | |
| Bugdet authority | [1] 80 | [2] 32 | —— | —— | —— | —— |
| Estimated outlays | 72 | 48 | —— | —— | —— | —— |
| Proposed changes: | | | | | | |
| Authorization level | —— | 158 | 430 | 445 | 460 | 475 |
| Estimated outlays | —— | 15 | 435 | 421 | 447 | 471 |
| Spending under H.R. 2275: | | | | | | |
| Specified authorization level | 80 | 190 | 205 | 220 | 235 | 250 |
| Estimated authorization level | —— | —— | 220 | 225 | 225 | 225 |
| Total estimated authorizations | 80 | 190 | 425 | 445 | 460 | 475 |
| Estimated Outlays | 72 | 63 | 430 | 421 | 447 | 471 |
| Changes in direct spending: | | | | | | |
| Estimated budget authority | —— | ([3]) | 1 | −4 | −4 | −4 |
| Estimated outlays | —— | ([3]) | 1 | −4 | −4 | −4 |

[1] The 1995 level is the amount actually appropriated for programs authorized by this bill.

[2] The current law total for fiscal year 1996 includes amounts that have already been appropriated under continuing resolutions enacted thus far. To date, the Congress has provided funding for the first five and one-half months of the fiscal year at an annualized level of $73 million.

[3] Less than $500,000.

The costs of this bill fall within budget function 300.

No amounts have been included in the above table for compensation payments to private property owners under Title I of H.R. 2275. While there is no basis for estimating precisely the cost of compensating property owners in any given year, CBO estimates that total compensation payments would not be significant over the 1996–2000 period because only a small number of claims would be paid during this time—most of which probably would be for very small amounts. Title I may encourage more sizable claims, but we expect that such claims would take several years to resolve.

The table also does not include any amounts for transactions related to the National Endowment for Fish and Wildlife because there is no basis for estimating how much may be appropriated to or from the fund that the bill would establish. Spending of amounts contributed to the endowment (which apparently would not be subject to appropriations) would be offset by additional receipts and would thus have no net impact on the federal budget. In any event, such amounts are not expected to be significant.

6. Basis of estimate:

*Spending subject to appropriations*

For purposes of this estimate, CBO has assumed that H.R. 2275 would be enacted by August 1996 and that the entire amounts specifically authorized or estimated to be necessary would be appropriated for each fiscal year. Outlays have been estimated on the

basis of historical spending patterns for ongoing ESA programs and similar conservation activities.

*Specific authorizations of appropriations.* Section 801 of H.R. 2275 would authorize the appropriation of operating funds to the three federal agencies responsible for carrying out the ESA. For fiscal years 1996 through 2001, the bill would authorize between $110 million and $160 million a year for the Department of the Interior (DOI), which has primary responsibility for implementing and enforcing the act through the U.S. Fish and Wildlife Service (USFWS). H.R. 2275 also would authorize between $15 million and $40 million annually for the Department of Commerce, which administers ESA programs for marine species through the National Marine Fisheries Service, and $4 million annually for the Department of Agriculture for animal and plant inspections. The bill would authorize the appropriation of $1 million annually to DOI for implementing CITES—the Convention on International Trade in Endangered Species—and $60 million annually for assisting nonfederal entities, including $20 million for conservation planning, $20 million for carrying out cooperative management agreements (including land acquisition and financial assistance to participants), and $20 million for habitat conservation grants.

In total, the funding levels specified in H.R. 2275 for each year are more than double the recent appropriated levels. The higher operating authorizations for DOI reflect the greater costs of carrying out the ESA under the many new requirements imposed by H.R. 2275. These provisions would affect regulatory costs by requiring additional public notice and hearings, consultation with affected states, and scientific peer review of agency decisions. Other provisions would increase administrative costs-particularly those of Title I, which would require the USFWS to establish a system for processing landowner requests for compensation. The $60 million authorized annually for assistance to nonfederal parties would be used in large part to comply with the federal matching requirements of section 802—for grants, land purchases, and other payments to state and local agencies and private land owners.

*Estimated authorizations.* The estimated authorizations shown in the table reflect the potential net effect on discretionary spending of section 802, which would require DOI to fund 50 percent of the costs of conservation measures taken by PMAs that sell hydroelectricity in the western and southeastern United States. The estimate of about $225 million a year is equal to one half of projected annual expenditures for conservation activities conducted primarily by the Bonneville Power Administration (BPA), and, to a much lesser extent, by the Western Area Power Administration (WAPA). BPA's conservation activities and certain WAPA projects do not receive appropriated funds for such purposes. (The impact of this authorization on BPA's electricity receipts is discussed in the direct spending subsection below.) Over the 1996–2000 period, BPA projects spending of about $435 million annually for mitigation measures (including purchases of power from our sources) to protect endangered fish species in the Columbia River basin. Under current law, the self-financed BPA would reflect the entire cost of such measures in its rates and would spend the resulting collections without further appropriation. Section 802, in contrast, would

require BPA to recover half of such costs from DOI rather than from its ratepayers. In order to make such payments to BPA and to WAPA's self-financed projects, DOI would need additional appropriations of about $225 million a year. The department also would have to pay a total of roughly $6 million annually to other PMAs, but any appropriations to DOI for this purpose would be offset by an identical decrease in appropriations directly to those power marketing administrations.

*Costs of compensating private property owners.* Title I would add a new section to the ESA addressing the rights of property owners. Specifically, the new provisions would prohibit the federal government from taking any action under the ESA that diminishes the market value of nonfederal property by 20 percent or more unless it offers to compensate the owners. The acting agency or agencies would be required to offer an affected property owner an amount equal to the diminution in value resulting from any federal action that limits an otherwise lawful use of the property. Property owners could seek compensation by writing the appropriate agency, electing binding arbitration, or bringing a civil action against the government. In all cases, any compensation amount negotiated or awarded (including related costs such as legal fees, and, in the case of litigation, interest awards) would be paid by the agency from appropriated funds. The bill specifies that all obligations of the United States for such compensation would be subject to the availability of appropriations.

The costs of Title I would depend on future actions taken by the USFWS and other federal agencies and by affected property owners, and on the outcome of future arbitration and court proceedings. These factors are extremely difficult to predict.

On the one hand, several provisions of Title I would probably cause more landowners to seek—and possibly obtain—compensation than do so under current law. CBO believes that the most important of these, accounting for the vast majority of new claims for compensation, is the establishment of a new administrative process for landowners who believe they have been harmed by an agency action. Allowing property owners to request payment directly from an agency without having to initiate a lawsuit would make it easier (and much cheaper) to seek compensation, particularly for the small landowners most often affected by endangered species regulations. Other provisions of the bill, such as the 20 percent loss threshold, probably would increase the number of lawsuits brought against the United States, at least in the short run, but we expect the increase in litigation would be much less costly to the federal government than the direct compensation cited above, because most such suits would probably be for large claims that would have been brought under current law anyway.

On the other hand, many provisions of Title I and other titles of H.R. 2275 could have the effect of limiting potential costs. For example, the bill would reduce the number of landowners affected by the ESA be exempting certain activities from permitting requirements and other regulations and by requiring the federal government to obtain landowner permission before any private property is designated as critical habitat for a listed species. Other provisions of the bill address general concerns of landowners who still

must comply with the act by simplifying the regulatory process and by providing more certainty (for example, by preventing agencies from expanding or changing permit terms of conservation plan requirements after they have been agreed to). Also, section 802 would further reduce landowners' costs of complying with the ESA by requiring DOI to pay one half of all direct compliance expenses, including those incurred to apply for permits. Finally, the requirement that agencies pay all compensation awards, including interest and legal costs, from their appropriation would probably minimize the costs of Title I by encouraging the affected agencies to avoid actions that would cause property owners to bring claims, to the greatest extent allowed by applicable law.

While the net effect of these factors on total compensation costs is impossible to estimate, CBO expects that the total cost of compensation payment would be higher than under current law (especially because there are so few claims brought or paid at present), at least in the short run. Because most claims would be for very small amounts, the additional cost would probably not add significantly to the costs of carrying out the ESA. Compensation costs in the long run would depend on how federal agencies respond to landowner claims and on the outcome of future litigation.

*Direct spending*

*PMA cost sharing.* CBO estimates that implementing the federal cost-sharing requirements of section 802 would reduce offsetting receipts by about $1.5 million in 1997. This amount is equal to one half of the cost of ESA conservation activities carried out by the Southeastern Power Administration (SEPA), the Southwestern Power Administration (SWPA), the Alaska Power Administration (APA), and portions of the Western Area Power Administration. We estimate that these agencies will spend a total of about $3 million annually from appropriated funds to comply with the ESA over the next several years, all of which would be fully reimbursed by electricity customers under current law. Section 802 would make the DOI share of such costs nonreimbursable for purposes of setting electricity rates. As a result, the PMAs would have lower electricity rates, reducing their receipts by $1.5 million each year. Receipt losses incurred by BPA and WAPA's self-financed projects, which also would be required to cut rates, are not included in the $1.5 million total because they would be offset by an identical reduction in mandatory spending authority. (No receipt losses are included for WAPA operations at Shasta Dam in California because all costs of conservation measures at these facilities are already nonreimbursable for ratemaking purposes.)

After 1997, the full cost of conservation measures carried out at one of WAPA's self-financing projects—Glen Canyon Dam—will become nonreimbursable under the provisions of the Grand Canyon Protection Act in Public Law 102–575. Beginning in 1998, enactment of the bill would reduce direct spending for the Glen Canyon Dam by $5 million annually, replacing it with appropriated spending, without any corresponding reduction in electricity receipts. Combining the direct spending savings at this project of $5 million annually starting in 1998, with the cost of about $1.5 million annu-

ally at other projects, results in an estimated net savings of about $3.5 million annually in direct spending starting in 1998.

*Elimination of cost reimbursements in citizen suits.* Section 201 would amend the ESA to terminate the authority of courts to award legal and expert witness fees to litigants in citizen suits. At present, such payments are made by the Department of Justice to parties (usually conservation groups) in citizen suits brought against the USFWS. Because these payments are made from the permanent judgment appropriation established by 31 United States Code 1304, repeal of the authority to award such amounts would reduce direct spending. In the past, individual payments have varied from a few thousand dollars to as much as $2 million. CBO estimates that savings from section 201 would average less than $500,000 a year.

7. Pay-as-you-go considerations: Section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985 sets up pay-as-you-go procedures for legislation affecting direct spending or receipts through 1998. CBO estimates that enactment of H.R. 2275 would affect direct spending overt this period. Section 802 of the bill, which would make the cost of conservation projects non-reimbursable for purposes of setting utility rates, would result in a $1.5 million increase in spending in 1997 and a $3.5 million decrease in 1998. Section 201, which would repeal existing authority to pay certain legal fees in citizen suits, would decrease spending by less than $500,000 annually staring in 1996. Finally, section 803 could increase receipts from contributions, but such amounts are not expected to be significant. The estimated pay-as-you-go effects are summarized in the following table.

[By fiscal year, in millions of dollars]

| | 1996 | 1997 | 1998 |
|---|---|---|---|
| Change in outlays | 0 | 1 | −4 |
| Change in receipts | 0 | 0 | 0 |

8. Estimated impact on State, local, and tribal governments: H.R. 2275 contains no intergovernmental mandates as defined in Public Law 104–4. The bill would affect state and local governments in a number of ways, but would not require any additional spending by these governments. State and local governments would benefit from many provisions in the bill that would enhance their role in implementing the ESA. Any additional state or local costs would result from voluntary decisions to accept greater responsibilities under the act. The bill would authorize appropriations to cover some of the costs of these voluntary activities as well as activities currently mandated by the ESA that would otherwise be borne by state and local governments or private individuals.

*Federal cost-sharing provisions.* H.R. 2275 would direct the federal government to pay 50 percent of certain ESA-related costs incurred by state and local governments, private entities, and federal power marketing administrations and would authorize appropriations for some of these costs. These payments would be subject to the availability of appropriations. Should the required funds not be available to pay any of these costs, the relevant requirements placed upon any state or local government, private entity, or power

marketing administration by a permit, plan, or agreement would be suspended until payment is made. H.R. 2275 would authorize annual appropriations of $20 million per year for fiscal years 1996–2000 for the federal share of costs incurred under section 6 cooperative management agreements and $20 million for the same period for the federal share of costs incurred to apply for and implement certain permits authorized by section 10 of the ESA. State and local governments as well as private entities would be eligible for these grants.

*Section 6 agreements.* Amendments to section 6 of the ESA would authorize the Secretary of the Interior to enter into cooperative management agreements with state or local governments for management of a particular species or group of species or a habitat for a species. Another amendment to that section would replace the existing authority for cooperative agreements with states with a provision for delegation agreements with states under which a state would assume responsibility for implementing the ESA within it borders. Any such agreement would be entered into voluntarily by a state. As is the case with existing cooperative agreement program, the federal government would pay up to 75 percent of the cost of a state's program from either the existing Cooperative Endangered Species Conservation Fund or some portion of the federal cost-sharing assistance authorized by H.R. 2275.

*Planning and assessment teams.* The bill would add a new section to the ESA concerning conservation objectives. This section would provide for planning and assessment teams for each newly listed species. These teams would include a representative nominated by the governor of each affected state and representative nominated by each affected local government. Participation by state and local governments would be voluntarily, however, and CBO does not expect that participation in these teams would entail significant costs for these governments.

*Power marketing administrations.* CBO estimates that PMA customers (primarily customers of the Bonneville Power Administration) would save over $200 million per year through lower electricity rates as a result of the new federal cost-sharing provisions. Almost half of BPA power sales in fiscal year 1994 were to public utilities, so we estimate that these customers would save over $100 million per year. Under current law, BPA expects to spend $435 million per year on conservation measures to protect salmon. H.R. 2275 would require that the federal government assume 50 percent of these costs or suspend the applicable conservation plan. The bill would not authorize any appropriations specifically for this purpose, however.

9. Estimated impact on the private sector: This bill would impose no new federal private sector mandates as defined in Public Law 104–4. By limiting the definition of "harm" to an action that would "proximately and foreseeably" kill or physically injure an identifiable member of an endangered species, this bill would permit certain activities that are now not permissible under current law. Moreover, H.R. 2275 adds a new requirement that the federal government must pay 50 percent of the direct costs of complying with certain existing mandates under the Endangered Species Act, including requirements promulgated in federal conservation plans for

listed species. If the federal government failed to make the required contribution, H.R. 2275 stipulates that the applicable mandates would be suspended until such time as the full contribution is made.

Enactment of H.R. 2275 would result in an electricity rate decrease at BPA and WAPA's self-financed projects equivalent to about $225 million annually. If no appropriations were made from DOI to the PMAs to pay for 50 percent of ESA costs, the bill calls for the suspension of ESA efforts, and could potentially result in a savings to PMA customers of $450 million annually.

10. Previous CBO estimate: None.

11. Estimate prepared by: Federal Cost Estimate—Deborah Reis and Kim Cawley; State and Local Government Cost Estimate—Marjorie Miller; Private Sector Cost Estimate—Patrice Gordon.

12. Estimated approved by: Robert A. Sunshine, for Paul N. Van de Water, Assistant Director for Budget Analysis.

## COMPLIANCE WITH PUBLIC LAW 104–4

H.R. 2275 contains no unfunded mandates.

## DEPARTMENTAL REPORTS

The Committee received an unfavorable report on H.R. 2275 from the Department of Justice on October 19, 1995. No other reports have been received on H.R. 2275.

DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
*Washington, DC, October 12, 1995.*

Hon. DON YOUNG,
*Chairman, Committee on Resources,*
*House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: This is to apprise you of the Department of Justice's substantial concerns regarding H.R. 2275, the "Endangered Species Conservation and Management Act of 1995." If H.R. 2275 were presented to the President, the Attorney General would recommend that he veto the bill for the reasons noted below.

The Department is opposed to this legislation because it would impost massive and unfair costs on the public, radically depart from 200 years of constitutional jurisprudence, unfairly compensate certain property owners for simply complying with the law, prevent enforcement of national and international wildlife laws, and create administrative burdens. Rather than provide discreet changes to improve conservation efforts under the ESA, H.R. 2275 would take discretion away with overly-prescriptive requirements that would probably result in a significant increase in litigation at the expense of endangered species protection. This legislation is contrary to the Administration's efforts to conserve biological diversity by making the ESA more flexible and effective. The Department's general comments are stated below; other Departments may have additional substantive concerns which are not reflected below.

*Radical departure from the Constitution, with massive costs to the taxpayer*

Section 101 of the bill would require agencies to compensate a property owner whenever agency action under the ESA diminishes the value of any portion of the property by 20 percent or more. If loss in value exceeds 50 percent of the affected portion, the owner would have the additional option of the insisting that the government purchase the affected portion for fair market value.

Substantial Costs. Like the compensation provisions in H.R. 9, the precise costs of the bill are unknown but certain to be tremendously expensive. The compensation requirement necessarily entails substantial costs of administering a compensation claims program, and of managing the patchwork quilt of parcels of land that the Federal government could be forced to acquire.

Unfair Results. Section 101 would result in such hugh costs, because it would require compensation in situations in which payment would be neither fair nor just. It is based on a radical premise that has never been a part of our law or tradition: that a private property owner has the absolute right to the greatest possible profit from that property, regardless of the consequences of the proposed use on other individuals or the public generally. Under the Fifth Amendment to the Constitution, the government must pay just compensation whenever it takes private property for public use. The ultimate standards for deciding whether compensation is required under the Constitution are fairness and justice. *Armstrong* v. *United States,* 364 U.S. 40, 49 (1959). In determining whether compensation would be fair, the Constitution requires consideration of the nature of the property interest at issue, the character and purpose of the agency action, the landowner's legitimate expectations, the harm a proposed land use would cause others, the public interest, and any other relevant factors. *Penn Central Transp. Co.* v. *City of New York,* 438 U.S. 104 (1978).

Section 101 would replace the constitutional standards of fairness and justice with a rigid, "one-size-fits-all" mandate that focuses on the extent to which regulations affect property value. Just two years ago, very Justice of the U.S. Supreme Court joined an opinion stating that diminution in value by itself is insufficient to demonstrate a taking. See *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust for Southern California,* 113 S. Ct. 2264, 2291 (1993). This principle is based on a recognition that other factors—such as the landowner's legitimate expectations, the landowner's benefit for government action, and the effect of the proposed land use on the public—must be considered in deciding whether compensation would be fair and just. Because Section 101 would preclude consideration of these factors, its single-factor test would necessarily result in myriad unjustified windfalls at the taxpayers' expense.

Section 101 2ould apply not only to land and water rights, but also to personal property. It would thus render exeedingly difficult, if not impossible, efforts to protect species by restricting the trade of the feathers, pelts, nests, eggs, and other items. Application of the compensation mandate and other items. Application of the compensation mandate to personal property contravenes longstanding understandings of our citizens, which recognize that the govern-

ment may regulate or prohibit certain commercial transactions without giving rise to expectations of compensation. *Lucas* v. *South Carolina Coastal Council* 112 S. Ct. 2886 (1922) *Andrus* v. *Allard,* 444 U.S. 51 (1979).

Unworkable "Affected Portion" Standard. The bill's focus on the reduction in value of any portion of the property is particularly unfair, for it ignores the effect of the agency action on the parcel as a whole. If an owner is allowed to harvest timber on 99 acres of a 100-acre parcel, but required to leave one acre unharvested to protect a bald eagle's nest, the bill could require compensation. Compensation could be required even whether the agency action enhances the remaining portion of the property (for example, where the value of the unregulated portion is enhanced due to its proximity to biologically diverse habitat). The "affected portion" standard also lends itself to the arbitrary segmentation or manipulation of parcels or property rights specifically for the purpose of meeting the statutory threshold. Owners who suffer any loss in value could frequently show a 50 percent loss with respect to the affected portion, and thus force federal acquisition of isolated parcels across the country, resulting in massive additional costs and administrative burdens.

New Bureaucracies. Section 101 would greatly expand the grounds for filing judicial claims for compensation. It would also establish an administrative compensation scheme with binding arbitration at the option of the property owner. Agencies would need to hire more employees to process compensation claims, more lawyers to handle claims, more experts to determine the validity of claims, more appraisers to assess the extent to which agency action has affected property value, and more arbiters to resolve claims. The sheer volume of claims would likely be overwhelming. The result would be far more government, not less.

Obstacle to Cooperation. Section 101 would also remove any incentive on the part of developers and other property owners to devise plans that protect species, or to reach a compromise on the appropriate balance between property use and species protection. Rather, the bill would encourage property owners to structure their land use proposals in a way that maximizes compensation, which would exacerbate controversies while driving up compensation costs. Section 105 of the bill compounds this problem for the conservation of salmon and other riparian species by prohibiting any officer or agency of the United States from relying on the ESA as authority to seek any limitation on the use of a water right or on delivery of water under a contract or State law. Like other property rights, a water right is not absolute and the scope of a water right is determined by State law. *U.S.* v. *Cappaert,* 508 F.2d 313, 318 (9th Cir. 1974), aff'd 426 U.S. 128 (1976). Agencies of the Federal government look to state law to determine the scope of a water right and the limits within which regulation may restrict the use of that right. Section 105, may be used to halt a variety of conservation efforts, including those pursued through negotiations, regardless of the merits of the conservation objective and its consistency with State law.

*Encouraging destruction of threatened and endangered species by preventing enforcement*

Narrow Definition of "Take." H.R. 2275 would undermine the government's ability to use law enforcement as a part of the Nation's conservation efforts, primarily by altering the prohibition on the "take" of threatened or endangered species. Section 202 of the bill, entitled "Removing Punitive Disincentives," redefines the term "take" to mean "a direct action . . . that actually injures or kills a member of the species." This definition makes little sense from the standpoint of law enforcement or conservation, because it eliminates arguably "indirect" actions that harm these species, such as the poisoning of eagles through toxic pollution, and may require proof of the intent of the actor in all cases. It would strip away almost all authority to protect the habitat that threatened and endangered species need to survive, eliminating the 1975 Department of the Interior regulations that prohibit "significant habitat modification or degradation" that "actually kills or injures" an endangered or threatened species, which the Supreme Court recently upheld. See *Babbitt* v. *Sweet Home Chapter of Communities,* 115 S. Ct. 2407 (1995). It would also impact the United States' pledge to conserve species of fish, wildlife and plants pursuant to the Convention on International Trade in endangered Species of Wild Fauna and Flora (CITES) and other international agreements cited in ESA subsection 2(a)(4). 16 U.S.C. § 1531(a)(4).

Broad Exemptions from Law Enforcement. In section 201, the bill further weakens enforcement powers by adding several new exemptions from enforcement to the ESA's existing provisions for compliance with an agreed State conservation program or a Federal permit. Section 201 adds a broad list of "permitted takings" that could be raised as defenses to enforcement efforts, including:

Activity that is claimed to be "consistent with" a conservation objective. This would provide an open-ended exception to the take prohibition, and would allow defendants to raise extremely difficult issues of proof regarding whether a particular take is consistent with a broadly defined "objective." It would allow defendants to raise a wide range of policy had scientific defenses to what is ordinarily a simple agency prohibition established through rulemaking.

A taking "for public health or safety purposes," which would allow any government agency to authorize the killing of endangered species regardless of a conservation program's provisions for public health and safety. Public health and safety should be protected as part of conservation efforts, not by creating exceptions to Federal enforcement of species protections.

A taking that is "incidental to" fishing or other activities in the territorial waters of the United States. This exemption could have an immediate impact on the conservation of sea turtles, whales, the Florida manatee and other marine species.

Actions authorized by Federal agencies consistent with the consultation provision (section 7(a)), creating the potential that a disagreement between FWS and another agency over an action's "consistency" with conservation efforts will be used by others to prevent enforcement.

Limited Law Enforcement Tools. Section 201 also amends the "Penalties and Enforcement" section, ESA section 11, to limit the legal tools for enforcement. First, it limits seizure powers used to combat the illegal trade in threatened and endangered species and requires "positive identification" of specimens within an unreasonable 30-day timeframe. Detention of items suspected to be parts or products of endangered or threatened species is essential to endangered species protection, and should be allowed to continue within the limits of due process and the Federal Rules of Criminal Procedure, rather than be subject to an arbitrary standard or time period.

Second, it prohibits the agencies from relying on any "interpretation, policy, guideline, finding, or other informal determination" without first adopting it through formal rulemaking procedures. In other words, the government may be required to publish a memo instructing agents to search for suspected criminal activity before agents could use the memo as part of a clandestine enforcement action. This could be used by those who traffic in endangered species to require the government, prior to enforcement, to anticipate all the possible decisions that would be subject to rulemaking, evaluate the impact of the proposed rule, show that the "restoration benefit of the proposed rule outweighs any negative conservation impact," and proposed them for public comment. The result would be an inability to respond quickly to crisis situations regarding the taking of threatened or endangered species.

Section 201 would also end the Department of the Interior's current practice of relying upon notifications from the CITES Secretariat, or upon resolutions of the party nations, to seize or detain illegal wildlife importations. Such information from CITES sources frequently is the only reliable information to establish probable cause. Frequently, party countries report to the CITES Secretariat about the theft of permits or security stamps and cancel affected permits. In turn, the CITES Secretariat disseminates that information to the U.S. and other party countries. Without the ability to use this notification, the U.S. may not be able to undertake appropriate enforcement action.

