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ENDANGERED SPECIES RECOVERY ACT

HEARINGS

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

ONE HUNDRED FIFTH CONGRESS

FIRST SESSION

ON

S. 1180

A BILL TO REAUTHORIZE THE ENDANGERED SPECIES ACT

SEPTEMBER 23 AND 24, 1997

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ENDANGERED SPECIES RECOVERY ACT OF 1997

TUESDAY, SEPTEMBER 23, 1997

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The committee met, pursuant to notice, at 9:30 a.m. in room 406, Dirksen Senate Office Building, Hon. John H. Chafee (chairman of the committee) presiding.

Present: Senators Chafee, Inhofe, Kempthorne, Allard, Sessions, Thomas, Wyden, Baucus, and Lieberman.

OPENING STATEMENT OF HON. JOHN H. CHAFEE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator CHAFEE. I want to welcome everyone here this morning for a hearing before the full Committee on Environment and Public Works concerning the reauthorization of the Endangered Species Act and legislation which has been submitted, S. 1180.

Now, our problem is as follows: at 9:30, which is right now, there are two back-to-back votes on a matter that has been long-scheduled in the Senate. So what I would like to do is to make an opening statement, and then—that will take a little time, but not too long. I'll ask the other Members whether they want to make their opening statements or they'll have a chance when we get back, so you can just see how the time comes, see whether, indeed, they start at 9:30.

The purpose of this hearing is to solicit views on S. 1180, the Endangered Species Recovery Act of 1997. Last Tuesday, I joined with Senators Kempthorne, Baucus, and Reid to introduce that bill to reauthorize and amend the Endangered Species Act.

The Endangered Species Act is our most important law to protect our nation's natural resources and biological diversity, and it has been instrumental in saving some of our country's most treasured species.

ESA law was last reauthorized almost 10 years ago in 1988, and I think it is very important to bear that in mind. In other words, the reauthorization in 1988 expired in 1992. Our bill reforms ESA and brings it up to date. It increases protection for endangered species in two fundamental ways. First, the bill improves the law's ability to work on private land. This is very important because private lands are habitat on which more than ⅔ of the listed species depend, to a large extent. It isn't just Federal lands we're talking about. It's private lands that we want to deal with, to the extent possible, and preserve that habitat.

The bill includes several incentives to encourage landowners to protect endangered plants and animals. Although some of these incentives have been implemented administratively, they are not authorized by statute.

What are some of these incentives?

They include "no surprises" guaranteed for permit holders that the Government will not seek additional mitigation over time.

A "safe harbor" policy encourages landowners to protect lands valuable to species without risking additional liability as a penalty for good stewardship.

A candidate conservation policy encourages landowners to undertake protection for species before they become endangered or threatened. Specific funding mechanisms, including a habitat reserve program and a habitat conservation revolving loan fund, are provided.

Each of these provisions will greatly improve species conservation by creating tools that never existed in the law before in areas where the law was never applied before.

The second way in which the bill strengthens protection for species is by overhauling the recovery program. For the first time since ESA was enacted, the bill would require actual implementation of recovery measures by the Federal Government. A recovery goal for each listed species must be developed by scientists using only the best science available. Each recovery plan must include measures to reach the goal and bench marks to measure progress as the plan is carried out.

The Fish and Wildlife Service and the National Marine Fisheries Service are authorized to enter into implementation agreements with other parties to carry out the recovery plans.

Now, I just want to greatly stress here the thanks that are owed to those who worked so closely in preparing this measure. Senator Kempthorne has been the chairman of the subcommittee that dealt with this. We had a series of hearings going back nearly 2 years. We had hearings in Oregon and in Idaho, in Wyoming, and those were very, very helpful.

Senator Baucus has been tremendous and devoted long hours on this. Senator, I want to thank you for everything you did.

Senator Reid, likewise, who is the ranking member of the subcommittee that dealt with this matter, should be recognized.

It has been a long negotiation. As I said, we started nearly 2 years ago. Through all that period, Senators Kempthorne, Baucus, and Reid have been most able leaders, working patiently on each issue.

Our witnesses have been involved in the effort to reauthorize the ESA for a long time and bring a great deal of insight and knowledge to our deliberations. So we welcome our distinguished panelists, and at this time—as I mentioned, Senator, before you got here, I thought we'd do what we could, recognizing that those two votes are going very shortly, and as soon as those go off, shortly after we'll adjourn and go over.

Senator Baucus?

OPENING STATEMENT OF HON. MAX BAUCUS, U.S. SENATOR FROM THE STATE OF MONTANA

Senator BAUCUS. Thank you very much, Mr. Chairman.

I'd like to begin by saying Senator Reid would like to be here. He supports the bill. He has a conflict, another hearing, but he is definitely here in spirit.

Senator CHAFEE. Is he here in vote?

Senator BAUCUS. He supports the bill.

I also want to acknowledge your leadership on this issue. Senator Kempthorne, Senator Reid, myself, and others know who the real leader is, and it is you. You've done a great job, and we want to let you know we would not be here were it not for your leadership.

Let me also make clear that, despite the grumbling and the honest heart-felt reservations we hear in some quarters about this bill, I think today's hearing represents extraordinary progress.

For example, just think back. Two years ago the Endangered Species Act was under attack. Appropriations writers, radical proposals to gut the Act, fierce partisan debate. Maybe all that controversy was good politics, but the Endangered Species Act was in critical condition, especially because of the appropriations writers which paralyzed the Fish and Wildlife Service's ability to implement the Act on the ground.

In contrast, today we have a bipartisan bill. It will reauthorize the Act and make narrow, targeted improvements. It will provide more protection for the species. It will make it easier for farmers and ranchers and other landowners who are trying to play by the rules. And it will allow us finally to put the controversy and partisanship behind us and move ahead.

Now let me turn to the bill. With all due respect to Senator Kempthorne, who has been a strong advocate for a conservative bill, let me list a few things that our bill does not include.

It does not include a takings provision. It does not change the standard for listing. It does not contain water rights language that overrides the protections of Federal law. It does not mandate the selection of the least-cost recovery plan. It does not change the substantive standards of Section 7. And it does not override NEPA.

Taking all this together, the bill does not include any of the provisions that would have threatened the fundamental underpinnings of the Endangered Species Act.

But, of course, the measure of a law is not what it fails to accomplish, but what it does accomplish. It accomplishes a lot. It improves the listing process by bringing better science to bear and providing for flexible, non-bureaucratic peer review.

I believe that better science makes the Act stronger, much stronger because it provides more confidence in decisions that are being made. It increases public participation by providing for more public hearings and opening up the recovery planning process. It creates a new emphasis on recovery planning, because recovery, after all, is what we're aiming for. It increases the role of states and encourages more cooperation with private landowners. And it makes modest changes to improve the consultation process among Federal agencies.

All that said, the bill is not perfect. It is not the bill I'd write if I were to write it my own way. Rather, it is a hard-fought com-

promise that represents concessions all around. It can be improved. I'm especially sensitive to the concern that the bill requires substantial increased funding in order for key provisions to work.

However, today's hearing is not the end of the road, but the beginning. We still have a lot to learn. Yesterday I held a meeting in Helena, Montana, to consider the views of many Montanans who have very strong feelings about this bill. Today we'll hear more from experts who have a great deal of experience with the Act.

We take your comments seriously. We've tried to achieve a solid bipartisan compromise, but we don't have all the answers. The folks I talked to in Montana yesterday and the witnesses today can help us improve our bill. That way we can pass a new Endangered Species Act, one that will renew our commitment to protect the fragile web of life that will sustain the grandchildren of the 21st century.

In closing, I want to again compliment our subcommittee chairman, Senator Kempthorne, and the ranking member, Senator Reid. Just like they did last Congress on the Safe Drinking Water Act, they worked very creatively to produce a win/win solution that is good for our environment and good for our economy.

Thank you.

Senator CHAFEE. Thank you very much.

Senator BAUCUS. I want to thank Secretary Babbitt, too, and also Jamie Clark.

Senator CHAFEE. We want to give kudos to Secretary Babbitt, whom we worked with very closely on this, and Jamie Clark, director of the U.S. Fish and Wildlife Service. They worked with us. I can remember being up here—Senator Kempthorne, Senator Reid, you, Senator Baucus, myself. I guess it was a Saturday morning, and we were working away, trying to get these compromises arrived at. And we were greatly appreciative.

Senator BAUCUS. That's true. It's not often you see the Secretary or the director late at night with their sleeves rolled up trying to work out agreements to this bill, and I appreciate it very much.

Senator CHAFEE. Thank you.

Senator Kempthorne?

OPENING STATEMENT OF HON. DIRK KEMPTHORNE, U.S. SENATOR FROM THE STATE OF IDAHO

Senator KEMPTHORNE. Mr. Chairman, thank you very much.

Mr. Chairman, I want to acknowledge the significant accomplishments that I think have taken place with regard to this bill, and it is because of your participation, your leadership; it is because of Senator Baucus' participation, his tenacity; Senator Reid and his participation. And I know that when we really began to dig into this 18 months ago to begin coming to a work product, I know there was probably a sense of whether or not we'd even get there, because we came from very, very wide, differing views of this. But I think all of us acknowledge that the Act could be improved, and that's what we have accomplished.

I think that somehow we have probably taken what is one of the more emotional polarizing issues, the Endangered Species Act, and we have crafted a balance in this particular Act—a balance between making the Act work better to save species and making the

Act work better for people in communities; that we truly can accomplish the original goal of the Act, which is to help species, but do it without putting people and communities at risk, because that is exactly what has been happening. And so this bill brings about some very important changes.

There are over 1,000 species currently on the endangered species list today. Half of those, no recovery plan has ever, ever been written. Significantly, no endangered species has ever been removed from the list based upon a recovery plan. So this bill puts an emphasis on recovery, because recovery is forever. It also allows us the opportunity that we can help species before we reach that point. It also has significant opportunities for now enhancing states' rights and states' authority in this whole process.

We need an ESA that will make advocates out of adversaries. As it is administered today, the ESA separates people from their environment. I will repeat that. It separates people from their environment. We are all environmentalists, because that is our life support system. It invites Federal regulators to become land use managers over some of the best stewards of our environment, our farmers, ranchers, and landowners. And we need their help if we are truly going to save species, because it is estimated that well over half of the species are on private property. Why would you not want to have a landlord that is friendly to the species? That just makes sense.

The ESA must provide more incentives to encourage property owners to become partners in the conservation of our rare and unique species, and we can bring real and fundamental reform to the Endangered Species Act. We can minimize the social and economic impacts of ESA on the lives of ordinary citizens that too often live in fear of the Act. And we can benefit species. I believe that Senate bill 1180 does just that.

Let me cite a few things that the bill does. The bill requires recovery plans for all species and sets deadlines for those plans. The bill provides incentives for agreements to implement recovery plans. States can assume responsibility for the development of recovery plans. Federal agencies are given greater authority to identify projects that are not likely to adversely affect a species. The bill allows permit applicants to participate in the consultation process. The bill gives property owners a variety of new tools to preserve species and habitat, including more flexible conservation plans, the "no surprises" protection "safe harbor" agreements, the habitat reserve agreement that Senator Chafee mentioned.

The bill requires enforcement actions be based on scientifically valid principles, not assumptions. The bill requires the Secretary to use good science. All listing and de-listing decisions must be peer reviewed. A species must be de-listed when its recovery goal is met.

Do you realize that currently we don't have a process for truly de-listing a species? We have an Act that is not constructed to declare victory? Well, now we will.

Again, I've seen all the different comments in the press about this from all the different groups and organizations, and I've seen what people on all sides of this and the extremes have said. But I will just tell you that again, Mr. Chairman, I think that we have struck a balance. I look forward to this hearing. I look forward to

the fact that 1 week from today we'll have a markup, and we're going to do what's right for species and also right for property owners.

So, Mr. Chairman, again I thank you and Senator Baucus and Senator Reid for the partnership that has been established on this.

Senator CHAFEE. Thank you very much, Senator.

You mentioned emotions. We held a hearing in Roseburg, Oregon. There were about 1,200 loggers in the area that gathered in the great, big—it was the county fair grounds. And they all seemed to be much bigger than I was.

[Laughter.]

Senator CHAFEE. And they weren't terribly happy with the position I took. I think the entire police force of Roseburg accompanied me out of the building.

Now, we've got the vote. There are just a few minutes left, so what I'd like to do now is we'll recess. There are two votes. I would ask everybody to come back as quickly as possible. Then we'll continue with other opening statements and proceed with the hearing. Thank you very much.

[Recess.]

Senator CHAFEE. All our Members aren't here. If there is one great non sequitur in the Senate, it is, "There will just be two quick roll calls."

[Laughter.]

Senator CHAFEE. Senator Wyden is next on our list.

OPENING STATEMENT OF HON. RON WYDEN, U.S. SENATOR FROM THE STATE OF OREGON

Senator Wyden. Thank you very much, Mr. Chairman.

I want to commend you and all four of the bipartisan group of Senators for what I think is a very solid start at this effort to preserve the Endangered Species Act.

My sense is that the solutions of the future are going to be found outside the beltway, and I think there ought to be an effort to encourage States, in particular, to develop home-grown, locally driven solutions to protecting species the way Oregonians have sought to do with the coho.

Let me also say that, as part of this effort, and something in this bill that I think makes sense, that States and areas that look to develop these solutions outside the beltway will be held accountable. They will have to operate in line with Federal criteria. It's not just a question of bucking the task home, but they will have to operate within certain specific criteria.

Now, there are two parts of this legislation that I am concerned about at this time, Mr. Chairman and colleagues.

First, it seems to me that it is critically important that this committee spell out what will happen if the funds that are so critical to making this legislation work are not forthcoming.

I think the sponsors, the bipartisan group of sponsors have, as I say, set out a very significant improvement in the way the Federal Government will operate, but it seems to me there must be a fall-back mechanism that would be put in place if the funds are not forthcoming. So that is No. 1.

No. 2, I would hope, Mr. Chairman—and this is an area I would like to work with the bipartisan group of sponsors on—that there could be more of an effort to encourage the States to play an active role pre-lifting of an endangered species. In other words, this bill allows for a very significant role for the States in the development of a recovery plan.

But I think if we've learned one thing about this challenge—and the Endangered Species Act challenges us like no other Federal environmental law does—we have to do more to get there early.

I know that my State, in developing the coho salmon plan, which did, in fact, avoid an endangered species listing, did find it very confusing as to what the path was with respect to the Federal Government in going forward on this effort.

So I will be interested in working with the bipartisan group of sponsors to lay out a very clear path for States pre-lifting so as to encourage these home-grown, locally driven solutions.

Last point that I would mention is a technical one, Mr. Chairman, and I'm sure the sponsors have looked at this, as well, and that is, I'm concerned that there may be, in parts of the bill, such a maze of bureaucratic steps that we may be stifling some of the creativity necessary to conserve endangered species. This is a technical issue, of course, and I know the sponsors of it have looked at it. But I would hope that, perhaps as part of this bipartisan effort, we could take some additional steps there to streamline some of those steps.

Those three concerns, Mr. Chairman, are important to this Senator. But, again, I think a very solid start has been made by this bipartisan group, and I'm looking forward to working with them to get a good bill out of committee and get it out in an expeditious way.

Senator CHAFEE. Thank you very much, Senator. Those were constructive suggestions. We appreciate the thought you've given it.

Senator Inhofe?

OPENING STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator INHOFE. Thank you, Mr. Chairman.

I would agree with Senator Wyden that we want to work together and get a good bill out. There would be some changes that I would look for in this that are probably different than the Senator from Oregon would look for. But I'm concerned about what this does in some other areas.

Mr. Chairman, I am the chairman of the Readiness Subcommittee of the Senate Armed Services Committee. I can remember being at Camp Lejeune, where they have areas roped off to protect the habitat of the red-cockaded woodpecker. I have been watching amphibious operations in North Carolina and South Carolina where they are unable to perform adequate training because of certain endangered species. I'm very much concerned about this.

About 3 years ago they were talking about putting the Arkansas River shiner on the list, and we calculated what that would cost the average small farmer in Oklahoma with runoff into the Cana-

dian system, and it's something that we have to approach in a more realistic manner.

I was prepared to talk about the good things in this bill, but I'd just echo what Senator Kempthorne listed in his list of three or four things that were very positive changes.

But the one area that I think is sadly lacking is that of protecting property rights, and I am very much concerned about that. I think it should have been addressed in this bill. It is not addressed. I know that we have a bill, 1181, coming along that will be addressing it. It would be my hope at some point that we could incorporate this language into this bill during the process, but I think what we have right now is an improvement over the existing situation, and I look forward to working and making it a better bill.

[The prepared statement of Senator Inhofe follows:]

PREPARED STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM THE STATE OF OKLAHOMA

Mr. Chairman, thank you for holding this hearing today on the Endangered Species Recovery Act of 1997. I know that you, Senator Kempthorne, Senator Baucus and Senator Reid worked long and hard to reach the product that we have before us today.

I have many concerns regarding the Endangered Species Act. I serve on the Armed Service Committee, as do many of my colleagues on this committee. As Chairman of the Readiness Subcommittee, I have heard many times how endangered species affect the activities of our military. In Camp Lejeune, The Red-Cockaded Woodpecker prevented training exercises. On the beaches of North and South Carolina, amphibian operations were curtailed because of the Sea Turtle.

America has adopted an attitude that places more value on the life of a critter that on a human being. We want to protect the Spotted Owl, yet we care little for the men and women who lost jobs in the Northwest when the timber industry was virtually shut down. We want to protect the Arkansas River Shiner, a bait fish in Oklahoma, yet we will allow unborn babies to have their brains sucked out in a partial birth abortion. Mr. Chairman, we need to do something.

Although this bill is far from perfect, it does move us one step closer to reforming an outdated law that has punished private land owners for too long. After reading through the bill, I found several sections that seem particularly important and wish to touch on those briefly.

I am glad to see more State involvement. States views must be solicited and considered by the Secretary when a listing is initiated. Also, States may assume responsibility for recovery planning. This bill will authorize States to appoint the recovery team and submit the draft recovery plan to the Secretary.

I am glad to see a process for de-listing a species within this bill. We have declared many species endangered, but few have ever been declared recovered. This will give the Secretary direction to implement just such a plan.

And finally, I am glad to see requirements that the Secretary use sound science regarding the listing of any species.

Having said that, I also wish to mention one glaring omission: The issue of private property rights and compensation for lost use. To me, this is the key to any meaningful endangered species reform. I have spoken to Senator Kempthorne and expressed my concern regarding this issue and he has assured me that this is also of concern to him. His bill, S. 1181, will address the property rights issue, and I wish to compliment him on that and offer my support for that legislation.

Additionally, I am in the process of drafting letters to Senator Hatch, Chairman of the Judiciary Committee, and Senator Roth, Chairman of the Finance Committee, to encourage them to hold hearings on S. 1181 as soon as possible. It is my sincere hope that when the bill before us today is brought to the floor, it will be amended with the language in S. 1181.

Mr. Chairman, as I have stated, this bill begins to move us in the right direction. However, it does not fulfill the campaign promises we made to America. I will reluctantly support this language and will actively pursue amending the bill to reflect the concerns of private property owner everywhere. Thank you.

Senator CHAFEE. Well, thank you. As far as the property rights matters go, I do not wish to see that included in this legislation.

If it is separate legislation applying to more than endangered species, that's a separate matter, it seems to me.

As you know, there has been in the past legislation reported out of the Senate Judiciary Committee dealing with the overall broad topic.

Senator Allard?

OPENING STATEMENT OF HON. WAYNE ALLARD, U.S. SENATOR FROM THE STATE OF COLORADO

Senator ALLARD. Mr. Chairman, I'd like to thank you for holding this hearing. I'd also like to applaud the efforts of both you and Senator Kempthorne on this issue. I know that you've put in countless hours, but I am somewhat disappointed in the final product.

As a western member of the committee, I have to look to several items on endangered species reform that are crucial to my State in Colorado, and I think many other western States.

Most importantly, language which protects existing yields of water, limiting the scope of Section 7 consultations, and protecting interstate compacts are important. Unfortunately, the legislation does not address these three concerns.

I accept the concerns of the chairman saying he doesn't want to have any water language, he doesn't want to have water law change in this particular piece of legislation.

If we apply that standard to this committee and the legislative branch, I don't think it's unreasonable to expect the same standards out of the bureaucracy, because they are in the process of changing water law, changing existing yields of water, and it seems to me that if we're going to have that restriction on this committee, that an appropriate restriction ought to be put on the bureaucracy, as well, so that they're not out there constantly changing water law.

Second, addressing Section 7 is very crucial to Colorado. In recent years, attempts by the Fish and Wildlife Service to expand Section 7 consultations from discrete action under review to other existing activities is very disturbing and I believe needs to be corrected.

Now, let me give the chairman an example of why strong language is necessary, and it goes back to a situation that occurred in 1991 in Colorado. At that time the Denver Water Board proposed to add what we call a "fuse plug" to the spillway. A fuse plug is a small plug that's put in a dam so that if you have a flash flood it doesn't tear out the whole dam. The fuse plug breaks away and saves the structure. The spillway is something, again, that is utilized during times of high run-off. It allows the water to run around the dam so it doesn't take out the dam. These are safety devices that we use in dam construction.

The installation required a Section 404 permit from the Corps, and Section 7 was, therefore, required on the action.

When the Corps and Fish and Wildlife began their determination of the scope, their conclusion was that the addition of a fuse plug required consultation on the impact of the project, on the depletion of the entire Colorado River. That's from Rocky Mountain National Park all the way down to the Gulf, through a number of western States, all the way down into Mexico.

This is not reasonable, and I think it points out a good example of why we need to have something on Section 7.

Because of this, the Denver Water Board canceled their proposed safety improvement.

This legislation, in my view, would not stop that kind of abuse.

I'm also concerned that Senate Bill 1180 does not go far enough in protecting interstate compacts. Specifically, I'm concerned that Section 3(l)(3) does not provide enough protection to interstate compacts. Protecting compacts is crucial to my State, and unless it can be fixed I'll have a very difficult time coming around and supporting this legislation.

I would remind the committee and the chairman that we have seven major drainage basins that occur in the State of Colorado. We have interstate compacts that have been agreed to, those States that are downstream from the State, and these have been agreed to by the Congress. And I think that we need to protect those compacts. They are vital to my State.

Mr. Chairman, again I would like to thank you for holding the hearing and I look forward to today's testimony.

Senator CHAFEE. Thank you very much, Senator.

I would remind all Senators that I just hope we won't let the vision of the perfect get in the way of the good. And the chances of legislation vastly different from what this legislation is of passing the Congress are very slim.

As I mentioned in my opening statement, this bill—the last reauthorization was nearly 10 years ago in 1988, and we've had other efforts since then that have not succeeded.

So I would hope that all of us would recognize that there may be some things that we would like to be different, but the question is: is it worthwhile, according the achievements that we have in this legislation?

Senator Thomas?

OPENING STATEMENT OF HON. CRAIG THOMAS, U.S. SENATOR FROM THE STATE OF WYOMING

Senator THOMAS. Thank you, Mr. Chairman.

I heard your admonition on brevity, and I will do that and submit my statement.

Thank you, all of you, and Senator Kempthorne, particularly, for the efforts over the years that you have done here.

I must confess I am a little nervous when my friend from Oregon and the Secretary of Interior talk about a solid first step. A first step? It makes you wonder what the next step is going to be. But, nevertheless, there are some good things here.

I do think certainly we have to move toward getting more cooperation in the Federal, State, and local governments, as well as landowners.

Mr. Chairman, I would have to disagree a little bit with this idea of the—I hear it so often—don't let the perfect interfere with the good. I think if you don't have a package you never get the rest of the stuff. You go with part of it, and then the pieces that you think are important, that I think are important, never get taken up. So I just think you have to modify that a bit to say this is a package and we have to go there.

I hope, too, that, as I've observed this over the last several years, each time this comes up we divide into camps and the environmentalists say, "Oh, if you want to change this you're simply trying to get rid of all the protection for endangered species." That's not the question. We've had 20 years of experience in dealing with this issue, and it's certainly time to use that experience to have a better bill. And if people want to change and make changes, it doesn't mean they're opposed to the endangered species. So I hope we get away from that kind of a break that always seems to happen.

I am concerned about water rights. I think that is terribly important to the west, and whatever my friend from Colorado indicates—and he's exactly right—we move in to the authority of States to adjudicate water through these bureaucratic kinds of things, and that's not what we propose to do.

I think property rights are terribly important here. This matter of listing and de-listing, clearly there has to be some priorities in listing. There are a million critters out there to list, and there is only so much resource. You have to do something to have some priorities.

The de-listing—and I've talked to the director before. The grizzly bears in Wyoming, we've been going to de-list those for how many years? Still haven't got it. Aren't even close. I think we have to do something there.

So certainly I'm glad we're doing this. I just hope that we take a realistic look at it and say, "Look, we've had some experience. These are the things that need to be changed from that experience," and seek to do it.

I thank you, Mr. Chairman.

Senator CHAFEE. Thank you very much, Senator.

[The prepared statement of Senator Thomas follows:]

PREPARED STATEMENT OF HON. CRAIG THOMAS, U.S. SENATOR FROM THE STATE OF WYOMING

Thank you, Mr. Chairman, for holding this hearing today to examine the recently introduced "Endangered Species Recovery Act of 1997." As this committee knows, you and Senators Kempthorne, Baucus, Reid—and the Clinton Administration—have been negotiating for months to reach a compromise on this legislation. I look forward to hearing the comments of my colleagues, and those of the witnesses, about the strengths and weaknesses of this bill.

Reforming the Endangered Species Act is one of the most important issues this committee will deal with this Congress. It is an Act that is complex and we need to look at ways to make the law more effective. This cannot be achieved, however, without cooperation between Federal, state and local governments, as well as private landowners. And as we learned from the last Congress, it is important that we do it right the first time. True reform of the Act cannot be achieved incrementally.

At the outset, let me say that we all want to protect and conserve endangered species. I am hopeful that this time around we can move beyond the rhetoric that has taken place in the past and recognize that all parties want to help protect species. The discussion should focus on using our experience to find a better way to list, recover and de-list endangered species.

Having reviewed the bill briefly since its introduction last week, I do believe there are some good provisions that will improve the ESA. However, I also noticed that issues like state authority over water rights and private property rights are not as detailed as some would like. As a Western Senator, I am concerned about what this means for folks in my state, and what it means for passage of this legislation.

As Senator Kempthorne and others on this committee know, water is the lifeblood of many farmers and ranchers in the arid West. Without it, communities, jobs and economic growth would literally dry up. I want to make sure that, at a minimum, states do not lose primacy over water allocation under this legislation, and would

prefer to work with the sponsors to possibly add language reaffirming states' rights with regard to water.

On the issue of private property, we all realize the warning flags that go up even at its suggestion. I have participated in numerous hearings with Senator Kempthorne in the last Congress and certainly understand both sides of this issue. S. 1180 incorporates "safe harbor agreements" and "no surprise policies," which aim to protect private property owners from further liability under the ESA when they take voluntary steps to conserve species on their property. I believe these provisions are important, but are they enough to ease the concerns of landowners in Wyoming and other states? I'm not sure. I hope to hear from our witnesses about these provisions and will be working with folks in my state in the next week to ensure they are comfortable with these measures.

I am pleased, however, that for the first time, the Secretary of Interior will be required to use the best scientific and peer-reviewed data available when listing and de-listing endangered species. In Wyoming, we've seen first hand the need to improve the listing process. The U.S. Fish and Wildlife Service should not be forced to spend taxpayers' money to look at proposals to list species without strong scientific evidence to back it up. And it's refreshing to see that individual states will be recognized as partners in the listing and recovery processes. For too long, the states folks who have all the responsibility for managing the species once it is off the list—have not been true partners in that process.

Furthermore, we need to start focusing on priorities for listing and de-listing and I hope to hear more about the scientific requirements in the bill for petitions to list, de-list or alter the status of a species. Wyoming's experience with the Grizzly Bear is a good example of some of the problems with the current de-listing process. It is my understanding that this legislation would develop deadlines for recovery plans and includes benchmarks to determine whether progress is being made toward recovering the species. I think it's important to realize that criterion and priorities need to be set—and once those targets are met—begin the process of de-listing. I hope our panelists will elaborate on how this section of the bill will improve the recovery and de-listing of endangered species.

In closing, Mr. Chairman, let me again say thanks to you and the other bill sponsors for bringing this issue to the forefront. Reforming the Endangered Species Act is, and has been, a priority of mine for quite some time. I hope we are able to move forward in a manner which improves the current Act and recognizes the importance of partnerships between the Federal Government, state governments and private property owners.

Senator CHAFEE. Senator Sessions?

OPENING STATEMENT OF HON. JEFF SESSIONS, U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman.

I want to thank Senator Kempthorne and the chairman for the work that you've put onto this bill. It is progress. It is better than we've had. I tend to believe it could be better, still, and I think we ought to strive to make it better, and I support those who share those concerns and agree with Senator Thomas.

We are here to reauthorize Endangered Species Act and to in no way take the teeth out of it or to undermine it, but I do believe we can make it work better. I believe we ought not to have regulations which are, in effect, a tax on those who have to meet those regulations. We ought to have no regulations that are unwise or unproductive, and the regulations we do have should enhance the goals that we seek to achieve.

Alabama has 87 species that are endangered—I think fifth highest in the nation. It is a rich ecological area that has much to offer the nation. We want to preserve that heritage, and we look forward to working with the members of the committee toward that end.

I will say I'm also somewhat concerned that, in delegating some of the authority under the Act to the State environmental agencies—and we have a good one—that that is being undermined, I

understand, by taking some of that power back and demanding approval of Federal agencies in addition, even after having delegated it to the States, so that's something I'm concerned about also, Mr. Chairman.

In the interest of brevity, I conclude my statement.

[The prepared statements of Senators Sessions, Hutchinson, Reid, and Lieberman follow:]

PREPARED STATEMENT OF HON. JEFF SESSIONS, U.S. SENATOR FROM THE STATE OF ALABAMA

I would like to begin by thanking Senator Chafee for calling this hearing to discuss S. 1180, the Endangered Species Recovery Act. This legislation, if enacted, would serve to reauthorize the Endangered Species Act through 2003, and I believe it appropriate that we have this hearing today to discuss some of the more controversial aspects of not only this legislation, but also of current law. I would also like to commend both Senator Chafee and Senator Kempthorne, the chairman of the Drinking Water, Fisheries and Wildlife Subcommittee, for the time and effort they have expended toward bringing this legislation forward.

Mr. Chairman, as a native Alabamian I have been truly blessed to come from a state with a rich assortment of diverse plant and animal species living within its borders. Alabama's legacy of biodiversity has been reflected within the context of the Endangered Species Act as Alabama currently hosts 87 plant and animal species that have been identified as either endangered or threatened, the fifth highest total in the nation. Constant exposure to so many species clearly gives Alabamians a unique perspective on the importance of efforts which seek to preserve not only our own indigenous species, but also those species whose ranges fall outside our borders.

Clearly, the large number of species Alabama hosts have also given rise to a large number of private individuals, landowners, and commercial entities who have had to navigate the complex world of Federal Endangered Species Act compliance. As we advance the important goal of species preservation, it is equally important that our efforts do not lose sight of the need to protect these people from many of the burdensome and costly regulations and procedures that they face under current law. I think we all can agree that many of the concerns these individuals have raised, for example concerns about unwarranted Federal consultation in permitting programs that have been delegated to the States, are valid and merit our serious attention. I believe that it is possible to reform current Endangered Species law in a common sense fashion to advance the dual goals of species protection and protection of private property rights, and I will be interested in hearing the comments of the witnesses who are assembled here today as to whether this legislation successfully promotes both of these important goals.

To this end, I would also like to thank the witnesses for coming forward today to present their views to the Committee. Clearly, the panelists today represent a broad range of interests, and I am certain their input will prove to be of assistance to us during our deliberations.

PREPARED STATEMENT OF HON. TIM HUTCHINSON, U.S. SENATOR FROM THE STATE OF ARKANSAS

Thank you, Mr. Chairman. I am pleased today to be a part of the beginning of a historic process to reauthorize the Endangered Species Act. I especially want to compliment Senator Kempthorne, Senator Chafee, Senator Baucus and Senator Reid for their efforts in making this legislation possible. I know that the negotiations have been difficult and, at times, frustrating. But, you stuck with it and have seemed to come to a consensus bill that can be passed.

Like the budget agreement, I don't think this legislation is perfect. Had I written it, it would be quite different. But, if that were the case, we would not be where we are now. I am looking forward to working on this legislation and coming to an agreement that will be a positive step toward serious reform of this law.

While once identified by some as the crown jewel of environmental legislation, the Endangered Species Act has become one of the most burdensome pieces of environmental legislation. Like so many laws created by Congress, the intentions of the ESA are good and, to a certain extent, has helped protect endangered species from becoming extinct. One such example is the American Bald Eagle, which is a success story that should be celebrated. Unfortunately, the success stories under the Endangered Species Act are few and far between.

To far too many land owners, the law has become a symbol of waning property rights and endless litigation. I consistently received letters from constituents who virtually beg for reform to this law, because in far too many cases, these law-abiding citizens have been treated almost like criminals. Many times these are not big landowners or large timber companies, but small land owners who are trying to make ends meet. One such constituent, Mr. Don Lind, of Fort Smith, Arkansas, complains of "runaway environmentalism," in his June letter to me.

In my opinion, one of the biggest problems with the original Endangered Species Act was that focused far too much on protection of a species, without doing enough to ensure the recovery of a species. I am very pleased to know that S. 1180 will focus more on recovery and that states will get an enhanced role to take over the recovery planning process.

Perhaps the most positive step in this legislation, however, will be to allow landowners to participate in the recovery and protection of a species. We have left these people out of the process for far too long. Their cooperation and efforts will enhance our ability to recover these endangered animals, while bringing those who are directly affected into the process.

Mr. Chairman, thank you, again, for your efforts. And thank you for calling this hearing today.

PREPARED STATEMENT OF HON. HARRY REID, U.S. SENATOR FROM THE STATE OF NEVADA

Mr. Chairman, I wish to thank you for scheduling today's hearing on this important legislation. Your leadership on this issue has brought us to the point we are at today and I commend you for your dedication to reauthorizing this important Act. I also wish to extend my thanks to the ranking member of the committee, Senator Baucus, and the chairman of the subcommittee, Senator Kempthorne.

The Endangered Species Recovery Act is the product of years of bipartisan efforts. The Endangered Species Act is considered to be one of the cornerstones of our environmental laws. Unfortunately, the current Act is failing in its ability to recover species. Like any good act, it is in need of reauthorization to adapt to changes in society. Having carefully examined where and how it is lacking we undertook efforts to craft legislative solutions. Much of these solutions are the result of input we received from environmentalists, landowners and those involved in administering this Act.

I believe the legislation we introduced last week represents a good starting point for reauthorizing the Act. While it may not make everyone happy, I do not believe we should make the perfect the enemy of the good. No legislation will please everyone. And arguably those measures which are criticized equally by opposing interests represent the best proposals. Bipartisan efforts help to ensure passage, they are not meant to be crowd pleasers.

I am pleased with the result of our bipartisan efforts. I wish to thank the Senators Chafee, Baucus and Kempthorne for the time and commitment they made toward reauthorizing this Act. I believe this measure represents significant progress from where we started earlier this year.

It is important that we undertake reauthorization so that we can put an end to legislative efforts to gut this Act on the annual Appropriations measures. As all are aware, these often extreme proposals resulted in fiercely partisan debates. I do not believe the appropriations process is the appropriate vehicle for amending this Act. Without this bill, however, that is where we would be debating this Act today.

The bipartisan measure we are considering today undertakes the necessary reforms to make this Act work. It not only provides greater protection for species but is makes the Act more user friendly to ranchers and landowners who simply seek to play by the rules. What are the improvements this bill makes?

- Listings will be based on better science.
- There is more public participation in developing plans to recover species.
- The bill emphasizes conservation and recovery of species.
- It includes deadlines and benchmarks for recovery.
- It provides for greater cooperation with landowners.
- It includes greater incentives and assistance to landowners.
- It streamlines Federal agency consultation and thus will bring about greater recovery.
- It ensures that recovery plans will actually be implemented and not simply sit on book shelves gathering dust.

A few other points. I have heard from some environmentalists about their concerns. I thank them for their input and look forward to reviewing their comments.

I would like to remind them of how far we have come on this measure by mentioning some things that are not in this bill.

- It does not include a provision on water rights.
- It does not allow agencies to "self-consult" on adverse affects.
- It does not require the selection of the least costly recovery strategy.
- It does not modify the standard of emergency listing to "threat of imminent extinction."
- It does not require a special rule for threatened species at the time of listing.
- It does not incorporate the Sweethome standard of "proximate and foreseeable" cause for take enforcement.
- It does not waive NEPA review for HCPs and Recovery Plans.

While improvements could be made, this measure is a solid proposal. I am hopeful we can fulfill our responsibility to reauthorize this Act.

PREPARED STATEMENT OF HON. JOSEPH I. LIEBERMAN, U.S. SENATOR FROM THE STATE OF CONNECTICUT

Mr. Chairman, I want to thank you and Senators Baucus, Reid, and Kempthorne for all of the work you and your staff have put into this bill. We heard through a series of hearings last year that while the Endangered Species Act is a very important environmental protection law, it is also a controversial law—particularly in cases where its implementation has delayed or prevented public and private development and other economic activities. So I commend you for trying to craft legislation that tries to meet the conflicting needs of the different values and interests involved.

As we enter this hearing, I think we should remember that the need to prevent species decline and habitat loss is growing, not declining. Global loss of plant and animal species is occurring at a far greater rate than ever before in the fossil record. This pace of extinction is truly staggering. At current rates, half of the plant and animal species alive today could be gone in 55 years—in large part due to human activity, not by the process of natural evolution. This statistic points to the need to ensure that our laws protect species so that we do not waste the biological legacy entrusted to us by our Creator.

This bill is a good start and has much to recommend it. In particular, I want to point out that "on-the-ground" conservation efforts might get a big boost if we can adequately fund the measures proposed in this legislation that offer financial incentives to private landowners who agree to manage their lands to benefit species. The bill also provides for greater public participation in the development of conservation plans for species, something that is sure to increase the acceptance of conservation measures by the people who ultimately have the responsibility of implementing them.

However, I have questions about whether the bill—if enacted as currently written—would weaken the Act in some important respects. Let me discuss some of these issues.

First, there are questions about whether a number of provisions in the bill impose new, burdensome requirements for listing species and for planning species' recovery efforts. Without adequate funding, I am concerned that the agencies responsible for administering the Act will face too much paperwork as they struggle to complete the complex analyses specified in this law. With tight deadlines for recovery plan completion—only 5 years to complete plans for over 400 plus species—limited resources for on-the-ground conservation efforts could be consumed.

Second, I question whether we should put into law the so-called "no surprises" policy. Under this provision, a landowner may enter into a conservation agreement for a number of species—some of which are not yet listed for protection under the ESA. As long as the landowner is in compliance with that agreement—which can last for as long as 100 years in some cases—he or she will not be required to undertake any additional mitigation measures, even if new knowledge about a species shows that more protections are required. Conservation biologists will tell us that we know very little about the requirements of many species, especially those that are not listed under the ESA. So, I am concerned about providing landowners with such solid assurances in law for such a long time period when only a limited amount of science is available. We may need to expand the "extraordinary circumstances" reopener that is now in the bill. An additional question raised about the "no surprises" policy is that the bill does not establish any mechanism to pay for "surprises" when they do occur. If a conservation plan fails to meet its objectives, the Secretary ought to have some kind of insurance fund available—be it funded by ap-

propriations or by performance bonds as some have suggested—to ensure that we can meet our obligations to help species recover.

Finally, Mr. Chairman, I have questions about changes to the process known as "consultation." Under current law, Federal agencies must consult with Fish and Wildlife Service or the National Marine Fisheries Service whenever an agency action may result in a "take" of imperiled species. In other words, consultation ensures that actions by Federal agencies will not affect species' chance for recovery—it is a law based on the common sense principle of "look before you leap." The changes in consultation proposed in the bill would limit the application of common sense by giving the Services—which already would be burdened by new requirements for listing and recovery—only 60 days to review decisions made by other Federal agencies.

So this legislation is a good start, but I hope that we can work together to address some or these concerns as we consider reauthorization of the Endangered Species Act.

Senator CHAFEE. Thank you very much, Senator.

Now, this is my plan. We have two panels. The first panel has three distinguished witnesses, and the second panel has five distinguished witnesses. All witnesses before this committee are distinguished.

[Laughter.]

Senator CHAFEE. I am very anxious to complete this hearing this morning. I know that we have our lunches at around 12:30-ish. I think that can probably be extended up until 12:50, but it is true that we have to move right along. I don't want to cut anybody off, but we're going to give each of the witnesses 5 minutes to make his or her presentation, and we'll reserve our questions until the panel has completed its testimony, and then we'll move back for questions.

So we'll start with The Honorable Jamie Clark, who is the director of the U.S. Fish and Wildlife Service.

We're delighted to see you here, Madam Director. Will you proceed?

STATEMENT OF HON. JAMIE RAPPAPORT CLARK, DIRECTOR, U.S. FISH AND WILDLIFE SERVICE, U.S. DEPARTMENT OF THE INTERIOR

Ms. CLARK. Thank you, Mr. Chairman.

Mr. Chairman and members of the committee, thank you for the opportunity to speak with you today about this very important legislation to reauthorize the Endangered Species Act.

Having served as a program manager for the endangered species program, I have, along with many of you, been deeply involved with the 5-year quest for a reauthorized and strengthened ESA. I'd like to commend you, Mr. Chairman, and Senators Kempthorne, Baucus, and Reid, and your staffs for the dedication and hard work that made introduction of this bill possible.

The Endangered Species Act is one of the nation's premier conservation laws, and I'm very encouraged by this bipartisan legislation. We appreciated your inviting the Departments of Interior, Commerce, and Justice to provide technical assistance and support to the process.

We're also pleased that another bipartisan bill, H.R. 2351, has been introduced in the House, and that the leadership of the House Resources Committee has begun tentative bipartisan discussions in an effort to seek common ground on reauthorization.

These positive developments suggest that at long last legislative gridlock is ending and we're on the road to reauthorizing the Endangered Species Act.

Your long efforts have resulted in legislation that has been carefully crafted to maintain the essential strengths of the current law, while taking steps to make it work better for species, landowners, and the States. The Administration is very pleased that the bill maintains a requirement that listing decisions be based solely on biological considerations and sound science, that the essential protections under Sections 7 and 9 remain intact, that there is increased opportunity for public and State involvement, and that recovery of species remains the centerpiece of the Act.

We are also pleased that the bill codifies many of the reforms and policies that the Administration has proposed and carried out over the past few years.

On balance, we believe that S. 1180 will strengthen our ability to conserve species. The Administration supports enactment of the bill, subject to the reconciliation of several issues set forth in this testimony. Prior to the committee markup of S. 1180, the Administration will provide the committee with a list of technical and clarifying amendments, as well as suggested report language. We'll also provide additional technical amendments, as the other Federal agencies and the Administration complete their review.

We believe Senate 1180 will strengthen our ability to conserve threatened and endangered species. The bill enhances recovery by encouraging conservation plans that address multiple species dependent on the same habitat and by providing increased Federal, State, and public involvement in the recovery planning and implementation process.

The bill ensures the use of sound science through the addition of peer review to listing decisions, new petition management guidelines, and increased information sharing with States. The bill provides incentives and certainty for landowners. The bill promotes increased public support and involvement in species conservation, and incorporates our "safe harbor" policy to encourage species and habitat conservation on private lands, while providing regulatory certainty to landowners.

The bill also addresses one of the major concerns regarding conservation plan, and "no surprises," by requiring monitoring of conservation plans to better assess their impacts on species.

The bill increases the involvement of States, tribes, affected public landowners, and the environmental and scientific communities to enhance public participation in endangered species conservation by emphasizing the importance of collaborative partnerships, and the bill eliminate threats to species through conservation measures undertaken before they have declined to very low numbers.

We are also pleased that the bill does not contain problematic language on water rights, property rights, or compensation provisions, that it reaffirms our ability to emergency list species when necessary, and does not waive other environmental statutes. We would strongly object to such provisions if they became part of the bill.

I'd like to now highlight the Administration's concerns regarding the bill. Securing adequate funding to support this legislation will

be the greatest challenge facing all of us. The legislation calls for an authorization level that more than doubles the resource agencies' current ESA budgets. Without adequate appropriations, we will face significant litigation backlogs, the recovery of many species will be stalled, and response and technical assistance to landowners, applicants, and Federal action agencies will be delayed.

Also, a number of agencies will require additional funds to adequately implement this bill because of the increased responsibilities for land management agencies, such as the Forest Service, Fish and Wildlife Service, and Bureau of Land Management.

In short, absent adequate funding or a reduction in the complexity of some of the processes, we cannot support this bill. The bill's greatest strength is in its increased emphasis on recovery, but the additional process outlined in the bill will be expensive to implement, and new deadlines may be difficult to meet, even with adequate funding.

The bill should be amended directing the Secretary to develop and implement a biologically based recovery planning priority system using the biological priorities as set forth in S. 1180 as a template for the system.

One method for streamlining the bill's process requirement is to consolidate the designation of critical habitat with the development of recovery plans. Although the bill allows for the regulatory designation of critical habitat at the time of recovery rather than listing, a significant improvement, we remain concerned that the cost of administrative burden of designating critical habitat by regulation in this bill is not warranted.

Habitat is the key for all species and, as such, needs to be thoroughly addressed in all recovery plans. Continuing to carry out a regulatory critical habitat designation process simultaneously with the new recovery plan development process is duplicative and escalates costs for little resource or stakeholder benefit.

We also recommend that our recent practice of working together with other Federal agencies early in the consultation process in a proactive manner is both more efficient and better if a species' conservation be codified. Even where early consultation occurs, the bill could be read to require that action agencies wait an additional 60 days for resource agencies to object to their findings concerning whether their actions will adversely affect listed species.

Language that stresses the importance of early proactive coordination and cooperation among Federal agencies and the ability of agencies to still request and receive expedited concurrence letters would alleviate those concerns.

Finally, I'd like to urge that the spirit of cooperative discussion that produced this bill extend to the development of the committee report so that our mutual understandings of these complex issues are strengthened, not eroded, as the bill proceeds through the legislative process.

I'm very encouraged that the Senate is moving forward to reauthorize the Endangered Species Act. We in the Administration stand ready to continue to assist in any way possible in seeing this process through to completion. We're optimistic that we can reach closure on these issues before final consideration of this bill in the Senate so the Administration can support its enactment. Together

we can make the Act work even better for species and people and get on with conserving our resources for future generations.

Thank you, Mr. Chairman.

Senator CHAFEE. Thank you very much, Director Clark. We appreciate that.

Senator CHAFEE. The Honorable Terry Garcia, acting Assistant Secretary for the National Oceanic and Atmospheric Administration, the U.S. Department of Commerce.

Mr. Secretary?

STATEMENT OF HON. TERRY GARCIA, ACTING ASSISTANT SECRETARY, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE

Mr. GARCIA. Thank you, Mr. Chairman.

I am pleased to be here today on behalf of the National Oceanic and Atmospheric Administration of the Department of Commerce. NOAA, as you know, is a partner with the Department of Interior in administering the Endangered Species Act.

Under the ESA, NOAA has primary jurisdiction over endangered plants and animals that live in our nation's ocean and coastal waters, including Pacific and Atlantic salmon, steelhead trout, sea turtles, whales, dolphins, and sea lions.

I welcome the opportunity to discuss with you the Endangered Species Recovery Act of 1997, S. 1180, as introduced by you, Mr. Chairman, and Senators Baucus, Kempthorne, and Reid.

I would like to congratulate the Senators on reaching a bipartisan consensus on the very difficult issues involved in preventing the extinction of threatened and endangered species.

Senators the extinction of our nation's living resources is not an option. Similarly, merely maintaining species on the brink of extinction is not acceptable. The return of ecosystems and habitats to their full function so that they can sustain species must be the outcome and goal of this legislation.

I agree completely with you, Mr. Chairman, when you said last week, "It is time to make recovery, rather than mere survival, the standard by which we measure our action."

Indeed, the principal unfinished business of the current ESA program relates to our ability to enlist non-Federal activities and landowners in the important job of recovery. Just look at the map of the west coast. Just look at the range of the Pacific salmon—it moves from Los Angeles to Canada—and you'll see the critical importance of involving landowners and other affected parties, States, and regional governments in the process.

I applaud the authors of this bill for the great strides they make in addressing this need by providing incentives to landowners, counties, and other entities to enter into long-term conservation agreements. Many of the Administration's reforms to provide landowner incentives have been codified in this bill.

Landowners are concerned, for example, that conservation measures on their land will create future restrictions, that they will be penalized for their efforts. To address these concerns, the Administration reached out to landowners with a "no surprises" policy. Under "no surprises," in return for entering into agreements to

conserve the species, landowners are given assurances that the Government will not impose additional requirements in the future.

Such certainty allows landowners to plan for the future, with the knowledge that a deal is a deal, and promises that the services will not require financial or regulatory commitments beyond those in the agreements.

The bill also contains provisions based on the Administration's "safe harbor" and "candidate conservation" agreements. These agreements attempt to keep species out of the emergency room and provide preventative treatment before the conservation and recovery of the species becomes a crisis.

Another important area is the role of State conservation planning, whereby the full range of State authorities and capabilities can be enlisted in the task of recovery.

Earlier this year, as Senator Wyden noted, NOAA and the State of Oregon literally broke the mold in the adoption of the Oregon salmon recovery plan in lieu of listing coho salmon in northern and central Oregon. The Oregon Plan is not perfect, and more work must be done, but it is a fully funded suite of aggressive programs directed to improvements in all aspects of the salmon life cycle. We remain optimistic that it will help save salmon and chart a new course for the next generation of ESA efforts in this country.

The Oregon plan is also a good example of NOAA's efforts to involve stakeholders. Involvement of stakeholders creates "ownership" in the process; our efforts in the Pacific Northwest to involve diverse groups have been amply rewarded.

In developing the Oregon Plan, NOAA coordinated with the general public, tribal governments, watershed councils, the timber industry, other Federal agencies, and State agencies, including the Governor's office.

This dynamic process brought all the interested parties to the table, with the goal of preserving the area's natural resources and economic stability, and provided greater certainty that the parties would accept and support the end result.

Such cooperation ensures that our collective energies will not be squandered on litigation and delay, but will go toward real species protection. Incorporating the stakeholder approach into recovery planning will provide similar ownership and accountability for the results.

As a science-based agency, NOAA welcomes the bill's emphasis on using good science. In our experience, there are no shortcuts to or end rounds around good science. Basing actions on good science eliminates time-consuming delay over biological issues, enhances species protection, and reduces unnecessary litigation. NOAA is pleased to see the bill codify NOAA's existing policy of basing its listing, de-listing recovery, consultation, and permitting decisions on the best scientific and commercial data available. NOAA also acknowledges the value of peer review, as the agency has followed a peer review policy since 1994.

That said, we have several concerns which should be addressed or must be addressed in order for us to support the bill.

If this Act is to live up to its name and truly recover species, adequate resources must be provided. Due to the complexity of the bill and the many new deadlines, we believe more funding than is cur-

rently authorized will be necessary. Without sufficient funding, the cycle of litigation, conflict, and crisis will haunt this Act into the next century, delaying recovery of our invaluable living resources.

The land management agencies will also need additional funding in order to carry out their new responsibilities. The funding issue involves more than mere authorization levels. As Jamie just noted, it will require firm commitments from Congressional leaders that appropriation increases above current baseline levels will be made for all agencies involved in this effort.

We also, along with the Department of Interior, support additional language which would stress the importance of early cooperation and coordination among the agencies. We do share concerns regarding the various interim deadlines contained in the bill, and we, with Interior, will submit some technical amendments to address these concerns.

This bill has made tremendous progress since the discussion draft circulated last January. Many provisions contained in that draft bill that would have proved troublesome, such as a provision on water rights, have been removed all together. Other provisions have been constructively modified, such as the consideration of social and economic impacts on recovery plans.

I'm also pleased to note that property rights provisions have not been included, as noted earlier. If they are, NOAA would feel compelled to oppose the legislation.

If these last few concerns noted in my testimony and in Interior's are addressed, then this bill will have our support. As it stands now, this legislation is a tremendous achievement and deserves serious consideration by all members of the committee, the Senate, and the House of Representatives.

Thank you, and I'm prepared to respond to your questions.

Senator CHAFEE. Thank you very much, Mr. Secretary.

Senator Baucus, would you introduce the next witness?

Senator BAUCUS. Yes. With pleasure, Mr. Chairman.

