

THE CODE OF THE LAWS
OF THE
UNITED STATES OF AMERICA
TITLE 16 — CONSERVATION

CHAPTER 35. ENDANGERED SPECIES

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§ 1531. Congressional findings and declaration of purposes and policy

(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;
- (2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;
- (3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;
- (4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to—
 - (A) migratory bird treaties with Canada and Mexico;
 - (B) the Migratory and Endangered Bird Treaty with Japan;
 - (C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;
 - (D) the International Convention for the Northwest Atlantic Fisheries;
 - (E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;
 - (F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and
 - (G) other international agreements; 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.

(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.

(Dec. 28, 1973, P. L. 93-205, § 2, 87 Stat. 884; Dec. 28, 1979, P. L. 96-159, § 1, 93 Stat. 1225; Oct. 13, 1982, P. L. 97-304, § 9(a), 96 Stat. 1426; Oct. 7, 1988, P. L. 100-478, Title I, § 1013(a), 102 Stat. 2315.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This Act", referred to in this section, is Act Dec. 28, 1973, P. L. 93-205, 87 Stat. 884, which appears generally as 16 USCS §§ 1531 et seq. For full classification of this Act, consult USCS Tables volumes.

Effective date of section:

Act Dec. 28, 1973, P. L. 93-205, § 16, 87 Stat. 903, provided: "This Act [16 USCS §§ 1531 et seq., generally; for full classification of this Act, consult USCS Tables volumes] shall take effect on the date of its enactment [enacted Dec. 28, 1973]."

Amendments:

1979. Act Dec. 28, 1979, in subsec. (a)(5), substituted "fish, wildlife, and plants" for "fish and wildlife".

1982. Act Oct. 13, 1982, in subsec. (c), designated existing provisions as para. (1), and added para. (2).

1988. Act Oct. 7, 1988, in subsec. (a)(4)(G), substituted "; and" for the period.

Short title:

Act Dec. 28, 1973, P. L. 93-205, § 1, 87 Stat. 884, provided: "This Act may be cited as the 'Endangered Species Act of 1973'." For full classification of such Act, consult USCS Tables volumes.

Act Nov. 10, 1978, P. L. 95-632, § 1, 92 Stat. 3751, provided: "This Act may be cited as the 'Endangered Species Act Amendments of 1978'." For full classification of such Act, consult USCS Tables volumes.

Act Oct. 13, 1982, P. L. 97-304, § 1, 96 Stat. 1411, provided: "This Act may be cited as the 'Endangered Species Act Amendments of 1982'." For full classification of such Act, consult USCS Tables volumes.

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Organization which utilizes refuge system for recreational purposes, including observation of wildlife protected by refuges, which alleges that allowing hunting on wildlife refuges forces members to witness animal corpses and environmental degradation, in addition to depleting supply of animals and birds that refuge visitors seek to view, has standing to challenge actions by United States Fish and Wildlife Service allowing hunting on some of national wildlife refuges in alleged violation of National Environmental Policy Act of 1969 (42 USCS §§ 4331 et seq.); Endangered Species Act of 1973 (16 USCS §§ 1531 et seq.); Refuge Recreation Act of 1962 (16 USCS §§ 460k et seq.); and National Wildlife Refuge System Administrative Procedure Act (16 USCS §§ 668dd). *Humane Soc'y of United States v Hodel* (1988, App DC) 268 US App DC 165, 840 F2d 45, 18 ELR 20636.

Summary judgment granted to government officials in suit brought against them by businesses and consumers of hydroelectric power under Endangered Species Act (16 USCS §§ 1531 et seq.), where claims alleged that government's plan to encourage growth in salmon population by increasing flow over dam would have harmful effect on supply and price of hydroelectric power, because, although power consumers' stated economic loss was sufficient to establish injury, the injury was remote and failed to meet causation and redressability requirements for standing to sue. *Pacific Northwest Generating Coop. v Brown* (1993, DC Or) 822 F Supp 1479, 37 Evt Rep Cas 1110, 23 ELR 21404, *affd* (1994, CA9 Or) 25 F3d 1443, 94 CDOS 4037, 94 Daily Journal DAR 7573, 39 Evt Rep Cas 1615, 24 ELR 21111, *amd* (1994, CA9 Or) 38 F3d 1058, 94 CDOS 7394, 94 Daily Journal DAR 13563.

9. Miscellaneous

Final environmental impact statement issued in

§ 1532. Definitions

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 exhibition of commodities by 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,

connection with proposed oil and gas lease sales covering 25 million acres of outer continental shelf located off coast of Massachusetts is inadequate since statement (1) fails to describe any alternatives that Secretary could have selected for lease sale date, (2) fails to present any significantly varied alternatives for sale from which Secretary could choose, and (3) attempts to cover area too large to be adequately site-specific; both Secretarial Issue Decision and Environmental Assessment fail to rehabilitate environmental impact statement, since both documents fail to provide kind of accurate, detailed information Secretary needs to balance needs of environment and oil industry. *Massachusetts v Clark* (1984, DC Mass) 594 F Supp 1373, 21 Evt Rep Cas 1673, 15 ELR 20132.

Court-ordered deadline for Fish and Wildlife Service (FWS) to provide its final designation of critical habitat is not vacated upon government's motion, where rider to public law provided that none of remaining funds for year may be used to make final determination regarding critical habitat, but where rider also provides that where Endangered Species Act (ESA) (16 USCS §§ 1531 et seq.) has been interpreted in any court order to require making determination respecting species or habitats by certain date, ESA must not be applied to require that determination be made by that date if making of determination is made impracticable by rescission made by preceding provision, because lawsuit at issue is clearly action which requires, by court order, making of determination respecting habitat by certain date and because FWS admits that final designation is not impracticable as matter of fact. *Silver v Babbitt* (1995, DC Ariz) 924 F Supp 972, 42 Evt Rep Cas 1016.

habitat acquisition, and a given ecosystem.

(4) The term "Endangered Species" means—

(5)(A) The term

means—

- (i) the species, at the time of the listing, is in danger of extinction throughout all or a significant portion of its range;
- (ii) special measures on the part of the Department of the Interior are required to prevent the extinction of such species.

(B) Critical habitat means any area which is essential to the conservation of such species.

(C) Excepted species means any species which is not a threatened species.

(6) The term "species" means any subspecies of a plant or animal species.

(7) The term "threatened species" means any species which is likely to become an endangered species within a reasonable future.

(8) The term "listing" means the process of determining whether a species is an endangered species or a threatened species.

(9) The term "transaction" means—

- (A) between a State and a foreign country;
- (B) between a State and a State;
- (C) between a State and a foreign country;
- (D) between a State and a State.

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 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.

(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 [15 USCS § 1533], 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 [15 USCS § 1533], 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.

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

(8) 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) 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) 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.

(11) [Repealed]

(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 [16 USCS § 1536], any person whose application to such agency for a permit or license has been denied primarily because of the application of section 7(a) [16 USCS § 1536(a)] to such agency action.

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

(15) 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 [5 USCS § 903 note]; 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 of vertebrate fish or wildlife which interbreeds when mature.

(17) 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) 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.

(20) 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) The term "United States", when used in a geographical context, includes all States.

(Dec. 28, 1973, P. L. 93-205, § 3, 87 Stat. 885; July 12, 1976, P. L. 94-359, § 5, 90 Stat. 913; Nov. 10, 1978, P. L. 95-632, § 2, 92 Stat. 3751; Dec. 28, 1979, P. L. 96-159, § 2, 93 Stat. 1225; Oct. 13, 1982, P. L. 97-304, § 4(b), 96 Stat. 1420; Oct. 7, 1988, P. L. 100-478, Title I, § 1001, 102 Stat. 2306.)

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ENDANGERED SPECIES

Water district is enjoined from pumping water from river for irrigation during winter-run chinook salmon's peak downstream migration, where district's pumping has resulted in 97 percent reduction in fish's population, causing fish to be listed as endangered species under 16 USCS § 1533(a)(1), because pumping constitutes a taking of fish pursuant listed under 16 USCS § 1532(19) as force of district's pumps causes fish to be impinged on fish screen, entrained through the screen, or fall prey to predation by other fish in district's diversion channel. *United States v Glenn-Colusa Irrigation Dist.* (1992, ED Cal) 788 F Supp 1126, 22 ELR 20877.

5. —“Harm”

Secretary does not exceed authority under Endangered Species Act in promulgating 50 CFR § 17.3, which provides that “harm” in the definition of “take” (16 USCS § 1532(19)) means an act which actually kills or injures wildlife and may include significant habitat modification or degradation. *Babbitt v Sweet Home Chapter of Communities for a Great Or.* (1995) 515 US 687, 132 L Ed 2d 597, 115 S Ct 2407, 95 CDOS 4966, 95 Daily Journal DAR 8566, 40 Env't Rep Cas 1897, 25 ELR 21194, 9 FLW Fed S 291, subsequent app (1995, App DC) 1995 US App LEXIS 31484 and (criticized in *Loggerhead Turtle v County Council of Volusia County* (1998, CA11 Fla) 148 F3d 1231, 47 Env't Rep Cas 1014, 41 FR Serv 3d 563, 28 ELR 21546, 11 FLW Fed C 1659).

Habitat destruction that could drive endangered species to extinction constitutes “harm” and therefore “taking” under Endangered Species Act (16 USCS §§ 1531–1543), since Secretary's construction of statute, which is entitled to deference if it is reasonable and not in conflict with Congressional intent, defines “harm” as including not only physical injury, but also injury caused by impairment of essential behavior patterns via habitat modifications that can have significant and permanent effects on listed species, and such construction is consistent with Congressional intent, including intent that term “take” be defined in broadest possible manner; accordingly, district court's interpretation of “harm” as including habitat destruction that could result in

16 USCS § 1533

extinction, and findings to that effect, are sufficient to sustain order for removal of sheep that destroyed woodland habitat upon which endangered species of bird depends. *Palila v Hawaii Dep't of Land & Natural Resources* (1988, CA9 Hawaii) 852 F2d 1106, 18 ELR 21199.

Under 50 CFR § 17.3, “harm,” as used in Endangered Species Act of 1973 (16 USCS §§ 1532(19) and 1538), includes significant environmental modification or degradation, which actually injures or kills wildlife; thus, where act actually injures or kills wildlife by significantly impairing essential breeding patterns, including breeding, feeding, or sheltering, it constitutes violation of 16 USCS § 1538(a)(1)(B). *Palila v Hawaii Dep't of Land & Natural Resources* (1985, DC Hawaii) 631 F Supp 787, 16 ELR 20669.

Environmental protection organization and marbled murrelet are granted injunctive relief against lumber company permanently enjoining implementation of timber harvest plan, where under plan, marbled murrelets will be killed or injured by logging operations or through significant impairment of their essential behavioral patterns, because plaintiffs established that plan would “harm” marbled murrelet. *Marbled Murrelet v Pacific Lumber Co.* (1995, ND Cal) 880 F Supp 1343, 41 Env't Rep Cas 1135, 25 ELR 21301, aff'd (1996, CA9 Cal) 83 F3d 1060, 96 CDOS 3205, 96 Daily Journal DAR 5299, 42 Env't Rep Cas 1661, 44 Fed Rules Evid Serv 349, 26 ELR 20995, amd, reh, en banc, den, motion den (1996, CA9 Cal) 96 CDOS 4726, 96 Daily Journal DAR 7536 and cert den (1997) 519 US 1108, 136 L Ed 2d 831, 117 S Ct 942, 44 Env't Rep Cas 1128.

6. Other terms

Fish and Wildlife Service's policy for identification of “distinct population segments” (DPSs) is arbitrary, capricious, and abuse of discretion, where policy means there can only be one subspecies in DPSs, because that policy limits DPSs in manner which was not contemplated by Congress in enacting Endangered Species Act (16 USCS §§ 1531 et seq.), and is not supported by information in administrative record. *Southwest Ctr. for Biological Diversity v Babbitt* (1997, DC Ariz) 980 F Supp 1080, 45 Env't Rep Cas 2015.

§ 1533. 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 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 [5 USCS § 903 note]—
- (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

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(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 outweigh 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 [5 USCS § 553(e)], 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 [5 USCS § 553(e)], to revise a critical habitat designation, 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.
- (4) Except as provided in paragraphs (5) and (6) of this subsection, the provisions of section 553 of title 5, United States Code [5 USCS § 553] (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;

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(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.

(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 [5 USCS § 553], 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 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.

(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 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.

(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 spe-

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cies contained therein by scientific and common name or names, if any, specify with respect to each such species over what portion of its range it is endangered or threatened, and specify any critical habitat within such range. The Secretary shall from time to time revise each list published under the authority of this subsection to reflect recent determinations, 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 subsections (a) and (b).

(d) Protective regulations. Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1) [16 USCS § 1538(a)(1)], in the case of fish or wildlife, or section 9(a)(2) [16 USCS § 1538(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 [16 USCS § 1535(c)] 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 [this section] 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) Recovery plans. (1) 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 developing 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 [5 USCS Appx.].

(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) 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.

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(h) Agency guidelines; publication in Federal Register; scope; proposals and amendments: notice and opportunity for comments. 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) a ranking system to assist in the identification of species that should receive priority review under subsection (a)(1) of this 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.

