106TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
106–1013

COMMON SENSE PROTECTIONS FOR ENDANGERED SPECIES ACT

OCTOBER 26, 2000.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 3160]

The Committee on Resources, to whom was referred the bill (H.R. 3160) to reauthorize and amend the Endangered Species Act of 1973, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF THE BILL

The purpose of H.R. 3160 is to reauthorize and amend the Endangered Species Act of 1973.

BACKGROUND AND NEED FOR LEGISLATION

H.R. 3160 amends the Endangered Species Act of 1973 (Public Law 93–295, codified at 16 U.S.C. 1531–1543) which was enacted to provide a means of preventing various forms of plants and animals from reaching the point of extinction. This law now imposes rigid and comprehensive regulations on federal agencies, state and local governments, and private citizens alike in order to protect species in the United States and to some extent foreign countries as well.

The Endangered Species Act (ESA) is administered by two separate federal agencies: the Fish and Wildlife Service within the Department of Interior and the National Marine Fisheries Service within the Department of Commerce ("Services"). The basic framework of the ESA includes the listing of a species as either endangered or threatened, after which it is prohibited to "take" the spe-

cies unless one obtains either a incidental take permit under Section 10(a) of the ESA for private actions or an incidental take statement for federal actions after what is commonly referred to as a Section 7 consultation.

Section 9 of the ESA sets forth those actions which are prohibited or unlawful. It prohibits the "taking" of a species. "Take" is defined to mean to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect a species or attempt to engage in any of these activities. Regulations issued by the Services also define "take" to include significant adverse modification or destruction of a species' habitat. Section 9 take prohibitions only directly apply to fish and wildlife which are listed as endangered. The ESA authorizes the Secretaries to extend by regulations the "take" prohibition to wildlife listed as "threatened."

There are significant differences in the prohibitions that apply to endangered plants. There is no prohibition on the "take" of a listed plant on one's own private property. However, regulatory authority to protect plants may be gained by the government if a private landowner needs a government permit to conduct certain activities, as when a Federal Water Pollution Control Act 404 permit is needed or an ESA Section 10 permit is needed because of the presence of endangered wildlife.

Section 7 identifies how all federal agencies will further the purposes of protecting endangered species through consultations with the Services. Every federal agency must insure that any action authorized, funded, or carried out is not likely to jeopardize the continued existence of a threatened or endangered species or result in destruction of or adverse modification of designated critical habitat. Consultation is the process which the federal agency engages in after a determination is made by that federal agency that its planned action may affect a listed species or critical habitat. After its initiation, consultation is concluded by the issuance of a biological opinion. The biological opinion must include the relevant Service's judgment as to whether the planned action will jeopardize the species (a "jeopardy opinion"), or whether it will not (a "no jeopardy opinion"). If a "jeopardy" opinion is reached, then the Service must suggest reasonable and prudent alternatives to the action.

The biological opinion is also the document which provides the "incidental take statement." If, in the opinion of the Service, a "take" will occur, the Service prescribes "reasonable and prudent measures" and sets forth the terms and conditions that the federal agency must meet or comply with to proceed with the project. There are, generally, two exceptions—hardship exemptions (which are very rare) and permits.

Under Section 10 of the ESA, the Service can issue a permit to allow the incidental taking of species so that an action or project can proceed. The permits issued under Section 10 are usually associated with private landowners or state and local governments and are issued only after an applicant submits an approved conservation plan (known as a habitat conservation plan or HCP). There are criteria the applicant must meet, including what the probable impact to the species will be, what mitigation measures the applicant is taking to minimize the impacts to the species, what alternatives to the action the applicant has developed and considered. Finally,

the applicant must follow other terms and conditions the Service may require.

An added complication overlaying some ESA decisions is the permit required by Section 404 of the Federal Water Pollution Control Act (Public Law 92–500) commonly known as the Clean Water Act. Section 404, through the Army Corps of Engineers, generally regulates the discharge of dredged or fill material into navigable waters of the United States, would includes wetlands. Current interpretation of "navigable" waters can mean just about any wet land or in many cases dry land near water bodies. The Corps must consult under Section 7 of the ESA with the Services when processing a 404 permit if the Corps determines that a particular activity may affect a threatened or endangered species or modify critical habitat.

Mitigation for impacts caused by activities on various environments is now regularly required by the Services to obtain a permit from a federal agency. Mitigation can be accomplished in many ways, but usually takes the form of setting aside nonfederal land or restricting activities on such lands, along with requiring various types of monetary payments. Mitigation measures can also be in the form of replanting trees or other vegetation that provides reciprocal habitat for the species or ecosystem impacted. Land involved in mitigation is often transferred to either a public or private entity for long- term maintenance. The entity may be a state or local agency or a private conservation group.

Over the most recent three Congresses, the Committee on Resources has held many hearings specifically on the Endangered Species Act and its implementation. Testimony has been received from hundreds of citizens, including many elected state and local officials, federal officials, private property owners, public land users, and many others. Their total input resulted in many of the recommendations for changes to the Endangered Species Act embodied in H.R. 3160. These changes are designed to approach saving endangered species in a common sense manner that includes consideration of impacts on both humans and the natural world.

As follows are hearings conducted by the Committee on Resources, through the ESA Task Force during the 104th Congress:

1. March 13, 1995: Joint oversight hearing on ESA and wetlands issues in Belle Chase, Louisiana (Hearing Print 104–6).
2. March 20, 1995: Hearing on ESA in Boerne, Texas (Hearing Print 104–6)
3. April 1, 1995: Hearing on ESA in New Bern, North Carolina (Hearing Print 104–7).
4. April 17, 1995: Hearing on ESA in Bakersfield, California (Hearing Print 104–13).
5. April 24, 1995: Hearing on ESA in Vancouver, Washington (Hearing Print 104–15).
6. April 26, 1995: Hearing on ESA in Riverside, California (Hearing Print 104–11).
7. April 28, 1995: Hearing on ESA in Stockton, California (Hearing Print 104–16).
8. May 10, 1995: Hearing on ESA in Washington, D.C. (Hearing Print 104–10).
9. May 18, 1995: Hearing on ESA in Washington, D.C. (Hearing Print 104–14).

10. May 25, 1995: Hearing on ESA in Washington, D.C. (Hearing Print 104–18).

As follows are hearings conducted by the Committee on Resources on the Endangered Species Act during the 104th Congress:

1. September 20, 1995: Hearing on H.R. 2275 in Washington, D.C. (Hearing Print 104–37).

2. March 20, 1996: Hearing on "The Implementation of the ESA, Private Property Rights and Whether Present Policies Have Recovered Threatened or Endangered Wildlife." in Washington, D.C. (Hearing Print 104–59).

3. April 17, 1996: Hearing on "Examining the Expenditures of Agencies That Participate in the Efforts to Save Endangered and Threatened Species." in Washington, D.C. (Hearing Print 104–65).

4. June 25, 1996: Hearing on the "Lifting of the Moratorium on Listing of Threatened or Endangered Species" in Washington, D.C. (Hearing Print 104–89).

5. July 24, 1996: Hearing on "The ESA with Regard to Section 10(a) Permits (Habitat Conservation Plans) and Other Incentives" in Washington, D.C. (Hearing Print 104–97).

6. September 17, 1996: Hearing on "Equal Access to the Courts Under the ESA", in Washington, D.C. (Hearing Print 104–100).

As follows are hearings conducted by the Committee on Resources on the Endangered Species Act during the 105th Congress:

1. April 10, 1997: Hearing on H.R. 478, to improve the ability of individuals and local, State, and federal agencies to comply with the ESA in building, operating, maintaining, or repairing existing flood control projects, facilities, or structures and to determine whether federal wildlife policies have impeded proper ongoing maintenance and repair of flood control structures. in Washington, D.C. and via teleconference in Sacramento, California (Hearing Print No. 105–12).

2. March 5, 1998: Hearing on regional differences in the manner in which the ESA is implemented. in Washington, D.C. (Hearing Print 105–80).

3. July 15, 1998: Oversight hearing on the implementation of the ESA in the Southwestern region of the United States in Washington, D.C. (Hearing Print 105–96).

4. September 2 and 3, 1998: Oversight field hearings were held in Pasco, Washington and Boise, Idaho on the National Marine Fisheries Service role in implementing the ESA and on H.R. 4335 to transfer to the Secretary of the Interior the functions of the Secretary of Commerce and the National Marine Fisheries Services under the ESA (Hearing Print 105–111).

5. October 26, 1998: Full Committee conducted a field hearing in Clovis, New Mexico, on how the ESA has been implemented in New Mexico (Hearing Print 105–118).

As follows are hearings conducted on the ESA during the 106th Congress:

1. April 14, 1999: Hearing on H.R. 1142, to ensure that landowners receive treatment equal to that provided to the federal government when property must be used, Washington, D.C. (Hearing Print 106–23).

2. May 26, 1999: Hearing on Land and Money Mitigation Requirements in Endangered Species Act Enforcement, Washington, D.C. (Hearing Print 106–34).

3. July 9, 1999: Hearing on Enforcement of the Endangered Species Act in California in Hemet, California (Hearing Print No. 106–49).

4. July 24, 1999: Hearing in Greeley, Colorado, on Implementation of the Endangered Species Act.

5. February 2, 2000: Hearing on: H.R. 3160, to reauthorize and amend the Endangered Species Act of 1973.

6. March 1, 2000: Hearing on: H.R. 3160, to reauthorize and amend the Endangered Species Act of 1973.

7. April 27, 2000: Hearing on: Hydropower, River Management and Salmon Recovery Issues on the Columbia/Snake River.

8. September 14, 2000: Hearing on: General Accounting Office (GAO) review of Endangered Species Act implementation in Southern California.

H.R. 3160 specifically addresses many of the concerns identified by witnesses in these hearings. The changes address many procedural deficiencies and are designed to insure fair treatment of private citizens impacted by the ESA. The major problems identified during the many hearings held by the Committee on the ESA are as follows:

1. The listing process: Many witnesses testified as to the lack of adequate scientific documentation, lack of scientific peer review, lack of adequate public notice and input; failure to involve the states and local governments in the listing process.

2. The consultation and permitting processes: There was considerable testimony regarding the failure to meet current statutory deadlines for making consultation decisions and the lack of deadlines for making decisions on permits.

3. The failure to comply with agreements: Many permit applicants testified that they cannot rely on representations and promises made by the Services.

4. Arbitrary and capricious use of mitigation: The Committee received a great deal of testimony and documentation regarding the arbitrary and capricious use of mitigation to extract extremely large amounts of land and money mitigation for both Section 10 and Section 7 permit and consultation applications.

5. Permit applicants and the Section 7 consultation process: Witnesses agreed that there is a lack of involvement of private permit applicants in the consultation process under Section 7.

6. Delisting and recovery: One of the major failures of the current law is the failure to recover species and to delist those species who have either recovered or which no longer exist, according to many witnesses.

7. No consideration of economic and social impacts: The lack of any consideration of economic and social impacts of the implementation of the ESA, including a failure to consider the impacts on public safety and public health of delays in decision making for important public safety related projects, was identified as a major weakness of the ESA.

In addition, many witnesses testified that the ESA results in the taking of private property without the payment of just compensation as required by the 5th Amendment of the U.S. Constitution. This issue was addressed in a separate piece of legislation, H.R. 1142, the Landowners Equal Treatment Act.

COMMITTEE ACTION

H.R. 3160 was introduced on October 27, 1999, by Resources Committee Chairman Don Young (R–AK). The bill was referred to the Committee on Resources. On February 2, 2000, and on March 1, 2000, the Committee on Resources held hearings on H.R. 3160. On June 21, 2000, the Full Resources Committee met to consider H.R. 3160. Congressman Jim Saxton (R–NJ) offered and withdrew an amendment in the nature of a substitute. Congressman George Miller (D–CA) also offered and withdrew an amendment. No further amendments were offered and the bill was ordered favorably reported to the House of Representatives by a roll call vote of 25 to 15, as follows:

Committee on Resources
U.S. House of Representatives
106th Congress

Full Committee

Date 6-21-00

Roll No. 1

Bill No. H.R. 3160 Short Title Common Sense Protection for Endangered Species

Amendment or matter voted on: FINAL PASSAGE

Member	Yea	Nay	Present	Member	Yea	Nay	Present
Mr. Young (Chairman)	X			*Mr. Miller*		X	
Mr. Tauzin	X			*Mr. Rahall*			
Mr. Hansen	X			*Mr. Vento*			
Mr. Saxton		X		*Mr. Kildee*		X	
Mr. Gallegly	X			*Mr. DeFazio*			
Mr. Duncan	X			*Mr. Faleomavaega*			
Mr. Hefley				*Mr. Abercrombie*		X	
Mr. Doolittle	X			*Mr. Ortiz*	X		
Mr. Gilchrest		X		*Mr. Pickett*			
Mr. Calvert	X			*Mr. Pallone*			
Mr. Pombo	X			*Mr. Dooley*	X		
Mrs. Cubin	X			*Mr. Romero-Barcelo*		X	
Mrs. Chenoweth-Hage	X			*Mr. Underwood*			
Mr. Radanovich				*Mr. Kennedy*			
Mr. Jones	X			*Mr. Smith*		X	
Mr. Thornberry	X			*Mr. John*			
Mr. Cannon	X			*Mrs. Christensen*		X	
Mr. Brady	X			*Mr. Kind*		X	
Mr. Peterson	X			*Mr. Inslee*		X	
Mr. Hill	X			*Mrs. Napolitano*		X	
Mr. Schaffer	X			*Mr. Tom Udall*		X	
Mr. Gibbons	X			*Mr. Mark Udall*		X	
Mr. Souder	X			*Mr. Crowley*		X	
Mr. Walden	X			*Mr. Holt*		X	
Mr. Sherwood							
Mr. Hayes	X						
Mr. Simpson	X						
Mr. Tancredo	X			**TOTAL**	25	15	

SECTION-BY-SECTION ANALYSIS

Section 1. Short title; table of contents

This section provides the short title for the bill, the Common Sense Protections for Endangered Species Act, and the table of contents for the bill.

Section 2. References to the Endangered Species Act of 1973

This section that amendments and repeals made by this bill are to the Endangered Species Act (ESA, 16 U.S.C. 1531 et seq.).