Vastly Curtailing Protection of Foreign Species. Enforcement of conservation efforts could be undermined by the bill's changes to the permit provisions of ESA section 10, which authorizes permits for the taking of threatened and endangered species. For example:

> Section 204(d) establishes a presumption that foreign endangered species would benefit from any taking for sport hunting and other uses in accordance with the wildlife management laws and policies of the nation in which it is found. The Secretary of the Interior would not be able to deny a permit to hunt these species or limits the importation of endangered species trophies unless he finds "substantial evidence" that the "benefit derived" from taking these species is outweighed by the detriment of their being taken from the wild, and he publishes this finding, promulgates a regulation, and provides 6 months for comments from foreign nations.
>
> Section 205 requires the Secretary to issue endangered species take permits to almost any licensed animal exhibitor and denies the protections of the ESA to the offspring of captive

species, providing a dramatic loophole that easily could be used to avoid compliance with the ESA.

Section 207 would prohibit the Secretary from protecting foreign species in a way that would "obstruct" the conservation program of another country unless the Secretary finds "substantial evidence" that the country's program is not consistent with CITES. The Secretary is forced to allow the importation of endangered species based on the judgment of the exporting nation unless he denies that permit for good cause supported by substantial evidence. Finally, the Secretary would not be able to issue rules protecting foreign threatened species without obtaining the "concurrence" of the nation's in which the species is found, or the approval of the President.

These amendments impairs the sovereign powers of the United States for the benefit of sport hunting and other trade in endangered species. They would present substantial barriers to our enforcement of conservation laws and our participation in CITES. By themselves, they would change the United States from an international leader in species conservation to an international pariah and a haven for illegal traffic in species and their body parts. In conjunction with the procedural barriers to conservation, described below, they would make effective administration of the ESA virtually impossible.

*More government and litigation, but less conservation*

Citizen Suit Provisions that Increase Litigation Without Benefitting Conservation. H.R. 2275 amends the ESA citizen suit provisions to the disadvantage of conservation efforts by requiring public interest plaintiffs to show that a violation "poses immediate and irreparable harm" to a species and by stripping the provision for the award of reasonable attorney and expert fees, which would ensure that only those who can afford to fund a lawsuit will do so. ESA reauthorization should not make it more difficult for environmental concerns to be resolved in court, and increase pressure for the use of civil disobedience.

However, H.R. 2275 would allow increased litigation by economic interests in several ways. Section 201 of the bill adds economic injury as a basis for bringing suit and includes "injuries" based on an agencies' regulation, application, nonapplication and a failure to act. In addition, the current provision for suits to enjoin violations of the ESA by any person is replaced by provisions that only allow suits against the United States. This new citizen suit provision also allows suits to compel the agencies to permit the taking of listed species. This provision may be interpreted as significantly expanding the ESA's zone of protected interests, which courts have limited to environmental concerns. The likely result of these provisions will be more challenges to the government actions taken to protect species, and less protection for species.

New Standards and Burdensome Procedures. H.R. 2275 also provides numerous new opportunities for litigation. For example, the bill would add several new analytical and procedural steps to the process for listing a species as threatened or endangered, and for defining the species' critical habitat, such as extensive peer review of scientific data and a hearing in every state. However, the Sec-

retary's decision that a species is threatened or endangered is not entitled to deference by generalist Federal judges, as is ordinary and necessary for such technical decisions. Instead, section 301 requires that the decision survive "*de novo* judicial review with the court determining whether the decision is supported by a preponderance of the evidence." Under the usual APA standard of review, courts review agency decisions under the arbitrary and capricious standard, and traditionally courts accord deference to agency expertise; this standard is especially relevant where the agency's decision is based on scientific or technical expertise. The bill would replace record review of the expert agency decision with a lengthy and scientifically complex trial. We strongly object to changing the standard of review to allow courts to substitute their judgement for the agency's, especially when the decision reviewed is one that requires biological expertise.

Once species are listed as threatened or endangered, H.R. 2275 would deny them most ESA protection until the Secretary develops a conservation plan or selects a conservation objective. To adopt a conservation plan, the Secretary must comply with unreasonably short deadlines and requirements that are overly prescriptive, which will bog the process down in regulatory activity and litigation. The bill requires a detailed, lengthy report by each assessment team within 5 months. The conservation plan requirements contain detailed prescriptions on what the draft plans and final plans must require, including an analysis of alternative management measures and a detailed analysis of a range of social and economic impacts of each alternative. Once a plan is published, it could be challenged on the grounds that any of the specific analytic requirements was not met, or alternatives not adequately considered, resulting in delay of implementation for years, during which time a listed species may become extinct.

Title IX extends the conservation plan requirements for all listed species. Under this provision, the Department of the Interior is required complete conservation plans for over 900 species within a period of three and one-half years. Given the amount of work and procedures involved in developing each plan, these deadlines are entirely unrealistic and will no doubt result in extensive legal challenges.

Similarly, the bill's revisions to ESA section 7 provisions for interagency consultation on impacts to species create new, unclear standards that will result in further opportunity for legal challenge. For example, section 401 may create unnecessary conflicts over conservation duties by providing that agencies shall render their decisions "in a manner consistent with the obligations and responsibilities of the agency under each applicable law and treaty." In addition, the consultation provisions, as revised, require the consultation to meet unreasonably short deadlines; if the deadlines are not met, the requirements of the section are deemed met, a result that is contrary to the ESA's goal of protecting threatened and endangered species.

Section 203(a) amends ESA section 10(a) to allow any person to consult with the agencies on whether an activity is consistent with a conservation plan or conservation objective, or is likely to jeopardize a listed species. This consultation process is similar to the

process for agencies under section 7, except that the person initiating the consultation is not required to submit a biological assessment and is entitled to a decision in 90 days. Without the necessary information provided in a biological assessment, the agency is required to issue a permit if it finds consistency with the conservation plan or conservation objective or that the action is not likely to jeopardize a listed species. It also makes the new consultation and permitting procedure, (paragraph 10(a)(3) added by 203(a)), an exception to the ESA's requirement that permits be based on a conservation plan. These changes to the "consultation" aspect of the ESA will hamstring the Fish and Wildlife Service, and result in agency activities that may harm endangered or threatened species simply because consultation was not done within the time period allowed. It will also divert agency attention from protection of listed species to defense of deadline suits.

Finally, H.R. 2275 includes provisions that affect every Federal agency involved in species conservation, and may be used to prevent agencies from assisting in conservation efforts. The bill requires agencies to ensure that consultation provisions are "consistent with the primary mission of the agency." These provisions will provide the opportunity to challenge agency action to protect listed species on the grounds that the action is not consistent with the primary mission or authority of the agency. In addition, Section 401 amends the Act to prohibit agencies from amending regulations, land management plans and other documents "for the purpose of maintaining viable populations of native and desired nonnative species" unless it is determined that current practices are likely to jeopardize the continued existence of the species. This is an unwieldy standard that could be used to prevent agencies from taking common-sense measures to protect the environment and prevent species from becoming threatened, endangered, or extinct.

*Summary*

The Justice Department strongly supports the protection of private property rights. The right to own, use, and enjoy private property is at the very core of our Nation's constitutional heritage and our continued economic strength. To the extent government regulations impose unreasonable burdens on private property, the Administration is committed to reforming those regulations to make them more fair and flexible. The Department cannot support legislation that would impose billions of dollars of unfair costs on American taxpayers, invite crippling litigation, and undermine the protection of endangered and threatened species.

Moreover, the Justice Department cannot support legislation that would render the Endangered Species Act unenforceable through enforcement loopholes and multiple opportunities for litigation. Effective Federal law enforcement is a small but essential aspect of this Nation's global efforts to conserve threatened and endangered species. If enacted as currently drafted, H.R. 2275 would undermine the Department's ability to prosecute activities that destroy or exploit threatened and endangered species. For these reasons, the Department of Justice stands firmly opposed to enactment of these reauthorization provisions. If H.R. 2275 were presented to

the President, the Attorney General would recommend that he veto the bill.

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

Sincerely,

ANDREW FOIS,
*Assistant Attorney General.*

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, 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

*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



***SECTION 1. SHORT TITLE; TABLE OF CONTENTS.***

*(a) SHORT TITLE.—This Act may be cited as the "Endangered Species Act of 1973".*

*(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:*

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 untempered by adequate concern and conservation;**]**

*(1) various species of fish, wildlife, and plants in the United States have been rendered extinct because of inadequate conservation practices and natural processes;*

* * * * * * *

(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) * * *

* * * * * * *

(G) other international agreements; **[**and**]**

(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, wildlife, and plants**[**.**]***; and*

*(6) the Nation's economic well-being is essential to the ability to maintain a sustainable resource base, therefore economic impacts and private property owners' rights must be considered while encouraging practices that protect species.*

**[**(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.—(1) 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.

**[**(2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.**]**

*(b) PURPOSES.—The purposes of this Act are the following:*

*(1) To provide a feasible and practical means to conserve endangered species and threatened species consistent with protection of the rights of private property owners and ensuring economic stability.*

*(2) To provide a program for the conservation and management of such endangered species and threatened species taking into account the economic and social consequences of such program.*

*(3) To take such steps as may be practicable to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.*

*(c) POLICY.—*

*(1) FEDERAL AUTHORITY.—It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve and manage endangered species and threatened species and shall, consistent with and not prevailing over their primary missions, utilize their authorities in furtherance of the purposes of this Act.*

*(2) COOPERATION WITH STATES.—It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species and consistent with State and local water laws.*

*(3) PROTECTION OF PRIVATE PROPERTY RIGHTS.—It is the policy of the Federal Government that agency action taken pursuant to this Act shall not use or limit the use of privately owned property when such action diminishes the value of such property without payment of fair market value to the owner of private property. Each Federal agency, officer, and employee shall exercise authority under this Act to ensure that agency action will not violate the policy established in this paragraph.*

DEFINITIONS

SEC. 3. For the purposes of this Act—

(1) The term "alternative courses of action" means all alternatives and thus is not limited to original project objectives and agency jurisdiction.

[(2) 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 exhibitions of commodities by museums or similar cultural or historical organizations.]

*(2) The term "best scientific and commercial data available" means factual information, including but not limited to peer reviewed scientific information and genetic data, obtainable from any source, including governmental and nongovernmental sources, which has been to the maximum extent feasible verified by field testing.*

*(3) 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, except that it does not*

*include exhibition of commodities or species by exhibitors licensed under the Animal Welfare Act (7 U.S.C. 2131 et seq.), museums, or similar cultural or historical organizations.*

[(3) 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.]

*(4) The terms "conservation objective" and "conservation plan" (except when modified by "non-Federal") mean a conservation objective and a conservation plan, respectively, developed under section 5.*

[(4)] *(5)* 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.

*(6) The term "cooperative management agreement" means a voluntary agreement entered into under section 6(b).*

[(5)(A) The term "critical habitat" for a threatened or endangered species means—

[(i) 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 (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

[(ii) 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, upon a determination by the Secretary that such areas are essential for the conservation of the species.

[(B) 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 subparagraph (A) of this paragraph.

[(C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.]

*(7)(A) The term "critical habitat" for an endangered species or a threatened species means the specific areas which are within the geographic area found to be occupied by a species at the time the species is determined to be an endangered species or a threatened species in accordance with section 4 and which contain such physical or biological features as—*

*(i) are essential to the persistence of the species over the 50-year period beginning on the date the regulation designating the critical habitat, or any revision of the regulation, is promulgated; and*

*(ii) require special management considerations or protection.*

*(B) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area occupied by the threatened species or endangered species.*

*(8) The term "distinct population of national interest" means a distinct population of a vertebrate species that is not otherwise an endangered species or threatened species in the United States, Canada, or Mexico, but which because of its value to the Nation as a whole has been designated by Congress as needing protection under this Act.*

*(8a) The term "foreign species" means a species naturally occurring outside the territory of the United States, but does not include any marine species, any species having a significant population occurring in the wild within the United States, or any migratory species whose migration route includes United States territory.*

[(6)] *(9)* 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.

[(7)] *(10)* The term "Federal agency" means any department, agency, or instrumentality of the United States.

[(8)] *(11)* 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, product, egg, or offspring thereof, or the dead body or parts thereof.

[(9)] *(12)* 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.

[(10)] *(13)* 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.

*(14) The term "imminent threat to the existence of", with respect to a species, means, as determined by the Secretary under section 4(b)(7) or the President under section 5(e)(2) solely on the basis of the best scientific and commercial data available, that there is a significant likelihood that the species will become extinct, or will be placed on an irreversible course to extinction, during the 2-year period beginning on the date of the deter-*

*mination that the species is an endangered species or a threatened species, unless the species is accorded fully the protection available under this Act during such period.*

*(15) The term "incidental take permit" means a permit issued under section 10(a)(1)(B).*

*(16) The term "likely to jeopardize the continued existence of", with respect to an action or activity affecting an endangered species or a threatened species, means an action or activity that significantly diminishes the likelihood of the survival of the species by significantly reducing the numbers or distribution of the entire species.*

*(17) The term "non-Federal person" means a person other than an officer, employee, agent, department, or instrumentality of the Federal Government or a foreign government, acting in the official capacity of the person.*

[(12) 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 primarily because of the application of section 7(a) to such agency action.]

*(18) The term "permit or license applicant" means, with respect to the consultation procedures established by section 7, any person that requires authorization or funding from a Federal agency as a prerequisite to conducting an activity (including a party to a written lease, right-of-way, license, contract to purchase or provide a product or service, or other permit with a Federal agency) that requires an action from the agency to obtain the benefit of the activity.*

[(13)] *(19)* "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, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States."

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

*(21) The term "reasonable and prudent alternative" means an alternative action under section 7(b)(3) during consultation on an agency action that—*

*(A) can be implemented in a manner consistent with the intended purpose of the agency action or the activity of a non-Federal person under section 10;*

*(B) can be implemented consistent with the scope of the legal authority and jurisdiction of the Federal agency;*

*(C) is economically and technologically feasible for the applicant or non-Federal person to undertake; and*

*(D) the Secretary believes would avoid being likely to jeopardize the continued existence of the species.*

[(15)] *(22)* 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 also means the Secretary of Agriculture.

[(16) The term "species" includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species or vertebrate fish or wildlife which interbreeds when mature.]

*(23) The term "species" includes any subspecies of fish or wildlife or plants, and any distinct population of national interest of any species or vertebrate fish or wildlife which interbreeds when mature.*

[(17)] *(24)* 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.

[(18)] *(25)* 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.

[(19) 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.]

*(26)(A) The term "take" means to harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in that conduct.*

*(B) In subparagraph (A), the term "harm" means an action that proximately and foreseeably kills or physically injures an identifiable member of an endangered species.*

[(20)] *(27)* 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.

[(21)] *(28)* The term "United States," when used in a geographical context, includes all States.

[DETERMINATION OF ENDANGERED SPECIES AND THREATENED SPECIES

[SEC. 4. (a) GENERAL.—(1) The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of any of the following factors:

[(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

[(B) overutilization for commercial, recreational, scientific, or educational purposes;

[(C) disease or predation;

[(D) the inadequacy of existing regulatory mechanisms; or

[(E) other natural or manmade factors affecting its continued existence.

[(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 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.

[(3) The Secretary, by regulation promulgated in accordance with subsection (b) and to the maximum extent prudent and determinable—

[(A) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

[(B) may, from time-to-time thereafter as appropriate, revise such designation.

[(b) BASIS FOR DETERMINATIONS.—(1)(A) The Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

[(B) In carrying out this section, the Secretary shall give consideration to species which have been—

[(i) designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement; or

[(ii) identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish or wildlife or plants.

[(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweight the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such

area as critical habitat will result in the extinction of the species concerned.

[(3)(A) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of title 5, United States Code, to add a species to, or to remove a species from, either of the lists published under subsection (c), the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If such a petition is found to present such information, the Secretary shall promptly commence a review of the status of the species concerned. The Secretary shall promptly publish each finding made under this subparagraph in the Federal Register.

[(B) Within 12 months after receiving a petition that is found under subparagraph (A) to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings:

[(i) The petitioned action is not warranted, in which case the Secretary shall promptly publish such finding in the Federal Register.

[(ii) The petitioned action is warranted in which case the Secretary shall promptly publish in the Federal Register a general notice and the complete text of a proposed regulation to implement such action in accordance with paragraph (5).

[(iii) The petitioned action is warranted but that—

[(I) the immediate proposal and timely promulgation of a final regulation implementing the petitioned action in accordance with paragraphs (5) and (6) is precluded by pending proposals to determine whether any species is an endangered species or a threatened species, and

[(II) expeditious progress is being made to add qualified species to either of the lists published under subsection (c) and to remove from such lists species for which the protections of the Act are no longer necessary

in which case the Secretary shall promptly publish such finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based.

[(C)(i) A petition with respect to which a finding is made under subparagraph (B)(iii) shall be treated as a petition that is resubmitted to the Secretary under subparagraph (A) on the date of such finding and that presents substantial scientific or commercial information that the petitioned action may be warranted.

[(ii) Any negative finding described in subparagraph (A) and any finding described in subparagraph (B)(i) or (iii) shall be subject to judicial review.

[(iii) The Secretary shall implement a system to monitor effectively the status of all species with respect to which a finding is made under subparagraph (B)(iii) and shall make prompt use of the authority under paragraph 7 to prevent a significant risk to the well being of any such species.

[(D)(i) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of title 5, United States Code, to revise a critical habitat designa-

tion, the Secretary shall make a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted. The Secretary shall promptly publish such finding in the Federal Register.

[(ii) Within 12 months after receiving a petition that is found under clause (i) to present substantial information indicating that the requested revision may be warranted, the Secretary shall determine how he intends to proceed with the requested revision, and shall promptly publish notice of such intention in the Federal Register.]

***SEC. 4. DETERMINATION OF ENDANGERED SPECIES AND THREATENED SPECIES.***

*(a) GENERALLY.—(1) The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of any of the following factors:*

*(A) The present or threatened loss of its habitat.*

*(B) Overutilization for commercial, recreational, scientific, or educational purposes.*

*(C) Disease or predation.*

*(D) The inadequacy of existing Federal, State, and local government regulatory mechanisms.*

*(E) Other natural or manmade factors affecting its continued existence.*

*(b) SECRETARIAL DETERMINATIONS.—*

*(1) BASIS FOR DETERMINATION.—(A) The Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available to the Secretary after conducting a review of the status of the species and after soliciting and fully considering the best scientific and commercial data available concerning the status of a species from any affected State or any interested non-Federal person, and taking into account those efforts being made by any State, any political subdivision of a State, or any non-Federal person or conservation organization, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas, and shall accord greater weight, consideration, and preference to empirical data rather than projections or other extrapolations developed through modeling.*

*(B) In making a determination whether a species is an endangered species or a threatened species under this section, the Secretary shall fully consider populations of the species that are bred through private sector, university, and Federal, State, and local government breeding programs for release in the habitat of the species. In the case of fish species, the bred populations referred to in the preceding sentence shall include hatchery populations.*

*(C) In making a determination whether a species is an endangered species or threatened species under this section, the Secretary shall consider the future conservation benefits to be provided to the species under any species conservation plans prepared pursuant to section 10 or to any cooperative management agreement entered into under section 6.*

*(D) Within 18 months after the date of the enactment of the Endangered Species Conservation and Management Act of 1995, the Secretary shall promulgate scientifically valid standards for rendering taxonomic determinations of species and subspecies. The standards shall provide that to be eligible for determination as a subspecies under this Act, a subspecies must be reproductively isolated from other subspecific population units and constitute an important component in the evolutionary legacy of the species.*

*(2) CONSIDERATION OF STATE RECOMMENDATIONS.—In making a determination pursuant to paragraph (1), the Secretary shall give consideration to species which have been identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency that is responsible for the conservation of fish or wildlife or plants.*

*(3) PETITIONS.—(A) A petition submitted to the Secretary asserting that a species is a threatened species or endangered species and requesting that the Secretary make a determination to that effect shall contain at a minimum the following:*

*(i) Information on the current population and range of the species.*

*(ii) Any information on efforts to field test the population estimates on the species.*

*(iii) If literature from scientific or other journals, dissertations or other such scientific writings of another person are submitted, they must be accompanied by an affidavit that the literature or writings have been peer reviewed.*

*(iv) The qualifications of any person asserting expertise on the species or status of the species.*

*(v) Information about the demonstrated habitat needs of the species, along with the known occupied habitat of the species.*

*(vi) Known causes of the species decline.*

*(B) Petitions to add a species to, or to remove a species from, either of the lists published under subsection (c)(1) shall be submitted in accordance with section 553(e) of title 5, United States Code. The Secretary may commence a review of the status of the species concerned consistent with the priorities set by the Secretary for the listing of species. The Secretary shall promptly publish any finding made under this subparagraph in the Federal Register.*

*(C) At the time the review provided in subparagraph (B) is commenced—*

*(i) the Secretary shall contact the Governor of each State in which the proposed species is located and shall solicit from the Governor information about the action requested in the petition in that State necessary to render a decision and shall solicit the advice of the Governor on whether the status of species merits the action petitioned for, and if the Governor advises that the petition action is not warranted and thereafter the Secretary proceeds with the action, the Secretary shall have the burden of showing that the information submitted by the Governor is incorrect and that the action is warranted; and*

*(ii) the Secretary shall, to the maximum extent feasible, require by field testing, the verification of the information presented regarding the status of the species.*

*(D) The Secretary shall implement a system to monitor effectively the status of all species with respect to which a finding is made that the petitioned action is warranted but precluded by proposals to determine whether any species is an endangered species or a threatened species and progress is being made to add qualified species to the list published under subsection (c) and to remove from lists published under that subsection species for which protection of this Act is no longer necessary, and shall make prompt use of the authority under paragraph (7) to prevent an imminent threat to the existence of any such species.*

*(E)(i) All data or information considered by the Secretary in making the determination to list as provided in this section, shall be considered public information and shall be subject to section 552 of title 5, United States Code (commonly referred to as the "Freedom of Information Act") unless the Secretary, for good cause, determines that the information must be kept confidential. The burden shall be on the Secretary to prove that such information shall be confidential and such decision shall be reviewable by a district court of competent jurisdiction, which shall review the decision in chambers. Good cause can include that the information is of a proprietary nature or that release of the location of the species may endanger the species further.*

*(ii) The Secretary shall minimize releasing the identification of particular private property as habitat for a species which is determined to be an endangered species or threatened species or proposed to be determined to be an endangered species or threatened species, unless the Secretary first notifies the owner thereof and receives his or her consent, or the information is otherwise public information.*

*(F) Before any further action is taken in accordance with this paragraph, the Secretary shall publish in the Federal Register a solicitation for further information regarding the status of a species which is the subject of a proposed rule to list the species as an endangered species or threatened species, including current population, populations trends, current habitat, Federal conservation lands which could provide habitat for the species, food sources, predators, breeding habits, captive breeding efforts, commercial, nonprofit, avocational, or voluntary conservation activities, or other pertinent information which may assist in making a determination under this section. The solicitation shall give a time limit within which to submit the information which shall be not less than 180 days. The time limit shall be extended for an additional 180 days at the request of any person who submits a request for such extension along with the reasons therefor. The Secretary in making the determination required in this subsection, shall give equal weight to the information submitted in accordance with this paragraph.*

*(G) Any person may submit to the Secretary a petition to revise a previous determination by the Secretary under this Act that a species is an endangered species or threatened species*

*and to remove the species from a list published under subsection (c), on the basis that—*

*(i) new data or a reinterpretation of prior data indicates that the previous determination was in error;*

*(ii) the species is extinct;*

*(iii) the population level target established for the species in a conservation plan under section 5(c)(3)(C)(vii) has been achieved; or*

*(iv) the original listing of the species did not undergo adequate peer review.*

*(H)(i) After receiving a petition under subparagraph (G), the Secretary shall complete a review of the species, which review shall include the solicitation of information as described in subparagraph (F).*

*(ii) The determination of the Secretary with respect to such petition shall be considered an action for purposes of subsection (i).*

*(iii) If the Secretary has not made a final determination by the end of the 18-month period beginning on the date of the filing of a petition under subparagraph (G), the species covered by the petition shall not be considered to be an endangered species or threatened species for the purposes of this Act and shall not be included or considered to be included in any list published under subsection (c).*

*(iv) If, following review required under clause (i) of this paragraph and subsection (i) of this section, the final determination of the Secretary is to retain the species as an endangered species or threatened species on a list published under subsection (c), that decision shall be considered to be a listing determination for purposes of section 5.*

*(v) This subparagraph shall not apply to a petition to delist a species for which a review, as required by this subparagraph, has been conducted by the Secretary in the preceding 10-year period.*

(4) Except as provided in paragraphs (5) and (6) of this subsection, 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.

[(5) With respect to any regulation proposed by the Secretary to implement a determination, designation, or revision referred to in subsection (a)(1) or (3), the Secretary shall—

[(A) not less than 90 days before the effective date of the regulation—

[(i) publish a general notice and the complete text of the proposed regulation in the Federal Register, and

[(ii) give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, and to each county or equivalent jurisdiction in which the species is believed to occur, and invite the comment of such agency, and each such jurisdiction, thereon;

[(B) insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to each foreign nation in which the species is believed to occur or

whose citizens harvest the species on the high seas, and invite the comment of such nation thereon;

[(C) give notice of the proposed regulation to such professional scientific organizations as he deems appropriate;

[(D) publish a summary of the proposed regulation in a newspaper of general circulation in each area of the United States in which the species is believed to occur; and

[(E) promptly hold one public hearing on the proposed regulation if any person files a request for such a hearing within 45 days after the date of publication of general notice.