(i) 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 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.

(Dec. 28, 1973, P. L. 93-205, § 4, 87 Stat. 886; July 12, 1976, P. L. 94-359, § 1, 90 Stat. 911; Nov. 10, 1978, P. L. 95-632, §§ 11, 13, 92 Stat. 3764, 3766; Dec. 28, 1979, P. L. 96-159, § 3, 93 Stat. 1225; Oct. 13, 1982, P. L. 97-304, § 2(a), 96 Stat. 1411; Oct. 7, 1988, P. L. 100-478, Title I, §§ 1002-1004, 102 Stat. 2306, 2307.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

“This Act” and “the Act”, referred to in this section, is Act Dec. 28, 1973, P. L. 93-205, 87 Stat. 884, which appears generally as 16 USCS §§ 1531 et seq. For full classification of this Act, consult USCS Tables volumes.

With respect to the Committee on Merchant Marine and Fisheries of the House of Representatives, referred to in this section, § 1(b)(3) of Act June 3, 1995, P. L. 104-14, which appears as a note preceding 2 USCS § 21, provides that any reference to such Committee in any provision of law enacted before January 4, 1995, shall be treated as referring to (A) the Committee on Agriculture of the House of Representatives, in the case of a provision of law relating to inspection of seafood or seafood products, (B) the Committee on National Security of the House of Representatives, in the case of a provision of law relating to interoceanic canals, the Merchant Marine Academy and State Maritime Academies, or national security

aspects of merchant marine, (C) the Committee on Resources of the House of Representatives, in the case of a provision of law relating to fisheries, wildlife, international fishing agreements, marine affairs (including coastal zone management) except for measures relating to oil and other pollution of navigable waters, or oceanography, (D) the Committee on Science of the House of Representatives, in the case of a provision of law relating to marine research, and (E) the Committee on Transportation and Infrastructure of the House of Representatives, in the case of a provision of law relating to a matter other than a matter described in any of subparagraphs (A) through (D).

Effective date of section:

This section is effective on the date of its enactment on Dec. 28, 1973, as provided by Act Dec. 28, 1973, P. L. 93-205, § 16, 87 Stat. 903, which appears as 16 USCS § 1531 note.

Amendments:

1976. Act July 12, 1976, in subsec. (f)(2)(B)(ii), substituted "subsection (b)(1)(A)" for "subsection (b)(A), (B), and (C)".

1978. Act Nov. 10, 1978, in subsec. (a)(1), added "At the time any such regulation is proposed, the Secretary shall also by regulation, to the maximum extent prudent, specify any habitat of such species which is then considered to be critical habitat. The requirement of the preceding sentence shall not apply with respect to any species which was listed prior to enactment of the Endangered Species Act Amendments of 1978."; in subsec. (b), added para. (4); in subsec. (c), in para. (1), deleted "and shall" following "or names, if any," and inserted ", and specify any critical habitat within such range", in para. (2), substituted "within 90 days of the receipt of" for "upon", inserted "and publish in the Federal Register", "the statutes of" and "Such review and finding shall be made and published prior to the initiation of any procedures under subsection (b)(1).", and added para. (4); in subsec. (f) in para. (2), in subpara. (A), substituted "Except as provided in subparagraph (B), in" for "In", redesignated subpara. (B) as subpara. (C), and added a new subpara. (B), in subpara. (C), as so redesignated, inserted "or (B)", and added paras. (4) and (5); and added subsec. (g).

1979. Act Dec. 28, 1979, in subsec. (b)(1), inserted "after conducting a review of the status of the species"; and in subsec. (f)(2)(B), substituted cl. (i) for one which read:

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

"(I) in the Federal Register, and

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

Such Act further, in subsec. (f)(2), in subpara. (B)(iv)(II), inserted "within 15 days after the date on which the public meeting is conducted," in subpara. (C), inserted ", subsection (b)(4) of this section," in cl. (ii), substituted "fish or wildlife or plants" for "fish or wildlife", "fish, wildlife, and plants," for "fish and wildlife," "240-day" for "120-day" wherever appearing, and inserted "If at any time after issuing an emergency regulation the Secretary determines, on the basis of the best scien-

tific and commercial data available to him, that substantial evidence does not exist to warrant such regulation, he shall withdraw it.”; and added subsec. (h).

1982. Act Oct. 13, 1982 (effective as provided by § 2(b) of such Act, which appears as a note to this section), in subsec. (a), in para. (1), in the introductory matter, inserted “promulgated in accordance with subsection (b)”, redesignated subparas. (1) through (5) as subparas. (A) through (E), respectively, in subpara. (B), as so redesignated, substituted “recreational” for “sporting”, deleted “At the time any such regulation is proposed, the Secretary shall also by regulation, to the maximum extent prudent, specify any habitat of such species which is then considered to be critical habitat. The requirement of the preceding sentence shall not apply with respect to any species which was listed prior to enactment of the Endangered Species Act Amendments of 1978.” following subpara. (E), as so redesignated, and added para. (3); and substituted subsec. (b) for one which read:

“(b)(1) The Secretary shall make determinations required by subsection (a) of this section on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after consultation, as appropriate, with the affected States, interested persons and organizations, other interested Federal agencies, and, in cooperation with the Secretary of State, with the country or countries in which the species concerned is normally found or whose citizens harvest such species on the high seas; except that in any case in which such determinations involve resident species of fish or wildlife, the Secretary of the Interior may not add such species to, or remove such species from, any list published pursuant to subsection (c) of this section, unless the Secretary has first—

“(A) published notice in the Federal Register and notified the Governor of each State within which such species is then known to occur that such action is contemplated;

“(B) allowed each such State 90 days after notification to submit its comments and recommendations, except to the extent that such period may be shortened by agreement between the Secretary and the Governor or Governors concerned; and

“(C) published in the Federal Register a summary of all comments and recommendations received by him which relate to such proposed action.

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

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

“(4) In determining the critical habitat of any endangered or threatened species, the Secretary shall consider the economic impact, and any other

relevant impacts, of specifying any particular area as critical habitat, and he may exclude any such area from the critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat, 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.”.

Such Act further, in subsec. (c), in para. (1), substituted “The Secretary shall from time to time revise each list published under the authority of this subsection to reflect recent determinations, designations, and revisions made in accordance with subsections (a) and (b).” for “, and from time to time he may by regulation revise,”, and deleted paras. (2) and (3) which read:

“(2) The Secretary shall, within 90 days of the receipt of the petition of an interested person under subsection 553(e) of title 5, United States Code, conduct and publish in the Federal Register a review of the status of any listed or unlisted species proposed to be removed from or added to either of the lists published pursuant to paragraph (1) of this subsection, but only if he makes and publishes a finding that such person has presented substantial evidence which in his judgment warrants such a review. Such review and finding shall be made and published prior to the initiation of any procedures under subsection (b)(1).

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

Such Act further, in subsec. (c), redesignated para. (4) as para. (2); in subsec. (d), substituted “section 6(c)” for “section 6(a)”; and deleted subsec. (f) which read:

“(f)(1) Except as provided in paragraphs (2) and (3) of this subsection and subsection (b) of this section, the provisions of section 553 of title 5, United States Code (relating to rulemaking procedures), shall apply to any regulation promulgated to carry out the purposes of this Act.

“(2)(A) Except as provided in subparagraph (B), in the case of any regulation proposed by the Secretary to carry out the purposes of this Act—

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

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

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

“(i) not less than 60 days before the effective date of the regulation, shall publish—

“(I) a general notice and the complete text of the proposed regulation in the Federal Register, and

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

“(ii) shall offer for publication in appropriate scientific journals the substance of the Federal Register notice referred to in clause (i)(I);

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

“(iv) shall—

“(I) if the proposed regulation does not specify any critical habitat, promptly hold a public meeting on the proposed regulation within or adjacent to the area in which the endangered or threatened species is located, if request therefor is filed with the Secretary by any person within 45 days after the date of publication of general notice under clause (i)(I), and

“(II) if the proposed regulation specifies any critical habitat, promptly hold a public meeting on the proposed regulation within the area in which such habitat is located in each State, and, if requested within 15 days after the date on which the public meeting is conducted, hold a public hearing in each such State.

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

“(C) Neither subparagraph (A) or (B) of this paragraph, subsection (b)(4) of this section, nor section 553 of title 5, United States Code, shall apply in the case of any of the following regulations and any such regulations shall, at the discretion of the Secretary, take effect immediately upon publication of the regulation in the Federal Register:

“(i) Any regulation appropriate to carry out the purposes of this

Act which was originally promulgated to carry out the Endangered Species Conservation Act of 1969.

“(ii) Any regulation (including any regulation implementing section 6(g)(2)(B)(ii) of this Act) issued by the Secretary in regard to any emergency posing a significant risk to the wellbeing of any species of fish or wildlife or plants, but only if (I) at the time of publication of the regulation in the Federal Register the Secretary publishes therein detailed reasons why such regulation is necessary, and (II) in the case such regulation applies to resident species of fish, wildlife, and plants, the requirements of subsection (b)(1)(A) of this section have been complied with. Any regulation promulgated under the authority of this clause (ii) shall cease to have force and effect at the close of the 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 subparagraph are complied with. If at any time after issuing an emergency regulation the Secretary determines, on the basis of the best scientific and commercial data available to him, that substantial evidence does not exist to warrant such regulation, he shall withdraw it.

“(3) The publication in the Federal Register of any proposed or final regulation which is necessary or appropriate to carry out the purposes of this Act shall include a summary by the Secretary of the data on which such regulation is based and shall show the relationship of such data to such regulations.

“(4) Any proposed or final regulation which specifies any critical habitat of any endangered species or threatened species shall be based on the best scientific data available, and the publication in the Federal Register of any such regulation shall, to the maximum extent practicable, be accompanied by a brief description and evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify such habitat, or may be impacted by such designation.

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

Such Act further redesignated subsecs. (g) and (h) as subsecs. (f) and (g), respectively; in subsec. (f), as so redesignated, substituted “recovery plans (1) shall, to the maximum extent practicable, give priority to those

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endangered species or threatened species most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other developmental projects or other forms of economic activity, and (2)" for "recovery plans,"; in subsec. (g), as so redesignated, in para. (1), substituted "subsection (b)(3)" for "subsection (c)(2)", in para. (3), substituted "under subsection (a)(1) of this section" for "for listing", and, in para. (4), substituted "subsection (f)" for "subsection (g)"; and added subsec. (h).

1988. Act Oct. 7, 1988, in subsec. (b)(3)(C), added cl. (iii); in subsec. (e), in the introductory matter, substituted "regulation of commerce or taking," for "regulation,"; and substituted subsec. (f) for one which read: "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 developing and implementing recovery plans (1) shall, to the maximum extent practicable, give priority to those endangered species or threatened species most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other developmental projects or other forms of economic activity, and (2) 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."

Such Act further redesignated former subsecs. (g) and (h) as subsecs. (h) and (i), respectively; and added a new subsec. (g).

Other provisions:

Transitional provisions for Act Oct. 13, 1982. Act Oct. 13, 1982, P. L. 97-304, § 2(b), 96 Stat. 1416, provided:

"(b)(1) Any petition filed under section 4(c)(2) of the Endangered Species Act of 1973 [subsec. (c)(2) of this section] (as in effect on the day before the date of the enactment of this Act [enacted Oct. 13, 1982]) and any regulation proposed under section 4(f) of such Act of 1973 [subsec. (f) of this section] (as in effect on such day) that is pending on such date of enactment [enacted Oct. 13, 1982] shall be treated as having been filed or proposed on such date of enactment [enacted Oct. 13, 1982] under section 4(b) of such Act of 1973 [subsec. (b) of this section] (as amended by subsection (a) [§ 2(a) of Act Oct. 13, 1982, P.L. 97-304, 96 Stat. 1416, amending subsec. (b) of this section]); and the procedural requirements specified in such section 4(b) [subsec. (b) of this section] (as so amended) regarding such petition or proposed regulation shall be deemed to be complied with to the extent that like requirements under such section 4 [this section] (as in effect before the date of the enactment of this Act [enacted Oct. 13, 1982]) were complied with before such date of enactment [enacted Oct. 13, 1982].

"(2) Any regulation proposed after, or pending on, the date of the enactment of this Act [enacted Oct. 13, 1982] to designate critical habitat for a species that was determined before such date of enactment to be endangered or threatened shall be subject to the procedures set forth in section 4 of such Act of 1973 [this section] (as amended by subsection (a) [see the 1982 Amendments note to this section]) for regulations

proposing revisions to critical habitat instead of those for regulations proposing the designation of critical habitat.

“(3) Any list of endangered species or threatened species (as in effect under section 4(c) of such Act of 1973 [subsec. (c) of this section] on the day before the date of the enactment of this Act [enacted Oct. 13, 1982]) shall remain in effect unless and until determinations regarding species and designations and revisions of critical habitats that require changes to such list are made in accordance with subsection (b)(5) of such Act of 1973 [subsec. (b)(5) of this section] (as added by subsection (a) [see the 1982 Amendments note to this section]).