TITLE I—IMPROVING SCIENTIFIC INTEGRITY OF LISTING DECISIONS AND PROCEDURES

Section 101. Improving the validity and credibility of decisions

Subsection (a) amends ESA Section 4 expanding the considerations upon which a listing of a species as endangered or threatened is made to allow the Secretary of the Interior and the Secretary of Commerce to consider not only the government regulatory mechanisms but also other proactive conservation programs and measures voluntarily undertaken. The designation of critical habitat is made part of the recovery planning process rather than a mandatory requirement during the listing process.

Currently, the Secretaries make listing determinations solely on the basis of the best scientific and commercial data available after conducting a review of the status of the species. H.R. 3160 would require the Secretaries to solicit and fully consider data from any affected state or any interested non-federal person. The bill requires the Secretaries to give greater weight, consideration, and preference to empirical data rather than projections or other extrapolations developed through modeling.

H.R. 3160 would allow the Secretaries, in making a listing decision, to consider the future conservation benefits to the species under habitat conservation plans prepared as part of the application for an incidental take permit or to any state or other management agreement or under any conservation agreement between the Secretaries and any other person.

Within 18 months from enactment of H.R. 3160, the Secretaries would be required to adopt a regulation establishing scientifically valid standards for rendering taxonomic determinations of species and subspecies, requiring reproductive isolation from other subspecific population units and constituting an important component in the evolutionary legacy of the species.

Subsection (b) of the section clarifies that decisions by the Secretaries on petitions to list, delist, or change the status of a species should be made consistent with the priority ranking system already established for listing species. It improves the petition process by requiring that when a petition to list is received by the Secretaries, the relevant Secretary shall publish a notice in the Federal Register. If the relevant Secretary finds that a petition is warranted, he shall begin the status review of the species and publish that warranted finding in the Federal Register.

The bill establishes minimum requirements to be contained in listing petitions which includes:

(1) Scientific documentation that the fish or wildlife or plant is a species;

(2) A description of all data on the range, population, and distribution of the species, explanation of how the data was obtained, and an identification of the location where the data can be reviewed;

(3) Scientific evidence that the population has declined beyond normal population fluctuations;

(4) An appraisal of the data on the threats or causes of decline;

(5) An identification of the data that has been peer-reviewed or field-tested;

(6) The reason that the petitioned action is warranted;

(7) A bibliography of scientific literature supporting the petition;

(8) The qualifications of any person cited in the petition as an expert; and

(9) At least one independent study or expert opinion in support of the petition.

H.R. 3160 requires that for positive findings on petitions, the relevant Secretary must send a copy of the petition to the Governor of a State in which the species is found and to affected tribes, and solicit the advice of the Governor and tribes as to whether the petitioned action is warranted. Thereafter, if the Secretary's decision is in direct conflict with the information submitted by the Governor or tribes, the finding shall not be final until the Secretary submits the finding to peer review for a period of 30 days. If the peer reviewers agree with the Secretary, he is to then prepare a record of decision which shall be submitted to the Governor or tribes.

The bill also sets up a procedure for submitting a petition to change the status of a species or delist a species, if the current listing is no longer appropriate because of a change in the factors used for listing, where there is new data or a reinterpretation of prior data, where it is found that the species is extinct, where the recovery goals for the species have been achieved, or the original listing was not subject to adequate peer review.

Under the current law, if the relevant Secretary finds that the petition may be warranted, he has one year to determine whether the listing is not warranted, warranted, or warranted but precluded. If he finds that the petition is warranted, H.R. 3160 would require that he publish a notice in the Federal Register that he is commencing a status review that includes the following:

(1) Any missing data that would support the determination.

(2) Any data necessary to make the determination.

(3) Any data that may be necessary to ensure the continued validity of the determination.

Under the bill, if there is a warranted finding, the Secretary must hold (if requested) at least one public meeting within 30 days in each State in which the species occurs and a person making a request resides. Public meetings must be at a location that is as centrally located as possible to the areas believed to be habitat of the species, and in each rural area of the State that the Governor determines is affected by the decision.

The bills continues to allow judicial review of negative findings on petitions and findings that petitions are not warranted or war-

ranted but precluded, but that in any such suit, it allows any person to intervene of right if the person can demonstrate that a determination to list will have a direct economic impact on such person and requires the courts to give great weight to the finding of warranted but precluded.

During the one-year status review, the bill requires greater solicitation of information regarding the status of the species from states and affected persons that may assist in making the determination whether to list. The relevant Secretary must allow not less than 180 days to submit data.

Subsection (c) of the section adds additional notices during the proposed rule stage for Governors and affected tribes. At least 12 months before proposing the rule, the relevant Secretary is to notify the Governor of each State in which the species is believed to occur (and each affected tribe) and solicit their advice as to whether the determination is warranted. He shall consider the advice received and if a Governor or tribe provides scientific evidence that the determination is not warranted, the Secretary may not proceed unless he shows by a preponderance of scientific evidence that the information submitted is incorrect and that the proposal is warranted. The bills retains all other notice requirements to the states and requires that the Secretary give the Governors a record of decision including information which did not support the determination.

The Secretary is to publish a summary of the proposed regulation in an area newspaper where the species occurs and upon request, not later than 45 days after publication of the notice, hold at least one public meeting in each affected State. The Secretary is not required to hold more than five public meetings.

The Secretary is to identify and include with the proposal a description of data to be considered and which is yet to be collected or field verified; any necessary data that have not been collected and considered; deadlines to collect and consider the data; a description of additional scientific and commercial data that would assist in the preparation of a recovery plan; a list of known threats to the species and a description of the types of activities that may be affected by the determination and any restriction on use of property that may result; and other measures that may either at present or in the future contribute to the conservation of the species. Not later than the deadline published by the Secretary, he shall collect the data; provide an opportunity for public review and comment on the data; consider the data after that review and comment; and publish in the Federal Register the results of that consideration and a description of and schedule for any actions warranted by the data.

Subsection (d) requires within 1 year from publication of the proposed rule, the Secretary shall publish in the Federal Register either a final regulation to implement the determination; a notice that period is being extended; or notice that the proposed regulation is being withdrawn.

Subsection (e) requires that each proposal to list a species shall be based primarily and substantially on peer-reviewed scientific information that has been to the maximum extent feasible verified by field testing.

Subsection (f) requires that concurrently with a listing rule, the Secretary shall publish in the Federal Register an analysis of the economic, social, and other public health, safety, and welfare effects of the listing.

Subsection (g) makes several definitional changes including the definition of the term "species" which would not include a distinct population which is listed as endangered or threatened under state law and where state law prohibits the unpermitted take of the species.

Section 102. Peer review

This section establishes new requirements for peer review of decisions which must be based on scientific standards, including the determination to list or delist a species; the designation or revision of the designation of critical habitat; the determination that a proposed action is likely to jeopardize the continued existence of a listed species; the proposal of any reasonable and prudent alternatives by the Secretary; and the issuance of any regulation or criteria establishing specific mitigation obligations with respect to a species. Peer reviewers would have to be "qualified individuals" requiring expertise in the biological sciences. The bill prevents conflicts of interests by precluding those persons who are employed by or under contract to the Secretary or to the State where the species is located or who has actively participated in the prelisting or listing processes or advocated that a listing decision be made; a person whose employment is related to the action or species under consideration; or a person with or employed by someone with a direct financial interest in the decision.

The relevant Secretary must seek nominations of persons who agree to peer review an action and maintain a list of qualified peer reviewers. Before any action shall become final, the Secretary appoints not more than two qualified individuals to review and report on the scientific information and analyses on which the proposed action is based. The Governor of each State in which the species is located may appoint up to two qualified individuals.

The Secretary shall make available to each peer reviewer all scientific information available regarding the species. The peer reviewer shall give his or her opinion with regard to any technical or scientific deficiencies in the proposal, whether the methodology and analysis supporting the petition conform to the standards of the academic and scientific community, and whether the proposal is supported by sufficient credible evidence.

The Secretary shall publish with any final regulation a summary of the peer review report which shall be included in the official record and available for public review.

Section 103. Making data public

Subsection (a) makes all data used to list a species subject to the Freedom of Information Act (5 U.S.C. 552) unless the Secretary, for good cause, determines that the information must be kept confidential. The burden is on the Secretary to prove that such information shall be confidential. The Secretary shall not disclose the location of private property as habitat for a listed species unless he first notifies and receives the consent of the owner or the information is otherwise public information.

Subsection (b) requires the Secretary to provide at least 30 days notice of any hearing or public meeting at which public comment is accepted in the Federal Register and in a newspaper in the location of the hearing or public meeting. Each public meeting shall allow the public to make statements and receive information and answers from the agency regarding the matter that is the subject of the public meeting.

Section 104. Judicial review

This section requires that any final listing decision shall be subject to de novo judicial review with the court determining whether the decision is supported by a preponderance of the evidence.

Section 105. State consultation on final determination

If a Governor who consulted with the Secretary during the listing process files comments disagreeing with the proposed regulation, a final regulation in conflict with the Governor shall not be issued until the Secretary consults with the President. If a final regulation is adopted that is in conflict with comments made by the Governor or a regulation requested by a Governor is not adopted, the Secretary shall submit to the Governor a written justification for the failure to adopt regulations consistent with the comments or petition of the Governor.

Section 106. Determinations by the Secretary to delist

This section requires the Secretary to conduct a review of all listed species every five years and determine whether any should be delisted, or have a change in listing status based on new data or a reinterpretation of prior data which is in error; where the species is extinct; or the recovery goal established for the species has been achieved. Upon such finding the process must begin within 90 days.

Section 107. Cooperation with the States

The Secretary shall develop, in cooperation with the States, and publish in the Federal Register, agency guidelines to ensure that cooperation with the States is achieved efficiently and effectively.

TITLE II—COMPLYING WITH ALL FEDERAL LAWS AND MISSIONS

Section 201. Balancing ESA with other laws and missions

Section 7 of the ESA requires the relevant Secretary to use his programs to protect endangered species. This section retains that requirement but requires other federal agencies to utilize their authorities for the conservation of endangered and threatened species consistent with their primary missions and in consultation with the Secretary. It requires all federal agencies to initiate consultation within 15 days after the date on which a request is received from a permit or license applicant for consultation. If the Secretary asserts the applicability of ESA Section 7 to any property, the Secretary has the responsibility of demonstrating that a threatened or endangered species or its critical habitat is located in the area that is the subject of the consultation, and the proposed action will jeopardize the continued existence of a threatened or endangered spe-

cies. This provision insures that the Secretary shall not issue a biological opinion that a proposed action will jeopardize the continued existence of a species where there is insufficient data on the impact of a proposed action on such species.

Whenever a listing or a designation of critical habitat requires reinitiation of consultation on an already approved action, the consultation shall commence promptly, but not later than 90 days after the date of the listing or critical habitat designation rule, and shall be completed not later than 1 year after the date on which the consultation commenced. During that one-year period, any site specific actions may not be enjoined based on that listing. The federal agency implementing a land use plan or management plan may continue a site-specific, ongoing or previously scheduled action within the scope of the plan on the lands prior to completing consultation on the plan, if no consultation on the action is required; or consultation on the action is required and the Secretary issues or has issued a biological opinion, and the action satisfies the requirements of law.

H.R. 3160 clarifies that the responsibilities of a federal agency under the ESA shall not supersede and shall be implemented in a manner consistent with duties assigned to the federal agency by any other laws or by any treaties. If a federal agency determines that its responsibilities and duties are in irreconcilable conflict with the ESA, the agency shall request the President to resolve the conflict. In determining a resolution, the President shall consider and choose the course of action that best meets the public interest and balances pursuit of the recovery objective or the purposes of the recovery plan with economic and social needs and the purposes of other laws or treaties.

This provision insure that if consultation is not concluded and the written incidental take statement is not provided to the federal agency by the deadline established in the ESA, the requirements of the ESA shall be deemed met and the federal agency may proceed with the agency action.

In conducting a consultation, the Secretary must provide any person who has sought authorization or funding from a federal agency for an action that is the subject of the consultation the opportunity to: (1) prior to the development of a draft biological opinion, submit and discuss with the Secretary and the federal agency information relevant to the effect of the proposed action on the species and the availability of reasonable and prudent alternatives that the federal agency and the person can take to avoid violation; (2) must be given information, subject to the Privacy Act, on the status of the species, threats to the species, and conservation measures used by the Secretary to develop the biological opinion, including any incidental taking statements; and (3) receive a copy of the draft biological opinion and prior to issuance of the final biological opinion be allowed to submit comments on the draft and discuss with the federal agencies the basis for the draft biological opinion. If reasonable and prudent alternatives are proposed by a person and the Secretary does not include the alternatives in the final biological opinion, the Secretary shall explain, in writing, why those alternatives were not included.

In the development of a biological opinion with respect to public lands, the Secretary shall solicit and utilize information and advice

regarding those lands from the Governor of each State in which the lands are located. With respect to nonpublic lands, the Secretary shall solicit such advice only upon the request of the affected landowner.

H.R. 3160 would prevent the Secretary from requiring another federal agency to impose in any biological opinion or take statement any restriction or obligation on the activity of any person that is not authorized, funded, carried out, or otherwise subject to regulation by the federal agency.

Subsection (d) provides definitions, including a definition of "reasonable and prudent alternative" to mean an alternative to an agency action that can be implemented in a manner consistent with the purpose of the agency action or the activity of a non-federal person; that can be implemented consistent with the scope of the legal authority and jurisdiction of the agency; that is economically and technologically feasible; that the Secretary believes would avoid being likely to jeopardize the continued existence of the species; that does not exceed in nature, scope, and extent the effect of the proposed activity that is the subject of the consultation; and that prevents the agency action concerned from jeopardizing the continued existence of the species and imposes the least social and economic cost possible. It also defines "likely to jeopardize the continued existence of" to mean an action or activity that significantly diminishes the likelihood of the survival of the species by significantly reducing the numbers or distribution of the entire species.

Subsection (e) requires the Secretary to provide to each applicant for a permit or license that is subject to consultation a written statement that shall guarantee that, so long as the project at issue is carried out consistent with the take statement, the applicant shall not be subject to new or additional requirements for the specific protection of any species beyond those in the take statement. All federal entities shall be bound by the Secretary's guarantee. The Secretary shall not refuse to provide an incidental take statement, unless the Secretary has provided to the agency and the permit applicant all conditions for issuance of the statement in writing, and an opportunity for the agency and the permit applicant to provide a written response to the conditions. Any refusal to provide an incidental take statement without first providing the written conditions and providing an opportunity to respond is deemed to be arbitrary and capricious. This section would prevent the Secretary from requiring measures to be taken that exceed in nature, scope, or effect the impact of the taking for which the statement is issued.