[(6)(A) Within the one-year period beginning on the date on which general notice is published in accordance with paragraph (5)(A)(i) regarding a proposed regulation, the Secretary shall publish in the Federal Register—

[(i) if a determination as to whether a species is an endangered species or a threatened species, or a revision of critical habitat, is involved, either—

[(I) a final regulation to implement such determination,

[(II) a final regulation to implement such revision or a finding that such revision should not be made,

[(III) notice that such one-year period is being extended under subparagraph (B)(i), or

[(IV) notice that the proposed regulation is being withdrawn under subparagraph (B)(ii), together with the finding on which such withdrawal is based; or

[(ii) subject to subparagraph (C), if a designation of critical habitat is involved, either—

[(I) a final regulation to implement such designation, or

[(II) notice that such one-year period is being extended under such subparagraph.]

*(5) NOTICE REQUIRED.—With respect to any regulation proposed by the Secretary to implement a determination referred to in subsection (a)(1) of this section, the Secretary shall—*

*(A) not less than 90 days before the effective date of the regulation—*

*(i) publish a general notice and the complete text of the proposed regulation in the Federal Register, and*

*(ii) give actual notice of the proposed regulation (including the complete text of the regulation) to the Governor of each State in which the species is believed to occur, and invite the determination of such State as to whether the action is warranted and if the Governor notifies the Secretary that the action is not warranted, the Secretary must provide to the Governor a record of decision for such determination, including information made available to the Secretary which did not support the determination, and the written reasons for the determination;*

*(B) in cooperation with the Secretary of State, give notice of the proposed regulation to each foreign nation in which the species is believed to occur or whose citizens harvest the species on the high seas, and consult with such nation thereon;*

*(C) give notice of the proposed regulation to any person who requests such notice, any person who has submitted additional data, each State and local government within which the species is believed to occur or which is likely to experience any effects of any measures to protect the species under this Act, and such professional scientific organizations as the Secretary deems appropriate;*

*(D) publish a summary of the proposed regulation in a newspaper of general circulation in each area of the United States in which the species is believed to occur; and*

*(E) promptly hold at least 1 hearing in each State in which the species proposed for determination as an endangered species or a threatened species is believed to occur, and in a location that is as close as possible to the center of the habitat of such species in such State, including at least one hearing in an affected rural area specified by the Governor of the State, if the Governor determines that 1 or more rural areas within the State are affected by the determination.*

*(6) PUBLICATION OF DETERMINATION.—(A) Within the one-year period beginning on the date on which general notice is published in accordance with paragraph (5)(A)(i) regarding a proposed regulation, the Secretary shall publish in the Federal Register, if a determination as to whether a species is an endangered species or a threatened species is involved, either—*

*(i) a final regulation to implement such determination,*

*(ii) a final regulation to implement such revision or a finding that such revision should not be made,*

*(iii) notice that such one-year period is being extended under subparagraph (B)(i), or*

*(iv) notice that the proposed regulation is being withdrawn under subparagraph (B)(ii), together with the finding on which such withdrawal is based.*

(B)(i) If the Secretary finds with respect to a proposed regulation referred to in subparagraph (A)(i) that there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination **[**or revision concerned**]**, the Secretary may extend the one-year period specified in subparagraph (A) for not more than six months for purposes of soliciting additional data.

(ii) If a proposed regulation referred to in subparagraph (A)(i) is not promulgated as a final regulation within such one-year period (or longer period if extension under clause (i) applies) because the Secretary finds that there is not sufficient evidence to justify the action proposed by the regulation, the Secretary shall immediately withdraw the regulation. The finding on which a withdrawal is based shall be subject to judicial review. The Secretary may not propose a regulation that has previously been withdrawn under this clause unless he determines that sufficient new information is available to warrant such proposal.

(iii) If the one-year period specified in subparagraph (A) is extended under clause (i) with respect to a proposed regulation, then before the close of such extended period the Secretary shall publish in the Federal Register either a final regulation to implement the

determination [or revision concerned, a finding that the revision should not be made,] or a notice of withdrawal of the regulation under clause (ii), together with the finding on which the withdrawal is based.

[(C) A final regulation designating critical habitat of an endangered species or a threatened species shall be published concurrently with the final regulation implementing the determination that such species is endangered or threatened, unless the Secretary deems that—

[(i) it is essential to the conservation of such species that the regulation implementing such determination be promptly published; or

[(ii) critical habitat of such species is not then determinable, in which case the Secretary, with respect to the proposed regulation to designate such habitat, may extend the one-year period specified in subparagraph (A) by not more than one additional year, but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.

[(7) Neither paragraph (4), (5), or (6) of this subsection nor section 553 of title 5, United States Code, shall apply to any regulation issued by the Secretary in regard to any emergency posing a significant risk to the well-being of any species of fish and wildlife or plants, but only if—]

*(7) EMERGENCY REGULATIONS.—Neither paragraph (4), (5), or (6) of this subsection nor section 553 of title 5, United States Code, shall apply to any regulation issued by the Secretary in regard to any emergency posing an imminent threat to the existence of any species of fish or wildlife or plants, but only if—*

(A) at the time of publication of the regulation in the Federal Register the Secretary publishes therein detailed reasons why such regulation is necessary; and

(B) in the case such regulation applies to resident species of fish or wildlife, or plants, the Secretary gives actual notice of such regulation to the State agency in each State in which such species is believed to occur.

Such regulation shall, at the discretion of the Secretary, take effect immediately upon the publication of the regulation in the Federal Register. Any regulation promulgated under the authority of this paragraph shall cease to have force and effect at the close of the 240-day period following the date of publication unless, during such 240-day period, the rulemaking procedures which would apply to such regulation without regard to this paragraph are complied with. If at any time after issuing an emergency regulation the Secretary determines, on the basis of the best appropriate data available to him, that substantial evidence does not exist to warrant such regulation, he shall withdraw it. *The Secretary may not delegate the final decision to issue an emergency regulation under this paragraph.*

(8) 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] *the best scientific and commercial data available* on

which such regulation is based and shall show the relationship of such data to such [regulation; and if such regulation designates or revises critical habitat, such summary shall, to the maximum extent practicable, also include 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 affected by such designation.] *regulation. Each regulation proposed by the Secretary to implement a determination referred to in subsection (a)(1) shall be based only upon peer-reviewed scientific information obtainable from any source, including governmental and nongovernmental sources, which has been to the maximum extent feasible verified by field testing.*

*(9) PUBLICATION IN FEDERAL REGISTER.—(A) The Secretary shall identify and publish in the Federal Register with each proposed rule under paragraph (1) or section 5(i) a description of—*

*(i) all data that are to be considered in making the determination under the subsection to which the proposed rule relates and that have yet to be collected or field verified;*

*(ii) data that are necessary to make determinations and that can be collected prior to any determination; and*

*(iii) data that are necessary to ensure the scientific validity of the determination, and each deadline for collecting these data.*

*(B) In making a determination pursuant to paragraph (1) or section 5(i), the Secretary shall collect and consider the data identified and described pursuant to subparagraph (A)(ii).*

*(C) The Secretary shall identify and publish in the Federal Register with each final rule promulgated under paragraph (1) or section 5(i)—*

*(i) a description of any data that have not been collected and considered in the determination to which the rule relates and that are necessary to ensure the continued scientific validity of the determination; and*

*(ii) each deadline by which the Secretary shall collect and consider the data in accordance with subparagraph (D).*

*(D) Not later than the deadline published by the Secretary pursuant to subparagraph (C)(ii), the Secretary shall—*

*(i) collect the data referred to in each paragraph;*

*(ii) provide an opportunity for public review and comment on the data;*

*(iii) consider the data after the review and comment; and*

*(iv) publish in the Federal Register the results of that consideration and a description of and schedule for any actions warranted by the data.*

*(10) FOREIGN SPECIES.—(A) In determining under subsection (a) whether a foreign species is an endangered species or a threatened species, the Secretary shall not determine that a species that is listed under the Convention is endangered or threatened unless he makes an adequate finding, supported by substantial evidence, that the Convention does not provide adequate regulation.*

*(B) The Secretary shall, prior to publishing a proposal in the Federal Register to determine that a foreign species is endangered or threatened, transmit the full text and a complete description of the proposed listing directly to the appropriate wildlife management authority of that nation, in the language of that nation, with at least 180 days allowed for review and comment. The 180 days shall be counted from the date of delivery of the materials supporting the proposed listing to the wildlife authorities of the country.*

*(C) Such transmission must be accompanied by—*

*(i) a plain-language explanation of the objective criteria for and purpose of the proposed listing;*

*(ii) an analysis of the anticipated beneficial impact or detrimental impact of the listing on the economic, social, and cultural utilization of the species, if any, and of the beneficial or detrimental impact on the resource management and conservation programs of that nation; and*

*(iii) a summary of the literature reviewed and experts consulted by the Secretary in regard to the species involved, and a summary of the Secretary's findings based on that review and consultation.*

*(D) The Secretary shall enter into discussions with the appropriate wildlife management officials of the nations to which he has sent the transmission referred to in subparagraph (C). If those officials feel that further studies of the species are indicated, the Secretary shall assist in finding the funds for such studies and in carrying out the studies.*

*(E) The Secretary must obtain the written concurrence of all the nations contacted. If such concurrence is not obtained, the Secretary may not issue the proposed regulation except by an order submitted to and approved by the President.*

*(11) FACA.—Consultation with States regarding petitions and proposed regulations under this subsection shall not be subject to the Federal Advisory Committee Act (5 U.S.C. App.).*

*(12) ANALYSIS OF ECONOMIC AND SOCIAL COSTS.—Concurrently with a determination that a species warrants listing as an endangered species or threatened species, the Secretary shall issue an analysis of the economic and social effects the listing may have. The analysis shall be published in the Federal Register with the listing determination and shall include an estimate of the effects the listing may have on Federal, State, and local expenditures and revenues, and the costs and benefits of the listing for the private sector, including lost opportunity costs.*

(c) LISTS.—(1) The Secretary of the Interior shall publish in the Federal Register 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, specify with respect to such species over what portion of its range it is endangered or threatened, and specify any critical habitat within such range. The Secretary shall from time to time revise each list published under the authority of this subsection to reflect recent determina-

tions, designations, and revisions made in accordance with subsections (a) and (b).

[(2) 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 subsection (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(c) of this Act only to the extent that such regulations have also been adopted by such State.]

*(2) The Secretary shall—*

*(A) conduct, at least once every 5 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, which shall be proposed within 90 days of the date upon which it is determined that—*

*(I) new data or a reinterpretation of prior data indicates that the previous determination was in error;*

*(II) the species is extinct; or*

*(III) the population level target established for the species in a conservation plan under section 5(c)(3)(C)(vii) has been achieved;*

*(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) of this section.*

*(d) REGULATIONS TO PROTECT THREATENED SPECIES.—Whenever any species is listed as a threatened species pursuant to subsection (c), the Secretary shall issue, concurrently with the regulation that provides for the listing of the species, such regulations as the Secretary deems necessary and advisable to provide for the conserva-*

*tion of such species. Such regulations may apply to the threatened species one or more of the prohibitions under section 9(a)(1), in the case of fish and wildlife, or section 9(a)(2) in the case of plants, with respect to endangered species. The prohibition applied to the threatened species shall address the specific circumstances of such species and may not be as restrictive as such prohibition for endangered species. 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 or delegation agreement pursuant to section 6 only to the extent that such regulations have also been adopted by such State.*

(e) SIMILARITY OF APPEARANCE CASES.—The Secretary may, by regulation of commerce or taking, 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)(1) RECOVERY PLANS.—The Secretary shall develop and implement plans (hereinafter in this subsection referred to as "recovery plans") for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species. The Secretary, in development and implementing recovery plans, shall, to the maximum extent practicable—

[(A) give priority to those endangered species or threatened species, without regard to taxonomic classification, that are most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity;

[(B) incorporate in each plan—

[(i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;

[(ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and

[(iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.

[(2) 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.

[(3) The Secretary shall report every two years to the Committee on Environment and Public Works of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives on the status of efforts to develop and implement recovery plans for all species listed pursuant to this section and on the status of all species for which such plans have been developed.

[(4) The Secretary shall, prior to final approval of a new or revised recovery plan, provide public notice and an opportunity for public review and comment on such plan. The Secretary shall consider all information presented during the public comment period prior to approval of the plan.

[(5) Each Federal agency shall, prior to implementation of a new or revised recovery plan, consider all information presented during the public comment period under paragraph (4).

[(g)] *(f)* MONITORING.—(1) The Secretary shall implement a system in cooperation with the States to monitor effectively for not less than five years the status of all species which have recovered to the point at which the measures provided pursuant to this Act are no longer necessary and which, in accordance with the provisions of this section, have been removed from either of the lists published under subsection (c).

(2) The Secretary shall make prompt use of the authority under paragraph 7 of subsection (b) of this section to prevent a significant risk to the well being of any such recovered species.

[(h)] *(g)* AGENCY GUIDELINES.—The Secretary shall establish, and publish in the Federal Register, agency guidelines to insure that the purposes of this section are achieved efficiently and effectively. Such guidelines shall include, but are not limited to—

(1) procedures for recording the receipt and the disposition of petitions submitted under subsection (b)(3) of this section;

[(2) criteria for making the findings required under such subsection with respect to petitions;

[(3)] *(2)* a ranking system to assist in the identification of species that should receive priority review under subsection (a)(1) of the section; and

[(4) a system for developing and implementing, on a priority basis, recovery plans under subsection (f) of this section. The Secretary shall provide to the public notice of, and opportunity to submit written comments on, any guideline (including any amendment thereto) proposed to be established under this subsection.]

*(3) a system for developing and implementing, on a priority basis, conservation objectives and conservation plans. The Secretary shall provide to the public notice of, and opportunity to submit written comments on, any guideline (including any amendment thereto) proposed to be established under this subsection.*

[(i) If, in the case of any regulation proposed by the Secretary under the authority of this section, a State agency to which notice thereof was given in accordance with subsection (b)(5)(A)(ii) files comments disagreeing with all or part of the proposed regulation, and the Secretary issues a final regulation which is in conflict with such comments, or if the Secretary fails to adopt a regulation pursuant to an action petitioned by a State agency under subsection

(b)(3), the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency's comments or petition.]

*(h) SUBMISSION TO STATE AGENCY OF JUSTIFICATION FOR REGULATIONS INCONSISTENT WITH STATE AGENCY'S COMMENTS OR PETITION.—If, in the case of any regulation proposed by the Secretary under the authority of this section, a Governor who consulted with the Secretary in accordance with subsection (b)(5)(A)(ii) of this section files comments disagreeing with all or part of the proposed regulation, the Secretary shall not issue a final regulation which is in conflict with such comments until the Secretary further consults with the President. If the Secretary adopts a final regulation in conflict with comments made by the Governor of a State or fails to adopt a regulation pursuant to an action petitioned by a Governor under subsection (b)(3) of this section, the Secretary shall submit to the Governor a written justification for the failure of the Secretary to adopt regulations consistent with the comments or petition of the Governor.*

*(i) PEER REVIEW REQUIREMENT.—*

*(1) DEFINITIONS.—In this subsection:*

*(A) The term "action" means—*

*(i) the determination that a species is an endangered species or a threatened species under subsection (a);*

*(ii) the determination under subsection (a) that an endangered species or a threatened species be removed from any list published under subsection (c)(1);*

*(iii) the designation, or revision of the designation, of critical habitat for an endangered species or a threatened species under section 5(i); and*

*(iv) the determination that a proposed action is likely to jeopardize the continued existence of a listed species and the proposal of any reasonable and prudent alternatives by the Secretary under section 7(b)(3).*

*(B) The term "qualified individual" means an individual with expertise in the biological sciences—*

*(i) who is by virtue of advanced education, training, or avocational, academic, commercial, research, or other experience competent to review the adequacy of any scientific methodology supporting the action, the validity of any conclusions drawn from the supporting data, and the competency of the individual who conducted the research or prepared the data;*

*(ii) who is not otherwise employed by or under contract to the Secretary or the State in which the species is located;*

*(iii) who has not actively participated in the prelisting or listing processes or advocated that a listing decision be made;*

*(iv) who has not been employed by or under contract to the Secretary or the State in which the species is located for work related to the action or species under consideration; and*

*(v) who has no direct financial interest, and is not employed by any person with a direct financial interest, in opposing the action under consideration.*

*(2) LIST OF PEER REVIEWERS.—In order to provide a substantial list of individuals who on a voluntary basis are available to participate in peer review actions, the Secretary shall, through the Federal Register, through scientific and commercial journals, and through the National Academy of Sciences and other such institutions, seek nominations of persons who agree to peer review action upon appointment by the Secretary.*

*(3) APPOINTMENT OF PEER REVIEWERS.—Before any action shall become final, the Secretary shall appoint, from among the list prepared in accordance with paragraph (2), not more than 2 qualified individuals who shall review, and report to the Secretary on, the scientific information and analyses on which the proposed action is based. The Governor of each State in which the species is located that is the subject of the proposal, may appoint up to 2 qualified individuals to conduct peer review of the action. If any individual declines the appointment, the Secretary or the Governor shall appoint another individual to conduct the peer review.*

*(4) DATA PROVIDED TO PEER REVIEWER.—The Secretary shall make available to each person conducting peer review all scientific information available regarding the species which is the subject of the peer review. The Secretary shall not indicate to a peer reviewer the name of any person that submitted a petition for listing or delisting that is reviewed by the reviewer.*

*(5) OPINION OF PEER REVIEWERS.—The peer reviewer shall give his or her opinion with regard to any technical or scientific deficiencies in the proposal, whether the methodology and analysis supporting the petition conform to the standards of the academic and scientific community, and whether the proposal is supported by sufficient credible evidence.*

*(6) PUBLICATION OF PEER REVIEW REPORT.—The Secretary shall publish with any final regulation implementing an action a summary of the report of the peer review panel noting points of disagreement between peer reviewers, if any, and the response of the Secretary to the report. The report of the peer reviewers shall be included in the official record of the proposed action and shall be available for public review prior to the close of the comment period on the regulation.*

*(j) JUDICIAL REVIEW OF DETERMINATIONS.—Any determination with regard to whether a species is a threatened species or endangered species shall be subject to a de novo judicial review with the court determining whether the decision is supported by a preponderance of the evidence.*

[LAND ACQUISITION

[SEC. 5. (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 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.]

***SEC. 5. SPECIES CONSERVATION PLANS.***

*(a) IN GENERAL.—Except as provided in subsection (b)(3)(C), the Secretary shall publish a conservation objective and a conservation plan for each species determined to be an endangered species or a threatened species pursuant to section 4.*

*(b) DEVELOPMENT OF CONSERVATION OBJECTIVE.—*

*(1) ASSESSMENT AND PLANNING TEAM.—Not later than 30 days after the listing determination, the Secretary shall appoint an assessment and planning team which shall not be subject to the Federal Advisory Committee Act (5 U.S.C. App.) and shall consist of—*

*(A) experts in biology or pertinent scientific fields, economics, property law and regulation, and other appropriate disciplines from the Department of the Secretary, other Federal agencies, and the private sector;*

*(B) a representative nominated by the Governor of each affected State;*

*(C) representatives nominated by each affected local government, if the local government agrees to the appointment of a representative; and*

*(D) representatives of persons who may be directly, economically impacted by the conservation plan.*

*The chairman of the team shall be selected from representatives of participating States or local governments.*

*(2) ASSESSMENTS.—Not later than 180 days after the listing determination, the assessment and planning team shall report to the Secretary the assessment of the following biological, economic, and intergovernmental factors with respect to the listed species:*

*(A) The team shall assess—*

*(i) the biological considerations necessary to carry out this Act;*

*(ii) the biological significance of the species;*

*(iii) the geographic range and occupied habitat of the species, and the type and amounts of habitat needed, at a minimum, to maintain the existence of the species and, at a maximum, to secure recovery of the species;*

*(iv) the current population, and the population trend, of the species;*

*(v) the technical practicality of recovering the species;*

*(vi) the potential management measures capable of recovering, or reducing the risks to survival of, the spe-*

*cies, including the contribution of existing or potential captive breeding programs for the species, predator control, enhancement of food sources, supplemental feeding, and other methods which enhance the survival of the young of the species; and*

*(vii) where appropriate, the demonstrable commercial or medicinal value of the species.*

*(B) The team shall assess the direct, indirect, and cumulative economic and social impacts on the public and private sectors, including local governments, that may result from the listing determination and any potential management measures identified under subparagraph (A)(vi), including impacts on the cost of governmental actions, tax and other revenues, employment, the use and value of property, other social, cultural, and community values, and an assessment of any commercial activity which could potentially result in a net benefit to the conservation of the species.*

*(C) The team shall assess the impacts on State and local land use laws, conservation measures, and water allocation policies that may result from the listing determination and from the potential management measures identified under subparagraph (A)(vi).*

*(D) The Secretary shall provide funding to the team to employ or obtain such technical assistance as necessary to fulfill its duties under this paragraph.*

*(E) Upon completion of the assessment, the Secretary shall publish in the Federal Register a notice of availability of the report and allow 30 days for public comment.*

*(3) SECRETARIAL REVIEW OF ASSESSMENTS AND ESTABLISHMENT OF CONSERVATION OBJECTIVE.—(A) Not later than 210 days after a listing determination, the Secretary shall review the report of the assessment and planning team prepared pursuant to paragraph (2), establish a conservation objective for the species, and publish in the Federal Register the conservation objective, along with a statement of findings on which the conservation objective was established.*

*(B) The conservation objective may be, in the discretion of the Secretary—*

*(i) recovery of the listed species;*

*(ii) such level of conservation of the species which the Secretary determines practicable and reasonable to the extent that the benefits of the potential conservation measures outweigh the economic and social costs of such measures, including but not limited to maintenance of existing population levels;*

*(iii) no Federal action other than enforcement against any person whose activity violates the prohibitions specified in section 9(a), including any activity that results in a taking of the species, unless the taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity; or*

*(iv) such other objective as the Secretary may determine that does not provide a lesser level of protection than the level described in clause (iii).*

*(C) If the conservation objective established by the Secretary is the objective provided in subparagraph (B)(iii), the Secretary shall not develop a conservation plan for the affected species under subsection (c).*

*(c) DEVELOPMENT OF CONSERVATION PLAN.—*

*(1) PRIORITIES.—In the development and implementation of a conservation plan under this subsection, the Secretary shall accord priority to—*

*(A) the development of an integrated plan for 2 or more endangered species or threatened species that are likely to benefit from an integrated conservation plan;*

*(B) the geographic areas where conflicts between the conservation of the affected species and development projects or other forms of economic activity exist or are likely to exist;*

*(C) protection of the listed species on units of the National Biological Diversity Reserve as provided in section 5A(a);*

*(D) the implementation of conservation measures that have the least economic and social costs;*

*(E) nonregulatory, incentive-based conservation measures and commercial activities that provide a net benefit to the conservation of the species; and*

*(F) plans in which States or private organizations or persons are the primary implementors.*

*(2) PUBLICATION OF DRAFT PLAN.—Not later than 12 months after the date of a determination that a species is an endangered species or a threatened species, the assessment and planning team for the species shall publish a draft conservation plan for the species which is based on the assessments made pursuant to subsection (b)(2) and designed to achieve the conservation objective established pursuant to subsection (b)(3).*

*(3) CONTENTS OF DRAFT PLAN.—Each draft conservation plan shall contain—*

*(A) recommendations for Federal agency compliance with section 7(a)(1) and 7(a)(2);*

*(B) recommendations for avoiding a taking of a listed species prohibited under section 9(a)(1) and a list of specific activities that would constitute a take under section 9;*

*(C) alternative strategies to achieve the conservation objective for the listed species which range from a strategy requiring the least possible Federal management to achieve the conservation objective to a strategy involving more intensive Federal management to achieve the objective, each of which contains—*

*(i) an estimate of the risks to the survival and recovery of the species that the alternative would entail;*

*(ii) a description of any site-specific management measures recommended for the alternative;*

*(iii) an analysis of the relationship of any habitat of the species proposed for designation as critical habitat to the recommended management measures;*

*(iv) a description of the direct, indirect, and cumulative economic and social impacts on the public and private sectors including impacts on employment, the cost of government actions, tax and other revenues, the use and value of property, and other social, cultural, and community values;*

*(v) a description of any captive breeding program recommended for the alternative;*

*(vi) an analysis of whether the alternative would include any release of an experimental population outside the current range of the species and an identification of candidate geographic areas for the release;*

*(vii) objective and measurable criteria, including a population level target, that, if met, would result in a determination under section 4 that the species is no longer an endangered species or threatened species;*

*(viii) estimates of the time and costs required to carry out the management measures, including any intermediate steps; and*

*(ix) a description of the role of each affected State, if any, in achieving the conservation objective.*