“(4) Section 4(a)(3)(A) of such Act of 1973 [subsec. (a)(3)(A) of this section] (as added by subsection (a) [see the 1982 Amendments note to this section]) shall not apply with respect to any species which was listed as an endangered species or a threatened species before November 10, 1978.”

CODE OF FEDERAL REGULATIONS

United States Fish and Wildlife Service, Department of the Interior—Endangered and threatened wildlife and plants, 50 CFR Part 17.

National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce—Designated critical habitat, 50 CFR Part 226.

CROSS REFERENCES

This section is referred to in 10 USCS § 7524; 16 USCS §§ 460k-1, 668dd, 670h, 715i, 715s, 1374, 1383b, 1387, 1402, 1532, 1534-1538, 1540, 4202.

RESEARCH GUIDE

Federal Procedure:

25 Fed Proc L Ed, Natural and Marine Resources §§ 56:2041, 2043.

Am Jur Proof of Facts:

35 Am Jur Proof of Facts 3d, Proof of Standing in Environmental Citizen Suits, p. 493.

Law Review Articles:

Rosenberry. The Effect of the Endangered Species Act on Housing Construction. 33 Hastings L J 551-582, January 1982.

Ruhl. Section 4 of the ESA—the cornerstone of species protection law. 8 Nat Resources & Env't 26, Summer 1993.

The exemption process under the Endangered Species Act: how the “god squad” works and why. 66 Notre Dame L Rev 825, 1991.

Arnold. Conserving habitats and building habitats: the emerging impact of the Endangered Species Act on land use development. 10 Stan Env'tl L J 1, 1991.

INTERPRETIVE NOTES AND DECISIONS

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| 1. Generally | 7. —Permission of hunting |
| 2. Constitutionality | 8. Practice and procedure |
| 3. Prerequisites to determination | 9. —Standing |
| 4. Particular determinations | 10. —Standard of review |
| 5. —Listing as threatened or endangered species | 11. Miscellaneous |
| 6. —Designation of critical habitat | |

1. Generally

16 USCS § 1533 with definition of threatened species; CA8 Minn 75:

Endangered species, USCS § 1533(c) procedures which species or th measures provi longer necessa § 1533(d), ESA ary authority 1 “any” threater this regulatory hibition agains forcement of showing that pr species to leve ingly, regulatic protected speci record fails to c enhance species only show that prohibited takin den has been s: rel. *Guste v Ve* ELR 21351.

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Given Cong and Wildlife S actions based o cies for which invoked, and w priorities, listin lines to priorit nently reasonab bitt (1998, CA. Cas 2108, 1998

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that inadequate funding has made designation impracticable. *Marbled Murrelet v Babbitt* (1996, WD Wash) 918 F Supp 318, 42 Env't Rep Cas 1647, 26 ELR 20990.

§ 1534. Land acquisition

(a) Implementation of conservation program; authorization of Secretary and Secretary of Agriculture. 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 [16 USCS § 1533]. 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 [16 USCS §§ 661 et seq.], and the Migratory Bird Conservation Act, as appropriate; and

(2) is authorized to acquire by purchase, donation, or otherwise, lands, waters, or interest therein, and such authority shall be in addition to any other land acquisition authority vested in him.

(b) Availability of funds for acquisition of lands, waters, etc. Funds made available pursuant to the Land and Water Conservation Fund Act of 1965, as amended [16 USCS §§ 4601-4 et seq.], may be used for the purpose of acquiring lands, waters, or interest therein under subsection (a) of this section. (Dec. 28, 1973, P. L. 93-205, § 5, 87 Stat. 889; Nov. 10, 1978, P. L. 95-632, § 12, 92 Stat. 3766.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

“The Fish and Wildlife Act of 1956, as amended”, referred to in this section, is Act Aug. 8, 1956, ch 1036, 70 Stat. 119, which appears generally as 16 USCS §§ 742a et seq. For full classification of this Act, consult USCS Table volumes.

“The Migratory Bird Conservation Act”, referred to in this section, is Act. Feb. 18, 1929, ch 257, 45 Stat. 1222, which appears generally as 16 USCS §§ 715 et seq. For full classification of this Act, consult USCS Tables volumes.

Effective date of section:

This section is effective on the date of its enactment on Dec. 28, 1973, as provided by Act Dec. 28, 1973, P. L. 93-205, § 16, 87 Stat. 903, which appears as 16 USCS § 1531 note.

Amendments:

1978. Act Nov. 10, 1978, in subsec. (a), substituted “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—” for “The Secretary of the Interior shall establish and implement a program to conserve (A) fish or wildlife which are listed as endangered species or threatened species pursuant to section 4 of this

16 USCS § 1534

CONSERVATION

Act; or (B) plants which are concluded in Appendices to the Convention. To carry out such program, he—”.

CROSS REFERENCES

This section is referred to in 16 USCS §§ 4601-9, 460iii-4.

RESEARCH GUIDE

Law Review Articles:

Rosenberry. The Effect of the Endangered Species Act on Housing Construction. 33 Hastings L J 551-582, January 1982.

Arnold. Conserving habitats and building habitats: the emerging impact of the Endangered Species Act on land use development. 10 Stan Envtl L J 1, 1991.

INTERPRETIVE NOTES AND DECISIONS

City cannot prevent United States from accepting donation of land from private individual for wildlife refuge by passing local resolution prohibiting such transfer except on its own terms, because Endangered Species Act (16 USCS §§ 1531 et seq.), under

which United States is accepting land, is program of national scope enacted to protect endangered wildlife, and purpose may not be frustrated by local ordinance. *Sierra Club v Marsh* (1988, SD Cal) 692 F Supp 1210, 19 ELR 20572.

§ 1535. Cooperation with States

(a) **Generally.** 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. 715) [16 USCS § 715s].

(c) **Cooperative agreements.** (1) In furtherance of the purposes of this Act, the Secretary is authorized to enter into a cooperative agreement in accordance with this section with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species. Within one hundred and twenty days after the Secretary receives a certified copy of such a proposed State program, he shall make a determination whether such program is in accordance with this Act. Unless he determines, pursuant to this 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 to conserve resident species of

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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 subparagraphs (C), (D), and (E) of this paragraph 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 shall not affect the applicability of prohibitions set forth in or authorized pursuant to section 4(d) or section 9(a)(1) [16 USCS §§ 1533(d), 1538(a)(1)] with respect to the taking of any resident endangered or threatened species.

(2) In furtherance of the purposes of this Act, the Secretary is authorized to enter into a cooperative agreement in accordance with this section with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species of plants. Within one hundred and twenty days after the Secretary receives a certified copy of such a proposed State program, he shall make a determination whether such program is in accordance with this Act. Unless he determines, pursuant to this paragraph, that the State program is not in accordance with this Act, he shall enter into a cooperative agreement with the State for the purpose of assisting in implementation of the State program. In order for a State program to be deemed an adequate and active program for the conservation of endangered species of plants and threatened species of plants, the Secretary must find, and annually thereafter reconfirm such finding, that under the State program—

(A) authority resides in the State agency to conserve resident species of plants determined by the State agency or the Secretary to be endangered or threatened;

(B) the State agency has established acceptable conservation programs, consistent with the purposes and policies of this Act, for all resident species of plants in the State which are deemed by the Secretary to be endangered or threatened, and has furnished a copy of such plan and program together with all pertinent details, information, and data requested to the Secretary;

(C) the State agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of plants; and

(D) provision is made for public participation in designating resident species of plants as endangered or threatened; or

that under the State program—

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

(ii) plans are included under which immediate attention will be given to those resident species of plants which are determined by the Secretary or the State agency to be endangered or threatened and which the Secretary and the State agency agree are most urgently in need of conservation programs; except that a cooperative agreement entered into with a State whose program is deemed adequate and active pursuant to clause (i) and this clause shall not affect the applicability of prohibitions set forth in or authorized pursuant to section 4(d) or section 9(a)(1) [16 USCS §§ 1533(d), 1538(a)(1)] with respect to the taking of any resident endangered or threatened species.

(d) Allocation of funds. (1) The Secretary is authorized to provide financial assistance to any State, through its respective State agency, which has entered into a cooperative agreement pursuant to subsection (c) of this section to assist in development of programs for the conservation of endangered and threatened species or to assist in monitoring the status of candidate species pursuant to subparagraph (C) of section 4(b)(3) [16 USCS § 1533(b)(3)(C)] and recovered species pursuant to section 4(g) [16 USCS § 1533(g)]. The Secretary shall allocate each annual appropriation made in accordance with the provisions of subsection (i) of this section to such States based on consideration of—

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

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

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

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

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

(F) 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

(G) the in State to a measures

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(G) 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.

So much of the annual appropriation made in accordance with provisions of subsection (i) of this section allocated for obligation to any State for any fiscal year as remains unobligated at the close thereof is authorized to be made available to that State until the close of the succeeding fiscal year. Any amount allocated to any State which is unobligated at the end of the period during which it is available for expenditure is authorized to be made available for expenditure by the Secretary in conducting programs under this section.

(2) Such cooperative agreements shall provide for (A) the actions to be taken by the Secretary and the States; (B) the benefits that are expected to be derived in connection with the conservation of endangered or threatened species; (C) the estimated cost of these actions; and (D) the share of such costs to be borne by the Federal Government and by the States; except that—

(i) the Federal share of such program costs shall not exceed 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 or threatened species, the conservation of which may be enhanced by cooperation of such States, enter jointly into an agreement with the Secretary.

The Secretary may, in his discretion, and under such rules and regulations as he may prescribe, advance funds to the State for financing the United States pro rata share agreed upon in the cooperative agreement. For the purposes of this section, the non-Federal share may, in the discretion of the Secretary, be in the form of money or real property, the value of which will be determined by the Secretary, whose decision shall be final.

(e) **Review of State programs.** Any action taken by the Secretary under this section shall be subject to his periodic review at no greater than annual intervals.

(f) **Conflicts between Federal and State laws.** Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species is void to the extent that it may effectively (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 but not less restrictive than the prohibitions so defined.

(g) **Transition.** (1) For purposes of this subsection, the term "establishment

period" means, with respect to any State, the period beginning on the date of enactment of this Act [enacted Dec. 28, 1973] and ending on whichever of the following dates first occurs: (A) the date of the close of the 120-day period following the adjournment of the first regular session of the legislature of such State which commences after such date of enactment [enacted Dec. 28, 1973], or (B) the date of the close of the 15-month period following such date of enactment [enacted Dec. 28, 1973].

(2) The prohibitions set forth in or authorized pursuant to sections 4(d) and 9(a)(1)(B) of this Act [16 USCS §§ 1533(d), 1538(a)(1)(B)] 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 [subsec (c) of this section] (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 [5 USCS § 553], or any other provision of this Act; but such prohibition shall expire 90 days after the date of its imposition unless the Secretary further extends such prohibition by publishing notice and a statement of justification of such extension.

(h) **Regulations.** The Secretary is authorized to promulgate such regulations as may be appropriate to carry out the provisions of this section relating to financial assistance to States.

(i) **Appropriations.** (1) To carry out the provisions of this section for fiscal years after September 30, 1988, there shall be deposited into a special fund known as the cooperative endangered species conservation fund, to be administered by the Secretary, an amount equal to 5 percent of the combined amounts covered each fiscal year into the Federal aid to wildlife restoration fund under section 3 of the Act of September 2, 1937 [16 USCS § 669b], and paid, transferred, or otherwise credited each fiscal year to the Sport Fishing Restoration Account established under 1016 of the Act of July 18, 1984.

(2) Amounts deposited into the special fund are authorized to be appropriated annually and allocated in accordance with subsection (d) of this section. (Dec. 28, 1973, P. L. 93-205, § 6, 87 Stat. 889; Dec. 19, 1977, P. L. 95-212, § 1, 91 Stat. 1493; Nov. 10, 1978, P. L. 95-632, § 10, 92 Stat. 3762; May 23, 1980, P. L. 96-246, 94 Stat 348; Oct. 13, 1982, P. L. 97-304, §§ 3, 8(b), 96 Stat. 1416, 1426; Oct. 7, 1988, P. L. 100-478, Title I, § 1005, 102 Stat. 2307.)

References

"This Act" 87 Stat. 889; classification "1016 of title 16, is § 1016 among other Restoration

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INTERPRETIVE NOTES AND DECISIONS

State statute which prohibits trade in elephant parts within state is preempted under 16 USCS § 1535(f) by 50 CFR § 17.40(e) which authorizes trade in African elephant products under special federal permits. *Man Hing Ivory & Imports, Inc. v Deukmejian* (1983, CA9 Cal) 702 F2d 760, 20 Env't Rep Cas 1988, 13 ELR 20477.

New York law which prohibits importation of skins of certain species on grounds that they are endangered is not invalid although it bans importation of skins of certain species which are not listed on endangered species list promulgated by Secretary of Interior; there is no inconsistency or conflict between New York statute and predecessor federal act. *Palladio, Inc. v Diamond* (1970, SD NY) 321 F Supp 630, 2 Env't Rep Cas 1069, aff'd (1971, CA2 NY) 440 F2d 1319, 2 Env't Rep Cas 1435, 1 ELR 20268, cert den (1971) 404 US 983, 30 L Ed 2d 367, 92 S Ct 446, 3 Env't Rep Cas 1436.