Section 202. Actions not requiring consultation and conferencing

This section would clarify that further consultation and conferencing shall not be required for any agency action that is consistent with a final recovery plan, a cooperative management agreement, or an incidental taking permit; or consists of routine operation, maintenance, rehabilitation, repair, or replacement to a project or facility, including operation of a project or facility in accordance with a previously-issued federal license, permit, or other authorization.

In addition, in order to respond to or to prevent or minimize damage from a natural event or other emergency, consultation could be waived for the repair or maintenance of a natural gas

pipeline, hazardous liquid pipeline, flood control facility, or electrical distribution transmission, or substation facility, if the repair or maintenance is necessary to address a probable imminent threat to human lives or a probable and significant threat to the environment. If a consultation is required by the relevant Secretary for such repair or maintenance, it shall be completed within 10 days of any request by the applicant for consultation. Any measure required to be taken to avoid take for an activity that is the subject of such a waiver may not exceed in nature, scope, and extent the effect of the activity and shall not be required prior to the completion of the repair or maintenance action.

An agency action shall not constitute a taking of a species if the action is consistent with the actions provided for in a final recovery plan; a cooperative management agreement or an incidental take permit; or the terms and conditions specified in an incidental take statement.

Section 203. Eliminating the exemption committee

This section eliminates the exemption committee and provides for Presidential exemptions which include: (1) an exemption for any activity if the Secretary of Defense determines that the exemption of the activity is necessary for reasons of national security; and (2) in areas President has declared to be a major disaster area, for any project for the repair or replacement of a public facility substantially as the facility existed prior to the disaster if the President determines that the project is necessary to prevent the recurrence of such a natural disaster or to reduce the potential loss of human life, and involves an emergency situation that makes the application of the procedures of the ESA impractical.

TITLE III—PERMITTING AND ENFORCEMENT

Section 301. Protecting public health and safety

This section insures that an action is not a taking of a listed species for which a private person or local government can be punished if the activity of that person: (1) addresses a critical threat to public health or safety or a catastrophic natural event, or is mandated by any government agency for public health or safety purposes; or (2) is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity that consists of ongoing maintenance, routine operation or use, and emergency repair of existing pipelines, flood control facilities or projects, fire breaks, transmission and distribution lines, groundwater recharge facilities and areas, water storage and recycling facilities, water drainage or water conveyance structures and channels, and appurtenant facilities; or road and right-of-away maintenance, use, and repair; or emergency repair or restoration of any property or non-federal facility to the condition in which it existed or operated immediately before an emergency or disaster, meeting current standards.

Section 302. Intervention in citizen suits

This section amends the law with regard to citizens suits to require that the person filing the suit must meet the Constitutional requirements for standing and insure standing for those who have suffered economic or other injury resulting from a violation of the

law or to enjoin the federal government or any of its officials alleged to be in violation of the ESA, if the violation poses immediate and irreparable harm to a threatened or endangered species.

This section would allow any person to intervene as a matter of right in any citizen suit brought if the suit represents a reasonable threat of economic injury to that person. The intervener would have the same right to present argument and to accept or reject potential settlements as the parties to the suit.

Section 303. Incidental take permits

The Secretaries are authorized under current law to issue incidental take permits which allow the taking of a species or its habitat. To obtain a permit, the applicant must submit a plan that specifies (1) the impact on the species from the taking; (2) the steps the applicant can reasonably and economically take to minimize and mitigate the impacts, and the funding to implement those steps; and (3) the alternatives to the taking and why other alternatives would not be used.

The relevant Secretary is to issue the permit if he finds that the taking will be incidental, the applicant will reasonably and economically minimize the impacts of the taking; the applicant will ensure that funding will be provided, the taking will not appreciably reduce the likelihood of the survival and recovery of the species, and these measures will be met. This section requires the Secretary to include terms and conditions in the permit that accomplish the goals of the law at the least cost to the permit applicant.

This section limits the Secretary's authority to require applicants, as a condition of processing a permit: (1) to expand the application to include land, an interest in land, a right to use or receive water, or a proprietary water right not owned by the applicant or to address a species other than the species for which the application is made; (2) to carry out mitigation that exceeds in nature, scope, or effect the impacts of the taking for which the permit is issued; (3) to minimize and mitigate for loss of habitat resulting from activities under the permit in an area of land greater than the area of land that is subject to impacts for which the mitigation is required; or (4) to expend an aggregate amount greater than the cost of fencing and preserving current conditions of the land on which activities are conducted under the permit.

This section places time limits on the Secretary for completing the processing of, and approving or denying, any application for a take permit within 90 days of the date of submission or within such period of time as mutually agreed to. It also clarifies that section 102(2) of the National Environmental Policy Act does not apply to preparation and issuance of an incidental take permit.

This section requires that if the Secretary considers a conservation plan to be insufficient or incomplete, he must inform the applicant in writing within 30 days, stating why the application is incomplete or insufficient and stating any conditions that must be met to issuance of the permit. Otherwise the denial is deemed to be arbitrary and capricious.

If the application is resubmitted, the Secretary shall have 60 days to either: (1) issue the permit; (2) provide written reasons for denial; or (3) formally deny the permit, in writing, stating the reasons for the denial.

This section clarifies that no consultation is required for any action by a permittee that is authorized by a permit; any action by the Secretary in implementing, enforcing, or monitoring compliance with a permit; or the issuance, amendment, or renewal of any permit, if the Secretary determines that his action will not appreciably reduce the likelihood of the survival and recovery of any species covered by the permit.

This section would limit the authority of the Secretary to later require additional minimization or mitigation measures from a permittee who is in compliance with the permit or to make additional payments, or accept additional restrictions on land available for development or land management or any water or water-related rights under the permit, without the consent of the permittee.

This section retains the authority of the Secretary to revoke permits for failure to comply with the permit, but only after providing a permittee notice and an opportunity to make appropriate corrections. It also limits lawsuits to challenge permits unless suit is filed within 45 days after publication in the Federal Register of notice of issuance of the permit.

This section limits the ability of the Secretary to require as a condition of a permit that a permittee for a public project take any measures to minimize or mitigate impacts of a taking under the permit if the costs of implementing such measures will exceed 10 percent of the total project costs of the public project; or for any activity that occurred prior to the date of the issuance of the permit. Public projects in this section means any construction project that is carried out or funded (in whole or in part) by a federal, State, or local agency; and the term "total project costs" means the aggregate costs of acquiring land and carrying out construction.

Section 304. Safe Harbor Agreements

This is a new provision that authorizes Safe Harbor Agreements, which are agreements with non-federal persons to benefit the conservation of listed species by creating, restoring, or improving habitat or by maintaining currently unoccupied habitat for endangered species or threatened species. These agreements would allow the take of listed species included on lands or waters that are subject to the agreement if the taking is incidental to, and not the purpose of, carrying out of an otherwise lawful activity, and does not violate certain baseline requirements established in the agreement.

The Secretary is required to establish a baseline that is mutually agreed upon by the applicant and the Secretary at the time of the agreement that will, at a minimum, maintain existing conditions for the species covered by agreement.

The Secretary is required to issue standards and guidelines for the development and approval of safe harbor agreements.

The section authorizes the Secretary to provide grants of up to $10,000 to any individual private landowner to assist the landowner in carrying out a safe harbor agreement.

TITLE IV—RECOVERY PLANNING

Section 401. Recovery planning

This section sets forth a new program to emphasize recovery of species. The Secretary, in cooperation with the States, is to develop

and implement recovery plans for domestic endangered and threatened species unless he finds that a plan will not promote the conservation of the species or because an existing plan already serves as the functional equivalent to a recovery plan.

To the maximum extent practicable, the Secretary is to give priority to recovery plans that: (1) address significant and immediate threats to the survival of an endangered or a threatened species, have the greatest likelihood of achieving recovery of the endangered or the threatened species, and will benefit species that are more taxonomically distinct; (2) will address multiple species; (3) reduce economic and development conflicts; and (4) reduce conflicts with military training and operations.

Subsection (c) sets forth schedules for publishing recovery plans. The draft recovery plan must be published not later than 18 months after the listing rule, and the final recovery plan must be published not later than 30 months after the listing rule.

Not later than 60 days after listing a species, the Secretary is to appoint a recovery team to develop a plan or provide a notice that a recovery team will not be appointed along with the reasons therefore; and if requested by a Governor where the species occurs, the Secretary shall appoint a recovery team to develop a plan or delegate to the Governor the authority to develop a recovery plan for that State.

This section sets forth the qualifications for the recovery team including scientific, economics, property law and regulation experts, and others from the private sector; a representative of affected States, representatives of affected local governments, and representatives of those directly economically impacted.

Each recovery team shall submit to the Secretary the draft recovery plan, which shall include recovery strategies recommended by the team and alternatives to meet the recovery goal. The recovery team shall also advise the Secretary concerning the designation of critical habitat, if any. The recovery team shall assess the direct, indirect, and cumulative economic and social impacts on the public and private sectors that may result from the listing or from recovery strategies. The recovery team shall recommend measures to balance the achievement of the recovery goal for a species with protecting the economic well-being of the area affected by implementation of the recovery plan.

This section provides that the Federal Advisory Committee Act shall not apply to the selection or activities of a recovery team except that meetings of the recovery team shall be open to the public.

Within 180 days after their appointment, the recovery team is to establish and submit a recommended biological recovery goal which is to be expressed as objective and measurable population criteria, that when met, would result in the species removed from the endangered or threatened list. Each draft plan shall contain recommendations for federal agency compliance with Section 7 of the ESA; recommendations for avoiding a prohibited take and a list of activities that constitute a take; alternative strategies to achieve the recovery goal; and a description of economic and social impacts. The alternative strategies must achieve an appropriate balance between the effectiveness of the measures in meeting the recovery goal, the length of time in which the recovery goal is likely to be achieved; and minimizing the economic and social impacts on the

public and private sectors. Each recovery plan under this section shall provide equitable treatment of each affected State and all other non-federal persons affected by the plan, and seek to minimize and fairly distribute the social and economic costs that may result from implementation of the plan.

If the Secretary finds that the draft plan meets these requirements, he shall publish in the Federal Register and a newspaper a description of and a request for public comment on the draft recovery plan. Upon request, the Secretary shall hold at least one public meeting on each draft recovery plan in each State to which the plan would apply, except no more than five total meetings are mandated.

After reviewing each plan, if the Secretary determines that the plan does not satisfy these requirements, he shall notify the recovery team and give the team an opportunity to address his concerns and resubmit a satisfactory plan. In each final plan the Secretary shall select recovery strategies that achieve the recovery goal and the benchmarks while achieving an appropriate balance, except that the Secretary shall select the recovery strategy that would impose the least costs and result in the least socioeconomic impacts in achieving the recovery goal. If the Secretary selects strategies other than those recommended by the recovery team, the Secretary shall publish with the final plan an explanation. The Secretary shall publish a notice of availability and summary of the final recovery plan, and include a response to significant comments received on the draft plan.

No later than five years after date of enactment, the Secretary shall review recovery plans published prior to that date of enactment of H.R. 3160. The Secretary shall review each recovery plan first approved or revised under this section after the date of enactment not later than five years after the date of approval or revision of the plan and every five years thereafter.

The Secretary shall revise a recovery plan if substantial new information indicates that the recovery goal will not achieve the conservation and recovery of the covered species. The Secretary shall convene a recovery team to develop the revisions, unless the Secretary has published a notice that a recovery team shall not be appointed. Otherwise the Secretary is not required to modify a recovery plan approved before enactment of H.R. 3160, or a recovery plan on which public notice and comment has been initiated before enactment of H.R. 3160.

Concurrent with the submission of the draft recovery plan, the recovery team appointed for the species shall provide the Secretary with a description of any area recommended for designation as critical habitat and any recommendations for special management considerations or protection. This section allows the Secretary, to the maximum extent prudent and determinable, to designate or revise an existing designation of critical habitat. Critical habitat may be designated at the time a species is listed if the Secretary determines that designation at that time is essential to avoid the imminent extinction of the species. The designation is to be made on the basis of the best data available and after taking into consideration the economic impact, impacts to military training and operations, and any other relevant impact of specifying any particular area as critical habitat. “Economic impact” as used here, means the cumu-

lative economic effects (including costs) resulting from the listing of a species and the designation of critical habitat of the species for communities and industries that are located in the area designated as critical habitat or that receive revenue from use of the area.

At the request of one or more Governors, the Secretary may delegate to a State the authority to develop and implement the recovery plans if the Secretary finds that the State has entered into a cooperative agreement with the Secretary and the State has submitted a statement to the Secretary demonstrating adequate authority and capability to carry out the requirements and schedules. If the Secretary finds that a State agency lacks any authority or capability, he shall notify the State and provide the State an opportunity to address his concerns.

The Secretary, in cooperation with the States, shall publish standards and guidelines for the development of recovery plans by States. The recovery team shall prepare a draft recovery plan in accordance with this section and shall transmit the draft plan to the Secretary through the State agency authorized to develop the recovery plan. Prior to publication of a notice of availability of a draft plan, the Secretary shall review each draft to determine whether it meets the requirements and shall give the State an opportunity to address any deficiencies. Thereafter, if the Secretary determines that the plan does not meet such requirements, he shall notify the State and, in cooperation with the State, develop a recovery plan in accordance with this section. On receipt of a draft plan transmitted by the State, the Secretary shall review and adopt the plan. The Secretary may withdraw the authority from a State if the actions of the State are not in accordance with the substantive and procedural requirements of this H.R. 3160. The Secretary shall give the State an opportunity to correct any deficiencies and may withdraw the authority from the State, unless the State within 60 days has corrected the deficiencies. Following withdrawal of authority, the Secretary shall within 18 months publish a draft plan for the State, and within 12 months after publication of the draft recovery plan, publish a final recovery plan for the State.

The term "State agency" means a State agency entering into a cooperative request and the Pacific Northwest Electric Power and Conservation Planning Council.