*(4) PLAN PREPARATION PROCEDURES.—(A) The Secretary shall consult with the Governor of each State in which the affected species is located during the preparation of each draft and final conservation plan. Each plan shall provide for equitable treatment of affected States and other non-Federal persons.*

*(B) The Secretary shall publish in the Federal Register and a newspaper of general circulation in each affected county and parish a notice of the availability and a summary of, and a request for the submission of comments on, each draft conservation plan.*

*(C) The Secretary shall hold at least 1 hearing on each draft conservation plan in each State to which the plan would apply in a location that is as close as possible to the center of the habitat of the affected species in such State.*

*(D) Prior to any decision to adopt a final conservation plan, the Secretary shall consider and weigh carefully all information presented during each hearing held under subparagraph (C) or received in response to a request for comments published under subparagraph (B).*

*(5) PUBLICATION OF FINAL PLAN.—Not later than 18 months from the date of a determination that a species is an endangered species or a threatened species, the Secretary shall publish in the Federal Register a notice of the availability, and a summary, of a final conservation plan for the species. The notice shall include a detailed description of—*

*(A) the reasons for the selection of the final conservation plan;*

*(B) the reasons for not selecting each of the other alternatives included in the draft conservation plan, including, if any alternative is selected other than the alternative that would impose the least total costs on the public and private sectors, the reasons for such selection;*

*(C) the effect of the priorities specified in paragraph (1) on the selection; and*

*(D) the response of the Secretary to the information referred to in paragraph (4).*

*(6) PARTICIPATION BY OTHER PERSONS.—In developing and implementing conservation plans, the Secretary may use the services of appropriate public and private agencies and institutions and other qualified persons.*

*(7) PLAN REVISION OR AMENDMENT.—Any revision of or amendment to a conservation plan shall be made in accordance with the procedures and requirements of subsection (b) and this subsection, except that the Secretary by regulation may provide for other procedures and requirements for any amendment that does not increase the direct or indirect cost of implementation of the plan or enlarge the area to which the plan applies.*

*(d) NO FURTHER PROCEDURES OR REQUIREMENTS FOR ACTIONS CONSISTENT WITH THE CONSERVATION PLAN.—If a conservation plan is prepared under subsection (c) or if a conservation objective is established under subsection (b)(3)(C)—*

*(1) any Federal agency that determines that the actions of the agency are consistent with the provisions of the conservation plan or conservation objective shall be considered to comply with section 7(a)(1) for the affected species;*

*(2) any agency action that the Federal agency determines is consistent with the provisions of the conservation plan or conservation objective shall not be subject to section 7(a)(2) for the affected species, except that a Federal agency may initiate consultation under section 7(a)(2) if the agency desires guidance from the Secretary on the consistency of the action of the agency with the conservation plan or conservation objective; and*

*(3) any action of any person that is consistent with the provisions of the conservation plan or conservation objective shall not constitute a violation concerning the affected species of any applicable prohibition under section 9(a) or 4(d), except that a non-Federal person may initiate consultation under section 10(a)(2)—*

*(A) if the person desires guidance from the Secretary on the consistency of the action with the plan or objective; or*

*(B) in order to determine whether to apply for a permit under section 10 for any action that is inconsistent with the plan or objective.*

*(e) MANAGEMENT PRIOR TO PUBLICATION OF CONSERVATION PLAN.—*

*(1) IN GENERAL.—After a listing determination and before the publication of a final conservation plan, or, if no plan is required pursuant to subsection (b)(3)(C), a conservation objective, for the species—*

*(A) the prohibitions of section 9(a) shall apply to any person, except in the case of a taking of a member of the species that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity which incidental taking activity may include but is not limited to the routine operation, maintenance, rehabilitation, replacement, or repair of any structure, building, road, dam, airport, or any*

*irrigation or other facility which is in operation prior to the publication of the determination under section 4(b)(6); and*

*(B) no Federal agency shall be required to comply with section 7(a)(1) and no consultation shall be required on any agency action under section 7(a)(2), except that the species shall continue to be treated as a species proposed for listing under section 4 solely for purposes of section 7(a)(4).*

*(2) EMERGENCY RULEMAKING PROTECTIONS.—Notwithstanding paragraph (1), sections 7(a) and 9(a) shall apply fully to the listed species during a period in which an emergency rulemaking is in effect pursuant to section 4(b)(7) or if the President declares, and advises the Secretary, that there exists an imminent threat to the existence of the species. Such declaration of the President expires upon the deadline for publication of a final conservation plan for the species pursuant to subsection (c)(5) or the publication of a conservation objective for the species provided in subsection (b)(3) or if no conservation plan is required pursuant to subsection (b)(3)(C).*

*(f) SUSPENSION OF CONSERVATION PLAN OR OBJECTIVE.—If the Secretary issues an incidental take permit or enters into a cooperative management agreement under section 6, the Secretary, by publication of notice in the Federal Register, shall suspend the conservation objective or conservation plan with respect to the geographic area or action applicable to the species to which the permit or agreement applies.*

*(g) NONDELEGATION OF DUTIES.—The Secretary may not delegate the authority to make the final decision to select a conservation objective, issue a conservation plan, or designate critical habitat under this section.*

*(h) REVIEW OF CONSERVATION PLANS.—*

*(1) DEADLINES.—The Secretary shall review each conservation plan and the conservation objective on which it is based before the end of the 5-year period that begins on the date of publication of the conservation plan, and before the end of each 5-year period thereafter.*

*(2) REVISIONS.—The Secretary shall revise a conservation plan or the conservation objective on which it is based if the Secretary determines—*

*(A) through a 5-year review under paragraph (1), that the conservation plan or conservation objective does not meet the requirements of this section; or*

*(B) at any time—*

*(i) that funding is not available for the implementation of a specific conservation measure that is integral to the conservation plan or that a more cost-effective alternative exists for a specific conservation measure that is integral to the conservation plan; or*

*(ii) on the basis of scientific or commercial data that were not available during the development of the conservation objective or conservation plan, that the conservation objective is not achievable or the conservation plan will not achieve the conservation objective.*

*(3) NO REOPENING OF CONSULTATIONS.—Section 7 consultations shall not be reopened as a result of modifications to a conservation plan under paragraph (2).*

*(i) CRITICAL HABITAT DESIGNATION.—*

*(1) DESIGNATION.—The Secretary—*

*(A) may, by regulation and to the extent prudent and determinable, designate critical habitat of a species determined to be an endangered species or threatened species that meets the requirements of paragraph (3) utilizing the National Biodiversity Reserve established under section 5A(a) as a first priority;*

*(B) may by regulation and to the extent prudent and determinable, revise a critical habitat designation on determining that the critical habitat does not meet the requirements of paragraph (3); and*

*(C) shall, by regulation and upon receiving a written request from a non-Federal person requesting a review of the critical habitat designation on such person's private property, revise a critical habitat designation on such private property on determining that the critical habitat does not meet the requirements of paragraph (3).*

*Designation or revision of critical habitat shall not result in reopening or reinitiation of consultations on Federal actions pursuant to section 7.*

*(2) DEADLINES FOR DESIGNATION.—Any proposed regulation and any final regulation to designate or revise critical habitat shall be published not later than 12 months and 18 months, respectively, after the date on which the affected species is determined to be an endangered species or a threatened species, or on which the Secretary receives a written request to review a critical habitat designation under paragraph (1)(C).*

*(3) BASIS FOR DESIGNATION.—The designation of critical habitat, and any revision of the designation, shall be made on the basis of the best available scientific and commercial data after taking into consideration the economic impact, and any other relevant impact, of designating any particular area as critical habitat and of the determination that the affected species is an endangered species or threatened species. The Secretary shall exclude any area from critical habitat—*

*(A) which does not meet the definition of critical habitat set forth in section 3(7);*

*(B) which is not necessary to achieve the conservation objective for the affected species established pursuant to subsection (b);*

*(C) for which the Secretary determines that the benefits of the exclusion of the area from designation as critical habitat outweigh the benefits of designation, unless the Secretary determines, on the basis of the best available scientific and commercial data, that the failure to designate the area as critical habitat will result in the extinction of the affected species; or*

*(D) in the case of property owned by a non-Federal person, where the owner thereof has not given written consent*

*to the designation, has withdrawn such consent in writing, or has not been compensated as provided in section 19.*

*(4) PROCEDURE FOR DESIGNATION.—In the Federal Register notice containing the proposed regulation to designate critical habitat, the Secretary shall describe the economic impacts and other relevant impacts that are to be considered, and the benefits that are to be weighed, under paragraph (3) in designating an area as critical habitat, along with maps showing the location of the area to be designated as critical habitat. The Secretary shall submit the description, and the documentation supporting the description, to the Bureau of Labor Statistics of the Department of Labor. The Commissioner of Labor Statistics shall submit written comments during the comment period on the proposed regulation. The Secretary shall hold at least one public hearing in each State on the proposed rule in which critical habitat is designated for a species. In issuing any final regulation designating critical habitat, the Secretary shall respond separately and fully to each comment.*

*(5) JUDICIAL REVIEW OF CRITICAL HABITAT DESIGNATION.—The decision whether to designate critical habitat shall be subject to a de novo judicial review with the court determining whether the decision is supported by a preponderance of the evidence.*

*(j) JUDICIAL REVIEW OF CONSERVATION OBJECTIVE OR PLAN.—The standard for judicial review of any decision of the Secretary, or a Federal agency pursuant to this section shall be whether the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.*

*(k) CONSERVATION PLANS FOR FOREIGN SPECIES.—In developing conservation objectives and conservation plans under this section, the Secretary shall, in regard to foreign species—*

*(1) act consistently with the Convention; and*

*(2) cooperate and support the conservation strategy adopted for that species by any foreign nation in which the species occurs.*

*(l) RECOGNITION OF CAPTIVE PROPAGATION AS MEANS OF CONSERVATION.—*

*(1) IN GENERAL.—In carrying out this Act, the Secretary shall recognize to the maximum extent practicable, and may utilize, captive propagation as a means of protecting or conserving an endangered species or a threatened species.*

*(2) CAPTIVE PROPAGATION GRANTS.—The Secretary may, subject to appropriations therefor, provide annual grants to non-Federal persons to fund captive propagation programs for the purpose of protecting or conserving any species that is determined under section 4 to be an endangered species or a threatened species, if the Secretary determines that such a program contributes to enhancement of the population of the species.*

*(m) TECHNICAL ASSISTANCE PROGRAM.—*

*(1) IN GENERAL.—The Secretary shall initiate a technical assistance program to provide technical advice and assistance to non-Federal persons who wish to participate in achieving the conservation objective for a species. The technical assistance provided shall include information on habitat needs of species,*

*optimum management of habitat for species, methods for propagation of species, feeding needs and habits, predator controls, and any other information which a non-Federal person may utilize or request for the purpose of conserving a species determined to be an endangered species or threatened species or proposed to be determined as an endangered species or threatened species.*

*(2) REGULATIONS TO PROVIDE EXEMPTIONS FROM SECTION 9.—The Secretary shall promulgate regulations that establish exemptions from section 9 for any person who participates in a conservation program under this subsection.*

*(n) DELEGATION TO STATE.—(1) At the request of a State, the Secretary shall delegate either under a cooperative management plan or a delegation agreement as provided in section 6, to the State the authority to develop and implement conservation objectives and plans for a species or group of species determined to be endangered species or threatened species, unless the Secretary determines that the State lacks authority and capability to carry out the requirements of this Act. If the Secretary determines that the State lacks authority and capability, the Secretary shall notify the Governor of the State of the specific concerns and specify measures necessary to address those concerns and provide the Governor with the opportunity to take the actions necessary to address those concerns.*

*(2) The Secretary shall monitor the actions of the State to develop and implement a conservation objective and conservation plan. The Secretary shall assist the States in coordinating their actions with other affected States where the species may occur.*

*(3) If the Secretary determines that the State is not in compliance with this Act, the cooperative management agreement, or the delegation agreement, the Secretary shall so notify the State and shall specify the areas of noncompliance. The States shall have 60 days in which to respond and in which to come into compliance. If the State fails to adequately respond or to come into compliance, the Secretary is authorized to resume responsibility for the development and implementation of the conservation objective and plan.*

***SEC. 5A. PROTECTION OF HABITAT.***

*(a) ESTABLISHMENT OF NATIONAL BIOLOGICAL DIVERSITY RESERVE.—*

*(1) IN GENERAL.—There is hereby established a National Biological Diversity Reserve (hereinafter in this Act referred to as the "Reserve"). The Reserve shall be composed of units of Federal and State lands designated in accordance with paragraph (2) and managed in accordance with paragraph (3).*

*(2) DESIGNATION OF RESERVE UNITS.—(A) Not later than 18 months after the date of enactment of the Endangered Species Conservation and Management Act of 1995, the Secretary of the Interior and the Secretary of Agriculture shall designate to the Reserve by regulation those units of the national conservation systems which are within the jurisdiction of the Secretary concerned and which the Secretary determines would contribute to biological diversity in accordance with the provisions of this Act. The term "national conservation systems" means wholly federally owned lands within the National Park System, the National Wildlife Refuge System, or the National Wilderness*

*Preservation System, and wild segments of rivers within the National Wild and Scenic Rivers System.*

*(B) The Secretary of the Interior shall—*

*(i) designate to the Reserve by regulation a unit of State-owned lands if such unit is nominated for designation by the Governor of the State and is managed under State law in accordance with paragraph (3);*

*(ii) designate to the Reserve by regulation privately owned land that is nominated for designation by the owner of the land, and shall remove such land from the Reserve if the owner requests removal;*

*(iii) remove from the Reserve by regulation any unit designated pursuant to clause (i) which the Secretary finds is not managed under State law in accordance with paragraph (3); and*

*(iv) remove from the Reserve any State-owned lands at the request of the Governor of that State.*

*(C) Designation of a Reserve unit shall not affect any valid existing permit, contract, license, right, right-of-way, access, interest in land, right to use or receive water, or property right.*

*(3) MANAGEMENT OF THE RESERVE.—(A) Each unit of the Reserve may have as a goal the conservation of biological diversity. Such goal shall be supplementary and secondary to other purposes established for such unit by or pursuant to any provision of law applicable to such unit. Management for biological diversity shall not be inconsistent with or diminish other unit purposes, other provisions of law applicable to such unit, and activities which occur or are authorized to occur on such unit.*

*(B) The manager of each Reserve unit should consistent with paragraph (4) utilize his authority to use active management and recovery measures, including those specified in section 5(b)(2)(A)(vi), and shall conduct a survey to determine the populations of species within the Reserve.*

*(C) Nothing in this section shall—*

*(i) alter, establish, or affect the respective rights of the United States, the States, or any person with respect to any water or water-related right; or*

*(ii) affect the laws, rules, and regulations pertaining to hunting, fishing, and other lawful wildlife harvest under existing State and Federal laws and Indian treaties.*

*(D) Within 1 year of the designation of a unit to the Reserve, the manager of such unit shall complete, and the Secretary concerned shall make available to the public by notice in the Federal Register, an inventory of the species composing the biological diversity within such unit.*

*(4) OTHER FEDERAL LANDS.—Nothing in this Act shall be construed as limiting the authority of the Secretary of the Interior or the Secretary of Agriculture to take such actions as are necessary and authorized by other law to protect, maintain, and enhance biological diversity on other Federal lands not designated to the Reserve except that, before taking any such action, the Secretary concerned shall make a finding based on the best available scientific and commercial data, that the biological diversity for which such action is proposed is not protected,*

*maintained, or enhanced in whole or substantial part on any unit of the Reserve. Such finding shall be published, along with the reasons therefor in the Federal Register.*

*(b) LAND ACQUISITION.—*

*(1) 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 determined to be endangered species or threatened species pursuant to section 4. To carry out such a program, the appropriate Secretary—*

*(A) shall utilize the land acquisition and other authority under the Fish and Wildlife Act of 1956 (16 U.S.C. 742a et seq.), the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.), and the Migratory Bird Conservation Act (16 U.S.C. 715 et seq.), as appropriate; and*

*(B) is authorized to acquire by purchase, lease, donation, or otherwise, lands, waters, or interest therein, including short- or long-term conservation easements, and such authority shall be in addition to any other land acquisition authority vested in that Secretary.*

*(2) AVAILABILITY OF FUNDS FOR ACQUISITION OF LANDS, WATER, ETC.—Funds made available pursuant to the Land and Water Conservation Fund Act of 1965 (16 U.S.C. 4601–4 et seq.) and funds made available under section 13(c)(4) may be used for the purpose of acquiring or leasing lands, waters, or interests therein under this subsection.*

*(c) EXCHANGES.—*

*(1) IN GENERAL.—In accordance with subsection (a), the Secretary of the Interior and the Secretary of Agriculture shall encourage exchanges of lands, waters, or interests in land or water within the jurisdiction of each Secretary (other than units of the National Park System and units of the National Wilderness Preservation System) for lands, waters, or interests in land or water that are not in Federal ownership and that are affected by this Act.*

*(2) TIMING OF EXCHANGES.—An exchange under this subsection may be made if the Secretary of the Interior or the Secretary of Agriculture determines, without a formal appraisal, that the lands to be exchanged are of approximately equal value after allowing the State in which the land being exchanged is located 30 days in which to comment on the exchange.*

*(3) ENVIRONMENTAL ASSESSMENT.—An environmental assessment shall be the only document under section 102(2) of the National Environmental Policy Act of 1976 (16 U.S.C. 4332(2)) that shall be prepared with respect to any exchange under this subsection.*

*(4) EXPEDITIOUS EXCHANGE DECISIONS.—An exchange under this subsection shall be processed as expeditiously as practicable. The Secretary of the Interior or the Secretary of Agriculture shall periodically provide information to the non-Federal landowner on the status of the exchange.*

*(5) APPLICABLE LAW.—The Secretary of the Interior and the Secretary of Agriculture shall process exchanges under this sub-*

*section in accordance with applicable laws that are consistent with this subsection.*

*(d) VALUATION.—Any land, water, or interest in land or water to be acquired by the Secretary or the Secretary of Agriculture by purchase, exchange, donation, or otherwise under this section shall be valued as if the land, water, or interest in land or water were not subject to any restriction on use under this Act imposed after the date of acquisition by the current owner of the land, water, or interest in land or water.*

*(e) IMPACTS ON ADJACENT PROPERTIES.—For any land or water acquired by the Secretary or the Secretary of Agriculture by purchase, exchange, lease, donation or otherwise under this section, the Secretary or Secretary of Agriculture shall ensure that such purchase, exchange, lease, donation, or other transfer shall not supersede, abrogate, or otherwise impair existing easements, rights-of-way, fencing, water sources, water delivery lines or ditches, and current uses of adjacent land.*

[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. 715s).

[(c)(1) COOPERATIVE AGREEMENTS.—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 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—

[(A) authority resides in the State agency of conserve resident species of fish or wildlife 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 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;

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

[(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 or threatened species of fish or wildlife; and

[(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—

[(i) the requirements set forth in paragraph (3), (4), and (5) of this subsection are complied with, and

[(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 clause (i) and this clause and this subparagraph 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) 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.]

***SEC. 6. COOPERATION WITH NON-FEDERAL PERSONS.***

*(a) GENERALLY.—In carrying out the program authorized by this Act, the Secretary shall cooperate to the maximum extent practicable with the States and other non-Federal persons. Such cooperation shall include consultation with the States and non-Federal persons concerned before acquiring any land or water, or interest therein, for the purpose of conserving any endangered species or threatened species.*

*(b) COOPERATIVE MANAGEMENT AGREEMENTS.—*

*(1) IN GENERAL.—The Secretary may enter into a cooperative management agreement with any State or group of States, political subdivision of a State, local government, or non-Federal person—*

*(A) for the management of a species or group of species listed as endangered species or threatened species under section 4, a species or group of species proposed to be listed under section 4, or species or group of species which are candidates for listing; or*

*(B) for the management or acquisition of an area which provides habitat for a species.*

*(2) SCOPE OF COOPERATIVE MANAGEMENT AGREEMENTS.—(A) A cooperative management agreement entered into under this subsection—*

*(i) may provide for the management of a species or group of species on both public and private lands which are under the authority, control or ownership of a State or group of States, political subdivision of a State, local government, or non-Federal person and which are affected by a listing determination, proposed determination, or proposed candidacy for determination; and*

*(ii) may include the acquisition or designation of land as habitat for species.*

*(B) A cooperative management agreement may not restrict private or non-Federal property unless written consent to such restrictions by the non-Federal owner is given either to the Secretary or the State, political subdivision, local government, or non-Federal person who is a party to the agreement.*

*(C) The Secretary may grant to a party to an agreement the authority to undertake programs to enhance the population or habitat of a species on federally owned lands, except that such authority shall not otherwise conflict with other uses of such land which are approved by the Secretary or authorized by the Congress.*

*(D) The Secretary is authorized, in conjunction with entering into and as a part of any agreement under this section, to provide funds to carry out the agreement to a non-Federal person, as provided in paragraph (11).*

*(3) NOTIFICATION.—Not later than 30 days after submission of a request to enter into a cooperative management agreement, the party submitting the request shall provide notice of the request to any non-Federal person or Federal power marketing*

*administration that would be subject to the proposed cooperative management agreement.*

*(4) DEVELOPMENT OF PROPOSED AGREEMENT.—(A) The requesting party shall develop and submit to the Secretary a proposed cooperative management agreement.*

*(B) The Secretary shall publish in the Federal Register a notice of availability and a request for public comment on any proposed cooperative management agreement between the Secretary and any governmental entity and shall hold a public hearing on such a proposed cooperative management agreement in each county or parish in which the proposed agreement would be in effect.*

*(C) Before entering into a cooperative management agreement with another governmental entity or a non-Federal person for the management of federally owned land, the Secretary shall consider and weigh carefully all information received in response to the request for comment published under subparagraph (B) and testimony presented in each hearing held under subparagraph (B).*

*(5) APPROVAL OF AGREEMENT.—(A) Not later than 120 days after the submission of a proposed cooperative management agreement under paragraph (4), the Secretary shall determine whether the proposed agreement is in accordance with this subsection and will promote the conservation of the species to which the proposed agreement applies.*

*(B) The Secretary shall approve and enter into a proposed cooperative management agreement, if the Secretary finds that—*

*(i) the requesting party has sufficient authority under law to implement and carry out the terms of the agreement;*

*(ii) the agreement defines an area that serves as habitat for the species or group of species to which the agreement applies;*

*(iii) the agreement adequately provides for the administration and management of the identified management area;*

*(iv) the agreement promotes the conservation of the species to which the agreement applies by committing Federal or non-Federal efforts to the conservation;*

*(v) the term of the agreement is of sufficient duration to accomplish the provisions of the agreement; and*

*(vi) the agreement is adequately funded to carry out the agreement.*

*(C) No later than 30 days after entering into a cooperative management agreement with a governmental entity, the Secretary shall publish in the Federal Register a notice of availability of the terms of such agreement and the response of the Secretary to all information received or presented with respect to the agreement pursuant to paragraph (4)(B).*

*(6) ENVIRONMENTAL ASSESSMENTS.—Preparation, approval, and entering into a cooperative management agreement under this subsection shall not be subject to section 102(2) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)).*

*(7) NO SURPRISES.—For any species or area that is the subject of a cooperative management agreement under this subsection, a party to the agreement shall not be required—*

*(A) to make any additional payment for any purpose, or to accept any additional restriction on any parcel of land available for development or land management under the agreement, without consent of the party; or*

*(B) to undertake any other measure to minimize or mitigate impacts on the species in addition to measures required by the agreement as established.*

*(8) EFFECT OF LISTING OF SPECIES.—A cooperative management agreement entered into under this subsection shall remain in effect and shall not be required to be amended if a species to which the agreement does not apply is determined to be an endangered species or threatened species under section 4.*

*(9) APPLICABILITY OF CERTAIN PROVISIONS.—Sections 5, 7, and 9 shall not apply to those activities of a party to a cooperative management agreement which are conducted in accordance with such agreement.*

*(10) VIOLATIONS OF AGREEMENTS.—(A) If the Secretary determines that a party to a cooperative management agreement is not administering or acting in accordance with the agreement, the Secretary shall notify the party.*

*(B) If a party that is notified under subparagraph (A) fails to take appropriate corrective action within a period of time determined by the Secretary to be reasonable (not to exceed 90 days after the date of the notification)—*

*(i) the Secretary shall rescind the entire cooperative management agreement or the applicability of the agreement to the party that is the subject of the notification; and*

*(ii) beginning on the date of the rescission—*

*(I) the entire agreement shall not be effective, or the agreement shall not be effective with respect to the party, whichever is appropriate; and*

*(II) sections 5, 7, and 9 shall apply to activities of the party.*

*(11) FACA.—Consultation with States pursuant to this section shall not be subject to the Federal Advisory Committee Act (5 U.S.C. App.).*

*(c) STATE AUTHORITY TO PROTECT ENDANGERED AND THREATENED SPECIES.—*

*(1) DELEGATION OF AUTHORITY.—In furtherance of the purposes of this Act, the Secretary may delegate to a State which establishes and maintains an adequate program for the conservation of endangered species and threatened species the authority contained in this Act with respect to species that are residents in the State. Within 120 days after the Secretary receives a certified copy of such a proposed State program, the Secretary shall make a determination whether such program will be adequate to provide protections to endangered species and threatened species in such State. In order for a State program to be determined to be an adequate program for the conservation of endangered species and threatened species, the Secretary must find that under the State program—*