16 USCS § 1535 expressly permits states to continue to legislate and regulate with respect to importation, exportation, interstate or foreign commerce in nonindigenous species, subject only to limitation that states cannot relax requirements of federal law or contravene terms of federal permit or exemption. *H. J. Justin & Sons, Inc. v Brown* (1981, ED Cal) 519 F Supp 1383, 12 ELR 20179, aff'd in part and rev'd in part on other grounds (1983, CA9 Cal) 702 F2d 758, 20 Env't Rep Cas 1993, 13 ELR 20479, cert den (1983) 464 US 823, 78 L Ed 2d 98, 104 S Ct 91.

Complaint by federally licensed wild bird importers is dismissed in action arising out of state law prohibiting sale of wild birds not born in captivity, where importers contended federal wildlife importer licenses issued under 16 USCS § 1538 preempted state law under 16 USCS § 1535, because importers licenses were issued under 16 USCS § 1538 which does not give preemptive effect of § 1539; licenses only gave permission to engage in import business and were issued solely to track trade in protective species and therefore do not constitute permits or exceptions preempting restrictive state law. *Cresenzi Bird Importers, Inc. v New York* (1987, SD NY) 658 F Supp 1441, 17 ELR 20996, aff'd (1987, CA2 NY) 831 F2d 410, 18 ELR 20036.

Although state statutes may protect species which are not on endangered species list promulgated under predecessor federal act, there has been no showing that compliance with both federal and state laws is impossibility, nor that state law could not be enforced without impairing effectiveness of federal law, nor that wildlife conservation is matter exclusively within sphere of federal competence nor that Congress intended to preempt state laws. *A. E. Nettleton Co. v Diamond* (1970) 27 NY2d 182, 315 NYS2d 625, 264 NE2d 118, 44 ALR3d 994, reh den (1971) 28 NY2d 539, 319 NYS2d 440, 268 NE2d 122 and reh den (1971) 28 NY2d 583 and app dismd (1971) 401 US 969, 28 L Ed 2d 319, 91 S Ct 1201, 2 Env't Rep Cas 1910.

§ 1536. Interagency cooperation

(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 [16 USCS § 1533].

(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 ap-

plicant 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 [16 USCS § 1533] 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.

(B) Consultation under subsection (a)(3), and an opinion issued 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 ac-

tion if the Secretary and the Federal agency agree that such changes have been made or that such change has occurred without such consultation.

(4) If after consultation with the Secretary and the Federal agency it is determined that—

(A) the agency action will not likely to violate such subsection (a)(2),

(B) the taking of such species by the agency will not likely to result in the taking of such species,

(C) if an endangered species is involved, the Secretary shall, in the case of a permit or license applicant, consult with the Secretary and the Federal agency, if any,

(i) specifies

(ii) specifies the period of time for which the Secretary considers necessary to complete the consultation,

(iii) in the case of a permit or license applicant, the Secretary shall, in the case of a permit or license applicant, consult with the Secretary and the Federal agency, if any,

(iv) sets forth the period of time for which the Secretary considers necessary to complete the consultation,

(v) sets forth the period of time for which the Secretary considers necessary to complete the consultation,

(vi) sets forth the period of time for which the Secretary considers necessary to complete the consultation,

(c) **Biological assessment.**

(1) The Secretary shall, in the case of a permit or license applicant, consult with the Secretary and the Federal agency, if any,

(i) in the case of a permit or license applicant, consult with the Secretary and the Federal agency, if any,

(ii) in the case of a permit or license applicant, consult with the Secretary and the Federal agency, if any,

(iii) in the case of a permit or license applicant, consult with the Secretary and the Federal agency, if any,

(iv) in the case of a permit or license applicant, consult with the Secretary and the Federal agency, if any,

(v) in the case of a permit or license applicant, consult with the Secretary and the Federal agency, if any,

(vi) in the case of a permit or license applicant, consult with the Secretary and the Federal agency, if any,

(vii) in the case of a permit or license applicant, consult with the Secretary and the Federal agency, if any,

(viii) in the case of a permit or license applicant, consult with the Secretary and the Federal agency, if any,

tion 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), the Secretary concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(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 [16 USCS §§ 1361 et seq.]

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,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 [16 USCS §§ 1361 et seq.] with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

(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 [enacted Nov. 10, 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 is 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 entered 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) [42 USCS § 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) **Endangered Species Committee.** (1) 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 section for the action set forth in such application.

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

- (A) The Secretary of Agriculture.
- (B) The Secretary of the Army.
- (C) The Chairman of the Council of Economic Advisors.
- (D) The Administrator of the Environmental Protection 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 USCS § 5703].

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- (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 [5 USCS § 552a and note], 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) Promulgation of regulations; form and contents of exemption application.** Not later than 90 days after the date of enactment of the Endangered Species Act Amendments of 1978 [enacted Nov. 10, 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; report to 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—

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(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 [5 USCS §§ 701 et seq.].

(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 [5 USCS §§ 554, 555, 556], 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 is mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing—

(A) the availability of 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 or 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 autho-

rized 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) Grant of 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 requirements 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, transplanted, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of title 5 of the United States Code [5 USCS §§ 701 et seq.].

(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.

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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; violation of international treaty or other international obligation of United States. 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) Exemption for national security reasons. 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) Exemption decision not considered major Federal action; environmental impact statement. 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 order granting exemption; cost of mitigation and enhancement measures; report by applicant to Council on Environmental Quality.

(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 a report shall be submitted annually until all such mitigation

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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 requirement for citizen suits not applicable.** The 60-day notice requirement of section 11(g) of this Act [16 USCS § 1540(g)] 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 [16 USCS § 1532(13)], 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) [16 USCS §§ 1533(d), 1538(a)(1)(B), (C)], sections 101 and 102 of the Marine Mammal Protection Act of 1972 [16 USCS §§ 1361 et seq.], or any regulation promulgated to implement any such section—

(1) any action for which an exemption is granted under subsection (h) 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) 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 [42 USCS § 5171 or § 5172], 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.

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(Dec. 28, 1973, P. L. 93-205, § 7, 87 Stat. 892; Nov. 10, 1978, P. L. 95-632, § 3, 92 Stat. 3752; Dec. 28, 1979, P. L. 96-159, § 4, 93 Stat. 1226; Oct. 13, 1982, P. L. 97-304, §§ 4(a), 8(b), 96 Stat. 1417, 1426; Nov. 14, 1986, P. L. 99-659, Title IV, § 411(b), 100 Stat. 3741, 3742; Nov. 23, 1988, P. L. 100-707, Title I, § 109(g), 102 Stat. 4709.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

“This Act”, referred to in this section, is Act Dec. 28, 1973, P. L. 93-205, 87 Stat. 884, which appears generally as 16 USCS §§ 1531 et seq. For full classification of such Act, consult USCS Tables volumes.

The “Disaster Relief Act of 1974”, referred to in this section, is Act May 22, 1974, P. L. 93-288, 88 Stat. 143, which appears generally as 42 USCS §§ 5121 et seq. For full classification of such Act, consult USCS Tables volumes.

The “Disaster Relief and Emergency Assistance Act”, also known as the Robert T. Stafford Disaster Relief and Emergency Assistance Act, referred to in this section, is Act May 22, 1974, P. L. 93-288, 88 Stat. 143, which appears generally as 42 USCS §§ 5121 et seq. For full classification of such Act, consult USCS Tables volumes.

Effective date of section:

This section became effective on enactment, as provided by Act Dec. 28, 1973, P. L. 93-205, § 16, 87 Stat. 903, which appears as 16 USCS § 1531 note.

Amendments:

1978. Act Nov. 10, 1978, substituted this section for one which read: “The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.”

1979. Act Dec. 28, 1979, in subsec. (a), substituted “(a) Federal agency actions and consultations. (1)” for “(a) Consultation.”, deleted “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’) does not jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section.” following “section 4 of this

16 USCS § 1536, n 17

grounds, remanded (1985, CA9 Idaho) 753 F2d 754, 22 Env't Rep Cas 1608, 15 ELR 20225 (criticized in *Bennett v Plenert* (1993, DC Or) 1993 US Dist LEXIS 21199).

Challenge to extension of registration of pesticide/rodenticide strychnine will not be dismissed for failure to exhaust 7 USCS § 136d(b) administrative remedies, where environmental groups took part in prior administrative review that was settled and now sue under 5 USCS § 706 to require EPA to comply with Endangered Species Act (16 USCS §§ 1531 et seq.), Migratory Bird Treaty Act (16 USCS §§ 703 et seq.), and Bald Eagle Protection Act (16 USCS §§ 668 et seq.) regarding registration of strychnine, because 7 USCS § 136d(b) does not preclude independent review of registrations where independent jurisdictional basis for suit exists. *Defenders of Wildlife v Administrator, Environmental Protection Agency* (1988, DC Minn) 688 F Supp 1334, 18 ELR 20960, aff'd in part and rev'd in part (1989, CA8 Minn) 882 F2d 1294, 30 Env't Rep Cas 1460, 19 ELR 21440.

18. —Standing

Environmental groups lacked standing to challenge regulation interpreting 16 USCS § 1536 as not applying to foreign nations. *Lujan v Defenders of Wildlife* (1992) 504 US 555, 119 L Ed 2d 351, 112 S Ct 2130, 92 CDOS 4985, 92 Daily Journal DAR 7876, 92 Daily Journal DAR 8967, 34 Env't Rep Cas 1785, 22 ELR 20913, 6 FLW Fed S 374.

Parties challenging federal agency's biological opinion imposing lake-level restrictions to protect endangered species have standing under zone of interests test to bring §§ 1533 and 1536 claims under Endangered Species Act, and § 1536 claim under Administrative Procedure Act. *Bennett v Spear* (1997) 520 US 154, 137 L Ed 2d 281, 117 S Ct 1154, 97 CDOS 2000, 97 Daily Journal DAR 3647, 44 Env't Rep Cas 1161, 27 ELR 20824, 10 FLW Fed S 354, on remand, remanded (1997, CA9) 112 F3d 402, 97 CDOS 2932, 97 Daily Journal DAR 5164, summary judgment gr, summary judgment den, in part sub nom *Bennett v Spear* (1998, DC Or) 5 F Supp 2d 882.

Purchasers of power from Bonneville Power Administration have standing to challenge response of Administration and federal agencies to listing of 3 salmon populations on Snake River as endangered or threatened; such status of species imposes actual costs and economic stake upon purchasers. *Pacific Northwest Generating Coop. v Brown* (1994, CA9

§ 1537. International cooperation

(a) **Financial assistance.** As a demonstration of the commitment of the United States to the worldwide protection of endangered species and threatened species, the President may, subject to the provisions of section 1415 of the Supplemental Appropriation Act, 1953 (31 U.S.C. 724), use foreign currencies

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Or) 25 F3d 1443, 94 CDOS 4037, 94 Daily Journal DAR 7573, 39 Env't Rep Cas 1615, 24 ELR 21111, amd (1994, CA9 Or) 38 F3d 1058, 94 CDOS 7394, 94 Daily Journal DAR 13563.

Environmental groups have standing to sue under 5 USCS § 702 to require EPA to comply with Endangered Species Act (16 USCS §§ 1531 et seq.), Migratory Bird Treaty Act (16 USCS §§ 703 et seq.), and Bald Eagle Protection Act (16 USCS §§ 668 et seq.), regarding registration of strychnine, where groups claim that EPA reversed, without adequate explanation or scientific support, its decision to ban most above-ground uses of strychnine, and that any continued registration will inevitably cause mortality to protected species, because groups therefore allege that EPA's conduct directly impairs their organizational purposes of study, enjoyment, and advancement of protected species. *Defenders of Wildlife v Administrator, Environmental Protection Agency* (1988, DC Minn) 688 F Supp 1334, 18 ELR 20960, aff'd in part and rev'd in part (1989, CA8 Minn) 882 F2d 1294, 30 Env't Rep Cas 1460, 19 ELR 21440.

Environmental groups have standing to bring action which seeks declaratory and injunctive relief requiring Fish and Wildlife Service to define critical habitat of razorback sucker fish (already classified as endangered species for more than two years). *Colorado Wildlife Fed'n v Turner* (1992, DC Colo) 36 Env't Rep Cas 1409, 23 ELR 20402.

19. Miscellaneous

United States Fish and Wildlife Service decision to bring 6 remaining free condors into captivity in effort to stem condor flock's steady decline was not arbitrary and capricious under 16 USCS §§ 1531 et seq., where Service had originally endorsed maintaining small wild flock but later reversed its policy, and where Service's documentation was succinct but nonetheless adequately disclosed concerns underlying agency's decision and demonstrated that decision rested on rational basis. *National Audubon Soc. v Hester* (1986, App DC) 255 US App DC 191, 801 F2d 405.

In certificate proceeding under § 7(c) of Natural Gas Act (15 USCS § 717f(c)), mitigation measures that had been recommended in final supplemental environmental impact statement at request of Fish and Wildlife Service put projects in compliance with § 7 of Endangered Species Act (16 USCS § 1536). *Mojave Pipeline Co.* (1989) FERC Op No. 322, 46 CCH FERC ¶ 61,029.