Within six months of enactment of H.R. 3160, the Secretary shall establish in the Fish and Wildlife Service a separate office, to be known as the Office of Species Recovery, and shall delegate to that Office authority to provide support services to recovery teams to develop, or where a recovery team cannot be appointed to develop, implement recovery plans; to seek the recovery of all endangered or threatened species; to make all delisting decisions; and to assist in the designation of critical habitat.

TITLE V—MISCELLANEOUS

Section 501. Authorizing increased appropriations

Subsection (a) authorizes appropriations to the Department of the Interior $130 million for fiscal year (FY) 2001; $140 million for FY 2002; $150 million for FY 2003; and $160 million for FY 2004. For the Department of Commerce, this subsection authorizes appropriations of $30 million for FY 2001; $35 million for FY 2002;

$40 million for FY 2003; and $45 million for FY 2004. Finally, this subsection authorizes appropriations for the Department of Agriculture of $4 million for each of FYs 2001–2004.

Subsection (b) authorizes appropriations to the Secretary of the Interior for international programs of $1 million for each of FYs 2001–2004.

Subsection (c) authorizes $10 million for each of FYs 2001–2004 for Safe Harbor Agreements.

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

With respect to the requirements of clause 2(1)(3) of rule XI of the Rules of the House of Representatives, and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee on Resources' oversight findings and recommendations are reflected in the body of this report.

FEDERAL ADVISORY COMMITTEE STATEMENT

The functions of the proposed advisory committee authorized in this bill are not currently being nor could they be performed by one or more agencies, an advisory committee already in existence or by enlarging the mandate of an existing advisory committee.

CONSTITUTIONAL AUTHORITY STATEMENT

Article I, section 8 of the Constitution of the United States grants Congress the authority to enact H.R. 3160.

COMPLIANCE WITH HOUSE RULE XIII

1. Cost of Legislation. Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out this bill. The Committee on Resources believes that any costs incurred in carrying out this bill would not create a significant impact on the federal budget.

2. Congressional Budget Act. As required by clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, this bill does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

3. Government Reform Oversight Findings. Under clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee has received no report of oversight findings and recommendations from the Committee on Government Reform on this bill.

4. Congressional Budget Office Cost Estimate. Under clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has requested but not received a cost estimate for this bill from the Director of the Congressional Budget Office.

COMPLIANCE WITH PUBLIC LAW 104–4

H.R. 3160 contains no unfunded mandates.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

ENDANGERED SPECIES ACT OF 1973

* * * * * * *

DEFINITIONS

SEC. 3. For the purposes of this Act—
(1) * * *

* * * * * * *

[(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.]

(20) The term "threatened species" means any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range, and the population of which is declining or has declined from known historic populations levels and beyond the normal population fluctuations for the species.

* * * * * * *

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

(23) The term "species" includes any subspecies of fish or wildlife or plants, and any distinct population of any species of vertebrate fish or wildlife which interbreeds when mature, unless such distinct population is determined to be endangered or threatened under the law of the State in which it is found and such law prohibits the unpermitted take of such species.

(24) The term "reasonable and prudent alternative" means an alternative to an agency action that—

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

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

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

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

(E) does not exceed in nature, scope, and extent the effect of the proposed activity that is the subject of the consultation; and

(F) both prevents the agency action concerned from jeopardizing the continued existence of the species and imposes the least social and economic cost possible.

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

* * * * * * *

DETERMINATION OF ENDANGERED SPECIES AND THREATENED SPECIES

SEC. 4. (a) GENERAL.—(1) The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) * * *

* * * * * * *

[(D) the inadequacy of existing regulatory mechanisms; or**]**

(D) the inadequacy of existing Federal, State, and local government regulatory mechanisms or other proactive conservation programs or measures, including programs and measures voluntarily undertaken;

* * * * * * *

[(3) The Secretary, by regulation promulgated in accordance with subsection (b) and to the maximum extent prudent and determinable—

[(A) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

[(B) may, from time-to-time thereafter as appropriate, revise such designation.**]**

* * * * * * *

[(b) BASIS FOR DETERMINATIONS.—(1)(A) The Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

[(B) In carrying out this section, the Secretary shall give consideration to species which have been—

[(i) designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement; or

[(ii) identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish or wildlife or plants.

[(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any par-

ticular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweight the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.]

[(3)(A) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of title 5, United States Code, to add a species to, or to remove a species from, either of the lists published under subsection (c), the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If such a petition is found to present such information, the Secretary shall promptly commence a review of the status of the species concerned. The Secretary shall promptly publish each finding made under this subparagraph in the Federal Register.

[(B) Within 12 months after receiving a petition that is found under subparagraph (A) to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings:

[(i) The petitioned action is not warranted, in which case the Secretary shall promptly publish such finding in the Federal Register.

[(ii) The petitioned action is warranted in which case the Secretary shall promptly publish in the Federal Register a general notice and the complete text of a proposed regulation to implement such action in accordance with paragraph (5).

[(iii) The petitioned action is warranted but that—

[(I) the immediate proposal and timely promulgation of a final regulation implementing the petitioned action in accordance with paragraphs (5) and (6) is precluded by pending proposals to determine whether any species is an endangered species or a threatened species, and

[(II) expeditious progress is being made to add qualified species to either of the lists published under subsection (c) and to remove from such lists species for which the protections of the Act are no longer necessary.

in which case the Secretary shall promptly publish such finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based.

[(C)(i) A petition with respect to which a finding is made under subparagraph (B)(iii) shall be treated as a petition that is resubmitted to the Secretary under subparagraph (A) on the date of such finding and that presents substantial scientific or commercial information that the petitioned action may be warranted.

[(ii) Any negative finding described in subparagraph (A) and any finding described in subparagraph (B)(i) or (iii) shall be subject to judicial review.

[(iii) The Secretary shall implement a system to monitor effectively the status of all species with respect to which a finding is made under subparagraph (B)(iii) and shall make prompt use of

the authority under paragraph 7 to prevent a significant risk to the well being of any such species.

[(D)(i) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of title 5, United States Code, to revise a critical habitat 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.]

(b) SECRETARIAL DETERMINATIONS.—

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

(B) In carrying out this section, the Secretary shall give consideration to species which have been—

(i) designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement; or

(ii) identified as in danger of extinction, or as 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.

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

(2) STANDARDS FOR DETERMINING SPECIES.—Within 18 months after the date of the enactment of the Common Sense Protections for Endangered Species Act, the Secretary shall promulgate a rule establishing scientifically valid standards for rendering taxonomic determinations of species and subspecies. The standards shall provide that to be eligible for determina-

tion as a subspecies under this Act, a subspecies must be reproductively isolated from other subspecific population units and constitute an important component in the evolutionary legacy of the species.

(3) RESPONSE TO PETITIONS.—

(A) ACTION MAY BE WARRANTED.—

(i) IN GENERAL.—Consistent with the ranking system established by the Secretary under subsection (h)(3) and to the maximum extent practicable, after receiving the petition of an interested person under section 553(e) of title 5, United States Code, to—

(I) add a species to;

(II) remove a species from; or

(III) change the status of a species from a previous determination with respect to;

either of the lists published under subsection (c), the Secretary shall immediately publish in the Federal Register a notice of receipt of the petition and shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If 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.

(ii) MINIMUM DOCUMENTATION.—A finding that the petition presents the information described in clause (i) shall not be made unless the petition provides—

(I) scientific documentation from a published scientific source that the fish or wildlife or plant that is the subject of the petition is a species;

(II) a description of all available data on the historical and current range, population, and distribution of the species, an explanation of the methodology used to collect the data, and an identification of the location where the data can be reviewed;

(III) scientific evidence that the population of the species is declining or has declined from historic population levels and beyond normal population fluctuations for the species;

(IV) an appraisal of the available data on the threats to the species or the causes of its decline;

(V) an identification of the information contained or referred to in the petition that has been peer-reviewed or field-tested;

(VI) the reason that the petitioned action is warranted, based on the factors established under subsection (a);

(VII) a bibliography of scientific literature on the species, if any, in support of the petition;

(VIII) the qualifications of any person cited in the petition as an expert on the species or the status of the species; and

(IX) at least one study or credible expert opinion, by a person who is not affiliated with the petitioner, to support the action requested in the petition.

(iii) NOTIFICATION TO THE STATES.—

(I) PETITIONED ACTIONS.—If the petition is found to present the information described in clause (i), the Secretary shall notify and provide a copy of the petition to the Governor of each State in which the species is believed to occur and to affected tribes, and shall solicit the advice of each such Governor and tribe as to whether the petitioned action is warranted. Such advice shall be submitted to the Secretary not later than 90 days after the notification.

(II) PEER REVIEW OF CERTAIN DETERMINATIONS.—If the Secretary's determination that the petitioned action is warranted is in direct conflict with the information submitted by the Governor or tribe, the finding shall not be final until the Secretary submits the finding to peer review as provided in subsection (f). The peer reviewers shall have not more than 30 days to submit their findings and comments to the Secretary. If the peer reviewers and the Secretary find that the petition is warranted, the Secretary shall prepare a record of decision and shall submit the record to the Governor or tribe. Issuance of such record shall be final agency action for purposes of chapter 7 of title 5, United States Code (relating to judicial review).

(B) PETITION TO CHANGE STATUS OR DELIST.—A petition may be submitted to the Secretary under subparagraph (A) to change the status of a species or to remove a species from either of the lists published under subsection (c) in accordance with subsection (a)(1), if—

(i) the current listing is no longer appropriate because of a change in the factors identified under subsection (a)(1); or

(ii) with respect to a petition to remove a species from either of the lists—

(I) new data or a reinterpretation of prior data indicate that removal is appropriate;

(II) the species is extinct;

(III) the recovery goals established for the species in a recovery plan adopted under section 5 have been achieved; or

(IV) the original listing of the species was not subject to adequate peer review as required by this Act.

(C) DETERMINATION.—Not later than the end of the 1-year period beginning on the date the Secretary receives a petition that is found under subparagraph (A)(i) to present substantial information indicating that the petitioned ac-

tion may be warranted, the Secretary shall make one of the following findings:

(i) NOT WARRANTED.—The petitioned action is not warranted, in which case the Secretary shall promptly publish the finding in the Federal Register.

(ii) WARRANTED.—The petitioned action is warranted, in which case the Secretary shall, within 45 days after making the determination and before issuing any proposed rule to implement the determination, publish in the Federal Register a notice of a review of the status of the species that includes a description of the following:

(I) Any missing data that, if obtained, would support the determination.

(II) Data that are necessary to make the determination and that can be collected within the period available for making the determination.

(III) Data that may be necessary in the future to ensure the continued validity of the determination, and the deadline or deadlines for collecting that data.

(iii) WARRANTED BUT PRECLUDED.—The petitioned action is warranted, but—

(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 the lists species for which the protections of this Act are no longer necessary;

in which case the Secretary shall promptly publish the finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based.

(D) PUBLIC MEETINGS.—If requested by any person within 30 days after the date of publication of a finding under subparagraph (C) regarding a species, the Secretary shall conduct at least one public meeting on the finding in each State in which the species is believed to occur and a person making such a request resides. Public meetings in a State under this clause shall include—

(i) a public meeting at a location that is as centrally located as possible to the areas in the State believed by the Secretary to be habitat of the species; and

(ii) at least one public meeting in each rural area of the State that the Governor of the State determines is affected by the determination.

(E) SUBSEQUENT DETERMINATION.—A petition with respect to which a finding is made under subparagraph (C)(iii) shall be treated as a petition that is resubmitted to the Secretary under subparagraph (A) on the date of the

finding and that presents substantial scientific or commercial information that the petitioned action may be warranted.

(F) JUDICIAL REVIEW.—(i) Any negative finding described in subparagraph (A)(i) and any finding described in clause (i) or (iii) of subparagraph (C) shall be subject to judicial review. In any suit for review brought under this paragraph, any person may intervene as a matter of right if the person can demonstrate that a determination to list will have a direct economic impact on such person.

(ii) In any action seeking judicial review of a finding by the Secretary described in subparagraph (C)(iii), the court shall give great weight to the finding.

(G) MONITORING.—The Secretary shall implement a system to monitor effectively the status of each species with respect to which a finding is made under subparagraph (C)(iii) and shall make prompt use of the authority under paragraph (7) to prevent a significant risk to the well-being of the species.

(H) DATA SOLICITATION.—(i) The Secretary shall, in the one-year period referred to in subparagraph (C)—

(I) solicit, through publication in the Federal Register, information regarding the status of the species that may be the subject of a proposed rule, including current population, population trends, current habitat, other State or local governmental conservation efforts, Federal conservation lands that could provide habitat for the species, food sources, predators, breeding habits, captive breeding efforts, commercial, nonprofit, avocational, or voluntary conservation activities, or other pertinent information that may assist in making the determination referred to in subsection (a)(1); and

(II) collect and consider the data identified and described pursuant to subclause (I).

(ii) The solicitation shall establish a time period within which to submit the information, that shall be not less than 180 days. The period shall be extended for an additional 60 days at the request of any person who submits a request for such extension that includes a statement of the reasons for the request. In making the determination referred to in subsection (a)(1), the Secretary shall give equal weight to the information submitted in accordance with this subparagraph.

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

release of the location of the species may endanger the species further.

(ii) The Secretary shall not publish or otherwise publicly disclose the location of particular private property as habitat for a species which is determined to be an endangered species or threatened species or proposed to be determined to be an endangered species or threatened species, unless the Secretary first notifies the owner thereof and receives the consent of the owner, or the information is otherwise public information.

* * * * * * *

[(5) With respect to any regulation proposed by the Secretary to implement a determination, designation, or revision referred to in subsection (a)(1) or (3), the Secretary shall—

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

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

[(ii) give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, and to each county or equivalent jurisdiction in which the species is believed to occur, and invite the comment of such agency, and each such jurisdiction, thereon;

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

[(C) give notice of the proposed regulation to such professional scientific organizations as he deems appropriate;

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

[(E) promptly hold one public hearing on the proposed regulation if any person files a request for such a hearing within 45 days after the date of publication of general notice.]

(5) PROPOSED REGULATIONS AND REVIEW.—With respect to any regulation proposed by the Secretary to implement a determination referred to in subsection (a)(1) of this section, the Secretary shall perform the following:

(A) Not later than 12 months before publishing the proposed regulation, the Secretary shall—

(i) notify the Governor of each State in which the species is believed to occur and each affected tribe; and

(ii) solicit submission by each such Governor and tribe, by not later than 90 days after the notification, of advice as to whether the determination is warranted.