I'd like to introduce the Governor of our great State of Montana. Marc Racicot has a long career of distinguished public service. He served as assistant attorney general, he served as attorney general. He's now serving in his second term as Governor. He enjoys widespread popularity in our State. He is very solid, hard-working, honest, dedicated, common-sense, balanced—all the things we want of our public servants.

I might say it's analogous to and very much a part of the effort behind this bill—namely, in a bipartisan way the four of us and the Secretary of Interior and Jamie Clark, too, have been working together to try to find the right solution that is best for America, listening to all the various points of view and trying to put them together in a way that makes good sense, and our Governor, Marc Racicot, is just such a person. I can mention the salmon issue, grizzly bear, bull trout, very contentious issues in our State, and he has put together an effort to try to resolve them in a very solid way.

We're very honored, Mr. Chairman, to have him as our Governor.

Senator CHAFEE. Thank you.

Governor, we're delighted to have you here. Won't you proceed?

STATEMENT OF HON. MARC RACICOT, GOVERNOR, STATE OF MONTANA

Governor Racicot. Thank you, Mr. Chairman, and Senator Baucus—you are very kind and generous—and members of the committee.

As was mentioned, my name is Marc Racicot, and I am temporarily serving as the Governor of the State of Montana. I am here today, however, representing not only myself, but the Western Governors Association and the National Governors Association, which I can allege represents virtually all of the Governors of all of the States and the territories of the United States of America.

I genuinely appreciate the opportunity to talk with you today about the Governors' perspectives on this unique legislation and its impact on our efforts to protect the nation's conservation resources.

I would like to, as well, request that the written testimony that I have prepared also be made a part of the record, if that's acceptable.

Senator CHAFEE. It will be.

Governor Racicot. We support the consensus bipartisan approach and recommend that the bill move forward. You have made major progress in this bill, and we know that it is a delicate consensus that has produced the provisions of Senate bill 1180.

The Western Governors know well what you and your staffs have endured to this point. We started a similar debate in the early years of this decade. As a group, we had never experienced a more acrimonious debate—so acrimonious, in fact, that we had to initially back off our attempt.

However, under the leadership of Montana's Governor, Stan Stephens, on one side of the debate, and Idaho's Governor, Cecil Andress, on the other, the Governors became convinced that the only way the Endangered Species Act could be improved was through a consensus process.

That leadership and consensus resulted in an outstanding proposal which would strengthen the role of the States, streamline the Act, and provide increased certainty and assistance for landowners and water users, while at the same time enhancing its conservation objectives.

The consensus has since been endorsed by the Western Governors Association, the National Governors Association, and the 50 State fish and wildlife associations through their International Association of Fish and Wildlife Agencies.

It was then forwarded to you, first in the form of legislative principles in 1993, and then in legislative language in September 1995.

The consensus principles that the Western Governors Association and the National Governors Association developed on ESA reform are reflected in Senate bill 1180. While none of our members would draft the bill in its exact form, we believe it deserves our active support.

Because such consensus on both our parts was difficult and hard-fought, it is worth a few minutes to outline here those areas in which we do agree in substance and which we encourage you to retain in the bill, and to work with us as you move toward Conference Committee consideration.

A greater State role has been acknowledged in recovery planning, and the bill reflects the strong intent to make States partners in achieving the objectives of the Act by inclusion of the language calling for cooperation with the States, in the major sections of the Act, as well as a strong definition of what that is to entail.

As a technical point, parenthetically, I suggest that the committee may have inadvertently missed inserting that phrase in the sections on "safe harbor," candidate conservation agreement, Section 7, and implementation agreement provisions.

Inclusion of strong incentives for private landowners, like "safe harbor" and "no surprises," the habitat conservation planning fund provisions, technical assistance to enable landowners and water users to be true partners in reversing the decline of species in their habitat, and in the companion bill, of course, the tax incentives for landowners are also areas that we believe should be retained in the bill.

In addition to that, peer review for listing decisions, greatly enhanced public comment, and involvement in all aspects of the Act elevating the recovery of species to a central focus of the Act, and the incorporation of implementation agreements with Federal agencies and other entities to ensure that recovery plans are not only comprehensive and inclusive in their effort to conserve species, but also that they are carried out: multi-species habitat conservation plans—HCPs—and the streamlined ACP process for small landowners with small impacts; designation of critical habitat at recovery planning stages, where it is most sensible and practical; increased rigor in the listing process; and, finally, increased funding authorization to carry out the new and expanded requirements of the Act.

As I'm sure you can appreciate, there were issues upon which the Governors could not reach consensus—areas which I know caused you difficulty, as well—for instance, water rights, Section 7, and a narrower definition of "take." Each Governor is working on those particular issues from the unique perspectives of their States and their needs.

However, just as the Governors were able to move ahead and reach overall consensus, we are encouraged that this committee has done the same. We strongly encourage you to retain the consensus you have reached and to move ahead with this legislation.

The vital natural resources which we all wish to see sustained and conserved depend upon the incentives, the streamlining, and the acknowledgement of partnership that are integral to this legislation.

I want to note that you were able to reach consensus on question seven, which eluded us in our deliberations. The Governors cannot specifically endorse that consensus because it is beyond the scope of our own agreement, but we encourage you to keep up that effort.

There were also four areas in which the Governors did reach consensus and on which you did not. We believe they would be very important and effective additions to your legislation. We understand that you have a consensus bill here and that you need to move it basically intact, so we request the opportunity to work with you and all the parties that are necessary to consensus prior to conference to try to meld in these four areas of gubernatorial con-

sensus. They are: State-initiated conservation agreements, adequate funding, a more-rigorous and less-costly de-listing process, and reconfirmation of the intent of Congress to have a statutory and regulatory distinction between a species listed under the Act as either threatened or endangered.

I would like to highlight the most critical of those four for you.

In my State, we have pulled together a broad-based group representing the major stakeholders with an interest in bull trout conservation. This bull trout conservation team or restoration team has been working to develop a conservation plan for this candidate species which would provide the basis for construction and recovery.

The type of agreements we can forge and the flexibility we need to forge those agreements are possible with a candidate species, but next to impossible if listing were to occur under the ESA. Yet, litigation and the deadline triggered by that petition is forcing the Fish and Wildlife Service toward that very listing, to the detriment, we believe, of our cooperative efforts and the bull trout.

The key concern of the Governors is that Senate bill 1180 provide for State-initiated conservation agreements. These agreements would be led by the States, so if listing were forced to occur, as it likely will with the bull trout, the agreements forged would continue in force and effect after listing.

The States simply have to have an incentive to get out in front of the listing process and conserve species. That is when the costs are as low as they will ever be and the flexibility to make important land management decisions is most urgent. Incorporating State-initiated conservation agreements into your legislation is a fundamental incentive for the States.

My colleagues in Oregon and Texas invite the members from your committee and the House Resources Committee and staff and other interested persons to visit them and see how these conservation agreements work on the ground.

Naturally, Montana or any other State in the west would be pleased to act as host, as well. We encourage you to accept the invitation and learn why incorporation of State-initiated conservation agreement language in your legislation is so critical to species conservation and to getting active, early State participation.

As to the specifics of the language for State-initiated conservation agreements and the other three areas of consensus which we believe the Governors have shown can be achieved, we provide more detail in my written comments.

Naturally, as I'm sure would be true with each of you, the Governors would like to manicure various aspects of the legislation. Our staffs are reviewing the bill, and we will forward to you those comments in the next several days. We hope you will provide us the opportunity to work with you as the bill moves forward.

I do genuinely appreciate this opportunity, and I thank you very much for giving me the chance to give you these brief comments on behalf of the Nation's Governors.

I, too, would be pleased to answer any questions or discuss with you any particulars about my testimony this morning. Thank you.

Senator CHAFEE. Thank you very much, Governor, for those comments. You certainly have a lovely State, and I've had the privilege

of visiting there, and you are well-represented on this committee with the distinguished work of Senator Baucus.

All three witnesses have discussed the need for the adequate funding, and we agree with that. We put in authorization, but, as somebody pointed out—I guess it was Director Clark—there is a difference between authorization and appropriation. However, all we can do is authorize on this committee, and then put our shoulder to the wheel and try and get the necessary funds.

But I want to say that all of us here—certainly the principal ones that worked on this, Senators Baucus, Kempthorne, Reid, and I—all agreed on the funding.

I'd like to ask, Jamie, you talked in your testimony about habitat is the key for all species. And I can't agree with that more. Habitat is what this thing is all about. And habitat conservation plans, HCPs, are what protect the habitat.

Now, I know that in subsequent panels, on the next panel there undoubtedly will be criticism of the steps that we are incorporating in the law which you presently do by administrative action—"safe harbor," "no surprises." When we put them into law, thus we give them an added protection.

Before the Fish and Wildlife went to those particular measures, how many habitat conservation plans had been approved or had been adopted? Do you know the answer to that?

Ms. CLARK. I can get in the ball park. Prior to this Administration, there were less than 15 HCPs that had been completed.

Senator CHAFEE. That was my understanding, that the figure I had was 14. There were 14 HCPs that had been adopted.

Now, if you agree that HCPs are the key to this, or a very crucial part of it all, then you move to say how you encourage the HCPs, and we've done that through adopting statutorily what you have been doing administratively.

Now, since you have been in office now—what, 5½ or 6 years or something like that—how many HCPs have been adopted? Do you know, roughly?

Ms. CLARK. We have over 200 HCPs that have been completed, and probably the same number that are under development today.

Senator CHAFEE. Now, what do we say to the witnesses that follow you on this if these are attacked? What's our best—what's your best defense?

Ms. CLARK. Well, Mr. Chairman, I think there are a couple——

Senator CHAFEE. I mean, you know what I'm talking about. We're talking about the "safe harbor," we're talking about the "no surprises."

Ms. CLARK. Well, as you paraphrased my testimony, you're absolutely right. I think the important thing about the Endangered Species Act is our need to profile the importance of habitat conservation, of maintaining species without their native habitats is certainly not going to promote recovery in any stretch of the term.

Collateral with this notion to understand and provide for long-term species and habitat conservation is the need to provide incentives for landowners, incentives for the potentially regulated public to step out and conserve those species and their habitats. That was the theme behind the "safe harbor" provision. That certainly is the

theme behind the "no surprises" provision associated with habitat conservation plans.

The concern has been heard and is very real with the magnitude of these kind of agreements that are in play now and have been adopted and finalized, that we continue to monitor the landscape and try to manage the efficiency of the process, and that's something that we have taken very seriously and have incorporated into our ongoing administration policies.

But it is the combination of providing certainty for the public, providing for long-term species conservation, and monitoring along the way that I think is the right mix.

Senator CHAFEE. A point that we've—when we had a press conference announcing this—and certainly Senator Kempthorne stressed it—was the recovery. What we're trying to do is to encourage the recovery of these species, not just throw out protection to them and not have them decline any more. We want them to come back.

Now, almost half the species listed don't have recovery plans, and our bill requires these plans, and under a certain deadline. Now, that has been attacked, as I—not attacked, but suggested that this adds too much more red tape. Could you comment on that?

Ms. CLARK. Certainly. I wouldn't maybe characterize it as "red tape." The comment that I'll make, particularly for the Fish and Wildlife Service, since most of the backlog lies with us, is that it's not because of a lack of a desire to complete recovery plans; it's a lack of dollars and resources to get the job done.

The concern expressed, as we've expanded the process, incorporating stakeholder involvement, is that we be mindful of our available appropriations and our available resources. Recovery is the key. Recovery plans are blueprints to march us toward species recovery, involving and being sensitive to the species' needs and the impact on landowners.

So we incorporated, by policy, 3 years ago the recovery planning deadlines.

Senator CHAFEE. My time is up.

Senator Baucus?

Senator BAUCUS. Thank you, Mr. Chairman.

Ms. Clark, as I understand it, the Administration does support this bill, but would like to see some changes and some improvements, from your point of view?

Ms. CLARK. That's correct.

Senator BAUCUS. One of the questions I heard in Montana yesterday is that the HCPs may make sense, and the "no surprises" policy part of it makes sense, but the long-term HCPs might be a little bit too long, and it's difficult if not impossible to reopen HCPs if there are some changes of circumstances or more information is available that would lead an ordinary, prudent, common-sense person to think there should be a change in the habitat conservation plan.

Do you have a response to that?

Ms. CLARK. A couple of comments.

I think the stresses on our environment are not getting any less, and the available habitat for species and conservation over the long

haul is not increasing, necessarily. Certainly, populations are increasing and pressure on the environment is increasing.

These long-term conservation plans that we are developing and negotiating do cause us to be mindful of the terms, and the "no surprises" policy, as incorporated today, does allow for tinkering. We don't go back for more land or we don't go back for more money, but it allows us to operate within the scheme of the terms and conditions of the plan, itself, and tinker with it. Plus, it encourages us to cooperate with the States and with the other Federal agencies to ensure our comprehensive landscape look at species recovery needs.

Senator BAUCUS. So you don't—under what circumstances should habitat conservation plan be reopened?

Ms. CLARK. If the permit applicant doesn't comply with the terms.

Senator BAUCUS. What about extraordinary circumstances?

Ms. CLARK. We have extraordinary circumstances—thats' a good point. The terms of extraordinary circumstances are species-specific and plan-specific, and the terms under which the extraordinary circumstances would be evaluated are incorporated in each of our plans.

Senator BAUCUS. I appreciate that.

I also heard a concern by several environmental groups that suggest that they should have equal input and access to the Section 7 consultation process as persons were seeking authorization and funding from a Federal agency as equal access compared with the action agency who is consulting with the Fish and Wildlife Service.

Your thoughts about that?

Ms. CLARK. Section 7 consultation is a deliberative process between the resource agencies—National Marine Fisheries Service or the Fish and Wildlife Service—and the consulting agency.

Applicants are afforded the opportunity to be involved in the process, and the applicant definition that is contained in Senate 1180 embraces our current regulatory definition of applicant.

It is a process that is on a deadline that we try to streamline as much as possible. We support the current process in the bill.

Senator BAUCUS. Do you think this bill essentially achieves the goals of providing greater protection to species, as well as adding greater protection to landowners?

Ms. CLARK. Yes, it does.

Senator BAUCUS. Governor, you said something kind of interesting to me, and that was, as I understood it, a State-initiated conservation plan. And I'm wondering how they would differ from the provisions in the bill which do already allow that—that is for a non-Federal person to enter into an agreement with the Secretary to provide a candidate conservation agreement subject to the same terms as habitat conservation plans—that is, "no surprises," and so on and so forth.

Are you suggesting something new in addition to the revisions already in the bill?

Governor Racicot. Yes, sir, although those provisions are obviously very constructive. We believe that there are opportunities where you can forecast, you can see predictively that there is going to be a situation developing, and if you are going to encourage the

highest level of prevention in terms of risking the elimination of species or threatening them, that you ought to encourage this constant monitoring and vigilance on the part of the States to be doing virtually everything that they can do to make certain that they do not end up in a situation where there is even a petition filed or candidate species that is under consideration.

And so what we're suggesting is that, with those who are very intimately involved with the landscape, they can obviously perceive precisely what is occurring, and you ought to make certain that you provide every flexibility that you possibly can for the States even to proceed at that point.

Senator BAUCUS. I don't want to be too technical here, but do you think that the provisions in the bill which provide for any non-Federal person to do as I say restricts a State from embarking upon the course that you are suggesting?

Governor Racicot. We think that it could be more clearly defined. I'm not certain that I could say that it restricts it.

Senator BAUCUS. Because a point of this actually is to allow the State to do the same thing that——

Governor Racicot. We would just like to very plainly have the ability to proceed in that direction.

Senator BAUCUS. And that's provided for already in the statute. Thank you.

Senator CHAFEE. Thank you, Senator.

Senator Kempthorne?

Senator KEMPTHORNE. Mr. Chairman, thank you very much.

Madam Director, let's talk about Section 7 consultation process for just a moment.

I know that, as I've traveled around the State of Idaho and around the country, it's interesting that not only are the landowners quite frustrated with existing Section 7 process, but many of the Federal agencies are just as frustrated.

As you know, the bill includes a new streamlined process that would allow Federal action agencies to make the initial determination that an action is not likely to adversely affect a species.

Would you agree that Federal agencies, with their own biologists, have the expertise to make these determinations?

Ms. CLARK. Yes, Senator, in many cases, they currently do. Our current regulatory process allows for Federal agencies to make that first call, that it is not likely to adversely affect, and they do.

Senator KEMPTHORNE. And, Director Clark, have you seen the frustration both among the Federal agencies and the property owners that often there is no closure to consultation and it continues and it continues one agency to another and back to that agency, and so that the project never receives a verdict?

Ms. CLARK. I've certainly heard stories, and we have been very sensitive to that in this Administration and have worked hard to accelerate the consultation process into a much more early collaborative, proactive mechanism, which certainly has been embraced in the Northwest and in your State, in particular.

Senator KEMPTHORNE. Now, the action agency with our language, again, if they determine that an action is not likely to adversely affect, they can go ahead and approve the project, but there's 60 days for your agency to review that decision.

Do you feel that that is appropriate? And do you feel that gives your agency sufficient time, but also that it does not jeopardize a species?

Ms. CLARK. I feel that the process is currently contained in the bill is appropriate, and I'll summarize it the way I understand it. The Federal agencies, with qualified biologists, can make that original initial call. They submit the information to the resource agencies, along with the documentation regarding how they made that not likely to adversely affect, and they move forward within 60 days unless we object.

We can object under one of three circumstances: we disagree with their evaluation, the information is incomplete for us to deliberate that evaluation, or the complexity of the action is such that we just don't have enough time.

And so, given those kind of caveats, I believe that species will not be jeopardized.

Senator KEMPTHORNE. All right. Thank you.

Governor Racicot, if I may then continue that thought there, from your perspective of the property owners in Montana, have you heard that Section 7 has been an area of great frustration for property owners as they have tried to get approval on a project but, unfortunately, consultation continues without closure?

Governor Racicot. Yes. I have heard that complaint.

Senator KEMPTHORNE. And do you feel then, Governor, that the provision that we have now put in place that an action agency can go ahead and make a determination will allow projects to move forward, knowing full well that the Fish and Wildlife, or NMFS, if that would be the case, have 60 days to review that, but that finally there is a process in place and that there is a deadline that will be imposed? And isn't that a clear signal to property owners that they now can have some certainty and expectations as they deal with the Federal Government?

Governor Racicot. I think it is a substantial improvement, and it does provide a trigger that requires some action. They can't just sit there in lethargy for a period of time and not be acted upon.

I do have some concern about the standard. Will not adversely affect seems to me to be one of those standards that will probably be susceptible to a significant amount of construction.

Senator KEMPTHORNE. And, Governor Racicot, let me ask you, because you've been involved in this—and I appreciate greatly the Western Governors Association and the National Governors Association and the work product that you provided us, which, as you have pointed out, is reflected a great deal in this legislation that is before us. Were the Governors in your consensus process able to reach agreement on water rights, property rights, or the scope of Section 7?

Governor Racicot. No, we could not.

Senator KEMPTHORNE. And can you give any further insight into that?

Governor Racicot. Well, I probably—I'm not the recipient of all of the comments. I can certainly reflect that there are some that genuinely have some concern about water rights language.

I, having been involved as attorney general and having litigated a number of those different issues, have a certain view, and I have

some comfort given me by the fact that I know that those are construed as a matter of State law, but I certainly can't speak for—and I'm comfortable with that—I can't speak for all of the Governors in that respect.

Senator KEMPTHORNE. Well, Governor, again, I appreciate your involvement and that of the Governors, and I'm a real advocate for States' rights, and I believe that we have now incorporated a real role for the States to play in the recovery of species and also looking out for the citizens that you serve.

Governor Racicot. Senator, thank you. And if I could—I hope not gratuitously—also commend the sponsors of this legislation, I know what it's like—although I certainly can't claim to know precisely what you went through in this respect—to deal with this issue and to put together a piece of legislation that is so encompassing and so difficult and so important, and I simply can't compliment you enough. I think this is an extraordinarily fine piece of legislation and it is in the best interest of the public and all of those creatures we share this planet with that it move forward.

Senator KEMPTHORNE. Governor, thank you.

Senator CHAFEE. That's the kind of statement we're delighted to hear.

[Laughter.]

Senator CHAFEE. Don't feel at all reluctant to repeat it at any opportunity you have.

[Laughter.]

Senator CHAFEE. Thank you, Senator.

Senator Wyden?

Senator WYDEN. Thank you, Mr. Chairman. And I want to thank the witnesses, as well. That was excellent testimony. I look forward to working with all three of you.

Particularly for you, Governor, and Ms. Clark, a question with respect to the State plans. And I think right at the heart of our getting a good bipartisan bill here is to come up with sensible ground rules to encourage these home-grown, locally driven, outside-the-beltway solutions to preserving species.

As both of you know, I have really championed the Oregon plan, because I think it is really the first fresh model to try to bring together environmentalists, scientists, industry, people across the board.

Now, this legislation does a lot to involve the States after a species is listed, but I don't think it is doing enough to mobilize these States pre-listing, so I have a question for each of you.

The first, with respect to you, Ms. Clark—and, as you know, this was my priority when you came up for confirmation—would you support conceptually—because you haven't seen the language now—laying out in this legislation the terms and the time table so we can send a message to States that they have an opportunity to be involved pre-listing?

Ms. CLARK. Absolutely, Senator. We support all interested parties, including the States, early on, to prevent listing of species.

Senator WYDEN. Well, we will get with you as the terms and time table and the amendment come out, and that is helpful.

Governor Racicot, I just want to make sure I understand the position of you and the Western Governors, because I think you are

very close to what Oregon talked about, but I may be missing something and I want to get it.

At home in Oregon we felt that avoiding a listing altogether was absolutely key psychologically, and it was especially key to industry, and a lot of ag folks and others were reluctant but wanted to come up with something new, and they said, "You've got to avoid a listing."

Are you and the Western Governors, in effect, calling for something that is close to Oregon but slightly different, which would say, in effect, "Well, all right, if there is a listing so be it, but then there would be an opportunity, in effect, to suspend the listing if you can attain the standards." Is that what you're calling for?

Governor Racicot. Yes.

Senator WYDEN. And in that way it's a little bit different than what Oregon has proposed.

Governor Racicot. Yes, Senator, and that's what Senator Baucus was probing, I believe, as well. And perhaps I didn't describe it well.

Let me give you an example. In Montana I mentioned the bull trout restoration team, and, of course, we have populations at risk there.

Three years ago, we put together, prior to the time that there was a petition filed, an effort recognizing that this was going to present itself, and this is a very, very sacred creature in the State of Montana, as virtually every one is except for a few insects here and there.

And the bottom line is that we put together a group of public and private resources, and they represented industry, they represented the environmental community, they represented State interest and Federal interest—Fish and Wildlife Service is involved. And we commissioned ourselves to perform a number of responsibilities, including performing a very exhaustive scientific inquiry.

A petition was filed in the middle of that process and, quite frankly, I believe the Fish and Wildlife Service is very sympathetic to our efforts, but they simply could not avoid proceeding with the listing process.

That places us now in a situation where that largest interest, the largest corporate interest owning over a million acres, has gone on their own and, as a consequence, destroyed the opportunity.

Senator WYDEN. Let us do this. I think, based on the answers that you and Ms. Clark have given, we are close, and we're certainly on the same wave length in terms of concept. I want you to know I am going to offer in this committee an amendment to try to promote these State efforts. I think it is long overdue. I think it gives us a chance to come up with fresh, creative ideas, but ones that are in line with some Federal criteria and can bring certainly Members of the Senate together, so we'll be showing it to both of you and look forward to working with you on it.

One last question for you, Ms. Clark, on this funding issue, which I feel is critical to really doing this well. What would happen under this kind of situation? The funds are available at the beginning. And, as Chairman Chafee noted, we don't have control over all of this, but let us say at the outset the funds are available, but midway through this process the funds do not become available.

What happens then? And isn't it going to be essential, as I said in my opening statement, to have some sort of fall-back mechanism for us to not lose the good work that has been done on a bipartisan basis by the Chairs and ranking members?

Ms. CLARK. Well, certainly, I think, as you've heard from all of us, funding is essential to implementation of this bill, and I think we have a whole different ball game if funds aren't available, and I think we're all sensitive to that.

Immediately we would have to look, at a minimum, at reduction in some of the complexity of the process and looking at different ways to achieve what continues to be the important goals of species and habitat conservation.

Senator WYDEN. Mr. Chairman, my time is up, but I'd like to say again I want to work with you and all four of you on this because I think that this is a solid bill and I think we do need some kind of fall-back mechanism so as to deal with this situation of, later in the authorization process, the funds not being available, and we wouldn't want to lose the good work that has been done.

I yield back.

Senator CHAFEE. Thank you very much.

Senator Burns, I noticed your Governor is here. Do you want to welcome him in any fashion?

Senator BURNS. I was trying to pick a place without working itself to death, and I found it.

Senator CHAFEE. Senator Allard?

Senator ALLARD. Thank you, Mr. Chairman.

Ms. Clark, on your testimony it wasn't clear to me if the bill—if the legislation is kept the way it is right now, can you support it, or do you oppose it unless some changes are made?

Ms. CLARK. We support this legislation conditional on some of the technical amendments that partially I discussed here, and we're finishing up this week, and hope to work with the chairman and other Members as the week goes on prior to markup.

Senator ALLARD. So you're still withholding your support until the technical amendments are resolved?

Ms. CLARK. Yes, we are.

Senator ALLARD. And now I was looking at the testimony from Mr. Garcia. He said, "If all our concerns are addressed, then this bill will have the Administration's support." So you, as the bill currently stands, if I interpreted your testimony right, your testimony is that you oppose the legislation until the specific conditions that you mentioned in your testimony in here are met, in which case then you would support it? Mr. Garcia?

Mr. GARCIA. Actually I heard the question. I was going to say I preferred my formulation——

Senator ALLARD. You looked a little blank there.

Mr. GARCIA. We support the legislation, subject to satisfaction of the conditions that we laid out in the testimony.

Senator ALLARD. So you don't support the legislation now, until those changes are made?

Mr. GARCIA. Without those changes, no.

Senator ALLARD. So there is still some negotiating that we have to do on both sides before we get the support of the Administration?

Mr. GARCIA. That's correct. The most fundamental concern we have—and all of us have emphasized that—is adequate funding. If we don't have adequate funding, there is no way that we can possibly comply with the complexity of——

Senator BAUCUS. If the Senator will yield, it's just the funding. Neither of you see fundamental problems in the way of Administration support? You're talking more about technical provisions, which you see resolved——

Ms. CLARK. Absolutely.

Senator BAUCUS.—except for the funding issue——

Ms. CLARK. Absolutely.

Senator BAUCUS.—which you think is significant. I think there is no one on this committee that would disagree with that.

Ms. CLARK. Right.

Senator ALLARD. Well, that was the next point I wanted to get to, and I thank the Senator from Montana in that regard.

As was pointed out by the chairman, we don't have control on the funding. I mean, you can be advocate for the funding of it, but this is an authorizing committee. We put the legal language in place so that when the dollars are appropriated, that they are authorized and within proper hearings such as this, and Congress has agreed that it's a program that needs to continue forward.

So, understanding the problem that this committee faces with the funding issue, then you would go ahead and fully support the bill now as is currently drafted?

Mr. GARCIA. With the technical changes that we have proposed, yes.

Senator ALLARD. So you still—so, even though there are funding issues here, that's still not all your concern? You still have some concern about some basic fundamental language that we have in here, and, putting the funding issue aside, neither one of you can support this piece of legislation until those technical issues or those issues are resolved; is that correct?

Mr. GARCIA. That's correct.

Senator ALLARD. OK. So we still have some concerns by the Administration, and if this was presented to the President as it stays today, then the President would veto it?

Ms. CLARK. Let me——

Senator ALLARD. Or you would make a recommendation to the President to veto it?

Ms. CLARK. Let me just make a couple of clarifying points.

What we are talking about, clarifications in this bill that make it more clear to those of us that have to implement it and to the regulated public.

I think we're talking about potential continued streamlining of some of these processes because of the concern over the funding. But certainly the marker is out and we're very mindful of the role of this committee that you don't appropriate dollars, but it's a discussion that we've had all along, and we have to remain concerned that we not build a process that implodes with no funding. And it's more of a discussion than anything else.

But I think we remain very confident that the remaining concerns—and "concerns" is too strong a word—that are in this bill are issues that we can work out in the short term.

Senator ALLARD. Well, the reason I want to—I mean, the committee also has some concerns.

Ms. CLARK. Right.

Senator ALLARD. I've mentioned some concerns in my testimony. I don't think that any of those concerns really have an impact on species recovery; it just helps clarify, I think, and make a lot of affected parties probably feel more comfortable about this legislation.

For example, on the interstate compacts, would you have any problem with us strengthening that language a little bit so that the States, and particularly the States that I represent where we have so many interstate compacts, would feel a little more comfortable with that language?

Ms. CLARK. Senator, that's when you get out of my league very quickly. We have a whole host of lawyers that are looking at that. The whole notion of water rights and interstate compacts are beyond my repertoire, so I can't respond to that.

Senator ALLARD. Well, of course, though, the point I make is that these are agreements——

Ms. CLARK. Right.

Senator ALLARD.—that have been made by the States, agreements that have been passed by the Congress.

The chairman is gaveling me down already, but, you know, there are——

Senator CHAFEE. I'm gaveling because of the red light.

Senator ALLARD. But, you know, these things have already gone through a lot of debate, and they are very important issues, I think, particularly to important rivers like the Colorado River——

Ms. CLARK. Right.

Senator ALLARD.—where we've got so many States involved.

Ms. CLARK. Right.

Senator ALLARD. And we have large—I mean, California, for example, has economy realized heavily, and I wouldn't want to do anything to force more people to move out of California and go to Colorado. You know, there is—we do have those concerns in that, and I would hope that we can all sit down.

Ms. CLARK. Right. Absolutely.

Senator ALLARD. And I don't see them as a problem with endangered species recovery, but they are things that people need to be assured that they aren't going to happen.

Thank you.

Senator CHAFEE. Senator Inhofe. I apologize. I inadvertently skipped over you, Senator, and I apologize.

Senator INHOFE. That's quite all right, Mr. Chairman.

I think that everyone in this hearing is aware that this bill was developed primarily by the four that have been mentioned, and I commend them, also, for the time that they have spent on this. My areas of expertise on this committee really aren't in endangered species, but I know that Senator Allard was very, very active over in the House side, and he has a lot of concerns that he has brought up, and I have looked at a number of amendments that I believe you at one point or another—probably next Tuesday—will be offering. But I would like to see—a couple of things have been addressed.

Governor Racicot, in the case of the unfunded mandates that I'm sure when you met with the Western Governors and the National Governors this term came up from time to time, is my understanding—if this thing doesn't happen in terms of funding, as Senator Wyden mentioned, if we started out funding and then stopped, or if we didn't even start out, it's my understanding that you would not fall into a situation where you would have to fund something that later on might precipitate a lawsuit under the unfunded mandates law. Is that correct?

Governor Racicot. I think that's correct. The challenge, of course, for us is—I might give you one example. We have a lot of costs that are assumed by the States already. For instance, with the grizzly bear management in greater Yellowstone area, I believe there is about $1 million of expense assumed by the States of Montana and Wyoming in that particular process, and about $100,000, I believe, the Federal Government contributes. So the States are assuming a significantly large expense right now.

If there is not adequate funding—I mean, all of these issues, all of this refinement, and all of this improvement in process takes people to drive it, and there are very, very lengthy and difficult investigations that take place. And, quite frankly, I think a great deal of the frustration with the Act is the result of an inability to simply keep up with an extraordinarily large and exponentially growing work load. And if you don't have funding, you're going to create a bad reputation very quickly for the reforms to the Act.

Senator INHOFE. Thank you, Governor. Of course, a lot of those—the problems we've dealt with from a funding perspective were there prior to the inception of this bill.

Governor Racicot. That's true.

Senator INHOFE. And I recognize that. I'm thinking about what happens from this point forward.

All three of you in your testimony talked about the technical amendments. Senator Allard mentioned, you know, where would you be if these were not adopted, so a lot is riding on that.

We're having our markup—is it going to be Tuesday? And you mentioned—you kind of scared me a little bit, Director Clark, when you talked about your whole host of lawyers. When would you think we are going to be able to see these technical amendments? It will be before the end of this week, so that we don't get them all sprung on us right before the hearing?

Ms. CLARK. Right. First let me say, Senator, sometimes our host of lawyers scare me, too.

The host—and maybe I'm using too strong a word—of technical or clarifying amendments that I'm talking about are along the lines of embracing the early collaborative consultation process. I don't think that that's a big deal, but it would be helpful in clarifying the notion that we all want Federal agencies to work together early on in the consultation process. It is the idea of developing a biologically based recovery plan priority system.

These are amendments or clarifying language that we're working on as we speak.

Senator INHOFE. When will we see these? That's my question.

Ms. CLARK. By the end of the week. We'll be working with staff and Members to——

Senator INHOFE. I think that's critical, because a lot of times we won't have time on Monday. Some of us aren't even here on Mondays.

Ms. CLARK. That's our top priority.

Senator INHOFE. OK. Fine.

Ms. CLARK. We're going to work on that.

Senator INHOFE. And several of you have mentioned the various deadlines that are there, as such, as the requirement that each Federal land management agency develop an inventory of endangered, threatened, and proposed and candidate species by December 31 of the year 2003.

Just real quickly, do you think that the deadlines that are in here are realistic?

Ms. CLARK. Well, again, we go back to the old mantra of adequate funding, and that's an issue that has been raised in the inter-agency process of review, especially for our land management agencies, including Fish and Wildlife Service.

Senator INHOFE. What if they were not able to meet these deadlines? Do you foresee a problem that this whole host of lawyers—would they see the problem that maybe some lawsuits might be coming into effect, for example, if that isn't happening by the deadline in the year 2003, how it might affect someone using that or leasing that land currently? Could they be sued successfully, do you believe?

Ms. CLARK. Well, I'm not a lawyer, myself, but I don't interpret the provision in the law as being judicially reviewable if, in fact, the deadline is not met.

Senator INHOFE. Well, I think it is something that has to be.

Since, Mr. Chairman, you had so much remorse about overlooking me, let me have an additional minute to ask one last question that's a little more specific.

[Laughter.]

Senator INHOFE. Well, how about 30 seconds?

I have heard from some—actually, one of them was in Oklahoma and one was not—pipeline companies that were concerned that this did not address the problems that would exempt them, their operations from this Act if an emergency should occur, such as a leak, a leaking pipeline. This might have a damaging effect on the environment by not allowing them to be exempt during the repair of that type of danger.

Is this something that was discussed, or would you like to—would you be receptive to an amendment that would take care of that problem?

Ms. CLARK. I can't speak to the full gamut of the discussions, but certainly addressing emergencies in the environment is something that is important and we need to do. There is a current emergency provision in the law that deals with acts of God, but certainly being able to expeditiously clean up catastrophic events is something we all need to be sensitive to.

Senator INHOFE. Perhaps some of your staff could work with us between now and next Tuesday. I would like to have an amendment that would address that problem.

Thank you, Mr. Chairman.

Senator CHAFEE. Thank you.

Now we've got a problem, and that is there has been a democratic objection to this committee and all committees sitting beyond 2 hours after the Senate went in session. The Senate went in session at 9:30 and, regrettably, we're in excess of that.

What I'd like to do—I'm not sure what happens if we go over, whether we're sent to Alcatraz or what takes place.

[Laughter.]

Senator CHAFEE. I've had in mind that perhaps the most junior Members—Senators Session and Wyden—should be submitted as hostages——

[Laughter and applause.]

Senator CHAFEE.—in case dire things occur to the committee. But, in all fairness, the rules are the rules, and perhaps they don't have a way of enforcing them, but we're really required—the Finance Committee has now just adjourned, and they, as you know, had a very, very major hearing.

My question is this: the Governor has come from out of State. What I'd like to do is to take the next panel. And I know on the next panel—take that tomorrow—the only difficulty there would be Mr. Duane Shroufe of Arizona.

Mr. Shroufe, is there any chance of your being around for tomorrow?

Mr. SHROUFE. Yes.

Senator CHAFEE. Yes? Well, then let's do this. I hope the committee will just make every effort for everybody to be here. There may be conflicts, but let's get started at 9:30 tomorrow.

Senator BAUCUS. Mr. Chairman, may I make another suggestion?

Senator CHAFEE. Sure.

Senator BAUCUS. As I understand it, there is this little feud that's going on on the floor. It is somewhat similar to problems that sometimes arise which requires us to suggest the absence of a quorum, and then the matter is worked out fairly quickly.

I might suggest that we temporarily suspend, maybe for 5 or 10 minutes. It's possible that this matter could be worked out in about 5 or 10 minutes, and that would obviate the necessity of somebody coming back at a later date.

Senator INHOFE. Could the Senator from Montana make some phone calls to try to——

Senator BAUCUS. It's the Senator from Oklahoma whose phone call would be more important here.

Senator INHOFE. I see. All right.

[Laughter.]

Senator CHAFEE. Let's just proceed.

But, however, I am willing to stretch the situation a little bit as far as the conclusion of this panel goes, and we have two more questioners, Senators Thomas and Sessions. And why don't we go ahead with your questions, gentlemen, and then the next panel, if you'd just wait and let's see how things develop.

Go ahead, Senator.

Senator THOMAS. Thank you.

Ms. Clark, how long has the recovery plan been in place, being prepared for the grizzlies in the Yellowstone area?

Ms. CLARK. I'm sorry, Senator, I don't have the exact number of years for that; we have a recovery plan in place with five independent chapters, but I don't have the date on it.

Senator THOMAS. It has been going on forever, and it hasn't yet been completed. Isn't that right? We don't know exactly when there will be a de-listing?

Ms. CLARK. Well, we have a completed recovery plan. We're revising the Yellowstone chapter as we speak to lay out the habitat criteria.

Senator THOMAS. What in this bill is going to change that so that that won't go on as long as it has?

Ms. CLARK. This bill requires, by statutory deadlines, recovery plans, but it also embraces the notion of revisions. The de-listing criteria in this plan—excuse me, in this bill requires that de-listing initiatives be based on accomplishments of the recovery set forth in the species recovery plans, which involved addressing the criteria that required the species to be listed in the first place.

So de-listing of species are based on the best available biology——

Senator THOMAS. But they haven't been de-listed because of lawsuits. Are you going to change that?

Ms. CLARK. We have biological criteria that we need to complete and finish the evaluation on before we initiate the de-listing. You are right that there is a lot of litigation around Yellowstone.

Senator THOMAS. What do you call "measurable bench marks"?

Ms. CLARK. Biological indicators that we can evaluate whether or not we've met working our way toward the recovery goal.

Senator THOMAS. Isn't that a reasonable thing to do?

Ms. CLARK. To develop biological bench marks?

Senator THOMAS. Yes.

Ms. CLARK. Absolutely.

Senator THOMAS. Why haven't you done them in the past?

Ms. CLARK. I believe we have in many instances.

Senator THOMAS. Well, then, why does this change it?

Ms. CLARK. Why does the—I'm sorry?

Senator THOMAS. Why does this bill change? I guess what I'm getting to—and you've talked an awfully lot, both of you, about cooperation among agencies. What has prohibited you having cooperation among agencies now?

Ms. CLARK. I believe we do have tremendous cooperation among the agencies.

Senator THOMAS. Well, then, why is this going to be such a step forward?

Ms. CLARK. The current bill?

Senator THOMAS. The bill. Yes.

Ms. CLARK. The bill certainly embraces open stakeholder involvement. I think it anchors and clarifies the components and roles of recovery plans and teams.

Senator THOMAS. I'm just puzzled, because it seems like this is reasonable stuff. This is stuff you don't have to have a law to do. You all can cooperate now.

Ms. CLARK. And we do.

Senator THOMAS. Yes, sure you do. Why are you doing this?

Ms. CLARK. Why are we doing——

Senator THOMAS. Yes. If you are cooperating so well, why do we need this?

Ms. CLARK. I must be confused. Why do we need——

Senator THOMAS. You must be. Well, let it go. It just seems to me like almost all of your conversation has been how we can cooperate. You can cooperate now. So I'm puzzled a little bit on how this is going to change the world for us.

Mr. GARCIA. Senator, could I try?

Senator THOMAS. Try.

Ms. CLARK. Please.

Mr. GARCIA. This does more than just encourage cooperation amongst the Federal agencies. We're doing that. Obviously, more could be done. But the focus on recovery is important.

This bill focuses where we should be focusing our energy on—recovering the species, not just listing, not just——

Senator THOMAS. I understand.

Mr. GARCIA.—receiving petitions.

Senator THOMAS. Why don't you do that now?

Mr. GARCIA. We attempt to do that now, and hopefully this bill is going to allow us to do that job.

Senator THOMAS. OK. All right.

Mr. GARCIA. The other thing that it does is to encourage States, regional entities, to come forward and work with us at the recovery——

Senator THOMAS. Sure.

Mr. GARCIA.—planning process.

Senator THOMAS. I'll tell you my concern.

Mr. GARCIA. We don't have that now.

Senator THOMAS. My concern is this is all great talk, and I'm for it. Everyone is for it. But I don't know that it's going to change. You could be doing it now.

Governor, we're talking a lot about partnerships. How are your partnerships working?

Governor Racicot. Well, there are challenges on occasion.

[Laughter.]

Senator THOMAS. Tell us about New World Mine. Tell us about Buffalo. Tell us about Brucellosis. And then tell us about partnerships.

Governor Racicot. Well, I think that, quite frankly, the challenge here is borne out of a certain lack of familiarity with the same culture that we share, and I guess what I see the Act as doing, even though it is not perfect in my reflection, either, is that it creates a different flow of events from the very beginning, from the listing decision all the way through recovery, and it has time lines on the recovery, and it creates, all the way from the beginning till the completion, an active participatory role for the States and for the public.

As a result, it changes the dynamics in terms of presenting an opportunity for these things to——

Senator THOMAS. Let me just cite an issue that distresses me a little bit. NEPA. We're going to cooperate with the States, but it doesn't say "States" in there. It says the cooperating agencies are Federal, and therefore the States aren't included.

Now, this doesn't specifically say how States are going to participate. It just says we're going to cooperate. We have been saying that. And I'm a little discouraged that just saying it doesn't——

Senator BAUCUS. If I might jump in here, you know, it does more than that.

Senator THOMAS. May I finish, please?

Senator BAUCUS. Yes. It does more than that.

Senator THOMAS. May I finish? Isn't your Governors' group concerned about that a little bit?

Governor Racicot. Well, there is no question but that we would like stronger language that reflected only our perspective, but if you're asking whether or not this is a substantial improvement over what is there presently, then unanimously it is.

Senator THOMAS. Yes. It just seems like—I mean, I understand, you know—and my red light is on—but we've got to do better, and we haven't. And to use broad language doesn't get it.

Senator CHAFEE. With that, let's go to Senator Sessions, the final questioner, and at the conclusion of Senator Sessions, then we will have to recess and we'll see how things come along for 20 minutes thereafter, and then I can get word to whether the next panel—it's my understanding—just raise your hands. I see most of them are in the front row. Senator McClure, can you all come back tomorrow at 9:30? OK.

Senator Sessions?

Senator SESSIONS. Mr. Chairman, I tend to share Senator Thomas' thoughts. Basically, I think this language is in there because people felt like consultation hadn't been working effectively, and I think it is a little bit healthy for the Senator to point out that this should provide legal protections to the States in some ways, and it shouldn't be really necessary.

Mr. Chairman, with regard to the question of funding, I am a little confused about how much. There is a planned increase in this bill. Can you share with us what that would be over the previous funding levels? Maybe Senator Kempthorne has that figure.

Senator CHAFEE. Yes. Fish and Wildlife goes from $70 million to $165 million, and NMFS goes from about $20 million to $70 million. We're talking millions of dollars, not billions.

Senator SESSIONS. Well, I would just say that is the largest increase of any budget item I think I've seen since I've been in this Senate. That's a really significant increase in funding. Is that not enough, Mr. Garcia?

Mr. GARCIA. We've submitted estimates on what would be required to adequately fund the activities at the Agency to carry out the new requirements in the bill. There are a number of new deadlines. There are deadlines within deadlines. There is a certain complexity to the bill that simply is going to require increased manpower.

So we are close, but we need additional resources in order to be able to adequately carry out our responsibilities. We are short-staffed now.

Senator SESSIONS. Well, how much more do you need?

Mr. GARCIA. I'll be happy to submit it for the record. I have a chart.

Senator SESSIONS. I think we're having a markup next week. You ought to share with us how much you'd like.

Mr. GARCIA. I will be happy to.

Senator SESSIONS. Over three times, as I—over three times increase in your budget is pretty significant, I think.

When I became attorney general, we had a crisis. My predecessor had been—a financial crisis—been saying he needed more money, and we couldn't get it, and it was worse than I thought, and we faced the problem of having to terminate all the non-married employees in the office, one-third of the office.

We reorganized that office and increased the productivity of it, and it's doing more and better legal work than it was before I took office.

I don't know if you all have—what you are doing with regard to really managing.

Ms. Clark, you're starting over now in this position. Do you have any plans to really evaluate your office from a management point of view to make sure your resources are properly applied so that they can reach the highest level of productivity for the taxpayers?

Ms. CLARK. Absolutely, Senator. Our agency has been undergoing an internal evaluation for quite some time. The endangered species program has certainly been among those programs that are being evaluated.

A couple things I will say. When you have over 1,000 listed species, when you have a program that is grounded in science, and when you have a program that demands technical assistance and participation of stakeholders, it is labor intensive and very important. And our resources are stretched to the max, and our people work very hard at all levels of the agency to——

Senator SESSIONS. Well, you would agree that this committee has been pretty generous——

Ms. CLARK. Absolutely.

Senator SESSIONS.—in increasing your funding, would you not?

Ms. CLARK. Yes, I would.

Senator SESSIONS. Let me ask this question. I'm concerned a little bit about the—my yellow light is on—the situation in which the EPA has delegated point source discharge authority to State environmental agencies, and that they are now requiring the Fish and Wildlife Service to also approve the plans of the States, and that is causing some significant delay in the process. Are you familiar with that?

Ms. CLARK. I know that we are currently working with EPA to look at ways to streamline the State delegating process. I don't think we're there yet.

Senator SESSIONS. The problem I have is it appears to me, from Congressman Moore's testimony, that, as a good legal case, that that's not appropriate. And it is not—and I think a lawsuit is pending on that.

I would just say to the Federal agencies it seems to me that you've got to—with this host of lawyers that you have, you ought not to take a position that is not justifiable legally. I assume you think you are justifiable, but if he's correct, it would be unfortunate that they have to go to court to file this lawsuit and expend a lot of money to just make sure the law is properly administered.

So I would ask you to look at that, if you think that's not justified, to change your position on it.

Mr. Chairman, that's all.

Senator CHAFEE. Thank you, Senators. And, Senator Kempthorne, you had a quick comment you wanted to make?

Senator KEMPTHORNE. Yes.

Mr. Chairman, with regard to Senator Thomas' point about the de-listing, the bill language includes for the first time a direction in the law that the Secretary must initiate the de-listing process when the recovery goal is met. Now, that isn't in the law today, and so the species, such as was referenced here, it has been falling in there.

I would also add, Mr. Chairman, as you well know, that the listing decision, the biological goals that are established for the recovery plan and the de-listing, is all peer reviewed, and the National Academy of Sciences provides a list of scientists, three of which are chosen, so you do have peer review for the first time in this process.

Senator CHAFEE. Thank you very much.

Now, if Senators Wyden and Sessions can get their toothbrushes and be prepared to go off in shackles——

[Laughter.]

Senator CHAFEE.—the rest of us will just recess here. It may be the final recess, but I'll just come back in a few minutes and see if any progress has been made.

[Recess.]

Senator CHAFEE. This is what I'd like to do. I recognize that we've got witnesses who have made considerable effort to be here, and it may be that this will be resolved at the conclusion of the caucuses, which the conclusion will be at 2. I suggest that everybody, all the witnesses, go about your business, and let us know where we can get you.

I would then, if the thing is lifted by 2, I then would call each of you and ask you to be back up here by 2:30. I think most of you can do that from your offices. And that takes care of everybody but the gentleman from Arizona.

Candidly, I think the chances are probably pretty slim that we'll be able to proceed, but I'm anxious to get going here.

So that's—if you make sure that somebody here has your office numbers, or where you're going to be where we can call you at two or very close thereto, and then a half an hour. Let's make it 2:45.

Now, I think, being candid, I think the chances are slim that this is going to be resolved and the thing lifted by 2. If it's not lifted then, then we'll call you anyway and tell you, and we won't continue it any more. That's over with.

But we will meet at 9:30 tomorrow. This will be a continuation, so that's no notice required for that. So this would be a continuation of the hearing we started this morning, and that would be at 9:30 tomorrow morning. If that panel would please be here at 9:30, we'll start right off, and I guarantee you we'll finish in 2 hours.

Any questions from the witnesses or anybody?

[No response.]

Senator CHAFEE. All right. You're all satisfied? Well, I won't ask if you're satisfied. I'll ask if everybody understands it.

OK. We will call each of your offices very close to 2, and you will have 45 minutes to get up here. But, being candid, I think it is unlikely to occur.

Thank you.

[Whereupon, at 12:15 p.m., the committee was recessed, to reconvene at 9:30 a.m. on Wednesday, September 24, 1997.]

[The bill, S. 1180, and additional statements submitted for the record follow:]

105TH CONGRESS
1ST SESSION

S. 1180

To reauthorize the Endangered Species Act.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 16, 1997

Mr. KEMPTHORNE (for himself, Mr. CHAFEE, Mr. BAUCUS, and Mr. REID) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

---

A BILL

To reauthorize the Endangered Species Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Endangered Species Recovery Act of 1997".

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

Sec. 1. Short title; table of contents.
Sec. 2. Listing and delisting species.
Sec. 3. Enhanced recovery planning.
Sec. 4. Interagency consultation and cooperation.
Sec. 5. Conservation plans.
Sec. 6. Enforcement.
Sec. 7. Education and technical assistance.
Sec. 8. Authorization of appropriations.
Sec. 9. Other amendments.

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

SEC. 2. LISTING AND DELISTING SPECIES.

(a) BEST SCIENTIFIC AND COMMERCIAL DATA AVAILABLE.—Section 3 of the Act (16 U.S.C. 1532) is amended—

(1) by striking the title and inserting the following:

"DEFINITIONS AND GENERAL PROVISIONS";

(2) by striking "For the purposes of this Act—" and inserting the following:

"(a) DEFINITIONS.—For purposes of this Act—"; and

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

"(b) GENERAL PROVISIONS.—

"(1) BEST SCIENTIFIC AND COMMERCIAL DATA AVAILABLE.—Where this Act requires the Secretary to use the best scientific and commercial data available, the Secretary shall when evaluating comparable data give greater weight to scientific or commercial

data that is empirical, field-tested or peer-reviewed.".

(b) CONFORMING AMENDMENT.—The table of contents in the first section (16 U.S.C. 1531) is amended by striking the item relating to section 3 and inserting the following:

"Sec. 3. Definitions and general provisions.".

(c) LISTING AND DELISTING.—

(1) FACTORS CONSIDERED FOR LISTING.—Section 4(a)(1) is amended—

(A) in subparagraph (C) by inserting "introduced species, competition," prior to "disease or predation"; and

(B) in subparagraph (D) by inserting "Federal, State and local government and international" prior to "regulatory mechanisms".

(2) CRITICAL HABITAT.—Section 4(a) is amended by striking paragraph (3).

(3) DELISTING.—Section 4(b)(2) is amended to read as follows:

"(2) DELISTING.—The Secretary shall, in accordance with section 5 and upon a determination that the goals of the recovery plan for a species have been met, initiate the procedures for determining, in accordance with subsection (a)(1), whether to re-

move a species form a list published under subsection (c)."

(4) RESPONSE TO PETITIONS.—Section 4(b)(3) is amended to read as follows:

"(3) RESPONSE TO PETITIONS.—

"(A) ACTION MAY BE WARRANTED.—

"(i) IN GENERAL.—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—

"(I) add a species to,

"(II) remove a species from, or

"(III) change a species status from a previous determination with respect to

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 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) documentation that the fish, wildlife, or plant that is the subject of the petition is a species as defined in section 3;

"(II) a description of the available data on the historical and current range and distribution of the species;

"(III) an appraisal of the available data on the status and trends of populations of the species;

"(IV) an appraisal of the available data on the threats to the species; and

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

"(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 State agency in each State in which the species is believed to occur and solicit the assessment of the agency, to be submitted to the Secretary within 90 days of notification, as to whether the petitioned action is warranted.

"(II) OTHER ACTIONS.—If the Secretary has not received a petition for a species and the Secretary is considering proposing to list such species as either threatened or endangered under subsection (a), the Secretary shall notify the State agency in each State in which the species is believed to occur and solicit the assessment of the agency, to be submitted to the Secretary within 90 days of the notification, as to whether the listing would

be in accordance with the provisions of subsection (a).