*(A)(i) authority resides in the State agency to conserve resident species that are determined by the State agency or the Secretary to be endangered species or threatened species;*

*(ii) the State agency has established acceptable conservation programs, consistent with the purposes and policies of this Act, for all resident species in the State which are determined by the Secretary to be endangered species or threatened species or for those species or taxonomic groups of species which the State proposes to cover under its program, and has furnished a copy of such plan and program together with all pertinent details, information, requested to the Secretary;*

*(iii) the State agency is authorized to conduct investigations to determine the status and requirements for survival of resident endangered species and threatened species;*

*(iv) an agency of the State 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;*

*(v) provision is made for public participation in designating resident species as endangered species or threatened species; and*

*(vi) the State agency has initiated or encouraged voluntary or incentive based programs to further the conservation objectives for the species; or*

*(B)(i) the requirements set forth in clauses (iii), (iv), and (v) of subparagraph (A) are complied with, and*

*(ii) plans are included under which immediate attention will be given to those resident species which are determined by the Secretary or the State agency to be endangered species or threatened species and which the Secretary and the State agency agree are most urgently in need of conservation programs.*

*(2) PROHIBITIONS NOT AFFECTED.—A delegation to a State whose program is determined adequate under paragraph (1) shall not affect the applicability of prohibitions set forth in or authorized pursuant to section 4(d) or section 9(a)(1) or (2) with respect to the taking of any resident endangered species or threatened species in the State.*

*(d) ALLOCATION OF FUNDS.—*

*(1) FINANCIAL ASSISTANCE.—(A) The Secretary may provide financial assistance to any State, through its respective State agency, which has entered into a cooperative management agreement under subsection (b) or received authority under a delegation pursuant to subsection (c) of this section to assist in development of programs for the conservation of endangered species and threatened species or to assist in monitoring the status of candidate species pursuant to subparagraph (C) of section 4(b)(3) and recovered species pursuant to section 4(f). The Secretary shall allocate each annual appropriation made in accordance with subsection (i) to such States based on consideration of—*

*(i) the international commitments of the United States to protect endangered species or threatened species;*

*(ii) the readiness of a State to proceed with a conservation program consistent with the objectives and purposes of this Act;*

*(iii) the number of endangered species and threatened species within a State;*

*(iv) the potential for restoring endangered species and threatened species within a State;*

*(v) the relative urgency to initiate a program to restore and protect an endangered species or threatened species in terms of survival of the species;*

*(vi) the importance of monitoring the status of candidate species within a State to prevent a significant risk to the well-being of any such species; and*

*(vii) the importance of monitoring the status of recovered species within a State to assure that such species do not return to the point at which the measures provided pursuant to this Act are again necessary.*

*(B) So much of the annual appropriation made in accordance with subsection (i) allocated for obligation to any State for any fiscal year as remains unobligated at the close thereof may 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 may be made available for expenditure by the Secretary in conducting programs under this section.*

*(2) CONTENTS OF DELEGATION AGREEMENT.—Such delegation 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 species 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 75 percent of the estimated program cost stated in the agreement; and*

*(ii) the Federal share may be increased to 90 percent whenever two or more States having a common interest in one or more endangered species 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 the Secretary's 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.*

*(3) COMPLIANCE WITH PROCEDURES.—In implementing this Act under authority delegated to a State by the Secretary, the State shall comply with all requirements, prohibitions, and procedures set forth by this Act.*

*(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 intervals of 5 years.*

*(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—*

*(1) permit what is prohibited by this Act or by any regulation which implements 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.*

(g) TRANSITION.—(1) * * *

(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**]**

*(A) to which the Secretary has delegated authority under subsection (c); or*

* * * * * * *

*(h) RULEMAKING AUTHORITY AND PROCEDURES.—The Secretary is authorized to promulgate such regulations as may be appropriate to carry out the provisions of this subsection, subject to the following requirements:*

*(1) The Secretary shall not propose a rule, under the authority of this Act, that has application in a State, until the Secretary and the State have consulted and the State has been given a meaningful opportunity to assist in the development of the rule, and shall seek to integrate into the proposed rule the recommendations of the State, including recommendations with regard to field practices.*

*(2) The Secretary shall establish procedures for rulemaking that include the applicable State within 60 days after the effective date of the Endangered Species Conservation and Management Act of 1995. If the rule will affect more than 1 State, the*

*rule shall provide a means by which the States or their representatives may participate in the rulemaking.*

*(3) Where the term "in cooperation with the States" is used in this Act, the requirements of this subsection shall apply.*

* * * * * * *

*(j) WATER RIGHTS.—Nothing in this Act shall be construed to supersede, abrogate, or otherwise impair any right or authority of a State to allocate or administer quantities of water (including boundary waters). Nothing in this Act shall be implemented, enforced, or construed to allow any officer or agency of the United States to utilize directly or indirectly the authorities established under this Act to impose any requirement not imposed by the State which would supersede, abrogate, condition, restrict, or otherwise impair rights to the use of water resources allocated under State law, interstate water compact, or Supreme Court decree, or held by the United States for use by a State, its political subdivisions, or its citizens. The exercise of authority pursuant to or in furtherance of this Act shall not be construed to create a limitation on the exercise of rights to water or constitute a cause for nondelivery of water pursuant to contract or State law.*

*(k) HABITAT CONSERVATION GRANTS.—(1) The Secretary may, from amounts in the account established by section 13 or from funds appropriated for such purpose, provide a grant to a non-Federal person (other than an officer, employee, or agent (acting in an official capacity) or a department or instrumentality of a State, municipality, or political subdivision thereof) for the purpose of conserving, preserving, or improving habitat for any species that is determined under section 4 to be an endangered species or a threatened species or for any conservation measures that enhances the survivability of such species, including predator control.*

*(2) The Secretary may provide a grant under this subsection if the Secretary determines that—*

*(A) the property for which the grant is provided contains habitat that significantly contributes to the protection of the population of the species;*

*(B) the property has been managed for species protection for a period of time that has been sufficient to significantly contribute to the protection of the population of the species; and*

*(C) the management of the habitat advances the interest of species protection.*

*(3) A grant made under this subsection shall be transferable to subsequent owners of the property for which the grant is provided.*

*(l) FACA.—Consultation with States regarding this section shall not be subject to the Federal Advisory Committee Act (5 U.S.C. App.).*

[INTERAGENCY COOPERATION

[SEC. 7. (a) FEDERAL AGENCY ACTIONS AND CONSULTATIONS.—(1) 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.

[(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to 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 affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

[(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

[(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 4 or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d).

[(b) OPINION OF SECRETARY.—(1)(A) Consultation under subsection (a)(2) with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

[(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)—

[(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth—

[(I) the reasons why a longer period is required;

[(II) the information that is required to complete the consultation; and

[(III) the estimated date on which consultation will be completed; or

[(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

[(2) Consultation under subsection (a)(3) shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

[(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a), the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and can be taken by the Federal agency or applicant in implementing the agency action.]

***SEC. 7. INTERAGENCY COOPERATION.***

*(a) FEDERAL AGENCY ACTIONS AND CONSULTATIONS.—*

*(1) PROGRAMS ADMINISTERED BY THE SECRETARY OF THE INTERIOR.—The Secretary shall review other programs administered by the Secretary and utilize such programs in furtherance of the purposes of this Act. Except as provided in section 5(d) and (e), all other Federal agencies shall, consistent with their primary missions and 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.*

*(2) PROGRAMS ADMINISTERED BY OTHER AGENCIES.—Except as provided in section 5(d) and (e), each Federal agency shall ensure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species or destroy or adversely modify any habitat that is designated by the Secretary as critical habitat of the species in a manner that is likely to jeopardize the continued existence of the species. In the case of any agency action that the agency has determined is subject to this paragraph and that is likely to significantly and adversely affect an endangered species or a threatened species, the Federal agency shall fulfill the requirements of this paragraph in consultation with and with the assistance of the Secretary. As provided in section 5(d)(2), each Federal agency may initiate consultation with the Secretary to receive guidance from the Secretary on the consistency of its action with the conservation objective or conservation plan for such species developed pursuant to section 5, with an incidental take permit for such species issued pursuant to section 10(a), or with a cooperative management agreement concerning such species executed pursuant to section 6(b). In fulfilling the requirements of this paragraph each agency shall use the best available scientific and commercial data, shall consider expert opinion and any reasonable and prudent alternatives developed under subsection (b)(3)(A), and shall render the decision of the agency in a manner consistent with the obligations and responsibilities of the agency under each applicable law and treaty.*

*(3) INVOLVEMENT OF APPLICANTS FOR FEDERAL APPROVALS.—Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, with the involvement of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project, that the project is inconsistent with the conservation objective or plan for such species developed pursuant to section 5, an incidental take permit for such species issued pursuant to section 10(a), or a cooperative management agreement for such species executed pursuant to section 6(b), and that implementation of such action will likely affect such species.*

*(4) CONFERRING ON SPECIES PROPOSED FOR LISTING.—Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 4 or to destroy or adversely modify any habitat that is proposed to be designated by the Secretary as critical habitat of such a species in a manner that is likely to jeopardize the continued existence of the species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d).*

*(5) LIMITATIONS ON MODIFICATIONS TO LAND MANAGEMENT.—Notwithstanding any other provision of this Act, the authority in this Act shall not be construed to authorize or form the basis for any Federal agency to modify a land management plan, policy, standard, or guideline or water allocation plan unless a determination has been made under section 4 that a species is threatened or endangered. Notwithstanding any other law or regulation, management plans, practices, policies, projects, or guidelines, including management plans which, as of October 1, 1995, are subject to modification pending completion of a final environmental impact statement, shall not be amended for the purpose of maintaining viable populations of native and desired non-native species unless it is determined under this Act that current practices are likely to jeopardize the continued existence of the species.*

*(6) DEMONSTRATION BY SECRETARY REQUIRED.—The Secretary shall have the responsibility of demonstrating, based on the best information available at the time of the request for consultation, that—*

*(A) a threatened species or endangered species or its respective critical habitat is located in the geographic area that would be affected by the proposed action; and*

*"(B) such proposed action will jeopardize the continued existence of a threatened species or endangered species.*

*(7) PROHIBITION ON OPINIONS BASED ON INSUFFICIENT DATA.—The Secretary shall not issue an opinion under subsection (b) that a proposed action will jeopardize the continued existence of a threatened or endangered species based on the insufficiency of available data on the impact of a proposed action on such species.*

*(8) ACTIONS EXEMPT FROM CONSULTATION AND CONFERENCING.—Consultation and conferencing under paragraphs (2) and (4) shall not be required for any agency action that—*

*(A) is consistent with the provisions of a final conservation plan under section 5(c)(5) or a conservation objective described in section 5(b)(3);*

*(B) is consistent with a cooperative management agreement or an incidental taking permit;*

*(C) addresses a critical, imminent threat to public health or safety or a catastrophic natural event or compliance with Federal, State, or local safety or public health requirements;*

*(D) consists of routine operation, maintenance, rehabilitation, repair, or replacement to a Federal or non-Federal project or facility, including operation of a project or facility in accordance with a previously issued Federal license, permit, or other authorization; or*

*(E) permits activities that occur on private land.*

*(9) ACTIONS NOT PROHIBITED.—An agency action shall not constitute a taking of a species prohibited by this Act or any regulation issued under this Act if the action is consistent with—*

*(A) the actions provided for in a final conservation plan under section 5(c)(5) or a conservation objective described in section 5(b)(3);*

*(B) a cooperative management agreement or an incidental take permit; or*

*(C) the terms and conditions specified in a written statement provided under subsection (b)(3) of this section.*

*(10) RELATIONSHIP TO DUTIES UNDER OTHER LAWS.—(A) The responsibilities of a Federal agency under this Act shall not supersede and shall be implemented in a manner consistent with duties assigned to the Federal agency by any other laws or by any treaties.*

*(B)(i) If a Federal agency determines that the responsibilities and duties described in subparagraph (A) are in irreconcilable conflict, the action agency shall request the President to resolve the conflict.*

*(ii) In determining a resolution to such a conflict, the President shall consider and choose the course of action that best meets the public interest and, to the extent possible, balances pursuit of the conservation objective or the purposes of the conservation plan with economic and social needs and pursuit of the purposes of the other laws or treaties. The authority assigned to the President by this subparagraph may not be delegated to a member of the executive branch who has not been confirmed by the Senate.*

*(11) MODIFICATION OF PROJECTS AND FACILITIES.—Any consultation and conferencing required under paragraphs (2) and (4) for an agency action that consists solely of a modification of a Federal, State, local government, or private project or facility shall be limited to the consideration of the effects that result from the modification that comprises the agency action.*

*(b) OPINION OF SECRETARY.—*

*(1) PERIODS WITHIN WHICH CONSULTATION MUST BE COMPLETED.—(A) Consultation under subsection (a)(2) with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated by the Federal agency. The period may be extended by not more than 45 days by the Secretary or head of the Federal agency by publication of notice in the Federal Register that sets forth the reasons for the extension. Consultation on an agency action involving a permit or license applicant shall be concluded not later than the earlier of—*

*(i) 1 year after the date of submission of the application to the Federal agency; or*

*(ii) the end of the period established under subparagraph (B).*

*(B) Subject to subparagraph (A), in the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)—*

*(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth—*

*(I) the reasons why a longer period is required,*

*(II) the information that is required to complete the consultation, and*

*(III) the estimated date on which consultation will be completed; or*

*(ii) if the consultation period proposed to be agreed to will end on or after the 150th day but before the 210th day after the date on which consultation was initiated, obtains the consent of the applicant to such period.*

*(C) If consultation is not concluded and the written statement of the Secretary required under paragraph (3)(A) is not provided to the Federal agency by the applicable deadline established under this paragraph, the requirements of subsection (a)(2) shall be deemed met and the Federal agency may proceed with the agency action.*

*(D) A permit or license applicant shall be entitled to participate fully in any consultation or conferencing under this section with respect to any agency action required for the granting of an authorization or provision of funding to the applicant.*

*(2) PROCEDURE FOR APPLICANT CONSULTATION.—Consultation under subsection (a)(3) shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.*

*(3) WRITTEN OPINION OF SECRETARY.—(A)(i) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a), the Secretary shall provide to the Federal agency and the applicant, if any, 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 action is consistent with the conservation objective or plan developed*

*pursuant to section 5, an incidental taking permit issued pursuant to section 10(a), or a cooperative management agreement executed pursuant to section 6(b). If the Secretary determines that the action is likely to jeopardize the continued existence of the species as described in subsection (a), the Secretary shall suggest reasonable and prudent alternatives (considering any reasonable and prudent alternatives undertaken by other Federal agencies) that are consistent with subsection (a)(2) and that impose the least social and economic costs. In the development of a biological opinion, the Secretary shall solicit and utilize information and advice from the Governor of any State in which is located a species or land that is the subject of the Federal action requiring consultation.*

*(ii) Unless required by law other than subsections (a) through (d), the Secretary, in any opinion or statement concerning an agency action made under this subsection (including any reasonable and prudent alternative suggested under clause (i) or any reasonable and prudent measure specified under clause (ii) of paragraph (4)), and the head of the Federal agency proposing the agency action, may not require, provide for, or recommend the imposition of any restriction or obligation on the activity of any person that is not authorized, funded, carried out, or otherwise subject to regulation by the Federal agency. Nothing in this clause prevents the Secretary from pursuing any appropriate remedy under section 11 for any activity prohibited by section 4(d) or 9.*

*(iii) The Secretary shall not require a reasonable and prudent alternative that may or will result in a significant adverse impact upon waterfowl populations, waterfowl habitat management, or waterfowl hunting opportunities in a significant waterfowl breeding, staging, or wintering habitat area. In this clause, the term "significant adverse impact" means any actions, proposed or in effect, which individually or cumulatively are likely to reduce the carrying capacity of habitat for waterfowl by 10 percent or more of its current capability, as determined on a local, regional, statewide or national basis. In this clause, the term 'significant waterfowl breeding, staging, or wintering habitat areas' means those private or public lands managed primarily for, or providing, waterfowl breeding, staging or wintering habitat including seasonal/permanent marsh lands or land under rice cultivation for three out of the past five years.*

*(iv) Notwithstanding any other provision of law, if the Secretary renders an opinion or suggests any reasonable and prudent alternative which has general application to a group of individuals conducting a commercial operation, the Secretary may not promulgate an emergency rule without providing at least 30 days for public comment on the emergency rule.*

*(v) No additional measures to minimize or mitigate impacts on a species that is a subject of an opinion issued under this paragraph shall be required of a permit applicant or licensee that is in compliance with the opinion and any agreement or permit issued to implement the opinion.*

(B) Consultation under subsection (a)(3), and an opinion based by the Secretary incident to such consultation, regarding an agency

action shall be treated respectively as a consultation under subsection (a)(2), and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that—

(A) * * *

* * * * * * *

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972.

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact, *including incentives to encourage the support of conservation programs approved under section 10(k),*

* * * * * * *

*(5) The Secretary shall, once a Biological Opinion has been rendered and the applicant has agreed to the terms and conditions contained in the Biological Opinion, provide to the applicant a written approval which shall guarantee that, so long as the project at issue is pursued consistent with the Biological Opinion, the applicant shall not be subject to new or additional requirements for the specific protection of any species beyond the requirements set forth in the Biological Opinion. All public entities shall be bound by the Secretary's approval.*

(c) BIOLOGICAL ASSESSMENT.—**[**(1)**]** To facilitate compliance with the requirements of subsection (a)(2) each Federal agency shall, with respect to any agency 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 species which is listed or proposed to be listed 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 within 180 days after the date on which initiated (or within such other period as in mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is en-

tered into and before construction is begun with respect to such action. Such assessment 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).

[(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

[(d) LIMITATION ON COMMITMENT OF RESOURCES.—After initiation of consultation required under subsection (a)(2), the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment 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 not violate subsection (a)(2).

[(e)(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 this section and determine in accordance with subsection (h) of this section whether or not to grant an exemption from the requirements of subsection (a)(2) of this action 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 of Economic Advisors.

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

[(E) The Secretary of the Interior.

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

[(G) The President, after consideration of any recommendations received pursuant to subsection (g)(2)(B) shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

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

[(B) The Secretary of the Interior shall be the Chairman of the Committee.

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

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

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

[(7)(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 a Federal agency.

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

[(8) In carrying 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.

[(9) 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.

[(10) 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.

[(f) REGULATIONS.—Not later than 90 days after the date of enactment of the Endangered Species Act Amendments of 1978, the Secretary shall promulgate regulations which set forth the form and manner in which applications for exemption shall be submitted to the Secretary 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 agency action include but not be limited to—

> [(1) a description of the consultation process carried out pursuant to subsection (a)(2) of this section between the head of the Federal agency and the Secretary; and

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

[(g) APPLICATION FOR EXEMPTION AND REPORT TO THE COMMITTEE.—(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, 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 (a)(2), the Secretary's opinion under subsection (b) indicates that the agency action would violate subsection (a)(2). An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be considered by the Committee for a final determination under subsection (h) after a report is made pursuant to paragraph (5). The applicant for an exemption shall be referred to as the "exemption applicant" in this section.

[(2)(A) An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f), not later than 90 days after the completion of the consultation process; except that, in the case of any agency action involving a permit or license applicant, such application shall be submitted not later than 90 days after the date on which the Federal agency concerned takes final agency action with respect to the issuance of the permit or license. For purposes of the preceding sentence, the term "final agency action" means (i) a disposition by an agency with respect to the issuance of a permit or license that is subject to administrative review, whether or not such disposition is subject to judicial review; or (ii) if administrative review is sought with respect to such disposition, the decision resulting after such review. Such application shall set forth the reasons why the exemption applicant considers that the agency action meets the requirements for an exemption under this subsection.

[(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly (i) notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governors so notified to recommend individuals to be appointed to the Endangered Species Committee for consideration of such application; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.

[(3) The Secretary shall within 20 days after the receipt of an application for exemption, or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary—

[(A) determine that the Federal agency concerned and the exemption applicant have—

[(i) carried out the consultation responsibilities described in subsection (a) in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2);

[(ii) conducted any biological assessment required by subsection (c); and

[(iii) to the extent determinable within the time provided herein, refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d); or

[(B) deny the application for exemption because the Federal agency concerned or the exemption applicant have not met the requirements set forth in subparagraph (A)(i), (ii), and (iii).

The denial of an application under subparagraph (B) shall be considered final agency action for purposes of chapter 7 of title 5, United States Code.

[(4) If the Secretary determines that the Federal agency concerned and the exemption applicant have met the requirements set forth in paragraph (3)(A) (i), (ii) and (iii) he shall, in consultation with the Members of the Committee, hold a hearing on the application for exemption in accordance with sections 554, 555, and 556 (other than subsection (b) (1) and (2) thereof) of title 5, United States Code, and prepare the report to be submitted pursuant to paragraph (5).

[(5) Within 140 days after making the determinations under paragraph (3) or within such other period of time as in mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing—

[(A) the availability and reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative courses of action consistent with conserving the species of the critical habitat;

[(B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;

[(C) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee; and

[(D) whether the Federal agency concerned and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d).

[(6) To the extent practicable within the time required for action under subsection (g) 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 this subsection shall be in accordance with sections 554, 555, and 556 (other than subsection (b)(3) of section 556) of title 5, United States Code.

[(7) Upon request of the Secretary, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Secretary to assist him in carrying out his duties under this section.

[(8) All meetings and records resulting from activities pursuant to this subsection shall be open to the public.

[(h) EXEMPTION.—(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g)(5). The Committee shall grant an exemption from the require-

ments of subsection (a)(2) for an agency action if, by a vote of not less than five of its members voting in person—

[(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g)(4), and on such other testimony or evidence as it may receive, that—

[(i) there are no reasonable and prudent alternatives to the agency action;

[(ii) 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;

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

[(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d); and

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

[(2)(A) Except as provided in subparagraph (B), an exemption for an agency action granted under paragraph (1) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action—

[(i) regardless whether the species was identified in the biological assessment; and

[(ii) only if a biological assessment has been conducted under subsection (c) with respect to such agency action.

[(B) An exemption shall be permanent under subparagraph (A) unless—

[(i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of a species that was not the subject of consultation under subsection (a)(2) or was not identified in any biological assessment conducted under subsection (c), and

[(ii) the Committee determines within 60 days after the date of the Secretary's finding that the exemption should not be permanent.

[If the Secretary makes a finding described in clause (i), the Committee shall meet with respect to the matter within 30 days after the date of the finding.

[(i) 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 or other international obligation of the United States. The Secretary of State shall, at the time of such certification, publish a copy thereof in the Federal Register.

[(j) Notwithstanding any other provision of this Act, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.

[(k) SPECIAL PROVISIONS.—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.

[(l) COMMITTEE ORDERS.—(1) If the Committee determines under subsection (h) that an exemption should be granted with respect to any agency action, the Committee shall issue an order granting the exemption and specifying the mitigation and enhancement measures established pursuant to subsection (h) which shall be carried out and paid for by the exemption applicant 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 applicant 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 applicant may request the Secretary to carry out such mitigation and enhancement measures. The costs incurred by the Secretary in carrying out any such measures shall be paid by the applicant receiving the exemption. No later than one year after the granting of an exemption, the exemption applicant shall submit to the Council on Environmental Quality a report describing its compliance with the mitigation and enhancement measures prescribed by this section. Such 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 Council on Environmental Quality.

[(m) NOTICE.—The 60-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 (h) of this section granting an exemption from the requirements of subsection (a)(2) of this section.

[(n) JUDICIAL REVIEW.—Any person, as defined by section 3(13) 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 (h) in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the

District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review. A copy of such petition shall be transmitted by the clerk of the court to the Committee and the Committee shall file in the court the record in the proceeding, as provided in section 2112, of title 28, United States Code. Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.

[(o) EXEMPTION AS PROVIDING EXCEPTION ON TAKING OF ENDANGERED SPECIES.—Notwithstanding sections 4(d) and 9(a)(1)(B) and (C) of this Act, sections 101 and 102 of the Marine Mammal Protection Act of 1972, or any regulation promulgated to implement any such section—

[(1) any action for which an exemption is granted under subsection (h) of this section shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and

[(2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) of this section shall not be considered to be a prohibited taking of the species concerned.

[(p) 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 and Emergency Assistance Act, the President is authorized to make the determinations required by subsections (g) and (h) 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 405 or 406 of the Disaster Relief and Emergency Assistance Act, 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.]