(B) Before publication of the proposed regulation, the Secretary shall consider advice received from State Governors and tribes under subparagraph (A)(ii). If a Governor or tribe provides scientific evidence pursuant to subparagraph (A)(ii) that the determination is not warranted, the Secretary may not make the determination with respect to that State or on the lands of that tribe, respectively, unless the Secretary shows by a preponderance of scientific evidence

that the information submitted by the Governor or tribe is incorrect and that the determination is warranted.

(C) 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 as provided in paragraph (8); and

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

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

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

(F) 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.

(G) At the request of any person made not later than 45 days after the date of publication of general notice, promptly hold at least one public meeting in each State that would be affected by the proposed regulation (including at least one public meeting in an affected rural area, if any) except that the Secretary shall not be required to hold more than five public meetings under this subparagraph.

(H) Identify and include with the proposed rule a description of—

(i) all data that are to be considered in making the determination under subsection (a)(1) to which the proposed rule relates and that have yet to be collected or field verified;

(ii) any data that have not been collected and considered in the determination under subsection (a)(1) to which the rule relates and that are necessary to ensure the continued scientific integrity of the determination;

(iii) deadlines by which the Secretary shall collect and consider the data in accordance with subparagraph (I);

(iv) a description of additional scientific and commercial data that would assist in the preparation of a recovery plan for the species to which the rule relates;

(v) a list of known threats to the species and a description of the types of activities that may be affected by the determination under subsection (a)(1) and any restriction on use of property that may result from the determination; and

(vi) other State, local, or Federal regulatory or conservation measures that may either at present or in the future contribute to the conservation of the species.

(I) Not later than the deadline published by the Secretary pursuant to subparagraph (H)(iii), the Secretary shall—

(i) collect the data;

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

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

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

[(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.]

(6) FINAL REGULATIONS.—

(A) IN GENERAL.—Within the 1-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) a final regulation to implement the determination;

(ii) notice that the 1-year period is being extended under subparagraph (B)(i); or

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

(B)(i) If the Secretary finds with respect to a proposed regulation referred to in subparagraph (A)(i) that there is substantial disagreement regarding the sufficiency or accuracy of the available

data relevant to the determination [or revision] concerned, the Secretary may extend the one-year period specified in subparagraph (A) for not more than six months for purposes of soliciting additional data.

* * * * * * *

(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.]

* * * * * * *

(8) The publication in the Federal Register of any proposed or final regulation which is necessary or appropriate to carry out the purposes of this Act shall include a summary by the Secretary of [the data] *the best scientific and commercial data available* on which such regulation is based and shall show the relationship of such data to such [regulation; and if such regulation designates or revises critical habitat, such summary shall, to the maximum extent practicable, also include a brief description and evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify such habitat, or may be affected by such designation.] *regulation, and shall provide, to the degree that it is relevant and available, information regarding the status of the affected species, including current population, population trends, current habitat, food sources, predators, breeding habits, captive breeding efforts, governmental and nongovernmental conservation efforts, or other pertinent information. Each regulation proposed by the Secretary to implement a determination referred to in subsection (a)(1) shall be based primarily and substantially on peer-reviewed scientific information obtainable from any source, including governmental and nongovernmental sources, that has been to the maximum extent feasible verified by field testing. The Secretary shall identify any data that is used as a basis for such a determination and that has not been verified by field testing.*

(9) ANALYSIS OF ECONOMIC AND SOCIAL COSTS.—(A) Concurrently with a determination that a species warrants listing as an endangered species or threatened species, the Secretary shall publish in the Federal Register with such determination an analysis of the economic, social, and other public health, safety, and welfare effects the listing may have.

(B) The analysis shall include—

(i) an estimate of the effects the listing may have on Federal, State, and local expenditures and revenues;

(ii) the costs and benefits of the listing for the private sector, including lost opportunity costs; and

(iii) an identification of the geographic area that may be affected by the listing.

* * * * * * *

(c) LISTS.—(1) * * *

[(2) The Secretary shall—

[(A) conduct, at least once every five years, a review of all species included in a list which is published pursuant to paragraph (1) and which is in effect at the time of such review; and

[(B) determine on the basis of such review whether any such species should—

[(i) be removed from such list;

[(ii) be changed in status from an endangered species to a threatened species; or

[(iii) be changed in status from a threatened species to an endangered species.

Each determination under subparagraph (B) shall be made in accordance with the provisions of subsection (a) and (b).]

(2) The Secretary shall—

(A) conduct, at least once every 5 years, a review of all species included in a list which is published pursuant to paragraph (1) and which is in effect at the time of such review; and

(B) determine on the basis of such review whether any such species should—

(i) be removed from such list, which shall be proposed within 90 days of the date upon which it is determined that—

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

(II) the species is extinct; or

(III) the recovery goal established for the species in a recovery plan under section 5(e) has been achieved;

(ii) be changed in status from an endangered species to a threatened species; or

(iii) be changed in status from a threatened species to an endangered species.

Each determination under subparagraph (B) shall be made in accordance with the provisions of subsections (a) and (b) of this section.

* * * * * * *

[(f)(1) RECOVERY PLANS.—The Secretary shall develop and implement plans (hereinafter in this subsection referred to as "recovery plans") for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds

that such a plan will not promote the conservation of the species. The Secretary, in development and implementing recovery plans, shall, to the maximum extent practicable—

[(A) give priority to those endangered species or threatened species, without regard to taxonomic classification, that are most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity;

[(B) incorporate in each plan—

[(i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;

[(ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and

[(iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.

[(2) The Secretary, in developing and implementing recovery plans, may procure the services of appropriate public and private agencies and institutions and other qualified persons. Recovery teams appointed pursuant to this subsection shall not be subject to the Federal Advisory Committee Act.

[(3) The Secretary shall report every two years to the Committee on Environment and Public Works of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives on the status of efforts to develop and implement recovery plans for all species listed pursuant to this section and on the status of all species for which such plans have been developed.

[(4) The Secretary shall, prior to final approval of a new or revised recovery plan, provide public notice and an opportunity for public review and comment on such plan. The Secretary shall consider all information presented during the public comment period prior to approval of the plan.

[(5) Each Federal agency shall, prior to implementation of a new or revised recovery plan, consider all information presented during the public comment period under paragraph (4).]

(f) PEER REVIEW REQUIREMENT.—

(1) DEFINITIONS.—In this subsection:

(A) The term "action" means—

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

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

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

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

(v) the issuance of any regulation or criteria establishing specific mitigation obligations with respect to a species.

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

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

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

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

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

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

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

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

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

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

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

* * * * * * *

(h) AGENCY GUIDELINES.—**[**The Secretary shall establish, and publish in the Federal Register, agency guidelines to insure that the purposes of this section are achieved efficiently and effectively.**]** *The Secretary shall develop in cooperation with the States, and publish in the Federal Register, agency guidelines to ensure that cooperation with the States is achieved efficiently and effectively.* Such guidelines shall include, but are not limited to—

(1) * * *

* * * * * * *

[(i) If, in the case of any regulation proposed by the Secretary under the authority of this section, a State agency to which notice thereof was given in accordance with subsection (b)(5)(A)(ii) files comments disagreeing with all or part of the proposed regulation, and the Secretary issues a final regulation which is in conflict with such comments, or if the Secretary fails to adopt a regulation pursuant to an action petitioned by a State agency under subsection (b)(3), the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency's comments or petition.**]**

(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 Governor who consulted with the Secretary in accordance with subsection (b)(5)(A)(ii) files comments disagreeing with all or part of the proposed regulation, the Secretary shall not issue a final regulation that is in conflict with such comments until the Secretary further consults with the President. If the Secretary adopts a final regulation in conflict with comments made by the Governor of a State or fails to adopt a regulation pursuant to an action petitioned by a Governor under subsection (b)(3), the Secretary shall submit to the Governor a written justification for the failure of the Secretary to adopt regulations consistent with the comments or petition of the Governor.

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

* * * * * * *

RECOVERY PLANS

SEC. 5. (a) IN GENERAL.—The Secretary, in cooperation with the States, and on the basis of the best scientific and commercial data available, shall develop and implement plans (referred to in this Act

as "recovery plans") for the conservation and recovery of endangered species and threatened species that are indigenous to the United States or in waters with respect to which the United States exercises sovereign rights or jurisdiction, in accordance with the requirements and schedules described in this section, unless the Secretary finds, after notice and opportunity for public comment, that a plan will not promote the conservation of the species or because an existing plan or strategy to conserve the species already serves as the functional equivalent to a recovery plan.

(b) PRIORITIES.—To the maximum extent practicable, the Secretary, in developing recovery plans, shall give priority, without regard to taxonomic classification, to recovery plans that—

(1) address significant and immediate threats to the survival of an endangered species or a threatened species, have the greatest likelihood of achieving recovery of the endangered species or the threatened species, and will benefit species that are more taxonomically distinct;

(2) address multiple species including (A) endangered species, (B) threatened species, or (C) species that the Secretary has identified as candidates or proposed for listing under section 4 and that are dependent on the same habitat as the endangered species or threatened species covered by the plan;

(3) reduce conflicts with construction, development projects, jobs, agriculture, private property, or other economic activities; and

(4) reduce conflicts with military training and operations.

(c) SCHEDULE.—For each species determined to be an endangered species or a threatened species after the date of enactment of this subsection for which the Secretary is required to develop a recovery plan under subsection (a), the Secretary shall publish—

(1) not later than 18 months after the date of the publication under section 4 of the final regulation containing the listing determination, a draft recovery plan; and

(2) not later than 30 months after the date of publication under section 4 of the final regulation containing the listing determination, a final recovery plan.

(d) APPOINTMENT AND ROLE OF RECOVERY TEAM.—

(1) IN GENERAL.—(A) Not later than 60 days after the date of the publication under section 4 of the final regulation containing the listing determination for a species, the Secretary, in cooperation with the affected States, shall either—

(i) appoint a recovery team to develop a recovery plan for the species; or

(ii) provide to each affected State and publish a notice that a recovery team will not be appointed, stating the reasons for not appointing a recovery team; and

(B) Upon request by the Governor of any State in which the species occurs made after publication of notice under subparagraph (A)(ii), the Secretary shall, as requested by the Governor—

(i) appoint a recovery team to develop a recovery plan under this section; or

(ii) delegate to the Governor, under subsection (l), the authority of the Secretary to develop a recovery plan for the species for that State.

(2) APPOINTMENT OF RECOVERY TEAM.—(A) The recovery team shall consist of—

(i) experts in biology or pertinent scientific fields, economics, property law and regulation, and other appropriate disciplines, including from the private sector;

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

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

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

(B) The chairman of the team shall be selected by the team from among its members who are representatives of States or local governments.

(3) DUTIES OF THE RECOVERY TEAM.—(A) Each recovery team shall prepare and submit to the Secretary the draft recovery plan, which shall include recovery strategies recommended by the team and alternatives, if any, to meet the recovery goal under subsection (e)(1). The recovery team may also be called on by the Secretary to assist in the implementation, review, and revision of recovery plans. The recovery team shall also advise the Secretary concerning the designation of critical habitat, if any.

(B) The recovery team shall assess the direct, indirect, and cumulative economic and social impacts on the public and private sectors, including local governments, that may result from the listing determination or from potential recovery strategies recommended under subparagraph (A), including—

(i) impacts on the cost of governmental actions, tax and other revenues, employment, the use and value of property, and other social, cultural, and community values; and

(ii) commercial activity that might result in a net benefit to the conservation of the species.

(C) The recovery team shall recommend to the Secretary measures to balance the achievement of the recovery goal for a species under subsection (e) with protecting the economic well-being of the area affected by implementation of the recovery plan for the species.

(4) TRAVEL EXPENSES.—The Secretary may provide travel expenses (including per diem in lieu of subsistence at the same level as authorized by section 5703 of title 5, United States Code) to recovery team members.

(5) FEDERAL ADVISORY COMMITTEE ACT.—The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the selection or activities of a recovery team appointed pursuant to this subsection, except that meetings of the recovery team shall be open to the public as provided in that Act for meetings of advisory committees.

(e) CONTENTS OF RECOVERY PLANS AND DRAFT RECOVERY PLANS.—

(1) BIOLOGICAL RECOVERY GOAL.—Not later than 180 days after the appointment of a recovery team under this section, the recovery team shall establish and submit to the Secretary a recommended biological recovery goal to conserve and recover the

species that, when met, would result in the determination, in accordance with section 4, that the species be removed from the list. The recovery goal shall be expressed as objective and measurable population criteria. When the goal is met, the Secretary shall initiate the procedures under this Act to remove the species from the list. The recovery team shall also report to the Secretary the scientific feasibility of full recovery of the species and the time frame in which recovery is likely to occur.

(2) CONTENTS OF DRAFT PLAN.—

(A) IN GENERAL.—Each draft recovery plan shall contain the following:

(i) Recommendations for Federal agency compliance with section 7(a)(1) and 7(a)(2).

(ii) Recommendations for avoiding a taking of a listed species prohibited under section 9(a)(1) and a list of specific activities that would constitute a take under section 9.

(iii) Alternative strategies to achieve the recovery goal for the listed species, that range from a strategy requiring the least possible Federal management to achieve the recovery goal to a strategy involving more intensive Federal management to achieve the goal.

(iv) A description of economic and social impacts identified under subsection (d)(3)(B).

(B) REQUIREMENTS FOR ALTERNATIVE STRATEGIES.—The alternative strategies under subparagraph (A)(iii) must achieve an appropriate balance among the following factors:

(i) The effectiveness of the measures in meeting the recovery goal.

(ii) The length of time in which the recovery goal is likely to be achieved if the time period within which the recovery goal is to be achieved will not pose a significant risk to recovery of the species.

(iii) Minimizing the economic and social impacts on the public and private sectors, including the impact on employment, the cost of government actions, tax and other revenues, the use and value of property, and other social, cultural, and community values.

(3) BENCHMARKS.—The recovery plan shall include objective, measurable benchmarks expected to be achieved over the course of the recovery plan to determine whether progress is being made toward the recovery goal. To the extent possible, current and historical population estimates, along with other relevant factors, should be considered in determining whether progress is being made toward meeting the recovery goal.