"(III) CONSIDERATION OF STATE ASSESSMENTS.—Prior to publication of a determination that a petitioned action is warranted or a proposed regulation, the Secretary shall consider any State assessments submitted within the comment period established by subclause (I) or (II).

"(B) PETITION TO CHANGE STATUS OR DELIST.—A petition may be submitted to the Secretary under subparagraph (A) to change the status of 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 in 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 indicates that removal is appropriate;

"(II) the species is extinct; or

"(III) the recovery goals established for the species in a recovery plan approved under section 5(h) have been achieved.

"(C) DETERMINATION.—Within 12 months after receiving a petition that is found under subparagraph (A)(i) to present substantial information indicating that the petitioned action 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 promptly publish in the Federal Register a general notice and the complete text of a proposed regulation to implement the action in accordance with paragraph (5).

"(iii) WARRANTED BUT PRECLUDED.—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 the lists species for which the protections of the 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) 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 such finding and that presents substantial scientific

1 or commercial information that the petitioned
2 action may be warranted.
3 "(E) JUDICIAL REVIEW.—Any negative
4 finding described in subparagraph (A)(i) and
5 any finding described in subparagraph (C)(i) or
6 (iii) shall be subject to judicial review.
7 "(F) MONITORING AND EMERGENCY LIST-
8 ING.—The Secretary shall implement a system
9 to monitor effectively the status of all species
10 with respect to which a finding is made under
11 subparagraph (C)(iii) and shall make prompt
12 use of the authority under paragraph (7) to
13 prevent a significant risk to the well-being of
14 any such species.".
15 (5) PROPOSED REGULATIONS.—Section 4(b)(5)
16 is amended by—
17 (A) striking "(5) With respect to any regu-
18 lation" and inserting the following:
19 "(5) PROPOSED REGULATIONS AND REVIEW.—
20 With respect to any regulation";
21 (B) striking "a determination, designation,
22 or revision" and inserting "a determination or
23 change in status";
24 (C) striking "(a)(1) or (3)," and inserting
25 "(a)(1),";

(D) striking "in the Federal Register," and inserting "in the Federal Register as provided by paragraph (8),"; and

(E) striking subparagraph (E) and inserting the following:

"(E) at the request of any person within 45 days after the date of publication of general notice, promptly hold at least 1 public hearing in each State that would be affected by the proposed regulation (including at least 1 hearing in an affected rural area, if any) except that the Secretary may not be required to hold more than 5 hearings under this clause.".

(7) FINAL REGULATIONS.—

(A) SCHEDULE.—Section 4(b)(6)(A) is amended to read as follows:

"(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 such withdrawal is based.".

(B) CONFORMING AMENDMENTS.—Section 4(b)(6) is amended—

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

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

(iii) by striking subparagraph (C).

(8) PUBLICATION OF DATA AND INFORMATION.—Section 4(b)(8) is amended by—

(A) striking "a summary by the Secretary of the data" and inserting "a summary by the Secretary of the best scientific and commercial data available";

(B) striking "is based and shall" and inserting "is based, shall"; and

(C) striking "regulation; and if such regulation designates or revises critical habitat, such

1 summary shall, to the maximum extent prac-
2 ticable, also include a brief description and eval-
3 uation of those activities (whether public or pri-
4 vate) which, in the opinion of the Secretary, if
5 undertaken may adversely modify such habitat,
6 or may be affected by such designation.'' and
7 inserting ''regulation, and shall provide, to the
8 degree that it is relevant and available, infor-
9 mation regarding the status of the affected spe-
10 cies, including current population, population
11 trends, current habitat, food sources, predators,
12 breeding habits, captive breeding efforts, gov-
13 ernmental and non-governmental conservation
14 efforts, or other pertinent information.''.
15 (9) SOUND SCIENCE.—Section 4(b) is amended
16 by adding at the end the following:
17 ''(9) ADDITIONAL DATA.—
18 ''(A) IN GENERAL.—The Secretary shall
19 identify and publish in the Federal Register
20 with the notice of a proposed regulation pursu-
21 ant to paragraph (5)(A)(i) a description of ad-
22 ditional scientific and commercial data that
23 would assist in the preparation of a recovery
24 plan and—

"(i) invite any person to submit the data to the Secretary; and

"(ii) describe the steps that the Secretary plans to take for acquiring additional data.

"(B) RECOVERY PLANNING.—Data identified and obtained under subparagraph (A) shall be considered by the recovery team and the Secretary in the preparation of the recovery plan in accordance with section 5.

"(C) NO DELAY AUTHORIZED.—Nothing in this paragraph shall be deemed to waive or extend any deadline for publishing a final rule to implement a determination (except for the extension provided in paragraph (6)(B)(i)) or any deadline under section 5.

"(10) INDEPENDENT SCIENTIFIC REVIEW.—

"(A) IN GENERAL.—In the case of a regulation proposed by the Secretary to implement a determination under subsection (a)(1) that any species is an endangered species or a threatened species or that any species currently listed as an endangered species or a threatened species should be removed from any list published pursuant to subsection (c), the Secretary

shall provide for independent scientific peer review by—

"(i) selecting independent referees pursuant to subparagraph (B);

"(ii) requesting the referees to conduct the review, considering all relevant information, and make a recommendation to the Secretary in accordance with this paragraph not later than 150 days after the general notice is published pursuant to paragraph (5)(A)(i).

"(B) SELECTION OF REFEREES.—For each independent scientific review to be conducted pursuant to subparagraph (A), the Secretary shall select 3 independent referees from a list provided by the National Academy of Sciences, who—

"(i) through publication of peer-reviewed scientific literature or other means, have demonstrated scientific expertise on the species or a similar species or other scientific expertise relevant to the decision of the Secretary under subsection (a);

"(ii) do not have, or represent any person with, a conflict of interest with re-

1 spect to the determination that is the sub-
2 ject of the review; and
3 "(iii) are not participants in a petition
4 to list, change the status of, or remove the
5 species under paragraph (3)(A)(i), the as-
6 sessment of a State for the species under
7 paragraph (3)(A)(iii), or the proposed or
8 final determination of the Secretary.
9 "(C) FINAL DETERMINATION.—The Sec-
10 retary shall take one of the actions under para-
11 graph (6)(A) of this subsection not later than
12 1 year after the date of publication of the gen-
13 eral notice of the proposed determination. If the
14 referees have made a recommendation in ac-
15 cordance with clause (ii) of subparagraph (A),
16 the Secretary shall evaluate and consider the in-
17 formation that results from the independent sci-
18 entific review and include in the final deter-
19 mination—
20 "(i) a summary of the results of the
21 independent scientific review; and
22 "(ii) in cases where the recommenda-
23 tion of a majority of the referees who con-
24 ducted the independent scientific review
25 under subparagraph (A) are not followed,

1 an explanation as to why the recommenda-
2 tion was not followed.
3 "(D) FEDERAL ADVISORY COMMITTEE
4 ACT.—The referees selected pursuant to this
5 paragraph shall not be subject to the Federal
6 Advisory Committee Act (5 U.S.C. App.).".
7 (10) LISTS.—Section 4(c) is amended by—
8 (A) inserting "designated" before "critical
9 habitat"; and
10 (B) striking "determinations, designations
11 and revisions" and inserting "determinations".
12 (11) PROTECTIVE REGULATION.—Section 4(d)
13 is amended by—
14 (A) striking "Whenever any species is list-
15 ed" and inserting the following:
16 "(1) IN GENERAL.—Whenever any species is
17 listed"; and
18 (B) adding at the end the following:
19 "(2) NEW LISTINGS.—With respect to each spe-
20 cies listed as a threatened species after the date of
21 enactment of the Endangered Species Recovery Act
22 of 1997, regulations applicable under paragraph (1)
23 to the species shall be specific to that species by the
24 date on which the Secretary is required to approve

a recovery plan for the species pursuant to section 5(c) and may be subsequently revised.''.

(12) RECOVERY PLANS.—Section 4 is amended by striking subsection (f) and redesignating subsections (g) through (i) as subsections (f) through (h), respectively.

(13) CONFORMING AMENDMENT.—Section 4(g) (as redesignated by paragraph (12)) is amended in paragraph (4) by striking ''subsection (f) of this section'' and inserting ''section 5''.

(d) PUBLIC AVAILABILITY OF DATA.—Section 3(b), as amended by subsection (a), is amended by adding at the end the following:

''(2) FREEDOM OF INFORMATION ACT EXEMPTION.—The Secretary, and the head of any other Federal agency upon the recommendation of the Secretary, may withhold or limit the availability of data requested to be released pursuant to section 552 of title 5, United States Code, if the data describes or identifies the location of an endangered species, a threatened species, or a species that has been proposed to be listed as threatened or endangered, and release of the data would be likely to result in increased take of the species.''.

SEC. 3. ENHANCED RECOVERY PLANNING.

(a) REDESIGNATION.—Section 5 of the Act is redesignated as section 5A.

(b) RECOVERY PLANS.—The Act is amended by inserting prior to section 5A (as redesignated by subsection (a)) the following:

"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 under the jurisdiction of the United States 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. The Secretary may authorize a State agency to develop recovery plans pursuant to subsection (m).

"(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 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 the Endangered Species Recovery Act of 1997 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.—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 appoint a recovery team to develop a recovery plan for the species or publish a notice pursuant to paragraph (3) that a recovery team shall not be appointed. Recovery teams shall include the Secretary and at least one representative from the State agency of each of the affected States choosing to participate and be broadly representative of the constituencies with an interest in the species and its recovery and in the economic or social impacts of recovery including representatives of Federal agencies, tribal governments,

local governments, academic institutions, private individuals and organizations, and commercial enterprises. The recovery team members shall be selected for their knowledge of the species or for their expertise in the elements of the recovery plan or its implementation.

"(2) DUTIES OF THE RECOVERY TEAM.—Each recovery team shall prepare and submit to the Secretary the draft recovery plan that shall include the team's recommended recovery measures and alternatives, if any, to meet the recovery goal under subsection (e)(1). The recovery team may also be called upon 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.

"(3) EXCEPTION.—

"(A) IN GENERAL.—Notwithstanding paragraph (1), the Secretary may, after notice and opportunity for public comment, establish criteria to identify species for which the appointment of a recovery team would not be required under this subsection, taking into account the availability of resources for recovery planning, the extent and complexity of the expected recov-

ery activities and the degree of scientific uncertainty associated with the threats to the species.

"(B) STATE OPTION.—If the Secretary elects not to appoint a recovery team, the Secretary shall provide notice to each affected State and shall provide the affected States the opportunity to appoint a recovery team and develop a recovery plan, in accordance with the requirements and procedures set out in subsection (m).

"(C) SECRETARIAL DUTY.—In the event that a recovery team is not appointed, the Secretary shall perform all duties of the recovery team required by this section.

"(4) TRAVEL EXPENSES.—The Secretary is authorized to 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 or subsection (m).

"(e) CONTENTS OF RECOVERY PLANS.—Each recovery plan shall contain:

"(1) BIOLOGICAL RECOVERY GOAL.—

"(A) IN GENERAL.—Not later than 6 months after the appointment of a recovery team under this section, those members of the recovery team with relevant scientific expertise shall establish and submit to the Secretary of recommended biological recovery goal to conserve and recover the species that, when met, would result in the determination, in accordance with the provisions of section 4, that the species be removed from the list. The goal shall be based solely on the best scientific and commercial data available. The recovery goal shall be expressed as objective and measurable biological criteria. When the goal is met, the Secretary shall be required to initiate the procedures for determining whether, in accordance with section 4(a)(1), to remove the species from the list.

"(B) PEER REVIEW.—The recovery team shall promptly obtain independent scientific review of the recommended biological recovery goal.

1 "(2) RECOVERY MEASURES.—The recovery plan
2 shall incorporate recovery measures that will meet
3 the recovery goal.
4 "(A) MEASURES.—The recovery measures
5 may incorporate general and site-specific meas-
6 ures for the conservation and recovery of the
7 species such as—
8 "(i) actions to protect and restore
9 habitat;
10 "(ii) research;
11 "(iii) establishment of refugia, captive
12 breeding, releases of experimental popu-
13 lations;
14 "(iv) actions that may be taken by
15 Federal agencies, including actions that
16 use, to the maximum extent practicable,
17 Federal lands; and
18 "(v) opportunities to cooperate with
19 State and local governments and other per-
20 sons to recover species, including through
21 the development and implementation of
22 conservation plans under section 10.
23 "(B) DRAFT RECOVERY PLANS.—
24 "(i) IN GENERAL.—In developing a
25 draft recovery plan, the recovery team or,

if there is no recovery team, the Secretary, shall consider alternative measures and recommend measures to meet the recovery goal including the benchmarks. The recovery measures shall achieve an appropriate balance among the following factors—

"(I) the effectiveness of the measures in meeting the recovery goal;

"(II) the period of time in which the recovery goal is likely to be achieved, provided that the time period within which the recovery goal is to be achieved will not pose a significant risk to recovery of the species; and

"(III) the social and economic impacts (both quantitative and qualitative) of the measures and their distribution across regions and industries.

"(ii) DESCRIPTION OF ALTERNATIVES.—The draft plan shall include a description of any alternative recovery measures considered, but not included in

the recommended measures, and an explanation of how any such measures considered were assessed and the reasons for their selection or rejection.

"(iii) DESCRIPTION OF ECONOMIC EFFECTS.—If the recommended recovery measures identified in clause (i) would impose significant costs on a municipality, county, region or industry, the recovery team shall prepare a description of the overall economic effects on the public and private sections including, as appropriate, effects on employment public revenues, and value of property as a result of the implementation of the recovery plan.

"(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 towards the recovery goal.

"(4) FEDERAL AGENCIES.—Each recovery plan for an endangered species or a threatened species shall identify Federal agencies that authorize, fund, or carry out actions that are likely to have a signifi-

1 cant impact on the prospects for recovering the spe-
2 cies.
3 "(f) PUBLIC NOTICE AND COMMENT.—
4 "(1) IN GENERAL.—If the Secretary makes a
5 preliminary determination that the draft recovery
6 plan meets the requirements of this section, the Sec-
7 retary shall publish in the Federal Register and a
8 newspaper of general circulation in each affected
9 State a notice of availability and a summary of, and
10 a request for public comment on, the draft recovery
11 plan including a description of the economic effects
12 prepared under subsection (e)(2)(B)(iii) and the rec-
13 ommendations of the independent referees on the re-
14 covery goal.
15 "(2) HEARINGS.—At the request of any person,
16 the Secretary shall hold at least 1 public hearing on
17 each draft recovery plan in each State to which the
18 plan would apply (including at least 1 hearing in an
19 affected rural area, if any), except that the Sec-
20 retary may not be required to hold more than 5
21 hearings under this paragraph.
22 "(g) PROCUREMENT AUTHORITY.—The Secretary, in
23 developing and implementing recovery plans, may procure
24 the services of appropriate public and private agencies and
25 institutions and other qualified persons.

"(h) REVIEW AND SELECTION BY THE SECRETARY.—

"(1) REVIEW AND APPROVAL.—The Secretary shall review each plan submitted by a recovery team, including a recovery team appointed by a State pursuant to the authority of subsection (m), 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) SECTION OF RECOVERY MEASURES.—In each final plan the Secretary shall select recovery measures that meet the recovery goal and the benchmarks. The recovery measures shall achieve an appropriate balance among the factors in subclauses (I) through (III) of subsection (e)(2)(B)(i).

"(3) MEASURES RECOMMENDED BY RECOVERY TEAM.—If the Secretary selects measures other than

1 those recommended by the recovery team, the Sec-
2 retary shall publish with the final plan an expla-
3 nation of why the measures recommended by the re-
4 covery team were not selected for the final recovery
5 plan.

6 "(4) PUBLICATION OF NOTICE ON FINAL
7 PLANS.—The Secretary shall publish in the Federal
8 Register a notice of availability, and a summary, of
9 the final recovery plan, and include in the final re-
10 covery plan a response to significant comments that
11 the Secretary received on the draft recovery plan.

12 "(i) REVIEW.—

13 "(1) EXISTING PLANS—Not later than 5 years
14 after date of enactment of Endangered Species re-
15 covery Act of 1997, the Secretary shall review recov-
16 ery plans published prior to such date.

17 "(2) SUBSEQUENT PLANS.—The Secretary shall
18 review each recovery plan first approved or revised
19 under this section subsequent to the enactment of
20 the Endangered Species Recovery Act of 1997, not
21 later than 10 years after the date of approval or re-
22 vision of the plan and every 10 years thereafter.

23 "(j) REVISION OF RECOVERY PLANS.—Notwith-
24 standing any other provisions of this section,the Secretary
25 shall revise a recovery plan if the Secretary finds that sub-

1 stantial new information, that may include the failure to
2 meet the benchmarks included in the plan, based upon the
3 best scientific and commercial data available, indicates
4 that the recovery goals contained in the recovery plan will
5 not achieve the conservation and recovery of the endan-
6 gered species or threatened species covered by the plan.
7 The Secretary shall convene a recovery team to develop
8 the revisions required by this subsection, unless the Sec-
9 retary has established an exception for the species pursu-
10 ant to subsection (d)(3).

11 "(k) EXISTING PLANS.—Nothing in this section shall
12 be interpreted to require the modification of—

13 "(1) a recovery plan approved, or

14 "(2) a recovery plan on which public notice and
15 comment has been initiated,

16 prior to the date of enactment of the Endangered Species
17 Recovery Act of 1997 until revised by the Secretary in
18 accordance with this section.

19 "(l) IMPLEMENTATION OF RECOVERY PLANS.—

20 "(1) IMPLEMENTATION AGREEMENTS.—The
21 Secretary is authorized to enter into agreements
22 with Federal agencies, affected States, Indian tribes,
23 local governments, private landowners and organiza-
24 tions to implement specified conservation measures
25 identified by an approved recovery plan that promote

the recovery of the species on lands or waters owned by, or within the jurisdiction of, each such party. The Secretary may enter into such agreements, if the Secretary, after notice and opportunity for public comment, determines that—

"(A) each party to the agreement has the legal authority and capability to carry out the agreement;

"(B) the agreement shall be reviewed and revised as necessary on a regular basis by the parties to the agreement to ensure that it meets the requirements of this section; and

(C) the agreement establishes a mechanism for the Secretary to monitor and evaluate implementation of the agreement.

"(2) DUTY OF FEDERAL AGENCIES.—Each Federal agency identified under subsection (e)(4) shall enter into an implementation agreement with the Secretary not later than 2 years after the date on which the Secretary approves the recovery plan for the species. For purposes of satisfying this section, the substantive provisions of the agreement shall be within the sole discretion of the Secretary and the head of the Federal agency entering into the agreement.

"(3) OTHER REQUIREMENTS.—

"(A) AGENCY ACTIONS.—Any action authorized, funded or carried out by a Federal agency that is specified in a recovery plan implementation agreement between the Federal agency and the Secretary to promote the recovery of the species and for which the agreement provides sufficient information on the nature, scope and duration of the action to determine the effect of the action on any endangered species, threatened species, or critical habitat shall not be subject to the requirements of section 7(a)(2) for that species, provided the action is to be carried out during the term of such agreement and the Federal agency is in compliance with the agreement.

"(B) COMPREHENSIVE AGREEMENTS.—If a non-Federal person proposes to include in an implementation agreement a site-specific action that the Secretary determines meets the requirements of subparagraph (A) and that action would require authorization or funding by one or more Federal agencies, the agencies authorizing or funding the action shall participate in the development of the agreement and shall

identify, at that time, all measures for the species that would be required under this Act as a condition of the authorization or funding.

"(4) FINANCIAL ASSISTANCE—

"(A) IN GENERAL.—In cooperation with the States and subject to the availability of appropriations under section 13(f), the Secretary may provide a grant of up to $25,000 to any individual private landowner to assist the landowner in carrying out a recovery plan implementation 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.

"(C) OTHER PAYMENTS.—Grants provided to an individual private landowner under this paragraph shall be in addition to, and not affect, the total amount of payments the landowner is otherwise eligible to receive under the Conservation Reserve Program (16 U.S.C. 3831 et seq.), the Wetlands Reserve Program (16

U.S.C. 3837 et seq.), or the Wildlife Habitat Incentives Program (16 U.S.C. 3836a).

"(m) 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 authorize the respective State agency to develop 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 or States have entered into a cooperative agreement with the Secretary pursuant to section 6(c); and

"(B) the State agency 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) of this subsection.

"(2) STANDARDS AND GUIDELINES.—The Secretary, in cooperation with the States, shall publish standards and guidelines for the development of recovery plans by a State agency under this subsection, including standards and guidelines for inter-

state cooperation and for the grant and withdrawal of authorization under this subsection by the Secretary.

"(3) MEMBERS AND DUTIES OF RECOVERY TEAM.—Each recovery team appointed by a State agency under this subsection shall include the Secretary. The recovery team shall prepare a draft recovery plan in accordance with the requirements of this section and shall transmit the draft plan to the Secretary through the State agency authorized to develop the recovery plan.

"(4) 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 it meets the requirements of this section. If the Secretary determines that the plan does not meet such requirements, the Secretary shall notify the State agency and, in cooperation with such State agency, develop a recovery plan in accordance with the requirements of this section.

"(5) REVIEW AND APPROVAL OF FINAL PLANS.—Upon receipt of a draft recovery plan transmitted by a State agency, the Secretary shall

1 review and approve the plan in accordance with sub-
2 section (h).
3 "(6) WITHDRAWAL OF AUTHORITY.—
4 "(A) IN GENERAL.—The Secretary may
5 withdraw the authority from a State that has
6 been authorized to develop a recovery plan pur-
7 suant to this subsection if the actions of the
8 State agency are not in accordance with the
9 substantive and procedural requirements of sub-
10 sections (c), (d)(1), (d)(2), and (e) of this sub-
11 section. The Secretary shall give the State
12 agency an opportunity to correct any defi-
13 ciencies identified by the Secretary and shall
14 withdraw the authority from the State unless
15 the State agency within 60 days has corrected
16 the deficiencies identified by the Secretary.
17 Upon withdrawal of State authority pursuant to
18 this subsection, the Secretary shall have an ad-
19 ditional 18 months to publish a draft recovery
20 plan and an additional 12 months to publish a
21 final recovery plan under subsection 5(c).
22 "(B) PETITIONS TO WITHDRAW.—Any per-
23 son may submit a petition requesting the Sec-
24 retary to withdraw the authority from a State
25 on the basis that the actions of the State agen-

1 cy are not in accordance with the substantive
2 and procedural requirements identified in sub-
3 paragraph (A). If the Secretary has not acted
4 on the petition pursuant to subparagraph (A)
5 within 90 days, the petition shall be deemed de-
6 nied and the denial shall be a final agency ac-
7 tion for the purposes of judicial review.
8 "(7) STATE AGENCY.—For purposes of this
9 subsection, the term 'State agency' includes—
10 "(A) State agencies (as defined in section
11 3) of the several States submitting a coopera-
12 tive request under paragraph (1); and
13 "(B) for fish and wildlife, including related
14 spawning grounds and habitat, on the Columbia
15 River and its tributaries, the Pacific Northwest
16 Electric Power and Conservation Planning
17 Council established under the Pacific Northwest
18 Electric Power Planning and Conservation Act
19 (16 U.S.C. 839 et seq.).
20 "(n) CRITICAL HABITAT DESIGNATION.—
21 "(1) RECOMMENDATION OF THE RECOVERY
22 TEAM.—Not later than 9 months after the date of
23 publication under section 4 of a final regulation con-
24 taining a listing determination for a species, the re-
25 covery 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 such habitat.

"(2) DESIGNATION BY THE SECRETARY.—The Secretary, to the maximum extent prudent and determinable, shall be regulation designate any habitat of an endangered species or a threatened species that is indigenous to the United States or waters under the jurisdiction of the United States that is considered to be critical habitat.

"(A) DESIGNATION.—

"(i) PROPOSAL.—Not later than 18 months after the date on which a final listing determination is made under section 4 for a species, the Secretary, after consultation and in cooperation with the recovery team, shall publish in the Federal Register a proposed regulation designating critical habitat for the species.

"(ii) PROMULGATION.—The Secretary shall, after consultation and in cooperation with the recovery team, publish a final regulation designating critical habitat for a

species not later than 30 months after the date on which a final listing determination is made under section 4 for the species.

"(B) OTHER DESIGNATIONS.—If a recovery plan is not developed under this section for an endangered species or a threatened species, the Secretary shall publish a final critical habitat determination for that endangered species or threatened species within 36 months after making a determination that the species is an endangered species or a threatened species.

"(C) ADDITIONAL 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 oper-

ations, 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) EXCLUSIONS.—The Secretary may exclude any area from critical habitat for a species if the Secretary determines that the benefits of the exclusion outweigh the benefits of designating the area as part of the critical habitat, unless the Secretary determines that the failure to designate the area as critical habitat will result in the extinction of the species.

"(5) REVISIONS.—The Secretary may, from time-to-time and as appropriate, revise a designation. Each area designated as critical habitat before the date of enactment of the Endangered Species Recovery Act of 1997 shall continue to be considered so designated, until the designation is revised in accordance with this subsection.

"(6) PETITIONS.—

"(A) DETERMINATION THAT REVISION MAY BE WARRANTED.—To the maximum extent practicable, within 90 days after receiving the

1 petition of an interested person under section
2 553(e) of title 5, United States Code, to revise
3 a critical habitat designation, the Secretary
4 shall make a finding as to whether the petition
5 presents substantial scientific or commercial in-
6 formation indicating that the revision may be
7 warranted. The Secretary shall promptly pub-
8 lish such finding in the Federal Register.

9 "(B) NOTICE OF PROPOSED ACTION.—
10 Within 12 months after receiving a petition
11 that is found under subparagraph (A) to
12 present substantial information indicating that
13 the requested revision may be warranted, the
14 Secretary shall determine how to proceed with
15 the requested revision, and shall promptly pub-
16 lish notice of such intention in the Federal Reg-
17 ister.

18 "(7) PROPOSED AND FINAL REGULATIONS.—
19 Any regulation to designate critical habitat or imple-
20 ment a requested revision shall be proposed and pro-
21 mulgated in accordance with paragraphs (4), (5)
22 and (6) of section 4(b) in the same manner as a reg-
23 ulation to implement a determination with respect to
24 listing a species.

"(o) REPORTS.—The Secretary shall report every two years to the Committee on Environment and Public Works of the Senate and the Committee on Resources of the House of Representatives on the status of efforts to develop and implement recovery plans for all species listed pursuant to section 4 and on the status of all species for which such plans have been developed.".

(c) CITIZEN SUITS.—Section 11(g)(1)(C) of the Act (16 U.S.C. 1540(g)(1)(C)) is amended by inserting "or section 5" after "section 4".

(d) CONFORMING AMENDMENTS FOR RECOVERY PLANNING.—

(1) Section 6(d)(1) is amended by striking "section 4(g)" and inserting "section 4(f)".

(2) Section 10(f)(5) is amended by striking the last sentence.

(3) Sections 104(c)(4)(A)(ii)(I), 115(b)(2), and 118(f)(11) of the Marine Mammal Protection Act are amended by striking "section 4(f)" each place it occurs and inserting "section 5".

(4) The table of contents in the first section (16 U.S.C. 1531) is amended by striking the item related to section 5 and inserting the following:

"Sec. 5. Recovery plans.
Sec. 5A. Land acquisition.".

1 (e) PLANS FOR PREVIOUSLY LISTED SPECIES.—In
2 the case of species included in the list published under
3 section 4(c) before the date of enactment of this Act, and
4 for which no recovery plan was developed before that date,
5 the Secretary shall develop a final recovery plan in accord-
6 ance with the requirements of section 5 (including the pri-
7 orities of section 5(b)) of the Endangered Species Act (16
8 U.S.C. 1531 et seq.), as amended by this Act, for not less
9 than one-half of the species not later than 36 months after
10 the date of enactment of this Act and for all species not
11 later than 60 months after such date.

12 **SEC. 4. INTERAGENCY CONSULTATION AND COOPERATION.**

13 (a) REASONABLE AND PRUDENT ALTERNATIVES.—
14 Section 3 (16 U.S.C. 1532) is amended by redesignating
15 paragraphs (15) through (21) as paragraphs (16) through
16 (22), respectively, and inserting the following new para-
17 graph after paragraph (14):

18 "(15) REASONABLE AND PRUDENT ALTER-
19 NATIVES.—The term 'reasonable and prudent alternatives'
20 means alternative actions identified during consultation
21 that can be implemented in a manner consistent with the
22 intended purpose of the action, that can be implemented
23 consistent with the scope of the Federal agency's legal au-
24 thority and jurisdiction, that are economically and techno-
25 logically feasible, and that the Secretary believes would

1 avoid the likelihood of jeopardizing the continued existence
2 of listed species or resulting in the destruction or adverse
3 modification of critical habitat.".

4 (b) INVENTORY OF SPECIES ON FEDERAL LANDS.—
5 Section 7(a)(1)(16 U.S.C. 1536(a)(1)) is amended by—

6 (1) inserting "(A)" after "(1)"; and

7 (2) adding the following at the end thereof:

8 "(B) INVENTORY OF SPECIES ON FEDERAL
9 LANDS.—The head of each Federal agency that is
10 responsible for the management of lands and wa-
11 ters—

12 "(i) shall by not later than December 31,
13 2003, prepare and provide to the Secretary an
14 inventory of the presence or occurrence of en-
15 dangered species, threatened species, species
16 that have been proposed for listing, and species
17 that the Secretary has identified as candidates
18 for listing under section(4), that are located on
19 lands or waters owned or under control of the
20 agency; and

21 "(ii) shall at least once every 5 years
22 thereafter update the inventory required by
23 clause (1) including newly listed, proposed and
24 candidate species.".

(c) CONSULTATION.—Section 7(a)(3) (16 U.S.C. 1536(a)(3)) is amended to read as follows:

"(3) CONSULTATION.—

"(A) NOTIFICATION OF ACTIONS.—Prior to commencing any action, each Federal agency shall notify the Secretary if the agency determines that the action may affect an endangered species or a threatened species or critical habitat.

(B) AGENCY DETERMINATION.—

"(i) IN GENERAL.—Each Federal agency shall consult with the Secretary as required by paragraph (2) on each action for which notification is required under subparagraph (A) unless—

"(I) the Federal agency makes a determination based on the opinion of a qualified biologist that the action is not likely to adversely affect an endangered species, a threatened species or critical habitat;

"(II) the Federal agency notifies the Secretary that it has determined that the action is not likely to adversely affect any listed species or

critical habitat and provides the Secretary, along with the notice, a copy of the information on which the agency based the determination; and

"(III) the Secretary does not object in writing to the agency's determination within 60 days from the date such notice is received.

"(ii) ACTIONS EXCLUDED.—The Secretary may by regulation identify categories of actions with respect to specific endangered species or threatened species that the Secretary determines are likely to have an adverse effect on the species or its critical habitat and, for which, the procedures of clause (i) shall not apply.

"(iii) BASIS FOR OBJECTION.—The Secretary shall object to a determination made by a Federal agency pursuant to clause (i), if—

"(I) the Secretary determines that the action may have an adverse effect on an endangered species, a threatened species or critical habitat; or

"(II) the Secretary finds that there is insufficient information in the documentation accompanying the determination to evaluate the impact of the proposed action on endangered species, threatened species, or critical habitat; or

"(III) the Secretary finds that, because of the nature of the action and its potential impact on an endangered species, a threatened species or critical habitat, review cannot be completed in 60 days.

"(iv) NAS REVIEW.—Not later than 3 years after the date of enactment of this clause, the Secretary shall enter into appropriate arrangements with the National Academy of Sciences to conduct a review of and prepare a report on the determinations made by Federal agencies pursuant to clause (i). The report shall be transmitted to the Congress not later than 5 years after the date of enactment of this clause.

"(v) REPORTS.—The Secretary shall report to the Congress not less often than

1 bienally with respect to the implementation
2 of this subparagraph including in the re-
3 port information on the circumstances that
4 resulted in the Secretary making any ob-
5 jection to a determination made by a Fed-
6 eral agency under clause (i) and the avail-
7 ability of resources to carry out the re-
8 quirements of this section.
9 "(C) CONSULTATION AT REQUEST OF AP-
10 PLICANT.—Subject to such guidelines as the
11 Secretary may establish, a Federal agency shall
12 consult with the Secretary on any prospective
13 agency action at the request of, and in coopera-
14 tion with, the prospective permit or license ap-
15 plicant if the applicant has reason to believe
16 that an endangered species or a threatened spe-
17 cies may be present in the area affected by the
18 applicant's project and that implementation of
19 the action will likely affect the species.".
20 (d) GAO REPORT.—The Comptroller General of the
21 United States shall report to the Committee on Environ-
22 ment and Public Works of the Senate and to the Commit-
23 tee on Resources of the House of Representatives not later
24 than 3 years after the date of enactment of this Act, and
25 2 years thereafter, on the cost of formal consultation to

1 Federal agencies and other persons carrying out actions
2 subject to the requirements of section 7 of the Endangered
3 Species Act (16 U.S.C. 1536), including the cost of rea-
4 sonable and prudent measures imposed.

5 (e) NEW LISTINGS.—Section 7(a) (16 U.S.C.
6 1536(a)) is amended by adding at the end the following:

7 "(5) EFFECT OF LISTING ON EXISTING
8 PLANS.—

9 "(A) ACTIONS.—For the purposes of para-
10 graph (2), the term 'action' includes land use
11 plans under the Federal Land Policy and Man-
12 agement Act (43 U.S.C. 1701 et seq.) and re-
13 source management plans under the Forest and
14 Rangeland Renewable Resources Planning Act
15 (16 U.S.C. 1600 et seq.), as amended by the
16 National Forest Management Act (16 U.S.C.
17 1600 et seq.).

18 "(B) RE-INITIATION OF CONSULTATION.—
19 Whenever a determination to list a species as
20 an endangered species or a threatened species
21 or designation of critical habitat requires re-ini-
22 tiation of consultation under section 7(a)(2) on
23 an already approved action as defined under
24 subparagraph (A), the consultation shall com-
25 mence promptly, but no later than 90 days

after the date of the determination or designation, and be completed within 12 months of the date on which the consultation is commenced.

"(C) SITE-SPECIFIC ACTIONS DURING CONSULTATION.—Notwithstanding subsection (d), the Federal agency implementing the land use plan or resource management plan under subparagraph (B) may authorize, fund, or carry out a site-specific ongoing or previously scheduled action with the scope of the plan on such 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 and the Secretary issues a biological opinion and the action satisfies the requirements of this section.".

(f) IMPROVED FEDERAL AGENCY COORDINATION.—Section 7(a) (16 U.S.C. 1536(a)) is amended by adding at the end the following:

"(6) CONSOLIDATION OF CONSULTATION AND CONFERENCING.—

"(A) CONSULTATION WITH A SINGLE AGENCY.—Consultation and conferencing under this subsection between the Secretary and a Federal agency may, with the approval of the Secretary, encompass a number of related or similar actions by the agency to be carried out within a particular geographic area.

"(B) CONSULTATION WITH SEVERAL AGENCIES.—The Secretary may consolidate requests for consultation or conferencing from various Federal agencies the proposed actions of which may affect the same endangered species, threatened species, or species that have been proposed for listing under section 4, within a particular geographic area.".

(g) USE OF INFORMATION PROVIDED BY STATES.—Section 7(b)(1) (16 U.S.C. 1536(b)(1)) is amended by adding at the end the following:

"(C) USE OF STATE INFORMATION.—In conducting a consultation under subsection (a)(2), the Secretary shall actively solicit and consider information from the State agency in each affected State.".

(h) OPPORTUNITY TO PARTICIPATE IN CONSULTATIONS.—Section 7(b)(1) (16 U.S.C. 1536(b)(1)) (as amended by subsection (g)) is further amended by adding at the end the following:

"(D) OPPORTUNITY TO PARTICIPATE IN CONSULTATIONS.—

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

"(I) 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 (if a jeopardy opinion is to be issued) that the Federal agency and the person can take to avoid violation of section 7(a)(2);

"(II) receive information, upon request subject to the exemptions of the Freedom of Information Act (5 U.S.C. 552(b)) 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 take statements; and

"(III) received 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.

"(ii) EXPLANATION.—If reasonable and prudent alternatives are proposed by a person under clause (i) and the Secretary does not include the alternatives in the final biological opinion, the Secretary shall explain to such person why those alternatives were not included in the opinion.".

(i) INCIDENTAL TAKING STANDARDS FOR FEDERAL AGENCIES.—Section 7(b)(4) (16 U.S.C. 1536 (b)(4)) is amended—

(1) in clause (ii), by inserting "and mitigate" after "to minimize"; and

(2) by adding at the end the following: "For purposes of this subsection, reasonable and prudent measures shall be related both in nature and extent to the effect of the proposed activity that is the subject of the consultation.".

(j) REVISION OF REGULATIONS.—Not later than 1 year after the date of enactment of the Endangered Spe-

cies Recovery Act of 1997, the Secretary shall promulgate modifications to part 402 of title 50, Code of Federal Regulations, to implement the provisions of this section.

SEC. 5. CONSERVATION PLANS.

(a) PERMIT FOR TAKE ON THE HIGH SEAS.—Section 10(a)(1)(B) (16 U.S.C. 1539(a)(1)(B)) is amended by striking "section 9(a)(1)(B)" and inserting in lieu thereof "subparagraph (B) or (C) of section 9(a)(1)".

(b) MONITORING.—Section 10(a)(2)(B) (16 U.S.C. 1539(a)(2)(B)) is amended by striking "reporting" and inserting in lieu thereof "monitoring and reporting".

(c) OTHER PLANS.—Section 10(a) (16 U.S.C. 1539(a)) is amended by striking paragraph (2)(C) and inserting the following new paragraphs:

"(3) MULTIPLE SPECIES CONSERVATION PLANS.—

"(A) IN GENERAL.—In addition to one or more listed species, a conservation plan developed under paragraph (2) may, at the request of the applicant, include species proposed for listing under section 4(c), candidate species, or other species found on lands or waters owned or within the jurisdiction of the applicant covered by the plan.

"(B) APPROVAL CRITERIA.—The Secretary shall approve an application for a permit under paragraph (1)(B) that includes species other than

species listed as endangered species or threatened species if, after notice and opportunity for public comment, the Secretary finds that the permit application and the related conservation plan satisfy the criteria of paragraphs (2)(A) and (2)(B) with respect to listed species, and that the permit application and the related conservation plan with respect to other species satisfy the following requirements:

"(i) The impact on non-listed species included in the plan will be incidental;

"(ii) The applicant will, to the maximum extent practicable, minimize and mitigate such impacts;

"(iii) The actions taken by the applicant with respect to species proposed for listing or candidates for listing included in the plan, if undertaken by all similarly situated persons within the range of such species, are likely to eliminate the need to list the species as an endangered species or a threatened species for the duration of the agreement as a result of the activities conducted by those persons;

"(iv) The actions taken by the applicant with respect to other non-listed species included in the plan, if undertaken by all similarly situ-

ated persons within the range of such species, would not be likely to contribute to a determination to list the species as an endangered species or a threatened species for the duration of the agreement;

"(v) The criteria of paragraphs (2)(A)(iv), (2)(B)(iii) and (2)(B)(v); and

the Secretary has received such other assurances as the Secretary may require that the plan will be implemented. 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 monitoring and reporting requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with.

"(C) TECHNICAL ASSISTANCE AND GUIDANCE.—To the maximum extent practicable, the Secretary and the heads of other Federal agencies, in cooperation with the States, are authorized and encouraged to provide technical assistance or guidance to any State or person that is developing a multiple species conservation plan under this paragraph. In providing technical assistance or guidance,

1 priority shall be given to landowners that might oth-
2 erwise encounter difficulty in developing such a plan.
3 "(D) DEADLINES.—A conservation plan devel-
4 oped pursuant to this paragraph shall be reviewed
5 and approved or disapproved not later than 1 year
6 after the date of submission, or within such other
7 period of time as is mutually agreeable to the Sec-
8 retary and the applicant.
9 "(E) STATE AND LOCAL LAW.—
10 "(i) OTHER SPECIES.—Nothing in this
11 paragraph shall limit the authority of a State or
12 local government with respect to fish, wildlife or
13 plants that have not been listed as an endan-
14 gered species or a threatened species under sec-
15 tion 4.
16 "(ii) COMPLIANCE.—An action by the Sec-
17 retary, the Attorney General, or a person under
18 section 11(g) to ensure compliance with a mul-
19 tiple species conservation plan and permit
20 under this paragraph may only be brought
21 against a permittee or the Secretary.
22 "(F) EFFECTIVE DATE OF PERMIT FOR NON-
23 LISTED SPECIES.—For any species not listed as an
24 endangered species or a threatened species, but cov-
25 ered by an approved multiple species conservation

plan, the permit issued under paragraph (1)(B) shall take effect without further action by the Secretary at the time the species is listed pursuant to section 4(c), and to the extent that the taking is otherwise prohibited by subparagraphs (B) or (C) of section 9(a)(1).

"(4) LOW EFFECT ACTIVITIES.—

"(A) IN GENERAL.—Notwithstanding paragraph (2)(A), the Secretary may issue a permit for a low effect activity authorizing any taking referred to in paragraph (1)(B), if the Secretary determines that the activity will have no more than a negligible effect, both individually and cumulatively, on the species, any taking associated with the activity will be incidental, and the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. The permit shall require, to the extent appropriate, actions to be taken by the permittee to offset the effects of the activity on the species.

"(B) APPLICATIONS.—The Secretary shall minimize the costs of permitting to the applicant by developing, in cooperation with the States, model permit applications that would constitute conservation plans for low effect activities.

"(C) PUBLIC COMMENT; EFFECTIVE DATE.—Upon receipt of a permit application for an activity that meets the requirements of subparagraph (A), the Secretary shall provide notice in a newspaper of general circulation in the area of the activity not later than 30 days after receipt and an opportunity for comment on the permit. If the Secretary does not receive significant adverse comment within 30 days of the notice, the permit shall take effect without further action by the Secretary 45 days after the notice is published.

"(5) NO SURPRISES.—

"(A) IN GENERAL.—Each conservation plan developed under this subsection shall include a no surprises provision, as described in this paragraph.

"(B) NO SURPRISES.—A person who has entered into, and is in compliance with, a conservation plan under this subsection may not be required to undertake any additional mitigation measures for species covered by such plan if such measures would require the payment of additional money, or the adoption of additional use, development or management restrictions on any land, waters or water-related rights that would otherwise be available under the terms of the plan without the consent of the permit-

tee. The Secretary and the applicant, by the terms of the conservation plan, shall identify—

"(i) other modifications to the plan; or

"(ii) other additional measures,

if any, that the Secretary may require under extraordinary circumstances.

"(6) PERMIT REVOCATION.—After notice and an opportunity for correction, as appropriate, the Secretary shall revoke a permit issued under this subsection if the Secretary finds that the permittee is not complying with the terms and conditions of the permit or the conservation plan.".

(d) CANDIDATE CONSERVATION AGREEMENTS.—

(1) PERMITS.—Section 10(a)(1) (16 U.S.C. 1539(a)(1)) is amended by—

(A) deleting "or" at the end of subparagraph (A);

(B) striking the period at the end of subparagraph (B) and inserting "; or"; and

(C) adding the following subparagraph at the end—

"(C) any taking incidental to, and not the purpose of, the carrying out of an otherwise lawful activity pursuant to a candidate conservation agreement.".

(2) AGREEMENTS.—Section 10 (16 U.S.C. 1539) is amended by adding at the end thereof the following:

"(k) CANDIDATE CONSERVATION AGREEMENTS.—

"(1) IN GENERAL.—At the request of any non-Federal person, the Secretary may enter into a candidate conservation agreement with that person for a species that has been proposed for listing under section 4(c)(1), is a candidate species, or is likely to become a candidate species in the near future on property owned or under the jurisdiction of the person requesting such an agreement.

"(2) REVIEW BY THE SECRETARY.—

"(A) SUBMISSION TO THE SECRETARY.—A non-Federal person may submit a candidate conservation agreement developed under paragraph (1) to the Secretary for review at any time prior to the listing described in section 4(c)(1) of a species that is the subject of the agreement.

"(B) CRITERIA FOR APPROVAL.—The Secretary may approve an agreement and issue a permit under subsection (a)(1)(C) for the agreement if, after notice and opportunity for public comment, the Secretary finds that—

"(i) for species proposed for listing, candidates for listing, or species that are likely to become a candidate species in the near future, that are included in the agreement, the actions taken under the agreement, if undertaken by all similarly situated persons, would produce a conservation benefit that would be likely to eliminate the need to list the species under section 4(c) as a result of the activities of those persons during the duration of the agreement;

"(ii) the actions taken under the agreement will not adversely affect an endangered species or a threatened species;

"(iii) the agreement contains such other measures that the Secretary may require as being necessary or appropriate for the purposes of the agreement;

"(iv) the person will ensure adequate funding to implement the agreement; and

"(v) the agreement includes such monitoring and reporting requirements as the Secretary deems necessary for deter-

mining whether the terms and conditions of the agreement are being complied with.

"(3) EFFECTIVE DATE OF PERMIT.—A permit issued under subsection (a)(1)(C) shall take effect at the time the species is listed pursuant to section 4(c), provided that the permittee is in full compliance with the terms and conditions of the agreement.

"(4) ASSURANCES.—A person who has entered into a candidate conservation agreement under this subsection, and is in compliance with the agreement, may not be required to undertake any additional measures for species covered by such agreement if such measures would require the payment of additional money, or the adoption of additional use, development or management restrictions on any land, waters, or water-related rights that would otherwise be available under the terms of the agreement without the consent of the person entering into the agreement. The Secretary and the person entering into a candidate conservation agreement, by the terms of the agreement, shall identify—

"(A) other modifications to the agreements; or

"(B) other additional measures,

1 if any, that the Secretary may require under ex-
2 traordinary circumstance.
3 (e) PUBLIC NOTICE.—Section 10(c) (16 U.S.C.
4 1539(c)) is amended by—
5 (1) striking "thirty" each place that it appears
6 and inserting in lieu thereof "60"; and
7 (2) inserting before the final sentence the fol-
8 lowing: "The Secretary may, with approval of the
9 applicant, provide an opportunity, as early as prac-
10 ticable, for public participation in the development of
11 a multiple species conservation plan and permit ap-
12 plication. If a multiple species conservation plan and
13 permit application has been developed without the
14 opportunity for public participation, the Secretary
15 shall extend the public comment period for an addi-
16 tional 30 days for interested parties to submit writ-
17 ten data, views, or arguments on the plan and appli-
18 cation.".
19 (f) SAFE HARBOR AGREEMENTS.—Section 10 (16
20 U.S.C. 1539) is amended by adding at the end thereof
21 the following new subsection:
22 "(l) SAFE HARBOR AGREEMENTS.—
23 "(1) AGREEMENTS.—
24 "(A) IN GENERAL.—The Secretary may
25 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, provided that the Secretary may not permit through such agreements any incidental take below the baseline requirement specified pursuant to subparagraph (B).

"(B) BASELINE.—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 may be expressed in terms of the abundance or distribution of endangered or threat-

ened 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 under section 15(d), 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.

"(C) OTHER PAYMENTS.—Grants provided to an individual private landowner under this paragraph shall be in addition to, and not affect, the total amount of payments that the landowner is otherwise eligible to receive under

the Conservation Reserve Program (16 U.S.C. 3831 et seq.), the Wetlands Reserve Program (16 U.S.C. 3837 et seq.), or the Wildlife Habitat Incentives Program (16 U.S.C. 3836a).".

(g) HABITAT RESERVE AGREEMENTS.—Section 10 (16 U.S.C. 1539) is amended by adding at the end thereof the following new subsection:

"(m) HABITAT RESERVE AGREEMENTS.—

"(1) PROGRAM.—The Secretary shall establish a habitat reserve program to be implemented through contracts or easements of a mutually agreed upon duration to assist non-Federal property owners to preserve and mange suitable habitat for endangered species and threatened species.

"(2) AGREEMENTS.—The Secretary may enter into a habitat reserve agreement with a non-Federal property owner to protect, manage or enhance suitable habitat on private property for the benefit of endangered species or threatened species. Under an agreement, the Secretary shall make payments in an agreed upon amount to the property owner for carrying out the terms of the habitat reserve agreement, provided that the activities undertaken pursuant to the agreement are not otherwise required by this Act.

1 "(3) STANDARDS AND GUIDELINES.—The Sec-
2 retary shall issue standards and guidelines for the
3 development and approval of habitat reserve agree-
4 ments in accordance with this subsection. Agree-
5 ments shall, at a minimum, specify the management
6 measures, if any, that the property owner will imple-
7 ment for the benefit of endangered species or threat-
8 ened species, the conditions under which the prop-
9 erty may be used, the nature and schedule for any
10 payments agreed upon by the parties to the agree-
11 ment, and the duration of the agreement.
12 "(4) PAYMENTS.—Any payment received by a
13 property owner under a habitat reserve agreement
14 shall be in addition to and shall not affect the total
15 amount of payments that the property owner is oth-
16 erwise entitled to receive under the Agricultural Act
17 of 1949 (7 U.S.C. 1421 et seq.), as amended by the
18 Federal Agriculture Improvement and Reform Act of
19 1996.
20 "(5) AUTHORIZATION OF APPROPRIATIONS.—
21 There are authorized to be appropriated to the Sec-
22 retary of Interior $10,000,000 and the Secretary of
23 Commerce $5,000,000 for each of fiscal years 1998
24 through 2003 to assist non-Federal property owners

to carry out the terms of habitat reserve programs under this subsection.".

(h) HABITAT CONSERVATION PLANNING FUND.—Section 10(a) (16 U.S.C. 1539(a)) is further amended by adding at the end thereof the following new paragraph:

"(7) HABITAT CONSERVATION PLANNING FUND.—

"(A) ESTABLISHMENT.—There is established in the Treasury of the United States a revolving fund, to be known as the 'Habitat Conservation Planning Fund', to be used in carrying out this subsection (referred to in this paragraph as the 'Fund'), consisting of—

"(i) amounts made available under section 15(f);

"(ii) repayments of advances from the Fund under subparagraph (C); and

"(iii) any interest earned on investment of amounts in the Fund under subparagraph (D).

"(B) EXPENDITURES FROM FUND.—

"(i) IN GENERAL.—On request by the Secretary, the Secretary of the Treasury shall transfer from the Fund to the Secretary such amounts as the Secretary determines necessary to make interest-fire advances under clause (ii).

"(ii) AUTHORITY TO MAKE GRANTS AND ADVANCES.—The Secretary may make an interest-free advance from the Fund to any State, county, municipality, or other political subdivision of a State to assist in the development of a conservation plan under this subsection. The amount of the advance under this clause may not exceed the total financial contribution of the other parties participating in the development of the plan.

"(iii) CRITERIA FOR ADVANCES.—In determining whether to make an advance from the Fund, the Secretary shall consider—

"(I) the number of species covered by the plan;

"(II) the extent to which there is a commitment to participate in the planning process from a diversity of interests (including local governmental, business, environmental, and landowner interests);

"(III) the likely benefits of the plan;

"(IV) such other factors as the Secretary considers appropriate.

"(C) REPAYMENTS OF ADVANCES FROM THE FUND.—

"(i) IN GENERAL.—Except as provided in clause (ii) amounts advanced from the Fund shall be repaid not later than 10 years after the date of the advance.

"(ii) ACCELERATED REPAYMENT.—Amounts advanced from the Fund shall be repaid—

"(I) not later than 4 years after the date of the advance if no conservation plan is developed within 3 years of the date of the advance; or

"(II) not later than 5 years after the date of the advance if no permit is issued under paragraph (1)(B) with respect to the conservation plan within 4 years of the date of the advance.

"(iii) CREDITING OF REPAYMENTS.—Amounts received by the United States as repayment of advances from the Fund shall be credited to the Fund and made available for further advances in accordance with this paragraph without further appropriation.

"(D) INVESTMENT OF FUND BALANCE.—

"(i) IN GENERAL.—The Secretary of the Treasury shall invest such portion of the Fund

as is not, in the judgment of the Secretary, required to meet current withdrawals. Investments may be made only in interest-bearing obligations of the United States.

"(ii) ACQUISITION OF OBLIGATIONS.—For the purpose of investments under clause (i), obligations may be acquired—

"(I) on original issue at the issue price; or

"(II) by purchase of outstanding obligations at the market price.

"(iii) SALE OF OBLIGATIONS.—Any obligation acquired by the Fund may be sold by the Secretary of the Treasury at market price.

"(iv) CREDITS TO THE FUND.—The interest on, and the proceeds from the sale or redemption of, any obligations held in the Fund shall be credited to and form a part of the Fund.