*(d) LIMITATION ON COMMITMENT OF RESOURCES.—*

*(1) IN GENERAL.—Except as provided in paragraph (2), after initiation of consultation required under subsection (a)(2), the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment 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 not violate subsection (a)(2).*

*(2) RELATIONSHIP TO LAND MANAGEMENT PLANNING REQUIREMENTS.—If the listing of a species, or other procedure or decision related to a species listed under section 4(c)(1), requires consultation under subsection (a)(2) on a land use plan or land or resource management plan (or an amendment to or revision of the plan) prepared under section 202 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1712) or section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604), the land management agency im-*

*plementing the plan may authorize, fund, or carry out an agency action that is consistent with the plan prior to the completion of the consultation, if, under the procedures established by this section, the head of the land management agency responsible for the action determines or has determined that the action—*

*(A) is not likely to significantly and adversely affect the species; or*

*(B) is likely to significantly and adversely affect the species, and the Secretary issues an opinion on the action that finds that the action—*

*(i) is not likely to jeopardize the continued existence of the species; or*

*(ii) is likely to jeopardize the continued existence of the species, and the agency agrees to a reasonable and prudent alternative.*

*(e) EXEMPTIONS.—Notwithstanding any other provision of this Act—*

*(1) the Secretary shall grant an exemption from this Act for any activity if the Secretary of Defense determines that the exemption of the activity is necessary for reasons of national security; and*

*(2) the President may grant an exemption from this Act for any area that the President has declared to be a major disaster area under The Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.) for any project for the repair or replacement of a public facility substantially as the facility existed prior to the disaster under section 405 or 406 of that Act (42 U.S.C. 5171 and 5172), if the President determines that the project—*

*(A) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life; and*

*(B) involves an emergency situation that does not allow the procedures of this Act (other than this subsection) to apply.*

INTERNATIONAL COOPERATION

SEC. 8. (a) * * *

* * * * * * *

*(e) ENCOURAGEMENT OF FOREIGN PROGRAMS.—Any action taken by the Secretary pursuant to this Act in regard to a foreign species which occurs in a country which is a party to the Convention—*

*(1) shall be done in cooperation with the wildlife conservation authorities of such country; and*

*(2) shall not obstruct any wildlife conservation program of such country unless the Secretary can show, based on adequate findings supported by substantial evidence, that the country's wildlife conservation program for the species in question is not consistent with the Convention.*

CONVENTION IMPLEMENTATION

SEC. 8A. (a) * * *

* * * * * * *

*(f) NONDUPLICATION OF FINDINGS.—The Secretary, in making the findings required in paragraph 3(a) of Article III of the Convention, shall limit such findings to the purpose of the importation, and shall not duplicate the findings required to be made by the exporting nation except for good cause based on adequate findings supported by substantial evidence.*

*(g) RELATIONSHIP OF PROTECTIVE REGULATIONS TO THE CONVENTION.—In determining the provisions of protective regulations pursuant to section 4(d) of this Act when such regulations relate to a foreign species—*

*(1) the Secretary may not prohibit any act that is permissible under the Convention, notwithstanding Article XIV of the Convention;*

*(2) the Secretary shall, prior to publishing a proposal for such protective regulations in the Federal Register, transmit the full text and a complete description of the proposed regulation directly to the appropriate wildlife management authority of that country, in the language of that country, with at least 180 days allowed for review and comment, the 180 days shall be counted from the date of delivery of the materials to the wildlife authorities of the country;*

*(3) such transmission must be accompanied by—*

*(A) a plain-language explanation of the reasons for and purpose of the proposed regulation;*

*(B) an analysis of the anticipated beneficial impact or detrimental impact of the regulation on the economic, social, and cultural utilization of the species, if any, and of the beneficial or detrimental impact on the resource management and conservation programs of that country; and*

*(C) a summary of the literature reviewed and experts consulted by the Secretary in regard to the species involved, and a summary of the Secretary's findings based on that review and consultation;*

*(4) the Secretary shall enter into discussions with appropriate wildlife management officials of the countries to which he has sent the transmission referred to in the previous paragraph, and if those officials feel that further studies of the species are indicated the Secretary may assist in finding funds from private sources for such studies and in carrying out the studies; and*

*(5) the Secretary must obtain the written concurrence of all the nations contacted, and if such concurrence is not obtained the Secretary may not issue the proposed regulation except by an order submitted to and approved by the President.*

*(h) ISSUANCE OF PERMITS FOR EXPORT.—*

*(1) COMPLIANCE WITH STATE RECOMMENDATION.—In any instance in which a State has a program for management of a native species which is the subject of a request for an export permit under the Convention, the Secretary shall act in accordance with the recommendation of the State unless the Secretary makes a finding and publishes a notice in the Federal Register that scientific evidence justifies a conclusion contrary to the advice of the State.*

*(2) APPEAL.—The State which is the subject to such a finding, or any person in that State directly affected because of inability to obtain a permit, may appeal the finding to an Administrative Law Judge or a court. The burden shall be on the Secretary to show that the evidence supports a finding contrary to the recommendation of the State.*

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—**]** *(1) Except as provided in paragraph (3), section 6(g)(2), subsections (d)(3) and (e) of section 5, section 7(a), and section 10, with respect to any endangered species of fish or wildlife listed pursuant to section 4 it is unlawful for any person subject to the jurisdiction of the United States to—*

(A) * * *

* * * * * * *

**[**(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—**]**

*(2) Except as provided in section 6(g)(2), subsections (d)(3) and (e) of section 5, and section 10, with respect to any endangered species of plants listed pursuant to section 4, it is unlawful for any person subject to the jurisdiction of the United States to—*

(A) * * *

* * * * * * *

*(3) PERMITTED TAKINGS.—An activity of a non-Federal person is not a taking of a species if the activity—*

*(A) is consistent with the provisions of a final conservation plan or conservation objective;*

*(B) complies with the terms and conditions of an incidental take permit or a cooperative management agreement;*

*(C) addresses a critical, imminent threat to public health or safety or a catastrophic natural event, or is mandated by any Federal, State, or local government agency for public health or safety purposes;*

*(D) is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity that consists of—*

*(i) on-going maintenance, routine operation or use, and emergency repair of existing pipelines, fire breaks, transmission and distribution lines, groundwater recharge facilities and areas, water storage facilities, water conveyance structures and channels, and appurtenant facilities;*

*(ii) road and right-of-away maintenance, use, and repair; or*

*(iii) emergency repair or restoration of any property or non-Federal facility to the condition in which it existed or operated immediately before an emergency or disaster, meeting current standards; or*

*(E) is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity that occurs within an area of the territorial sea or exclusive economic zone established by Proclamation Numbered 5030, dated March 10, 1983, that is not designated as critical habitat under section 5(i), and the affected species is not a species of fish.*

* * * * * * *

*(h) IMPORTATION AND EXPORTATION.—*

*(1) LIMITATION ON IMPORTATION.—The prohibition on importation in subsection (a) of this section shall not apply to a specimen of a threatened species taken for an inherently limited use in accordance with the laws of a foreign nation which is a party to the Convention and accompanied by an export permit issued by that nation or an equivalent document. For the purpose of this subsection, the term "inherently limited use" means scientific collection, live export for captive breeding, sport hunting, and falconry.*

*(2) REGULATIONS FOR SHIPPING UNDER CONVENTION.—(A) The Secretary shall adopt regulations regarding the finding required by the Convention that live specimens exported from the United States will be so prepared as to minimize the risk of injury, damage to health, or cruel treatment. Such regulations shall provide clear, consistent and reliable guidance to exporters.*

*(B) In any instance in which the Secretary believes that a shipment for export is not prepared in accordance with the regulations, a detailed written notice of noncompliance shall be issued to the exporter. The notice shall contain recommendations as to how future shipments should be modified in order to come into compliance with the regulations. The notice shall go into effect 30 days after receipt by the shipper, subject to appeal to an Administrative Law Judge or a court. The filing of an appeal shall toll the effectiveness of the notice. The issue of noncompliance may be appealed as well as the issue of the appropriateness of the recommendation for compliance.*

[EXCEPTIONS

[SEC. 10. (a) PERMITS.—(1) The Secretary may permit, under such terms and conditions as he shall prescribe—

[(A) any act otherwise prohibited by section 9 for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant subsection (j); or

[(B) any taking otherwise prohibited by section 9(a)(1)(B) if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

[(2)(A) No permit may be issued by the Secretary authorizing any taking referred to in paragraph (1)(B) unless the applicant therefor submits to the Secretary a conservation plan that specifies—

[(i) the impact which will likely result from such taking;

[(ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;

[(iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and

[(iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

[(B) If the Secretary finds, after opportunity for public comment, with respect to a permit application and the related conservation plan that—

[(i) the taking will be incidental;

[(ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;

[(iii) the applicant will ensure that adequate funding for the plan will be provided;

[(iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and

[(v) the measures, if any, required under subparagraph (A)(iv) will be met;

and he has received such other assurances as he may require that the plan will be implemented, the Secretary shall issue the permit. The permit shall contain such terms and conditions as the Secretary deems necessary or appropriate to carry out the purposes of this paragraph, including, but not limited to, such reporting requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with.

[(C) The Secretary shall revoke a permit issued under this paragraph if he finds that the permittee is not complying with the terms and conditions of the permit.]

***SEC. 10. EXCEPTIONS.***

*(a) PERMITS.—*

*(1) AUTHORITY TO ISSUE PERMITS.—The Secretary may permit, under such terms and conditions as the Secretary shall prescribe—*

*(A) any act otherwise prohibited by section 9 undertaken for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to—*

*(i) acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j);*

*(ii) the public display or exhibition of living wildlife in a manner designed to educate, or which otherwise contributes to the education of the public about the ecological role and conservation needs of the affected species;*

*(iii) in the case of foreign species, acts that are consistent with the Convention and with conservation strategies adopted by the foreign nations responsible for the conservation of the species; and*

*(iv) acts necessary for the research in and carrying out of captive propagation; or*

*(B) any taking otherwise prohibited by section 9(a)(1)(B) if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.*

*(2) SPECIES CONSERVATION PLANS.—(A) Except as provided in paragraph (3), no permit may be issued by the Secretary authorizing any taking referred to in paragraph (1)(B) unless the applicant therefor submits to the Secretary a species conservation plan that specifies—*

*(i) the impact on the species which will be the likely result of the activities to be permitted;*

*(ii) what steps the applicant can reasonably and economically take consistent with the purposes and objectives of the activity to minimize such impacts, and the funding that will be available to implement such steps; and*

*(iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized.*

*(B) If the Secretary finds, after opportunity for public comment, with respect to a permit application and the related species conservation plan that—*

*(i) the taking will be incidental;*

*(ii) the applicant will, to the extent reasonable and economically practicable, minimize the impacts of such taking;*

*(iii) the applicant will ensure that adequate funding for the plan will be provided;*

*(iv) the taking will not appreciably reduce the likelihood of the survival and conservation of the species; and*

*(v) the measures specified under subparagraph (A)(ii) will be met;*

*and the Secretary has received such other assurances as the Secretary may require that the plan will be implemented, the Secretary shall issue the permit. The permit shall contain such reasonable and economically practicable terms and conditions consistent with the purposes and objectives of the activity as the Secretary deems necessary or appropriate to carry out the purposes of this paragraph, including, but not limited to, such reporting requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with.*

*(C) The Secretary may not require the applicant, as a condition of processing the application or issuing the permit, to expand the application to include land, an interest in land, right to use or receive water, or a proprietary water right not owned by the applicant or to address a species other than the species for which the application is made.*

*(D)(i) The Secretary shall complete the processing of, and approve or deny, any application for a permit under paragraph (1)(B) within 90 days of the date of submission of the application or within such other period of time after such date of submission to which the Secretary and the permit applicant mutually agree.*

*(ii) The preparation and approval of a species conservation plan and issuance of a permit under paragraph (1)(B) shall not*

*be subject to section 102(2) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)).*

*(E) No additional measures to minimize and mitigate impacts on a species that is a subject of a permit issued under paragraph (1)(B) shall be required of a permittee that is in compliance with the permit. With respect to any species that is a subject of such a permit, under no circumstance shall a permittee in compliance with the permit be required to make any additional payment for any purpose, or accept any additional restriction on any parcel of land available for development or land management or any water or water-related right under the permit, without the consent of the permittee.*

*(F)(i) For such activities as the Secretary determines will not appreciably reduce the chances of survival of a species, the Secretary may issue an interim permit to any applicant for a permit under this section that provides evidence of appropriate interim measures that—*

*(I) will minimize impacts of any incidental taking that may be associated with the activity proposed for permitting; and*

*(II) are to be performed while the underlying permit application is being considered under this section.*

*(ii) An interim permit issued under clause (i)—*

*(I) shall specifically state the types of activities that are authorized to be carried out under the interim permit;*

*(II) shall not create any right to the issuance of a permit under this section;*

*(III) shall expire on the date of the granting or denial of the underlying permit application; and*

*(IV) may be revoked by the Secretary upon failure to comply with any term of the interim permit.*

*(G) The Secretary shall revoke a permit issued under this paragraph if he finds that the permittee is not complying with the terms and conditions of the permit.*

*(3) VOLUNTARY CONSULTATION.—(A) Subject to such regulations as the Secretary may issue, any non-Federal person may initiate consultation with the Secretary on any prospective activity of the person—*

*(i) to determine if the activity is consistent or inconsistent with a conservation plan or conservation objective; or*

*(ii) if the person determines that the activity is inconsistent, to determine whether the activity is likely to jeopardize the continued existence of an endangered species or a threatened species, or to destroy or adversely modify the designated critical habitat of the species in a manner that is likely to jeopardize the continued existence of the species.*

*(B) The voluntary consultation process for non-Federal persons authorized by subparagraph (A) shall be conducted in accordance with the procedures and requirements for consultation on agency actions set forth in section 7, except that—*

*(i) the period for completion of the consultation shall be 90 days from the date on which the consultation is initiated, or not later than such other date as is mutually agree-*

*able to the Secretary and the person initiating the consultation;*

*(ii) the person initiating the consultation shall not be required to prepare a biological assessment or equivalent document;*

*(iii) neither the activity for which the consultation process is sought nor the consultation process itself shall be deemed a Federal action for the purpose of compliance with section 102(2) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)) or an agency action for the purpose of compliance with the consultation requirement of section 7(a)(2);*

*(iv) the Secretary shall provide the person initiating the consultation with a written opinion only, unless such person requests a permit referred to in paragraph (1)(B) and meets the requirements of clause (v); and*

*(v) a permit described in clause (iv) shall be issued if the Secretary makes a finding of—*

*(I) consistency pursuant to subparagraph (A)(i);*

*(II) no jeopardy pursuant to subparagraph (A)(ii); or*

*(III) jeopardy pursuant to subparagraph (A)(ii), but offers a reasonable and prudent alternative which the person initiating the consultation accepts.*

*(C) Any person that is not an owner of property is prohibited from participating in the consultation process under this paragraph with respect to the property without written permission from the owner of the property.*

*(4) GENERAL PERMITS.—(A) After providing notice and opportunity for public hearing, the Secretary may issue a general permit under paragraph (1)(B) on a county, parish, State, regional, or nationwide basis for any category of activities that may affect a species determined to be an endangered species or threatened species if the Secretary determines that the activities in the category are similar in nature, will cause only minimal adverse effects on the species if performed separately, and will have only minimal cumulative adverse effects on the species generally. A general permit issued under this paragraph shall specify the requirements and standards that apply to an activity authorized by the general permit.*

*(B) A general permit issued under this paragraph shall be effective for a period to be specified by the Secretary, but not to exceed the 5-year period that begins on the date of issuance of the permit.*

*(C) The Secretary may revoke or modify a general permit if, after providing notice and opportunity for public hearing, the Secretary determines that the activities authorized by the general permit have a greater than minimal adverse effect on a species that is included in a list published under section 4(c)(1) or that the activities are more appropriately authorized by individual permits issued under paragraph (1) or (3).*

*(5) RESEARCH ON ALTERNATIVE METHODS AND TECHNOLOGIES.—Priority for issuing permits under paragraph (1)(A) shall be accorded to applications for permits to conduct research, captive breeding, or education on alternative methods*

*and technologies, and the comparative costs of the methods and technologies, to reduce the incidental taking as described in paragraph (1)(B) of an endangered species or a threatened species for which the employment of existing methods or technologies for avoidance of the incidental taking entails significant costs for non-Federal persons.*

*(6) EDUCATIONAL OR PROPAGATION PERMITS.—(A) A permit under paragraph (1)(A) (ii) or (iv) shall be issued if—*

*(i)(I) the applicant holds a current and valid license as an exhibitor under the Animal Welfare Act (7 U.S.C. 2131 et seq.);*

*(II) in the case of a permit under paragraph (1)(A)(ii), the applicant maintains a public display or exhibition of living wildlife described in that paragraph; and*

*(III) viewing of the public display or exhibition is not limited or restricted other than by charging an admission fee; or*

*(ii) in the case of a permit under paragraph (1)(A)(iv), the applicant has demonstrated the ability to use propagation techniques that result in increases in the populations of species held in captivity for eventual release into the wild, maintenance of live specimens, or falconry purposes.*

*(B)(i) The Secretary shall issue an educational or propagation permit as authorized in subparagraph (A) within 30 days from the effective date of this subparagraph to any qualified organization or qualified person for educational or propagation purposes, who has demonstrated the ability to propagate, handle, or recover species for a minimum of 15 years or who had at least 10 permits in the aggregate issued pursuant to this Act or any of the laws listed in subparagraph (H).*

*(ii) The Secretary shall issue a permit within 90 days of receipt of a completed application from any qualified organization or person who currently does not hold any permit but who has demonstrated the ability to handle or recover species for a minimum of 15 years of who has received at least 10 permits in the aggregate and who has not violated any terms or conditions of any permits previously issued pursuant to this Act or the laws listed in subparagraph (H).*

*(C) A permit referred to in paragraph (1)(A)(ii) shall be for a term of not less than 6 years.*

*(D) A permit referred to in paragraph (1)(A)(ii) shall also authorize the permittee to import, export, sell, purchase, or otherwise transfer possession of the affected species.*

*(E) The Secretary shall revoke a permit referred to in paragraph (1)(A)(ii) if the Secretary determines that the permittee—*

*(i) no longer meets the requirements of subparagraph (A) and is not reasonably likely to meet the requirements in the near future;*

*(ii) is not complying with the terms and conditions of the permit; or*

*(iii) is engaging in an activity likely to jeopardize the continued existence of the species subject to the permit.*

*(F) The Secretary may require an annual report on the activities authorized by a general permit, but may not require reports more frequently than annually.*

*(G) A permit authorized in this paragraph shall be the only permit required for the activities authorized therein, and may cover activities for one or more species or taxa simultaneously.*

*(H) The authorizations for any activities permitted under this paragraph or permitted by the Bald Eagle Protection Act (16 U.S.C. 668–668d), the Fish and Wildlife Conservation Act of 1980 (16 U.S.C. 2901–2911), the Lacey Act Amendments of 1981 (18 U.S.C. 42; 16 U.S.C. 3371–3378), the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361–1407), the Migratory Bird Conservation Act (16 U.S.C. 715–715d), the Migratory Bird Treaty Act (16 U.S.C. 703–712), or the Wild Bird Conservation Act of 1992 (Public Law 102–440) shall be consolidated into a general permit to cover all authorized activities, notwithstanding any law or regulation to the contrary.*

*(7) FOREIGN SPECIES.—(A) In determining whether to issue a permit under subsection (a)(1)(A)(iii), there shall be a rebuttable presumption that the survival of a species is enhanced by the ordinary benefit occurring from the taking of a specimen for an inherently limited use in accordance with the laws and wildlife management policies of the nation in which it is found.*

*(B) The Secretary may not refuse to issue a permit for such specimens and may not limit the number of such specimens which may be imported unless he makes and publishes in the Federal Register a finding that there is substantial evidence that the detriment resulting from the taking of such specimens outweighs the benefit derived, and subsequently promulgates regulations containing the limitation.*

*(C) The Secretary shall transmit the full text and a complete description of the proposed regulation referred to in the preceding paragraph directly to the appropriate wildlife management authorities of the nations from which the specimens are exported, in the language of those countries, with at least 180 days allowed for review and comment. The 180-day period shall be counted from the date of the delivery of the materials to the wildlife management authority of each of the nations.*

*(D) For the purpose of this paragraph, the term "inherently limited use" means scientific collection, live export for captive breeding, sport hunting, and falconry.*

*(8) RESTRICTION ON NEW OR ADDITIONAL REQUIREMENTS.—The Secretary shall, as part of the conservation planning process, guarantee that, so long as the permittee is complying with the terms and conditions of the permit issued under this section, the permittee shall not be subject to new or additional requirements for the specific protection of any species beyond the requirements set forth in the conservation plan. All public entities shall be bound by this guarantee.*

*(9) EXPEDITED PERMITTING PROCESS FOR LOW-IMPACT ACTIVITIES.—(A) Not later than 180 days after the date of the enactment of the Endangered Species Conservation and Management Amendments of 1995, the Secretary shall issue regulations*

*which establish a simple, standardized application form for a permit under paragraph (1)(B) for a low-impact activity.*

*(B) If a person submits an application for a permit under paragraph (1)(B) in accordance with the form established by the Secretary under subparagraph (A)—*

*(i) the person shall not be required to submit any other information to obtain the permit; and*

*(ii) the Secretary shall complete processing of the application, and approve or deny the permit, within 30 days after the date the Secretary receives the completed application.*

*(C) The regulations under this paragraph—*

*(i) shall describe classes of activities that are low-impact activities for purposes of this paragraph; and*

*(ii) shall treat as a low-impact activity any activity which has no significant effect on the survival of endangered species and threatened species.*

*(D) For purposes of this paragraph, the term "low-impact activity" means an activity in a class of activities described in regulations under subparagraph (C)(i).*

* * * * * * *

(j) EXPERIMENTAL POPULATIONS.—(1) * * *

(2)(A) The Secretary may authorize the release (and the related transportation) of any population (including eggs, propagules, or individuals) of an endangered species or a threatened species outside the current range of such species if the Secretary determines that such release will further the conservation of such species.

**[**(B) Before authorizing the release of any population under subparagraph (A), the Secretary shall by regulation identify the population and determine, on the basis of the best available information, whether or not such population is essential to the continued existence of an endangered species or a threatened species.**]**

*(B) Before authorizing the release of any population under subparagraph (A), the Secretary shall by regulation—*

*(i) identify the population and the precise boundaries of the geographic area for the release and determine, on the basis of the best available information, whether the release is in the public interest, whether or not such population is essential to the continued existence of an endangered species or a threatened species; and*

*(ii) in the case of a release of a species of predatory mammal in a unit of the National Park System or the National Wildlife Refuge System—*

*(I) require that if the species enters private property, measures shall be taken to remove the species from the property and protect the safety and welfare of the public and domestic animals, including livestock; and*

*(II) provide funding for such measures, including compensation for dimunition of property values pursuant to section 19 of this Act.*

(C) For the purposes of this Act, each member of an experimental population shall be treated as a threatened species; except that—

(i) solely for purposes of section 7 (other than subsection (a)(1) thereof), an experimental population determined under subparagraph (B) to be not essential to the continued existence

of a species shall be treated, except when it occurs in an area within the National Wildlife Refuge System or the National Park System, as a species proposed to be listed under section 4; [and

[(ii) critical habitat shall not be designated under this Act for any experimental population determined under subparagraph (B) to be not essential to the continued existence of a species.]

*(ii) for the purposes of sections 4(d) and 9(a)(1)(B), any member of an experimental population found outside the geographic area in which the population is released shall not be treated as a threatened species if the member poses a threat to the welfare of the public; and*

*(iii) critical habitat shall not be designated under this Act or if designated prior to the Endangered Species Conservation and Management Act of 1995, shall be removed from any non-Federal land, for any experimental population determined under subparagraph (B) to be not essential to the continued existence of a species.*

*(D) The Secretary shall determine under subparagraph (B) that a population is not essential to the continued existence of an endangered species or threatened species, unless the Secretary determines on the basis of the best available scientific and commercial data that the loss of one or more of the members of the population will result in the extinction of the species.*

*(3) REQUIREMENTS FOR RELEASES.—In authorizing the release of a population under paragraph (2), the Secretary shall require that—*

*(A) to the maximum extent practicable, the release occurs only in a unit of the National Park System or the National Wildlife Refuge System;*

*(B) a release outside a unit occurs only in an area that has been identified as a candidate site for release of the population in a conservation plan for the species;*

*(C) in the case of a release outside a unit, measures to protect the safety and welfare of the public and domestic animals and the funding for the measures are identified in the regulations authorizing the release and are implemented;*

*(D) the regulations authorizing the release identify precisely the geographic area for the release;*

*(E) a release on non-Federal land occurs only with the written consent of the owner of the land;*

*(F) the regulations authorizing the release include measurable reintroduction goals to restore viable populations only within the specific geographic area identified for release in the regulations;*

*(G) the regulations authorizing the release obligate the Secretary to remove members of the population from non-Federal land at the written request of the landowner and within a reasonable period of time after receiving such a request, not to exceed 90 days; and*

*(H) the regulations authorizing the release of a population that is determined under this paragraph to not be es-*

*sential to the survival of a species shall provide that, notwithstanding any other provision of this Act, a taking of a member of such population shall not be treated as a taking if it is—*

*(i) not knowing,*

*(ii) not willful, or*

*(iii) incidental to, and not the purpose of, otherwise lawful activity.*

*(4) COMPLIANCE WITH STATE LAW.—In authorizing any release under paragraph (2), the Secretary shall ensure that the release does not conflict with the laws of affected States relating to the species to be released.*

*(5) DETERMINATION REGARDING POPULATIONS AUTHORIZED BEFORE EFFECTIVE DATE OF ENDANGERED SPECIES CONSERVATION AND MANAGEMENT ACT OF 1995.—(A) For each population of a species that the Secretary, before the effective date of the Endangered Species Conservation and Management Act of 1995, authorized the release of in a geographical area separate from the other populations of the species, the Secretary shall determine by regulation whether or not the population is essential to the continued existence of the species.*

*(B) If the Secretary receives a written request for the issuance of a regulation under subparagraph (A) for a population for which the Secretary has not issued such a regulation, the Secretary shall promptly issue such a regulation by not later than 180 days after receiving the request.*

**[**(3)**]** *(6)* The Secretary, with respect to population of endangered species or threatened species that the Secretary authorized, before the date of the enactment of this subsection, for release in geographical areas separate from the other populations of such species, shall determine by regulation which of such populations are an experimental population for the purposes of this subsection and whether or not each is essential to the continued existence of an endangered species or a threatened species.