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accruing to the Development of a foreign country ment of program sary or useful species listed t § 1533]. The P limited to, the a therein) to forei as he deems app vision of assista ence to funds a USCS § 1542].

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accruing to the United States Government under the Agricultural Trade Development and Assistance Act of 1954 or any other law to provide to any foreign country (with its consent) assistance in the development and management of programs in that country which the Secretary determines to be necessary or useful for the conservation of any endangered species or threatened species listed by the Secretary pursuant to section 4 of this Act [16 USCS § 1533]. The President shall provide assistance (which includes, but is not limited to, the acquisition, by lease or otherwise, of lands, waters, or interests therein) to foreign countries under this section under such terms and conditions as he deems appropriate. Whenever foreign currencies are available for the provision of assistance under this section, such currencies shall be used in preference to funds appropriated under the authority of section 15 of this Act [16 USCS § 1542].

(b) Encouragement of foreign programs. In order to carry out further the provisions of this Act, the Secretary, through the Secretary of State, shall encourage—

- (1) foreign countries to provide for the conservation of fish or wildlife and plants including endangered species and threatened species listed pursuant to section 4 of this Act [16 USCS § 1533];
- (2) the entering into of bilateral or multilateral agreements with foreign countries to provide for such conservation; and
- (3) foreign persons who directly or indirectly take fish or wildlife or plants in foreign countries or on the high seas for importation into the United States for commercial or other purposes to develop and carry out with such assistance as he may provide, conservation practices designed to enhance such fish or wildlife or plants and their habitat.

(c) Personnel. After consultation with the Secretary of State, the Secretary may—

- (1) assign or otherwise make available any officer or employee of his department for the purpose of cooperating with foreign countries and international organizations in developing personnel resources and programs which promote the conservation of fish or wildlife or plants; and
- (2) conduct or provide financial assistance for the educational training of foreign personnel, in this country or abroad, in fish, wildlife, or plant management, research and law enforcement and to render professional assistance abroad in such matters.

(d) Investigations. After consultation with the Secretary of State and the Secretary of the Treasury, as appropriate, the Secretary may conduct or cause to be conducted such law enforcement investigations and research abroad as he deems necessary to carry out the purposes of this Act.

(Dec. 28, 1973, P. L. 93-205, § 8, 87 Stat. 892; Dec. 28, 1979, P. L. 96-159, § 5, 93 Stat. 1228.)

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ENDANGERED SPECIES

these countries have not yet been certified in accordance with "turtle law" (16 USCS § 1537 note), because sufficient proof exists that shrimp from these countries were caught manually or by other methods that do not endanger sea turtles. *Earth Island Inst. v Christopher* (1996, CIT) 948 F Supp 1062, 18 BNA Intl Trade Rep 2516, vacated, remanded on other grounds sub nom *Earth Island Inst. v Albright* (1998, CA FC) 147 F3d 1352, 20 BNA Intl Trade Rep 1193, 28 ELR 21421.

§ 1537a. Convention implementation

(a) Management Authority and Scientific Authority. The Secretary of the Interior (hereinafter in this section referred to as the "Secretary") is designated as the Management Authority and the Scientific Authority for purposes of the Convention and the respective functions of each such Authority shall be carried out through the United States Fish and Wildlife Service.

(b) Management Authority functions. The Secretary shall do all things necessary and appropriate to carry out the functions of the Management Authority under the Convention.

(c) Scientific Authority functions; determinations. (1) The Secretary shall do all things necessary and appropriate to carry out the functions of the Scientific Authority under the Convention.

(2) The Secretary shall base the determinations and advice given by him under Article IV of the Convention with respect to wildlife upon the best available biological information derived from professionally accepted wildlife management practices; but is not required to make, or require any State to make, estimates of population size in making such determinations or giving such advice.

(d) Reservations by the United States under Convention. If the United States votes against including any species in Appendix I or II of the Convention and does not enter a reservation pursuant to paragraph (3) of Article XV of the Convention with respect to that species, the Secretary of State, before the 90th day after the last day on which such a reservation could be entered, shall submit to the Committee on Merchant Marine and Fisheries of the House of Representatives, and to the Committee on the Environment and Public Works of the Senate, a written report setting forth the reasons why such a reservation was not entered.

(e) Wildlife preservation in Western Hemisphere. (1) The Secretary of the Interior (hereinafter in this subsection referred to as the "Secretary"), in cooperation with the Secretary of State, shall act on behalf of, and represent, the United States in all regards as required by the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (56 Stat. 1354, T.S. 982, hereinafter in this subsection referred to as the "Western Convention"). In the discharge of these responsibilities, the Secretary and the Secretary of State shall consult with the Secretary of Agriculture, the Secretary of Commerce, and the heads of other agencies with respect to matters relating to or affecting their areas of responsibility.

16 USCS § 1537a

3. Practice and procedure

16 USCS § 1537(b) deals with subject within exclusive jurisdiction of Court of International Trade, while § 1537(a) deals with subject outside jurisdiction of any federal court; therefore, District Court has no jurisdiction over suit brought by environmental organization to enforce § 1537. *Earth Island Inst. v Christopher* (1993, CA9 Cal) 6 F3d 648, 93 CDOS 7332, 93 Daily Journal DAR 12513, 15 BNA Intl Trade Rep 2460, 23 ELR 21553.

16 USCS § 1537a

(2) The Secretary and the Secretary of State shall, in cooperation with the contracting parties to the Western Convention and, to the extent feasible and appropriate, with the participation of State agencies, take such steps as are necessary to implement the Western Convention. Such steps shall include, but not be limited to—

(A) cooperation with contracting parties and international organizations for the purpose of developing personnel resources and programs that will facilitate implementation of the Western Convention;

(B) identification of those species of birds that migrate between the United States and other contracting parties, and the habitats upon which those species depend, and the implementation of cooperative measures to ensure that such species will not become endangered or threatened; and

(C) identification of measures that are necessary and appropriate to implement those provisions of the Western Convention which address the protection of wild plants.

(3) No later than September 30, 1985, the Secretary and the Secretary of State shall submit a report to Congress describing those steps taken in accordance with the requirements of this subsection and identifying the principal remaining actions yet necessary for comprehensive and effective implementation of the Western Convention.

(4) The provisions of this subsection shall not be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate resident fish or wildlife under State law or regulations. (Dec. 28, 1973, P. L. 93-205, § 8A, as added Dec. 28, 1979, P. L. 96-159, § 6(a), 93 Stat. 1228; Oct. 13, 1982, P. L. 97-304, § 5 [(a)], 96 Stat. 1421.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

With respect to the Committee on Merchant Marine and Fisheries of the House of Representatives, referred to in this section, § 1(b)(3) of Act June 3, 1995, P. L. 104-14, which appears as a note preceding 2 USCS § 21, provides that any reference to such Committee in any provision of law enacted before January 4, 1995, shall be treated as referring to (A) the Committee on Agriculture of the House of Representatives, in the case of a provision of law relating to inspection of seafood or seafood products, (B) the Committee on National Security of the House of Representatives, in the case of a provision of law relating to interoceanic canals, the Merchant Marine Academy and State Maritime Academies, or national security aspects of merchant marine, (C) the Committee on Resources of the House of Representatives, in the case of a provision of law relating to fisheries, wildlife, international fishing agreements, marine affairs (including coastal zone management) except for measures relating to oil and other pollution of navigable waters, or oceanography, (D) the Committee on Science of the House of Representatives, in the case of a provision of law relating to marine research, and (E) the Committee on Transportation and Infrastructure of the House of Representatives, in the case of a provision of law relating to a matter other than a matter described in any of subparagraphs (A) through (D).

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INTERPRETIVE NOTES AND DECISIONS

In enacting 16 USCS § 1537a(c)(2), Congress eliminated not only need for population data, but also information on projected kill levels from each state before "no detriment" finding can be issued

for that state. *Defenders of Wildlife, Inc. v Endangered Species Scientific Authority* (1984, App DC) 233 US App DC 199, 725 F2d 726, 20 Env't Rep Cas 1833, 14 ELR 20188.

§ 1538. Prohibited acts

(a) **Generally.** (1) Except as provided in sections 6(g)(2) and 10 of this Act [16 USCS §§ 1535(g)(2), 1539], with respect to any endangered species of fish or wildlife listed pursuant to section 4 of this Act [16 USCS § 1533] it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

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

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 4 of this Act [16 USCS § 1533] and promulgated by the Secretary pursuant to authority provided by this Act.

(2) Except as provided in sections 6(g)(2) and 10 of this Act [16 USCS §§ 1535(g)(2), 1539], with respect to any endangered species of plants listed pursuant to section 4 of this Act [16 USCS § 1533], it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from, the United States;

(B) remove and reduce to possession any such species from areas under Federal jurisdiction; maliciously damage or destroy any such species on any such area; or remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law;

(C) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

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

(E) violate any regulation pertaining to such species or to any threatened species of plants listed pursuant to section 4 of this Act [16 USCS § 1533] and promulgated by the Secretary pursuant to authority provided by this Act.

16 USCS § 1538

(b) Species held in captivity or controlled environment. (1) The provisions of subsections (a)(1)(A) and (a)(1)(G) of this section shall not apply to any fish or wildlife which was held in captivity or in a controlled environment on (A) December 28, 1973, or (B) the date of the publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to subsection (c) of section 4 of this Act [16 USCS § 1533(c)]: Provided, That such holding and any subsequent holding or use of the fish or wildlife was not in the course of a commercial activity. With respect to any act prohibited by subsections (a)(1)(A) and (a)(1)(G) of this section which occurs after a period of 180 days from (i) December 28, 1973, or (ii) the date of publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to subsection (c) of section 4 of this Act [16 USCS § 1533(c)], there shall be a rebuttable presumption that the fish or wildlife involved in such act is not entitled to the exemption contained in this subsection.

(2)(A) The provisions of subsection (a)(1) shall not apply to—

- (i) any raptor legally held in captivity or in a controlled environment on the effective date of the Endangered Species Act Amendments of 1978; or
 - (ii) any progeny of any raptor described in clause (i);
- until such time as any such raptor or progeny is intentionally returned to a wild state.

(B) Any person holding any raptor or progeny described in subparagraph (A) must be able to demonstrate that the raptor or progeny does, in fact, qualify under the provisions of this paragraph, and shall maintain and submit to the Secretary, on request, such inventories, documentation, and records as the Secretary may by regulation require as being reasonably appropriate to carry out the purposes of this paragraph. Such requirements shall not unnecessarily duplicate the requirements of other rules and regulations promulgated by the Secretary.

(c) Violation of Convention. (1) It is unlawful for any person subject to the jurisdiction of the United States to engage in any trade in any specimens contrary to the provisions of the Convention, or to possess any specimens traded contrary to the provisions of the Convention, including the definitions of terms in article I thereof.

(2) Any importation into the United States of fish or wildlife shall, if—

- (A) such fish or wildlife is not an endangered species listed pursuant to section 4 of this Act [16 USCS § 1533] but is listed in Appendix II to the Convention,
- (B) the taking and exportation of such fish or wildlife is not contrary to the provisions of the Convention and all other applicable requirements of the Convention have been satisfied,
- (C) the applicable requirements of subsections (d), (e), and (f) of this section have been satisfied, and
- (D) such importation is not made in the course of a commercial activity, be presumed to be an importation not in violation of any provision of this Act or any regulation issued pursuant to this Act.

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- (d) Imports and exports.** (1) In general. It is unlawful for any person, without first having obtained permission from the Secretary, to engage in business—
- (A) as an importer or exporter of fish or wildlife (other than shellfish and fishery products which (i) are not listed pursuant to section 4 of this Act [16 USCS § 1533] as endangered species or threatened species, and (ii) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants; or
 - (B) as an importer or exporter of any amount of raw or worked African elephant ivory.
- (2) Requirements. Any person required to obtain permission under paragraph (1) of this subsection shall—
- (A) keep such records as will fully and correctly disclose each importation or exportation of fish, wildlife, plants, or African elephant ivory made by him and the subsequent disposition made by him with respect to such fish, wildlife, plants, or ivory;
 - (B) at all reasonable times upon notice by a duly authorized representative of the Secretary, afford such representative access to his place of business, an opportunity to examine his inventory of imported fish, wildlife, plants, or African elephant ivory and the records required to be kept under subparagraph (A) of this paragraph, and to copy such records; and
 - (C) file such reports as the Secretary may require.
- (3) Regulations. The Secretary shall prescribe such regulations as are necessary and appropriate to carry out the purposes of this subsection.
- (4) Restriction on consideration of value or amount of African elephant ivory imported or exported. In granting permission under this subsection for importation or exportation of African elephant ivory, the Secretary shall not vary the requirements for obtaining such permission on the basis of the value or amount of ivory imported or exported under such permission.
- (e) Reports.** It is unlawful for any person importing or exporting fish or wildlife (other than shellfish and fishery products which (1) are not listed pursuant to section 4 of this Act [16 USCS § 1533] as endangered or threatened species, and (2) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants to fail to file any declaration or report as the Secretary deems necessary to facilitate enforcement of this Act or to meet the obligations of the Convention.
- (f) Designation of ports.** (1) It is unlawful for any person subject to the jurisdiction of the United States to import into or export from the United States any fish or wildlife (other than shellfish and fishery products which (A) are not listed pursuant to section 4 of this Act [16 USCS § 1533] as endangered species or threatened species, and (B) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants, except at a port or ports designated by the Secretary of the Interior. For the purpose of

16 USCS § 1538

CONSERVATION

facilitating enforcement of this Act and reducing the costs thereof, the Secretary of the Interior, with approval of the Secretary of the Treasury and after notice and opportunity for public hearing, may, by regulation, designate ports and change such designations. The Secretary of the Interior, under such terms and conditions as he may prescribe, may permit the importation or exportation at nondesignated ports in the interest of the health or safety of the fish or wildlife or plants, or for other reasons if, in his discretion, he deems it appropriate and consistent with the purpose of this subsection.