"(E) TRANSFERS OF AMOUNTS.—

"(i) IN GENERAL.—The amounts required to be transferred to the Fund under this paragraph shall be transferred at least monthly from the general fund of the Treasury to the

1 Fund on the basis of estimates made by the
2 Secretary of the Treasury.
3 "(ii) ADJUSTMENTS.—Proper adjustments
4 shall be made in amounts subsequently trans-
5 ferred to the extent prior estimates were in ex-
6 cess of or less than the amounts required to be
7 transferred.".
8 (i) EFFECT ON PERMITS AND PROPOSED PLANS.—
9 No amendment made by this section shall be interpreted
10 to require the modification of—
11 (1) a permit issued under section 10 of the En-
12 dangered Species Act (16 U.S.C. 1539); or
13 (2) a conservation plan submitted for approval
14 pursuant to such section prior to the date of enact-
15 ment of this Act.
16 (j) RULE-MAKING.—Not later than 1 year after the
17 date of enactment of this Act, the Secretary shall, after
18 consultation with the States and notice and opportunity
19 for public comment, publish final regulations implement-
20 ing the provisions of section 10(a) of the Endangered Spe-
21 cies Act (16 U.S.C. 1539(a)), as amended by this section.
22 (k) NAS REPORT.—Not later than 2 years after the
23 date of enactment of this Act, the Secretary shall enter
24 into appropriate arrangements with the National Academy
25 of Sciences to conduct a review of and prepare a report

on the development and implementation of conservation plans under section 10(a) of the Endangered Species Act (16 U.S.C. 1531 et seq.). The report shall assess the extent to which those plans comply with the requirements of that Act, the role of multiple species conservation plans in preventing the need to list species covered by those plans, and the relationship of conservation plans for listed species to implementation of recovery plans. The report shall be transmitted to the Congress not later than 5 years after the date of enactment of this Act.

SEC. 6. ENFORCEMENT.

(a) ENFORCEMENT FOR INCIDENTAL TAKE.—Section 11 (16 U.S.C. 1540) is amended by adding after subsection (g) the following new subsection and redesignating the subsequent subsection accordingly:

"(h) INCIDENTAL TAKE.—In any action under subsection (a), (b), or (e)(6) of this section against any person for an alleged take incidental to the carrying out of an otherwise lawful activity, the Secretary or the Attorney General must establish, using scientifically valid principles, that the acts of such person have caused, or will cause, the take, of—

"(1) an endangered species, or

"(2) a threatened species the take of which is prohibited pursuant to a regulation under section 4(d).".

(b) CITIZEN SUIT FOR INCIDENTAL TAKE.—Section 11(g) (16 U.S.C. 1540(g)) is amended by adding the following new paragraph after paragraph (2) and redesignating the subsequent paragraphs accordingly:

"(3) INCIDENTAL TAKE.—In any suit under this subsection against any person for an alleged take incidental to the carrying out of an otherwise lawful activity, the person commencing the suit must establish, using scientifically valid principles, that the acts of the person alleged to be in violation of section 9(a)(1) have caused, or will cause, the take, of—

"(1) an endangered species, or

"(2) a threatened species the take of which is prohibited pursuant to a regulation under section 4(d).".

SEC. 7. EDUCATION AND TECHNICAL ASSISTANCE.

(a) IN GENERAL.—Section 13 (16 U.S.C. 1542) is amended to read as follows:

"PROPERTY OWNERS EDUCATION AND TECHNICAL ASSISTANCE PROGRAM

"SEC. 13. (a) IN GENERAL.—In cooperation with the States, the Secretary shall develop and implement a pri-

1 vate landowners education and technical assistance pro-
2 gram to—
3 "(1) inform the public about this Act;
4 "(2) respond to requests for technical assist-
5 ance from property owners interested in conserving
6 species listed or proposed for listing under section
7 4(c)(1) and candidate species on the land of the
8 landowners; and
9 "(3) recognize exemplary efforts to conserve
10 species on private land.
11 "(b) ELEMENTS OF THE PROGRAM.—Under the pro-
12 gram, the Secretary shall—
13 "(1) publish educational materials and conduct
14 workshops for property owners and other members
15 of the public on the role of this Act in conserving
16 endangered species and threatened species, the prin-
17 cipal mechanisms of this Act for achieving species
18 recovery, and potential sources of technical and fi-
19 nancial assistance;
20 "(2) assist field offices in providing timely ad-
21 vice to property owners on how to comply with this
22 Act;
23 "(3) provide technical assistance to State and
24 local governments and property owners interested in
25 developing and implementing recovery plan imple-

1 mentation agreements, conservation plans, and safe
2 harbor agreements;
3 "(4) serve as a focal point for questions, re-
4 quests, and suggestions from property owners and
5 local governments concerning policies and actions of
6 the Secretary in the implementation of this Act;
7 "(5) provide training for Federal personnel re-
8 sponsible for implementing this Act on concerns of
9 property owners, to avoid unnecessary conflicts, and
10 improving implementation of this Act on private
11 land; and
12 "(6) nominate for national recognition by the
13 Secretary property owners that are exemplary man-
14 agers of land for the benefit of species listed or pro-
15 posed for listing under section 4(c)(1) or candidate
16 species.".
17 (b) CONFORMING AMENDMENT.—The table of con-
18 tents in the first section is amended by striking the item
19 related to section 13 and inserting the following:

"Sec. 13. Private landowners education and technical assistance program.".

20 (c) EFFECT ON PRIOR AMENDMENTS.—Nothing in
21 this section or the amendments made by this section af-
22 fects the amendments made by section 13 of the Endan-
23 gered Species Act of 1973 (87 State. 902), as in effect
24 on the day before the date of enactment of this Act.

SEC. 8. AUTHORIZATION OF APPROPRIATIONS.

(a) IN GENERAL.—Section 15(a) (16 U.S.C. 1542(a)) is amended—

(1) in paragraph (1), by striking "and $41,500,000 for fiscal year 1992" and inserting "$41,500,000 for fiscal year 1992, $135,000,000 for fiscal year 1998, $150,000,000 for fiscal year 1999, and $165,000,000 for each of fiscal years 2000 through 2003";

(2) in paragraph (2), by striking "and $6,750,000" and inserting "$6,750,000"; and inserting ",$50,000,000 for fiscal year 1998, $60,000,000 for fiscal year 1999, and $70,000,000 for each of fiscal years 2000 through 2003" after "and 1992"; and

(3) in paragraph (3), by striking "and $2,600,000" and inserting $2,600,000"; and inserting ", and $4,000,000 for each of fiscal years 1998 through 2003" after "and 1992".

(b) EXEMPTIONS FROM ACT.—Section 15(b) (16 U.S.C. 1542(b)) is amended by inserting "and $625,000 for each of fiscal years 1998 through 2003" after "and 1992".

(c) CONVENTION IMPLEMENTATION.—Section 15(c) (16 U.S.C. 1542(c)) is amended by striking "and $500,000" and inserting $500,000," and by inserting

1 "and $1,000,000 for each fiscal year 1998 through 2003"
2 after "and 1992,".
3 (d) ADDITIONAL AUTHORIZATIONS.—Section 15 (16
4 U.S.C. 1542) is further amended by adding the following
5 at the end:
6 "(d) FINANCIAL ASSISTANCE FOR SAFE HARBOR
7 AGREEMENTS.—There are authorized to be appropriated
8 to the Secretary of the Interior $10,000,000 and the Sec-
9 retary of Commerce $5,000,000 for each of fiscal years
10 1998 through 2003 to carry out section 10(l).
11 "(e) HABITAT CONSERVATION PLANNING FUND.—
12 There are authorized to be appropriated to the Habitat
13 Conservation Planning Fund established by section
14 10(a)(7) $10,000,000 for each of fiscal years 1998
15 through 2000 and $5,000,000 for each of fiscal years
16 2001 and 2002 to assist in the development of conserva-
17 tion plans.
18 "(f) FINANCIAL ASSISTANCE FOR RECOVERY PLAN
19 IMPLEMENTATION.—There are authorized to be appro-
20 priated to the Secretary of Interior $30,000,000 and the
21 Secretary of Commerce $15,000,000 for each of the fiscal
22 years 1998 through 2003 to carry out section 5(l)(4).
23 "(g) AVAILABILITY.—Amounts made available under
24 this section shall remain available until expended.

"(h) LIMITATION ON USE OF FUNDS.—Of the funds made available to carry out section 5 for any fiscal year, not less than $32,000,000 shall be available to the Secretary of Interior and not less than $13,500,000 to the Secretary of Commerce to implement actions to recover listed species. Of the funds made available to the Secretary of Interior and the Secretary of Commerce in each fiscal year to list species, the Secretary of Interior and the Secretary of Commerce shall use not less than 10% of those funds in each fiscal year for delisting species. If any of the funds made available by the previous sentence are not needed in that fiscal year for delisting eligible species, those funds shall be available for listing.".

(e) ASSISTANCE TO STATES FOR CONSERVATION ACTIVITIES.—Section 6(i) (16 U.S.C. 1535(i)) is amended by adding at the end the following:

"(3) ASSISTANCE TO STATES FOR CONSERVATION ACTIVITIES.—There are authorized to be appropriated to the Secretary such sums as are necessary for each of fiscal years 1998 through 2003 to provide financial assistance to State agencies to carry out conservation activities under other sections of this Act, including the provision of technical assistance for the development and implementation of recovery plans.".

SEC. 9. OTHER AMENDMENTS.

(a) DEFINITIONS.—

(1) CANDIDATE SPECIES.—Section 3 is amended by inserting the following paragraph after paragraph (1) and redesignating the subsequent paragraphs accordingly:

"(2) CANDIDATE SPECIES.—The term 'candidate species' means a species for which the Secretary has on file sufficient information on biological vulnerability and threats to support a proposal to list the species as an endangered species or a threatened species, but for which listing is precluded because of pending proposals to list species that are of a higher priority. This definition shall not apply to any species defined as a 'candidate species' by the Secretary of Commerce prior to the date of enactment of the Endangered Species Recovery Act of 1997.".

(2) IN COOPERATION WITH THE STATES.—Section 3 (16 U.S.C. 1532) is amended by inserting the following paragraph after paragraph (11) (as redesignated by this subsection):

"(12) IN COOPERATION WITH THE STATES.—The term 'in cooperation with the States' means a process in which—

"(A) the State agency in each of the affected States, or the State agency's representative, is given an opportunity to participate in a meaningful and timely manner in the development of the standards, guidelines, and regulations to implement the applicable provisions of this Act; and

"(B) the Secretary carefully considers all substantive concerns raised by the State agency, or the State agency's representative, and, to the maximum extent practicable consistent with this Act, incorporates their suggestions and recommendations, while retaining final decision making authority.".

(3) RURAL AREA.—Section 3 (16 U.S.C. 1532) is amended by inserting the following new paragraph after paragraph (16) (redesignated by this subsection and section 4(a)) and redesignating the subsequent paragraphs accordingly:

"(17) RURAL AREA.—The term 'rural area' means a county or unincorporated area that has no city or town that has a population of more than 10,000 inhabitants.".

(4) COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS.—Section 3(20) (16 U.S.C. 1532(18))

(as redesignated by this subsection and section 4(a)) is amended by striking "Trust Territories of the Pacific Islands" and inserting "Commonwealth of the Northern Mariana Islands".

(b) FINDINGS, PURPOSES, AND POLICY.—Section 2(a)(3) (16 U.S.C. 1531(a)(3)) is amended by inserting "commercial," after "recreational,".

(c) NO TAKE AGREEMENTS.—Section 9 (16 U.S.C. 1538) is amended by adding at the end thereof the following new subsection:

"(h) NO TAKE AGREEMENTS.—The Secretary and a non-Federal property owner may, at the request of the property owner, enter into an agreement identifying activities of the property owner that will not result in a violation of the prohibitions of paragraphs (1)(B), (1)(C), and (2)(B) of section 9(a). The Secretary shall respond to a request for an agreement submitted by a property owner within 90 days of receipt.".

(d) CONFORMING AMENDMENTS.—

(1) TITLE.—The title of section 10 (16 U.S.C. 1539) is amended to read as follows:

"CONSERVATION MEASURES AND EXCEPTIONS".

(2) TABLE OF CONTENTS.—The table of contents in the first section of the Act is amended with

1 respect to the item relating to section 10 to read as
2 follows:

"Sec. 10. Conservation measures and exceptions.".

○

STATEMENT OF JAMIE RAPPAPORT CLARK, DIRECTOR, U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR

Mr. Chairman and members of the Committee, thank you for the opportunity to speak with you today about this very important legislation to reauthorize the ESA. It is fitting that I would be appearing before you today at my first legislative hearing after my confirmation to give our views on the Endangered Species Recovery Act of 1997. Having served as the lead program manager for the Endangered Species Program, I have, along with many of you, been deeply involved with the 5-year quest for a reauthorized and strengthened Endangered Species Act. I would like to pay tribute to you Mr. Chairman and Senators Kempthorne, Baucus, and Reid and your staffs for the dedication and hard work that made the introduction of this bill possible.

I am very encouraged that bipartisan legislation has been introduced to reauthorize one of the nation's premier conservation laws. For too long, we heard only complaints from parties on all sides of this issue and there were precious few who offered constructive solutions. Instead of more of the same, the leadership of the Environment Committee rolled up their sleeves in a serious effort to address concerns associated with current implementation of the Act. We appreciated your inviting staff from the Departments of the Interior, Commerce and Justice to provide technical assistance and support to the process. We also welcomed the opportunities the Committee provided to Secretary Babbitt, myself and other officials to work with you during this process. We are also pleased that another bipartisan bill, H.R. 2351 has been introduced in the House by Congressman Miller and that the leadership of the House Resources Committee has begun tentative, bipartisan discussions in an effort to seek common ground on reauthorization. All of these events are positive developments and suggest that at long last, legislative gridlock on ESA reauthorization is coming to an end.

The result of your efforts in the Senate is legislation that has been carefully crafted to maintain the essential strengths of the current law while taking steps to make it work better for species conservation, the States, and affected landowners. The Administration is very pleased that the bill maintains as the foundation of the listing process the requirement that decisions be grounded solely on biological considerations and sound science; that the essential protections under Sections 7 and 9 remain intact; that the opportunity for participation by the States, affected landowners, and the general public is increased; and foremost, that species recovery receives enhanced recognition as the centerpiece of the Act.

On balance, we believe that S. 1180 will strengthen our ability to conserve endangered, threatened and declining species. The Administration supports enactment of the bill subject to the reconciliation of several issues set forth in this testimony. Prior to the Committee markup of S. 1180, the Administration will provide the Committee with a list of other technical and clarifying amendments, as well as suggested report language to accompany key provisions of the bill. We will also provide additional technical amendments as the other Federal agencies complete their review.

Reform of the implementation of the Endangered Species Act has been a major focus of this Administration and we were pleased to see that your bill contains many of the reforms and policies that the Administration has proposed and carried out over the past few years to improve the Act's effectiveness in species conservation and fairness for landowners. When the Departments of the Interior and Commerce announced our 10 point plan to improve implementation of the Endangered Species Act in March 1995, we recognized that the Act needed to be more effective in conserving species and that we needed to engage landowners as partners in conservation, not as adversaries. We acknowledge that we must provide landowners with greater certainty and work with them in a more open, flexible manner with new incentives to increase their involvement in conservation actions. After 5 years of developing a "new ESA" through Administrative reforms, we would welcome the codification of many of the reforms we have now established.

We believe S. 1180 will strengthen our ability to conserve threatened and endangered species by including provisions that:

Enhance Recovery.—Twenty-three years of experience has taught us that conserving multiple species in a comprehensive programmatic fashion is not only more efficient, it is better for the species. This bill authorizes and encourages conservation plans that address multiple species associated with the same habitat such as the Natural Communities Conservation Planning (NCCP) program currently being implemented in southern California. Since 1991 this innovative ecosystem based management program has been successfully balancing the need to preserve the unique species of the coastal sage scrub ecosystem with the desired economic development

of the area. The bill also: provides for increased Federal, state and public involvement in the recovery planning and implementation process; clarifies the role of Federal agencies in species recovery efforts; specifies deadlines for the completion of both draft and final plans; and provides for biological benchmarks to measure progress on the road to recovery.

Ensure the Use of Sound Science.—The use of sound science has been highlighted by our reforms through the addition of peer review to listing decisions, new petition management guidelines, and increased information sharing with states. The bill's incorporation of peer review and enhanced state involvement recognizes the importance of these measures in decisionmaking. Although we support the peer review requirement in the bill for listing decisions, we remain concerned that requiring that the National Academy of Sciences produce a list from which qualified experts are chosen is unnecessary and potentially costly and burdensome. We would suggest requiring that three, independent and qualified experts be chosen by the Secretary, in keeping with our current procedure.

Provide incentives and certainty for landowners.—Many private interests are willing to help conserve species, but landowners and businesses need regulatory certainty upon which they can base long-term economic decisions. Such certainty is vital to encouraging private landowners to participate in conservation planning. The bill addresses one of the major concerns regarding conservation plans and the "no surprises" policy by requiring monitoring of conservation plans to better assess their impacts on species conservation. S. 1180 also adopts a number of important Administration reforms, including our "no surprises" policy, candidate conservation agreement policy and "no-take" agreement program, thereby providing incentives for public support and involvement in species conservation.

The Act has been criticized for inadvertently encouraging landowners to destroy wildlife habitat because they fear possible restrictions on the future use of their property if additional endangered species are attracted to improved habitat. S. 1180 incorporates the Administration's "safe harbor" policy, which removes the regulatory disincentive associated with enhancing habitat for endangered species and thus encourages pro-active conservation efforts. We interpret the language in the bill as being consistent with our "safe harbor" policy. This policy has already generated considerable success in the southeast where 20,000 acres have been improved as endangered red-cockaded woodpecker habitat under these agreements. Similar agreements are in place in Texas and are helping to restore the Aplomado falcon to Texas for the first time in 50 years. The bill also authorizes a number of incentive programs to encourage landowners to participate in species conservation, including conservation and recovery planning, that if adequately funded could greatly aid species conservation efforts.

Improve Governmental and Public Involvement.—Involvement of other Federal agencies, states, the tribes, affected public landowners and environmental and scientific communities is key to endangered species conservation and has been a cornerstone of our 10 point plan. S. 1180 furthers this goal by enhancing public participation processes and by emphasizing State-Federal partnerships for endangered species conservation especially in the areas of recovery and conservation planning, as well as many others.

Eliminate threats to species.—Species are conserved most efficiently and least expensively when we can remove threats facing them through conservation measures undertaken before they have declined to very low numbers. We can act before species require listing and before recovery options are limited, and sometimes expensive. This bill endorses our candidate conservation agreement initiative which encourages Federal agencies and our partners to reach agreement on measures to conserve candidate and proposed species that remove threats to species and that can preclude the need to list these species in the future. The Department has a number of these agreements including an agreement in Utah which removed the threats facing the Virgin River spinedace and avoided the need to list this fish due to the efforts of local governments working closely with the Service. In the Midwest, a successful conservation agreement is bringing together the States of Kentucky, Illinois, and Indiana with the Farm Bureau and the coal industry to protect the copper belly watersnake.

A key factor leading to our support of this legislation has been the willingness of the sponsors to make a number of improvements since the January draft. The Committee leadership is to be commended for allowing technical comment and discussion upon the January draft and responding to many concerns that were raised through that process. For example, the bill no longer includes a water rights provision, which avoids changing the status quo on the interrelationship of the Act and state water laws, thereby minimizing conflicts between the Act and water projects in the West. The recovery section has been greatly improved by requiring that re-

covery goals be based solely on sound science. Then, within this biological context, social and economic factors will be considered as we work together to find ways to expeditiously achieve the species' recovery goal. Retaining the current emergency listing standard is appropriate since this is an extremely important tool in the very few crisis situations where we may need it. After thorough examination of the Section 9 take standard by your Committee, we are pleased to see that the bill has reaffirmed the current law. Your bill does not waive other environmental statutes and we commend you for this decision. Finally, the bill contains no compensation provision or other problematic property rights language; we would strongly object to such provisions.

These are all very positive parts of a bill that maintains and actually improves the essential protections and integrity of the Act while also seeking to make the Act work better for the affected public and landowners. I would now like to discuss the Administration's recommendations on the bill, which we believe are important to our ability to implement a comprehensive ESA.

Securing adequate funding to support this legislation will be the greatest challenge facing all of us. This legislation calls for an authorization level that is more than double the current resource agencies' ESA budgets. Even if this level of increase is realized in appropriations, we remain concerned that the cost and complexity of some of the changes, particularly process changes, may actually exceed the authorized levels. Without adequate appropriations, we will face significant litigation backlogs, and some species' recovery may be stalled. In addition, response and technical assistance to landowners, applicants, and Federal action agencies will be delayed. Also, a number of agencies will require additional funds to adequately implement this bill because of increased responsibilities for land management agencies such as the Forest Service, the Bureau of Land Management and the Fish and Wildlife Service. In short, absent adequate funding or a reduction in the complexity of some of the processes, we can not support this bill.

The greatest strength of this bill is its increased emphasis on recovery, but this comes with additional requirements that will be expensive to implement and new deadlines that may be difficult to meet even with adequate funding. The bill should be amended directing the Secretary to develop and implement a biologically based recovery planning priority system using the biological priorities as set forth in S. 1180 as a template for this system. Also, the Administration would like to see the recovery process streamlined as explained below.

One method for streamlining the bill's process requirements is to consolidate the designation of critical habitat with the development of recovery plans. Although the bill allows for the regulatory designation of critical habitat at the time of recovery rather than listing, a significant improvement, we remain concerned that the cost and administrative burden of designating critical habitat by regulation in this bill is not warranted. Habitat is "the key" for all species and as such needs to be thoroughly addressed in all recovery plans. Continuing to carry out a regulatory critical habitat designation process simultaneously with the new recovery plan development process is duplicative and escalates costs for little resource or stakeholder benefit. Both processes include consideration of economic costs and provide for public participation. The two should be integrated into one process. We will be glad to suggest the necessary technical changes that would better incorporate this process into recovery planning and save time and money, while ensuring protection of species and habitat.

The bill provides that a Federal agency can go forward with an action if the agency makes a determination that the action is not likely to adversely affect the species and the resource agencies do not object. The bill provides an increased role for Federal agencies in species conservation by requiring inventories of species present on federally managed lands, recovery implementation agreements, and increased responsibility for their decisions under Section 7. We believe we can work with other agencies to make the new trigger and the plan consultations work well for the involved agencies, applicants and the resource. However, an endorsement of our recent practice of working together with other Federal agencies early in the consultation process in a pro-active manner that is both more efficient and better for species conservation needs should be codified. Even where early coordination occurs, the bill could be read to require that action agencies wait an additional 60 days for resource agencies to object to their findings. Language that stresses the importance of early proactive coordination and cooperation among Federal agencies and the ability of agencies to still request and receive expedite concurrence letters would alleviate these concerns.

Finally, I would like to urge that the spirit of cooperative discussion that produced this bill extend to the development of the Committee report, so that our mutual un-

derstandings of these complex issues are strengthened, not eroded, as the bill proceeds through the legislative process.

I am very encouraged that the Senate is moving forward to reauthorize the ESA. We in the Administration stand ready to continue to assist in any way possible in seeing the process through to completion. We are optimistic that we can reach closure on these issues before final consideration of this bill in the Senate so that the Administration can support its enactment. Together, we can make the Act work even better for species and people and get on with conserving our resources for future generations.

National Marine Fisheries Service
Authorization for Appropriations for Endangered Species Recovery Act of 1997 (S.1180)

	(FY 97)	Year 1 (FY 98)	Year 2 (FY99)	Year 3 (FY 2000)	Year 4 (FY 2001)	Year 5 (FY2002)	Year 6 (FY2003)
Listing	1,963,000	3,630,000	3,630,000	3,630,000	2,950,000	2,950,000	2,950,000
Recovery Total	14,016,000	34,588,000	47,088,000	57,088,000	67,088,000	77,088,000	70,888,000
	Team Management	1,200,000 (10)	1,200,000 (10)	1,200,000 (10)	1,200,000 (10)	1,200,000 (10)	1,200,000 (10)
	State, Tribal, public partic. @ 217K/plan	2,170,000	2,170,000	2,170,000	2,170,000	2,170,000	2,170,000
	Prepare Draft Plans	2,500,000 (10)	2,500,000 (10)	2,500,000 (10)	2,500,000 (10)	2,500,000 (10)	0
	Prepare Final Plans	0	2,500,000 (10)	2,500,000 (10)	2,500,000 (10)	2,500,000 (10)	2,500,000 (10)
	Critical Habitat @ 400K/plan	4,000,000 (10)	4,000,000 (10)	4,000,000 (10)	4,000,000 (10)	4,000,000 (10)	0
	Review and Revise Plans	750,000 (5)	750,000 (5)	750,000 (5)	750,000 (5)	750,000 (5)	750,000 (5)
	Litigation Support	468,000	468,000	468,000	468,000	468,000	468,000
	Subtotal Recovery Plan Prep.	11,088,000	13,588,000	13,588,000	13,588,000	13,588,000	7,388,000
	Subtotal Recovery Implement (1 mill/plan)	23,500,000 (10)	33,500,000 (10)	43,500,000 (10)	53,500,000 (10)	63,500,000 (10)	63,500,000 (0)
Sections 7, 9,10, 13, NAS Studies	5,237,000	10,000,000	15,000,000	21,000,000	21,000,000	20,000,000	20,000,000
CITES (Marine Species)		1,000,000	1,000,000	1,000,000	1,000,000	1,000,000	1,000,000
NMFS Totals for Sec 15 (a)(2)	21,216,000	49,218,000	66,718,000	82,718,000	92,038,000	101,038,000	94,038,000

Other	(FY 97)	(FY 98)	(FY 99)	(FY2000)	(FY2001)	(FY2002)	(FY2003)
Safe Harbor section 15 (d)	0	5,000,000	5,000,000	5,000,000	5,000,000	5,000,000	5,000,000
HCP Fund section 15 (e)	0	10,000,000	10,000,000	10,000,000	5,000,000	5,000,000	0
Recovery Plans section 15 (f)	0	10,000,000	10,000,000	10,000,000	15,000,000	15,000,000	15,000,000
States section 6(i)(3)	0	n/a	n/a	n/a	n/a	n/a	n/a
Habitat reserves section 10 (m)	0	5,000,000	5,000,000	5,000,000	5,000,000	5,000,000	5,000,000

Explanations

General Authorization

Listing - Litigation support is included in both the listing and recovery estimates

Recovery planning/Implementation - Implementation agreements are required with agencies within 2 years of completion of recovery plans and recovery plans for all species must be completed within 5 years.

Consultation - Requirement for DOI/DOC to contract with NAS (estimate $1 million) for a review of determinations; and increased participation by states and applicants in the development of biological opinions.

Section 9 - Develop no-take agreements.

Section 10 - Technical assistance to state/private landowners; Implement No Surprises, Safe Harbor, and Candidate Conservation assurances; review of low-effects HCPS within specific time-frame; and NAS report on conservation plans (estimate $1 million). NMFS will be required to accelerate its current programs for HCPs, Safe Harbor and CCAs and this accounts for the estimates of funds required to staff these programs.

Section 13 - Property Owners Educational and Technical Assistance Program is a new requirement.

Other Authorizations

1. Safe Harbor Grants

2. Habitat Conservation Planning Fund for States, Counties and local governments: With the listing of West Coast salmon, we anticipate a great interest in this fund.

3. Financial Assistance for Recovery Plan Implementation to private landowners: With the listing of coho and steelhead salmon, many western landowners will be able to benefit from this program.

4. Assistance to State for Conservation Activities. NMFS estimates that about 25 states will be interested in this program including the western states (especially California, Washington and Oregon), the Gulf Coast states (sea turtles) and the Northeast (Atlantic salmon).

5. Habitat Reserve Agreements (assistance to non Federal property owners): Again with the listing of species that occur on private land, NMFS expects this program has the ability to benefit many landowners including states and local governments.

Cost Comparison for S. 1180

	Recovery		Total ESA	
	NMFS	FWS	NMFS	FWS
FY97	$14 M	$39 M	$21 M	
FY98 (as requested)	$20.2 M		$30.7 M	
FY98 Service est	$34.60	80.9	$49.2 M	$135.3 M
FY98 EPW Authorized	n/a		$50 M	
FY99 (as requested)	$33 5 M		$44 M	
FY99 Service est	$47.1 M	$91.5 M	$66.7 M	$165.9 M
FY99 EPW Authorized	n/a		$60 M	
FY00 Service est	$57 1 M	$94 5 M	$82.7 M	$160 1 M
FY00 EPW Authorized	n/a		$70 M	$162.8 M
FY01 Service est	$67.1 M	$90.3 M	$92 M	$170.40
FY01 EPW Authorized	n/a		$70 M	
FY02 Service est	$77.1 M	$90 1 M	$101 M	$170.40
FY02 EPW Authorized	n/a		$70 M	
FY03 Service est	$71 M	$93.5 M	$94 M	$182.7 M
FY03 EPW Authorized	n/a		$70 M	

STATEMENT OF TERRY D. GARCIA, ACTING ASSISTANT SECRETARY FOR OCEANS AND ATMOSPHERE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE

Mr. Chairman and members of the committee, I am pleased to be here today on behalf of the National Oceanic and Atmospheric Administration (NOAA) of the Department of Commerce. NOAA is a partner with the Department of Interior in administering the Endangered Species Act (ESA) and working with other Federal agencies on aspects of its implementation. We are responsible for the protection of many endangered plants and animals that live in the ocean and coastal waters of our nation. Some of the more familiar species we protect are the Pacific and Atlantic salmon, steelhead trout, sea turtles, whales and stellar sea lions.

I welcome the opportunity to discuss with you today the Endangered Species Recovery Act of 1997 (S. 1180) as introduced by Senators Chafee, Baucus, Kempthorne and Reid. First, I would like to congratulate the Senators on reaching a bipartisan consensus on the very difficult issues involved in conserving threatened and endangered species and conserving the ecosystems upon which they depend.

I am very pleased that there is such a strong emphasis in this legislation on the recovery of species that are in trouble. Recovery of listed species, including the conservation of the ecosystems upon which they depend, simply must be the goal of our efforts in this area. Current law requires it, common sense calls for it, and our own experience about what makes for a strong economy and healthy ecosystems dictates it.

Let me be very clear. Extinction of our nation's living resources is not an option. Similarly, merely maintaining species on the brink of extinction is not acceptable. The return of ecosystems and habitats to their full function so that they can sustain species must be the outcome of this legislation. This should be the goal of all our efforts—from low effect permits, to large scale long term habitat conservation plans, to inter-agency consultations under Section 7, to recovery plans for entire species and groups of species. I agree completely with Senator Chafee when he said last week Ait is time to make recovery, rather than mere survival, the standard by which we measure our actions.

Indeed, the principal unfinished business of the current ESA program relates to our ability to enlist non-Federal activities and landowners in the important job of recovery. Look at the map of the Pacific coastline and the job of saving salmon across a geography stretching from the Canadian border to Los Angeles. Then you will understand the essential role of non-Federal parties in getting the job done. One crucial opportunity for filling the gaps in the law is in the area of incentives to landowners, counties and other entities to enter into long-term conservation agreements—an area where the Administration has made great strides that are addressed in the bill.

Of the species under NOAA's jurisdiction, salmon species have been one of the most frequent lightening rods for criticism of the ESA. Their highly migratory nature places them in many states, involving large numbers of stakeholders, many of whom are private citizens and corporations that hold large tracts of land valued as both commercial property and prime salmon habitat.

Long-term management of habitat rather than short-term piecemeal efforts has proven to be the most effective means of recovering species. Landowners are concerned, however, that conservation measures on their land will create future restrictions and that they could be penalized for their efforts. To address these concerns, the Administration reached out to landowners with the "no surprises" policy. Under, "no surprises" in return for entering into agreements to conserve the species, landowners are given assurances that the government will not impose additional requirements in the future. Such certainty allows landowners to plan for the future with the knowledge that a "deal is a deal," and promises that the Services will not require financial or regulatory commitments beyond those in the agreements.

NOAA has been involved in negotiating a number of these agreements, both with states and private landowners. The Departments of Interior and Commerce recently signed a 1.14 million acre multi-species habitat conservation plan with the Washington Department of Natural Resources to protect spotted owl and salmon for 70 to 100 years. The Fish and Wildlife Service and the National Marine Fisheries Service (the Services) have also worked with the Plum Creek Timber Company to conclude a 170,000 acre multi-species habitat conservation plan with strong riparian habitat protections. The plan will provide protection for 50 years, with an option to extend another 50 years. Both Plum Creek and the State of Washington said they came to the table to gain certainty and predictability with respect to ESA action on their lands.

The Administration developed two additional incentives policies to encourage landowners to protect prime habitat—"Safe Harbor Agreements" and "Candidate Conservation Agreements." "Safe harbor" agreements allow landowners to engage in conservation measures without concern that attracting new listed species to their land could restrict future use. Candidate Conservation Agreements encourage landowners to take voluntary proactive measures on their land for species that are not yet listed, but show signs of decline.

These agreements attempt to get species out of the "emergency room," and provide preventative treatment before the conservation and recovery of the species becomes a crisis. We are pleased to see that the bill codifies provisions similar to the Administration's policies, and even goes further toward species protection in certain instances. The "safe harbor" provision ensures that the agreement will, at a minimum, maintain existing condition for the species. In addition, non-listed species receive a higher standard of protection in multi-species conservation plans.

Another important area is in the role of state conservation planning, whereby the full panoply of state authorities and capabilities can be enlisted in the task of recovery B thereby filling those gaps in Federal capabilities that I referenced above. Earlier this year, NOAA and the State of Oregon literally broke the mold in the adoption of the Oregon Plan in lieu of listing coho salmon in northern and central Oregon.

The Oregon Plan is not perfect, and more work must be done to improve it; but it is a fully funded suite of aggressive programs directed to improvements in all aspects of the salmon life cycle. The bi-partisan effort at the state level has our full support. We are working day-by-day and side-by-side on its implementation, and we remain optimistic that it will help save salmon and chart a new course for the next generation of ESA efforts in this country.

The Oregon Plan is also a good example of NOAA's efforts to involve stakeholders in ESA decisionmaking. Involvement of stakeholders creates "ownership" of the process; our efforts in the Pacific Northwest to involve diverse groups have been amply rewarded. In developing the Oregon Plan, NOAA coordinated with the general public, tribal governments, the Watershed Councils, the timber industry, other Federal agencies, and the state agencies, including the Governor's office.

This dynamic process brought all the interested parties to the table with the goal of preserving the area's natural resources and economic stability, and provide greater certainty that the parties would accept and support the end result. Such cooperation ensures that our collective energies will not be squandered on litigation and delay, but will go toward real species protection.

Allow me to give you another example to demonstrate our commitment to public involvement. Prior to the recent steelhead trout listing decision (which involved the states of California, Oregon, Washington, and Idaho), NOAA held 16 public hearings, heard 188 witnesses, and analyzed 939 comments. The public participation provisions of the new bill mirror NOAA's already extensive efforts to fully involve the affected interests.

The Clinton Administration has another goal that goes hand-in-hand with preventing the extinction of species. We believe that we must create strong economies in conjunction with our efforts to protect the environment. The conviction that healthy environments and sustainable economies are inextricably linked is the bedrock upon which our efforts to implement the Endangered Species Act are founded.

Finally, we at NOAA firmly believe that in order to succeed in identifying and recovering threatened and endangered species and the ecosystems upon which they depend, our efforts must be grounded in good science. In our experience, there are no short cuts to or end runs around good science.

As a science-based agency, NOAA welcomes the bill's emphasis on using good science. Basing actions on good science eliminates unnecessary delay over biological issues, enhances species protection, and reduces unnecessary litigation. NOAA is pleased to see the bill codify NOAA's existing policy basing its listing, de-listing, recovery, consultation, and permitting decisions on the best scientific and commercial data available. NOAA also acknowledges the value of peer review, as the agency has followed a peer review policy since 1994. Although NOAA biologists are among the best scientists in the world, peer review helps the agency maintain an unbiased biological perspective.

Good science is the compass that will help us chart our course in the complex and controversial arena of species protection. NOAA especially applauds S. 1180's requirement recovery plans contain a biological recovery goal. The heart of a recovery plan must be biological or the stakeholder process cannot function.

NOAA supports S. 1180's requirement that recovery plans be periodically reviewed to determine if new information warrants a revision of the plan. In some cases, new information may dictate that a plan needs new goals or conservation

measures to achieve recovery, or instead, indicate that certain measures are overly broad or no longer appropriate. The plans will evolve along with the science, and stakeholders can be confident that the plans are based on the most up-to-date information available. Such fine-tuning will maintain faith in the process, and ensure that the recovery plan is the best "road-map" possible to recover the species.

We are concerned, however, about certain provisions of the bill. For example, the new consultation provisions may have the unintended effect of putting species at risk. Under current law, the burden is on the Services to object within 60 days or the proposed action can go forward. This language reverses the current Act's precautionary approach that requires action agencies to obtain concurrence from the Services before an action can proceed.

We recognize this language only applies to informal consultation, and formal consultation is required if the Services object to the finding of "Not Likely to Adversely Affect." However, this provision may be misinterpreted to mean that the highly successful, streamlined consultation process currently underway in the Northwest is not working. The provision also creates another unrealistic and arbitrary deadline.

Moreover, the listing and recovery planning processes required in the bill are highly complex and are driven by very specific deadlines. As I mentioned earlier, most of NOAA's species are highly migratory, and every action, from listing to recovery to de-listing, could require data from vast areas, and involve stakeholders from several states.

It will be difficult to meet many of the interim deadlines given the active role stakeholders and peer reviewers will play in each process. We worry that there may not be sufficient time and flexibility built in to these processes so that NOAA can obtain the good science necessary to make informed decisions. Rather than avoiding litigation, this bill may actually increase it by creating new, unworkable obligations for the involved agencies, including the Federal land management agencies.

Finally, if this Act is to live up to its purpose and conserve species, adequate resources must be provided. Without sufficient funding, the cycle of litigation, conflict and crisis will haunt this Act into the next century, delaying recovery of our invaluable living resources.

The land management agencies also will need additional funding in order to carry out their new responsibilities under this bill. The funding issue involves more than mere authorization levels. It will require firm commitments from Congressional leaders that appropriations increase above current baseline levels for all the agencies that implement the Act and live by it will be provided.

This bill has made tremendous progress since the discussion draft circulated last January. Many particularly troublesome provisions contained in that draft bill, such as a provision on water rights, have been removed all together. Other provisions have been constructively modified, such as the consideration of social and economic impacts in recovery plans.

However, in the Administration's view, some additional changes are required. For example, with respect to consultation, legislative language to stress the importance of early coordination and cooperation among Federal agencies and the ability of agencies to still request and receive concurrence letters is necessary. In addition, there must be a significant reduction in the complexity of the process if Congress does not provide adequate funding to carry out the many prescriptive requirements in this bill. The Administration will provide to the Committee later this week a detailed list of technical and clarifying amendments to S. 1180, as well as suggested report language to accompany key provisions of the bill.

If all our concerns are addressed, then this bill will have the Administration's support. Even as it stands now, this legislation is a tremendous achievement, and deserves serious consideration by all the members of the Committee, the Senate and the House of Representatives.

As you know, members of my staff have provided you extensive technical assistance in preparing this legislation. If, however, our remaining concerns are not addressed, or this bill is saddled with amendments on takings or water rights, NOAA will be forced to oppose the bill. I am certain that with the leadership of these four sponsors, that result is extremely unlikely. We look forward to working with the Committee to discuss the Administration's remaining concerns. Thank you again for the opportunity to share with you my views, and the views of my agency, on this important legislation.

STATEMENT OF GOVERNOR MARC RACICOT, STATE OF MONTANA, ON BEHALF OF THE NATIONAL GOVERNORS' ASSOCIATION AND THE WESTERN GOVERNORS' ASSOCIATION

Appreciation and Representation (WGA/NGA)

Mr. Chairman, Senator Baucus, Members of the Committee. My name is Marc Racicot, Governor of the State of Montana. I am here today representing the Western Governors' Association (WGA) and the National Governors' Association (NGA). I also serve as the vice-chairman of the NGA Natural Resources Committee. I appreciate the opportunity to talk with you about the Governors' perspectives on this unique legislation and its impact on our efforts to protect the nation's conservation resources.

Commendation and History of Governors' Involvement

We support the consensus, bipartisan approach and recommend you move the bill forward. You have made major progress in this bill. We know it is a delicate consensus that has produced the provisions of S. 1180. The Western Governors know well what you and your staffs have endured to reach this point. We started a similar debate in the early years of this decade. As a group we had never experienced a more acrimonious debate—so acrimonious in fact that we had to initially back off our attempt. However, with the leadership of Montana's Governor Stan Stephens on one side of the debate and Idaho's Governor Cecil Andrus on the other, the Governors became convinced that the only way the Endangered Species Act (ESA) could be improved was through a consensus process. That leadership and and that consensus resulted in an outstanding proposal which would strengthen the role of states, streamline the Act, and provide increased certainty and assistance for landowners and water users while at the same time enhancing its conservation objectives. The consensus has since been endorsed by the Western Governors Association, the National Governors Association and the 50 state fish and wildlife agencies through their International Association of Fish and Wildlife Agencies. It was forwarded to you first in the form of legislative principles in 1993 and then in legislative language in September 1995.

Comments on S. 1180

The consensus principles that the Western Governors' Association and National Governors' Association developed on ESA reform are reflected in S. 1180. While none of our members would draft the bill in this exact form, it deserves our active support. Because such consensus on both our parts was difficult and hard fought, it is worth a few minutes to outline here those areas in which we do agree in substance and which we encourage you to retain in the bill and to work with us as you move toward conference committee consideration:

A. A greater State role has been acknowledged in recovery planning, and the bill reflects the strong intent to make states partners in achieving the objectives of the Act by inclusion of language calling for "in cooperation with the States"in the major sections of the Act as well as a strong definition of what that is to entail. (As a technical point, we suggest the committee may have inadvertently missed inserting that phrase in the sections on "safe harbor," Candidate Conservation Agreements, Section 7, and Implementation Agreements.);

B. Inclusion of strong incentives for private landowners like "safe harbor" and "no surprises," Habitat Conservation Planning Fund, technical assistance to enable landowners and water users to be true partners in reversing the decline of species and their habitat, and, in the companion bill, tax incentives for land owners;

C. Peer review of listing decisions;

D. Greatly enhanced public comment and involvement in all aspects of the Act;

E. Elevating the Recovery of Species to a central focus of the Act and the incorporation of Implementation Agreements with Federal agencies and other entities to ensure that recovery plans are not only comprehensive and inclusive in their effort to conserve species, but also carried out;

F. Multispecies Habitat Conservation Plans and a Streamlined HCP process for small landowners with small impacts;

G. Designation of critical habitat at recovery planning stage where it is most sensible and practical;

H. Increase rigor in the listing process; and

I. Increased funding authorization to carry out the new and expanded requirements of the Act.

As I'm sure you can appreciate, there were issues upon which the Governors could not reach consensus—areas which I know caused you difficulty as well: water rights, Section 7, and a narrower definition of "take". Each Governor is working on those particular issues from the unique perspectives of their states and their needs. How-

ever, just as the Governors were able to move ahead and reach overall consensus, we are encouraged that this Committee did the same. We strongly encourage you to retain the consensus you have reached and to move ahead with this legislation. The vital natural resources which we all wish to see sustained and conserved depend upon the incentives, the streamlining and the acknowledgment of partnership that are integral to this legislation.

I want to note that you were able to reach consensus on Section 7 which eluded us in our deliberations. The Governors cannot specifically endorse that consensus because it is beyond the scope of our own agreement, but we encourage you to keep up your effort.

There were also four areas in which the Governors did reach consensus and on which you did not. We believe they would be very important and effective additions to your legislation. We understand that you have a consensus bill here and that you need to move it basically intact, so we request the opportunity to work with you and all the parties that are necessary to consensus prior to conference to try to meld in these four areas of gubernatorial consensus: State-initiated Conservation Agreements, adequate funding, a more rigorous and less costly delisting process, and reconfirmation of the intent of Congress to have a statutory and regulatory distinction between a species listed under the Act as threatened or as endangered.

I would like to highlight the most critical of those four for you. In my state, we have pulled together a broad-based group representing the major stakeholders with an interest in Bull Trout conservation. This Bull Trout Restoration Team has been working to develop a conservation plan for this candidate species which would provide the basis for conservation and recovery. The type of agreements we can forge and the flexibility we need to forge those agreements are possible with a candidate species, but next to impossible if listing were to occur under the ESA. Yet, litigation and the deadline triggered by that petition is forcing the Fish and Wildlife Service toward that very listing—to the detriment, we believe, of our cooperative efforts and the Bull Trout.

At the heart of our recommendations is preventative conservation and that is why our states are actively engaged in developing conservation plans to restore declining species before they need the protections of the Act. Your bill provides for Candidate Conservation Agreements under Section 10 of the Act and that is a step in the right direction. However, human nature makes it difficult for most of us to notice the gradual loss in the number and habitat of species. We often need a wake up call, especially to mobilize resources on a large scale. Unfortunately the alarm is often a petition to list a species, which triggers a listing deadline that often can not be met in time as is likely to occur with the Bull Trout. If the petition has merit, the listing needs to proceed in order to bring the protections of the Act into play. The listing forces Federal agencies to consult on actions that may affect the species, yet the listing brings less protection to the majority of species using private lands. While your bill will make it more likely that individual land owners and water users will become partners in conservation, all Federal and state officials know that a listing chills voluntary efforts to conserve species on private lands.

This is why my colleagues and I urge you incorporate state-initiated conservation agreements under Section 4 of the Act into your bill. Under these agreements a listing would proceed. However, if an agreement was close to being implemented, the effects of the Act would be suspended for the state or states where they were being developed or, if later, once the agreements were implemented. If the effort falters or if the parties do not fulfill their obligations, then the full effect of the listing would be triggered. That threat in fact is a spur to action.

The benefits can be enormous. A Governor can use the wake-up call to rally a coalition of state, Federal, private and non-profit interests to conserve species through voluntary, but scientifically reviewed, monitored and reported, efforts. The financial and other resources of the parties are leveraged that would otherwise be scattered by the listing. More importantly, threats to the species are addressed and efforts are mobilized to remove the need to list the species. If all goes well, this could be accomplished in nearly the time that the Secretary takes to determine whether or not to list the species. Without such agreements, it would take two additional years to develop a Recovery Plan and additional time to fully implement recovery agreements. Also, states and their communities can retain control over their destiny instead of the courts; large political capital is expended and conservation is made a clear priority. Additional safeguards also exist: the Secretary must concur that the agreements will conserve the species and the Secretary's emergency listing authority remains in place.

The recent Oregon Coastal Coho Restoration Plan in which Governor Kitzhaber has leveraged $15 million in state and private funds and the current collaborative effort of the Governors of Washington, Oregon, Idaho, and California to conserve the

steelhead trout are examples of the energy and leadership that exists among the nation's Governors. Other such examples include the recent conservation agreement in Kentucky, Illinois, and Indiana to conserve the Copperbelly Water Snake, and in Texas to conserve the Barton Springs Salamander.

My colleagues in Oregon and Texas invite the members of your committee and the House Resources Committee and staff and other interested groups to visit them and see how these Conservation Agreements work on the ground. Naturally, Montana or any other state in the West would be pleased to act as host as well. We encourage you to accept this invitation and learn why incorporation of State-initiated Conservation Agreement language in your legislation is so critical to species conservation and to getting active, early state participation.

Inadequate funding has been a major impediment to the success of the ESA and to the public's support of the Act. Funding must match the design of a reauthorized Act with its increased role for the states, its incentives and assistance for private landowners, and its emphasis on recovery. Without adequate funding, burdens are unfairly placed on local communities and owners of private property. We are pleased that the bill doubles the authorization for carrying out the Act, but we note that the funding must be stable and actually appropriated. If a stable funding source can not be found, then we suggest that the bill establish a national task force composed of Federal, state, local representatives and the general public to identify creative and equitable funding strategies.

We encourage your consideration of a change very high on the priority list of the Governors. That in the listing process, there be a rebuttable presumption that the state assessment is accurate when the Secretary is making the final listing determination. Very, very often listing is based on incomplete science and conclusions not supported by the evidence. Despite the improvements in S. 1180 regarding the listing process, it does not provide for those circumstances when data is sketchy or unavailable—the instances which are causing poor listing decisions under the current Act.

The bill provides for an effective trigger to initiate the delisting process when recovery goals have been met. But the cost, complexity and probability of delisting will remain unless an alternative to use of the Section 4(a) criteria—in reverse—is developed. The Governors advocate a simplified process utilizing rulemaking that would take advantage of the wealth of information and progress already made through accomplishment of the recovery goals. As the Governor of the state of Montana, I also strongly encourage the Committee to consider including provisions whereby delisting could occur by state boundaries or other boundaries based on standards and criteria developed by the Secretary in cooperation with the states. This is particularly important as flexibility to list a species more precisely based on existing efforts have not been incorporated. We all agree that incentives to private landowners are important. This is one incentive that is imperative to state involvement so that good efforts will be rewarded without being held hostage to efforts by others.

Congress originally intended but court cases and rulemaking have completely blurred, a distinction between a "threatened" and an "endangered" species. Such a distinction also provides incentives for states and private landowners to work to down-list a species to take advantage of increased flexibility and greater management freedoms. We strongly encourage you to reconfirm the listing distinction originally included in the Act.

Thank you very much for the opportunity to provide these written comments on behalf of the nation's Governors. Please contact my office or the Western Governors Association if we can provide any additional clarification or detail about our testimony.

Office of the Governor, State of Montana
September 26, 1997

HON. JOHN CHAFEE, *Chairman,*
Committee on Environment and Public Works,
Dirksen Senate Office Building,
U.S. Senate, Washington, DC

Dear Senators Chafee and Baucus: want appreciated the opportunity to appear before the Senate Environment and Public Works Committee on Tuesday concerning the reauthorization of the Endangered Species Act (ESA). There were at least two issues we discussed that would benefit from further clarification in S. 1180—issues exceptionally important to the Governors.

Your legislation meets one of the chief concerns of the states by providing a substantial increase in funding for ESA activities. However, all of the funds provided

are directed to the two Federal services. It is not clear that any portion of those funds or other funding was dedicated to Section 6 funding for the states and the legislation lacks explicit authority for and direction to the Secretary to channel funds to states to complete recovery planning responsibilities he would otherwise perform. Further imbalancing funding between the Federal and state partners will result in greatly increased Federal activities and Federal employees which will unalterably change the parity necessary between states and the Federal Government in ESA activities. In order for the strong language in the legislation calling for state authority to develop recovery plans to be effective want would ask you to consider an explicit requirement that such funding flow through to a state assuming recovery planning authority.

The second area of key significance to the Governors is state-initiated conservation agreements to encourage preventative efforts by states in species and habitat conservation. This is the surest avenue to reduced long-term recovery planning and implementation costs under the ESA for the Federal Government, states and private landowners. There must be an incentive and consistent, dedicated funding for the states to initiate such proactive undertakings. Without precise ESA authority that recognizes the legal basis for such agreements should listing occur, there is absolutely no incentive to initiate them and every cost and resource disincentive to do so.

Though S. 1180 includes language on conservation agreements, the qualification of that language by the term "non-Federal person" and its inclusion in Section 10 concerns us greatly. Inclusion in Section 10 strongly implies that such conservation agreements are only valid when tied to a Habitat Conservation Plan for a listed species. Effective state initiated conservation agreements must be authorized in Section 4(a) of the Act because such agreements must not be set aside by the decision to list or preempted by the time-lines required by the listing process. The language now in S. 1180 would suffice if included in Section 4(a).

The Western Governors Association (WGA) will, this afternoon, provide technical amendments addressing the inclusion of the "in cooperation with the states" language in the provisions dealing with Safe Harbor Agreements, Candidate Conservation Agreements, Implementation Agreements, and Habitat Reserve Program Agreements.

Because funding dollars are so scarce, we would suggest your serious consideration of the Teaming With Wildlife proposal now being circulated by the International Association of Fish and Wildlife Agencies as a means to provide the dedicated funds.. The States have demonstrated remarkable conservation success with sport fish and game wildlife through the Wallop-Breaux and Pittman-Robinson programs. Teaming With Wildlife may offer an opportunity to utilize that same formula for success in non-game wildlife efforts critical to conserving species prior to a need to list under the ESA. Providing such secure funding in combination with the changes identified in your consensus bill and by the Governors would represent a significant milestone in rich conservation history of this nation.

Thank you for your good work and for the courtesy you extended to me during my testimony. i believe that the information in this letter will help to clarify that testimony and promote strong reauthorization of the Act.

If want can provide any additional information about the issues discussed here, please contact me.

Sincerely,

Marc Racicot.

Governor.