(4) EQUITABLE TREATMENT OF AFFECTED STATES AND OTHER NON-FEDERAL PERSONS.—Each recovery plan under this section shall—

(A) provide equitable treatment of each affected State and all other non-Federal persons affected by the plan; and

(B) seek to minimize and fairly distribute the social and economic costs that may result from implementation of the plan.

(f) PUBLIC NOTICE AND COMMENT.—

(1) IN GENERAL.—If the Secretary makes a preliminary determination that the draft recovery plan meets the requirements of this section, the Secretary shall publish in the Federal Register, and a newspaper of general circulation in areas in each affected State that are located as close to the affected area as possible, a notice of availability and a summary of, and a request for public comment on, the draft recovery plan. The notice shall include a description of the activities that will require a permit under section 10, a description of the economic and social impacts referred to in subsection (d)(3)(B), and the recommendations of the recovery team on the recovery goal under subsection (e)(1).

(2) HEARINGS.—At the request of any person, the Secretary shall hold at least 1 public meeting on each draft recovery plan in each State to which the plan would apply (including at least 1 public meeting in an affected rural area, if any), except that the Secretary may not be required to hold more than 5 public meetings under this paragraph.

(g) REVIEW AND SELECTION BY THE SECRETARY.—

(1) REVIEW AND APPROVAL.—The Secretary shall review each plan submitted by a recovery team to determine whether the plan was developed in accordance with the requirements of this section. If the Secretary determines that the plan does not satisfy such requirements, the Secretary shall notify the recovery team and give the team an opportunity to address the concerns of the Secretary and resubmit a plan that satisfies the requirements of this section. After notice and opportunity for public comment on the recommendations of the recovery team, the Secretary shall adopt a final recovery plan that is consistent with the requirements of this section.

(2) SELECTION OF RECOVERY STRATEGIES.—In each final plan the Secretary shall select recovery strategies that achieve the recovery goal and the benchmarks while achieving an appropriate balance among the factors described in subsection (e)(2)(B), except that the Secretary shall select the recovery strategy that would impose the least costs and result in the least socioeconomic impacts in achieving the recovery goal.

(3) STRATEGIES RECOMMENDED BY RECOVERY TEAM.—If the Secretary selects strategies other than those recommended by the recovery team, the Secretary shall publish with the final plan an explanation of why the strategies recommended by the recovery team were not selected for the final recovery plan.

(4) PUBLICATION OF NOTICE ON FINAL PLAN.—The Secretary shall publish in the Federal Register a notice of availability, and a summary, of the final recovery plan, and include in the final recovery plan a response to significant comments that the Secretary received on the draft recovery plan.

(h) REVIEW.—

(1) EXISTING PLANS.—Not later than five years after date of enactment of this subsection, the Secretary shall review recovery plans published prior to that date of enactment.

(2) SUBSEQUENT PLANS.—The Secretary shall review each recovery plan first approved or revised under this section after the date of enactment of this subsection, not later than 5 years after

the date of approval or revision of the plan and every 5 years thereafter.

(i) REVISION OF RECOVERY PLANS.—Notwithstanding any other provision of this section, the Secretary shall revise a recovery plan if the Secretary finds, based on the best scientific and commercial data available, that substantial new information, which may include failure to meet the benchmarks included in the plan, indicates that the recovery goal contained in the recovery plan will not achieve the conservation and recovery of the endangered species or threatened species covered by the plan. The Secretary shall convene a recovery team to develop the revisions required by this subsection, unless the Secretary has published a notice that a recovery team shall not be appointed pursuant to subsection (d)(3).

(j) EXISTING PLANS.—Except as provided in subsection (i), nothing in this section shall require the modification of—

(1) a recovery plan approved before the date of the enactment of the Common Sense Protections for Endangered Species Act; or

(2) a recovery plan on which public notice and comment has been initiated before that date of enactment.

(k) CRITICAL HABITAT DESIGNATION.—

(1) RECOMMENDATION OF THE RECOVERY TEAM.—Concurrent with the submission of the draft recovery plan for a species to the Secretary, the recovery team appointed for the species shall provide the Secretary with a description of any habitat of the species that is recommended for designation as critical habitat pursuant to this subsection and any recommendations for special management considerations or protection that are specific to the habitat.

(2) DESIGNATION BY THE SECRETARY.—

(A) IN GENERAL.—The Secretary, to the maximum extent prudent and determinable, may by regulation designate or revise an existing designation of critical habitat of each endangered species or threatened species that is indigenous to the United States or to waters with respect to which the United States exercises sovereign rights or jurisdiction.

(B) EMERGENCY AUTHORITY.—The Secretary may publish a regulation designating critical habitat for an endangered species or a threatened species concurrently with the final regulation implementing the determination that the species is endangered or threatened if the Secretary determines that designation of such habitat at the time of listing is essential to avoid the imminent extinction of the species.

(3) FACTORS TO BE CONSIDERED.—The designation of critical habitat shall be made on the basis of the best scientific and commercial data available and after taking into consideration the economic impact, impacts to military training and operations, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary shall describe the economic impacts and other relevant impacts that are to be considered under this subsection in the publication of any proposed regulation designating critical habitat.

(4) PROPOSED AND FINAL REGULATIONS.—Any regulation to designate critical habitat or implement a requested revision shall be proposed and promulgated in the same manner as a

regulation to implement a determination with respect to listing a species.

(5) ECONOMIC IMPACTS DEFINED.—In this subsection, the term "economic impact" means the cumulative economic effects (including costs) resulting from the listing of a species and the designation of critical habitat of the species, for communities and industries that are located in the area designated as critical habitat or that receive revenue from use of the area.

(l) STATE AUTHORITY FOR RECOVERY PLANNING.—

(1) IN GENERAL.—At the request of the Governor of a State, or the Governors of several States in cooperation, the Secretary may delegate to the State agency, or to the State agencies of such States acting jointly, respectively, the authority of the Secretary to develop and implement the recovery plan for an endangered species or a threatened species in accordance with the requirements and schedules of subsections (c), (d)(1), (d)(2), and (e) and this subsection, if the Secretary finds that—

(A) the State agency (or agencies, jointly) has entered into a cooperative agreement with the Secretary pursuant to section 6(c); and

(B) the State agency (or agencies, jointly) has submitted a statement to the Secretary demonstrating adequate authority and capability to carry out the requirements and schedules of subsections (c), (d)(1), (d)(2), and (e) and this subsection.

(2) RESPONSE TO CONCERNS OF SECRETARY.—If the Secretary finds that a State agency lacks any authority or capability required under paragraph (1)(B), the Secretary shall notify the State agency and provide the State agency with an opportunity to address the concerns of the Secretary.

(3) STANDARDS AND GUIDELINES.—The Secretary, in cooperation with the States, shall publish standards and guidelines for the development of recovery plans by State agencies under this subsection, including standards and guidelines for interstate cooperation and for the grant and withdrawal of authorization by the Secretary under this subsection.

(4) DUTIES OF RECOVERY TEAM.—The recovery team shall prepare a draft recovery plan in accordance with this section and shall transmit the draft plan to the Secretary through the State agency authorized to develop the recovery plan.

(5) REVIEW OF DRAFT PLANS.—Prior to publication of a notice of availability of a draft recovery plan, the Secretary shall review each draft recovery plan developed pursuant to this subsection to determine whether the plan meets the requirements of this section and shall give the State an opportunity to address any deficiencies in the plan. Thereafter, if the Secretary determines that the plan does not meet such requirements, the Secretary shall notify the State agency and, in cooperation with the State agency, develop a recovery plan in accordance with this section.

(6) REVIEW AND APPROVAL OF FINAL PLANS.—On receipt of a draft recovery plan transmitted by a State agency, the Secretary shall review and adopt the plan in accordance with subsection (g).

(7) WITHDRAWAL OF AUTHORITY.—(A) The Secretary may withdraw the authority from a State that has been delegated authority to develop a recovery plan pursuant to this subsection if the actions of the State agency are not in accordance with the substantive and procedural requirements of subsections (c), (d)(1), (d)(2), and (e) and this subsection. The Secretary shall give the State agency an opportunity to correct any deficiencies identified by the Secretary and may withdraw the authority from the State unless the State agency within 60 days has corrected the deficiencies identified by the Secretary.

(B) Following withdrawal of authority delegated to a State pursuant to this subsection, the Secretary shall, in accordance with this section—

(i) within 18 months after the date of that withdrawal, publish a draft recovery plan for the State; and

(ii) within 12 months after publication of the draft recovery plan, publish a final recovery plan for the State.

(8) DEFINITION OF STATE AGENCY.—For purposes of this subsection, the term "State agency" means—

(A) a State agency (as defined in section 3) of each State entering into a cooperative request under paragraph (1); and

(B) for fish and wildlife, including related spawning grounds and habitat, on the Columbia River and its tributaries, the Pacific Northwest Electric Power and Conservation Planning Council established under the Pacific Northwest Electric Power Planning and Conservation Act (16 U.S.C. 839 et seq.).

(m) OFFICE OF RECOVERY PLANNING.—

(1) ESTABLISHMENT.—Not later than 6 months after the date of the enactment of the Common Sense Protections for Endangered Species Act, the Secretary shall establish in the United States Fish and Wildlife Service a separate office, to be known as the Office of Species Recovery.

(2) AUTHORITIES.—The Secretary, subject to subsection (l), shall delegate to the head of the Office of Species Recovery authority of the Secretary under this Act to—

(A) provide support services to recovery teams to develop, or where a recovery team cannot be appointed to develop, implement recovery plans under this section;

(B) otherwise seek the recovery of all species listed under section 4(c) as endangered species or threatened species;

(C) make all determinations to remove a species from such a list; and

(D) assist in the designation of critical habitat.

LAND ACQUISITION

SEC. **[**5**]** *5A*. (a) PROGRAM.—The Secretary, and the Secretary of Agriculture with respect to the National Forest System, shall establish and implement a program to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species pursuant to section 4 of this Act. To carry out such a program, the appropriate Secretary—

(1) * * *

* * * * * * *

COOPERATION WITH THE STATES

SEC. 6. (a) * * *

* * * * * * *

(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)] *(G)* of section 4(b)(3) and recovered species pursuant to section 4(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) * * *

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[INTERAGENCY COOPERATION

[SEC. 7. (a) FEDERAL AGENCY ACTIONS AND CONSULTATIONS.—(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act.]

SEC. 7. INTERAGENCY COOPERATION.

(a) FEDERAL AGENCY ACTIONS AND CONSULTATIONS.—

(1) PROGRAMS ADMINISTERED BY THE SECRETARY OF THE INTERIOR.—The Secretary shall review other programs administered by the Secretary and utilize such programs in furtherance of the purposes of this Act. Except as provided in section 5(k)(2), all other Federal agencies shall, consistent with their primary missions and in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4.

* * * * * * *

(5) INITIATION OF CONSULTATION.—A Federal agency that receives a request under paragraph (3) shall initiate consultation within 15 days after the date on which the request is received from the permit or license applicant.

(6) DEMONSTRATION BY SECRETARY REQUIRED.—If the Secretary asserts the applicability of section 7 to any property, the Secretary shall have the responsibility of demonstrating, based on the best information available at the time any consultation under this subsection is initiated, that—

(A) a threatened species or endangered species or its respective critical habitat is located in the geographic area that is the subject of the consultation; and

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

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

(8) EFFECT OF LISTING ON EXISTING PLANS.—

(A) DEFINITION OF ACTION.—For the purposes of this paragraph, the term "action" includes the adoption of land use plans under the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.) and land and resource management plans under the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1600 et seq.), as amended by the National Forest Management Act of 1976 (16 U.S.C. 1600 (note)).

(B) REINITIATION OF CONSULTATION.—Whenever a determination to list a species as an endangered species or a threatened species or a designation of critical habitat requires reinitiation of consultation on an already approved action, the consultation shall commence promptly, but not later than 90 days after the date of the determination or designation, and shall be completed not later than 1 year after the date on which the consultation is commenced. During that 1-year period, the site specific actions referred to in subparagraph (C) may not be enjoined under this Act based on that listing.

(C) SITE-SPECIFIC ACTIONS DURING CONSULTATION.—Notwithstanding subsection (d), the Federal agency implementing the land use plan or land and resource management plan under subparagraph (B) may authorize, fund, or carry out a site-specific ongoing or previously scheduled action within the scope of the plan on the lands prior to completing consultation on the plan under subparagraph (B) pursuant to the consultation procedures of this section and related regulations, if—

(i) no consultation on the action is required; or

(ii) consultation on the action is required, the Secretary issues or has issued a biological opinion, and the action satisfies the requirements of this section.

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

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

(ii) In determining a resolution to such a conflict, the President shall consider and choose the course of action that best

meets the public interest and, to the extent possible, balances pursuit of the recovery objective or the purposes of the recovery plan with economic and social needs and pursuit of the purposes of the other laws or treaties. The authority assigned to the President by this subparagraph may not be delegated to a member of the executive branch who has not been confirmed by the Senate.

* * * * * * *

(b) OPINION OF SECRETARY.—(1)(A) * * *

* * * * * * *

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

[(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.]

(2) OPPORTUNITY TO PARTICIPATE IN CONSULTATIONS.—(A) In conducting a consultation under subsection (a)(2), the Secretary shall provide any person who has sought authorization or funding from a Federal agency for an action that is the subject of the consultation, the opportunity to—

(i) prior to the development of a draft biological opinion under paragraph (3), submit and discuss with the Secretary and the Federal agency information relevant to the effect of the proposed action on the species and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the Federal agency and the person can take to avoid violation of subsection (a)(2);

(ii) receive information, on request, subject to the exemptions specified in section 552(b) of title 5, United States Code, on the status of the species, threats to the species, and conservation measures, used by the Secretary to develop the draft biological opinion and the final biological opinion, including the associated incidental taking statements; and

(iii) receive a copy of the draft biological opinion from the Federal agency and, prior to issuance of the final biological opinion, submit comments on the draft biological opinion and discuss with the Secretary and the Federal agency the basis for any finding in the draft biological opinion.

(B) If reasonable and prudent alternatives are proposed by a person under subparagraph (A) and the Secretary does not include the alternatives in the final biological opinion under paragraph (3), the Secretary shall explain, in writing, to the person why those alternatives were not included in the opinion.