(2) Any port designated by the Secretary of the Interior under the authority of section 4(d) of the Act of December 5, 1969 (16 U.S.C. 666cc-4(d)), shall, if such designation is in effect on the day before the date of the enactment of this Act [enacted Dec. 28, 1973], be deemed to be a port designated by the Secretary under paragraph (1) of this subsection until such time as the Secretary otherwise provides.

(g) **Violations.** It is unlawful for any person subject to the jurisdiction of the United States to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in this section.

(Dec. 28, 1973, P. L. 93-205, § 9, 87 Stat. 893; Nov. 10, 1978, P. L. 95-632, § 4, 92 Stat. 3760; Oct. 13, 1982, P. L. 97-304, § 9(b), 96 Stat. 1426; Oct. 7, 1988, P. L. 100-478, Title I, § 1006, Title II, Part III, § 2301, 102 Stat. 2308, 2321; Nov. 14, 1988, P. L. 100-653, Title IX, § 905, 102 Stat. 3835.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This Act", referred to in this section, is Act Dec. 28, 1973, P. L. 93-205, 87 Stat. 884, which appears generally as 16 USCS §§ 1531 et seq. For full classification of this Act, consult USCS Tables volumes.

"The effective date of the Endangered Species Act Amendments of 1978", referred to in this section, is probably the date of enactment of P. L. 95-632, 92 Stat. 3751, which is Nov. 10, 1978.

"Section 4(d) of the Act of December 5, 1969 (16 U.S.C. 666cc-4(d)", referred to in this section, is § 4(d) of Act Dec. 5, 1969, P. L. 91-135, 83 Stat. 276, which formerly appeared as 16 USCS § 668cc-4(d), and which was repealed by Act Dec. 28, 1973, P. L. 93-205, § 14, 87 Stat. 903.

Effective date of section:

This section is effective on the date of its enactment on Dec. 28, 1973, as provided by Act Dec. 28, 1973, P. L. 93-205, § 16, 87 Stat. 903, which appears as 16 USCS § 1531 note.

Amendments:

1978. Act Nov. 10, 1978, in subsec. (b), designated existing provisions as para. (1), and added para. (2).

1982. Act Oct. 13, 1982, in subsec. (a)(2), redesignated subparas. (B), (C), and (D) as subparas. (C), (D), and (E), respectively, and added a new subpara. (B); and, in subsec. (b), substituted para. (1) for one which read: "The provisions of this section shall not apply to any fish or wildlife held in captivity or in a controlled environment on the effective date of this Act if the purposes of such holding are not contrary to the purposes of this Act;

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ENDANGERED SPECIES

16 USCS § 1539

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Endangered Species Act of 1973 applies to captive-bred sea turtles which are hatched and raised in controlled environment. *Cayman Turtle Farm, Ltd. v Andrus* (1979, DC Dist Col) 478 F Supp 125, 9 ELR 20416.

Injunctive relief would not be issued pursuant to 16 USCS § 1538(a)(1)(B) to prevent state from issuing scientific research permits to some whale-watching vessels exempting them from 500-yard buffer zone, where state issued last permit some 7 years earlier, and conservationist opposing exemptions did not show likelihood that state would repeat its actions. *Strahan v Coxe* (1996, DC Mass) 939 F Supp 963, 45 Fed Rules Evid Serv 987, 27 ELR

20254, affd in part and vacated in part on other grounds (1997, CA1 Mass) 127 F3d 155, 45 Env't Rep Cas 1321, 28 ELR 20114, cert den (1998, US) 142 L Ed 2d 63, 119 S Ct 81 and cert den (1998, US) 142 L Ed 2d 356, 119 S Ct 437, 47 Env't Rep Cas 2024.

Knowledge and actions of master of vessel can be imputed to owner of vessel; thus, owner of vessel, who allegedly equipped vessel with qualified turtle excluder devices (TEDs) and instructed vessel's operator to use them as required by law, can nonetheless be found to have knowingly and unlawfully failed to use TEDs in each net during trawling on vessel greater than 25 feet in length, in Gulf area, offshore, in violation of § 1538(a)(1)(G). *Blue Horizon, Inc.* (1992, NOAA App) 6 ORW 700.

§ 1539. Exceptions

(a) **Permits.** (1) The Secretary may permit, under such terms and conditions as he shall prescribe—

(A) any act otherwise prohibited by section 9 [16 USCS § 1538] 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 to subsection (j); or

(B) any taking otherwise prohibited by section 9(a)(1)(B) [16 USCS § 1538(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.

- (b) Hardship exemptions.** (1) If any person enters into a contract with respect to a species of fish or wildlife or plant before the date of the publication in the Federal Register of notice of consideration of that species as an endangered species and the subsequent listing of that species as an endangered species pursuant to section 4 of this Act [16 USCS § 1533] will cause undue economic hardship to such person under the contract, the Secretary, in order to minimize such hardship, may exempt such person from the application of section 9(a) of this Act [16 USCS § 1538(a)] to the extent the Secretary deems appropriate if such person applies to him for such exemption and includes with such application such information as the Secretary may require to prove such hardship; except that (A) no such exemption shall be for a duration of more than one year from the date of publication in the Federal Register of notice of consideration of the species concerned, or shall apply to a quantity of fish or wildlife or plants in excess of that specified by the Secretary; (B) the one-year period for those species of fish or wildlife listed by the Secretary as endangered prior to the effective date of this Act shall expire in accordance with the terms of section 3 of the Act of December 5, 1969 (83 Stat. 275); and (C) no such exemption may be granted for the importation or exportation of a specimen listed in Appendix I of the Convention which is to be used in a commercial activity.
- (2) As used in this subsection, the term "undue economic hardship" shall include, but not be limited to:

- (A) substantial economic loss resulting from inability caused by this Act to perform contracts with respect to species of fish and wildlife entered into prior to the date of publication in the Federal Register of a notice of consideration of such species as an endangered species;
- (B) substantial economic loss to persons who, for the year prior to the notice of consideration of such species as an endangered species, derived a substantial portion of their income from the lawful taking of any listed species, which taking would be made unlawful under this Act; or
- (C) curtailment of subsistence taking made unlawful under this Act by persons (i) not reasonably able to secure other sources of subsistence; and (ii) dependent to a substantial extent upon hunting and fishing for subsistence; and (iii) who must engage in such curtailed taking for subsistence purposes.
- (3) The Secretary may make further requirements for a showing of undue

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economic hardship as he deems fit. Exceptions granted under this section may be limited by the Secretary in his discretion as to time, area, or other factor of applicability.

(c) **Notice and review.** The Secretary shall publish notice in the Federal Register of each application for an exemption or permit which is made under this section. Each notice shall invite the submission from interested parties, within thirty days after the date of the notice, [of] written data, views, or arguments with respect to the application; except that such thirty-day period may be waived by the Secretary in an emergency situation where the health or life of an endangered animal is threatened and no reasonable alternative is available to the applicant, but notice of any such waiver shall be published by the Secretary in the Federal Register within ten days following the issuance of the exemption or permit. Information received by the Secretary as a part of any application shall be available to the public as a matter of public record at every stage of the proceeding.

(d) **Permit and exemption policy.** The Secretary may grant exceptions under subsections (a)(1)(A) and (b) of this section only if he finds and publishes his finding in the Federal Register that (1) such exceptions were applied for in good faith, (2) if granted and exercised will not operate to the disadvantage of such endangered species, and (3) will be consistent with the purposes and policy set forth in section 2 of this Act [16 USCS § 1531].

(e) **Alaska natives.** (1) Except as provided in paragraph (4) of this subsection the provisions of this Act shall not apply with respect to the taking of any endangered species or threatened species, or the importation of any such species taken pursuant to this section, by—

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

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

if such taking is primarily for subsistence purposes. Non-edible byproducts of species taken pursuant to this section may be sold in interstate commerce when made into authentic native articles of handicrafts and clothing; except that the provisions of this subsection shall not apply to any non-native resident of an Alaskan native village found by the Secretary to be not primarily dependent upon the taking of fish and wildlife for consumption or for the creation and sale of authentic native articles of handicrafts and clothing.

(2) Any taking under this subsection may not be accomplished in a wasteful manner.

(3) As used in this subsection—

(i) The term “subsistence” includes selling any edible portion of fish or wildlife in native villages and towns in Alaska for native consumption within native villages or towns; and

(ii) The term “authentic native articles of handicrafts and clothing” means items composed wholly or in some significant respect of natural materials, and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple

16 USCS § 1539

carvers, or other mass copying devices. Traditional native handicrafts include, but are not limited to, weaving, carving, stitching, sewing, lacing, beading, drawing, and painting.

(4) Notwithstanding the provisions of paragraph (1) of this subsection, whenever the Secretary determines that any species of fish or wildlife which is subject to taking under the provisions of this subsection is an endangered species or threatened species, and that such taking materially and negatively affects the threatened or endangered species, he may prescribe regulations upon the taking of such species by any such Indian, Aleut, Eskimo, or non-Native Alaskan resident of an Alaskan native village. Such regulations may be established with reference to species, geographical description of the area included, the season for taking, or any other factors related to the reason for establishing such regulations and consistent with the policy of this Act. Such regulations shall be prescribed after a notice and hearings in the affected judicial districts of Alaska and as otherwise required by section 103 of the Marine Mammal Protection Act of 1972 [16 USCS § 1373], and shall be removed as soon as the Secretary determines that the need for their impositions has disappeared.

(f) Pre-Act endangered species parts exemption; application and certification; regulation; validity of sales contract; separability of provisions; renewal of exemption; expiration of renewal certification. (1) As used in this subsection—

(A) The term "pre-Act endangered species part" means—

(i) any sperm whale oil, including derivatives thereof, which was lawfully held within the United States on December 28, 1973, in the course of a commercial activity; or

(ii) any finished scrimshaw product, if such product or the raw material for such product was lawfully held within the United States on December 28, 1973, in the course of a commercial activity.

(B) The term "scrimshaw product" means any art form which involves the substantial etching or engraving of designs upon, or the substantial carving of figures, patterns, or designs from, any bone or tooth of any marine mammal of the order Cetacea. For purposes of this subsection, polishing or the adding of minor superficial markings does not constitute substantial etching, engraving, or carving.

(2) The Secretary, pursuant to the provisions of this subsection, may exempt, if such exemption is not in violation of the Convention, any pre-Act endangered species part from one or more of the following prohibitions:

(A) The prohibition on exportation from the United States set forth in section 9(a)(1)(A) of this Act [16 USCS § 1538(a)(1)(A)].

(B) Any prohibition set forth in section 9(a)(1)(E) or (F) of this Act [16 USCS § 1538(a)(1)(E), (F)].

(3) Any person seeking an exemption described in paragraph (2) of this subsection shall make application therefor to the Secretary in such form and manner as he shall prescribe, but no such application may be considered by the Secretary unless the application—

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- (A) is received by the Secretary before the close of the one-year period beginning on the date on which regulations promulgated by the Secretary to carry out this subsection first take effect;
- (B) contains a complete and detailed inventory of all pre-Act endangered species parts for which the applicant seeks exemption;
- (C) is accompanied by such documentation as the Secretary may require to prove that any endangered species part or product claimed by the applicant to be a pre-Act endangered species part is in fact such a part; and
- (D) contains such other information as the Secretary deems necessary and appropriate to carry out the purposes of this subsection.
- (4) If the Secretary approves any application for exemption made under this subsection, he shall issue to the applicant a certificate of exemption which shall specify—
- (A) any prohibition in section 9(a) of this Act [16 USCS § 1538(a)] which is exempted;
- (B) the pre-Act endangered species parts to which the exemption applies;
- (C) the period of time during which the exemption is in effect, but no exemption made under this subsection shall have force and effect after the close of the three-year period beginning on the date of issuance of the certificate unless such exemption is renewed under paragraph (8); and
- (D) any term or condition prescribed pursuant to paragraph (5)(A) or (B), or both, which the Secretary deems necessary or appropriate.
- (5) The Secretary shall prescribe such regulations as he deems necessary and appropriate to carry out the purposes of this subsection. Such regulations may set forth—
- (A) terms and conditions which may be imposed on applicants for exemptions under this subsection (including, but not limited to, requirements that applicants register inventories, keep complete sales records, permit duly authorized agents of the Secretary to inspect such inventories and records, and periodically file appropriate reports with the Secretary); and
- (B) terms and conditions which may be imposed on any subsequent purchaser of any pre-Act endangered species part covered by an exemption granted under this subsection;
- to insure that any such part so exempted is adequately accounted for and not disposed of contrary to the provisions of this Act. No regulation prescribed by the Secretary to carry out the purposes of this subsection shall be subject to section 4(f)(2)(A)(i) of this Act.
- (6)(A) Any contract for the sale of pre-Act endangered species parts which is entered into by the Administrator of General Services prior to the effective date of this subsection and pursuant to the notice published in the Federal Register on January 9, 1973, shall not be rendered invalid by virtue of the fact that fulfillment of such contract may be prohibited under section 9(a)(1)(F) [16 USCS § 1538(a)(1)(F)].
- (B) In the event that this paragraph is held invalid, the validity of the remainder of the Act, including the remainder of this subsection, shall not be affected.