ENDANGERED SPECIES RECOVERY ACT OF 1997

WEDNESDAY, SEPTEMBER 24, 1997

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The committee met, pursuant to recess, at 9:30 a.m. in room 406, Dirksen Senate Office Building, Hon. John H. Chafee (chairman of the committee) presiding.

Present: Senators Chafee, Thomas, Kempthorne, Sessions, Wyden, and Baucus.

OPENING STATEMENT OF HON. JOHN H. CHAFEE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator CHAFEE. We want to welcome everyone this morning. We appreciate the panel taking the trouble to come back today.

As always, there are conflicts, particularly this morning. As you know, the Finance Committee is having a hearing on the IRS, and there are, I think, a total of five members on this committee, or four, who are on the Finance Committee, so that makes life somewhat difficult. Senator Baucus is one of those, and I expect Senator Baucus will be here shortly.

Obviously, your testimony will be included in the record in full, as will many of the statements and so forth that take place here.

Now, if the next panel, panel two, would please come forward to the table—again, I want to thank you for taking the trouble to come back again today.

The first witness on the panel will be former Senator James McClure, who served with distinction on this committee for a number of years. When I first came on the committee, Senator McClure was here, and we worked together on a whole series of matters. I can remember working on the Lacy Act, which he knew a lot more about than I did. Even when we were finished, he knew a lot more about it than I did.

So we welcome you, Senator. Why don't you proceed?

STATEMENT OF HON. JAMES A. MC CLURE, CHAIRMAN, NATIONAL ENDANGERED SPECIES ACT REFORM COALITION

Mr. MCCLURE. Thank you very much, Mr. Chairman.

I am very familiar with the kind of conflicts you have up here. I vaguely remember how disruptive it is to your life and to your plans.

Let me start by stating my real appreciation for the opportunity to appear here on behalf of the membership of National Endan-

gered Species Act Reform Coalition, NESARC, which I have the honor to chair. I appreciate the efforts, and I really do appreciate the efforts of the four of you who have drafted this proposed legislation. I recognize how difficult it is in the polarized and often contentious areas in which you must work, how difficult it is to achieve a consensus that allows you to do anything more than minimal. This bill is more than minimal.

It would also be certainly candid on my part to confess that it isn't the bill I would have drafted or would personally desire, nor is it exactly the kind of legislation that our coalition would desire, but we recognize it as a significant improvement over the status quo. Certainly the Act needs to be reauthorized. Congress should work its will with respect to this legislation, as difficult as that is.

I was an active participant in the Senate debates in this committee and on the floor at the time the Act was passed in the first place, and I remember some of the difficulties we had and some of the ambiguities that we consciously left.

Senator CHAFEE. I think it passed unanimously in the Senate on the floor of the Senate.

Mr. MCCLURE. Yes. But that does not mean that there was a unanimous understanding about exactly what we had done.

[Laughter.]

Senator CHAFEE. There frequently seems to be wisdom, particularly, I notice, on foreign relations matters, to leave things a little vague.

Mr. MCCLURE. Once in a while an artful ambiguity is useful. In this case it was an ambiguity because we simply couldn't resolve some of the issues and, second, because we weren't quite sure what it was we were setting in motion, but it was very clear that Congress intended to revisit the Act when we had had more experience with it, and we have not done that as well as we should have because it is very difficult.

Good morning, Senator Kempthorne. Glad to have you here this morning and to recognize your leadership, in particular, in bringing this to the point where we are today.

Senator KEMPTHORNE. Thank you, Senator McClure.

Mr. MCCLURE. So NESARC does support this legislation. We would also urge some improvements, and I say that not for 1 minute derogating or diminishing the difficulty of making those improvements. I recognize how difficult it has been to get here.

We also support S. 1180, which is another bill by Senator Kempthorne to provide a number of important incentives, including several tax breaks and compensation for regulatory takings.

We believe it's just not fair for society to take somebody's property and make no compensation for it. It just isn't fair. And when you get down to the core of some of the programs we have in the application of the Act, it is a recognition that the burden of society's policy is put on a few. That isn't the way it ought to be. If society wants to do something that impairs somebody else's property values, then that person ought to be compensated for that diminution of value.

That's easy to say and harder to do, and I recognize that, as well.

Let me turn for a moment to some of our specific concerns regarding the implementation of ESA and the steps that S. 1180 takes to address our concerns.

Citizen participation, especially those whose livelihoods are most affected by the conservation measures, should have a greater stake in the ESA decisionmaking, and we support the citizen participation provisions of S. 1180.

Shared burdens—ESA is supposed to be for the benefit of all citizens. That may be true, but our members bear a disproportionate amount of the costs. Costs should be borne more even-handedly, particularly where the Act limits perfectly legal activities—indeed, necessary activities in our society—and we urge their full funding and support.

On water rights, Mr. Chairman, we believe that Congress should take action to ensure that the ESA is in harmony with and recognizes the primacy of State water law. I know this issue is important to Senator Kempthorne and other members of the committee, and I hope we can come to a resolution. I can make a suggestion or two if you'd like.

On consultation, we support provisions in S. 1180 to find the scope of measures that may be imposed during consultation. NESARC also supports provisions that allow the action agency to determine, in limited situations, that a proposed action is not likely to adversely affect listed species. There are more than enough adequate safeguards to ensure the biological integrity of this process, and we also support more-cooperative, consolidated consultations.

We support broader reforms than this, but we recognize improvements in the bill.

Definition of take—finally, Mr. Chairman, we support amending the definition of take. We believe ESA originally was intended to prohibit activities directed toward an identifiable member of a species as the word "take" was understood in the common law on game and wildlife.

We understand that the co-sponsors of S. 1180 had not come to an agreement on this issue; nevertheless, our views have not changed. We do support provisions that require, before initiating a take enforcement action, a scientific determination that a take actually would occur.

I would particularly call attention in my prepared testimony to my reference to my last appearance before this committee on this subject in 1994, and I've attached a copy of that testimony. It indicates, I believe, that we have been consistent in our position.

I want to, just for the record, state a couple of things, as Senator Baucus did yesterday, what NESARC is not, as Senator Baucus indicated what this bill is not yesterday.

NESARC is not just an industry group. We have a broad coalition of different kinds of groups representing millions of Americans, and it has sometimes been described as an industry group, which I think is inaccurate.

I want to very strongly indicate, as the name of our organization indicates, we are not advocating the repeal or destruction of ESA. We support its objectives. We support strengthening those objectives. We support making this bill more workable. We commend

you for what you've done and would look forward to whatever questions you might wish to ask.

Senator CHAFEE. Thank you very much, Senator. I appreciate your testimony.

What we'll do is we'll hear from each of the five witnesses, and then we'll have questions.

As you know, the Senate is not going in today until later on, so there's no problem with that 3-hour rule, 2-hour rule, and we want every witness to be able to have his statement submitted and a good question period.

Mr. Michael Bean, director of the wildlife program for the EDF, Environmental Defense Fund.

Mr. Bean, we welcome you here. Won't you proceed?

STATEMENT OF MICHAEL BEAN, DIRECTOR, WILDLIFE PROGRAM, ENVIRONMENTAL DEFENSE FUND

Mr. BEAN. Thank you, Mr. Chairman, members of the committee.

I'm Michael Bean, testifying this morning on behalf of the Environmental Defense Fund, for which I work, the Center for Marine Conservation, and the World Wildlife Fund.

I recognize that for the last 6 years Congress has been deadlocked on what to do about the Endangered Species Act, and in panels like the one you have before you this morning you've heard two widely divergent views about what you should do.

From the environmental community, you've heard that the Act has to be strengthened, that it's not doing as effective a job as it needs to do. And from those in the regulated community you've heard that it has to be relaxed, that it's too burdensome, it's too onerous, and so forth. And Congress has, frankly, been unable to choose between those two points of view and has done nothing. And, having done nothing, it has served the interests of neither of those two camps, nor has it served the interests of our declining wildlife.

I believe that the solution to this impasse is to recognize that what is needed is not to choose between those two points of view, but to find a solution that accomplishes both goals, that makes the Act more effective in protecting endangered species, while making it less onerous for those that it regulates.

Having said that, however, I have to emphasize that that's a lot easier to say than it is to do. It is not so simple as just relaxing restrictions and the Act will automatically become more effective, but neither, I would acknowledge, is it so simple as saying that by tightening restrictions the Act automatically does a better job at protecting species.

There are, I think, significant differences of opinion—you've heard them yesterday and you'll hear them today—about how well you have done in trying to meet those two objectives, but I believe, and I very much appreciate the fact that I think the four of you, with Senator Reid, have really tried to do that, and that is something that has not often been tried in the last 6 years. So I think you are deserving of credit for that, as is Secretary Babbitt, with whom you've worked.

Let me turn to the substance of what you've produced.

I think there are many positive features of this bill. There are also features that give me some concern. I want to address both of those.

First, I think one of the most positive features in this bill are the new incentive programs, new cost-sharing assistance programs for private landowners, and there are a couple of simple reasons why those are so important.

First, most endangered species have most of their habitat on private land. Second, those species, in general, are not faring very well. And, third, many of those species absolutely depend upon active management of their habitat if they are to persist. Without cost-sharing assistance, many landowners can't implement the needed management measures, and without those management measures the continued decline of many species is virtually assured.

For those reasons, I think the financial assistance provisions of your bill are extremely important, but there is one big caveat: those have got to be funded. Without funding, the potential of those programs to do some positive good for endangered species won't be realized.

I'd like, if I may, Mr. Chairman, to enter into the record a letter that I provided your staff yesterday signed by the American Farm Bureau Federation, Environmental Defense Fund, and Center for Marine Conservation. I should add that both Defenders of Wildlife and World Wildlife Fund wish to be associated with this letter, as well. This calls upon you to make a very earnest effort to find a secure source of assured funding for these incentive programs, because we all believe—the Farm Bureau and the environmental organizations I named—that these are vitally important measures for improving the conservation of endangered species and for improving the relations between landowners and conservation agencies. So, if I may, I'd like to have that entered into the record.

Senator CHAFEE. Yes. Definitely.

Mr. BEAN. I think the bill also deserves credit for improving the standards for approval of habitat conservation plans that pertain to listed and unlisted species. I commend that aspect of the bill.

With respect to the "no surprises" policy which your bill codifies, I think it is extremely important to bear in mind that, while that policy lifts burdens in the sense of removing uncertainty from regulated interests, absent some mechanism to ensure that the Government can pick up the slack when necessary, when unforeseen circumstances do arise, the risk is shifted that we will not effectively save a species. And so I would encourage you again to think very creatively about ways to make sure the Secretary has the resources to step in when necessary, in light of the"no surprises" policy.

I have also addressed in my testimony, Mr. Chairman, what I believe are some serious resource problems stemming from the requirements with respect to recovery planning.

As you know, this bill imposes some substantial new requirements for recovery planning and requires that an existing backlog of species that current lack recovery plans be eliminated over 5 years. There are now 389 species that are listed that don't have recovery plans, and another 99 that are proposed for listing and likely to be listed soon.

At the rate of recovery plan preparation over the last 5 years, it will take 8 years of effort to eliminate that backlog. Put differently, to do what this bill requires, to eliminate that backlog in 5 years would require a 40 percent increase over current levels of resources, and that's assuming no change in procedures, but your bill does make procedural changes that are difficult. And it also assumes that nothing else gets listed in the meantime. So I want to underscore what I think is a very serious resource limitation problem that this bill will create.

Senator CHAFEE. That gets to your first point about the funding.

Mr. BEAN. Yes. That's correct.

Let me just conclude this way, because I see I have exceeded my time already, for which I apologize. My written testimony ends with a quotation from William Beebe, who was a close friend of Teddy Roosevelt, but let me just very briefly describe what I think is an important lesson for this, one of the last Congresses of this century, to learn from our first President of this century, and in my opinion our greatest American President.

Teddy Roosevelt was very bold about a conservation vision for the future. We can enjoy today and will enjoy over the next century the 51 national wildlife refuges, the five national parks, the literally scores of national forests that he created, and the 232 million acres of land that he set aside for various forms of protection.

He had a bold vision for conservation for the future that has endured, and I think the challenge you face today in recognizing the threats to endangered species is no less a challenge than he faced then, and I hope that you will understand the gravity of that challenge and that you will set in motion some programs and new ideas that can sustain a conservation vision for the next century as effectively as that first republican President of this century did.

Thank you.

Senator CHAFEE. Thank you very much, Mr. Bean. I was about to discuss that Teddy Roosevelt television series that was on last evening——

Mr. BEAN. I have to confess I watched it and that's where I got these facts.

[Laughter.]

Senator CHAFEE. And it went right into everything you discussed, particularly about his founding of the first Fish and Wildlife refuge, which was in Florida.

Thank you very much. We'll get into questions.

I noticed in your testimony you have some suggestions of where you think the funding might be.

Senator CHAFEE. Mr. Henson Moore was a distinguished Member of the House of Representatives.

Mr. Moore, we're delighted to have you here.

STATEMENT OF HON. W. HENSON MOORE, PRESIDENT, CHIEF EXECUTIVE OFFICER, AND CO-CHAIR, AMERICAN FOREST AND PAPER ASSOCIATION, ON BEHALF OF THE ENDANGERED SPECIES COORDINATING COUNCIL

Mr. MOORE. Thank you, Mr. Chairman. I'd like to ask that my written testimony be made a part of the record.

Senator CHAFEE. It will be.

Mr. MOORE. I'm here representing the American Forest and Paper Association, which represents the timber and paper industry, but also the Endangered Species Coordinating Council, which represents another 200 organizations and companies, including labor, ranching, mining, fishing, and other agricultural groups.

I think I'm going to say with sincere conviction, as Mr. Bean did, that I don't think any of us thought anything was going to happen with Endangered Species Act updating—and it needed to be updated—until you all got involved. And I think that you have my complete and all of the organizations I represent complete respect and complete gratitude for the fact you're willing to tackle this issue.

You, Mr. Chairman, Senator Baucus, Senator Reid, certainly Secretary Babbitt, and especially Senator Kempthorne have decided to take on an issue that certainly nobody is marching in the street saying it needs to be done. It certainly doesn't register on anybody's poll of issues that have to be done. But it is a very profound law that has a tremendous impact or could on the nature and the environment of this country, as well as on human beings who happen to be in conflict with that.

The fact that this law has been in effect now some 23 or 24 years, we've learned—and most anybody that deals with the Act knows there are some things that need to be done to update it and make it work more fairly and more effectively. The fact that you all took this on and took on essentially extremists from both ends is a fact of legislative leadership that I think is all too rare today, and I compliment you for having done that.

You have ignored the extremes, those that say, "Don't do anything, or increase the burdens, get out more bayonets, let's get more rifles out, we'll make this thing work yet." You've also ignored the extremes who say, "Let's gut the law. Let's do away with the law. Let's find some new regime that we've yet to try that might make all this work."

You have really approached this, the point of view that, in our opinion, the statute hasn't really worked as it should have, it hasn't really—only four species, according to the numbers we see, out of 1,500 listed have been de-listed because of recovery.

We spend hundreds of millions of dollars, and there is angst in communities and in families and in landowners across the country coming into conflict with this statute.

What you have done, we find it rather incredulous to find difficulty with—the idea that we're going to have better science, the idea that you put stakeholders and communities at the table, the idea you consider alternative recovery plans, that you do codify provisions that we have to compliment the Administration for initiating, that may be in danger because they do not have a statutory background or may not be considered that by a court.

We think all of these make the law work more fairly, make the law work better, and certainly update the statute.

Nobody is going to be 100 percent happy with this statute. You're already hearing that and seeing that in news clips this morning of the testimony yesterday. But the polls we just recently saw show that 70 percent of the American people would approve of what

you're doing—of updating the statute in a very limited way to make it work better.

Will it work better? It is our considered opinion, from looking at these provisions in this bill, that it definitely will work better than the existing statute on both camps that Mr. Bean so adequately described—trying to protect nature, and also at the same time trying to be fairer to those people who ultimately bear the burden of this protection.

We're not going to ever give up on the comment that Senator McClure made, that we do need to ultimately have the question of property rights and compensation dealt with, but we also realize that this probably isn't the time politically to be able to do that.

We also think that there are new issues that this bill could have taken up, and it didn't, such as the attempt by EPA and the Fish and Wildlife Service to impose Endangered Species Act on the Clean Water Act, which we think is something that the Congress ought to do, not something that ought to be done administratively. But there, again, we recognize that's probably something that can't be done now.

Overall, this legislation is not earth-shaking. We look at it as being marginal changes to procedures, not to the substance of the law. Those marginal changes need to be made to make it work better and to make it work more fairly. And at this particular moment in history, with this Administration and perhaps even this Congress, that may be the best that can be done, is make procedural changes to make the law work better, and that's the position that we've come to. While we'd like to see more, we just don't think that's probably possible at the present time.

You all have done what we hoped we'll see happen, is find a consensus. Any time you have a complicated—in my observation—and a very controversial and a very emotional piece of legislation, which this one certainly is, or this law certainly is, you have to have consensus to be able to address it, and it seems to me that you've found grounds for consensus, common ground. You found it in a bipartisan way, and even with assistance from the Administration, and that to us gives us hope that yet this law can be made to work effectively and, at the same time, more fairly.

Therefore, Mr. Chairman, while we do have some reservations, we put those reservations aside to work with you in the course of the markup and say, without any equivocation, we strongly support your efforts and we strongly support the legislation.

Senator CHAFEE. Thank you very much, Mr. Moore.

Mr. Mark Van Putten is president of the National Wildlife Federation and has brought great energy to that job. Indeed, he hired away our staff director.

[Laughter.]

Senator CHAFEE. But we'll forgive him for that.

Mr. Van Putten, we're delighted you're here. Won't you proceed?

STATEMENT OF MARK VAN PUTTEN, DIRECTOR, NATIONAL WILDLIFE FEDERATION

Mr. VAN PUTTEN. Thank you, Senator Chafee and members of the committee. I appreciate the opportunity to appear before you today on behalf of the National Wildlife Federation, America's larg-

est conservation education and advocacy organization. But, in addition to being big, I'd like to emphasize the fact that we are diverse and we represent mainstream American values. Our ranks include hikers, birders, outdoor enthusiasts, hunters, and anglers—the diverse set of Americans who enjoy our out-of-doors and appreciate the importance of species.

For our membership, the protection of species and the interests of private property owners are not at odds with one an other. Our ranks include State affiliates, such as: the Environmental Council of Rhode Island, the Montana Wildlife Federation, the Idaho Wildlife Federation, and the Wyoming Wildlife Federation—independent State affiliates that send delegates that elect our board and establish our conservation policies.

I'd like to join all of the witnesses who have testified over the past 2 days in commending Senator Chafee, Senator Baucus, Senator Kempthorne, and Senator Reid for your accomplishment in working on a consensus basis to produce a bill.

I think the touchstone for measuring that bill, from our perspective, was best articulated by Senator Baucus in his opening remarks yesterday when he said, "The measure of this bill should not be what it does not do, but what it does do," and I agree entirely with that, and was also heartened to hear Senator Baucus characterize this bill as a starting point.

Given some of the rhetoric and the polarization around this issue over the past few years, I acknowledge that, from a damage control point of view, this bill is an accomplishment in not doing as much damage to the Endangered Species Act as some of the radical anti-environmental proposals would have accomplished. But, measured against Senator Baucus' standard, which we believe is the right one, and noting the improvements in the bill that we have identified in our section-by-section analysis attached to my written testimony, we have concluded that, on balance, this bill does not enhance the conservation of endangered species and their habitat.

Throughout this discussion, the National Wildlife Federation has clearly and consistently articulated four goals for Endangered Species Act reauthorization, and I would like to briefly speak about each of those and our assessment of this bill against those goals.

First of all, funding. There has been a lot said about funding over the last 2 days, and I will not repeat it other than to say that we share the concerns of all witnesses on that, and that noting there are really three different funding issues. They are: the issue of adequately funding the agencies, Federal and State, charged with implementing the bill; second, the issue of when HCPs go bad, when they don't work out right, how will the necessary changes be funded; and, third, the issue of funding landowner incentives. We look forward to a creative discussion about ways in which to come up with a dedicated revenue stream for those areas. We think leaving it up to the appropriation committees is not a satisfactory approach.

The second issue that we've consistently identified as critical is habitat conservation plans. We recognize and join with others who have testified in acknowledging the critical importance of private lands for endangered species. The issue for us is not to be for or against habitat conservation plans; it is how to learn from the ex-

perience so far and distill from that the improvements that need to be made.

We have convened two conferences over the last year of stakeholders and individuals and groups who have been involved in the HCP process—one in the Pacific Northwest and a national conference this May in Washington.

And, based on our assessment of HCPs developed to date, we have concluded that the bill that you have drafted is deficient in two respects.

First of all, it does not require that the approval of HCPs not undermine the recovery of endangered species. Second, we believe that the Administration's "no surprises" policy that would be enshrined in law in your bill does not adequately provide for adaptive management and adequate biological monitoring. In my written statement we have made specific proposals to address that.

The third touchstone that we have articulated for the Endangered Species Act is the enhancement of citizen participation and fairness in the process. To date, it has been our experience and the experience of our members, State affiliates, and other like-minded organizations, that citizens are routinely excluded from the HCP process, or they are only there at the sufferance of the permit applicant. We think it's important that the legislation ensure adequate citizen participation in the HCP process so they are not merely presented with *fait accompli* at its end.

The final point that we have identified as a touchstone for measuring the adequacy of any efforts to reauthorize the Endangered Species Act is to increase agency effectiveness and accountability. And here, too, I would echo the concerns that many witnesses have articulated previously about the additional procedural requirements that will be placed on the agencies. We think, particularly given the vagaries of the funding at this point, it may result in setting up the Act and the agencies for further failure and further discrediting of their efforts to conserve endangered and threatened species.

Having said that, on balance we conclude that this bill does not enhance the conservation of endangered species and their habitat.

I would end by noting that I believe you have provided a framework for doing so. You have identified, in our view, the critical issues. You have made efforts to address those issues. And we look forward to working with this committee and throughout the process of considering this legislation to address the issues that we have identified.

Thank you very much, Mr. Chairman.

Senator CHAFEE. Well, thank you very much, Mr. Van Putten, for that constructive testimony. We appreciate your having submitted it, and we'll obviously be asking you some questions as we go along here.

Mr. Duane Shroufe, who is director of the Arizona Department of Game and Fish—again, we want to thank you for coming here. I realize you had to stay an extra day. I'm sorry that occurred.

Won't you proceed?

STATEMENT OF DUANE SHROUFE, DIRECTOR, ARIZONA DEPARTMENT OF GAME AND FISH

Mr. SHROUFE. Thank you, Mr. Chairman, for the opportunity to appear before you today to share the perspectives of the International Association of Fish and Wildlife Agencies on S. 1180, the Endangered Species Recovery Act of 1997.

My name is Duane Shroufe, and I'm director of the Arizona Game and Fish Department and immediate past president of the Association. I'd like to commend you, Senator Kempthorne, Senator Baucus, and Senator Reid for your persistence and dedication to producing this consensus proposal on a difficult but extremely important conservation issue.

On behalf of the Association, I bring to you today the firm support of S. 1180. The Association believes that this bill improves the effectiveness of the Endangered Species Act for both the conservation of fish, wildlife, and plant species, and with regards to appropriate certainty for the regulated community.

While we offer some suggested improvements in our written statement to sharpen these aspects and will strongly encourage a commitment to securing robust appropriations for the implementation of this bill, the Association reiterates its firm support of the bill.

I'd like to start by recognizing and thanking the bill sponsors for grounding this bill in the collective legislative recommendations from our Association and the nation's Governors, under the leadership of the Western Governors Association, which we shared with you starting in the first session of last Congress.

We believe you, as did we, recognized that over the 25 years of the Endangered Species Act, we have a much better understanding of what works under the Act, what doesn't, and how it can be improved.

The State Fish and Wildlife Agencies' objectives are fairly straightforward: to successfully carry out our responsibilities as public trust agencies to our citizens to ensure the vitality of our fish and wildlife resources for present and future generations, and to encourage, facilitate, and enhance the opportunities, means, and methods available to all citizens, and especially landowners in our States, to contribute to meeting this conservation objective, in cooperation with our agencies and our Federal counterparts.

Much of this involves solving problems and the reconciliation of differences, and we believe that this bill provides new and useful tools, opportunities, and directions to achieve both of these objectives.

Let me first strongly urge Congress and the conservation community to collectively dedicate ourselves to securing the appropriations necessary to fulfill these improvements. All of these changes will require the additional time and attention of Federal and State wildlife agencies and need to be adequately funded in order to meet the objectives to improve the effectiveness of the Act to achieve conservation objectives, and with regards to the appropriate certainty for the regulated community.

We firmly believe that S. 1180 goes a long ways toward reaffirming the State fish and wildlife agencies' role in all aspects of ESA, reflecting our concurrent jurisdiction over listed species, as we be-

lieve Congress originally intended under the Act, and sets the stage for more efficient and effective administration of the endangered species programs.

Also, we believe that the affirmation of the true partnership between the State Fish and Wildlife Agencies and the U.S. Fish and Wildlife Service and National Marine Fisheries Service will take full advantage of the expertise in fish, wildlife, and plant conservation that exists at both the State and Federal level, while minimizing duplicative processes and administrative burdens, in a relief that we can hardly afford to ignore in these times of constrained natural resource budgets.

The Association encourages you and your staff to accept Governor Racicot's invitation to visit any of our States, to experience first-hand the value of preventive conservation measures long before the need to list a species occurs.

This just makes good common sense and good biological sense to avoid the crisis of listing. The Association reaffirms its commitment to prudent conservation of fish, wildlife, and natural communities that they depend on, so that the need to impose the rigors of the ESA is minimized.

And I'd also like to personally invite you to Arizona, where we can show you examples of how these conservation agreements—we have several species, or small native fish—the Virgin spinedace, the Ramsey Canyon leopard frog, and the flat-tailed horned lizard, on which we have put together conservation agreements in lieu of listing that are working very, very well.

We can also show you an example of one that didn't quite make it, the jaguar. That was a conservation agreement attempt, in my opinion, that brought our communities in Arizona closer together, working better with the ESA and toward a common purpose of conservation of the species.

Further, there needs to be a major thrust, distinct from this ESA reauthorization, to broaden the highly successful user pay/user benefit concept under Pittman-Robertson, and Wallop-Breaux programs to meet today's broader conservation challenges, enabling State/Federal programs for the conservation of the vast majority of non-game fish and wildlife currently receiving less than adequate attention, and thereby providing means to prevent species from becoming endangered.

We have such a proposal, "Teaming with Wildlife," supported by the conservation community, all 50 State fish and wildlife agencies, and over 2,300 businesses and organizations across the country, and we look forward to visiting with you further on this proposal.

The Association applauds and fully supports your efforts in S. 1180 to energize recovery plans through implementation agreements, to restore the focus in ESA not just to listing species but carrying out actions that restore species and their habitats.

As the bill provides, State Fish and Wildlife Agencies must be given the opportunity to take the lead in recovery plans. The utility of a team approach not only provides for application of a broad base of knowledge and perspectives, but also better inter-governmental coordination regarding biological, social, economic, and environmental factors.

Finally, we fully support the incentive provisions of S. 1180, the financial assistance, regulatory certainty, and technical assistance, and education for private landowners to facilitate their stewardship of their land and associated resources. The provision of incentives seems to be an area of general agreement on which most parties can agree.

Much of these policies grew out of those of Secretary Babbitt in March 1995, and the Association supports the codification of these "no surprises," "safe harbor," and candidate conservation agreement policies in statute to affirm the Secretary's authority in offering and implementing these policies.

Thank you, Mr. Chairman, for the opportunity to share the Association's firm support and the perspectives on S. 1180, and I'd be pleased to address any questions you might have.

Senator CHAFEE. Thank you very much, Mr. Shroufe, for making this long trip here. We appreciate it and look forward to having the opportunity to visit some of your members in their States and see what's happening.

There are three points I would like to make here. First, the points you've made about the money is recognized here. I think each and every one of you have stressed that—that there has got to be appropriate funding for this—and we realize that.

I'm glad that each of you mentioned that, because it spurs us on, and we've just got to get a constant source of funding.

Now, that's, as you all know, easier said than done. Dedicated funds are difficult. But, nonetheless, the sums we're talking about in the big picture aren't that much, so we're aware of that.

Second, I think all of us have to recognize—and I'm not suggesting you don't, but I want to stress it—the importance of private lands, and that's where these endangered species are. The statistics we have show that ⅔ of these endangered species depend, to a considerable extent, to a major extent, on private lands. And so we've got to do everything we can to encourage the private landholders to participate in this, and I don't think the current law does that.

As I've mentioned before, when Senator Kempthorne held the hearings out west, I think it was in his State—or maybe it was in Oregon—where the individual came forward and said, as far as he was concerned, he believed in the three S's: shoot, shovel, and shut up. And that's hardly a constructive attitude toward saving endangered species, but he was recognizing that what—how detrimental it was to him as a landowner if an endangered species showed up on his property.

And, finally, I'd like to stress that there is great danger in doing nothing here. There is some thought that, well, the bill isn't so bad. It's being fixed up administratively, in the views of some, by the Department of Interior and Fish and Wildlife. And so just drift along the way we are.

Well, I'd like to stress that this was last authorized in 1988 and that expired in 1992, and Senator Baucus and I, to a considerable degree, and the others on the committee, likewise, are under tremendous pressure on the floor of the Senate to hold off not only amendments, moratoriums on listings, and so forth, which we've seen, but also cutting all funding.

It's through the appropriation process that those who are dissatisfied with this Act are going to take their actions and their dissatisfactions.

Senator Baucus and I have, to date, been fairly successful in holding people off. We're trying to reauthorize this, but that song we can only sing for so long, and we've got to product action.

And if we fail to reauthorize this Act, I think there are going to be very grave consequences to the Act, both through outright amendments and through the appropriations process, as I previously mentioned.

Now, I'd just like to—I've taken a good deal of my time. I would like to ask Mr. Van Putten a question.

In your statement, on page 6, you talked about increase the agency's accountability and ability to achieve recovery. That's on page 6, item 3 there. And then you say, "For example, the bill's provisions governing recovery implementation agreements would insulate those agreements from judicial review."

Now, I know this is rather technical, but that gives us trouble because it would turn over all power to those who write the recovery plans. In other words, the recovery plan comes up, being written, and by those—I guess the scientists would write it, and that comes before Fish and Wildlife.

And under your suggestion here, that would be it. In other words, we would be turning over—"we," the Federal Government, would be turning over to these scientists complete powers.

I'm not enthusiastic about that. Could you enlarge upon that a bit, please?

Mr. VAN PUTTEN. Yes, Senator.

I would also like to point out that in the section-by-section analysis on page 3, with respect to each of the four goals I articulated, we have identified both the positive and the negative features we see in this bill.

Responding specifically to your question, as we read the provision concerning the implementation agreement between the Federal agency and the Fish and Wildlife Service, or NMFS, whomever it would be, by providing that the agreement is in the discretion of those agencies, it effectively insulates it from judicial review. You can see the cross reference on page 3 of the section-by-section.

Senator CHAFEE. I'll have to study that a little more, because it does present problems to me.

Mr. VAN PUTTEN. OK.

Senator CHAFEE. You know, Senator McClure, you touched briefly on the takings. Obviously, that is a subject that is going to come up, perhaps in the markup, perhaps on the floor. Who knows? But, to me, as I mentioned yesterday, to put the takings in this provision, when the whole concept of takings crosses a whole swath of areas way beyond endangered species, whether you have Section 404 of the Clean Water Act and the wetlands or under mining, restoration of the mining areas, why restrict it to this bill? I mean, the Judiciary Committee has considered this. Last Congress they reported a bill out. They never brought it up, recognizing it was in heavy weather.

So I just feel very strongly that it is unfair to tack a takings provision onto this bill.

Mr. McCLURE. Mr. Chairman, I understand that dilemma. But, again, the perfect is the enemy of the good. It may be perfect to try to get the whole thing done for ever the Federal Government and/or State governments may do, but sometimes the good is what is achievable now.

We have this Act before us. It has impact upon private property rights. It has impact upon people's lives. It just strikes me that it's not fair for society to selectively impose burdens, crushing financial burdens, on a few for the benefit of society.

It is something that needs to be addressed.

Senator CHAFEE. Well, you and I would—I would have a vastly different interpretation of the good under that particular provision, but——

Mr. McCLURE. I would hope we don't have a disagreement on the idea that private property rights, and being secure in your private property, is essential to freedom as we know it in this country. And we have always honored the idea that Government may have the power and maybe even have the right to take private property for public uses, but we have always followed the idea that if we do that, appropriate compensation is also in order.

Senator CHAFEE. That's a long subject, and the Fifth Amendment addresses that, as you know.

Mr. McCLURE. And some say, "Don't touch it. Just let the Fifth Amendment do it."

Senator CHAFEE. We shouldn't have brought the subject up.

[Laughter.]

Mr. McCLURE. I'm glad you did.

Senator CHAFEE. Senator Baucus?

Senator BAUCUS. For that very reason, Mr. Chairman and Senator McClure, don't you think it's wise that it not be brought up? That is, if bringing up property takings and state water rights jeopardizes this bill so that there is no bill, then do you think it should not be brought up?

Mr. McCLURE. Senator, I understand that point, and I don't disagree with you at all. But you're familiar with cases—I know one particular one, the New World Mine in Montana right now, in which this very issue is very central. Is the lady who owns the property entitled to compensation?

Senator BAUCUS. We're not talking about New World Mine. We're talking about this bill.

[Laughter.]

Senator BAUCUS. We're talking about this bill and we're talking about whether it is—do you agree that it is not wise to take up takings on this bill——

Mr. McCLURE. No, I——

Senator BAUCUS. Let me finish please.

Mr. McCLURE. Surely.

Senator BAUCUS. Or water rights on this bill if doing so would jeopardize the passage of this bill?

Mr. McCLURE. If, as a matter of fact, it would have that result, I would agree. But I'm not sure that it is necessarily true that that's the answer.

Senator BAUCUS. But if.

Mr. McCLURE. Yes.

Senator BAUCUS. Well, in my judgment that is the case, because I think the President would veto it.

Mr. MCCLURE. I'd echo that, too.

Senator BAUCUS. That it would not pass. This bill would not pass if either of those provisions are on this bill.

So if that's the case, then, and if you agree it would not pass, then you're saying it should not be brought up?

Mr. MCCLURE. That would be too bad.

Senator BAUCUS. Yes. I know from your bill it would be too bad. That's a different issue, too.

Mr. MCCLURE. But it's too bad.

Senator BAUCUS. That's not the question I was asking you.

Let me ask a question of Mr. Bean.

Going to funding, we're all concerned about the funding. My guess is, though, that the Administration will come up with the proper amount of funding in its budget next year. I mean, if this becomes law, and when the Administration puts together its fiscal year 1999 budget, that it probably—at least the Fish and Wildlife Service is sure going to be in there pitching for its fair share, and if Administration supports this bill, as it basically does, but for a few technical changes, I think we're off to a pretty good start. Then it's up to the Congress to make sure that we don't cut, again further assuming that the funds are there.

You mentioned in your testimony something in a nature of maybe an insurance fund of some kind. Could you elaborate on that and what the sources might be and what we might do to further ensure that we're going to have enough funds to make this thing work?

Mr. BEAN. Yes, Senator. In my testimony I actually suggested two separate needs for some secure funding. One is a source of funding for the new incentive provisions in this bill, the cost-sharing assistance to private landowners. That's the subject of the letter I handed out from the Farm Bureau Federation and us and others.

There are a number of potential sources of funding that ought to be looked at. In my testimony I suggested as one possible source some of the revenues from the impending sale of the Elk Hills Naval Petroleum Reserve, expected to bring a couple billion dollars into the U.S. Treasury next year, a Federal facility that has a lot of endangered species on it, and those endangered species will receive substantially less protection once that facility is transferred to private ownership.

There is an $11 or $12 billion unexpended balance in the land and water conservation fund that I earnestly hope will some day be spent for the purposes for which it was put there, but in the meantime, in recognizing that that's probably an overly optimistic hope, it might be possible to take some very small fraction of that to fund the sorts of incentive programs proposed here.

The insurance fund addresses a separate matter, which is the effect of the "no surprises" policy upon the Secretary of the Interior, who, through this policy, is assuming the burden that the habitat conservation plans he approves will work out as planned. If they fail to work out as planned, then the "no surprises" policy shifts responsibility entirely to the Secretary's shoulders.

Senator BAUCUS. Right.

Mr. BEAN. The burden of doing what's necessary.

Senator BAUCUS. What about some dedicated fund of some kind?

Mr. BEAN. That is my suggestion, that there be some source of revenue available for that purpose, as well, so that the Secretary will, in fact, be able to respond to those situations which may never arise, but if they do arise there will be a need for him to take some action to avoid loss of those species.

Senator BAUCUS. Is there something like the Pittman-Robertson Act, or something like that?

Mr. BEAN. Well, the Pittman-Robertson and Dingell-Johnson laws are classic examples of how much can be accomplished through a dedicated funding mechanism. Currently I believe about $400 million of Federal excise tax receipts are made available to the States to support largely successful conservation programs. That's a legacy of the other President Roosevelt in the 1930's. It has been a fabulously successful program at doing what it does, but it has a somewhat different focus than what is needed here.

Senator BAUCUS. Mr. Van Putten, I was a little surprised at your statement that you think the bill does not further protect species, in view of Jamie Clark's testimony yesterday that she felt that it does, the bill does advance the protection of species. I don't want to put words in Mr. Bean's mouth, but I think he reached the same conclusion, albeit it he has some suggestions.

What accounts for their different reading of this compared with yours? Or let me ask the question differently. What accounts for your different reading compared to theirs?

Mr. VAN PUTTEN. Thank you, Senator.

I think one way in which our evaluation differs from Ms. Clark's evaluation is that this bill essentially enshrines in law the habitat conservation planning process that the Administration has had underway, but we do not feel that it reflects the experience to date and some of the criticisms to date of that process.

As Senator Chafee noted yesterday in his questioning, we have made significant progress in the number of plans agreed to on paper, but the longer-term and more important issue is the success of those plans for the species that they are designed to protect.

Senator BAUCUS. What about recovery plans? Isn't putting teeth in recovery plans a major advance?

Mr. VAN PUTTEN. Senator, there are some significant advances in the bill in that regard, and we have noted them, basing recovery plans on science, for example. We've noted some of our concerns about the process itself, the role of States, etc., but we have acknowledged a significant improvement in that regard.

Senator BAUCUS. Is your organization working with us to improve and make this bill work, or are you opposing this bill?

Mr. VAN PUTTEN. Senator, we're very eager to work with this committee, with this bill, as a starting point to improve it and to continue the discussions we've had underway on that point.

Senator BAUCUS. So you look forward to supporting the bill?

Mr. VAN PUTTEN. We would look forward to supporting it if the concerns we've identified could be addressed.

Senator BAUCUS. Thank you.

Thank you, Mr. Chairman.

Senator CHAFEE. Thank you, Senator.

Senator Kempthorne?

Senator KEMPTHORNE. Thank you, Mr. Chairman. That was the reciprocal of Senator Allard in the discussions with the Administration yesterday.

[Laughter.]

Senator BAUCUS. The true reciprocal was my getting Jamie Clark to say the Administration truly supports the bill.

Senator KEMPTHORNE. That's right, and you did well.

[Laughter.]

Senator KEMPTHORNE. Senator McClure, may I first acknowledge your tremendous service to Idaho and the nation as the former U.S. Senator, and I note that your dedication to good government continues. Specifically, I believe yesterday was your 47th wedding anniversary, and you were here and Louis was back in Idaho.

Mr. MCCLURE. My wife noted that, too.

[Laughter.]

Senator KEMPTHORNE. Well, happy anniversary.

Mr. MCCLURE. Thank you.

Senator KEMPTHORNE. Best to Louis.

And the discussion that you had with Senator Chafee and Senator Baucus on property rights was deja vu for me, because I've had the same spirited discussion with them.

Senator BAUCUS. With the same results.

Senator KEMPTHORNE. Yes.

[Laughter.]

Senator KEMPTHORNE. Only we had Senator Reid there at the time, as well.

Senator McClure, if I may point out, of course, that nobody knows better than you the importance of State water rights to the west and, of course, to Idaho.

We were unable to come to an agreement at this point on language concerning water. We're still going to continue efforts, but at this point we just have not been able to find that language.

As I visited with Idahoans, they told me that, while water was critical to our State, that they supported the bill. And, in the words of John Rosholt, who you and I both know is one of the leading water attorneys, he said, "The bill is good for America and needs to pass."

So, Senator McClure, can you share your view on this subject as a veteran legislator and an Idahoan?

Mr. MCCLURE. Well, I agree with Mr. Rosholt in his conclusion that the bill is good and needs to pass. I also recognize that the water community in Idaho, as it is throughout the west, is divided on this issue. They would like to find a solution, but they don't know what that solution is and they haven't been able to identify it.

Same thing is true of our membership. Our membership is divided on the issue as to whether or not the issue should be raised and resolved, and I have my own views on that, which are not necessarily reflective of the organization that I head.

It is a difficult—very, very difficult issue. My first venture into public life was as a prosecuting attorney for my county, and I learned very quickly in the first year in that office that I could tell

within about 15 minutes when the water got in the ditches in the spring, because fine, Christian, upright gentlemen, community leaders in every respect, and fine family men would cheerfully kill their neighbor if he was steeling their water.

It is that kind of an emotional, basic issue to many, many people, but I approach it from this standpoint: the Federal Government may, in this instance, as in others, have the authority and perhaps the right to take private property, but if they take private property they ought to pay for it, and if they're going to take water they ought to pay for it.

There is nothing more fundamental to the value of land in an arid area than the water that it takes to make it valuable. And the Government, by taking water, can make land valueless.

So I think it is extremely important that we recognize by some mechanism, as we do in the State of Idaho, but not in every State, that a water right is a property right, and to interfere with it or take it demands compensation.

Senator KEMPTHORNE. All right. Thank you very much.

Also, in your testimony you state that you believe that there should be greater public notice throughout the Endangered Species Act. That sounds a lot like the issue that we had with the Safe Drinking Water Act, which was the community right to know provision. Do you believe that there should be a community right to know provision in the Endangered Species Act?

Mr. MCCLURE. I think any of the mechanisms that will guarantee that there is widespread public knowledge of the actions being proposed would be an improvement. The Corps of Engineers does a number of things already.

We fall back on the idea that publication in "The Federal Register" is sufficient public notice. I don't know anybody that reads "The Federal Register," certainly not any ordinary citizen. So there needs to be a better mechanism.

Senator KEMPTHORNE. And any suggestion what that might be?

Mr. MCCLURE. Well, we did in the testimony parallel the notice requirement, the notice manner in which the Corps of Engineers approaches this, and that would be an improvement.

Senator KEMPTHORNE. OK. Good.

To Henson Moore, may I say, too, I salute the distinguished service that you had in the House of Representatives and appreciate the comments that you've made today.

Let me ask you, some have suggested that the Section 7 consultation process works well as it currently exists, and that we should, therefore, leave it the way that it is.

Why do you believe and why do those that belong to your organization believe that the consultation process needs to be streamlined?

Mr. MOORE. Senator, there's no doubt that the consultation process may work well in some cases, or has worked well in some cases, but we've seen others, from the experience we've gathered anecdotally of our members in the vast coalition we represent, that's not the case many times.

It is very confusing. It takes an awful lot of time. It is very bureaucratic. You can find one agency hold and gum the whole thing up by not going through the consultation process as they should.

We find that there are often back room discussions during the informal consultations between the Fish and Wildlife Service or the National Marine Fisheries Service that result in larger set-asides or other concessions than the Federal agency's own people thought were really appropriate.

We think that there can be improvements made, and certainly we understand this is a sensitive area. There are people who think it works just fine. So you had to craft a very narrow area of where you could make improvements that would find the consensus that you've found.

While we think you could probably go further in the consultation area, we think that probably you couldn't get consensus if you did.

We think that what you've found in the bill, what you've done in the bill, would make this work better than the way it works now, and so we have—I think the last time Mr. Bean and I testified, this issue came up over on the House side, and we had some evidence then and made comments then on where the consultation process—anecdotal examples we elicited that didn't work well.

Senator KEMPTHORNE. Let me ask you, Mr. Bean, I want to acknowledge you've been a great service on this, and I remember you helped us lead the effort on identifying incentives with the Keystone Group.

If you eliminate the "no surprises" policy, won't the result be that landowners will no longer be willing to enter into HCPs and preserve habitat?

Mr. BEAN. I certainly think that is true for some landowners, and the whole rationale for the "no surprises" policy is to meet the, I think, legitimate concern of landowners for some certainty that the commitments they make will stick.

The thrust of my testimony has not been to suggest that the policy doesn't serve a worthy purpose, but rather the policy can have an unanticipated and undesirable effect, and that is to make it impossible to effectively conserve species unless you simultaneously give the Secretary of Interior the resources he needs to keep his end of the bargain—that is, to take the mitigation that proves necessary if what the landowner commits to do proves insufficient.

Senator KEMPTHORNE. My time has expired.

I would just note, Senator McClure, things haven't changed around here. Last week I celebrated my 20th anniversary, and we spent it right here because we voted until 10 p.m.

[Laughter.]

Mr. MCCLURE. I understand that. I hope Patricia did.

Senator KEMPTHORNE. Yes. She talked to Louise.

Senator CHAFEE. Senator Sessions?

Senator SESSIONS. Thank you, Mr. Chairman.

Mr. Van Putten, on the—and I guess Mr. Bean—I think both of you, it would be fair to say, favor programs that would encourage landowners on their own to take those extra efforts, sometimes not too great, if they are working positively, to preserve endangered species. Is that right?

Mr. VAN PUTTEN. Yes.

Senator SESSIONS. I liked, Senator McClure, your comments on that in your remarks. I thought you point that up well.

I grew up in the country, and where I grew up the home there is on a creek bank, and on that creek bank is a little rush area, maybe 2 or 3 acres. The Government couldn't afford to manage that property. There is no way a Fish and Wildlife officer could go out there and try to preserve the violets that grow every year. I saw them this spring, and they were growing when I was a kid. I've never seen them anywhere else, and salamanders and things.

So I just think, as a nation, we ought to see what we can do to encourage them to monitor that, themselves. And sometimes that takes some compensation. If the land is covered with timber or it has been farmed for a long time and it brings in a certain amount of income, it could be a modest expenditure.

Would you support—I think as Senator McClure does—that kind of voluntary effort with some compensation that could result in very cost-effective environmental benefits?

I guess, Mr. Van Putten, your comments on that.

Mr. VAN PUTTEN. Senator, we strongly encourage the kinds of voluntary efforts that you describe. We have also encouraged and made specific suggestions for providing education and incentives for landowners.

Where we may differ—and I think it is more than just semantic—is when you start talking about compensation. To the extent that you are, through that, suggesting takings and some of the interpretations of takings, I would probably disagree with you. But we certainly agree with the need to encourage voluntary action by landowners having educational programs, technical assistance, and appropriate financial incentives.

Senator SESSIONS. Let me just say this about that subject of private present. When the Senator referred to the Fifth Amendment, and Senator Chafee did, I know there are a lot of people in the environmental movement that are more committed to endangered species than they are of the Constitution of the United States, but we represent this nation and we are bound by that document, and it perfectly and rationally states that you cannot take private property without paying just compensation. You cannot take people's beneficial use of their property without compensating them for it. That is a fundamental American right.

It's not going to go away, and it's something we've got to deal with.

Senator McClure has said, "Well, we can't put this in the bill." I know some of them have been huddling over there. I haven't been in the huddle. And they've decided not to put it in the bill, for reasons I respect and I understand and I know you do, but do you think at some point we need to have Members of this body vote on this issue?

Mr. MCCLURE. Certainly I do believe that.

I recognize the definition of a taking or the question of what is a diminution of value are complex and difficult issues. I don't brush that aside. But I think there needs to be a recognition of that American principle that is embedded in our Constitution that people cannot be truly free if Government can take their property.

I think at some point Congress will have to stand up and reaffirm that principle by a vote in the Congress of the United States.

Senator SESSIONS. I agree, and I think de minimis regulations, we don't need to have compensation commissions for every zoning or regulatory body, but when there is a significant diminution of value——

Mr. MCCLURE. Well, there are complexities that we don't need to go into today, but the relocation of a highway greatly reduces the value of the property that was on the old location. Is that a taking?

Senator SESSIONS. Right.

Mr. MCCLURE. Those are the kind of problems that kind of paralyze us as we look at this issue. But, while we are being paralyzed, we are also doing grave injustice to the individual people in this country, and I don't think we can just say, "Gee, this is tough. Let them bear the burden by losing their property." We need to do better than that.

Senator SESSIONS. Well, I appreciate that.

Do any of you—and, Mr. Chairman, something that concerned me yesterday when we were looking at the substantial increases—and I believe increases are needed, funding increases, but would any of you comment on the ability—I'll ask Congressman Moore and Senator McClure, from their experience—about doubling or more than doubling an agency's budget in 1 year, whether they can wisely assimilate that and use it well, and maybe whether or not we ought to consider phasing in those increases, along with some sort of management plan to utilize the resources wisely? Do you think that might be something we should consider?

Mr. MCCLURE. Senator, I think it is something you have to be concerned about. I think this committee has to look very carefully at the budget requests, as does the Appropriations Committee, to determine whether or not that money is really needed and if it can be used effectively.

I don't think that I'm in a position to make a judgment at this point as to how much money is appropriate or how much should be appropriated.

Senator SESSIONS. Congressman Moore?

Mr. MOORE. I'd have to agree with the Senator's statement. I'm not trying to dodge the question. I've found that in my years in an administration it's very hard to ramp up a program and spend a vast new sum of money very quickly. On the other hand, it serves no purpose whatsoever to pass this legislation and complicated it or confound it but not funding what has to be funded in it. I don't think anybody thinks that's the best interest of individuals, humans, communities, States, or protecting species.

And so that's the question you guys are going to have to figure out, is what's the right amount of money, and I'm afraid I can't help you much with that.

Senator SESSIONS. Well, in the scheme of things it's not tremendous, but we've got to manage every dollar that we spend.

Briefly, Congressman Moore, on your—I was a Federal attorney and represented Federal agencies at various times consistently for 12 years, and your concern is about delegation of programs to the State and that a lawsuit has been filed concerning whether or not there is an abuse of the review process by EPA which is putting conditions upon a source discharge pollution or discharges, that that perhaps exceeds the law as it is stated.

I believe sometimes that agencies, in their zeal to do what they like to do, sometimes exceed their authority. Would you comment on that?

Mr. MOORE. Senator, you commented on that yesterday, and I think you have it right, as far as we're concerned. We are in court on this issue. We think it's very clearly a case where the Fish and Wildlife Service has exceeded existing legislative authority.

This is something this very committee and the Congress needs to deal with is this intersection of the Clean Water Act and what we have the States doing with what now the Fish and Wildlife wants to do to graft the Endangered Species Act on top of that as an additional permit, and that's a decision you all haven't made, it's a decision that, if you look at what's going on in the Clean Water Act application or enforcement at the State level, you have they say, "What's broken?" Is there any evidence something's not working there? Are there endangered species being imperiled by the existing permitting process under the Clean Water Act?

We've seen no evidence of any of that.

This is a decision that we simply thought that, since this statute that you're dealing with or this bill deals with Endangered Species Act, that was a good time to deal with that issue, recent issue. It's only maybe several months old and growing.

On the other hand, I have to respect, as Senator Baucus said, if this is something you can't find consistence on right now, we're certainly not going to urge you to scuttle the bill over that, but it is an increasing issue that at some point the Congress really needs to take a look at. We thought the point was now, the time.

Senator SESSIONS. Thank you.

Senator CHAFEE. Thank you, Senator.

Senator Wyden?

Senator WYDEN. Thank you, Mr. Chairman. And let me also thank the witnesses. I think all of you have been helpful. And I share the view of the sponsors that this bipartisan effort has a lot of positive features in it, and let me see if I can just kind of flesh out a couple.

Start maybe with you, Mr. Putten, with respect to what I think the biggest single challenge is with the Endangered Species Act.

I think the problem here is that we largely don't get after it until there is a crisis on our porch, and once there is a crisis on our porch, we've got a species endangered, then we set about through this process that doesn't seem to be very satisfying to people Mr. Moore and Mr. McClure represent, nor the folks that you're trying to represent.

What we have tried in Oregon—and we are the first State to have gotten this precedent-setting waiver from the Endangered Species Act—tries to deal with this issue of getting there early, trying to get out in front, bringing together folks from all of the different approaches, and getting there early, and we're very optimistic about it.

But I wonder if either of you have any other suggestions for how to encourage this kind of early mobilization, bringing together folks from an environmental perspective, from an industry perspective, and others so that you don't later have to play catch-up ball with recovery processes and the like.

Questions for you two to start with.

Mr. BEAN. Thank you, Senator.