(C) 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) * * *

* * * * * * *

(C) In the development of an opinion under this paragraph with respect to public lands, the Secretary shall solicit and utilize information and advice regarding those lands from the Governor of each State in which the lands are located. With respect to nonpublic lands, the Secretary shall solicit such advice only upon the request of the affected landowner.

(D) Unless required by law other than subsections (a) through (d), the Secretary, in any opinion or statement under this subsection concerning an agency action (including any reasonable and prudent alternative suggested under subparagraph (A) or any reasonable and prudent measure specified under clause (ii) of paragraph (4)), and the head of the Federal agency proposing the agency action, may not require, provide for, or recommend the imposition of any restriction or obligation on the activity of any person that is not authorized, funded, carried out, or otherwise subject to regulation by the Federal agency.

* * * * * * *

(5) The Secretary shall provide to each applicant for a permit or license that is subject to consultation under this section a written statement that shall guarantee that, so long as the project at issue is carried out consistent with the statement issued under paragraph (4), the applicant shall not be subject to new or additional requirements for the specific protection of any species identified in the statement beyond the requirements set forth in the statement. All Federal entities shall be bound by the Secretary's guarantee.

(6)(A) The Secretary shall not refuse to provide an incidental take statement under paragraph (4), unless the Secretary has provided to the agency and the permit applicant—

(i) all conditions for issuance of the statement, in writing; and

(ii) an opportunity for the agency and the permit applicant to provide a written response to the conditions.

(B) Any refusal to provide an incidental take statement without first providing the written conditions therefore and providing an opportunity to respond in accordance with subparagraph (A), is deemed to be arbitrary and capricious.

(7) The Secretary may not require any measures under subsection (b)(4) that exceed in nature, scope, or effect the impact of the taking for which the statement is issued.

(c) BIOLOGICAL ASSESSMENT.—**[**(1)**]** To facilitate compliance with the requirements of subsection (a)(2) each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on the date of enactment of the Endangered Species Act Amendments of 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as in mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day

period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is 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).

[(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.]

* * * * * * *

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

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

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

[(A) The Secretary of Agriculture.

[(B) The Secretary of the Army.

[(C) The Chairman of the Council of Economic Advisors.

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

[(E) The Secretary of the Interior.

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

[(G) The President, after consideration of any recommendations received pursuant to subsection (g)(2)(B) shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

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

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

[(5)(A) Five members of the Committee or their representatives shall constitute a quorum for the transaction of any function of the Committee, except that, in no case shall any representative be considered in determining the existence of a quorum for the trans-

action of any function of the Committee if that function involves a vote by the Committee on any matter before the Committee.

[(B) The Secretary of the Interior shall be the Chairman of the Committee.

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

[(D) All meetings and records of the Committee shall be open to the public.

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

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

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

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

[(D) The Committee may use the United States mails in the same manner and upon the same conditions as a Federal agency.

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

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

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

[(10) In no case shall any representative, including a representative of a member designated pursuant to paragraph (3)(G) of this subsection, be eligible to cast a vote on behalf of any member.]

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

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

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

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

(B) involves an emergency situation that makes the application of the procedures of this Act (other than this subsection) impractical.

[(f) REGULATIONS.—Not later than 90 days after the date of enactment of the Endangered Species Act Amendments of 1978, the Secretary shall promulgate regulations which set forth the form and manner in which applications for exemption shall be submitted to the Secretary and the information to be contained in such applications. Such regulations shall require that information submitted in an application by the head of any Federal agency with respect to any agency action include but not be limited to—

[(1) a description of the consultation process carried out pursuant to subsection (a)(2) of this section between the head of the Federal agency and the Secretary; and

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

[(g) APPLICATION FOR EXEMPTION AND REPORT TO THE COMMITTEE.—(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption for an agency action of such agency if, after consultation under subsection (a)(2), the Secretary's opinion under subsection (b) indicates that the agency action would violate subsection (a)(2). An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be considered by the Committee for a final determination under subsection (h) after a report is made pursuant to paragraph (5). The applicant for an exemption shall be referred to as the "exemption applicant" in this section.

[(2)(A) An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f), not later than 90 days after the completion of the consultation process; except that, in the case of any agency action involving a permit or license applicant, such application shall be submitted not later than 90 days after the date on which the Federal agency concerned takes final agency action with respect to the issuance of the permit or license. For purposes of the preceding sentence, the term "final agency action" means (i) a disposition by an agency with respect to the issuance of a permit or license that is subject to administrative review, whether or not such disposition is subject to judicial review; or (ii) if administrative review is sought with respect to such disposition, the decision resulting after such review. Such application shall set forth the reasons why the exemption applicant considers that the agency action meets the requirements for an exemption under this subsection.

[(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly (i) notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governors so notified to recommend individuals to be appointed to the Endangered Species Committee for consideration of such application; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of

the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.

[(3) The Secretary shall within 20 days after the receipt of an application for exemption, or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary—

[(A) determine that the Federal agency concerned and the exemption applicant have—

[(i) carried out the consultation responsibilities described in subsection (a) in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2);

[(ii) conducted any biological assessment required by subsection (c); and

[(iii) to the extent determinable within the time provided herein, refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d); or

[(B) deny the application for exemption because the Federal agency concerned or the exemption applicant have not met the requirements set forth in subparagraph (A)(i), (ii), and (iii).

The denial of an application under subparagraph (B) shall be considered final agency action for purposes of chapter 7 of title 5, United States Code.

[(4) If the Secretary determines that the Federal agency concerned and the exemption applicant have met the requirements set forth in paragraph (3)(A) (i), (ii) and (iii) he shall, in consultation with the Members of the Committee, hold a hearing on the application for exemption in accordance with sections 554, 555, and 556 (other than subsection (b) (1) and (2) thereof) of title 5, United States Code, and prepare the report to be submitted pursuant to paragraph (5).

[(5) Within 140 days after making the determinations under paragraph (3) or within such other period of time as in mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing—

[(A) the availability and reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative courses of action consistent with conserving the species of the critical habitat;

[(B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;

[(C) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee; and

[(D) whether the Federal agency concerned and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d).

[(6) To the extent practicable within the time required for action under subsection (g) of this section, and except to the extent inconsistent with the requirements of this section, the consideration of any application for an exemption under this section and the con-

duct of any hearing under this subsection shall be in accordance with sections 554, 555, and 556 (other than subsection (b)(3) of section 556) of title 5, United States Code.

[(7) Upon request of the Secretary, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Secretary to assist him in carrying out his duties under this section.

[(8) All meetings and records resulting from activities pursuant to this subsection shall be open to the public.

[(h) EXEMPTION.—(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g)(5). The Committee shall grant an exemption from the 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, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by Committee under this subsection shall be considered final agency action for purposes of chapter 7 of title 5 of the United States Code.

[(2)(A) Except as provided in subparagraph (B), an exemption for an agency action granted under paragraph (1) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action—

[(i) regardless whether the species was identified in the biological assessment; and

[(ii) only if a biological assessment has been conducted under subsection (c) with respect to such agency action.

[(B) An exemption shall be permanent under subparagraph (A) unless—

[(i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of a species that was not the subject of consultation under subsection (a)(2) or was not identified in any biological assessment conducted under subsection (c), and

[(ii) the Committee determines within 60 days after the date of the Secretary's finding that the exemption should not be permanent.

If the Secretary makes a finding described in clause (i), the Committee shall meet with respect to the matter within 30 days after the date of the finding.

[(i) REVIEW BY SECRETARY OF STATE.—Notwithstanding any other provision of this Act, the Committee shall be prohibited from considering for exemption any application made to it, if the Secretary of State, after a review of the proposed agency action and its potential implications, and after hearing, certifies, in writing, to the Committee within 60 days of any application made under this section that the granting of any such exemption and the carrying out of such action would be in violation of an international treaty obligation or other international obligation of the United States. The Secretary of State shall, at the time of such certification, publish a copy thereof in the Federal Register.

[(j) Notwithstanding any other provision of this Act, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.

[(k) SPECIAL PROVISIONS.—An exemption decision by the Committee under this section shall not be a major Federal action for purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.): *Provided,* That an environmental impact statement which discusses the impacts upon endangered species or threatened species or their critical habitats shall have been previously prepared with respect to any agency action exempted by such order.

[(l) COMMITTEE ORDERS.—(1) If the Committee determines under subsection (h) that an exemption should be granted with respect to any agency action, the Committee shall issue an order granting the exemption and specifying the mitigation and enhancement measures established pursuant to subsection (h) which shall be carried out and paid for by the exemption applicant in implementing the agency action. All necessary mitigation and enhancement measures shall be authorized prior to the implementing of the agency action and funded concurrently with all other project features.

[(2) The applicant receiving such exemption shall include the costs of such mitigation and enhancement measures within the overall costs of continuing the proposed action. Notwithstanding the preceding sentence the costs of such measures shall not be treated as project costs for the purpose of computing benefit-cost or other ratios for the proposed action. Any applicant may request the Secretary to carry out such mitigation and enhancement measures. The costs incurred by the Secretary in carrying out any such measures shall be paid by the applicant receiving the exemption. No later than one year after the granting of an exemption, the exemption applicant shall submit to the Council on Environmental Quality a report describing its compliance with the mitigation and enhancement measures prescribed by this section. Such report shall be submitted annually until all such mitigation and enhancement measures have been completed. Notice of the public availability of such reports shall be published in the Federal Register by the Council on Environmental Quality.

[(m) NOTICE.—The 60-day notice requirement of section 11(g) of this Act shall not apply with respect to review of any final determination of the Committee under subsection (h) of this section granting an exemption from the requirements of subsection (a)(2) of this section.

[(n) JUDICIAL REVIEW.—Any person, as defined by section 3(13) of this Act, may obtain judicial review, under chapter 7 of title 5 of the United States Code, of any decision of the Endangered Species Committee under subsection (h) in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review. A copy of such petition shall be transmitted by the clerk of the court to the Committee and the Committee shall file in the court the record in the proceeding, as provided in section 2112, of title 28, United States Code. Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.]

[(o) EXEMPTION AS PROVIDING EXCEPTION ON TAKING OF ENDANGERED SPECIES.] *(f) EXCEPTION FOR TAKING IN ACCORDANCE WITH STATEMENT.*—Notwithstanding sections 4(d) and 9(a)(1)(B) and (C) of this Act, sections 101 and 102 of the Marine Mammal Protection Act of 1972, or any regulation promulgated to implement any [such section—

[(1) any action for which an exemption is granted under subsection (h) of this section shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and

[(2) any taking] *such section, any taking* that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) of this section shall not be considered to be a prohibited taking of the species concerned.

[(p) EXEMPTIONS IN PRESIDENTIALLY DECLARED DISASTER AREAS.—In any area which has been declared by the President to be a major disaster area under the Disaster Relief and Emergency Assistance Act, the President is authorized to make the determinations required by subsections (g) and (h) of this section for any project for the repair or replacement of a public facility substantially as it existed prior to the disaster under section 405 or 406 of the Disaster Relief and Emergency Assistance Act, and which the President determines (1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures of this section to be followed. Notwithstanding any other provision of this section, the Committee shall accept the determinations of the President under this subsection.]

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(q) ACTIONS NOT REQUIRING CONSULTATION AND CONFERENCING.—

(1) IN GENERAL.—Consultation and conferencing under paragraphs (2) and (4) of subsection (a) shall not be required for any agency action that—

(A) is consistent with the provisions of a final recovery plan under section 5;

(B) is consistent with a cooperative management agreement under section 6 or an incidental taking permit under section 10; or

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

(2) EMERGENCY CONSULTATIONS.—In response to, or to prevent or minimize damage from, a natural event or other emergency, consultation under subsection (a)(2) may be waived by a Federal agency for the repair or maintenance of a natural gas pipeline, hazardous liquid pipeline, flood control facility, or electrical distribution transmission, or substation facility, if the repair or maintenance is necessary to address a probable imminent threat to human lives or a probable and significant threat to the environment. If a consultation is required by the Secretary for such repair or maintenance, it shall be completed within 10 days of any request by the applicant for consultation. Any measure required to be taken to avoid take for an activity that is the subject of such a waiver may not exceed in nature, scope, and extent the effect of the activity and shall not be required prior to the completion of the repair or maintenance action.

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

(A) the actions provided for in a final recovery plan under section 5;

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

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

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PROHIBITED ACTS

SEC. 9. (a) GENERAL.—(1) * * *

* * * * * * *

(3) PROTECTING PUBLIC HEALTH AND SAFETY.—An activity of a non-Federal person is not a taking of a species for purposes of paragraph (1) if the activity—

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

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

(i) ongoing maintenance, routine operation or use, and emergency repair of existing pipelines, flood control facilities or projects, fire breaks, transmission and distribution lines, groundwater recharge facilities and areas, water storage and recycling facilities, water drainage or water conveyance structures and channels, and appurtenant facilities;

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

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

* * * * * * *

EXCEPTIONS

SEC. 10. (a) PERMITS.—(1) * * *

* * * * * * *

[(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.]

(2) SPECIES CONSERVATION PLANS.—(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 species conservation plan that specifies—

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

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

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

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

(i) the taking will be incidental;

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

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

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

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

and the Secretary has received such other assurances as the Secretary may require that the plan will be implemented, the Secretary shall issue the permit. The permit shall contain such reasonable and economically practicable terms and conditions consistent with the purposes and objectives of the activity as the Secretary deems necessary 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. The Secretary shall include those terms and conditions that accomplish the goals of this section for the least cost to the permit applicant.

(C) The Secretary may not require the applicant, as a condition of processing the application or issuing the permit—

(i) to expand the application to include land, an interest in land, a right to use or receive water, or a proprietary water right not owned by the applicant or to address a species other than the species for which the application is made;

(ii) to carry out mitigation that exceeds in nature, scope, or effect the impacts of the taking for which the permit is issued;

(iii) to minimize and mitigate for loss of habitat resulting from activities under the permit, in an area of land greater than the area of land that is subject to impacts for which the mitigation is required; or

(iv) to expend an aggregate amount greater than the cost of fencing and preserving current conditions of the land on which activities are conducted under the permit.

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

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

(iii) If the Secretary considers a plan submitted under subparagraph (A) to be insufficient or incomplete, the Secretary shall respond in writing to the applicant within 30 days after receiving the application, stating why the application is incomplete or insufficient and stating any additional conditions that must be met for the issuance of the permit. Any denial of a permit under paragraph (1)(B) without first providing such conditions in writing is deemed to be arbitrary and capricious.