16 USCS § 1539

CONSERVATION

(7) Nothing in this subsection shall be construed to—

(A) exonerate any person from any act committed in violation of paragraphs (1)(A), (1)(E), or (1)(F) of section 9(a) [16 USCS § 1538(a)(1)(A), (E), (F)] prior to the date of enactment of this subsection [enacted July 12, 1976]; or

(B) immunize any person from prosecution for any such act.

(8)(A)[(i)] any valid certificate of exemption which was renewed after October 13, 1982, and was in effect on March 31, 1988, shall be deemed to be renewed for a six-month period beginning on the date of enactment of the Endangered Species Act Amendments of 1988 [enacted Oct. 7, 1988]. Any person holding such a certificate may apply to the Secretary for one additional renewal of such certificate for a period not to exceed 5 years beginning on the date of such enactment [enacted Oct. 7, 1988].

(B) If the Secretary approves any application for renewal of an exemption under this paragraph, he shall issue to the applicant a certificate of renewal of such exemption which shall provide that all terms, conditions, prohibitions, and other regulations made applicable by the previous certificate shall remain in effect during the period of the renewal.

(C) No exemption or renewal of such exemption made under this subsection shall have force and effect after the expiration date of the certificate of renewal of such exemption issued under this paragraph.

(D) No person may, after January 31, 1984, sell or offer for sale in interstate or foreign commerce, any pre-Act finished scrimshaw product unless such person holds a valid certificate of exemption issued by the Secretary under this subsection, and unless such product or the raw material for such product was held by such person on October 13, 1982.

(g) **Burden of proof.** In connection with any action alleging a violation of section 9 [16 USCS § 1538], any person claiming the benefit of any exemption or permit under this Act shall have the burden of proving that the exemption or permit is applicable, has been granted, and was valid and in force at the time of the alleged violation.

(h) **Certain antique articles; importation; port designation; application for return of articles.** (1) Sections 4(d), 9(a), and 9(c) [16 USCS §§ 1533(d), 1538(a), (c)] do not apply to any article which—

(A) is not less than 100 years of age;

(B) is composed in whole or in part of any endangered species or threatened species listed under section 4 [16 USCS § 1533];

(C) has not been repaired or modified with any part of any such species on or after the date of the enactment of this Act [enacted Dec. 28, 1973]; and

(D) is entered at a port designated under paragraph (3).

(2) Any person who wishes to import an article under the exception provided by this subsection shall submit to the customs officer concerned at the time of entry of the article such documentation as the Secretary of the Treasury,

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after consultation with the Secretary of the Interior, shall by regulation require as being necessary to establish that the article meets the requirements set forth in paragraph (1)(A), (B), and (C).

(3) The Secretary of the Treasury, after consultation with the Secretary of the Interior, shall designate one port within each customs region at which articles described in paragraph (1)(A), (B), and (C) must be entered into the customs territory of the United States.

(4) Any person who imported, after December 27, 1973, and on or before the date of the enactment of the Endangered Species Act Amendments of 1978 [enacted Nov. 10, 1978], any article described in paragraph (1) which—

(A) was not repaired or modified after the date of importation with any part of any endangered species or threatened species listed under section 4 [16 USCS § 1533];

(B) was forfeited to the United States before such date of the enactment [enacted Nov. 10, 1978], or is subject to forfeiture to the United States on such date of enactment [enacted Nov. 10, 1978], pursuant to the assessment of a civil penalty under section 11 [16 USCS § 1540]; and

(C) is in the custody of the United States on such date of enactment [enacted Nov. 10, 1978];

may, before the close of the one-year period beginning on such date of enactment [enacted Nov. 10, 1978], make application to the Secretary for return of the article. Application shall be made in such form and manner, and contain such documentation, as the Secretary prescribes. If on the basis of any such application which is timely filed, the Secretary is satisfied that the requirements of this paragraph are met with respect to the article concerned, the Secretary shall return the article to the applicant and the importation of such article shall, on and after the date of return, be deemed to be a lawful importation under this Act.

(i) Noncommercial transshipments. Any importation into the United States of fish or wildlife shall, if—

(1) such fish or wildlife was lawfully taken and exported from the country of origin and country of reexport, if any;

(2) such fish or wildlife is in transit or transshipment through any place subject to the jurisdiction of the United States en route to a country where such fish or wildlife may be lawfully imported and received;

(3) the exporter or owner of such fish or wildlife gave explicit instructions not to ship such fish or wildlife through any place subject to the jurisdiction of the United States, or did all that could have reasonably been done to prevent transshipment, and the circumstances leading to the transshipment were beyond the exporter's or owner's control;

(4) the applicable requirements of the Convention have been satisfied; and

(5) such importation is not made in the course of a commercial activity,

be an importation not in violation of any provision of this Act or any regulation issued pursuant to this Act while such fish or wildlife remains in the control of the United States Customs Service.

(j) **Experimental populations.** (1) For purposes of this subsection, the term "experimental population" means any population (including any offspring arising solely therefrom) authorized by the Secretary for release under paragraph (2), but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species.

(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.

(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) [16 USCS § 1536], 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 [16 USCS § 1533]; 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.

(3) The Secretary, with respect to populations of endangered species or threatened species that the Secretary authorized, before the date of the enactment of this subsection [enacted Oct. 13, 1982], 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.

(Dec. 28, 1973, P. L. 93-205, § 10, 87 Stat. 896; July 12, 1976, P. L. 94-359, §§ 2, 3, 90 Stat. 911, 912; Nov. 10, 1978, P. L. 95-632, § 5, 92 Stat. 3760; Dec. 28, 1979, P. L. 96-159, § 7, 93 Stat. 1230; Oct. 13, 1982, P. L. 97-304, § 6, 96 Stat. 1422; Oct. 7, 1988, P. L. 100-478, Title I, §§ 1011, 1013(b), (c), 102 Stat. 2314, 2315.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"The effective date of this Act", referred to in this section, is the date of enactment of P. L. 93-205, 87 Stat. 884, which is Dec. 28, 1973.

"Section 3 of the Act of December 5, 1969 (83 Stat. 275)", referred to in this section, is § 3 of Act Dec. 5, 1969, P. L. 91-135, 83 Stat. 275, which

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16 USCS § 1539, n 8

Engineers to help migrating salmon, including surface transportation of juvenile salmon and river flow improvement measures, are not "connected actions", government's exclusion of transportation method from scope of environmental impact statement was not final agency action subject to review. *Northwest Resource Info. Ctr. v National Marine Fisheries Serv.* (1995, CA9 Or) 56 F3d 1060, 95 CDOS 4058, 40 Env't Rep Cas 1996.

Challenges to 1993 decision by Bonneville Power Administration with respect to water management actions in Columbia River System for benefit of Snake River salmon are moot, where challenged flow augmentation measures have already occurred, 1993 management action plan has expired, and factual underpinnings of plan have been superseded, and where Administration's current actions are being taken pursuant to new management action plan. *Idaho Dep't of Fish & Game v National Marine Fisheries Serv.* (1995, CA9 Or) 56 F3d 1071, 95 CDOS 4049, 40 Env't Rep Cas 2005.

Claim by Pacific Northwest Generating Cooperative that National Marine Fisheries Service's 2-step jeopardy analysis had no foundation in Endangered Species Act and created excessively strict standard for determining whether operations of hydropower system jeopardized salmon were moot, where biological opinion evaluating effects of action was of

short duration and followed opinion of 4-year duration; claimants thus had more than enough time to obtain judicial review and their claims do not evade review. *Idaho Dep't of Fish & Game v National Marine Fisheries Serv.* (1995, CA9 Or) 56 F3d 1071, 95 CDOS 4049, 40 Env't Rep Cas 2005.

9. Miscellaneous

Environmental organization was not entitled to relief enjoining United States Fish and Wildlife Service (FWS) from capturing and removing from wild habitat all California condors, since FWS's decision to place wild condors in captivity, which represented policy change, was not arbitrary and capricious, nor did it fail to satisfy requirements of 16 USCS §§ 1536 and 1539, where documentation adequately disclosed concerns underlying decision and demonstrated rational basis. *National Audubon Soc. v Hester* (1986, App DC) 255 US App DC 191, 801 F2d 405.

Party who imported fully mounted leopard was not eligible for exemption under predecessor act because he contracted for import of leopard after leopard was placed on endangered species list, although leopard was slain prior to time that leopard was placed on list. *United States v Species of Wildlife etc.* (1975, ED NY) 404 F Supp 1298.

§ 1540. Penalties and enforcement

(a) Civil penalties. (1) Any person who knowingly 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 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 [16 USCS § 1538(a)(1)(A), (B), (C), (D), (E), or (F), (2)(A), (B), (C), or (D), (c), (d), (f), or (g)], may be assessed a civil penalty by the Secretary of not more than \$25,000 for each violation. Any person who knowingly 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

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such court shall have jurisdiction to hear and decide any such action. The court shall hear such action on the record made before the Secretary and shall sustain his action if it is supported by substantial evidence on the record considered as a whole.

(2) Hearings held during proceedings for the assessment of civil penalties authorized by paragraph (1) of this subsection shall be conducted in accordance with section 554 of title 5, United States Code [5 USCS § 554]. The Secretary may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and administer oaths. Witnesses summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpoena served upon any person pursuant to this paragraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Secretary or to appear and produce documents before the Secretary, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(3) Notwithstanding any other provision of this Act, no civil penalty shall be imposed if it can be shown by a preponderance of the evidence that the defendant committed an act based on a good faith belief that he was acting to protect himself or herself, a member of his or her family, or any other individual from bodily harm, from any endangered or threatened species.

(b) Criminal violations. (1) Any person who knowingly 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 [16 USCS § 1538(a)(1)(A), (B), (C), (D), (E), or (F), (2)(A), (B), (C), or (D), (c), (d), (f), or (g)] shall, upon conviction, be fined not more than \$50,000 or imprisoned for not more than one year, or both. Any person who knowingly 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.

(2) The head of any Federal agency which has issued a lease, license, permit, or other agreement authorizing a person to import or export fish, wildlife, or plants, or to operate a quarantine station for imported wildlife, or authorizing the use of Federal lands, including grazing of domestic livestock, to any person who is convicted of a criminal violation of this Act or any regulation, permit, or certificate issued hereunder may immediately modify, suspend, or revoke each lease, license, permit, or other agreement. The Secretary shall also suspend for a period of up to one year, or cancel, any Federal hunting or fishing permits or stamps issued to any person who is convicted of a criminal violation of any provision of this Act or any regulation, permit, or certificate issued hereunder. The United States shall not be liable for the payments of any compensation, reimbursement, or damages in connection

with the modification, suspension, or revocation of any leases, licenses, permits, stamps, or other agreements pursuant to this section.

(3) Notwithstanding any other provision of this Act, it shall be a defense to prosecution under this subsection if the defendant committed the offense based on a good faith belief that he was acting to protect himself or herself, a member of his or her family, or any other individual, from bodily harm from any endangered or threatened species.

(c) **District court jurisdiction.** The several district courts of the United States, including the courts enumerated in section 460 of title 28, United States Code [28 USCS § 460], shall have jurisdiction over any actions arising under this Act. For the purpose of this Act, American Samoa shall be included within the judicial district of the District Court of the United States for the District of Hawaii.

(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 violation of this Act 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 Act or any regulation issued hereunder, and (2) the reasonable and necessary costs incurred by any person in providing temporary care for any fish, wildlife, or plant pending the disposition of any civil or criminal proceeding alleging a violation of this Act 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 [16 USCS § 1535(i)].

(e) **Enforcement.** (1) The provisions of this Act and any regulations or permits issued pursuant thereto shall be enforced by the Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating, or all such Secretaries. Each such Secretary may utilize by agreement, with or without reimbursement, the personnel, services, and facilities of any other Federal agency or any State agency for purposes of enforcing this Act.

(2) The judges of the district courts of the United States and the United States magistrates may, within their respective jurisdictions, upon proper oath or affirmation showing probable cause, issue such warrants or other process as may be required for enforcement of this Act and any regulation issued thereunder.