*(k) MULTIPLE SPECIES CONSERVATION PLANS.—*

*(1) DEVELOPMENT.—The Secretary may assist a non-Federal person in the development of a plan, to be known as a "multiple species conservation plan", for the conservation of—*

*(A) any species with respect to which a finding is made and a status review is commenced under section 4(b)(3)(B); and*

*(B) any other species that—*

*(i) inhabit the area covered by the plan; and*

*(ii) are designated in the plan or are within a taxonomic group designated in the plan.*

*(2) ISSUANCE OF PERMITS.—A non-Federal person may submit a species conservation plan prepared under this subsection for the conservation of multiple species to the Secretary for approval under subsection (a)(2). If the Secretary approves the plan, the Secretary shall issue an incidental take permit authorizing take of any threatened species subject to the plan under section 4(d). The Secretary shall also recommend terms and conditions to address species subject to the plan which*

*have not been determined to be endangered species or threatened species.*

*(3) EFFECT OF LISTING OF SPECIES.—A multiple species conservation plan developed under this subsection and a permit issued with respect to the plan shall remain in effect and shall not be required to be amended if a species to which the plan and permit apply is determined to be an endangered species or a threatened species under section 4, except that the Secretary's recommendations under paragraph (2) shall become terms and conditions of the permit. No additional restrictions or prohibitions under this Act shall be imposed upon the plan permittee for such species or geographic area beyond those provided for in the approved plan or the permit terms and conditions.*

*(4) CONSIDERATION OF STATE RECOMMENDATIONS.—The Secretary shall, in cooperation with the States, develop a process whereby full consideration can be given to State recommendations regarding standards and guidelines for the development and approval of a broad range of multiple species conservation plans. To the maximum extent practicable and consistent with the conservation of the affected species, such standards and guidelines shall—*

*(A) develop clear criteria by which conservation plans would be approved;*

*(B) encourage the development of conservation plans which would reduce economic impacts while providing conservation of affected species;*

*(C) include assurances that further conservation measures would not be required of a non-Federal person should any species dependent upon that habitat type be subsequently listed unless any additional costs are assumed by the Secretary; and*

*(D) provide incentives to a non-Federal person who voluntarily agrees to manage to enhance habitat for species on their property by excluding them from restrictions if they later return their land to its previous condition or use.*

*(5) TECHNICAL ASSISTANCE OR GUIDANCE.—To the maximum extent practicable, the Secretary and other Federal agencies, in cooperation with the affected States, are authorized and encouraged to provide technical assistance or guidance to any non-Federal person who is developing a multiple species conservation plan pursuant to this subsection.*

*(l) WILDLIFE BRED IN CAPTIVITY.—For the purposes of this Act or any regulation adopted pursuant to this Act, the terms "bred in captivity" or "captive-bred", with respect to wildlife, means wildlife, including eggs, born or otherwise produced in captivity from parents that mated or otherwise transferred gametes in captivity if reproduction is sexual, or from parents that were in captivity when development of the progeny began, if development is asexual. Such progeny shall be considered domestic fish or wildlife for all purposes and shall not come under the provisions and prohibitions of this Act and the laws listed in subsection (a)(6)(H) unless intentionally and permanently released to the wild. Any person holding any fish or wildlife or their progeny as described in this subsection must be able to demonstrate that such fish or wildlife do, in fact, qualify*

*under the provision of this subsection, and shall maintain and submit to the Secretary, on request, such inventories, documentation, and records as the Secretary may by regulation require as being reasonable and appropriate to carry out the purposes of this subsection. Such requirements shall not unnecessarily duplicate the requirements of other rules and regulations promulgated by the Secretary.*

*(m) INCENTIVES.—(1) The Secretary shall exempt, under such terms and conditions as the Secretary may prescribe by regulation, any operator of a trawl vessel required to use a turtle excluder device under regulations promulgated under this Act from such requirement if such operator agrees to support a conservation program approved under paragraph (2) and such support is determined to be appropriate under paragraph (4).*

*(2) No later than 180 days after the effective date of this subsection and each year thereafter, the Secretary shall—*

*(A) review all those programs intended to conserve the endangered species and threatened species of sea turtles found in the Gulf of Mexico and along the Atlantic seaboard, including those programs involving protection of nesting beaches in other nations;*

*(B) approve any such program determined by the Secretary to be of significant benefit to the recovery of the species of such sea turtles under this subsection; and*

*(C) publish notice of such determination in the Federal Register.*

*(3)(A) Any person or group of persons operating trawl vessels may submit in writing a request to the Secretary for an exemption under this subsection.*

*(B) Not later than 60 days after receipt of such request the Secretary shall provide such person or group written notice of the issuance or denial of such request.*

*(4) The Secretary shall determine that the support offered by an operator in a written request submitted under paragraph (3) is appropriate if the benefits provided by such support to the recovery of such species exceed any harm to the recovery of such species incurred as a result of the operator not using turtle excluder devices under an exemption provided under this subsection.*

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

PENALTIES AND ENFORCEMENT

SEC. 11. (a) CIVIL PENALTIES.—(1) Any person who [knowingly] *with specific intent* 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), (C), or (D), (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 $25,000 for each violation. Any person who [knowingly] *with specific intent* 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 $12,000 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 $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. Any such 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.

(b) CRIMINAL VIOLATIONS.—(1) Any person who [knowingly] *with specific intent* violates any provision of this Act, 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), (C), or (D), (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 $50,000 or imprisoned for not more than one year, or both. Any person who [knowingly] *with specific intent* violates any provision of any other regulation issued under this Act shall, upon conviction, be fined not more than $25,000 or imprisoned for not more than six months, or both.

* * * * * * *

(d) REWARDS AND CERTAIN INCIDENTAL EXPENSES.—The Secretary or the Secretary of the Treasury shall pay, from sums received as penalties, fines, or forfeitures of property for any violations of this chapter or any regulation issued hereunder (1) a reward to any person who furnishes information which leads to an arrest, a criminal conviction, civil penalty assessment, or forfeiture of property for any violation of this chapter or any regulation issued hereunder, and (2) the reasonable and necessary costs incurred by any person in providing temporary care for any *endangered species or threatened species of* fish, wildlife, or plant pending the disposition of any civil or criminal proceeding alleging a violation of this chapter with respect to that fish, wildlife, or plant. The amount of the reward, if any, is to be designated by the Secretary or the Secretary of the Treasury, as appropriate. Any officer or employee of the United States or any State or local government who furnishes information or renders service in the performance of his official duties is ineligible for payment under this subsection. Whenever the balance of sums received under this section and section 6(d) of the Act of November 16, 1981 (16 U.S.C. 3375(d)) as penalties or fines, or from forfeitures of property, exceed $500,000, the Secretary of the Treasury shall deposit an amount equal to such excess balance in the cooperative endangered species conservation fund established under section 6(i) of this Act.

(e) ENFORCEMENT.—(1) * * *

* * * * * * *

(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 container, including its contents, and all accompanying documents, upon importation or exportation. Such persons 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,] *Any endangered species or threatened species of fish or 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 the 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 *endangered species or threatened species of* 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, transporting, delivering, receiving, carrying, shipping, exporting, or importing of any *endangered species or threatened species of* 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.

* * * * * * *

*(7) ADOPTION OF REGULATIONS.—No interpretation, policy, guideline, finding, or other informal determination may be relied upon by the Secretary in the implementation and enforcement of this Act unless such determination has been the subject of a proposed rule, subject to review by the public and comment for a period of no less than 60 days. Any proposed rule under this subparagraph must include—*

*(A) a plain-language explanation of the reasons for and purpose of the proposed rule;*

*(B) an analysis of the anticipated impact of the proposed rule;*

*(C) an analysis showing that the restoration benefit of the proposed rule outweighs any negative conservation impact of that proposed rule;*

*(D) an analysis showing that compliance with the proposed rule is reasonably within the means of the State or the range nation concerned; and*

*(E) a summary of the literature reviewed and experts consulted in regard to the species involved, and a summary of the Secretary's findings based on that review and consultation.*

*(8) BASIS FOR REFUSAL OF ENTRY.—No refusal of entry, seizure of evidence, or other enforcement action may take place under this Act if the action is based solely on a notification under the Convention or on a resolution of the Conference of the Parties to the Convention.*

*(9) DETENTION FOR PURPOSE OF IDENTIFICATION.—The burden is on the Secretary to show that a specimen belongs to a species which is determined to be an endangered species or threatened species under this Act or is included in an Appendix to the Convention. The Secretary may not detain a specimen for longer than 30 days for the purpose of identification except where the specimen has been substantially changed from its natural appearance, in which case it may be retained for an additional 30 days for identification. If the specimen cannot be positively identified within that time, then it shall be released.*

(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 *endangered species or threatened species 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) CITIZEN SUITS.—(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; or

[(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 4 which is not discretionary with the Secretary.

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 or to order the Secretary to perform such act or duty, 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.

[(C) No action may be commenced under subparagraph (1)(C) of this section prior to sixty days after written notice has been given to the Secretary; except that such action may be brought immediately after such notification in the case of an action under this section respecting an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants.

[(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, 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).]

*(g) CITIZEN SUITS.—*

*(1) IN GENERAL.—Except as provided in paragraph (2), a civil suit may be commenced by any person on his or her own behalf, who satisfies the requirements of the Constitution and who has suffered or is threatened with economic or other injury resulting from the violation, regulation, application, nonapplication, or failure to act—*

*(A) to enjoin the United States or any agency or official of the United States who is alleged to be in violation of any provision of this Act or regulation issued under the authority thereof, if the violation poses immediate and irreparable harm to a threatened species or endangered species;*

*(B) to compel the Secretary to apply, or modify the application of, the prohibitions set forth in or authorized pursuant to section 9(a)(1)(B) or 4(d);*

*(C) to compel the Secretary to apply, or modify the application of, the provisions of section 10(a); or*

*(D) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 4(d) which is not discretionary with the Secretary.*

*The district courts shall have jurisdiction to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be.*

*(2) PREREQUISITE PROCEDURES.—(A) No action may be commenced under paragraph (1)(A)—*

*(i) prior to 60 days after written notice of the alleged violation has been given to the Secretary, and to any agency or official of the United States who is alleged to be in violation, except that a State may commence an action at any time;*

*(ii) if the Secretary has commenced action to impose a penalty pursuant to subsection (a); 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 the alleged violation of any such provision or regulation.*

*(B) No action may be commenced under paragraph (1)(B) prior to 60 days after written notice has been given to the Secretary setting forth the reasons for applying, or modifying the application of, the prohibitions with respect to the taking of a threatened species.*

*(C) No action may be commenced under paragraph (1)(C) prior to 60 days after written notice has been given to the Secretary, except that such action may be brought immediately after such notification in the case of an action under this subsection respecting an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants.*

*(3) VENUE.—Any suit under this subsection may be brought in the judicial district in which the violation occurs.*

*(4) COSTS.—The court, in issuing any final order in any suit brought pursuant to paragraph (1), may award costs of litigation (excluding attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.*

*(5) INJUNCTIVE RELIEF.—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).*

*(6) INTERVENTION.—Any person may intervene as a matter of right in any civil suit brought under this subsection if such suit presents a reasonable threat of economic injury to such person. Any intervenor under this paragraph shall have the same right to present argument and to accept or reject potential settlements as do the parties to the suit.*

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[CONFORMING AMENDMENTS

[SEC. 13. (a) Subsection 4(c) of the Act of October 15, 1966 (80 Stat. 928, 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 or 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, 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 and 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. (a) IN GENERAL.—Except as provided in subsection (b), (c), and (d), there are authorized to be appropriated—

[(1) not to exceed $35,000,000 for fiscal year 1988, $36,500,000 for fiscal year 1989, $38,000,000 for fiscal year 1990, $39,500,000 for fiscal year 1991, and $41,500,000 for fiscal year 1992 to enable the Department of the Interior to carry out such functions and responsibilities as it may have been given under this Act;

[(2) not to exceed $5,750,000 for fiscal year 1988, $6,250,000 for each of fiscal years 1989 and 1990, and $6,750,000 for each of fiscal years 1991 and 1992 to enable the Department of Commerce to carry out such functions and responsibilities as it may have been given under this Act; and

[(3) not to exceed $2,200,000 for fiscal year 1988, $2,400,000 for each of fiscal years 1989 and 1990, and $2,600,000 for each of fiscal years 1991 and 1992, to enable the Department of Agriculture to carry out its functions and responsibilities with respect to the enforcement of this Act and the Convention which pertain to the importation or exportation of plants.

[(b) EXEMPTIONS FROM ACT.—There are authorized to be appropriated to the Secretary to assist him and the Endangered Species Committee in carrying out their functions under section 7 (e), (g), and (h) not to exceed $600,000 for each for fiscal year 1988, 1989, 1990, 1991, and 1992.

[(c) CONVENTION IMPLEMENTATION.—There are authorized to be appropriated to the Department of the Interior for purposes of carrying out section 8A(e) not to exceed $400,000 for each of fiscal years 1988, 1989, and 1990, and $500,000 for each of fiscal years 1991 and 1992, and such sums shall remain available until expended.

[EFFECTIVE DATE

[SEC. 16. This Act shall take effect on the date of its enactment.]

***SEC. 13. NATIONAL ENDOWMENT FOR FISH AND WILDLIFE TRUST FUND.***

*(a) ESTABLISHMENT.—There is established in the general fund of the Treasury a separate account which shall be known as the "National Endowment for Fish and Wildlife Trust Fund" (in this section referred to as the "Fund").*

*(b) CONTENTS.—The Fund shall consist of the following:*

*(1) Amounts received as gifts, bequests, and devises under subsection (d).*

*(2) Other amounts appropriated to or otherwise deposited in the Fund.*

*(c) USE.—Amounts in the fund shall be available to the Secretary, subject to appropriations, for the following:*

*(1) Payment of compensation under section 19.*

*(2) Habitat conservation grants under section 6(k).*

*(3) Payment of cost sharing under section 16.*

*(4) Acquisition or leasing of lands, waters, or interests therein under section 5A(b).*

*(d) GIFTS, BEQUESTS, AND DEVISES.—*

*(1) IN GENERAL.—The Secretary may accept, use, and dispose of gifts, bequests, or devises of services or property, both real and personal, for the purpose of carrying out this Act.*

*(2) DEPOSIT INTO FUND.—Gifts, bequests, or devises of money, and proceeds from sales of other property received as gifts, bequests, or devises, shall be deposited in the Fund and shall be available for disbursement upon order of the Secretary.*

***SEC. 14. PUBLIC HEARINGS AND PUBLIC MEETINGS.***

*(a) IN GENERAL.—Except as otherwise provided by this Act, the Secretary shall provide notice of any hearing or other public meeting at which public comment is accepted under this Act by publication in the Federal Register and in a newspaper of general circulation in the location of the hearing or meeting at least 30 days prior to the hearing or meeting.*

*(b) HEARINGS.—Public hearings held pursuant to this Act shall provide an opportunity for the public to make statements and receive information from the agency regarding the impact of the proposal that is the subject of the public hearing. To the maximum extent practicable, the Secretary shall ensure that members of the public are provided with the information sought at the public hearing.*

***SEC. 15. AUTHORIZATION OF APPROPRIATIONS.***

*(a) IN GENERAL.—In addition to the amounts authorized to be appropriated under section 6(i) and subsections (b) through (e), there are authorized to be appropriated—*

*(1) to the Department of the Interior to carry out the duties of the Secretary of the Interior under this Act $110,000,000 for fiscal year 1996, $120,000,000 for fiscal year 1997, $130,000,000 for fiscal year 1998, $140,000,000 for fiscal year 1999, $150,000,000 for fiscal year 2000, and $160,000,000 for fiscal year 2001;*

*(2) to the Department of Commerce to carry out the duties of the Secretary of Commerce under this Act $15,000,000 for fiscal year 1996, $20,000,000 for fiscal year 1997, $25,000,000 for fiscal year 1998, $30,000,000 for fiscal year 1999, $35,000,000 for fiscal year 2000, and $40,000,000 for fiscal year 2001; and*

*(3) to the Department of Agriculture to carry out the duties of the Secretary of Agriculture under this Act $4,000,000 for each of fiscal years 1996 through 2001.*

*(b) COOPERATIVE MANAGEMENT AGREEMENTS.—There are authorized to be appropriated to the Department of the Interior to carry out section 16(b)(4), $20,000,000 for each of fiscal years 1996 through 2001, to remain available until expended.*

*(c) CONVENTION IMPLEMENTATION.—There are authorized to be appropriated to the Department of the Interior to carry out section 8A(e) $1,000,000 for each of fiscal years 1996 through 2001, to remain available until expended.*

*(d) NON-FEDERAL CONSERVATION PLANNING.—There are authorized to be appropriated to the Department of the Interior to carry out section 16(b)(3) $20,000,000 for each of fiscal years 1996 through 2001, to remain available until expended.*

*(e) HABITAT CONSERVATION GRANTS.—There are authorized to be appropriated to the Department of the Interior to provide habitat conservation grants under section 6(k) $20,000,000 for each of fiscal years 1996 though 2001, to remain available until expended.*

***SEC. 16. FEDERAL COST-SHARING REQUIREMENTS FOR CONSERVATION OBLIGATIONS.***

*(a) DIRECT COSTS DEFINED.—In this section, the term "direct costs" means—*

*(1) expenditures on labor, material, facilities, utilities, equipment, supplies and other resources which are necessary to undertake a specific conservation measure;*

*(2) increased purchase power costs and lost revenues caused by changes in the operation of a hydropower system from which the non-Federal person or Federal power marketing administration markets power to meet a specific conservation measure; and*

*(3) other reimbursable costs specifically identified by the Secretary as directly related to the performance of a specific conservation measure.*

*(b) COST-SHARING.—*

*(1) CONSERVATION PLANS.—For any non-Federal person or Federal power marketing administration, the Secretary shall pay 50 percent of any direct costs that result from the compliance by the person or administration mandated by a conservation plan issued under section 5 or any conservation measure that provides protection to a listed species under a plan developed under the Pacific Northwest Electric Power Planning and Conservation Act (16 U.S.C. 839 et seq.) including a plan that provides protection to a larger population unit of the same listed species.*

*(2) CONSULTATION REQUIREMENTS.—For any non-Federal person or Federal power marketing administration, the Secretary shall pay 50 percent of direct costs that result solely from requirements imposed by the Secretary on the person or marketing administration under section 7.*

*(3) INCIDENTAL TAKE PERMITS.—For any non-Federal person issued an incidental take permit under section 10, the Secretary shall pay to such person 50 percent of the direct costs of preparing the application for the permit and implementing the terms and conditions of the permit.*

*(4) COOPERATIVE MANAGEMENT AGREEMENTS.—The Secretary shall pay 50 percent of the direct costs of preparing and implementing the terms and conditions of a cooperative management agreement under section 6(b) incurred by a party to the agreement and any costs incurred by any other non-Federal person or Federal power marketing administration subject to the terms of such agreement.*

*(c) METHOD OF COST-SHARING.—*

*(1) IN GENERAL.—Except as provided in paragraph (2), the Secretary may make a contribution required under subsection (b) by—*

*(A) providing a habitat reserve grant under section 6(b)(14);*

*(B) acquiring, from or for the party to the cost-share, land or an interest in land as provided in section 5A; or*

*(C) providing appropriated funds.*

*(2) COST-SHARE PAYMENT FOR FEDERAL POWER MARKETING ADMINISTRATIONS AND OTHER STATE OR LOCAL GOVERNMENTAL ENTITIES.—The Secretary shall make a contribution under subsection (b) to a Federal power marketing administration or any other State or local governmental entity by providing appropriated funds directly to the administration or governmental entity.*

*(3) APPROPRIATED FUNDS.—To the maximum extent practicable, any appropriated funds paid by the Secretary under paragraphs (1) and (2) shall be paid directly (in lieu of reimbursement) to the party, person, or administration.*

*(4) LOANS.—The Secretary may not consider a loan to the party to the cost-share as a contribution or portion of a contribution under subsection (b).*

*(5) RECOVERED COSTS.—The Secretary may not claim as a portion of the Federal share under subsection (b) any costs to the Federal Government that are recovered through rates for the sale or transmission of power or water.*

*(6) EFFECT OF FEDERAL NONPAYMENT.—If the Secretary fails to make the contribution required under subsection (b), the application of the applicable provision of the conservation plan, requirement under section 7, term under the incidental take permit, or provision of the cooperative management agreement shall be suspended until such time as the full contribution is made. If the suspended provision or requirement includes a conservation easement or other instrument restricting title to the property of the non-Federal person, nonpayment of the full contribution shall result in the nullification of the previously granted restriction on title.*

*(7) IN-KIND CONTRIBUTIONS.—A non-Federal person or Federal power marketing administration may include in-kind contributions in calculating the appropriate share of the costs of the person or administration under this section.*

*(8) COSTS PAID BY THE SECRETARY.—Compensation from the Federal Government under section 19 may not cover costs incurred by a non-Federal person that were otherwise paid by the Secretary under subsection (b).*

*(d) EXISTING COST-SHARING AGREEMENTS.—Any cost-sharing agreement with a non-Federal person provided in any recovery plan or other agreement in existence prior to the date of enactment of this subsection shall remain in effect unless the non-Federal person requests that the cost-sharing percentage be reconsidered.*

*(e) ADJUSTMENTS TO COST-SHARING PERCENTAGE.—At the request of the non-Federal person, the Secretary may adjust the percentage of the Federal contribution to a higher share.*

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***SEC. 19. RIGHT TO COMPENSATION.***

*(a) PROHIBITION.—The Federal Government shall not take an agency action affecting privately owned property or nonfederally owned property under this Act which results in diminishment of value of any portion of that property by 20 percent or more unless compensation is offered in accordance with this section.*

*(b) COMPENSATION FOR USE OR LIMITATION ON USE.—The agency or agencies that take an agency action that exceeds the amount provided in subsection (a) shall compensate the private property owner for the otherwise lawful use or limitation on the otherwise lawful use in the amount of the diminution in value of the portion of that property resulting from the use or limitation on use. If the diminution in value of a portion of that property is greater than 50 percent, at the option of the owner, the agency or agencies shall buy that portion of the property and shall pay fair market value based on the value of the property before the use or limitation on use was imposed. Compensation paid shall reflect the duration of the use or limitation on use necessary to achieve the purposes of this Act.*

*(c) REQUEST OF OWNER.—An owner seeking compensation under this section shall make a written request for compensation to the agency implementing the agency action. The request shall, at a min-*

*imum, identify the affected portion of the property, the nature of the use or limitation, and the amount of compensation claimed. No such request may be made later than one year after the owner receives actual notice that the use of property has been limited by an agency action.*

*(d) NEGOTIATIONS.—The agency may negotiate with that owner to reach agreement on the amount of the compensation and the terms of any agreement for payment. If such an agreement is reached, the agency shall within 90 days pay the owner the amount agreed upon. An agreement under this section may include a transfer of the title or an agreement to use the property for a limited period of time.*

*(e) CHOICE OF REMEDIES.—If, not later than 180 days after the written request is made, the parties have not reached an agreement on compensation, the owner may elect binding arbitration or seek compensation due under this section in a civil action.*

*(f) ARBITRATION.—The procedures that govern the arbitration shall, as nearly as practicable, be those established under title 9, United States Code, for arbitration proceedings to which that title applies. An award made in such arbitration shall include a reasonable attorney's fee and other arbitration costs, including appraisal fees. The agency shall promptly pay any award made to the owner.*

*(g) CIVIL ACTION.—An owner who prevails in a civil action against the agency pursuant to this section shall be entitled to, and the agency shall be liable for, the amount of compensation awarded plus reasonable attorney's fees and other litigation costs, including appraisal fees. The court shall award interest on the amount of any compensation from the time of the limitation.*

*(h) SOURCE OF PAYMENTS.—Any payment made under this section to an owner, and any judgment obtained by an owner in a civil action under this section shall, notwithstanding any other provision of law, be made from the annual appropriation of the agency that took the agency action. If the agency action resulted from a requirement imposed by another agency, then the agency making the payment or satisfying the judgment may seek partial or complete reimbursement from the appropriated funds of the other agency. For this purpose the head of the agency concerned may transfer or reprogram any appropriated funds available to the agency. If insufficient funds exist for the payment or to satisfy the judgment, it shall be the duty of the head of the agency to seek the appropriation of such funds for the next fiscal year.*

*(i) AVAILABILITY OF APPROPRIATIONS.—Notwithstanding any other provision of law, any obligation of the United States to make any payment under this section shall be subject to the availability of appropriations.*