I think that you've put your finger on a very important problem. Most endangered species, by the time they reach the endangered species list, have been so reduced in numbers or range that there is little realistic prospect of recovering them, and many of the cheaper options that might have existed earlier have been lost. So I think it is critically important to find ways to direct resources to those species earlier.

I would note, part of the task is simply identifying the species that are likely to be candidates for future listing early enough so that we know which ones to target our resources to, and, second, to offer some incentives to landowners and others so that they are willing to take steps to head off some of the threats to those species, rather than creating for those landowners the sense that they would be better off if they got rid of those species on their property so that they wouldn't have to deal with them when they were later listed.

I think the bill, to its credit, does have some mechanisms that will improve our ability to do that. I think the candidate species conservation agreement is an example of that, and the tougher standards that are in the bill with respect to habitat conservation plans that encompass unlisted species, but species that are clearly potential candidates in the future, those are big improvements.

But I would suggest that in order to accomplish what you are suggesting, a serious effort needs to be focused on providing resources to identify the species that we need to get out ahead for, and providing the resources to encourage landowners and others to take the steps necessary.

Mr. VAN PUTTEN. Senator, I agree with the premise of your question and would associate myself with Michael's answer. I would only supplement it to say that the teaming with wildlife effort that Dwayne mentioned is one way in which to build on the Pittman-Robertson, Dingell-Johnson model and enhance the funding and capability of States to play precisely the role that you described, and the National Wildlife Federation serves on the Steering Committee with the International Association of Fish and Wildlife Agencies in developing and advancing that proposal.

So I would only supplement Michael's answer with that observation.

Senator WYDEN. Mr. Moore, on the HCPs and the whole question of private land, what is your sense of what is right to ask of private landowners on this issue?

I think that right at the heart of some of the debate at home in the west is you want to do something, obviously, that, you know, is doable, and at the same time you want to push as hard as you can so that all parties kind of maximize this.

And we're going to have to wrestle with, you know, the whole question of a standard here, and should the standard be sort of no negative harm? Should the standard be some sort of affirmative progress?

Obviously, when you're talking about somebody's private land you're not talking about government property, so you're dealing with a different standard.

What, in your judgment, is right to ask of private landowners on that HCP standard?

Mr. MOORE. Senator, I go back and endorse 100 percent everything that Senator McClure said. The more onerous you want to make a recovery plan on private land, the more you're coming into conflict with the question, "Then what do you to do the private landowner?"

This legislation has largely escaped that or gotten away from that by dealing strictly with the question of making the law work more fairly, and we will accept that as being all that can be done at the present time, and at the same time having the provisions in there we've all talked about, about funding, to help very small landowners find a way to get there.

If you are contemplating something that would be more onerous on landowners than is in the legislation and existing law, then I think you are going to run right head-on into how are we going to define taking and how are we going to deal with compensation, because you just—as I said earlier, there are not enough bayonets in the country to make this law tougher on private land than it is.

I think that's something that the Senators who crafted this bill have realized that and have said, "Look, let's go make the thing procedurally work better and leave this question for another day," and that will give relief both to protecting endangered species and, we believe, in giving relief also to landowners.

But to take it further than it is, I don't know how you get to there without dealing with the subject.

Senator WYDEN. I don't see this as being a tougher or weaker kind of question; I see this as a question of coming up with something creative along the lines of what we've done in Oregon, and that's why I asked the question of what you think the standard ought to be.

Maybe our environmental representatives, Mr. Van Putten or Mr. Bean, are interested in talking about that, as well.

Mr. VAN PUTTEN. Senator, I think that is a very penetrating question, and as you were asking it I was thinking of Aldo Leopold and defining a thing as right when it enhances the stability and viability of the biotic community, grossly paraphrasing.

Now, Aldo Leopold was no fuzzy-headed environmental radical. He was one of the most well-respected and renowned scientists of his time. And I think the issues that we've raised concerning adaptive management and the need to integrate biological standards for adaptive management into HCPs is speaking to precisely that issue of what is the right standard.

What is right to ask in return for the certainty of HCPs is that there are actions taken that do enhance the stability and viability of that biotic community, and that we monitor it and we have appropriate opportunities to adjust that plan as science indicates necessary.

I think that's an excellent and penetrating question that gets to the heart of the entire HCP issue.

Mr. BEAN. Senator, I would only add that it seems to me it is also important to keep in mind the context. That is, the answer to your question sort of depends upon what other tools you have at

your disposal in order to achieve conservation and recovery of endangered species.

If we seriously invest in incentive programs for landowners, the question of precisely how we define the duty of landowners under HCPs becomes less significant than if we are putting all of our eggs in the basket that we're going to try to recover endangered species on the backs of HCP participants.

The worry I have is that many of the threats to endangered species are not addressed by those HCPs and probably won't be, and therefore you need a whole mix of other tools, and if you've got those other tools then you can have a little more flexibility and creativity in figuring out what the right standard for HCP participants is.

Senator WYDEN. Let me see if I can get one other question in.

Senator McClure, on the question of funding, I think it is clear that one of the things that has brought people together on this has been the additional funding, because it clearly increases our options. It's kind of like having something else in the tool bag.

I have been wrestling with what happens if the funding isn't there. We talked yesterday about some kind of fallback mechanism, which I think might well be appealing, sort of across the board. You have a set of processes that are in place now. You don't have adequate funding. You work with industry, environmental folks, scientists. You scale some of that back.

What's your thought in terms of what to do if the good work that Chairman Chafee and Senator Baucus doesn't go forward, and especially because you don't want to blow the constructive progress that is being made here.

I mean, you and I go back to the days when in the Northwest we were running a lawyers' full employment program over the spotted owl. That's all that happened. Any side would go out and sue the other side, and it was great for the children of lawyers, but not much for either protecting species or for communities. It wasn't much for either side.

So here we are. We're making some progress now, and I'd be interested in your thoughts on what happens if the funding piece goes awry, say in the third year.

Say John Chafee and Max Baucus can continue this roll they're on, they keep the money in place for the first couple years, and the third year something happens. What would be your thoughts on that?

Mr. MCCLURE. First of all, you've got great concern on both sides, great concern on the part of the environmental community, that not enough is being done. You have great concern on the part of the private landowner that their rights are being confiscated without compensation.

I would hope that there is enough pressure from those two communities in our country to keep the Congress conscious of the need to provide adequate funding.

Now, I recognize that there is a hazard that that might not occur, but I think, just beyond that response is the underlying question of, If it fails, who bears the burden?

The environmental community said the species should not. People that I represent said the individual should not. And I think

that's a fundamental question you have to deal with is what happens if the funding mechanism fails? Do we then again reimpose the burdens on the individual property owner? That's what we've done in the past in this legislation is put the burden of society's demands squarely on the shoulders of the individual property owner.

I think that's totally wrong. If society wants to take care of this problem, let society generally pay the bill of taking care of this problem.

You're talking about how do you make things like the Oregon experiment work. If there is a hazard that you get into it and it fails and the burdens then imposed by that attempt fall on the backs of the property owner, how in the world will you expect the property owner to engage in the process of getting into it in the first place?

And I think it——

Senator WYDEN. My time is up. But just before we leave this point, just so we're clear, in Oregon the industry folks deserve great credit because they were the ones who put up the money. That's No. 1.

No. 2, I think what we heard yesterday from Jamie Clark is she said if the money wasn't in place she would look at a process where, in effect, all sides would have to give.

She said, "You're going to have to make some changes in the process," which I interpreted as saying all sides are going to have to give, not putting it just on the private landowner.

Mr. MCCLURE. I would agree with that, but I would also caution you that, whether it's the Oregon effort or the Administration's effort on the "no surprises" policy, it's not clear to me that the law permits either one. If somebody challenges that, you may get both of them upset.

Senator WYDEN. Yesterday——

Senator CHAFEE. Wait. The time is up. We've got others here. I'll put Senator McClure down on the takings issue as undecided.

[Laughter.]

Senator CHAFEE. Now Mr. Moore has to go. It's my understanding he's due over on the other side to testify. And so therefore I'd yield to anybody here who had a question for Mr. Moore.

Senator KEMPTHORNE. While you're here, Congressman Moore, would you just, from your perspective, what are some of the key provisions that you like and you think are significant that are included in this language?

Mr. MOORE. Senator, there are a great number. Certainly we think the better science provision will help see to it we really spend our resources on the things that we really have data and information on that need to be saved. At the same time, it gives the assurance to the people who bear the burden of this that this is being seriously looked at and it really is good science that says we have to make this sacrifice.

Second, the whole notion of putting stakeholders at the table is an American kind of a thing. It's very un-American to have a group of bureaucrats sit down and make a decision affecting your property. You can't even get in the room. I think you've changed that. That makes a big difference. It is very important.

Looking at alternative recovery plans—you should, in the decisionmaking process, look at every alternative, and the fact that you've put that in legislation makes sense.

The notion that you've got to have a recovery plan from a certain time period I think makes a lot of sense. The notion that you codified the provisions of Secretary Babbitt's administrative proposals we think is really key to seeing to it that those will be able to withstand, surely, more lawsuits in the future to try to confound the Act from those who have a different viewpoint.

The consultation process improvements that are in the bill are there.

I could really go on. I virtually think almost every section of the bill is a vast improvement over the way the existing law works.

There are some questions in there we're all concerned about. We're confident that the committee and the staff will work to resolve those questions as you go through things.

I just keep thinking that the nit-picking that goes on with this bill—not here, but just outside with the press and everything else—boy, if there had been that level of scrutiny leveled at the Endangered Species Act, it never would have passed to begin with.

We're looking at really moderate changes, and look at the degree of scrutiny they're getting compared to not touching the substance of a law, which is being left for another day. They have some serious questions in people's minds one way or the other.

So I compliment, as I said earlier, the four Senators and Secretary Babbitt for really taking on this chore, as you've done something for which you will get very little credit. And I'll do my best to see to it that people we represent understand the good work that you're doing and how important this is to move on and get this done.

It is good. It does need to pass.

Senator CHAFEE. Congressman Moore, you're all set. You can leave if you so choose, and we appreciate your coming.

Mr. MOORE. Thank you, Senator.

Senator CHAFEE. I'd like to ask Mr. Shroufe about the role of the State.

As you know, we have increased the role of the State rather substantially here, and we're glad you're going to be in on the—consulted on the listing, and we delegate the recovery planning to the states, so you're going to have—now what's that going to mean financially to you if you take on these added burdens? Just take your particular situation in Arizona.

Mr. SHROUFE. Well, Mr. Chairman, I think there is going to be an added burden, and it is going to be a financial added burden.

I suspect with Arizona, as with many other State wildlife agencies, they will be looking for some moneys to help in that recovery effort.

That money, of course, can come from a lot of sources. Some States right now, Arizona for one, has some money to dedicate toward this process, but we'd still be looking for probably Federal money from Congress to implement this.

The aspects of including the State in the listing process really puts a lot more emphasis on making sure that the available, up-

to-date science is there, intact, for perusal and use in the listing process.

So many times now that science is not being used to its fullest extent from State governments.

On the other hand, the burden of trying to ensure that that species doesn't get to the point that we're talking about now does fall on most State governments. The State statutes, in fact, dictate that States are in charge of managing those wildlife species. And more work has to be done there. We talked today in comments that we need to first of all know the status of those species, and that's something that we're terribly short on right now.

We have not had the money to work on those species, and we've not done that, and we're finding out that the ESA now is being really litigated in court before we—based on little science or no science, because we've not done the work on the species.

That's where I think we and Congress have to get together and look at some sort of dedicated funding in order to ensure that the number of species that reach the crisis of listing is at a minimum, and we've not been able to do a good job of that on the non-game species at this time.

The "Teaming with Wildlife" proposal is one such alternative to that.

Senator CHAFEE. Thank you very much.

I'd just ask a question here of Mr. Bean and Mr. Van Putten.

I had our folks from this bill make a list of the species protections that we include in this bill, and I just—if you could kind of jot them down, I'll go through them kind of quickly, and then see—it makes a pretty impressive list.

Mr. Van Putten, I know that you didn't endorse what we've done. You gave us some praise for what we've accomplished, but you had some reservations.

But, on balance, I'm curious as to how you weigh these factors, whether you'd agree with them: improvements over the existing law for protection, overhauling a recovery mandate, the mandatory implementation for Federal agencies, the biological recovery goal, incentives for private persons, the deadlines—Senator Kempthorne has talked about this several times—the deadlines that we put in here for the recovery plan development. True, it needs money, but at least there is a deadline in there. Now nothing much happens. The funding for implementation, the protection for non-listed species, the standards in the HCPs—I know I'm going kind of fast, rather fast here—the incentives for private landowners, streamlining the permit process, and the low-effect permits, and new policies to encourage permit applications in conservation measures, namely the "no surprises," the "safe harbor," the candidate conservation, and financial incentives, plus the technical assistance in education.

Now, I didn't go into every detail of these, I know, and I kind of gave it to you rather fast, but it seems to me this is a pretty impressive list, and I'm curious as to what your comments are.

Mr. Van Putten, do you want to take a crack at it?

Mr. VAN PUTTEN. Yes, sir.

Senator as you were reading the list, I was both trying to jot it down and comparing it to the positive features in the bill that we identified on pages 2–4 of our section-by-section listing, and I think

many of the features that you described are features that we acknowledge as being positive features.

There are significant concerns, however, that we have. Funding there has been a lot of discussion about, so I will just——

Senator CHAFEE. We've got to set some funding aside. We all agree on that, that that's very, very important.

Mr. VAN PUTTEN. So, having some kind of dedicated revenue stream over the long term for the funding.

The other very significant issue that we have identified is the HCP process, because as, I think, Senator Session correctly pointed out, enlisting the aid of private landowners in conserving species is so critical.

As I said in my response to Senator Wyden's question, doing so in a way that incorporates emerging science, that has appropriate adaptations, that sets biological goals for those HCPs, so we know, to the best of our ability, that the measure of success for HCPs isn't the number of documents produced, but rather the actions on the ground for species.

That is, in addition to the funding, one of our primary concerns. As I indicated in my opening comments, we view this bill as essentially enshrining the Administration's policy at the beginning of the process and not appropriately reflecting the experience of the HCPs and the HCP process as it has played out on the ground.

Senator CHAFEE. I think it is fair to say that you are complaining about the existing policy under the existing law, and we believe we'd improve that.

Mr. Bean, I really am over my time, but if you——

Mr. BEAN. I'll be brief, Senator.

I think your list is more or less the same list I would come up with of positive features in this bill. I, in particular, would emphasize the extreme importance of the new incentive provisions. I think that there are lots of landowners in Alabama, Senator Sessions, like those we have worked with in North Carolina and South Carolina and Georgia who would be willing to manage, for example, their long-leaf pine forests in ways that would be beneficial to endangered species if there were some financial incentive available to help them do that.

That, in my judgment, is the most important positive in this bill. But, as you've noted, without funding for it, it will really be a mirage. So I must return to that, although I know you've heard it many times.

Senator CHAFEE. Senator Baucus, you have no questions?

Senator BAUCUS. No, thank you.

Senator CHAFEE. Senator Kempthorne?

Senator KEMPTHORNE. OK. Mr. Van Putten, let me—I would genuinely be interested, Mark, in your thoughts. You've heard Senator McClure's eloquent views on takings and compensation when a property owner has lost the use or significant value of the land.

Why is that of such great concern that your organization opposes the idea of it being addressed?

Mr. VAN PUTTEN. Senator, the National Wildlife Federation has never advocated the repeal of the Fifth Amendment to the U.S. Constitution, and I want to make that clear. I was thinking that as Senator McClure was answering your previous question.

Our concern is, first of all, a concern similar to that which Senator Chafee articulated, and one that we saw played out in the 104th Congress, where an attempt to take what we viewed as an ideological meat axe to our environmental laws under the guise of takings fell short.

We are concerned about efforts to then try to introduce that issue into a particular bill such as the Endangered Species Act and to use that as a vehicle to address that issue.

Second, without getting into a long discussion of Constitutional law, as Senator McClure pointed out, there are many subtleties in terms of defining what is, in fact, a taking of private property, For example, it is generally understood that there is a commensurate burden to the public good that comes along with the ownership of private property.

It is, as Senator McClure acknowledged, a much more subtle issue than it sometimes seems to be.

Senator KEMPTHORNE. All right. Let me also ask you, as the chairman has pointed out, there's no question. Everyone agrees that there needs to be the funding, adequate funding.

Do you believe that today there is adequate funding for the endangered species program?

Mr. VAN PUTTEN. Senator, it is our view that additional funding is required in the three areas that identify both the implementation by agency, State, Federal, in the preventative context, as well as in the context we're talking about here.

Second, as Michael has identified the need to assure funding for when—to assure that HCPs work and what to do when they don't work.

And, third, to provide funding for the incentives for private landowners.

So the short answer is no, we don't believe there is enough funding in those three areas.

Senator KEMPTHORNE. Even under the existing Act, status quo, there is not sufficient funding today for endangered species activity?

Mr. VAN PUTTEN. Senator, we believe that, as the list of species indicates, there is not adequate funding at this time.

Senator KEMPTHORNE. So could we agree that this new bill that is being proposed may be the catalyst toward highlighting and achieving additional funding?

Mr. VAN PUTTEN. I think I can agree with that.

Senator KEMPTHORNE. So would it be worth supporting this legislation in order to achieve——

[Laughter.]

Mr. VAN PUTTEN. I knew where you were going, but I was willing to go there anyway.

Sir, as suggested by Senator Wyden a few minutes ago, through the good offices of you and others on this committee, we might get appropriations 1, 2, 3 years out. But, as Senator Chafee has noted, the last time this bill was reauthorized was 10 years ago, and the bill you are writing today may be the law we live with for more than a decade, and we need to have an assured revenue stream to fund these programs. So it's not just a matter of getting the appropriation this year or next year.

And, as I've reiterated, we've identified what we believe to be some significant problems with the way in which the good concept of HCPs has been incorporated in this bill.

Senator KEMPTHORNE. OK. And, with regard to HCPs—because I know you have some concerns about that, but shouldn't we acknowledge that with HCPs—and I think of Plum Creek, for example, that has been very innovative in dealing with HCPs—that, as they deal with the issue and as they collect biological data concerning their particular project, isn't that just a tremendous value to the Secretary to have that sort of data that can help us in other areas dealing with that particular species that we will gain that information from those HCPs?

Mr. VAN PUTTEN. Senator, I believe the development of that additional understanding of the needs of species in their habitats is beneficial, but it may not be to the advantage of particular species of concern if the habitat conservation plan does not provide for the incorporation of that emerging information in an appropriate and adaptive fashion.

Senator KEMPTHORNE. OK. Senator McClure, would you, if you could, too—and I appreciate we do have your written testimony, but just could you highlight some of the significant improvements you believe that are derived from this legislation?

Mr. MCCLURE. Well, I can tick them off pretty quickly. Indeed, we think the citizen participation is improved. It could be improved further, we believe. And we would support additional strengthening in that area.

We certainly support including a broader range of interests, including the States on the recovery teams.

And I think the public notice question is improved, but could be improved further. I think the addition of the mandating for good science and the means by which it is done is an extremely important aspect of this legislation.

The incentives to conserve habitat—and let me mention the "no surprises" policy, the "safe harbor" agreements, the low-effect conservation plans and candidate conservation plans.

We also very strongly support the habitat reserve program, as proposed. That's an area where we also need assured funding to make that one work well, and it can work very well, I believe.

Cost-effective recovery plans, I would like to get into that a little bit more because—and I can understand why people would react to the term "least-cost plan" as being a bad directive, but I can't understand why anybody wants to object to having cost-effective plans. We ought to be able to do the best we can with the money that we have, and I think you move in that direction.

Those are the things that I would look at. The consultation process is improved. It could be improved further. And I would hope, as you go through this process, and I would expect, as you go through this process——

Senator KEMPTHORNE. You're kind of tough to please, aren't you?

[Laughter.]

Mr. MCCLURE. Never satisfied.

[Laughter.]

Senator KEMPTHORNE. I appreciate that.

Mr. MCCLURE. When I got 51 percent of the vote, you should have thought I'd be happy. Would you be? Well, you'd be satisfied, but you're really after more than that.

Senator KEMPTHORNE. Yes.

And, too, Mr. Chairman, if I may just make this comment to Mr. Shroufe, I did have some questions for you, but if you could perhaps provide for the record, because there was the question about what can we do earlier to help species, and I really think you're someone that—your information would be invaluable. You're one of those that is on the ground. You are one of the stewards that works with this, and so I think you have invaluable input, which I would appreciate, and I appreciate your being here.

Senator CHAFEE. Thank you, Senator.

Senator Sessions?

Senator SESSIONS. Mr. Chairman, the question of deadlines, I ran into that as attorney general. We were trying to get trials tried more speedily, and the argument came back, the judges and all said that if you would double the budget they could do that, and I always inquired as to why it costs more to try a 1-day burglary case, trying it 60 days from arrest rather than 2 years from arrest. In fact, sometimes it costs more because more complications come up.

We do need to get caught up. I'm sure the agency is behind in a lot of these matters. But essentially it's not a big cost increase to get timely in your decisionmaking process, to me. it's just tough management and realistic hard work.

With regard to the voluntary compliance, I really do think that has great potential. You may have a 500-acre tract, and only 2 or 3 acres really involve an endangered species. The Federal Government cannot manage a one-acre tract in the heart of a private landowners' property, and they need that landowner to set it aside, and maybe some advice on how to manage it and monitor it, can provide a habitat there that would preserve that species.

I think we are on to something with that.

Mr. Chairman, I'm not aware—and I should know—how much of the increased funding we're talking about will go for that kind of project and how much will be going to the actual administrative staff of the agencies involved.

Senator CHAFEE. I'm informed that most of it goes to the recovery planning and the implementing of it.

Senator SESSIONS. That is more justifiable to me than just adding to our bureaucracy, and I think we've got to be careful how we manage it.

And cost is a factor. If you can do a project for half the cost, you can do two projects instead of one. That's so basic. We need to know that.

Mr. Chairman, I am due at another meeting at this time. I want to say that I think there are many good things in this bill. I think it is a major step forward. It has eliminated a number of things that everybody has agreed is irrational and has not furthered the preserving endangered species, but has burdened the process, has burdened landowners and private businesses unnecessarily, and if we can eliminate those unnecessary costs and apply our resources

wisely, we can increase the number of endangered species we can preserve.

I do appreciate the extremely dedicated service you and Senator Kempthorne and Senator Baucus and others have given to this bill. It presents some very difficult issues. You've worked through them. I support this legislation. I think we could improve it. There were some things in it I would like to see, but nothing is perfect.

So thank you for your leadership and for conducting this hearing.

Senator CHAFEE. Thank you, Senator Sessions. Your concern about the costs and how they work is, of course, not an original concern in the Government.

My predecessor as Secretary of the Navy developed what he called—his name was Paul Ignatius. He developed the Ignatius rule for the purchase of aircraft. And that is, if you buy fewer, they cost more per plane. And if you buy more, they cost more per plane.

[Laughter.]

Senator CHAFEE. Now, Mr. Van Putten, it appears to me—and I'm open to correction—that the Wildlife Federation's principal complaint about the bill is that it codifies the "no surprises" policy. But I believe that the "no surprises" policy has made the HCPs an effective mechanism to work with landowners. I believe in the "no surprises" policy.

But I know you have some concerns, and obviously we want to learn more about them, but it seems to me that you are opposing the bill because of your concerns about a policy that is going to go on even if we don't pass the bill. I mean, that policy is going to stay, regardless of what we do here. Could you explain that?

Mr. VAN PUTTEN. Yes, Senator. We do not oppose the concept of "no surprises," per se. That is, we acknowledge the need to grant some degree of certainty to private landowners. We've identified two very significant features of the current policy that they can undermine the recovery of species and that they fail to reflect adaptive management strategies, and we've made very specific suggestions there.

Senator I think enshrining it in law will make it much more difficult in the future to have HCPs that are, in fact, measured by what they achieve on the ground, as opposed to a bean counting approach of the number of plans we have.

It is because we acknowledge the critical role of private lands, it is because we acknowledge the need to provide some regulatory certainty to private landowners that we focus on the HCP provisions as being so critical to our support for the bill.

Senator CHAFEE. I'm not sure I understood the answer there.

Mr. VAN PUTTEN. Sir, it is real important to us that the HCP process actually work on the ground, and we think that enshrining in the law an approach that does not provide for adaptive management as we learn more about the needs of species subject to HCPs and an approach that would allow HCPs that undermine recovery is an approach that will not achieve the goals for conserving species and their habitat.

So it may sound like we're picking one thing out of a bill with many positive features, but, in addition to some of the other com-

plaints we have, this HCP issue is critical to us because of the importance.

Senator CHAFEE. But suppose we do nothing. Suppose we give up, we say we can't get this bill passed, and so that's it. We end it. All of that "no surprises" and the existing policy is going to continue, are they not?

Mr. VAN PUTTEN. Well, the existing policy might continue. The existing policy might evolve over time. There is a significant difference, in our view, to enshrining or freezing in the law the policy essentially as the Administration began this experiment and not reflecting what we believe we've learned from this experiment with HCPs.

Senator CHAFEE. What do you say to that, Mr. Bean?

Mr. BEAN. I think that the existing policy is troubling in a number of respects, and the most significant troubling aspect of it is that it sets no outer limit for the duration of these assurances to private landowners in setting no outer——

Senator CHAFEE. You mean in years?

Mr. BEAN. Yes, in years. That's right.

Senator CHAFEE. You mean it can be whatever—but there is a limit set in each respective HCP, but it could——

Mr. BEAN. That's right.

Senator CHAFEE.—it could go for 80 years.

Mr. BEAN. That's correct, and because the policy itself sets no limit, the landowners have an understandable desire to seek as long an assurance as possible, and the longer the assurance the greater the likelihood that you're going to learn something during that period of time that's different from what you thought you knew when you began.

It seems to me that the solutions to that are either one of two things. One, giving the Secretary the resources, the insurance fund, if you will, to step in when necessary when things don't turn out as expected. Or to do what neither the policy nor this bill does, which is to have some safeguards as to the duration of those assurances, have the duration of those assurances somehow keyed to the strength of the science underlying the plan, keyed to the inclusion in the plan of contingent measures or adaptive management measures or so on.

That's a problem that we've had with the policy, although it seems to me it can be addressed in either of those two ways. I've chosen to emphasize in my testimony this morning giving the Secretary an insurance fund that allows him to step in and do what's necessary. That seems to me to be a doable approach that would largely eliminate much of the controversy about the policy.

Senator CHAFEE. Well, I think, yes, I understand that. But, on the other hand, it is true that if we do nothing and this bill doesn't pass, all those problems are going to continue anyway.

Mr. BEAN. You're correct about that, sir.

Senator CHAFEE. Senator Kempthorne?

Senator KEMPTHORNE. Mr. Chairman, thank you.

I, too, have to go to another meeting, but I just want to thank this panel. I think it has been an excellent panel. All of you have provided us good input, plus you've been part of this whole process.

Mr. Chairman, I want to thank you again for sticking with it and sticking with me, and I appreciate it greatly, and to acknowledge the significant role of the staff of you and Senator Baucus, Senator Reid and my staff. We greatly appreciate it. We're set for next Tuesday for markup.

Again, I just—it's time that we solve this issue.

Senator CHAFEE. Yes, and it's going to require work between now and then, obviously. We've gotten some good thoughts here, and to consider those thoughts and what to do about them, whether to incorporate, whether to not in the chairman's mark. So obviously we'll be working closely together.

I will say that there is not much time, particularly if we are going to get in amendments and the amendments have to be in 24 hours in advance. We want a chance to look at them.

So I would say to all the staff here, ones that are left, and their bosses to please get any amendments in as quickly as possible, because we don't want to have to wrestle with all this at the last minute.

Mr. Van Putten, I've got a question here. You interpret the bill's waiver section of Section 7 as a "no surprises" policy, is that correct?

Mr. VAN PUTTEN. Yes, sir.

Senator CHAFEE. And I'd like to point out that the waiver applies only to those activities that promote the recovery of the species and that are carried out during the term of the agreement, that are in compliance with the agreement, and which there is sufficient information on the scope of the activity.

The bill explicitly requires that plans are to be reviewed every 10 years and agreements must be reviewed and revised as necessary on a regular basis.

Now, that doesn't sound like "no surprises" to me. Could you explain that?

Mr. VAN PUTTEN. Senator, I think we addressed this in page 9 and 10 of the side-by-side—excuse me, in the section-by-section analysis. And if you get beyond that, you've gotten beyond my capacity to respond, but I would welcome the opportunity to submit a response for the record.

Senator CHAFEE. All right. That would be fine if you could do that.

You argue that recovery implementation agreements would seriously harm species. I'm not sure I understand that. The biological standard on which such agreements are approved is that they "must promote the recovery of the species." It can't be approved unless each party has the capability to carry it out. It can't be approved without provisions for regular review and revision. All of these must be approved by the Secretary. There must be sufficient information so the Secretary can evaluate the scope and duration of the project.

The Section 7 consultation provides a lower standard, one that is tied to no jeopardy, which, itself, ensures that species are not seriously harmed.

Did you follow all that?

Mr. VAN PUTTEN. Yes, sir.

Senator CHAFEE. Could you explain it?

Mr. VAN PUTTEN. Sir, we've acknowledged some of the positive aspects of the recovery planning, but we've also identified some of the problems we see.

One of them that was discussed somewhat earlier is, as we read the bill, the provision that would allow the States, at their desire, to play the lead role, and then put the Secretary in the position of having to approve or disapprove it at the end of the process.

We are concerned about that process. We think it may exacerbate tensions between the State and Federal Government. We think it introduces an element of brinksmanship into this.

And I would say, based on my nearly twenty-year history with the implementation of the Clean Water Act and delegating programs to the State, that I have seen that phenomena repeated time and time again and fear that we may be setting in place a similar dynamic here that doesn't enhance collaboration but really results in confrontation, and we've identified that as one of our concerns with the processes set out in the bill.

Senator CHAFEE. OK. Again, here is—we have some testimony that has been submitted—I've put it in the record—from the Evangelical Environmental Network, which is a coalition on the environment and Jewish life and the National Council of Churches. We'll put this in the record and appreciate their having submitted it.

Thank you all very much for coming. We appreciate it.

Mr. Shroufe, safe journey home.

Mr. SHROUFE. Thank you.

[Whereupon, at 11:31 a.m., the committee was adjourned, to reconvene at the call of the Chair.]

[Additional statements submitted for the record follow:]

STATEMENT OF HON. JAMES A. MCCLURE, CHAIRMAN, NATIONAL ENDANGERED SPECIES ACT REFORM COALITION

Mr. Chairman, Senator Kempthorne, Senator Baucus, Senator Reud and other members of the Committee, I appreciate this opportunity to appear before you today as you consider legislation to reauthorize the Endangered Species Act. I come before you to share the perspective I gained as an active participant in the Senate debates regarding enactment of the original Endangered Species Act of 1973, as well as subsequent debates on reauthorization and amendments. I also appear here today, more specifically, as a representative of those who are directly affected by the Endangered Species Act.

I especially want to extend my congratulations to the chairmen and ranking members of the full Committee and the Subcommittee on Drinking Water, Fisheries and Wildlife for their efforts in drafting S. 1180, the bill we are here to discuss today. Their diligence, patience, good faith and hard work are to be commended. As one who served 24 years in the Senate and the House of Representatives, including a number of years on this Committee, I know that your efforts toward bipartisanship and consensus represent a very appropriate method, and perhaps the only successful method, for dealing with the difficult issues that surround reauthorization of the Endangered Species Act. We must recognize that consensus legislation, by its very nature, will not provide all things to all people, but often times does provide an opportunity for real change, and in this case improvements, to current law.

There is a temptation in long struggles like efforts to reauthorize the ESA to say "enough is enough, we have fought long enough." While I understand this sentiment, it should not be allowed to override the need to find solutions to the problems that gave rise to the struggle in the first place. Long after action is taken on the legislation before us today, the Endangered Species Act will continue to affect thousands of species and millions of Americans, so we must not shy away from making the difficult choices associated with this issue. It is our hope and belief that the ESA can work to protect species better without causing unfair or unjustified disruption in the lives of individuals and communities directly affected by the requirements of this law.

That is the challenge that faces each of us appearing before you today. We must cast aside the emotions of the legislative struggle and make good judgments that will recast the Endangered Species Act in ways which will allow the ESA to withstand the test of time and the strain of more species listings. We are certain that more communities will be brought into the world of ESA decisionmaking. The challenge facing you in this reauthorization is to ensure that they are brought into a process that is more positive, more certain and more constructive in the preservation of species and economic necessity than the decisionmaking process our communities face today. When the process is more fair, private individuals and state and local governments will become more active and dedicated partners in the effort to conserve species and their habitat. The ultimate beneficiaries of this partnership will be the endangered and threatened species themselves.

Mr. Chairman, I currently serve as Chairman of the National Endangered Species Act Reform Coalition (NESARC). The membership of the Coalition consists of more than 200 organizations representing diverse sectors of the economy including agriculture, water districts, manufacturers, electric utilities, builders, municipal government, small businesses and individual land owners. Some of our members are themselves coalitions or organizations representing large numbers of individuals, such as the American Farm Bureau Federation, the National Rural Electric Cooperative Association, and the National Association of Home Builders. The Coalition represents, directly or indirectly, millions of individuals whose livelihoods and property are affected by the implementation of the Endangered Species Act. It is important to note that no one has a greater interest in providing for the recovery of threatened and endangered species than the members of this coalition, for when a species is recovered, it can be removed from the list and regulatory restrictions can be lifted.

The primary purpose of my testimony today is to present the initial views of the Coalition on S. 1180, the Endangered Species Recovery Act of 1997. By necessity, our views will be preliminary. Our coalition members are reviewing S. 1180 which was introduced just 1 week ago and a more detailed review of the bill is underway. Before addressing the bill, however, I would like to call the attention of the Committee to testimony I delivered just over 3 years ago to the subcommittee now chaired by my friend and fellow Idahoan, Senator Dirk Kempthorne. My testimony in 1994 outlined my views, as one who voted in favor of the Endangered Species Act of 1973 and subsequent amendments to the Act, regarding the intent of Congress when it established this very important program to conserve our biological resources nearly a quarter century ago. I recently reviewed this statement, and I find it to be as relevant today as it was 3 years ago. Mr. Chairman, I would be pleased to provide a copy of this statement, and I request that you include it in the record of this hearing.

NESARC Position on S. 1180

I will state the position of NESARC regarding S. 1180 in two parts. First, NESARC supports S. 1180; and second, we also urge certain improvements to the bill. We believe the consensus-based approach the authors of this bill have undertaken is the only way to move ESA reauthorization legislation in the Senate at the present time. We support this approach and the legislation it produced. At the same time, this Coalition, since its inception almost 6 years ago, has taken clear, consistent and strong positions on a number of key issues. While S. 1180, as a compromise measure, does not fully address all of our priorities in the manner we prefer, it does recognize that the ESA is in need of significant improvements and seeks to address the need for better scientific processes, greater citizen participation in ESA decisionmaking and more incentives for cooperative conservation efforts. S. 1180 is a positive change in the law, and we urge the committee to act favorably upon it. Additionally, we urge the Administration, which has sought to make this law work better, to support the legislation.

Along these lines, I wish to commend to this Committee another bill that Senator Kempthorne has introduced, S. 1181, the Endangered Species Habitat Protection Act. This legislation provides land owners with a number of important incentives which give them a real reason to want to join in the effort to conserve the habitat of endangered and threatened species. This bill would codify several notable tax incentives and, perhaps more significantly, provide compensation to those who suffer partial regulatory takings. Mr. Chairman, it is simply not fair to take people's property that is, to destroy the value of their property, in whole or in part without compensation. NESARC strongly believes that there must be a reliable mechanism to compensate property owners who suffer full or partial regulatory takings. I urge the members of this Committee to consider with a fair and open mind how greatly this kind of compensation program would assist in the important task of protecting this

country's biological diversity. I urge the members of this Committee to support S. 1181.

I will now turn to NESARC's specific concerns with respect to the Endangered Species Act and the steps S. 1180 takes to address our concerns.

Citizen Participation

We believe that private citizens, and especially those most directly affected by conservation measures in a social or economic manner, should have a greater stake and more prominent role during ESA decisionmaking. S. 1180 includes a number of very positive reforms in this area which NESARC supports strongly. I might add that, in my view, this is one area in which we share considerable common ground with environmental advocacy groups.

In particular, NESARC supports the following reforms, which are contained in S. 1180:

- More opportunities for public hearings on listing decisions and recovery plans.

For some time, the members of NESARC have called for public hearings on recovery plans which should be the heart of recovery efforts. Public notice and hearings will assist in investing communities in our nation's efforts to conserve species. Under S. 1180, recovery planning and critical habitat designations occur concurrently. We suggest that the Committee consider adding new language to call for hearings on critical habitat designations. Alternatively, the legislation, which appears to provide for critical habitat designation "after consultation and in cooperation with the recovery team," could further provide that the required hearings on recovery plans also must address critical habitat designations.

- Making information on which conservation decisions are based publicly available.

S. 1180 includes a clarification regarding the circumstances under which the Secretary may withhold information to prevent acts of vandalism. On this point, NESARC believes the legislation should include stronger language clearly stating that the public should have a right to this information unless the Secretary presents evidence that the information must be withheld.

- Inclusion of a broader range of interests in the recovery planning and implementation process, and inclusion of the applicant during a Section 7 consultation.
- A greater role for states and local governments during major ESA processes, particularly listing and recovery planning and implementation. In particular, we find the increased role of states to be a positive improvement in the law.

We recognize that the recovery team, which includes a representative of an affected state agency, recommends the designation of critical habitat. Nevertheless, we would support a stronger statement of the Secretary's duty to cooperate with states or consider state information at time of critical habitat designation, as well as provide recommendations during the peer review process.

Finally, I want to make a broader statement regarding the public's right to know. Under current law, the Secretary must publish a notice of certain actions in the Federal Register and a newspaper of general circulation. While this may be sufficient notification for some, most common folk don't read the Federal Register or the legal notice section of the newspaper. For this reason, too often actual notice to affected parties does not occur.

We believe it is possible to develop, on a consensus basis, a mechanism to provide the public better notice of ESA actions. We recommend a system of mailed or electronic notification for those who request to be placed on a notice list, similar to an existing mechanism that the Army Corps of Engineers administers with respect to the wetlands program.

Good Science

To ensure fair, sensible and biologically effective ESA actions, scientific information must be as accurate and as thorough as possible. S. 1180 includes a number of very good reforms to ensure the use of high quality scientific information and we strongly support these reforms:

- Greater weight for data that is empirical, field-tested or peer-reviewed.

The bill qualifies this preference by applying it only "when evaluating comparable data." While this may be a matter of semantics, we see no need to qualify the preference for better scientific information.

- Minimum documentation standards for petitions to change the listing status of the species.
- Automatic peer review of listing decisions and the recovery goal.

NESARC recommends two additional peer review reforms. First, states should have the option of appointing the recovery team. Second, NESARC supports peer review of critical habitat designations.

Incentives to Conserve Habitat

Most of the habitat of endangered and threatened species occurs on non-Federal lands. The owners of these lands must participate fully in conservation efforts to ensure the survival and recovery of threatened and endangered species.

Unfortunately, some still believe that the best way to provide for the participation of our private citizens and land owners is to establish even more restrictive land use and management programs at the Federal level and to threaten land owners with punishment, including severe criminal penalties, if they do not manage their own land exactly as the Federal Government dictates. The members of NESARC take a different view.

We believe that conservation is enhanced when the nation's endangered species program not only calls for strict, legalistic compliance with Federal standards, but also wins the hearts and minds of those who make the day-to-day decisions regarding the land that serves as habitat. Private land owners are the first line of defense for threatened and endangered species. Imperiled species are best protected when land owners are full partners in the programs and decisions that affect the value and use of their property. This only can be achieved through more positive, not negative, incentives.

S. 1180 provides these kinds of positive incentives in a number of ways, including:

- A "no surprises" policy, assuring land owners that if they enter into an agreement with the Federal Government to conserve habitat, the government cannot break that deal at a later time without the land owner's consent. If land owners cannot receive this simple assurance that the agreements they make with the government are binding, they will be less likely to enter into voluntary agreements to conserve habitat.
- A "safe harbor" policy to provide incentives for private land owners to proactively restore habitat, actually expanding areas available for threatened and endangered species.
- Low effect habitat conservation plans, encouraging small land owners and others who may take actions having a negligible effect on the species to work with the Fish and Wildlife Service or National Marine Fisheries Service as they do so.
- Multiple species conservation plans and candidate conservation agreements, providing an opportunity and incentive for private land owners to work more proactively to conserve species before they reach threatened or endangered status.
- A habitat reserve program, similar to the existing conservation reserve program, to provide a direct monetary incentive to conserve habitat, particularly for farmers, without requiring loss of title to property or involuntary conversion of property uses.

Mr. Chairman, many of the reforms I have just described have been developed administratively over the past few years. This coalition does not support every action of the Clinton Administration with respect to the Endangered Species Act, however, we want to acknowledge that the Administration has worked hard to make this Act work in a more positive and cooperative fashion in the area of habitat conservation plans.

Cost-Effective Recovery Plans

Recovery plans can be very expensive to develop and implement. In the past, the Services have occasionally attempted to document their own costs associated with a recovery plan, but they did not systematically consider the costs to other parties such as the individuals and organizations NESARC represents.

When choosing between a number of alternative recovery plans that achieve recovery within a reasonable amount of time, we believe the Secretary should be required to approve and implement the least costly or most cost efficient recovery plan. Frankly, I cannot see any principled basis upon which to oppose this common sense notion.

S. 1180 includes a number of methods to improve the recovery planning and implementation process. NESARC notes the following significant improvements to current law:

- Representation of those who are socially or economically impacted on the recovery team.
- The requirement that both the recovery team and the Secretary achieve an "appropriate balance" among the effectiveness in achieving recovery, the time to achieve recovery, and social and economic impacts.

On this point, we believe that S. 1180 could provide stronger encouragement for the Secretary to approve only least costly or most cost efficient recovery measures among reasonable alternatives.

- The requirement of a detailed description of the economic effects of a recovery measure.

Mr. Chairman, S. 1180 requires the Secretary to give priority to recovery plans that have certain characteristics. For example, the Secretary would be required to give priority to recovery plans that "reduce conflicts with construction, development projects, jobs or other activities," as well as to plans that "have the greatest likelihood of achieving recovery of the endangered species or the threatened species," among other things. On its face, we view this language as positive. Based on my years of experience as a legislator, however, I want to recommend that the authors of this legislation clarify their intent.

We believe this language is intended to ensure that the Secretary determine whether a recovery plan meets each one of the criteria specified. Too often in the past, when Congress has required the Secretary to consider economic factors, the agency has ignored Congressional intent by arguing that the conservation values expressed elsewhere in the Act are more important. We believe that you, the authors of this bill, did not intend that result in this case, and we would recommend minor changes in the legislative language to reflect that intent.

Shared Burdens

Just from reading the "findings and policy" section of the ESA, one might conclude that the ESA calls for "encouraging" states and private parties, through a system of incentives, to implement a program to conserve fish, wildlife and plants "for the benefit of all citizens." In practice, those who live in certain areas, particularly rural areas and the West, and those who work in natural resource intensive businesses, bear the brunt of the costs to implement the ESA.

It is the residents of these areas that, by engaging in perfectly legal activities that are necessary to meet our nation's needs for power, water, food, and other goods and services, are most affected by the Endangered Species Act. I refer to those men and women who engage in such activities as the farming and ranching from which we get our food; harvesting the timber which is necessary for, among other things, construction of new houses; building the homes in which we live, the markets where we shop and the businesses where we work and earn our pay check; and generating and transmitting the electricity without which artificial lights—not to mention our voice mails, facsimiles and computers—would not exist.

Protecting endangered species is an endeavor in which we engage for the benefit of all people. If additional costs associated with conservation efforts are imposed on specific activities, we believe the costs of species protection should be shared more even handedly. In this respect, S. 1180 includes a number of programs through which grants may be made available for those seeking to implement conservation measures. We urge the Committee to continue to support these programs, and we also urge the members of the Committee to work to ensure full funding of these programs in the appropriations process.

Water Rights

The water law of the various states is a complex matter that often establishes property rights to water. There are significant problems and concerns associated with this area of the law as it relates to the Endangered Species Act. Maybe some of the controversy and conflicting decisions can be addressed through the improvements made by S. 1180. NESARC urges the Congress to take action to ensure that the Endangered Species Act is in harmony with, and recognizes the primacy of, state water law.

Consultation

NESARC supports provisions in S. 1180 that require reasonable and prudent alternatives to be consistent with the action that is the subject of consultations; within the scope of the Federal agency's legal authority and jurisdiction; and economically and technologically feasible. NESARC also supports the requirement that reasonable and prudent measures be related both in nature and extent to the proposed activity that is the subject of the consultation. I strongly believe that these provisions represent the original intent of Congress when it codified and amended Section 7. Obviously, they represent the intent of the four original cosponsors of this bill.

NESARC appreciates the provisions of S. 1180 that allow the action agency to determine, in certain limited situations, that a proposed action is not likely to adversely affect listed species. We believe S. 1180 contains more than adequate safeguards to ensure the biological integrity of this process. Frankly, we would support broader reforms than this, but this amendment will help eliminate unnecessary paperwork and administrative costs for certain low impact activities.

Finally, NESARC supports provisions to:

- encourage consolidated consultations where more than one agency is involved;

• encourage consolidated consultations where a single agency proposes more than one action; and

• provide, in the event of a newly listed species, only as much disruption of previously approved plans and activities as is strictly necessary to allow consultation regarding that species.

Definition of "Take"

It consistently has been the position of NESARC that Congress intended the Endangered Species Act to prohibit direct "takes" of endangered species, as the word "take" traditionally has been understood in the common law dealing with game and wildlife. In other words, we believe the ESA originally was intended to prohibit activities directed toward an identifiable member of certain species, not perfectly legal land use actions that may happen to have some indirect impact on species. Accordingly, we have supported amending the definition of "take" to clarify that habitat modification is not a "take," so long as there is no direct action against an identifiable member of the species.

We understand that the original cosponsors of S. 1180 could not come to an agreement that would address the legality of habitat modification. We simply note for the record that our views on this subject have not changed.

We do support provisions in S. 1180 that require the Secretary and others to establish, using scientifically valid principles, that an action actually would cause a "take." Unfortunately, in certain instances, we believe that some persons—especially small land owners who cannot easily afford a lawyer—have been pressured into paying unreasonable mitigation costs as a condition for an incidental take permit for an otherwise lawful activity, without an adequate demonstration of the risk of an actual "take." It appears that S. 1180 would require verification of a "take" before demanding mitigation or bringing an enforcement action, and we support this provision.

Citizen Suits

In the past, NESARC has taken the position that our members should not be excluded from court based on our point of view. Specifically, NESARC opposed decisions of some courts, particularly those in the ninth Federal circuit, that held that parties alleging economic injuries had no legal standing to bring a citizen suit under the Endangered Species Act. This issue is no longer part of our legislative agenda because of the Supreme Court's unanimous decision in Bennett v. Spear. The Supreme Court's decision in that case completely vindicated our point of view, and we support the decision of the authors of S. 1180 not to offer new legislative language to address this issue.

Conclusion

Mr. Chairman and members of the Committee, thank you again for this opportunity to testify on behalf of NESARC. We commend the efforts of Senators Kempthorne, Chafee, Baucus and Reid, and their staff, to draft S. 1180. In our view, S. 1180 would bring needed balance to ESA decisionmaking. Enactment of the legislation would improve significantly ESA scientific and public involvement processes and provide incentives for cooperative agreements. S. 1180 represents a significant improvement in the law. We support the bill, and we urge favorable action on the legislation by this Committee and the full Senate.

National Endangered Species Act Reform Coalition,
Washington, DC, September 24, 1997.

HON. JOHN CHAFEE, *Chairman,*
Committee on Environment and Public Works,
Dirksen Senate Office Building,
U.S. Senate, Washington, DC.

DEAR CHAIRMAN CHAFEE: I again want to thank you for allowing me, on behalf of the National Endangered Species Act Reform Coalition, to testify in favor of S. 1180, The Endangered Species Recovery Act of 1977.

During your remarks today, you alluded to an important point upon which want would like to further comment for the record, if possible. want feel particularly qualified to do so as a former Chairman of the Interior Appropriations Subcommittee, and as the current Chairman of this Coalition, which has tried to attach amendments to appropriations bills dealing with the ESA reform.

I very much agree with your statements which implied, perhaps even warned, that should the ESA not be reauthorized by the Congress, the pressure to change

the current law through the appropriations process will increase each year. As you know, the recent moratorium on the listing of additional species was accomplished through this manner.

Although NESARC did not initiate that specific amendment, we did support it as method to build pressure so that Congress would review the underlying Act. Additionally, over the past few years, we have instigated, although ultimately unsuccessfully, several amendments to appropriations bills which would have strengthened the public's right to know about species listings, designation of critical habitat and upon what information those decisions were based. We also initiated amendments to codify the no-surprises policy and to require that the least cost alternative be implemented in recovery plans.

Iwant to echo your statement that there are other forums by which changes to the ESA might be attempted, should your Committee, and the Congress not proceed with addressing reauthorization of the Act. That is why your effort, and that of Senators Kempthorne, Baucus and Reid are so important.

In short, your comments were right on mark. want hope, that by including this letter in the hearing record, want might bring additional attention to them.

Again thank you and your colleagues for bringing S. 1180 to this point. We are currently working very hard to perfect this bill, and to help garner the support needed to secure its passage.

Sincerely,

James A. McClure,
Chairman.

STATEMENT OF MICHAEL J. BEAN, ON BEHALF OF THE CENTER FOR MARINE CONSERVATION, THE ENVIRONMENTAL DEFENSE FUND, AND THE WORLD WILDLIFE FUND

For the past 6 years, Congress has been deadlocked over the future of the Endangered Species Act. Two camps have put two quite starkly different views of the Act before you. The environmental camp my camp—has argued that the existing law must be strengthened, that it is not accomplishing its vitally important goal of conserving rare species as effectively as it must if it is to stave off a flood of extinctions. The other camp has argued that the existing law is unduly onerous for those whose activities it regulates, and must be made less so. Unable to choose between these two divergent views, Congress has done nothing, an outcome that furthers the goals of neither camp and serves the interests of our nation's wildlife not at all.

The solution to breaking this impasse is to recognize that what is needed is not to choose between these two views, but to find the solutions that accomplish both goals. By making the Act more effective at conserving species and less onerous for those it regulates, real progress can be accomplished. That, however, is much easier said than done. Improvement in the conservation of rare species doesn't flow automatically from loosening the regulatory screws, as some in the regulated community have argued, but neither does tightening those screws guarantee better conservation results. The task before all of us is much more difficult than that. It is to build a much larger endangered species conservation toolbox than that which now exists, one that has enough different tools in it to address effectively the many varied challenges that declining species and landowners face.

There are significant differences of opinion about the extent to which you succeeded in accomplishing what I have just outlined, but I want to be very clear that I recognize and appreciate that you—Senators Chafee, Kempthorne, Baucus, and Reid, as well as Secretary Babbitt have genuinely tried to do so. For that, you are deserving of much credit.

Let me turn now to the substance of your effort. I don't think I can offer a better summary than that of my colleague John McCarthy of the Idaho Conservation League. As he noted, "There are some definite improvements, and there are some definite danger zones. A lot depends on whether there is funding for the good things." Among the most important of the improvements are three new programs to offer financial incentives to private landowners who agree to implement beneficial management practices on their land. There are three inescapable facts that underscore how urgently such incentive programs are needed. First is the fact that most endangered species have most of their habitat on non-Federal land, especially private land. Second, in general species that depend heavily on private land are faring poorly. And third, some of the most significant threats to these species can only be addressed through active management measures, in particular control of invasive exotic species, and replication of natural disturbance regimes that no longer function, especially fire disturbance regimes. Without cost sharing assistance, many

landowners can't implement the needed management measures. Without such active management, the continued decline of many of these species is inevitable.

For these reasons, the provisions of this bill that authorize financial assistance to landowners implementing the active management measures called for by "safe harbor" agreements, recovery plan implementation agreements, and agreements to enroll land in the new endangered species habitat reserve program are vitally important. But let me add one major caveat. The promise of these new programs will never be realized unless they are funded. Your bill authorizes appropriations for each of these programs, but the experience of seeing other promising conservation programs, including some under the Farm Bill, go underfunded, or even unfunded, is too recent and too clear to permit me to regard these new programs as anything more than a mirage at this time. If you are serious about these new incentive programs, you must find a means of assuring funding for these programs. One idea among many that ought to be seriously considered would be to dedicate a portion of the expected receipts from the sale next year of the Elk Hills Naval Petroleum Reserve to a special trust fund that would be available, without further appropriation, for expenditure in support of these new landowner incentive programs. The Elk Hills Reserve supports a number of endangered species, all of which will receive substantially less protection as a result of its transfer to private ownership; thus, it is appropriate to reserve at least some of the more than $2 billion expected from its sale for the purpose of encouraging endangered species conservation on private land. Other possibilities ought to be seriously explored as well.