(iv) If the application is resubmitted after the Secretary responds under clause (iii), the Secretary shall, within 60 days after receiving the resubmitted application—

(I) issue the permit;

(II) at the request of the permit applicant, provide written reasons for refusal to complete consideration of the application; or

(III) formally deny the permit, in writing, stating the reasons for the denial.

(E) No consultation is required under section 7 for—

(i) any action by a permittee under this section that is authorized by the terms and conditions of the permit;

(ii) any action by the Secretary in implementing, enforcing, or monitoring compliance with a permit under this section; or

(iii) the issuance, amendment, or renewal of any permit under this section, if the Secretary determines that the issuance, amendment, or renewal, respectively, will not appreciably reduce the likelihood of the survival and recovery of any species that is authorized to be taken under the permit.

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

(G) After providing a permittee notice and an opportunity to make appropriate corrections, the Secretary shall revoke a permit issued under this paragraph if the Secretary finds that the permittee is not complying with the terms and conditions of the permit or the species conservation plan required for the permit.

(H) Notwithstanding any other provision of law, a person may not commence any action or proceeding to challenge the approval of a permit under this section unless suit is filed within 45 days after publication in the Federal Register of notice of issuance of the permit.

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(k) LIMITATION ON REQUIRED MITIGATION.—

(1) IN GENERAL.—Subsection (a)(2) does not require, and the Secretary may not require as a term or condition of a permit under subsection (a)(1)(B), that a permittee for a public project take any measures to minimize or mitigate impacts of a taking under the permit—

(A) if the costs of implementing such measures will exceed 10 percent of the total project costs of the public project; or

(B) for any activity that occurred prior to the date of the issuance of the permit.

(2) DEFINITIONS.—In this subsection—

(A) the term "public project" means any construction project that is carried out or funded (in whole or in part) by a Federal, State, or local agency; and

(B) the term "total project costs" means the aggregate costs of acquiring land and carrying out construction.

(l) SAFE HARBOR AGREEMENTS.—

(1) AGREEMENTS.—

(A) IN GENERAL.—The Secretary may enter into agreements with non-Federal persons to benefit the conservation of endangered species or threatened species by creating, restoring, or improving habitat or by maintaining currently unoccupied habitat for endangered species or threatened species. Under an agreement, the Secretary shall permit the person to take endangered species or threatened species included under the agreement on lands or waters that are subject to the agreement if the taking is incidental to, and not the purpose of, carrying out of an otherwise lawful activity, and does not violate the baseline requirement established under subparagraph (B).

(B) BASELINE REQUIREMENT.—For each agreement under this subsection, the Secretary shall establish a baseline requirement that is mutually agreed upon by the applicant and the Secretary at the time of the agreement that will, at a minimum, maintain existing conditions for the species covered by the agreement on lands and waters that are subject to the agreement. The baseline requirement may be expressed in terms of the abundance or distribution of endangered species or threatened species, quantity or quality of habitat, or such other indicators as appropriate.

(2) STANDARDS AND GUIDELINES.—The Secretary shall issue standards and guidelines for the development and approval of safe harbor agreements in accordance with this subsection.

(3) FINANCIAL ASSISTANCE.—

(A) IN GENERAL.—In cooperation with the States and subject to the availability of appropriations to carry out this section, the Secretary may provide a grant of up to $10,000 to any individual private landowner to assist the

landowner in carrying out a safe harbor agreement under this subsection.

(B) PROHIBITION ON ASSISTANCE FOR REQUIRED ACTIVITIES.—The Secretary may not provide assistance under this paragraph for any action that is required by a permit issued under this Act or that is otherwise required under this Act or other Federal law.

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PENALTIES AND ENFORCEMENT

SEC. 11. (a) CIVIL PENALTIES.—(1) * * *

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[(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]

(g) CITIZEN SUITS.—

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

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

* * * * * * *

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

* * * * * * *

[REPEALER

[SEC. 14. The Endangered Species Conservation Act of 1969 (sections 1 through 3 of the Act of October 15, 1966, and sections 1 through 6 of the Act of December 5, 1969; 16 U.S.C. 668aa–668cc–6), is repealed.

[AUTHORIZATION OF APPROPRIATIONS

[SEC. 15. (a) IN GENERAL.—Except as provided in subsection (b), (c), and (d), there are authorized to be appropriated—

[(1) not to exceed $35,000,000 for fiscal year 1988, $36,500,000 for fiscal year 1989, $38,000,000 for fiscal year

1990, $39,500,000 for fiscal year 1991, and $41,500,000 for fiscal year 1992 to enable the Department of the Interior to carry out such functions and responsibilities as it may have been given under this Act;

[(2) not to exceed $5,750,000 for fiscal year 1988, $6,250,000 for each of fiscal years 1989 and 1990, and $6,750,000 for each of fiscal year 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 7 (e), (g), and (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) 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.]

SEC. 14. PUBLIC HEARINGS AND PUBLIC MEETINGS.

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

(b) PUBLIC MEETINGS.—Each public meeting held pursuant to this Act shall provide an opportunity for the public to make statements and receive information and answers, respectively, from the agency regarding all aspects of and questions regarding the petition or other matter that is the subject of the public meeting. To the maximum extent practicable, the Secretary shall ensure that members of the public are provided with the information sought at the public meeting.

SEC. 15. AUTHORIZATION OF APPROPRIATIONS.

(a) IN GENERAL.—There are authorized to be appropriated—

(1) to the Department of the Interior to carry out the duties of the Secretary of the Interior under this Act $130,000,000 for fiscal year 2001, $140,000,000 for fiscal year 2002, $150,000,000 for fiscal year 2003, and $160,000,000 for fiscal year 2004;

(2) to the Department of Commerce to carry out the duties of the Secretary of Commerce under this Act $30,000,000 for fiscal year 2001, $35,000,000 for fiscal year 2002, $40,000,000 for fiscal year 2003, and $45,000,000 for fiscal year 2004; and

(3) to the Department of Agriculture to carry out the duties of the Secretary of Agriculture under this Act $4,000,000 for each of fiscal years 2001 through 2004.

(b) CONVENTION IMPLEMENTATION.—In addition to the other amounts authorized by this section, there are authorized to be appropriated to the Secretary of the Interior to carry out section 8A $1,000,000 for each of fiscal years 2001 through 2004, to remain available until expended.

(c) SAFE HARBOR AGREEMENTS.—In addition to the other amounts authorized by this section, there are authorized to be appropriated to the Secretary to carry out section 10(l) $10,000,000 for each of fiscal years 2001 through 2004, to remain available until expended.

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DISSENTING VIEWS

We remain strongly opposed to H.R. 3160. We do not deny there are frustrations with the ESA and the manner in which it is implemented. We also all recognize that changes in the law could be made to address those frustrations. We agree that listing decisions should be made on the best science available and that states and local governments can and should play a role in recovery efforts; that there can and should provide more incentives for private landowners to protect species on their property; and that the law has not done enough to recover species and get them off the list. This bill, however, is not the answer to those needed changes.

While H.R. 3160 purports to address the problems of recovery and the scientific integrity of the listing process, it goes far beyond those goals and makes broad sweeping changes to the Act that will fundamentally undermine the law's premise of protecting and recovering endangered species throughout the United States. Some of the most obvious concerns are discussed below, but by no means does this constitute a comprehensive litany of all the concerns regarding the legislation.

Changes to scientific requirements and listing procedures

While the premise of these new requirements are valid, that listing decisions under the Act should be based on the best scientific information available, the bill also adds many other requirements that are so burdensome that the overall effect will be to greatly slow not only the listing process, but the delisting and critical habitat designations processes as well.

For example, the bill requires peer reviews at each step of the regulatory process to protect species, including the listing decision, identification of critical habitat, jeopardy decisions, and for mitigation requirements under section 10 HCPs. While peer review of FWS and NMFS decisions is warranted, this duplicative review requirement could simply delay it to the point where emergency listing is required or listing is no longer needed because the species is extinct. In addition, while the term peer review implies a review that is consistent with the academic peer review process, the process that is established in the bill is very different and could be quite difficult to implement.

In addition, the legislation requires the Secretary to demonstrate by a preponderance of the scientific evidence that a species should be listed anytime a listing is challenged by the Governor or a tribe, but does not stipulate the quality of the evidence that must be provided to support the challenge. It also allows for petitions to delist any species currently listed, if such species was not subject to the new peer review requirements laid out in this bill. This could potentially result in a flood of delisting petitions with which the Secretary would be forced to contend.

Finally, H.R. 3160 would preclude the federal listing of a distinct population of a species if it is already listed under a state plan and the state law prohibits the unpermitted take of such species. This provision will result in inconsistent protections for species between states and much weaker protection within states that have ESA programs which are not comparable to the Federal program.

Reduced Federal agency responsibility

Perhaps even more significant and serious are the provisions of the bill that dramatically reduce the responsibility of Federal agencies to protect species. Under the current law, all federal agencies must consult with the FWS or NMFS to insure that their actions neither jeopardize the continued existence of endangered or threatened species nor adversely modify critical habitat. H.R. 3160 makes several significant changes to current law that greatly reduce the mandatory and paramount nature of the obligations imposed on federal agencies under Section 7 of the ESA to protect and recover species.

First, the consultation requirement is qualified with the phrase "consistent with their primary mission", thereby requiring agencies to accommodate the needs of listed species only to the extent that they deem it to be consistent with their other duties. This shift in the burden of responsibility will greatly reduce the protection that these federal agencies are compelled to provide. In fact, this approach was first adopted in 1966 in the original ESA, but was soon revised because few if any federal agencies found the protection of species consistent with their primary mission.

Second, the bill weakens the jeopardy standard. While maintaining the requirement that federal agencies insure their actions are not "likely to jeopardize the continued existence of any endangered or threatened species", it defines the term "likely to jeopardize the continued existence of" to mean an action or activity that significantly diminishes the likelihood of survival of the species by significantly reducing the numbers or distribution of the entire species", thereby undermining the effectiveness of the requirement. According to Administration comments on 1995 legislation which included the same language, this new definition of the jeopardy standard "would make it difficult, if not impossible, to find that any Federal action jeopardized any distinct population segment such as the bald eagle, any subspecies, or any species which, although endangered in the U.S. is found anywhere else in the world". In addition, it would be difficult to find jeopardy in one part of the U.S. if the species occurred elsewhere in the country or possibly even in captivity.

Finally, the bill exempts routine maintenance, repair or replacement of any Federal or non-Federal facility from the consultation requirements of the Act. Moreover, it does not define "Federal or non-Federal facility". With this latitude, it could potentially exempt the operation and maintenance of virtually everything from roads to dams from the requirements to protect species. The effect of this exemption is so broad and far reaching that, combined with the change in the jeopardy standard and the consistency provision, it could effectively eliminate consideration and protection of listed species by federal agencies.

Changes in permitting and enforcement requirements

While it might be assumed that the requirements to protect species would then fall to private land owners and non-Federal entities, the bill makes several changes to Section 9 of the Act that effectively undermine those protections as well.

Currently, Section 9 prohibits activities that "take" listed species and require an incidental take permit that will minimize and mitigate impacts of such activities. Take is defined by the Act as any activity which would "harm, harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect" a listed species. Court rulings have interpreted this definition to include activities that would impact habitat of listed species. Exemptions from this permitting process are allowed in emergency situations. H.R. 3160, however, would exempt ongoing maintenance, routine operation or use, and emergency repair of pipelines, flood control facilities or projects, transmission and distribution lines, water storage, drainage, conveyance, or recycling facilities as well as road and right-of-way maintenance, use and repair from the take prohibition and make no requirement that they minimize and mitigate their impact on listed species.

Similar to, but even broader than, legislation that was considered and rejected by the House in 1997 (H.R. 478), this could include a wide range of activities from the operation of a dam to the construction of a drainage ditch next to a road. This exemption would apply at any time, not just in emergency situations. While this would have clear negative impacts on listed species, it could also have unintended consequences as other interests, including fishermen, cattlemen, and loggers, would still be subject to the requirements of the Act. For example, operations of flood control and water conveyance, storage and irrigation systems in Northern California could be virtually exempt from the requirements to protect and recover species like salmon. At the same time, small boat fishermen, who have already seen their salmon harvest reduced to economically unsustainable levels to rebuild salmon stocks, will be forced to cut their harvest even more and possibly be shut down altogether. This is not fair and it does nothing to solve the problem of recovering species.

H.R. 3160 also makes changes in conditions for issuing incidental take permits. In order to receive an ITP, an individual must demonstrate, among other things, that the take of the species will not "appreciably reduce the likelihood of the survival and recovery of the species in the wild". H.R. 3160 amends this requirement by deleting the phrase "in the wild", potentially establishing a situation where species could exist in captivity and the take of the species in the wild would not be regarded as impacting the survival and recovery of the species. Clearly, this is a weaker standard than now exists.

In conclusion, in the name of good science, the bill shifts the burden of proof for listing species, and creates a situation where the absence of perfect scientific knowledge delays listings indefinitely. The effect will be to delay listings to the point where they likely are not needed because the species is extinct.

The bill also provides broad exemptions from the requirements to protect species for the routine operation, maintenance, rehabilitation, repair or replacement of any federal or non-federal facility,

and stipulates that federal agencies must only protect species to the extent that it is consistent with their "primary mission". These changes will significantly reduce—if not elliminate—federal agencies' responsibilities to protect listed species.

At the same time, the equally broad exemption from the take prohibition provisions of the law for the ongoing maintenance and routine operation or use of any water storage, drainage, conveyance or recycling facility as well as flood control facilities, transmission and distribution lines, and roads, may leave some wondering who will be subject to the ESA and the requirements to protect species. In fact, it will be fishermen and farmers, and perhaps grazers, who will be forced to bear an even greater responsibility for species conservation.

If we are serious about our desire to reform the ESA and start recovering species, then let's do that. Let's work together to draft legislation that will have the support of the Administration, the environmental community, fishermen, and small landowners and achieves our common goal—an ESA that recovers species and works for landowners. This bill will not have that support or achieve that goal, and instead will be divisive and ultimately unsuccessful.

GEORGE MILLER.
FRANK PALLONE, Jr.
MARK UDALL.
JIM SAXTON.
RUSH D. HOLT.

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