*(j) DUTY OF NOTICE TO OWNERS.—An agency may not take any action limiting the use of private property unless the agency has given appropriate notice to the owners of that property directly affected explaining their rights under this section and the procedures for obtaining any compensation that may be due to them under this section.*

*(k) RULES OF CONSTRUCTION.—The following rules of construction shall apply to this Act:*

*(1) OTHER RIGHTS PRESERVED.—Nothing in this Act shall be construed to limit any right to compensation that exists under the Constitution or under other laws.*

*(2) EXTENT OF FEDERAL AUTHORITY.—Payment of compensation under this section (other than when the property is bought by the Federal Government at the option of the owner) shall not confer any rights on the Federal Government other than the use or limitation on use resulting from the agency action for the duration so that the agency action may achieve the species conservation purposes of this Act.*

*(l) DEFINITIONS.—For the purposes of this section:*

*(1) AGENCY.—The term "agency" has the meaning given that term in section 551 of title 5, United States Code.*

*(2) AGENCY ACTION.—The term "agency action"—*

*(A) subject to subparagraph (B), has the meaning given that term in section 551 of title 5, United States Code, and*

*(B) includes—*

*(i) the loss of use of property to avoid prosecution under section 11;*

*(ii) a designation pursuant to section 9(i) of privately owned property as critical habitat;*

*(iii) the denial of a permit under section 10 that restricts the use of private property;*

*(iv) an agency action pursuant to a biological opinion under section 7 that would cause an agency to restrict the use of private property;*

*(v) an agreement under section 6 to set aside property for habitat under the terms of an easement or other contract;*

*(vi) a restriction imposed on private property as part of a conservation plan adopted by the Secretary under section 5;*

*(vii) any other agency action that restricts a legal right to use that property, including, the right to alter habitat; and*

*(viii) the making of a grant of land or money, to a public authority or a private entity as a predicate to an agency action by the recipient that would constitute a limitation if done directly by the agency.*

*(3) FAIR MARKET VALUE.—The term "fair market value" means the most probable price at which property would change hands, in a competitive and open market under all conditions requisite to fair sale, between a willing buyer and willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts, prior to occurrence of the agency action.*

*(4) LAW OF THE STATE.—The term "law of the State" includes the law of a political subdivision of a State.*

*(5) LIMITATION ON USE.—The term "limitation on use" means only a limitation on a use which is otherwise permissable under applicable State property or nuisance laws.*

*(6) PRIVATE PROPERTY, PRIVATELY OWNED PROPERTY, NON-FEDERAL PROPERTY.—The term "private property", "privately owned property", or "non-Federal property" means property*

*which is owned by a person other than any Federal entity of government.*

*(7) PROPERTY.—The term "property" means land, an interest in land, the right to use or receive water, and any personal property that is subject to use by the Federal Government or to a restriction on use.*

***SEC. 20. RECOGNIZING NET BENEFITS TO AQUATIC SPECIES.***

*(a) ENCOURAGING NET BENEFITS.—In carrying out this Act, if the number of individual members of an endangered species or threatened species exiting an aquatic habitat area under the control, authority or ownership of a non-Federal person is equal to or greater than the number of individual members of the species entering such area, the Secretary shall not require, provide for, or recommend the imposition of any restriction or obligation on the activity of the non-Federal person in a manner which would require the non-Federal person to support the maintenance of any greater number of individual members of the species than that which enters such aquatic habitat area.*

*(b) CONSIDERATION OF HATCHERY POPULATIONS.—In calculating the number of individual members of a species entering and exiting a specific aquatic habitat area pursuant to this section, the Secretary shall consider hatchery populations.*

*(c) LIMITATIONS.—The Secretary shall not require, provide for, or recommend the imposition of any restriction or obligation on the activity of any non-Federal person in an aquatic habitat area to remedy adverse impacts on a species resulting from activities of individuals other than the non-Federal person.*

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## SECTION 1010 OF THE ACT OF OCTOBER 7, 1988

AN ACT To authorize appropriations to carry out the Endangered Species Act of 1973 during fiscal years 1988, 1989, 1990, 1991, and 1992, and for other purposes.

# TITLE I—ENDANGERED SPECIES ACT AMENDMENTS OF 1988

* * * * * * *

**SEC. 1010. EDUCATION, STUDY AND REPORT.**

(a) EDUCATION.—The Administrator of the Environmental Protection Agency in cooperation with the Secretary of Agriculture and the Secretary of the Interior, promptly upon enactment of this Act, shall conduct a program to inform and educate fully persons engaged in agricultural food and fiber commodity production of any proposed pesticide labeling program or requirements that may be imposed by the Administrator in compliance with the Endangered Species Act (16 U.S.C. 1531 et seq.). *Nothing in this Act or the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) shall be construed as prohibiting certified applicators, as that term is defined in section 2(e) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136(e)), or persons working under their direct supervision, from applying a registered pesticide in or around a commer-*

*cial facility located within the critical habitat of a listed or endangered species for the purpose of preventing, destroying, repelling, or mitigating any pest, including but not limited to rats, mice, ground squirrels, or other rodents that may pose a threat to public health or safety; nor shall anything in this Act or the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) be construed as requiring or authorizing the Administrator of the Environmental Protection Agency by means of pesticide labeling, regulation, or otherwise from prohibiting certified applicators, as that term is defined in section 2(e) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136(e)), or persons working under their direct supervision, from engaging in the activities described in the foregoing clause. The term 'commercial facility' as used in the preceding sentence means any structure or other facility that is intended for nonresidential use, including but not limited to food processing plants, food warehouses, grocery stores, feed lots, restaurants, and retail shopping malls. Neither this Act nor the Endangered Species Act of 1973 (15 U.S.C. 1531 et seq.) shall place any additional restrictions on the use of the United States Department of Agriculture registered toxicants.* The Administrator also shall provide the public with notice of, and opportunity for comment on, the elements of any such program and requirements based on compliance with the Endangered Species Act, including (but not limited to) an identification of any pesticides affected by the program; an explanation of the restriction or prohibition on the user or applicator of any such pesticide; an identification of those geographic areas affected by any pesticide restriction or prohibition; an identification of the effects of any restricted or prohibited pesticide on endangered or threatened species; and an identification of the endangered or threatened species along with a general description of the geographic areas in which such species are located wherein the application of a pesticide will be restricted, prohibited, or its use otherwise limited, unless the Secretary of the Interior determines that the disclosure of such information may create a substantial risk of harm to such species or its habitat.

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## DISSENTING VIEWS

We remain strongly opposed to H.R. 2275 as reported by the Committee on Resources. At the minimum, the ambiguous and contradictory language of the legislation provides for such broad latitude in interpretation that many government actions under this legislation are likely to result in unreasonable delays and expensive taxpayer-funded lawsuits. The ambiguity of the language is evidenced by the wide range of legal opinions on the bill's various impacts on species. Even the bill's authors repeatedly noted during the markup session that the various concerns raised about the legislation were "based on interpretation." At the maximum, this legislation serves to drastically weaken or repeal many of the ESA's most important provisions.

In the process of gutting one of our nation's premiere environmental laws, the Committee has also provided a cascade of benefits for special interests who seek short-term profits at the expense of the well-being of future generations.

### RECOMMENDATIONS BASED ON SCIENCE

Of paramount concern are the bill's changes to the definitions of the terms "harm" and "species". By limiting "harm" to an action that "proximately and foreseeably kills or physically injures an identifiable member of an endangered species," the legislation abolishes 90% of the ESA's authority to protect habitat. For example, this amendment would eliminate the ESA's ability to prevent commercial development of the entire winter feeding grounds of the highly endangered whooping crane while the birds were on their summer breeding grounds in Canada. Nothing in the ESA as amended by this legislation would prevent clear-cutting of old growth forests that are critical to the survival of the spotted owl and other species unless a spotted owl nest was located in a particular tree with eggs or fledglings present in the nest at the time of cutting. It would be difficult, if not impossible, to stop the bulldozing of salmon spawning streams during the parts of the year when the fish were at sea.

By excluding distinct population segments from the definition of "species" unless conserving them is in the "national interest," as determined by an Act of Congress, the legislation politicizes scientific decisions and is likely to eliminate ESA protection for salmon and other species—species which are critical to biodiversity, important to the economy, and harbor medicinal potential. Under this provision, bald eagles in the lower 48 states could not have been listed while they remained plentiful in Alaska and Canada; salmon in Washington and California would not be provided ESA protection as long as Alaskan salmon are not endangered.

Also affected by this provision would be a Florida population of a plant which develops chemical characteristics in responses to spe-

cific environmental conditions in Florida, but may not develop those chemicals in its Tennessee population. Under H.R. 2275, the Florida population cannot receive ESA protection without Congressional action, even though those chemical responses may be the basis for cures to cancer or AIDS, or the plant may play a critical role in its Florida ecosystem.

These changes to existing law fly in the face of good science, and are opposed by the National Academy of Sciences, the Ecological Society of America, and numerous other scientific organizations. The Committee also received a letter opposing these provisions signed by more than 150 scientists from such pre-eminent institutions as Johns Hopkins University, Purdue University, the Harvard School of Public Health, Yale University, Brigham Young University, and others involved in research in cures and treatments for AIDS, cancer, and cardiovascular disease.

The Committee unwisely chose to ignore these letters and similar testimony from the scientific community, throughout the hearing process. The Committee also rejected an amendment to the bill which would have delayed implementation until the National Academy of Sciences reviewed the legislation's effects on the availability of endangered and threatened species for biomedical research. We cannot in good conscience support a bill which contains these provisions.

COMPENSATION

Section 101 provides an extraordinary new entitlement program for landowners whose property may be affected by endangered species protections. Like past "takings" provisions passed this year in this Committee and the whole House, this provision goes well beyond the guarantees of the Fifth Amendment to the U.S. Constitution, requiring payments for minimal restrictions and modifications on the use of property. While ignoring the benefits that inure to property owners from species protection, section 101 of H.R. 2275 would require agencies to set up new programs to administer payments from the Treasury to reimburse as little as a 20% reduction in the value of any portion of a tract of land—a loss as small as the lumber in one bald eagle nesting tree would require an administrative payment process.

In addition, this language actually provides landowners with an incentive to plan property uses in a way that most interferes with species' needs, in order to collect money from the government when those plans fall through. Under existing law and the Fifth Amendment, landowners have an incentive to find economic uses of their property that do not harm threatened and endangered species. In part as a result of landowners' ability to plan around the needs of species, no "takings" claim under the Endangered Species Act has ever succeeded in court. Under the plain language of section 101, a landowner would have an incentive to plan to cut down that bald eagle nesting tree, in order to force the taxpayers to pay him not to do it.

Section 101 is far broader in scope than the "takings" language previously passed by the House Congress in H.R. 925 and H.R. 9. It goes beyond reimbursing the lost value of land and water, and extends the payment requirement to 20% losses in value of all per-

sonal property as well. For example, an individual might claim a right to payment for loss of use of an off-road vehicle if federal land use is restricted to protect endangered desert tortoises. Or the government might have to pay for confiscation of illegally taken or imported endangered species skins. Even if endangered species parts are regarded as contraband, and thus not private property, the government still might have to pay for species parts dumped at the border to avoid Customs agents, since section 101 also extends the payment requirement to "the loss of use of property to avoid prosecution under section 11."

We support relief for private property owners in the form of incentives, and believe that a thorough examination of tax-related incentives could prove to be an effective, widely supported tool for assisting property owners in conserving endangered and threatened species. The legislation reported by the Committee achieves little more than the establishment of a massive new bureaucracy at taxpayer expense, and would enact a broad new interpretation of the Fifth Amendment to the Constitution far beyond that used by the courts of this nation.

MARINE SPECIES

Several sections of the bill weaken current ESA protections for marine species. Of particular concern is section 201, which redefines the critical concept of incidental take. Under this provision, an activity is not a "taking" of a listed species if the activity is "incidental to, and not the purpose of, an otherwise lawful activity" that occurs within the territorial sea or exclusive economic zone.

Current law allows the Secretary to grant permits for incidental takes of listed species. Under the ESA's existing provisions, these permits are frequently granted to applicants conducting otherwise lawful activities, and may be conditioned in a manner that requires mitigation for incidental takes. However, the changes contained in this legislation provide an exemption from the ESA's "take" provisions for impacts from activities such as oil exploration, dredging, and commercial fishing. No mitigating measures would be required, and no liability would be tied to incidental takes of sea turtles, seabirds or endangered marine mammals that might occur following an oil spill (since the drilling operation itself is a lawful activity), or shrimp trawling (since the fishing itself is a lawful activity).

The very nature of the debate in the Committee on the various interpretations of this provision highlights our concerns regarding the nature of the language throughout H.R. 2275. This provision was defended during the markup session as insultation from civil or criminal liability for a shrimper if he or she incidentally catches a sea turtle while using a turtle excluder device during fishing operations. It was also argued that other provisions in the ESA would still require shrimpers to prevent incidental takes of sea turtles. It is our view, however, that if section 201 were enacted, there would be no prohibition against incidental takes of sea turtles—or other endangered marine species—in the course of fishing or otherwise lawful activities in waters not designated as critical habitats for those species. The Committee's interpretation is clearly at odds with the plain language of the bill

ABILITY TO CONSERVE FOREIGN SPECIES

Section 207 of the bill eliminates the authority of the United States to impose limitations on access to the U.S. market if American consumers serve as an incentive to imperil foreign species. This section has added negative impact on wildlife when combined with section 701 of the bill, which automatically voids any State law or regulation prohibiting "what is authorized pursuant to an exemption or permit provided for in this Act". We do not believe that the majority of the American people support an elimination of this nation's ability to play a responsible leadership role in controlling access to its own markets for threatened wildlife.

Currently, Article XIV of the International Convention on Trade in Endangered Species (CITES), to which the U.S. is a party, recognizes the right of the U.S. or any other nation to adopt stricter domestic measures than are required by CITES. The Committee bill overturns Article XIV as it applies to the U.S. and abrogates our sovereign rights to restrict imports of threatened wildlife or wildlife products, if those products are caught or purchased in accordance with the other nation's wildlife laws. As a result of this change, elephant tusks and other sport hunting trophies could be imported from any African nation which is a party to CITES and which issues an export permit. This section of the bill will have the simple effect of allowing other nations to decide what is—and what is not—contraband at U.S. borders.

It is our view that this provision does not provide an incentive for other nations to preserve their wildlife, as was promoted by the bill's authors. We recognize that some nations have responsible wildlife conservation programs, and would support consulting with those nations on listing and import/export decisions. However, we must oppose a wholesale change in the law requiring the Secretary to grant import privileges to nations which may not have adequate conservation programs. Under these circumstances, demands for sport hunting trophies and other market demands from wealthy American consumers could prove disastrous for a number of species native to developing nations.

In addition, we wish to clarify a misconception which was used to promote this provision at the Committee markup session. An amendment was added which limited the lifting of the import bans to nations which are parties to CITES. This limitation will have no impact on demands for sport hunting trophies, since CITES applies to commercial trade in wildlife products.

RELATIONSHIP TO OTHER LAWS PROTECTING WILDLIFE

Title IX contains a new section added during the markup session which eliminates all prohibitions on taking wildlife not listed under the ESA if the purpose of the taking is to conserve a listed species. On its face, this section may appear to be smart management policy. However, an examination of the facts reveals that the situation is not as clear cut as the Committee would have it.

Under this provision, the protection afforded California sea lions under the Marine Mammal Protection Act (MMPA) would be eliminated for the purpose of conserving salmon. No guidance is provided by this section on a process under which the prohibition on

taking would be lifted, nor is a definition offered for the term "for the purpose of conserving". During the reauthorization of the MMPA in the 103rd Congress, a detailed, structured process was enacted into law which achieves the purpose of this section. That process was negotiated over a period of months with all the stakeholders involved—including the states of the Pacific Northwest—and resulting action to protect salmon is currently underway. The language of the legislation adopted by the Committee overthrows the negotiated language of the MMPA, and effectively, establishes an open season on California sea lions in Washington, Oregon, and California.

The Committee also did not consider the impacts of this section on other wildlife protection laws which have extensive nationwide support. Protection afforded to golden eagles under the Bald and Golden Eagle Protection Act, and to other raptors or waterfowl under the Migratory Bird Treaty Act could be eliminated by this section for the purpose of conserving any listed species.

SUMMARY

We have focused here on some of the most egregious provisions of the bill as reported by the Committee. However, we wish to be clear in our views that this legislation generally constitutes such a drastic weakening of the Endangered Species Act that it must be viewed as a repeal of the existing law.

GEORGE MILLER.
MAURICE HINCHEY.
FRANK PALLONE, JR.
NEIL ABERCROMBIE.
SAM FARR.
GERRY STUDDS.
SAM GEJDENSON.
BILL RICHARDSON.
TIM JOHNSON.
DALE E. KILDEE.
PAT WILLIAMS.
BRUCE F. VENTO.
PETER DEFAZIO.
NICK RAHALL.

## SUPPLEMENTAL VIEWS OF HON. HELEN CHENOWETH

The Endangered Species Act (ESA) has long been in need of reform. The Act has merely lived on through yearly appropriations, and has not been reauthorized since it sunset in 1992. The Endangered Species Act has too large of an impact on humans and wildlife to go unauthorized year after year.

I doubt that the original authors of the Endangered Species Act envisioned a law that protects snails the size of a #1 buckshot, while having the effect of locking up public and private lands from any type of resource use. The federal government has interpreted the current ESA to mean much more than preservation of endangered species that are in the national interest to save. Whole towns have gone into an economic tailspin as a result of setting aside land for species, including many listed species which lack scientific evidence that they are endangered. This is a devastating trade-off that must stop.

As a member of the Resources Committee Endangered Species Act Task Force, I have spent time listening to people from all over the country who simply want to know that their private property rights will be upheld, in accordance with the 5th Amendment to the Constitution, ". . . nor shall private property be taken for public use without just compensation." These are people from all walks of life who love the land and wildlife, and given incentives to participate in conservation, have much to contribute to management of wildlife. However, because of the punitive nature of the Act, landowners feel compelled to keep their land free of endangered species. Landowners who have tried to accommodate species on their land have found themselves crosswise with federal regulators, facing punishment and fines. Simply put, the Act's been bad for species and bad for humans.

Throughout the process of hearings, discussions, and mark-up of H.R. 2275, I've raised concerns that legislative language be strong and clear enough to ensure that federal agencies do not thwart the reforms intended in the bill. Government agencies are well-funded and well-staffed and have been able to outspend private individuals and small businesses who are not nearly as equipped to battle endangered species designations. The tug-of-war between people and their government does nothing to actively protect or recover species, and in fact, creates more adversity towards government and the Act itself.

One of the more onerous aspects of the current Act and an example of how agency interpretation has run amok, is the manner in which an opinion issued by the Secretary under Section 7 has evolved into a document that has the effect of controlling millions of acres of land and millions of acre feet of water. Commonly referred to as the biological opinion, agencies have used a broad interpretation of an "opinion" to usurp state and federal laws, includ-

ing the National Environmental Policy Act (NEPA). In Idaho, a biological opinion was issued by the National Marine Fisheries Service which required major changes to the operation of the hydropower, transportation, and irrigation systems on the Snake and Columbia Rivers, which cost taxpayers half a billion dollars annually. This opinion was called "biologically sound and affordable" yet there's no scientific data to support its recommendations.

Another section of the current Act, section 10J, allows for reintroduction of species to help boost distinct populations. Unfortunately, the effect of this provision has been a policy to reintroduce predators into areas that have enormous effects on the culture and economies of many westerners. Despite over a decade of opposition to the reintroduction of the gray wolf by Idaho residents and the legislature, the Fish and Wildlife Service persisted and reintroduced wolves in 1995 and 1996. In doing so, they violated state law by placing reintroduced species in the state without the consent of the state, and violated the ESA by failing to consult properly with the state. Despite widespread problems with the reintroduction at a high cost to the taxpayer, the Fish and Wildlife Service, in conjunction with other agencies, intends to reintroduce the most violent predator of all to our state, the grizzly bear.

It is for these reasons that I introduced an amendment, which was adopted, that would force the Secretary to comply with any laws passed by the legislature that oppose the release of reintroduced species. This amendment addresses the top-down mentality of the federal government that bureaucrats in Washington, D.C. know what's best for the citizens of each and every state. Most states have a long history of dealing with wildlife and are far better equipped to determine how it shall be managed within state boundaries. And most importantly, when the views of the state have been communicated through the legislature and through public comment, the federal government should listen and comply.

Currently, the Act's interpretation is completely subjective on the part of the agencies, and as mentioned previously, they have used this leeway to their great advantage. As long as there is a regulatory structure in place, there are ways for a bureaucracy to grow out of control. It is my fervent hope that federal agency regulatory authority under H.R. 2275 will be kept in check.

I applaud my colleagues, Chairman Young and Congressman Pombo, for putting together legislation that makes some very important revisions to the existing Endangered Species Act. This bill takes steps towards dismantling certain regulatory burdens that have been put upon both man, government and endangered species. It's clear to me however, that we will only succeed in protecting species and people's livelihoods when we move away from a regulatory structure and towards a non-punitive incentive-based system. I am not alone in my support for such an approach; it has been supported by environmentalists, federal officials, private property advocates, and members of Congress. Only by this type of cooperation will we be able to look upon the ESA positively without the rancor that currently divides us. If we take away the fear asso-

ciated with protecting species today, landowners will become willing partners in helping wildlife and communities.

HELEN CHENOWETH.

APPENDIX

HOUSE OF REPRESENTATIVES,
COMMITTEE ON AGRICULTURE,
*Washington, DC, January 23, 1996.*

Hon. DON YOUNG,
*Chairman, Committee on Resources,*
*1324 Longworth HOB, Washington, DC.*

DEAR MR. CHAIRMAN: On behalf of the House Committee on Agriculture, I have reviewed H.R. 2275, the Endangered Species Conservation Act of 1995, as acted on by your Committee. As you are aware, the Committee on Agriculture received an additional referral of this legislation upon the introduction of H.R. 2275. This referral was consistent with the memorandum of understanding regarding the jurisdictional claim of this Committee as contained in our correspondence dated September 6, 1995.

After reviewing the legislation as marked up by your Committee in its business meeting and examining the hearing record compiled by the Committee on Resources, I am convinced that your Committee has produced legislation that is in the best interests of agricultural producers, while maintaining and clarifying the principles contained in the Endangered Species Act. Therefore, the Committee on Agriculture does not intend to undertake further consideration of H.R. 2275. However, the Committee on Agriculture reserves the right to an appointment of conferees from this Committee should the bill go to a House-Senate conference.

Your Committee is to be commended for the excellent work performed in considering this legislation, and I look forward to working with you to pass this legislation out of the House of Representatives.

Sincerely,

PAT ROBERTS, *Chairman.*

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HOUSE OF REPRESENTATIVES,
COMMITTEE ON WAY AND MEANS,
*Washington, DC, September 5, 1996.*

Hon. DON YOUNG,
*Chairman, Committee on Resources,*
*1324 Longworth House Office Building, Washington, DC.*

DEAR MR. CHAIRMAN: This is to confirm my understanding of our agreement concerning further consideration of H.R. 2275, the Endangered Species Conservation and Management Act of 1995, which was referred to the Committee on Resources.

Section 207(c) of H.R. 2275, as reported by the Committee on Resources, contains a provision of jurisdictional interest to the Committee on Ways and Means. Specifically, section 207(c) would add subsection (h) to section 9 of the Endangered Species Act of 1973. Subsection (h)(1) provides that the prohibition on importation con-

tained in section 9 would not apply to a specimen of a threatened species taken for an inherently limited use in accordance with the laws of a foreign nation which is a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora and which is accompanied by an export permit.

In order to expedite the consideration of this important legislation, I do not believe that a markup of H.R. 2275 by the Committee on Ways and Means will be necessary. However, this is being done only with the understanding that this does not in any way prejudice the Committee's jurisdictional prerogatives on this measure or any similar legislation, and it should not be considered as precedent for consideration of matters of jurisdictional interest to the Committee on Ways and Means in the future. I reserve the right to request that the Committee on Ways and Means be named as conferees on any provisions of jurisdictional interest should the Senate amend those portions of the bill during its consideration. I would very much appreciate your written assurances to this effect and would ask that a copy of our exchange of letters on this matter be placed in the Resources Committee's report on H.R. 2275.

Thank you for your consideration on this matter.

With best personal regards,

BILL ARCHER, *Chairman.*

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HOUSE OF REPRESENTATIVES,
COMMITTEE ON RESOURCES,
*Washington, DC, September 6, 1996.*

Hon. BILL ARCHER,
*Chairman, Committee on Ways and Means,*
*1102 Longworth HOB, Washington, DC.*

DEAR MR. CHAIRMAN: Thank you for your letter regarding section 207(c) of H.R. 2275, the Endangered Species Conservation and Management Act of 1995. I concur that the Committee on Ways and Means has a jurisdictional interest in this provision and appreciate your willingness to forego a markup of the bill at this time.

At this late date in the session, I do not anticipate any further action by the House of Representatives on H.R. 2275 during the 104th Congress. However, if such a provision is included in any future legislation, I would support your request to be named to any conference committee convened on that legislation.

It has been a pleasure working with you and your staff this Congress and I look forward to continuing our relationship in the 105th Congress.

Sincerely,

DON YOUNG, *Chairman.*

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