On a related topic, your bill contains new standards for the approval of multi-species habitat conservation plans, standards that are significant improvements over those now in the law. The bill would also shift certain burdens to the Federal Government, however, that we are concerned will not be met because of lack of funding. Specifically, the bill would codify the "no surprises" policy that the Administration promulgated 3 years ago. That policy guarantees landowners certainty that the agreements they make will not be subject to unilateral changes in mitigation requirements. In light of this, it is very important to ensure that the government has the resources to respond to the risks that this policy places upon it. We urge you to create an "insurance fund" to cover the costs of additional mitigation measures for which the government itself may be responsible under this policy. The creation of such a fund would go a long way toward resolving much of the recent controversy over the "no surprises" policy.

There is another risk entailed in this bill that concerns me deeply. It is the risk that the new procedural requirements imposed by the bill with respect to the development of recovery plans and, to a lesser extent, the listing of species, will overwhelm the Fish and Wildlife Service and the National Marine Fisheries Service. The new procedural requirements imposed on the recovery planning process are complex, costly, and, in my judgment, unduly burdensome. The result, I believe, will be the opposite of what is apparently intended. Instead of getting recovery plans that play a vital and central role in the implementation of the Act, you will get a major diversion into unproductive bureaucratic procedures of scare resources that could have gone into on-the-ground conservation, a paucity of recovery plans, and a proliferation of litigation over non-compliance with deadlines and content requirements.

These, I realize, are strong words, but they are carefully chosen, and I think they are justified. I base them on the following: The bill requires that recovery teams be constituted as they have never been constituted before, including as team members people who have no prior recovery planning experience; it requires these new teams to develop plans substantially more complex than those that have been done heretofore; it requires the plans they develop to be subjected to new public hearing requirements not found in present law; it requires that plans be produced at a pace the government has been unable to achieve thus far; and it simultaneously requires that a substantial existing backlog of unfinished recovery plans be eliminated by preparing plans in accordance with these procedures for all listed species that currently lack them. Ignore all of the other changes and just focus for a moment on this last requirement. At present, there are 389 listed species that do not yet have recovery plans, plus an additional 99 species proposed for listing. Over the last 5½ years, the government has produced, on average, 27 final recovery plans per year, encompassing an average of 62 species. Even assuming no changes in the recovery planning process, at these rates the existing backlog of recovery plans for already listed or proposed species would require nearly 8 years to eliminate. To eliminate this backlog in 5 years would necessitate a 40 percent increase in resources currently devoted to recovery planning, assuming no other species were added to the list in the meantime. In reality, the resource demands will be even greater, since the new procedures applicable to recovery planning are substantially more complex and demanding than existing procedures.

Absent a very substantial increase in funding for recovery planning, this is a prescription for paralysis. One partial solution to ameliorate some of this impact would be to allow recovery plans to be developed in accordance with existing procedures for those species that are already listed as of the date of the law if a recovery team for such species has already been appointed and begun work. In other words, limit the applicability of the new procedures to newly listed species and to those already listed species for which recovery planning is not yet under way.

Even this partial solution, however, does not address the larger question of whether the new planning procedures in this bill are worthwhile. I understand that the expectation underlying these new requirements is that they will lead to recovery plans that have a substantial degree of "buy-in" from affected interests and plans that are taken more seriously than present plans often are. These are worthy goals, but they won't be achieved by loading up recovery planning processes with a host of new procedural requirements. That "easy solution" reminds me of H. L. Mencken's comment that "There is always an easy solution to every human problem neat, plausible, and wrong." I urge you to rethink them carefully, with a critical eye on the resource demands they entail.

For similar reasons, I think it a mistake for Congress to require independent scientific review of every listing decisions and to prescribe how that review is to be accomplished. Many listing decisions generate no real controversy, and to require independent review of them is a make-work exercise. When independent review is needed., the National Research Council may or may not be the best source of qualified reviewers, and it may or may not be able to respond promptly to the needs of the government for such reviewers. It is much better, in my view, to direct the Secretary to institute a mechanism that assures independent scientific review and is free from the appearance of conflict of interest, but leave it to him to determine how that should best be accomplished.

Finally, the bill makes a number of changes to the provision of the Act that governs how Federal agencies are to carry out their obligations toward endangered species. That provision, Section 7, has been in many ways the cornerstone of the Act. Its procedures are well known, having changed little in the last two decades. Its results have been generally quite positive, as measured both by the infrequency of irreconcilable conflicts, and by the fact that species found on Federal lands are generally faring much better than those not found there. In general, I favor the philosophy that "if it ain't broke, don't fix it." In my view, Section 7 ain't broke.

I hope that you will address these and other concerns seriously. As I have noted at the outset, I think it is legitimate and appropriate to try to reduce the burdens this Act imposes on those it most directly affects, but it is essential to do so in a way that actually improves the prospects for survival of the species at risk of extinction. I urge you to keep in mind what William Beebe, a scientist, explorer, and friend of Theodore Roosevelt, wrote more than 90 years ago: "The beauty and genius of a work of art may be reconceived, though its first material expression be destroyed; a vanished harmony may yet again inspire the composer; but when the last individual of a race of living things breathes no more, another heaven and another earth must pass before such a one can be again." In his lifetime, Beebe saw the once most abundant bird on earth, the passenger pigeon, disappear into extinction. He saw the heath hen of the Northeast pass forever from this earth, and the Carolina parakeet of the Southeast vanish not long thereafter. None of us will ever see these creatures or hear their voices. As you consider this bill, I hope you will seek to ensure that those who come after us will be able to see and hear the species that we still have the power to save.

American Farm Bureau Federation
Park Ridge, IL, September 22, 1997.

HON. DIRK KEMPTHORNE,
Committee on Environment and Public Works,
Senate Office Building,
Washington, DC.

DEAR SENATOR KEMPTHORNE: We applaud the provisions in your Endangered Species Recovery Act of 1997 that authorize financial assistance to landowners in implementing the active management measures called for by "safe harbor" agreements, recovery plan implementation agreements, and agreements to enroll land in the new endangered species habitat reserve program. These are vitally important measures for improving the conservation of endangered species and for improving the relations between landowners and conservation agencies.

But the promise of these new programs will never be realized unless they are funded. Although the bill authorizes appropriations for each of these programs, we are painfully aware of other promising conservation programs that never achieved their potential because they were underfunded, or even unfunded.

Accordingly, we urge you to explore every possible opportunity to provide a secure, assured source of funding for these new incentive programs. We pledge to work with you to make such an assured source of funding a reality. We believe that it will put many of this nations endangered species more securely on the road to recovery and will enlist the cooperation of the farmers and other landowners who share your concern for conservation.

Respectfully submitted,

Dean Kleckner,
President, American Farm Bureau Federation.

Wm. Robert Irvin,
Acting Vice President for Programs, Center for Marine Conservation.

Michal J. Bean,
Chairman, Wildlife Program, Environmental Defense Fund.

STATEMENT W. HENSON MOORE, PRESIDENT AND CEO, AMERICAN FOREST AND PAPER ASSOCIATION, ON BEHALF OF THE ENDANGERED SPECIES COORDINATING COUNCIL

Mr. Chairman and members of the Committee, thank you for the opportunity to testify today on S. 1180, the "Endangered Species Recovery Act of 1997."

I am W. Henson Moore, President and CEO of the American Forest & Paper Association (AF&PA). AF&PA is the national trade association of the forest, pulp, paper, paperboard, and wood products industry. We represent approximately 150 member companies which grow, harvest and process wood and wood fiber; manufacture pulp, paper and paperboard products from both virgin and recovered fiber; and produce solid wood products. The association is also the umbrella for more than 60 affiliate member associations that reach out to more than 10,000 companies. AF&PA represents an industry which accounts for more than 8 percent of total U.S. manufacturing output. It directly employs about 1.4 million people and ranks among the top 10 manufacturing employers in 46 states.

I am also here today representing the Endangered Species Coordinating Council (ESCC). The ESCC is a coalition of more than 200 companies, associations, individuals and labor unions involved in ranching, mining, forestry, manufacturing, fishing and agriculture. A current list of members is attached. The labor unions alone represent over 2 million working Americans. We seek to provide workable procedures and positive incentives in the Endangered Species Act which promote conservation of wildlife in a way that considers economic factors and respects the rights of private property owners without impairing the law's fundamental commitment to protect listed species.

First, I would like to thank Chairman John Chafee and Sens. Dirk Kempthorne, Max Baucus and Harry Reid for drafting and introducing S. 1180, the Endangered Species Recovery Act of 1997. Given the challenge in reaching a consensus on these complex and sometimes contentious issues, it is understandable that the bill takes a modest approach at updating the law. I think we can all agree that the changes contained in S. 1180 are procedural only, which, while important, effect no substantive change in the statute or in species protection.

Congress enacted the Endangered Species Act to protect endangered and threatened species, a goal which we support. We believe the principles behind the Endangered Species Act represent those qualities which make our society the finest in the world. However, believing in these principles and writing a law that works are two entirely different matters.

As its operating premise, the Endangered Species Act mandates protection of the species to the point of its recovery, without regard to the interaction of these steps with the rest of society. Humans are part of the diversity of nature and are one of the natural elements that is capable of causing changes, sometimes dramatic change, in the environment. Humans have modified the natural environment in North America for hundreds, if not thousands, of years. A recent example is the virtual elimination of wildfire from the environment in the Southeast. A number of species, some of which are now listed under the Endangered Species Act, were dependent on these fires for their existence. Recovery of these species by restoration of their original habitat would mean the return of the widespread fires upon which

the species thrive, a circumstance which would have devastating consequences for the people who live and work in this area. Yet, some would argue that is the literal mandate of the Endangered Species Act.

There is growing momentum within the American public for updating the ESA. A May 1997 national survey conducted by Market Strategies found that over 70 percent of the respondents favored updating the ESA. This is an substantial increase from the 42 percent who in a 1995 national survey believed the ESA needed to be amended.

When presented with the fact that 1,500 species have been listed and only 27 have been removed from the list since ESA's inception in 1973, a mere four due to recovery, 60 percent of those surveyed in May agreed that the law was under performing. Furthermore, 62 percent believed they are not getting their money's worth from the law as currently written. We have spent hundreds of millions of dollars in the name of preserving threatened and endangered plants and animals, but really have little to show for these expenditures in the way of recovered species.

The American public has strong opinions on how they would like to see the ESA updated. When presented with various options to consider, they overwhelming agreed with a number of the provisions included in the legislation currently being considered:

- 88 percent approve of requiring sound science and a well defined set of scientific criteria that is peer-reviewed when evaluating data concerning an endangered plant or animal.
- 85 percent want to include private landowners in the process through incentives that allow them to work cooperatively with the government to protect listed species that inhabit their land.
- 81 percent agree that the government should consider alternative methods for protecting an endangered animal or plant which may be less disruptive in terms of its social and economic costs;
- 80 percent support providing the specific incentive of certainty—specifically that when the government and a private landowner agree on a plan to protect an endangered plant or animal on the landowner's property, neither party can change that plan without the consent of the other.
- 77 percent believe state government should have a bigger role in the identification and protection of animals and plants.

I. S. 1180 updates the Endangered Species Act in several key areas which we believe are essential to provide for a workable law. For example, this legislation would:

- improve the quality of the science to be used for listings and recovery plans;
- enhance the recovery process;
- remove the inefficiencies and inequities from programmatic consultation on public lands;
- provide a strong legislative foundation for Secretary Babbitt's policies which recognize the importance of including, rather than excluding, private landowners in species conservation efforts;
- create mechanisms to assist smaller landowners faced with the complexities of the Endangered Species Act; and
- establish reasonable sideboards on enforcement which are consistent with Supreme Court precedent.

Quality Science.—We applaud the provisions in Section 2 which assure that listings are based on quality science. While we have disagreed on occasion with the quality of the science which has been used, we nonetheless believe the listings must be kept in the scientific arena. We have long supported the concept that proposed listings should be subject to independent peer review, the normal process for scientific studies, a concept with which 88 percent of Americans agree. S. 1180 directs this, and as an important component, requires the Secretary to summarize and respond to the peer review in the final listing. We recognize that many criticize peer review of listing as a process which will unduly delay listings. We disagree, provided two things occur. First, the Secretary and the agencies must consider peer review as helping their deliberations on the status of a species, rather than as a hindrance. They must begin planning for peer review early in the process of preparing a proposed listing. Second, Congress must demonstrate its commitment to quality science through peer review by annually appropriating sufficient funds.

We believe the bill would be strengthened with a more rigorous requirement for the identification, and subsequent collection, of data which is necessary to determine whether the assumptions on which the Secretary based the listing remain valid. However, the provision in S. 1180 which requires identification of data which would assist in recovery, and of steps to acquire the data, at least recognizes that data, assumptions and conclusions are not set in concrete at the time of listing.

Finally, the bill focuses the agency on use of empirical and field tested data. In the past, the agency has relied too readily on computer models and assumptions. While these tools have a role, we believe that the damage to the Secretary's credibility from overreliance on computer models and assumptions far outweighs any benefit provided by listings which lack hard data.

Enhanced Recovery Process.—Section 5 of the bill presents a completely revised process for the development and implementation of recovery plans. We have long advocated that recovery plans should be the focus of conservation efforts by the Federal Government, These plans should address the biologic needs of the species, the economic and social consequences of fulfilling those needs, and the financial and scientific capabilities of achieving recovery. S. 1180 goes a long way toward accomplishing this.

We particularly support the expanded membership of the recovery team required in the bill. We believe it is essential to include not only scientific experts, but representatives of all relevant fields and affected interests, particularly landowners who are likely to have specific information about habitat conditions. We also agree with the authors that each recovery plan should consider alternative measures to achieve the goal and the benchmarks, which balance biology, timeframes and economic dislocations. These provisions will require the Secretary to consider the impacts of recovery and to analyze strategies which will lessen or avoid social and economic disruptions. In the recent Market Strategies survey, 81 percent of those polled supported the consideration of recovery alternatives which could have less social and economic impact.

Programmatic Consultation.—Section 4 of the bill contains a much needed improvement for management of public lands. A decision by the U.S. Court of Appeals for the Ninth Circuit, Pacific Rivers Council v. Thomas, needlessly complicated this management by requiring a halt to all site-specific activity on a national forest when a new species is listed until the Forest Service consults with the Secretary on the need to amend the existing forest plan. Even though site-specific activities would undergo individual consultation on their affect on the newly listed species, the Ninth Circuit interpreted the Endangered Species Act to require they be halted until the plan-level consultation was completed. The bill would allow the site-specific activity to proceed, provided it meets the criteria of ESA Section 7(a)(2), that is, it is not likely to jeopardize the continued existence of the listed species or destroy or adversely modify designated critical habitat.

Legislative Foundation for Private Landowners.—S. 1180 would enact into law several existing Administration policies adopted by Secretary of the Interior Bruce Babbitt which are critical to the continued involvement of private landowners in conservation of listed species—"no surprises," multiple species habitat conservation plans (HCPs), candidate species conservation agreements, and "safe harbor" agreements. The bill also provides new opportunities for landowner participation in recovery planning and consultation.

Many landowners intend to use or manage their land for a period of years. Forest landowners, for example, will establish a management strategy designed to produce income over the growing cycle of the trees, called a rotation, which in some cases may be as long as 80 or 100 years. These landowners are willing to discuss how this land will be managed, provided they receive the certainty that the business decision they make today is likely to be constant for the life of the intended use, such as the rotation of the affected trees. Indeed, they might be willing to adjust their management in return for more certainty.

Prior to 1993, a landowner had no certainty with respect to the Endangered Species Act. Then Secretary Babbitt announced he would sign agreements, habitat conservation plans authorized by the ESA, which would contain a "no surprises" commitment. In other words, landowners could rely on the fact that the lands they agreed to set aside for the species would remain constant over the life of a plan. If more land, or other changes, becomes necessary, it is the government's responsibility to fund what is needed. With this change, the number of approved plans increased by over 1000 percent in 3 years. This incentive of certainty is supported by 80 percent of those polled by Market Strategies.

This policy must be put into the statute, and S. 1180 would do so. The Secretary has been sued once over its adoption and will likely be sued again. This concept of certainty has given protection to hundreds of endangered species. This successful concept should be protected from litigation by enactment into law.

The bill provides a standard for approval of multiple species agreements and candidate species conservation agreements which appears confusing at first, but which we find ingenious in its simplicity. The standard measures whether the landowner's proposed management activities, if undertaken by all similarly situated persons, would eliminate the need to list the species based upon these activities. It recog-

nizes that no one person may be able to protect a species and that species face risks from a variety of sources. It then focuses on the risk within the applicant's control and measures it as if undertaken by all persons who could control that risk. This provision is likely to allow creative use of these agreements and to make them available to landowners with only a small amount of habitat but who could nonetheless provide a true benefit to a species.

We do have a concern about the continued reference to "conservation," particularly for species not yet listed. The Endangered Species Act (ESA) defines "conservation" to mean "to use and the use of all methods and procedures" to remove the need for protection under the ESA, i.e. recovery. In particular, a candidate species conservation agreement is designed to avoid the need to list the species in the first instance. We suggest either the removal of references to "conservation" where recovery is not intended or an explanation in the Committee Report that the use of "conservation" is intended to identify appropriate methods and procedures, and not to require an actual recovery process unless clearly indicated, such as the reference to plans for "the conservation and recovery" in new Section 5(a) added by Section 3 of the bill.

Assistance to Smaller Landowners.—Small, family owned tree farms, ranches and agricultural farms are the backbone of rural America, and in many respects, the backbone of the country itself. In the forest and paper industry, for example, over 60 percent of forested land in the country is owned by some 10 million nonindustrial landowners. As might be expected, the needs and philosophies of these landowners are as numerous as the individuals. S. 1180 provides several mechanisms to encourage these landowners to work with the Endangered Species Act, including low effect habitat conservation plans, grants and habitat reserve agreements. We certainly recognize the difficulty Congress will face in fully funding these programs. We hope that the Committee will continue to work with the Finance Committee and others to craft other provisions which will present landowners with an array of options and thus gain the broadest support for conservation of listed species.

Enforcement.—If you drive your car in excess of the posted speed limit, you know you have broken the law and could legitimately receive a ticket. If you break into a building and take goods or money, you know you have broken the law and face possible arrest. However, under the Endangered Species Act, if you farm your land or harvest your trees, you face prosecution if a Federal bureaucrat speculates that you might break the law. These bureaucrats will advise you repeatedly that you will break the law by managing your land, referring to some vague study which may or may not be based on empirical data. They may even drag you into a Federal court and try to prove their case to a judge. Landowners are usually helpless in the face of these escalating threats of prosecution.

We applaud the effort in Section 6 of the bill to remind the bureaucrats, and citizens who would file these lawsuits, that the burden is on them to prove a "take" has occurred or will occur, using "scientifically valid principles." This provision encapsulates the Supreme Court's decision in Babbitt v. Sweet Home Chapter of Communities for a Great Oregon by requiring proof of an actual "take," thus eliminating such concepts as "reasonably likely" to take, and by emphasizing a causal connection between the action and the take.

The reference to "scientifically valid principles" is taken directly from the 1993 decision by the Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc. However, the court used the phrase, 509 U.S. at 599, in the context of "pertinent evidence based on" such principles. On remand, the U.S. Court of Appeals emphasized the importance of the evidence being capable of testing. We strongly recommend that the Committee avoid confusion on this point and include a reference to "evidence" in the legislative language, or at least in the Committee's report.

II. Although we believe S. 1180 updates the ESA in a positive manner and moves species protection in the correct direction, we are concerned that a few provisions run the risk of perpetuating the confrontational tone of the existing law. It is possible that proper implementation could be achieved. However, we have seen too many instances in the past where good intentions failed in the face of political pressure or expansive interpretation.

Consultation.—Section 4 of the bill substantially revises the consultation process between Federal agencies and the Secretary. Since we do not believe that process works very well at present, particularly with regard to the "informal" consultation process set out in the ESA regulations, the process in the bill may actually improve the situation. However, we have three concerns. First, the bill allows the Secretary to exclude categories of action from the new process by regulation. This strikes us as an invitation to focus on the politically out of favor or controversial activities. Second, the bill allows the Secretary to object to an agency's conclusion if the Secretary finds there is insufficient information. ESA determinations are always look-

ing for more information, thus the emphasis in the bill on quality science. It should be sufficient to object based on disagreement with the adverse affect finding. This at least requires the Secretary to analyze the other agency's determination. Finally, we believe the objection based on the need for more time beyond 60 days is too open-ended. In our experience, Federal agencies never believe they have enough time. The bill would allow the Secretary to plead lack of personnel, lack of money, crush of other business, or any number of excuses that undermine the purpose of the deadline.

Recovery Goal. We have considerable concern about the manner in which the recovery goal is developed. The bill provides that, notwithstanding the fact that the goal is subject to peer review, it is "established" by only those members of the recovery team "with relevant scientific expertise" and then recommended to the Secretary. The bill does not explicitly provide for how or when the Secretary reviews this "recommendation." We submit that this establishes two classes of membership on the recovery team and renders the "recommendation" virtually impossible to change. In our view, this could defeat the benefits of expanded team membership and once again allows a small group of scientists to tie the hands of the Secretary.

Recovery Plan Implementation Agreements. We are concerned with the targeting of Federal agencies in the recovery plan, accompanied by a mandatory implementation plan. Even though the bill clearly requires identification of a Federal agency in the recovery plan only if the agency takes an action "likely to have a significant impact on the prospects for recovering a species," such phrases in the Endangered Species Act have a history of being read interpreted broadly rather than narrowly. We find it questionable to allow one law to impinge on every Federal program without, at a minimum, providing strict sideboards to require a showing that the agency action be likely to prevent recovery. Moreover, the provision exempting the agency action from consultation under ESA Section 7(a)(2) requires such specificity as to make the exemption difficult to apply for most future actions. Most agencies would likely prefer consultation since it also provides incidental take protection.

The bill allows the Secretary to enter implementation agreements with private parties as well. The bill provides no encouragement for private parties, or state governments, to enter these agreements, so their exact purpose is not evident. We are concerned that they will somehow be used to attach a recovery goal to habitat conservation plans (HCP). We strongly recommend that either the bill or the Committee's report emphasize that these are entirely voluntary and should in no way be coupled with an HCP. Indeed, the purpose of the HCP, to allow land use activity to proceed, while containing any take of listed species within acceptable limits and providing offsetting benefits for the species to the extent possible, should be set out in the report to avoid any confusion with recovery, an entirely separate process.

Existing Recovery Plans. We would prefer that existing recovery plans be required to comply with the provisions of Section 3 of the bill by a specific date. The bill exempts both existing plans and plans which have been released for public comment but not adopted at the time of enactment of the bill into law. This latter provision could cause particular mischief since the Secretary may have released a draft plan for public comment some years ago but never issued a final plan. For example, the recovery plan for the northern spotted owl was released for public comment in April 1992 but has never been adopted as final. Under the bill, any recovery plan for the owl would be exempt from the new procedures.

III. Finally, there are two areas which we believe should be addressed in this legislation.

NEPA/Biological Opinion Equivalency. The experience of our members has been that preparation, negotiation and completion of an habitat conservation plan is an expensive and time-consuming process. The HCP contains considerable analysis of the species' biology, of the existing environment, of impacts and of alternatives. Then, a portion of this analysis must be repeated in a document to satisfy the National Environmental Policy Act (NEPA), at yet more expense. In addition, the Secretary brings in more personnel to conduct consultation under ESA Section 7. We certainly do not object to a process that ensures the analysis is complete, but we do object to redundant compliance. Since the Secretary has as yet been unable to provide an Administration solution to these needless frustrations, we urge the Committee to do so. A legislative solution would likely be the safest course as well since the Federal courts tend to view NEPA and ESA compliance in a literal manner, viewing even legitimate streamlining with disfavor.

Programs Delegated to States. We recognize that S. 1180 updates the Endangered Species Act in virtually every program. We have long advocated the need to provide comprehensive changes in this law, rather than targeting one or two issues. However, one area not addressed by the bill is State action. The bill would substantially increase the role of States in the conservation of listed species. At the same time,

the bill does not address the recent efforts by the Secretary and the Environmental Protection Agency which enmesh State programs with additional Federal bureaucracy and which will dramatically reduce States' ability to run their water quality programs.

Within the past several years, the Environmental Protection Agency (EPA) has begun requiring that States, as a condition to obtaining the delegation under the Clean Water Act to issue point source discharge (NPDES) permits, agree to consult with the U.S. Fish and Wildlife Service (FWS) (or the National Marine Fisheries Service) on proposed individual state permits which may adversely affect a listed or proposed species. If, as a result of the consultation, the FWS and the State environmental agency are not able to reach agreement on appropriate terms for the proposed permit, FWS will notify EPA. EPA agrees to then veto the permit and issue it as a Federal permit with conditions acceptable to FWS, or refuse to issue it at all.

EPA imposed this procedure, which provides FWS with a veto over State-issued permits, on Louisiana and Oklahoma as a condition for the delegation of the NPDES permit program, with an earlier version imposed on Florida and South Dakota. We understand that now EPA and FWS are preparing to expand this process to the 40 or so States that have been delegated the NPDES program since 1972. The agencies are also considering application of the process to State wetlands and sewage sludge programs. Moreover, they are planning to provide FWS with a prominent role in the development State water quality standards.

The Clean Water Act and EPA's own regulations require EPA to delegate the NPDES program to a state as long as the state program meets the enumerated statutory criteria, none of which pertain to the ESA. Also, EPA, in its oversight of state permitting, is only authorized to veto a proposed state permit that is "outside the guidelines and requirements of the Clean Water Act." EPA is not authorized to reject a State-issued permit on the basis that it is not in compliance with the ESA.

No one can object to FWS providing the permit-issuing entity appropriate information, including the presence of listed species. However, Congress has not imposed the ESA on the States, other than through the prohibited activities in Section 9, such as take. The Clean Water Act is designed to be implemented through State programs, with Federal oversight merely to ensure consistency with national water quality goals. Federal agencies should not be allowed to impose these sort of burdens on States, burdens that neither agency thought were appropriate for over 20 years, without careful consideration by Congress. We strongly recommend that the Committee include in S. 1180 a provision which puts a halt to these bureaucratic efforts. If the Committee finds it in the national interest, we suggest you conduct a review to determine the appropriate interaction between the Clean Water Act and the Endangered Species Act at the State level.

IV. Conclusion. We support this bill as an important first step to update the Endangered Species Act to a law that actually achieves wide support for species conservation. I have expressed our concern with some of its elements, but overall we believe the bill will improve both protection of species and the ability of landowners to manage their land in the presence of listed species. We fail to understand how anyone can oppose such concepts as peer review, allowing landowners and applicants to participate in the process, analysis of alternatives recovery measures so as not to miss less disruptive methods, providing certainty as an incentive to conserve species and habitat.

As I indicated, we believe more needs to be done in order to fully update the Endangered Species Act. For example, we have not lost sight of the need to recognize and protect private property rights. The Fifth Amendment to the U.S. Constitution requires that landowners be compensated if the government takes their property for a public purpose. It is unfair—it is un-American—to impose the cost of the public purposes embodied in the Endangered Species Act on a few unlucky citizens. In this regard, we applaud the introduction of S. 1181, the "Endangered Species Habitat Protection Act," by Senator Kempthorne, and urge other Members of the Senate to support this effort.

On behalf of the American Forest & Paper Association and the Endangered Species Coordinating Council, I appreciate the opportunity to offer our views on S. 1180, the "Endangered Species Recovery Act of 1997." I would be happy to answer any questions you may have.

STATEMENT OF MARK VAN PUTTEN, PRESIDENT AND CEO, NATIONAL WILDLIFE FEDERATION

Good morning, Mr. Chairman and Members of the Committee. My name is Mark Van Putten, President of the National Wildlife Federation, the nation's largest conservation education and advocacy organization. I would like to thank you for this opportunity to testify on Endangered Species Act reauthorization, a subject that is of intense interest to NWF's members, affiliates and other constituents.

What is at stake here today is not just this nation's bountiful natural heritage. If the United States, the wealthiest nation on the planet, fails now to reaffirm its commitment to endangered species conservation because it perceives that the costs are too great, we can hardly expect the rest of the family of nations to make the tough choices needed to conserve the biological diversity that is rapidly disappearing around the world.

NWF's passionate commitment to endangered species conservation should not be confused with zealotry. We recognize the importance of bipartisan support for ESA reauthorization and understand that such support can only be achieved through compromise. We applaud the Senators and their staffs for rolling up their sleeves and trying to develop a compromise reauthorization package that could win broad support in Congress and across the country.

Senators Chafee, Baucus, Kempthorne and Reid have devoted a great deal of personal time and energy to this effort. Now that we have a bill before us, it is time for those of us with constituents who work with the Endangered Species Act in their daily lives to size up the results. The test is a straightforward one: will the nation's imperiled plant and animal species be better off, or worse off, if S. 1180 were to become law?

Based on NWF's expert analysis and on-the-ground experiences, I am pleased to note that the bill contains several needed improvements to the ESA. These changes are neither "strengthening" or "weakening" amendments. They would simply make the Act work better—a goal we should all share.

Despite these improvements, however, we have come to the conclusion that the overall effect of the bill, in its current form, would be to seriously weaken the ESA's essential protections. It is my sincere hope that we can work together in the coming weeks and months to make the changes that are needed to mold S. 1180 into a bill that we can support. You have before you a base to work with. Our challenge is to convert it into a bill that addresses the legitimate concerns of some landowners and regulated industries and, at the same time, improves the situation for the nation's imperiled plant and animal species. Attached to my testimony is a detailed, section-by-section analysis of the bill which notes the areas of the bill we applaud and also explains the problems we see. I would like to use the balance of my time to highlight a few of the biggest problems and to recommend some solutions.

FOUR PRIORITIES FOR ESA IMPROVEMENT

In the past few years, as we looked around the country to examine how the ESA was being implemented, NWF identified four areas where improvements to the ESA are most needed:

(1) Habitat Conservation Plans, or HCPs, need to be better designed to work for both landowners and wildlife;

(2) The Act needs to promote fairness and citizen participation;

(3) The Act needs to increase the accountability and ability of Federal agencies to achieve species recovery; and

(4) The ESA needs to provide greater incentives for landowners and others to conserve wildlife.

Measuring S. 1180 against each of these needs, we find it to be deficient and in need of improvement.

1. Design HCPs that Work for Both Landowners and Wildlife

NWF believes that HCPs, particularly large-scale, multi-species HCPs, have the potential to address many of our most vexing conservation challenges on nonFederal lands. NWF has always supported "place-based" conservation policies—policies that set a workable conservation standard and then empower everyday people to play an important role in deciding how wildlife resources will be managed to meet that standard. A placed-based approach taps into the wisdom and talent of local people and ensures the local buy-in needed for successful implementation. By authorizing multispecies HCPs and Candidate Conservation Agreements and by setting workable approval standards for unlisted species, S. 1180 takes a small but important step in this direction.

Unfortunately, the major thrust of the bill's HCP provisions would undermine the ability of people in local communities to develop broadly supported multi-species conservation plans. NWF has been carefully studying HCPs—we've held two major conferences and have been involved with several individual plans—and we have found that two existing policies are crying out for change. Not only does S. 1180 fail to address either of these problems; in fact, it worsens the situation by weakening HCPs in critical areas.

First, S. 1180 codifies the Fish and Wildlife Service's practice of approving HCPs for listed species even if the HCPs would undermine species recovery. When Congress enacted the HCP provisions in 1982, its model was the San Bruno HCP, which allowed landowners to destroy roughly 10 percent of the remaining habitat of two endangered butterflies and called for significant active management as mitigation for that loss. In contrast with that model, the Service is currently approving HCPs in the southeastern United States for red-cockaded woodpeckers that allow landowners to destroy all of the habitat on their property in exchange for simply building artificial cavities on public lands. The sacrifice of private-land woodpecker habitat and the failure to include a serious mitigation strategy has been roundly criticized by the scientific community as being inconsistent with the recovery needs of the woodpecker. To address this problem, we urge the Committee to amend S. 1180 to clarify that HCPs cannot be approved if they would undermine recovery.

Second, S. 1180 codifies the Administration's "no surprises" policy, which assures landowners that once they agree to an HCP, their ESA obligations will not be revisited at their expense for the duration of the HCP, which often is 50 or more years. Leading scientists have harshly criticized this hands-off approach, noting that many HCPs are based on controversial scientific assumptions that need to be revisited and revised to account for new information and changed circumstances.

We recognize that landowners need certainty and that some form of regulatory assurances policy is needed to encourage landowners to invest time and money in large-scale conservation planning. But to justify giving assurances, the underlying HCPs must be improved. Among other things, HCPs must include provisions for monitoring biological performance and for funding management changes necessary to prevent HCPs from jeopardizing the existence of species. These safeguards can be provided while still giving landowners regulatory assurances. H.R. 2351, the ESA reauthorization bill introduced by Representative Miller (D-CA) this summer, includes the safeguards needed for both species and landowners—we urge you to consider the approach taken in that bill.

2. Promote Fairness and Citizen Participation

Providing meaningful opportunities for citizen participation in key ESA decisions is essential to ensure well-grounded decisions and to help build community buy-in to those decisions. Although the current Administration has made some strides in this direction, a fundamental problem with HCPs and other large-scale management plans is that they are developed behind closed doors with regulated interests and then announced to citizens after meaningful opportunities to contribute have long since passed. Members of the Committee should not be surprised to hear that environmental and scientific support for HCPs developed under these conditions has been lacking. S. 1180 simply codifies the current, ineffective approach of letting the regulated interests decide whether to invite citizens into the HCP negotiations. At the same time, it worsens the situation for Section 7 consultations by creating new rights of "special access" to regulated interests.

3. Increase the Agencies' Accountability and Ability to Achieve Recovery

If imperiled species are going to be recovered under the ESA, the Act needs to be amended to make all Federal agencies legally accountable for achieving recovery and to give them the tools to do the job. Unfortunately, S. 1180 contains amendments that would undermine the ESA's recovery goal. It weakens agency accountability by creating a series of new loopholes in the areas of recovery planning, recovery implementation agreements, and Section 7 consultations. For example, the bill's provisions governing recovery implementation agreements would insulate those agreements from judicial review—an approach we thought Congress would abandon after the "logging without laws" debacle. The bill also creates a nightmare of new bureaucratic requirements in listings, 4(d) rules, and recovery planning—the combined effect of which would be to divert scarce agency resources away from actual conservation. All of the new, ambitious procedural hoops and hurdles are a recipe for failure. The agencies will not be able to recover species under this bill and, as a result, the ESA is being set up for future complaints and attacks on the basis that it has failed to achieve its recovery goal.

4. Provide Incentives for Landowners and Others to Conserve Wildlife

As a participant in the landmark 1995 Keystone dialog on private landowner incentives, NWF is aware of the importance of providing financial and other encouragement to landowners to take actions benefiting species. Many imperiled species simply cannot thrive in our highly altered landscapes without active management of their habitats, and active management on nonFederal lands can only be secured with incentives. We therefore strongly support the grant programs, education and technical assistance programs, and revolving loan fund authorized in S. 1180. However, we caution anyone who concludes that these authorizations will lead to improved species conservation on the ground. In the absence of a secure source of funding, the appropriations committees ultimately will determine the success or failure of these programs. Although we will continue our work in advocating before these committees for better funding of endangered species conservation, we are not naive about the enormous obstacles that lie before us.

Leaving the success or failure of this bill in the hands of the appropriations committees is a recipe for disaster. We look forward to continued discussions with the Committee about how we can develop a funding mechanism for endangered species conservation that is not subject to the vagaries of the appropriations process. It is essential that such a fund be created and enacted as part of any ESA reauthorization bill, such as this one, that relies so heavily on more money to get the job done. As with Superfund and the Transportation bills, the program changes and the money to pay for those changes must go together.

CONCLUSION

Looking again at the four priority areas for ESA improvements, I am sorry to report that S. 1180 does not significantly improve the situation in any of the four areas. The improvements that are in the bill are overwhelmed by the numerous provisions that undermine essential protections for imperiled species. This readily apparent in the priority areas of HCPs, citizen participation and Federal agency recovery efforts. Unless S. 1180 is amended to address each of these problems, NWF cannot in good faith support this bill. To paraphrase biologist E.O. Wilson, if our generation stands by silently while the earth's treasure of biological diversity is destroyed, it will be a sin for which our descendants will never forgive us.

We would welcome an opportunity to meet with the Committee and its staff to work through our concerns in greater detail.

Thank you again for this opportunity to testify.

ATTACHMENT

COMMENTS OF THE NATIONAL WILDLIFE FEDERATION ON S. 1180

By John Kostyack, Counsel, Office of Federal and International Affairs

Washington, DC, September 22, 1997

The National Wildlife Federation, the nation's largest conservation education and advocacy organization, believes that bipartisan agreement on improving and reauthorizing the Endangered Species Act (ESA) is essential. Unfortunately, although S. 1180 contains some improvements to the ESA, its overall effect would be to seriously weaken this nation's most important law protecting endangered wildlife and wildlife habitat.

Considering that 84 percent of Americans want the ESA to be either strengthened or retained, Congress will need to make significant changes to this bill to bring it in synch with the views of mainstream America. Set forth below are the key changes that are needed and a section-by-section analysis of the bill.

KEY CHANGES NEEDED

The National Wildlife Federation has identified four areas where improvements to the ESA are most needed:

A. Design Habitat Conservation Plans that Work for Both Landowners and Wildlife.

B. Promote Fairness and Citizen Participation in Wildlife Conservation.

C. Increase the Accountability and Ability of Federal Agencies to Achieve Recovery.

D. Provide Incentives for Landowners and Others to Conserve Wildlife.

Unfortunately, rather than improving the ESA in these key areas, S. 1180 would significantly weaken the Act's vital protections.

The following is a summary of NWF's comments on and recommended changes to the most significant features of the bill, both positive and negative. The numbers in parentheses are references to the bill; they also may be used in locating specific NWF's comments in the section-by-section analysis.

A. Design Habitat Conservation Plans that Work for Both Landowners and Wildlife.

Positive Features.—Establishes Workable Standard for Unlisted Species Covered by HCPs (Page 54, Line 5).

Codifies Administration's Workable New Standards for Candidate Conservation Agreements (Page 60, Line 3).

Negative Features.—Fails to Address Services' Approval of HCPs that Undermine Recovery. (Page 53, Line 18).

Weakens Standards for Reviewing Activities That May or May Not be "Low Effect"(Page 57, Line 2).

Locks in HCPs and CCAs, Some of Which Will Prove to be Harmful to Species and Will Need to be Adjusted. (Page 59, Line 6 and Page 60, Line 3).

Authorizes Safe Harbor Agreements Without Requiring Conservation Benefit. (Page 65, Line 1).

Creates New Obstacle to Enforcement and Habitat Conservation Planning. (Page 74, Line 20).

Authorizes "No Take" Agreements That Could Contain Broad ESA Exemptions (Page 83, Line 8).

B. Promote Fairness and Citizen Participation in Wildlife Conservation.

Positive Features.—Creates Broadly Representative Recovery Teams (Page 20, Line 11).

Negative Features.—Deters Participation on Recovery Teams by Creating Unmanageable Tasks (Page 20, Line 11).

Provides Special Access to Section 7 Consultations to Regulated Industries (Page 51, Line 11).

Fails to Adequately Address Behind-the-Scenes Approach to Developing HCPs and CCAs. (Page 64, Line 14 and Page 60, Line 3).

C. Increase the Accountability and Ability of Federal Agencies to Achieve Recovery.

Positive Features.—Emphasizes that Recovery Goals are to be Based Solely on Science (Page 23, Line 20.)

Calls for Inventory of Species on Federal Lands (Page 43, Line 18).

Clarifies Duty to Mitigate Harmful Effects of Federal Activities (Page 53, Line 6).

Negative Features.—Creates a Procedural Morass at the Expense of On-the-Ground Conservation:

Places Unwarranted Bureaucratic Obstacles in Front of Listings (page 10, Line 14).

Creates Unnecessary Bureaucratic Steps in Managing Threatened Species (Page 16, Line 16.)

Creates a Burdensome Recovery Planning Process That Would Undermine ESA Implementation (Page 24, Line 21.)

Adds Unwarranted Recovery Planning Obstacles by Delegating to States (Pages 33, Line 20).

Creates a New Loophole for Avoiding Recovery Planning (Page 18, Line 22).

Fails to Address Services' Approval of Federal Activities that Undermine Recovery. (Page 53, Line 6).

Creates Unreviewable "Recovery Implementation" Agreements With Federal Agencies That Could Seriously Harm Species (Page 31, Line 9).

Provides Harmful "No Surprises" Assurances to Industries Engaged in Federal Activities (Page 30, Line 13).

Removes FWS and NMFS from Key Decisions and Allows the "Fox to Guard the Henhouse" (Page 44, Line 22).

Authorizes Potentially Destructive Activities During ESA Review of Federal Land Management Plans. (Page 48, Line 20).

D. Provide Incentives for Landowners and Others to Conserve Wildlife.

Positive Features.—Authorizes Grants to Private Landowners, States and Others to Implement Recovery Plans(Page 30, Line 13).

Authorizes Education and Technical Assistance Programs (Page 56, Line 9 and Page 76, Line 2.)

Authorizes Habitat Reserve Program. (Page 67, Line 17).

Authorizes Habitat Conservation Planning Fund. (Page 69, Line 11).

Increases the Amounts Authorized for Incentives and Other Programs (Page 78, Line 4).

Negative Features.—Identifies No Secure Source of Funding. (Page 78, Line 4).

II. SECTION-BY-SECTION ANALYSIS

Sec. 2. Listing and Delisting Species

Creates Inflexibility Regarding Contents of Listing Petitions (Page 5, Line 2.)

Although it makes sense to set standards regarding the contents of listing petitions, these standards should not be designed in a manner that enables the Services to reject petitions arbitrarily. Because even the most thorough listing petitioner will not likely be able to describe all of the available data pertaining to the species, this requirement should be qualified with the phrase "to the maximum extent practicable."

Limits Tracking of Unlisted Species (Page 9, Line 15.)

In addition to being required to monitor "warranted but precluded" species, the Services should be required to maintain a list of species for which it has been found that listing may be warranted but further research is necessary. When such a list was maintained under the name of "C–2 candidate species," it proved extremely useful to Federal land managers and others seeking to manage natural resources proactively and avoid future ESA listings.

Places Unwarranted Bureaucratic Obstacles in Front of Listings (page 10, Line 14).

The bill places three new and costly hurdles in front of species listings: a requirement of up to five hearings per listing, an added comment period for states, and mandatory peer review regardless of whether there is a scientific dispute regarding the need to list. The overall effect of these changes, and the new 4(d) and recovery planning deadlines discussed below, will be that fewer imperiled species will be listed and species will wait longer to receive ESA protections.

Creates Unjustified Bureaucratic Steps in Managing Threatened Species (Page 16, Line 16.) The bill adds new and potentially costly bureaucratic steps for the Services to follow in managing threatened species. Under current law, threatened species automatically receive the protections of the full take prohibition unless the Services issue a species-specific management plan called a 4(d) rule. Under S. 1180, the Services are required to issue a 4(d) rule for each threatened species by the time the recovery plan for that species is finalized. (The bill requires that recovery plans be finalized within 30 months of listing.) Although species-specific 4(d) rules are justified for some threatened species, the arbitrary requirement that they be developed for all threatened species regardless of whether they are needed will divert limited resources away from actual conservation. Moreover, this requirement sends a dangerous message that removing the full take prohibition is appropriate for threatened species generally, at a time when many threatened species are seriously imperiled and rely heavily upon the full take prohibition for their survival.

Fails to Require Meaningful Citizen Participation in Development of 4(d) Rules (Page 16, Line 16). The bill also fails to identify the process that will be used in developing the numerous 4(d) rules that will now be required. Large-scale management plans such as 4(d) rules should be developed with the input of a wide array of stakeholders, so that all relevant information and ideas are assembled. Unfortunately, without legislative guidance on this issue, the Services will likely develop 4(d) rules behind-the-scenes, with a short comment period thereafter, in an effort to meet the statutory deadline.

SEC. 3. ENHANCED RECOVERY PLANNING

Creates a New Loophole for Avoiding Recovery Planning (Page 18, Line 22). The bill allows the Services to avoid their obligation to prepare a recovery plan for species if "an existing plan or strategy to conserve the species already serves as the functional equivalent to a recovery plan." This open-ended language would allow the Services to sidestep preparation of recovery plans in favor of existing internal planning documents developed with little or no scientific guidance or public participation. Although it makes sense to avoid unnecessary duplication, this goal can be achieved by incorporating previous work into the recovery planning process, rather than simply eliminating all of the procedural and substantive requirements of recovery planning.

Sets the Wrong Recovery Planning Priorities (Page 19, Line 1). We acknowledge that the Services must choose priorities in allocating resources among various recovery plans. But these provisions do nothing more than confuse the priority-setting process by suggesting that the Services must give priority to plans with four attributes that are unlikely to ever be found in a single plan. For example, few if any plans will contain both the first attribute (addresses "significant and immediate

threats" to the species) and the third (reduces conflicts with construction or other development projects).

These priority provisions are also problematic because they place the objective of reducing conflict with short-term development schemes on equal footing with the ESA's fundamental objective of recovering species. To further the ESA's recovery goal, Congress should direct the Services to give priority to recovery plans that address significant and immediate threats, have the greatest likelihood of achieving recovery, and address multiple species. Once these priority plans are chosen and scientific criteria for recovery are identified, then recovery teams should attempt to design implementation strategies that minimize social and economic disruptions while achieving timely recovery.

Creates Broadly Representative Recovery Teams, But Deters Participation by Creating Unmanageable Tasks (Page 20, Line 11). We wholeheartedly endorse the concept of creating "broadly representative" recovery teams. But in describing potential members of the recovery team, the bill includes "commercial enterprises" but fails to mention conservation organizations. This leaves open the possibility that conservation interests will be included, if at all, as mere token participants. (A recent habitat conservation planning process in Texas included just one conservation member, in contrast with six timber industry representatives.) The bill needs to be revised to clarify that recovery teams must have a rough balance of participation from both those seeking to promote economic activity that adversely affects species and those seeking to conserve species. This approach—currently utilized in the Marine Mammal Protection Act provisions governing take reduction teams and the Federal Land Policy and Management Act regulations governing range advisory councils—would help ensure that a full range of viewpoints are represented on recovery teams.

Of course, the concept of stakeholder-type recovery teams makes sense only if the assigned tasks are manageable. As discussed below, S. 1180 would need to be revised substantially to make the recovery planning process accessible to stakeholders.

Helps Recovery Team Members Cover Costs (Page 22, Line 16.) We applaud the bill's recognition that participation on a recovery team will be costly and that the Federal Government should help defray the costs. This makes perfect sense, considering that the recovery team will essentially be providing advisory services to the Services. To limit the budgetary impact of this proposal, Congress should condition the reimbursement of expenses upon a demonstration of financial need.

Emphasizes that Recovery Goals are to be Based Solely on Science (Page 23, Line 20.) The bill appropriately calls for scientific members of the recovery team to recommend a recovery goal "based solely on the best scientific and commercial data available" and "expressed as objective and measurable biological criteria." This, along with the requirement of peer review of the recommended recovery goal, will help ensure that political considerations do not intrude into the process of resolving the scientific issue of the species' recovery needs. To ensure that economic self-interest does not intrude into this determination, language should be added to clarify that the term "independent scientific review" means that peer reviewers may not have economic conflicts of interest.

Creates a Recovery Planning Process That Would Undermine ESA Implementation (Page 24, Line 21.) The bill adds numerous bureaucratic requirements to the recovery planning process that would essentially negate the recovery planning improvements noted in the above three paragraphs. These requirements would make development of the recovery plan more expensive, difficult, and time-consuming and would create numerous litigation opportunities from those seeking to frustrate ESA implementation. The new requirements would also delay finalization of recovery plans, increasing the likelihood that HCPs and other management plans will provide inadequate species protections. Finally, the burdensome processes would drain limited agency resources away from the on-the-ground conservation activities that determine the success or failure of the ESA.

The following is a summary of the numerous tasks that have been added to the existing recovery planning process. Although a small handful of these steps are useful, the cumulative effect of these requirements would be to undermine ESA implementation.

1. The bill first requires the Services to assemble a recovery team. Although (as noted above) NWF supports making recovery teams broadly representative, the bill also mandates that they be developed "in cooperation with the affected states," which would create a procedural morass. (The bill defines such cooperation as incorporating the states' recommendations "to the maximum extent practicable.") In light of the inherent difficulties of soliciting and incorporating state recommendations, the bill's 60-day deadline for appointing recovery team members would likely be im-

possible to meet, especially for recovery plans governing species found in multiple states.

2. The scientific members of the recovery team must then convene to recommend a biological recovery goal.

3. The recovery goal must then be subjected to peer review and the comments of the peer reviewers must be considered and, where appropriate, incorporated.

4. Recovery team members must then decide upon the "recovery measures" for the draft recovery plan, balancing three conflicting factors: effectiveness in meeting the recovery goal, the period of time in which the goal is likely to be achieved, and the social and economic impacts and their distribution across regions and industries.

5. Recovery team members must then prepare a description of alternative recovery measures considered and set forth the reasons for their selection or rejection. Presumably, the discussion of reasons for selecting and rejecting recovery measures must include an analysis of how each of the three factors described above was applied to each of the selected and rejected recovery measures.

6. To add to this already difficult task, the bill then states that for recovery measures that impose significant costs, the team must somehow prepare a description of "overall economic effects" of the recovery plan, including effects on employment, public revenues, and property values. This assessment would be even more speculative than the assessments of regulatory impacts called for in the various "takings" bills that Congress has considered and rejected. Rather than analyzing the effect of a single regulation, the recovery team will need to analyze the potential economic effects of a long list of broadly defined recovery measures that may or may not be implemented, depending on when funding becomes available, over the course of decades. This task will produce nothing more than wild speculation about potential economic effects, speculation that will become available to ESA opponents seeking to block implementation.

7. In addition, the recovery team must identify objective benchmarks to determine whether progress is being made toward the recovery goal.

8. The team must also make recommendations regarding designation of critical habitat, including recommendations for special management considerations.

9. The work is far from over once the recovery team's numerous recommendations and extensive analyses are completed. At that juncture, the Services must review this extensive set of materials and, if they find any deficiencies, they must send the package back to the recovery team with an explanation.

10. At that point, the team must convene again to address the perceived deficiencies. (Page 28).

11. Once the Services have received the revised recommendations of the recovery team, the Services must publish a draft plan in the Federal Register and hold up to 5 public hearings on the draft plan, if requested. If this draft plan has not been completed within 18 months of listing, the Services must also defend against potential lawsuits for failure to meet the new statutory deadline.

12. The Services must then develop a final plan, and included with the plan their responses to any significant comments received from the public. If the Services ultimately reject any measures recommended by the recovery team, they must publish an explanation along with the final plan. If this draft plan has not been completed within 30 months of listing, the Services must also defend against potential lawsuits for failure to meet the new statutory deadline.

13. The bill also requires the Services, upon request, to delegate to one or more states the authority to develop recovery plans on their own (with the exception of final approval of the recovery plan, which remains with the Services). As discussed below, this would greatly increase the likelihood of inadequate recovery plans and would substantially increase the associated costs, complexities and delays.

14. Because satisfaction of these new procedural requirements and preparation of these numerous analyses will be extremely difficult and will involve many judgment calls by the Services and the recovery team, litigation over recovery planning procedures and recovery plan contents will likely expand dramatically.

As this summary makes clear, the overall effect of the bill's recovery planning provisions is not to "enhance" recovery planning, but to make achieving the ESA's recovery goal more difficult and to set up those seeking to implement the ESA for failure.

Authorizes Grants to Private Landowners, States and Others to Implement Recovery Plans (Page 30, Line 13). NWF strongly supports the bill's authorization for the Services to develop and provide funds for recovery "implementation agreements" in which states, tribes, local governments and private landowners commit to taking actions that promote species recovery. By encouraging landowners and others to take actions specified in the recovery plan as beneficial to species recovery, this provision will potentially help ensure that recovery plans serve a meaningful purpose and

help imperiled species move closer to the recovery goal. The success of this provision, of course, will ultimately be determined by the extent to which funds are appropriated by Congress.