(3) Any person authorized by the Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating,

to enforce this Act may detain for inspection and inspect any package, crate, or other container, including its contents, and all accompanying documents, upon importation or exportation. Such person may make arrests without a warrant for any violation of this Act if he has reasonable grounds to believe that the person to be arrested is committing the violation in his presence or view, and may execute and serve any arrest warrant, search warrant, or other warrant or civil or criminal process issued by any officer or court of competent jurisdiction for enforcement of this Act. Such person so authorized may search and seize, with or without a warrant, as authorized by law. Any fish, wildlife, property, or item so seized shall be held by any person authorized by the Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating pending disposition of civil or criminal proceedings, or the institution of an action in rem for forfeiture of such fish, wildlife, property, or item pursuant to paragraph (4) of this subsection; except that the Secretary may, in lieu of holding such fish, wildlife, property, or item, permit the owner or consignee to post a bond or other surety satisfactory to the Secretary, but upon forfeiture of any such property to the United States, or the abandonment or waiver of any claim to any such property, it shall be disposed of (other than by sale to the general public) by the Secretary in such a manner, consistent with the purposes of this Act, as the Secretary shall by regulation prescribe.

(4)(A) All fish or wildlife or plants taken, possessed, sold, purchased, offered for sale or purchase, transported, delivered, received, carried, shipped, exported, or imported contrary to the provisions of this Act, any regulation made pursuant thereto, or any permit or certificate issued hereunder shall be subject to forfeiture to the United States.

(B) All guns, traps, nets, and other equipment, vessels, vehicles, aircraft, and other means of transportation used to aid the taking, possessing, selling, purchasing, offering for sale or purchase, transporting, delivering, receiving, carrying, shipping, exporting, or importing of any fish or wildlife or plants in violation of this Act, any regulation made pursuant thereto, or any permit or certificate issued thereunder shall be subject to forfeiture to the United States upon conviction of a criminal violation pursuant to section 11(b)(1) of this Act [subsec. (b)(1) of this section].

(5) All provisions of law relating to the seizure, forfeiture, and condemnation of a vessel for violation of the customs laws, the disposition of such vessel or the proceeds from the sale thereof, and the remission or mitigation of such forfeiture, shall apply to the seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this Act, insofar as such provisions of law are applicable and not inconsistent with the provisions of this Act; except that all powers, rights, and duties conferred or imposed by the customs laws upon any officer or employee of the Treasury Department shall, for the purposes of this Act, be exercised or performed by the Secretary or by such persons as he may designate.

(6) The Attorney General of the United States may seek to enjoin any person who is alleged to be in violation of any provision of this Act or regulation issued under authority thereof.

16 USCS § 1540

CONSERVATION

(f) Regulations. The Secretary, the Secretary of the Treasury, and the Secretary of the Department in which the Coast Guard is operating, are authorized to promulgate such regulations as may be appropriate to enforce this Act, and charge reasonable fees for expenses to the Government connected with permits or certificates authorized by this Act including processing applications and reasonable inspections, and with the transfer, board, handling, or storage of fish or wildlife or plants and evidentiary items seized and forfeited under this Act. All such fees collected pursuant to this subsection shall be deposited in the Treasury to the credit of the appropriation which is current and chargeable for the cost of furnishing the services. Appropriated funds may be expended pending reimbursement from parties in interest.

(g) 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 [16 USCS § 1535(g)(2)(B)(ii)], the prohibitions set forth in or authorized pursuant to section 4(d) or section 9(a)(1)(B) of this Act [16 USCS §§ 1533(d), 1538(a)(1)(B)] 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 [16 USCS § 1533] 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

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tary 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 [16 USCS § 1535(g)(2)(B)(ii)] 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).

(h) Coordination with other laws. The Secretary of Agriculture and the Secretary shall provide for appropriate coordination of the administration of this Act with the administration of the animal quarantine laws (21 U.S.C. 101-105, 111-135b, and 612-614) and section 306 of the Tariff Act of 1930 (19 U.S.C. 1306). Nothing in this Act or any amendment made by this Act shall be construed as superseding or limiting in any manner the functions of the Secretary of Agriculture under any other law relating to prohibited or restricted importations or possession of animals and other articles and no proceeding or determination under this Act shall preclude any proceeding or be considered determinative of any issue of fact or law in any proceeding under any Act administered by the Secretary of Agriculture. Nothing in this Act shall be construed as superseding or limiting in any manner the functions and responsibilities of the Secretary of the Treasury under the Tariff Act of 1930, including, without limitation, section 527 of that Act (19 U.S.C. 1527), relating to the importation of wildlife taken, killed, possessed, or exported to the United States in violation of the laws or regulations of a foreign country.

(Dec. 28, 1973, P. L. 93-205, § 11, 87 Stat. 897; July 12, 1976, P. L. 94-359, § 4, 90 Stat. 913; Nov. 10, 1978, P. L. 95-632, §§ 6-8, 92 Stat. 3761; Nov. 16, 1981, P. L. 97-79, § 9(e), 95 Stat. 1079; Oct. 13, 1982, P. L. 97-304, §§ 7, 9(c), 96 Stat. 1425, 1427; June 25, 1984, P. L. 98-327, § 4, in part, 98 Stat. 271; Oct. 7, 1988, P. L. 100-478, Title I, § 1007, 102 Stat. 2309.)

ENDANGERED SPECIES

16 USCS § 1542

43 USCS § 1349 where foundation assisted state in successful claim under Outer Continental Shelf Lands Act (42 USCS § 1349) and Endangered Species Act (16 USCS § 1540) that govern leasing activity, even though Foundation could not allege violations of OCSLA on its own behalf, because Foundation's efforts were necessary and important factor in achieving successful result; Foundation is not entitled under "lodestar" approach to recover for hours spent for duplicative consultative or supervisory work but is entitled to award adjustment of 10 percent for rendering services that were superior in every respect. *Conservation Law Foundation, Inc. v Watt* (1984, DC Mass) 654 F Supp 706.

Successful challengers of pesticide registration are entitled to attorney's fees under 16 USCS § 1540(g)(4), where (1) they prevailed on several issues and (2) government's position was not substantially justified; award is reduced by 15 percent based on efforts not related to successful claims. *Defenders of Wildlife v Administrator, Environmental Protection Agency* (1988, DC Minn) 700 F Supp 1028, 19 ELR 20611.

Animal rights groups are not entitled to recover attorney's fees or costs under 16 USCS § 1540(g)(4), where court never granted groups leave to intervene prior to dropping of suit by original plaintiffs, even though court granted motions after dismissal of case

"for sole purpose of allowing intervenors to demonstrate their entitlement to attorneys' fees and costs," because groups were never "parties" to case when it was litigated and are not covered by fee-shifting provision. *Putting People First v Babbitt* (1993, DC Dist Col) 838 F Supp 10, 24 ELR 20657.

Fees will not be awarded environmental group which sued Interior officials, where officials were working on recovery plan for Bradshaw's Desert Parsley one year prior to lawsuit and had final recovery plan approved about 14 months after litigation began, because group failed to show sufficient causal connection between their lawsuit and publication of recovery plan. *Oregon Natural Resource Council v Turner* (1994, DC Or) 863 F Supp 1277, 25 ELR 20380.

Award of attorney fees to environmental group was appropriate where plaintiff's success substantially contributed to goals of Endangered Species Act by ensuring conservation of one of few remaining marbled murrelet nesting habitats in state by undertaking unpopular case, and where plaintiff served public interest by assisting interpretation and implementation of ESA as applied to scope of activities that private landowner may engage in on his own land. *Marbled Murrelet v Pacific Lumber Co.* (1995, ND Cal) 163 FRD 308, 41 Env't Rep Cas 1157.

§ 1541. Endangered plants

The Secretary of the Smithsonian Institution, in conjunction with other affected agencies, is authorized and directed to review (1) species of plants which are now or may become endangered or threatened and (2) methods of adequately conserving such species, and to report to Congress, within one year after the date of the enactment of this Act [enacted Dec. 28, 1973], the results of such review including recommendations for new legislation or the amendment of existing legislation.

(Dec. 28, 1973, P. L. 93-205, § 12, 87 Stat. 901.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective date of section:

This section is effective on the date of its enactment on Dec. 28, 1973, as provided by Act Dec. 28, 1973, P. L. 93-205, § 16, 87 Stat. 903, which appears as 16 USCS § 1531 note.

RESEARCH GUIDE

Law Review Articles:

Rosenberry. The Effect of the Endangered Species Act on Housing Construction. 33 *Hastings L J* 551-582, January 1982.

§ 1542. Authorization of appropriations

(a) **In general.** Except as provided in subsections (b), (c), and (d), there are authorized to be appropriated—

16 USCS § 1542

CONSERVATION

ENDANGERED

(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 sections [section] 7(e), (g), and (h) [16 USCS § 1536(e), (g), (h)] not to exceed \$600,000 for each of fiscal years 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) [16 USCS § 1537a(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.

(Dec. 28, 1973, P. L. 93-205, § 15, 87 Stat. 903; June 30, 1976, P. L. 94-325, § 1, 90 Stat. 724; Nov. 10, 1978, P. L. 95-632, § 9, 92 Stat. 3762; Dec. 28, 1979, P. L. 96-159, § 8, 93 Stat. 1230; Oct. 13, 1982, P. L. 97-304, § 8[(a)], 96 Stat. 1425; Oct. 7, 1988, P. L. 100-478, Title I, § 1009, 102 Stat. 2312.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This Act", referred to in this section, is Act Dec. 28, 1973, P. L. 93-205, 87 Stat. 884, which appears generally as 16 USCS §§ 1531 et seq. For full classification of this Act, consult USCS Tables volumes.

Explanatory notes:

The bracketed word "section" has been inserted in subsection (b) as the word probably intended by Congress.

Effective date of section:

This section is effective on the date of its enactment on Dec. 28, 1973, as provided by Act Dec. 28, 1973, P. L. 93-205, § 16, 87 Stat. 903, which appears as 16 USCS § 1531 note.

Amendments:

1976. Act June 30, 1976, redesignated subpara. (A) as para. (1) and, in para. (1) as so redesignated, substituted "not to exceed \$10,000,000 for the fiscal year ending June 30, 1976, not to exceed \$1,800,000 for the fiscal transitional period ending September 30, 1976, and not to exceed a total of

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“(2) not to exceed \$2,500,000 for each of fiscal years 1979 and 1980, not to exceed \$3,000,000 for fiscal year 1981, and not to exceed \$3,500,000 for fiscal year 1982 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 \$1,500,000 for fiscal year 1980, not to exceed \$1,750,000 for fiscal year 1981, and not to exceed \$1,850,000 for fiscal year 1982 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 terrestrial plants.”

1988. Act Oct. 7, 1988 substituted this section for one which read:

“(a) In general. Except as provided in subsections (b), (c), and (d), there are authorized to be appropriated—

“(1) not to exceed \$27,000,000 for each of fiscal years 1983, 1984, and 1985 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 \$3,500,000 for each of fiscal years 1983, 1984, and 1985 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 \$1,850,000 for each of fiscal years 1983, 1984, and 1985 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) Cooperation with States. For the purposes of section 6, there are authorized to be appropriated not to exceed \$6,000,000 for each of fiscal years 1983, 1984, and 1985.

“(c) Exemptions. 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 of fiscal years 1983, 1984, and 1985.

“(d) 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 \$150,000 for each of fiscal years 1983 and 1984, and not to exceed \$300,000 for fiscal year 1985, and such sums shall remain available until expended.”

CROSS REFERENCES

This section is referred to in 16 USCS § 1537.

RESEARCH GUIDE

Law Review Articles:

Rosenberry. The Effect of the Endangered Species Act on Housing Construction. 33 Hastings L J 551-582, January 1982.

§ 1543. Construction with Marine Mammal Protection Act of 1972

Except as otherwise provided in this Act, no provision of this Act shall take precedence over any more restrictive conflicting provision of the Marine Mammal Protection Act of 1972.

(Dec. 28, 1973, P. L. 93-205, § 17, 87 Stat. 903.)

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16 USCS § 1544

§ 1544. Annual cost analysis by the Fish and Wildlife Service

On or before January 15, 1990, and each January 15 thereafter, the Secretary of the Interior, acting through the Fish and Wildlife Service, shall submit to the Congress an annual report covering the preceding fiscal year which shall contain—

- (1) an accounting on a species by species basis of all reasonably identifiable Federal expenditures made primarily for the conservation of endangered or threatened species pursuant to this Act; and
 - (2) an accounting on a species by species basis of all reasonably identifiable expenditures made primarily for the conservation of endangered or threatened species pursuant to this Act by States receiving grants under section 6 [16 USCS § 1535].
- (Dec. 28, 1973, P. L. 93-205, § 18, as added Oct. 7, 1988, P. L. 100-478, Title I, § 1012, 102 Stat. 2314.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

“This Act”, referred to in this section, is Act Dec. 28, 1973, P. L. 93-205, 87 Stat. 884, which is popularly known as the Endangered Species Act of 1973, and appears generally as 16 USCS §§ 1531 et seq. For full classification of such Act, consult USCS Tables volumes.

CODE OF FEDERAL REGULATIONS

United States Fish and Wildlife Service, Department of the Interior—Endangered and threatened wildlife and plants, 50 CFR Part 17.
National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce—General provisions, 50 CFR Part 217.

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