Creates Unreviewable "Recovery Implementation" Agreements That Could Seriously Harm Species(Page 31, Line 9). We also agree with the concept of requiring that Federal agencies with activities significantly affecting recovery enter into recovery implementation agreements. However, two key features of S. 1180's recovery implementation agreements with Federal agencies appear to be designed to undermine recovery. The first feature is the language that precludes any judicial review of recovery implementation agreements, the very kind of "sufficiency" language that led to the "logging without laws" debacle of the 104th Congress. According to the bill, the terms of recovery implementation agreements are "within the sole discretion of the Secretary and the head of the Federal agency entering the agreement." This would make the agencies' judgments regarding what promotes or undermines recovery unreviewable, thus opening the door for deals that could never stand up to legal or scientific scrutiny and that could contribute directly to the extinction of imperiled species.

Provides Harmful "No Surprises" Assurances to Industries Engaged in Federal Activities (Page 30, Line 13). The second harmful feature of S. 1180's recovery implementation agreements with Federal agencies is the Section 7 waiver. By waiving Section 7(a)(2) for actions set forth in the implementation agreement, the bill removes an essential ESA tool for updating management strategies and modifying them as necessary to prevent serious harm to imperiled species.

At first blush, the bill appears to contain some limited safeguards: it states that the waiver applies only to actions "specified in a recovery plan implementation agreement . . . to promote recovery and for which the agreement provides sufficient information on the nature, scope and duration of the action to determine the effect" on the species or its critical habitat. It also calls for the Services to approve the agreement only if they find that the agreement will be "reviewed and revised as necessary on a regular basis . . . to ensure that it meets the requirements of this section." However, these safeguards can easily be ignored because, as noted above, the bill precludes any challenges to the terms of recovery plan implementation agreements.

Even without the sufficiency language, recovery implementation agreements still could be used to authorize activities that prove to be harmful to species. The bill's "duration" language is sufficiently flexible to potentially allow agreements of one or two decades or more. (The Services have utilized the similar flexibility of the ESA's Section 10 to approve HCPs of up to 100 years.) And the bill's "regular" review requirement is sufficiently flexible to allow for agreements that are reevaluated at intervals of 5 years or more. Thus there is a substantial risk that by the time management practices approved in the recovery implementation agreement are carried out, they will be inconsistent with the current scientific understanding of the species' needs. Even if the recovery implementation agreement is contributing directly to a species' decline, the Section 7 waiver would preclude the Services from reinitiating consultation and revising the agreement to conform with the latest science.

For example, if the Fish and Wildlife Service enters a 10-year recovery implementation agreement with the Agriculture Department's Animal Damage Control (ADC) agency stating that depredation of the gray wolf to protect livestock on Federal grazing allotments is necessary to promote wolf recovery (the current FWS view), S. 1180 would waive Section 7's applicability to all future wolf depredation authorized by the agreement. After 3 years, if new data reveals that wolf depredation authorized by the agreement is contributing to the species' rapid decline, the bill would preclude FWS from reinitiating consultation with ADC and making appropriate changes to save the species.

In effect, the Section 7 waiver would provide harmful "no surprises" assurances to Federal agencies and the industries that rely upon the agencies' authorizations. This policy is harmful enough as applied to nonFederal activities—it would be far more harmful if extended to Federal activities.

Creates Unwarranted Recovery Planning Obstacles by Delegating to States (Pages 33, Line 20).

For at least three reasons, NWF opposes such wholesale delegation of recovery plan development to the states. First, most listed species are imperiled due to management practices carried out by a wide variety of landowners and resource users on lands and waters within the jurisdiction of Federal, state, tribal and local government landowners. Under our constitutional framework, only the Federal Government has the ability to confront these threats. Although the bill suggests that the Services and the states can develop "standards and guidelines" for interstate cooperation, history tells us that such cooperation is quite difficult to achieve, espe-

cially in cases where neighboring states have conflicting economic development and resource conservation strategies.

Second, state governments are suffering widespread and severe funding shortfalls due (among other things) to the devolution of numerous Federal programs. Before delegating another costly and complex Federal program, Congress should investigate whether the state wildlife agencies have the resources, expertise and demonstrated commitment to endangered species conservation to undertake the lead role on recovery plan development. In an era when (according to a National Audubon Society survey) only six state wildlife agencies have staff ornithologists, Congress should be particularly hesitant about inviting states to take the lead in drafting complex recovery plans for migratory birds and other "multi-jurisdictional" species.

Finally, delegation to the states would increase the overall costs of recovery planning. States would need to develop separate ESA recovery planning bureaucracies and devote substantial resources simply toward coordinating amongst themselves and with the Services. The Services would retain the responsibility to participate on recovery teams, monitor state compliance with the maze of new procedures and withdraw state authority when appropriate, review draft plans, and make final approval decisions. Even if resources to pay for this additional staffing were available, it would be much better utilized doing on-the-ground conservation. The benefits, if any, of giving the states the lead role in developing recovery plans would be far outweighed by the added costs and complexities.

There are plenty of ways of increasing state involvement in ESA recovery efforts without creating undue risks for species. Because states already have the ability to participate on recovery teams led by the Services, Congress could expand that involvement by increasing Section 6 funding. As recognized elsewhere in this bill, states can also be encouraged to take the lead in implementing recovery plans.

Reopens Critical Habitat Loophole (Page 37, Line 21). The bill requires final designation of critical habitat only "to the maximum extent prudent and determinable"—a return to the approach that was taken prior to 1982, when Congress recognized this as a loophole that was enabling the Services to claim arbitrarily that habitat is not determinable and to evade their responsibilities to designate critical habitat. This provision should be removed and the 1982 amendment requiring final designation "to the maximum extent prudent" should be reinstated.

Imposes Recovery Plan Deadlines (Page 20, Line 3 and Page 42, Line 16). NWF supports imposing deadlines for completion of recovery plans. However, deadlines should be imposed only after making a realistic estimation of the time needed for each of the assigned recovery planning tasks given anticipated levels of appropriations. The fact that the bill is replete with inordinately complex and burdensome tasks that could never be achieved under any near-term deadline suggests that this process has not been undertaken. By setting near-term deadlines for numerous difficult-to-achieve tasks without any realistic hope that appropriators will provide the necessary funding, the bill appears to be setting up the Services for failure.

Calls for Inventory of Species on Federal Lands (Page 43, Line 18). The bill calls upon Federal land management agencies to undertake a long overdue inventory of listed species, species proposed for listing, and candidate species on Federal lands. One of the major obstacles to effective management of both Federal and nonFederal lands is the paucity of biological data. The success of this program, of course, will ultimately be determined by the extent to which funds are appropriated by Congress. Considering that most Federal land management agencies are already very understaffed, Congress will need to appropriate substantial funds to make this program a success.

Removes FWS and NMFS from Key Decisions and Allows the Fox to Guard the Henhouse (Page 44, Line 22). S. 1180 would remove the Services from their longstanding roles as the expert biologists charged with ESA consultations, i.e., reviewing and potentially modifying Federal projects to reduce their harmful impacts on imperiled species. The bill instead merely gives the Services the option to perform the consultative role: if the "action" agency contends that its project would not be likely to adversely affect imperiled species, the Services may object within 60 days and force a consultation to take place. If they fail to object within 60 days, the project moves forward without their expert review.

The risk that the Services will fail to respond to "not likely to adversely affect" (NLAA) findings by action agencies is substantial, especially given the severe staffing shortages currently faced by the Services, the many new bureaucratic requirements imposed by this bill, and the lack of any evidence that appropriators are committed to substantial funding increases. (The new bill gives new incentives to regulated industries to oppose such funding increases, since ESA review of their projects will be less likely so long as the Services remain understaffed.) The risk of inaction

by the Services is further heightened by the fact that most of the bureaucratic tasks required by this bill are mandatory, whereas responding to the agencies' NLAA findings is discretionary. As the Services' experience with the listing program teaches us, when the understaffed Services are forced to choose between legally mandated and discretionary actions, they choose the legally mandated actions.

The bill's requirement that the action agency rely upon a "qualified biologist" does not provide a sufficient safeguard for imperiled species. Agencies such as the U.S. Forest Service (FS) and Bureau of Land Management (BLM) routinely rely upon biologists to advocate for projects that are deleterious to species. Because the missions of these agencies are not oriented toward protecting wildlife, allowing them to make key ESA decisions unilaterally would be disastrous—no different than the proverbial "fox guarding the henhouse."

The Clinton Administration itself has acknowledged that FS and BLM cannot be entrusted with making far-reaching decisions concerning endangered species. In its October 1996 indictment of the timber salvage program, it concluded that "some FS and BLM personnel do not have an understanding of, or a commitment to the goals and requirements of the ESA." In contrast, FWS and NMFS in recent years have successfully maintained their expert roles while consolidating and streamlining consultations. There simply is no justification for shifting responsibility for implementing the ESA's consultation provisions away from these expert agencies.

Calls for an Unbalanced ESA Study (Page 48, Line 10). The bill calls for the GAO to issue a report on the cost to Federal agencies, corporations and others of complying with Section 7, without seeking any information on the conservation benefits of this provision. The result will be ammunition to those seeking to undermine the Act, not a balanced appraisal of the results of ESA implementation.

Authorizes Potentially Destructive Activities During ESA Review of Federal Land Management Plans. (Page 48, Line 20). An essential feature of the existing ESA is that potentially destructive Federal activities do not go forward if the Services cannot rule out the possibility that they might jeopardize the existence of an imperiled species. S. 1180 would undermine this principle by allowing action agencies to go forward with their activities while the cumulative harmful effects of those activities on newly listed species are being evaluated.

For example, under the current ESA, if a newly listed salmon species is threatened with extinction by timber harvesting, the Services must review the FS's land management plan authorizing timber harvesting and recommend changes needed to protect the species. At the outset of the review process, if the Services find that certain harvesting activities authorized by the old plan could threaten the very existence of the species, Section 7(d) of the ESA calls for delaying those activities pending completion of the review. The bill would undermine Section 7(d) protections by allowing those activities to go forward before the plan review is completed—even if the resulting habitat destruction would irrevocably undermine efforts to save the species.

Although S. 1180 calls for the plan review to be completed within 15 months of listing, this offers little protection to imperiled species. Projects that go forward before the end of 15 months will still potentially cause significant harm. Moreover, if the plan review is not completed within 15 months, additional harmful projects could potentially go forward because the bill fails to provide any remedy for failure to meet the statutory deadline.

The bill should be amended to authorize action agencies to initiate a review of their land management plans during the 1-year period in which a species has been proposed for listing. This approach, which the Administration is in the process of adopting a MOU between key agencies, would ensure that the plan review is completed prior to the time when the listing goes into effect and that imperiled species receive the protections called for in the amended plan immediately upon listing.

Provides Special Access to Section 7 Consultations to Regulated Industries (Page 51, Line 11). The National Wildlife Federation supports the notion of giving access to stakeholders, including regulated industries, to the Section 7 consultation process. However, the language proposed here would create a "special right" of access to regulated industries while shutting out other citizens who have an equally legitimate interest in decisions concerning Federal lands and other public wildlife resources. This language should be revised to give equal access to all citizens to the Section 7 process.

Clarifies Duty to Mitigate, But Fails to Address Activities that Undermine Recovery. (Page 53, Line 6). It is helpful that the bill clarifies that the Services, when designing "reasonable and prudent measures" to reduce take in the Section 7 consultation process, must identify mitigation efforts as well as minimization. (In practice, the Services were already doing this.) However, this language fails to address a critical flaw with the implementation of the minimization and mitigation require-

ments in both Sections 7 and 10: the failure by the Services to ensure that the harmful effects of projects are minimized and mitigated to point where they do not undermine recovery.

The Services' current approach to Section 7 is to review Federal activities for their impacts on the short-term survival of an imperiled species, but not to consider their impacts on the species' recovery needs. As a result, many Federal activities are approved even though they undermine the ESA's recovery goal. S. 1180 fails to grapple with this well-known problem, thus perpetuating the problem of species being added to the ESA list but virtually never being removed.

Limits Mitigation Options (Page 53, Line 8).

By requiring reasonable and prudent measures for minimizing/mitigating take to be "related both in nature and extent" to the effects of the proposed activity, the bill would potentially limit significantly the Services' ability to ensure that the destructive effects of Federal activities are fully mitigated. Often, the only viable mitigation strategy that arises in a Section 7 consultation is the requirement of offsite habitat restoration. By imposing this new restriction, S. 1180 would frustrate the Services' ability to ensure that Federal activities do not undermine recovery.

SEC. 5. CONSERVATION PLANS

Fails to Address the Services' Approval of HCPs that Undermine Recovery. (Page 53, Line 18). Habitat Conservation Plans (HCPs) represent a potentially powerful mechanism to reconcile the desires on nonFederal landowners to undertake economic activities in endangered species habitats with the recovery needs of endangered species. Unfortunately, in approving HCPs to date, the Services have failed to consider the long-term recovery needs and instead have chosen to focus on the species' short-term survival needs. By failing to address this problem, S. 1180 leaves open the possibility that the Services will approve HCPs that undermine the ESA's recovery goal.

Establishes Workable Standard for Unlisted Species Covered by HCPs, But Creates New Obstacle to Multispecies Planning (Page 54, Line 5). The bill establishes two positive new approval standards (based largely on the Administration's candidate conservation agreement policy) for unlisted species that landowners seek to have included in their multispecies HCPs. These standards will be helpful in ensuring that any inclusion of unlisted species in an HCP is based on sound science. However, the addition of these standards without similar improvements to the approval standard for listed species could create an unintended new obstacle to multispecies planning. Because the bill's new standard for candidate species, in essence, requires a contribution to the recovery of the species, it is more protective than the standard for listed species, which merely requires the HCP to avoid jeopardizing the species. A potential result is that landowners will develop HCPs for listed species only, and later amend their HCPs once any candidates have been listed, thereby benefiting from the lower standard for listed species. To ensure early development of ecosystem-oriented plans that address multiple listed and unlisted species, the bill should be revised to require that the recovery needs of both candidate and listed species be addressed in the HCP.

Authorizes Education and Technical Assistance Programs (Page 56, Line 9 and Page 76, Line 2.)

The availability of education and technical assistance will be essential to make the ESA work for both species and landowners. However, agency personnel already have the authority to provide technical assistance, so it is unclear what effect, if any, this additional authorizing language would have. The main hindrance to technical assistance has been lack of available funding, and whether the funding situation would improve as a result of this bill remains an open question.

Imposes Arbitrary Deadlines for Plan Approval (Page 56, Line 19). The timeframes set forth in the bill for approving or disapproving HCPs are likely to be impossible to achieve, especially in cases where the potentially significant environmental effects of a plan justify full-scale NEPA review. Because of the rapidly evolving nature of HCPs and other management plans, deadlines for processing proposed plans should continue to be set administratively.

Weakens Standards for Reviewing Activities That May or May Not be "Low Effect" (Page 57, Line 2). NWF supports offering expedited permitting procedures to small landowners with low effect activities. However, the procedures set forth in the bill for determining whether an activity is truly "low effect" are far weaker than the Administration's current approach, which itself has been criticized for not allowing adequate scientific scrutiny or citizen input. For example, the bill states that low-effect permits will automatically be issued if no significant adverse comment has been received within 30 days. This kind of "auto-pilot" provision would create unac-

ceptable risks to imperiled species. Given the brief period of review and limited resources of conservationists and independent scientists, it is inappropriate to infer from the absence of citizen or scientific input that a permit application is sound.

The bill also removes Section 10's key protection for species, the requirement that harm be minimized and mitigated to the maximum extent practicable. This essential safeguard ensures that strategies for avoiding unnecessary harm, which are sometimes virtually cost-free, have been fully considered.

To ensure adequate citizen and scientific input into potentially "low effect" activities, Congress should require that the Services propose individual species, along with specific economic activities, as eligible for the "low effect" permit procedures and invite broad public input into the proposals. This would ensure adequate scientific scrutiny and citizen input while giving landowners guidance about which permitting procedures would be appropriate for their particular project proposals.

Locks in HCPs, Some of Which Will Prove to be Harmful to Species and Will Need to be Adjusted. (Page 59, Line 6). S. 1180 would codify the Clinton Administration's "no surprises" policy, a policy that has been roundly criticized by conservationists and scientists. Under the "no surprises" policy, the Services offer landowners assurances that no ESA obligations will be imposed on them beyond those stated in the HCP, even if the HCP ultimately proves to be contributing toward species decline and possible extinction. As critics from the scientific and conservation communities have pointed out, many HCPs are long-term plans with numerous questionable assumptions about the adequacy of species protections, and thus some HCPs will inevitably fail to perform as anticipated. Although giving landowners regulatory certainty makes sense, this certainty should only be offered in return for HCPs that contain basic safeguards for species.

In addition to the HCP safeguards recommended elsewhere in these comments, S. 1180 needs to be amended to include a credible adaptive management strategy. (An adaptive management strategy is a program for periodic reevaluations of and adjustments to a management plan; reevaluations include measuring biological performance and checking assumptions in light of new information and changed circumstances.) To ensure that HCPs are adjusted as needed to ensure species recovery, the following adaptive management provisions need to be built into any HCP assurances policy:

(a) Monitoring and Biological Goals. The bill should be amended to require that the performance of the HCP be carefully monitored. With biological indicators established at the outset of the plan, key assumptions of the plan can routinely be tested. The landowners should be required to generate monitoring data, and the Services should in turn be required to evaluate the data and issue regular progress reports for public inspection.

(b) Requirements to Take Corrective Action. The bill should be amended to require that the HCP identify all foreseeable changes in conditions that would have an adverse effect on species recovery, and include the landowner's agreement to undertake specific mitigation strategies to address those changes. (The Services acknowledge the need for such a strategy, but fail to require it. See 62 Fed. Reg. 29093 ("HCP planners should identify potential problems in advance and identify specific strategies or protocols in the HCP for dealing with them")). The bill should also require the Services to take corrective action to address unforeseeable changed conditions that would adversely affect recovery.

(c) Limits on Duration. To ensure that adaptive management strategies are credible, the bill should limit the duration of HCPs to a time period in which the landowner can reasonably foresee—and design mitigation strategies to address—the changed conditions that would adversely affect species recovery.

(d) Reliable Funding. To ensure adequate funding for corrective action, the bill should be amended to ensure that responsibility is properly divided between private and public sources. As noted earlier, the landowner should be required to respond to reasonably foreseeable risks in the HCP's adaptive management provisions. A performance bond or other evidence of the landowner's ability to carry out this responsibility should be required as a condition of plan approval. For risks that cannot reasonably be foreseen, Congress should establish a trust fund to cover the costs of corrective action.

By requiring that the "no surprises" assurances be provided without these conservation safeguards, S. 1180 locks in controversial HCP management strategies and removes the tools needed to respond if the HCP is found to be contributing to species decline and possible extinction.

Codifies Administration's Workable New Standards for Candidate Conservation Agreements, But Leaves Other Basic Flaws with CCAs Unaddressed. (Page 60, Line 3). The bill would set a useful standard for approving candidate conservation agreements—virtually the same one recently proposed by the Administration. This will

help ensure that the agreements are based on sound science—a significant improvement over agreements approved in the past, which have been harshly criticized as political deals to avoid listings that fail to address the needs of species. However, it would greatly reduce (if not eliminate) the potential benefits to be achieved by such agreements by requiring that agreements be covered by the flawed "no surprises" policy (discussed above) and allowing them to continue to be developed with a behind-the-scenes process that denies citizens meaningful opportunities to participate (discussed immediately below).

Fails to Adequately Address Behind-the-Scenes Approach to Developing HCPs. (Page 64, Line 14). Under the current ESA, many large-scale HCPs are developed in closed-door negotiations between the Services and regulated interests. Although citizens are given a brief period to comment on the final draft of the HCP, this comment period does not allow for meaningful input. As a result, many HCPs appear to be biased toward the viewpoints of the regulated interests. Because HCPs are essentially long-term management plans affecting numerous valuable public resources ranging from wildlife to drinking water to flood protection, citizens are entitled to a seat at the table as the plans are developed.

S. 1180 fails to address this need for expanded public participation. Although it states that citizens may participate in plan development with the approval of the permit applicant, it offers nothing to citizens in situations where the permit applicant believes that it will get a better deal in a closed-door negotiation. This voluntary approach is essentially a codification of the approach taken by the Administration in its HCP Handbook, which has not succeeded in stimulating greater opportunities for citizen participation. The bill should be amended to set forth clear standards for balanced participation in the development of large-scale HCPs.

Authorizes Safe Harbor Agreements Without Requiring Conservation Benefit. (Page 65, Line 1). Safe harbor agreements are a laudable attempt to get conservation benefits from private lands that otherwise might not be managed for the benefit of species. These new agreements, however, are still in the experimental stage and should be approached with caution. The following safeguards should be added to S. 1180 to ensure that "safe harbor" agreements result in improved conditions for species:

(a) Establish a Net Conservation Benefit Standard. As the Administration has stated in its proposed rulemaking on "safe harbor" agreements, such agreements are not necessarily appropriate for all species and all habitats. For example, scientists have raised concerns that endangered species will move from protected habitat to newly created or restored habitat covered by "safe harbor" agreements. As a result, the abandoned habitat would lose its ESA protection and both the abandoned and "safe harbor" habitat would be subject to development—a net loss of habitat for the endangered species. The bill should require that "safe harbor" agreements be entered into only if (as the Administration has proposed in its recent rulemaking) the Services rule out such negative effects and find that the agreement will lead to a net conservation benefit.

(b) Establish a Scientifically Credible Baseline. The fundamental premise of "safe harbor" agreements is that landowners may improve habitat on their land and later destroy those improvements, as long as the habitat is left no worse off than it was at the time the agreement was initiated. Thus, an accurate baseline measure of existing habitat quality and quantity must be identified at the start, to ensure that later activities do not result in a net loss of habitat. The bill requires use of a baseline, but contains only vague suggestions about how the baseline should be defined in the "safe harbor" agreement. Congress should require that the parties use scientifically defensible and measurable data, including the number of species present on the land and indicators of habitat quality, to define the baseline that must be protected under the "safe harbor" agreement.

(C) Prevent Safe Harbor Agreements From Being Undermined By Incidental Take Permits. Some landowners have asserted that they are entitled to receive an incidental take permit authorizing habitat destruction and, at the same time, to receive a "safe harbor" agreement for restoring habitat just destroyed under the permit. By leaving open this possibility, the bill would allow the "safe harbor" agreement to be used as a tool to remove ESA protections from habitat. The bill should make clear that habitat sacrificed under a take permit is not appropriate for a "safe harbor" agreement—it must be restored and given the same ESA protection that it had in the first place.

(d) Don't Subsidize Agreements Lacking Net Conservation Benefit Standard. The bill authorizes the Services to provide grants of up to $10,000 to private landowners to assist in carrying out a "safe harbor" agreement. Unless the bill is amended to require that "safe harbor" agreements provide a net conservation benefit to species,

this funding would be much better targeted toward other landowner incentives programs authorized in the bill.

(e) Provide Opportunities for Citizen Involvement. Under S. 1180, "safe harbor" agreements may be developed without any notice to the public or opportunity to comment. Public participation opportunities must be expanded significantly to ensure that the Service is held accountable for setting a credible baseline obligation and providing a conservation benefit to the species.

Authorizes Habitat Reserve Program. (Page 67, Line 17). This provision authorizes the Services to pay private landowners for managing habitat pursuant to a contract or easement—an important financial incentive that would help promote recovery of imperiled species on private lands. To ensure that the maximum conservation benefit will be realized for the taxpayer's incentives dollars, the bill should give priority to habitat management that is identified in an approved recovery plan. (Like the other incentives programs authorized by this bill, the success of this program depends completely on whether necessary funds are appropriated.)

Authorizes Habitat Conservation Planning Fund. (Page 69, Line 11). This revolving loan fund, which will provide financial incentives to states and localities to develop HCPs, would provide an important stimulus for comprehensive, region-wide planning. Again, the success of this program will depend entirely upon whether sufficient funds are appropriated.

Creates New Obstacle to Enforcement and Habitat Conservation Planning. (Page 74, Line 20). The effectiveness of HCPs and other conservation planning tools depends on a credible enforcement threat. For example, the Clinton Administration has used a combination of the threat of ESA enforcement and positive incentives to convince landowners to "come to the table" and develop HCPs that balance their desire to undertake economic activities with the needs of imperiled species. According to NWF's sources, the negotiators of S. 1180 have agreed to include report language that would require proof that the landowners' activities are the "proximate cause" of harm to imperiled species. This would reduce the Administration's ability to convince landowners to engage in conservation planning and increase the difficulty of protecting the numerous imperiled species that are threatened by the indirect effects of urbanization, intensive agriculture and resource extraction.

Increases the Amounts Authorized for Incentives and Other Programs, But Identifies No Secure Source of Funding. (Page 78, Line 4). The bill laudably provides for substantial (and long overdue) increases in the authorizations for appropriations to the agencies charged with implementing the ESA and includes new authorizations for important incentives programs. Unfortunately, the actual dollar amounts that will fund these programs will be decided in the appropriations committees, and those committees historically have starved ESA programs of funding. Spending targets under the recent budget agreement call for a steady decline in most discretionary spending. Thus, without a new, guaranteed source of funding, this bill will likely be underfunded and the bill's provisions benefiting imperiled species will not be implemented. A bipartisan effort to create a trust fund for endangered species conservation, not subject to the vagaries of the appropriations process, is badly needed.

Authorizes "No Take" Agreements That Could Contain Broad ESA Exemptions (Page 83, Line 8). NWF strongly supports the use of "no take" agreements and other written understandings between the Services and landowners regarding how habitat can be managed to avoid take of imperiled species. Presumably, the bill's drafters merely intended to codify the Administration's policy and practice of entering such agreements. However, the bill language is so vaguely worded that virtually any land management practice could be authorized under a "no take" agreement, regardless of its impact on species and regardless of whether it would ordinarily violate the ESA. Rather than simply authorizing the Services to declare activities identified in the agreement as not in violation of the ESA, the bill should identify what biological and other standards must be met to justify a finding of "no take." To ensure agency accountability, notice of such agreements should be placed in the Federal Register.

STATEMENT OF DUANE L. SHROUFE, DIRECTOR, ARIZONA GAME AND FISH DEPARTMENT AND IMMEDIATE PAST PRESIDENT, INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES

Thank you, Mr. Chairman, for the opportunity to appear before you today to share the perspectives of the International Association of Fish and Wildlife Agencies on S. 1180, the Endangered Species Recovery Act of 1997. I am Duane Shroufe, Director of the Arizona Game and Fish Department, and Immediate Past President of the Association, and I would like to commend you, Senator Kempthorne, Senator Baucus, and Senator Reid for your persistence and dedication to producing this bi-

partisan centrist and consensus proposal on a difficult but extremely important conservation issue. I bring to you today the firm support for S. 1180. While this proposal does not have everything we advocated for in an ESA reauthorization bill, the Association believes that S. 1180 is a bill that improves the effectiveness of the ESA for both the conservation of fish, wildlife and plant species and with regards to appropriate certainty for the regulated community; it appropriately restores Congress' original intent to respect throughout the Act the concurrent jurisdiction of state fish and wildlife agencies with the US Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) for listed species; restores the focus in the ESA to what we endorse as its most important perspective and that is recovering listed species to a level and vitality where the measures under the Act are no longer necessary; and provides incentives in the form of financial assistance, certainty, and the provision of technical education and assistance to landowners to facilitate their stewardship of their land and associated resources. While we will offer some suggested improvements to S. 1180 to sharpen these aspects and will strongly encourage a commitment to securing robust appropriations to implement S. 1180, the Association reiterates its firm support of this bill.

The International Association of Fish and Wildlife Agencies was founded in 1902 as a quasi-governmental organization of public agencies charged with the protection and management of North America's fish and wildlife resources. The Association's governmental members include the fish and wildlife agencies of the states, provinces, and Federal Governments of the U.S., Canada, and Mexico. All 50 states are members. The Association has been a key organization in promoting sound resource management and strengthening Federal, state, and private cooperation in protecting and managing fish and wildlife and their habitats in the public interest.

I would like to start by recognizing and thanking the bill sponsors for grounding S. 1180 in the collective legislative recommendations from our Association and the nation's Governors under the leadership of the Western Governors' Association which we shared with you starting in the first session of the last Congress. Governor Racicot has shared with you the process of our consensus building in conjunction with the Administration which culminated in our recommendations, and we sincerely appreciate the validation of our work as reflected in S. 1180. We believe you, as did we, recognize that over the 25 years of the ESA, we have a much better understanding of what works under the Act, what doesn't, and how it can be improved. The State fish and wildlife agencies' objectives are fairly straightforward: to successfully carry out our responsibilities as public trust agencies to our citizens to ensure the vitality of our fish and wildlife resources for present and future generations; and to encourage, facilitate and enhance the opportunities, means and methods available to all citizens and especially landowners in our states to contribute to meeting this conservation objective in cooperation with our agencies and our Federal counterparts. Much of this involves solving problems and reconciling differences, and we believe S. 1180 provides new and useful tools, opportunities and direction to achieve both of these objectives.

Let me first strongly urge Congress and the conservation community to collectively dedicate ourselves to securing the appropriations necessary to fulfill the improvements contained in S. 1180. All of these changes will require the additional time and attention of the Federal and state fish and wildlife agencies to satisfy these mandates. Additional listing process requirements, public participation, energized recovery plans through implementation agreements, assistance to private landowners and other provisions are significant improvements which need to be adequately funded in order to meet the objectives of S. 1180 to improve the effectiveness of the Act in achieving conservation objectives and with regards to appropriate certainty for the regulated community. Therefore, the Association strongly urges that Congress and the conservation community make a commitment to securing the robust appropriations necessary to implement these improvements to the Act.

We firmly believe that reaffirming the role of the State fish and wildlife agencies in all aspects of the ESA reflecting our concurrent jurisdiction over listed species sets the stage for more efficient and effective administration of endangered species programs. The State fish and wildlife agencies have broad statutory responsibility for the conservation of fish and wildlife resources within their borders, including on most Federal public lands. The states are thus legal trustees of these public resources with a responsibility to ensure their vitality and sustainability for present and future citizens of their States. State authority for fish and resident wildlife remains the comprehensive backdrop applicable in the absence of specific, overriding Federal law. As Secretary Babbitt said before this Committee 2 years ago, "the States are the presumptive front line managers of fish and wildlife within their borders," a perspective with which we fully concur, and which we believe S. 1180 reflects.

Also, we believe that the affirmation of the true partnership between the State fish and wildlife agencies and the USFWS and NMFS contemplated in S. 1180 will take full advantage of the expertise in fish, wildlife and plant conservation that exists at both the state and Federal level, while minimizing duplicative processes and administrative burdens, a relief that we can hardly afford to ignore in these times of constrained natural resources budgets.

We would be happy to work with your staff on the one area where we believe there needs to be enhanced deference to State fish and wildlife conservation responsibility: the review of listing petitions. We would urge you to consider directing the Secretary to give greater weight to the recommendations of the State fish and wildlife agencies than in the existing language, which simply calls for the Secretary to consider the States' recommendations. We believe the State fish and wildlife agencies have experience and expertise that the Secretary should avail himself of as a first level of "peer review" of listing petitions. Our preference is to give favor to the State recommendations in the form of a rebuttable presumption which the Secretary can overturn, but we are also happy to work with staff on other alternatives.

Also, we respectfully bring to your attention other areas where we believe the "in cooperation with the States" construct should appear in the Candidate Conservation and Safe Harbors agreements, and would ask for your consideration of those changes. We will work with your staff on the specifics of these recommendations.

The Association encourages you and staff to accept Governor Racicot's invitation to visit any of our States to experience firsthand the value of preventative conservation measures long before the need to list species (or even designate candidate species) occurs. This just makes good common sense and good biological sense to avoid the crisis of listing. The Association reaffirms its commitment to prudent conservation of fish, wildlife and the natural communities that they depend on, so that the need to impose the rigors of the ESA is minimized. We do not advocate avoiding the application of the Act; rather, we advocate addressing species and habitat declines before a crisis situation is reached. We need, where possible, to anticipate impacts (from development and other projects) on species and habitats, and address those comprehensively, rather than reacting to them.

The ESA can and will play a role in our preventive management programs, but should remain primarily as the necessary tool of last resort for protecting against extirpation. Through the use of preventive management actions, the ESA could then fulfill a more appropriate role of dealing with species undergoing precipitous decline.

Federal and State conservation agencies should cooperate in coordinating the application of the many existing Federal statutes relating to public lands management (NFMA, FLPMA, etc.), habitat conservation (CWA, CAA), and project impact review (NEPA, etc.); comparable State laws (State nongame and endangered species laws; State environmental review statutes and programs); and county and local land use planning ordinances and programs. A more comprehensive integration of the relevant statutes at all levels will enhance their utility for the conservation of fish and wildlife and their habitats, ensure the sustainability of ecological communities, and preclude the need to list species.

Further, there needs to be a major thrust (distinct from ESA reauthorization) to broaden the highly successful user-pay/user-benefit concept under the Pittman-Robertson and Wallop-Breaux programs to meet today's broader conservation challenges, enabling State/Federal programs for the conservation of the vast majority of nongame fish and wildlife currently receiving less than adequate attention, and thereby providing the means to prevent species from becoming endangered. Based programmatically on the highly successful Sportfish and Wildlife Restoration Programs under the Wallop-Breaux and Pittman-Robertson Acts, the Fish and Wildlife Diversity Funding Initiative, "Teaming with Wildlife," supported by the IAFWA and conservation community, by all 50 State fish and wildlife agencies, and by a substantial (over 2300 businesses and organizations) grassroots coalition across the country, is designed to secure permanent, dedicated funding, based on user fees in the form of an excise tax, to provide among other things, the prevention of species becoming endangered, through the provision of routine fish and wildlife management practices. We look forward to visiting with you further on this proposal.

Further, the Association encourages the use of legally binding Conservation Agreements for declining or candidate species in lieu of listing as threatened or endangered, where management actions specified under such an agreement remove the threat(s) to the species, and where the Agreement is enforced. Comprehensive habitat based agreements should be encouraged. Clarification of the Endangered Species Act to support such Conservation Agreements is required and affirmation of State authority for pre-listed species must be legislatively assured. The role of the State fish and wildlife agencies in this process must be affirmed and institutionalized. By requiring the Secretary to concur with State-led conservation agree-

ments involving affected jurisdictional entities and private landowners (where appropriate), the Secretary will be legally shielded from a requirement to impose certain regulatory implications through suspension of the consequences of listing. Private landowners should be given legal assurances that, once they commit to certain responsibilities under the agreement, no additional liabilities under Section 9 will be imposed upon them. The incentive for Federal agencies to participate is that they obviously incur no liability under Section 7 if actions to recover declining species are taken prior to listing. This provision is detailed further in the legislative recommendations from the WGA/IAFWA/NGA, and we look forward to continuing to represent to you the merits of such a proposal through a review of on-the-ground successes.

The Association applauds and fully supports your efforts in S. 1180 to energize recovery plans through implementation agreements to restore the focus in the ESA to not just listing species, but to carrying out actions that restore species and habitat to a sustainability level where the measures under the Act are no longer necessary. As S. 1180 provides, State fish and wildlife agencies must be given the opportunity to take the lead on recovery plans. The utility of a team approach not only provides for application of a broad base of knowledge and perspectives, but also better intergovernmental coordination regarding biological, social, economic and environmental factors. State fish and wildlife agency lead or affirmed participation brings in experience in working with both private landowners and local land use regulatory agencies (county Planning and Zoning agencies, for example) both of which are vital to the success of recovery programs.

Finally, we fully support the provisions of financial assistance, regulatory certainty, and education for private landowners in S. 1180. The provision of incentives seems to be an area of general agreement on which most parties can agree. As you are aware, Mr. Chairman, the "no surprises," "safe harbors," and "candidate conservation agreements" policies were contained in Secretary Babbitt's March 1995 ten-point policy articulation of administrative improvements to the ESA. The Association heartily supported that proposal, and participated in the consensus building between the States and the Department of the Interior, which culminated in the Secretary's policy. The Association supports the codification of these policies in statute to affirm the Secretary's authority in offering and implementing these policies.

Thank you for the opportunity to share the Association's firm support for and perspectives on S. 1180, and I would be pleased to address any questions you might have.

RESPONSE BY MARK VAN PUTTEN TO QUESTION FROM SENATOR CHAFEE

Question: That doesn't sound like "no surprises" to me. Could you explain that?

Answer: The Section 7 waiver in S. 1180 effectively precludes the Services from reopening recovery implementation agreements (RIAs) except pursuant to the terms of the RIAs. This is a"no surprises" feature in the sense that Federal agencies are given assurances that the Services cannot unilaterally call for changes in the agreement even if those changes are needed to address the rapid decline of an imperiled species.

The committee partly addressed NWF's concern by amending S. 1180 at markup to require that RIAs provide opportunities to reopen at 5-year intervals. However, the bill still reduces the Services' management flexibility from the current ESA, which authorizes the Services to reinitiate consultation whenever "new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered." 50 C.F.R.—402.16(b).

This new inflexibility would be harmful to imperiled species. To protect species, management strategies need to be updated continually to incorporate new information and address changed circumstances. For example, if the Fish and Wildlife Service enters a 5-year recovery implementation agreement with the Agriculture Department's Animal Damage Control (ADC) agency stating that depredation of the gray wolf to protect livestock on Federal grazing allotments is necessary to promote wolf recovery (the current FWS view), S. 1180 would waive Section 7's applicability to all future wolf depredation authorized by the agreement. After 3 years, if new data reveals that wolf depredation authorized by the agreement is contributing to the species' rapid decline, the bill would preclude FWS from reinitiating consultation with ADC and making appropriate changes to save the species.

This new inflexibility is particularly harmful considering that a "no surprises" policy is already being applied to nonFederal activities covered by Habitat Conservation Plans (HCPs). With the Services' management options already reduced on nonFederal lands, it makes no sense to restrict them further on Federal lands.

In summary, there is a significant risk that by the time management practices approved in the recovery implementation agreement are carried out, they will be inconsistent with the current scientific understanding of the species' needs. Even if the recovery implementation agreement is contributing directly to a species' decline, the Section 7 waiver would preclude the Services from reinitiating consultation and revising the agreement to conform with the latest science. NWF strongly recommends removing the Section 7 waiver.

STATEMENT OF THE COALITION ON THE ENVIRONMENT AND JEWISH LIFE

The Endangered Species Act encodes into law a biblical precept common to the Jewish, Christian, and Moslem faiths and record by the vast majority of Americans that creation in all its diversity is good" and that it is wrong for human beings to knowingly cause the extinction of a unique form of life. This core moral principle is the foundation for what has become a significant public policy priority for the Coalition on the Environment and Jewish life, an organization encompassing 26 national Jewish organizations including the Conservative, Orthodox, and Reform movements as well as the major Jewish public affairs agencies in the U.S.; the Jewish Council for Public Affairs, (formerly the National Jewish Community Relations Advisory Council), which is an umbrella organization for 13 national agencies and 125 Jewish public affairs councils; and the Union of American Hebrew Congregations, representing 1.5 million Reform Jews. We have been working together, and with major groups from other faiths that comprise the National Religious Partnership for the Environment, to advocate stronger protections for endangered species. We welcome efforts to reauthorize the Endangered Species Act and applaud the positive proposals included in the Senate Endangered Species Recovery Act of 1997; however, we are profoundly concerned that provisions in this bill fall far short of goals to strengthen protections for endangered species sufficiently to ensure their full recovery.

Sources from the Bible to contemporary Jewish theologians teach us about our obligations to—in the words of Genesis—"Serve and protect" the creation and all of its constituent life forms. Nothing was created in vain, the Talamud (Shabbat 77b) teaches us. Our sages taught that human beings were created last in order to remind us, lest we grow too proud, that God's entire world preceded us, that God declared the world good before we arrived, and that we could not have been created had all the rest of it not been formed first (Sanhedrin 38a).

Science and religion alike agree that there is a profound integrity to the natural order, a marvelous ecological complexity and interdependence that even now, with all our growing scientific understanding, rant beyond our comprehension We stand in awe of creation's integrity, humbled by our limited knowledge of it and our awesome responsibility to protect it.

Today we are confronted with a challenge similar to that of Noah: we must ensure that all of God's creatures have safe passage from one epoch of human history to another. We have a solemn obligation to ensure that as our society grows and develops, that all of the plants and measures with which we share the earn survive into the fixture.

The Endangered Species Act serves as a contemporary Noah's ark. Yet it is an ark in need of major repair. While the provisions of He Act have rescued many species from extinction, less than ½ of 1 percent of endangered species have recovered sufficiently to be removes from the list of threatened and endangered species.

As the Congress considers the reauthorization of the Endangered Species Act, we welcome efforts to address the shortcomings of the Act lay strengthening provisions to recover threatened and endangered species on both public and private lands. In July 1997, eve enthusiastically endorsed the Endangered Species Recovery Act introduced by Representative George Miller (CA) as a constructive and proactive effort to recover declining species by setting recovery goals and providing incentives.

We welcome the provisions included in the Senate Endangered Species Recovery Act, S. 1180, introduced by Senators Baucus, Chafee, Kempthorne, and Reid, which would improve the chances for species to recover, including:

Recovery plans that require the establishment of recovery teams which will set biologically based recovery goals using the best scientific and commercial data available, and which will be reviewed every 10 years;Financial assistance, incentives, and technical assistance for private property holders, including grants to implement conservation plans, the creation of habitat reserves on private property, and a revolving fund for habitat conservation planing; and

Substantially increased appropriations for endangered species programs.

However, we are gravely concerned about a number of provisions which we believe are not in the best interests of the recovery of threatened and endangered species:

The proposed recovery teams are too heavily weighted in favor of vested economic interests. While we agree that those parties that have a stake in the outcome of land use decisions should have an opportunity to present their views, we believe that those developing recovery plans should, to the greatest degree practicable, be citizens without a vested interest other than the common good of the community.

Too much weight is given to economic interests in the selection of recovery measures and the designation of critical habitat. Critical habitat should be determined solely on the bow of scientific analysis.

Interests utilizing Federal lands whose activities are the subject of review by the Department of Interior are given inappropriate access to decisionmakers in the Department.

Overly broad discretion is given to the Secretary of Interior regarding the creation of recovery teams, the designation of critical habitat, and the provision of wholesale exemptions to species protections.

The consultation process for Federal agencies natures the Secretary of Interior to object to planned actions within a 60 day period. We believe that the current process, whereby an agency must obtain positive permission from the Department of Interior, is superior as it is a more cautious approach.

"No surprises" assurances would require the government to lock into place for long periods of time conservation agreements between the Department of Interior and private landowners regardless of new scientific information that may invalidate the ecological assumptions of those agreements. We favor the approach taken in the House bill which would require the creation of performance bonds by recipients of land use permits to cover the costs of changes in conservation agreements due to reasonably foreseeable circumstances.

The Senate Endangered Species Recovery Act of 1997 as currently proposed may, in many cases, risk species recovery, and the common good of the community, in favor of short term economic interests. While we agree that the economic and social costs of species protection should be calculated, and in cases of overwhelming human need be considered. when developing conservation plans, we believe that our solemn obligation to protect the integrity of creation requires us, whenever possible, to integrate human affairs into the larger patterns of creation rather than relegate to the margins of our human-conceived society the creation whose ecosystems all life, including our own, depends. A precautionary principle should be applied to protect life forms from extinction: we must err on the side of caution.

We must fulfill our long term responsibilities to our children, to creation, and to the Creator. In the greater scheme of things, the requirements for economic security, human health and well-being, and ecological integrity are consistent. By making difficult choices today, we will not only fulfill our overriding moral obligations, we will provide a sounder basis for long term economic vitality. Consistent with a religious perspective humility not arrogance must be the byword in assessing our obligations to the multiplicity of creations with which we have been blessed by the Creator.

STATEMENT OF THE EVANGELICAL ENVIRONMENTAL NETWORK, COALITION ON THE ENVIRONMENT AND JEWISH LIFE, AND THE NATIONAL COUNCIL OF CHURCHES OF CHRIST, USA

We are gravely disappointed that the perspectives of faith and values, as shared by religious people throughout the United States, have not been invited into the Committee's discussions today. Where could the need for these be more self-evident than when reflecting upon the condition of God's creation? Failure to consider religious teachings has led to the destruction of God 's creatures in the first place, and the decision not to hear them is happening again here today.

This is not about the exclusion of an interest group but of a way of looking at the world —one shared by tens of millions of people of faith. As the perspectives of science, commerce, environmentalism, and government bring unique insights, so too does that of religious thought. But that is not here today. And without it, these deliberations present to our nation a circumscription of vision and values.

We appreciate that the Committee intends no disrespect to people and communities of faith as such. We are confident that, as always, many Members of Congress will listen to the views of religious denominations across this country. But we wish the Committee to understand the depth and breadth of the religious community's convictions here —unanimous not always on the intricate details of environmental policy but on the inescapably religious and moral principles which policy must clear-

ly embody. People of faith in this nation will respond with great resolve if action on the Endangered Species Act is hastily moved through the Congress without due consideration of their views.

Though our traditions are diverse, we together have understood the value of care for creation from the beginnings of Scripture: "And God said, 'Let the waters swarm with swarms of living creatures, and let fowl fly above the. earth, across the expanse of heaven.' And God created the great sea-beasts, and all the living creatures of every kind that creep, which the waters brought forth in swarms, and all the winged birds of every kind. And God saw that this was good." (Genesis 1: 2021) God's affirmation of all creation sets the standard for our protection of it. We ask ourselves, as a result of this legislation will the condition of life and habitat be more or less likely to be "good"?

At the end of the Noah story, we read of God's rescue and recovery of all species, as God establishes "the covenant which want make between Me and you and every living creature that is with you, for all future generations." (Genesis 9: 12) In this legislation, will we seek less than rescue and recovery? With "every living creature" and "for all future generations"? And underlying this standard is the proclamation from Psalms: "The Earth is the Lord's and the fullness thereof" (Psalm 24: 1). God owns it, not us. Will this legislation, then, help us live up to our obligations to be good stewards of God's creation?

Increasingly, people of faith from all the world's great traditions are coming to understand afresh how care for the diversity of creation is a standard of faithfulness, at the heart of what it must mean to be religious. We are relearning what our sages have taught for millennia. Sages such as St. Basil the Great, who wrote in the 4th century: "May we realize that our brothers and sisters the animals live not for us alone, but for themselves and for You, God, and that they love the sweetness of life." Talmudic sages writing at roughly the same time noted (Shabbat 77b, Sanhedrin 38a) that even those species we might consider unnecessary or a nuisance have value to God and to the world—and that Genesis relates, "lest we grow too proud, that even the fleas took precedence over us in the order of creation." St. Thomas Aquinas wrote, "The whole universe together participates in the divine goodness more perfectly, and represents it better, than any single creature whatever." The 1 3th century sage, Nachmanides, in his commentary on Deuteronomy, wrote that "The Bible does not permit a killing that would uproot a species, even when it has permitted the killing of individuals of that species."

Scripture and perennial teachings such as these have led increasingly of late to a distinctively religious vision and voice on issues of environmental justice and sustainability —a vision and voice that have been lifted up in ardent support of the Endangered Species Act. The National Council of Churches of Christ has distributed "A Call to Defend God's Creation" to 50,000 mainline Protestant, historic African-American, and Orthodox Christian congregations. Across the broadest spectrum, from Reform to Orthodox, members of the Jewish community worked together on "Operation Noah," celebrating how the Endangered Species Act has served as a modern day Ark, preserving and nurturing the remnants of God's creation until they, like the Bald Eagle, can soar on their own again. After much prayer and reflection, members of the Evangelical Environmental Network took on the defense of the Endangered Species Act as its very first public policy initiative. Representatives of the faith community have testified in formal hearings and met with senior Congressional leaders of both parties in private deliberations.

We are eager, therefore, to continue this spirit of dialog as discussion of new legislation, such as S. 1180 and H.R. 2351, move forward in this Congress. In this light, we wish to make clear that there are a number of provisions in S. 1180 that we believe will serve the common good of human community and natural habitat alike. The Landowner's Education and Technical Assistance program, the revolving fund to assist with Habitat Conservation Plans, and the inventory of Federal lands are all positive steps in the right direction. They will help the restoration of species even as they provide added flexibility and clarity of law.

We do believe, however—for is this not the standard set before us by God's covenant in Genesis—that this legislation needs to focus more firmly on the recovery of endangered species. To this end, we are concerned that certain elements in the bill as it now stands will actively hinder that goal. For example, while we welcome the mandating of public hearings in a number of provisions, we are concerned that industries which apply for the use of Federal lands are granted private, unlimited access to the consultation process, without the opportunity for public comment. S. 1180 also requires in-depth analyses of the costs of recovery plans, without seeking to set this in the comprehensive context of the economic and health benefits, ecosystem services, and moral value of species recovery. We also fear that the less

stringent, extremely timebound consultation requirements for Federal agencies would result in weakened protection of endangered species on public lands.

Along with these specifics, which we are eager to discuss with the authors of this legislation, we are, however, most deeply concerned that adequate time be given for people across the United States, including religious communities, to be informed about, and to share their views on, this legislation as proposed.

In the 104th Congress, efforts were made to rush final action on ill-considered revisions of the Endangered Species Act. Not again. The religious community played perhaps some small role in preventing that action and the pace with which it was undertaken. The cordial and cooperative relationship we have been steadily building with Members of Congress and the Administration over the past several years should prevent this from happening once more. Indeed, we look forward not simply to avoiding past failures but to amplifying new visions.

The biological integrity of the world and its spiritual integrity are stunningly intertwined, and it is no small thing that we are invited —more than invited, that we are called —to work as God's partners in tending this exquisite garden, this precious planet whose stewards we are. Our commitment to the endangered species of this planet is one way, one indispensable way, in which we choose to respond to that call, and we do so with love, with gratitude, and with reverence. As you consider your actions, it is our prayer that this same reverence will enter into your deliberations.

STATEMENT BY THE NATIONAL ASSOCIATION OF HOME BUILDERS

INTRODUCTION

This statement is presented on behalf of the National Association of Home Builders (NAHB). NAHB and its 800 state and local affiliate organizations comprise over 195,000 member firms that employ over 8,000,000 people. Many of our members have been involved in efforts to make the Endangered Species Act (ESA) work better for landowners while at the same time protect endangered and threatened species. Unfortunately, while there have been successes, the Act's often unwieldy and inflexible nature has more often than not frustrated these efforts.

NAHB's members recognize the importance of maintaining our country's rich natural heritage. However, they also recognize the importance of economic growth and, of course, the investment in the future that purchasing one's own home represents. Therefore, NAHB has continued to call for improvements to the ESA that can better balance species protection efforts with goals for economic progress.

The commitment of NAHB's members to making the ESA work better is illustrative of the impact this law has had on the home building industry. Indeed, while residential construction represents over 7 percent of our nation's GDP, NAHB is primarily a small business organization, and as such can be dramatically affected by the Act's sometimes sweeping prohibitions. Specifically, over half of the members of NAHB build fewer than 10 homes per year, and nearly ¾ build 25 or fewer homes.

OVERVIEW AND THE NEED FOR LEGISLATIVE REFORM

The ESA imposes some of the most stringent restrictions on the use of private property of any Federal statute. The Act's provisions are mandatory, inflexible, and absolute. Indeed, unlike most legislative schemes, the statute's requirements are not moderated by "where practicable" or "where the benefits exceed the costs." This inflexibility is manifested by the Act's imposition of restrictions on private land due to the listing of a particular species which have often been based on questionable scientific data. Little opportunity for public involvement in the listing process exists, and the burden of proof often falls to the landowner where alleged violations are concerned.

As an example of the kinds of impacts the Act can have on communities and regions around the country, consider the listing of the Golden-cheeked Warbler as an endangered species. The listing effectively imposed a development moratorium in Travis County, Texas. The county appraisal district estimated that land values in the area fell from over $335 million to less than $57 million after the Warbler was listed. Moreover, estimates reflected a reduction in property tax revenues from almost $7 million to $302,000. These figures do not include lost revenues from abandoned business ventures, and foregone taxes to the city, school districts, and county government. Similarly, the listing of the California Gnatcatcher was accompanied by prohibitions that severely restricted or prohibited the use of more than 300,000 acres of private property in Southern California, an area six times larger than Washington, DC. Clearly, it is cases such as these, which have the potential to dev-

astate communities, that illustrate the dramatic need for an improved ESA that is both accurate and sensitive to the concerns of the citizens of this nation. Moreover, while we should protect the environment from harm, Congress should ensure that the Act's significant land use prohibitions are exercised only when accurate and reliable scientific data demonstrates a species is truly endangered. Congress should guarantee that the Act's burdensome costs are distributed equitably with minimal disruption to local and regional economies, and without expecting a few landowners to foot the large costs of species protection and habitat preservation. Congress should also guarantee that the public has a much greater role in the ESA process than it currently does, and that the Federal Government is held much more accountable for how the Act is implemented.

At the same time, however, NAHB clearly recognizes that species preservation is a worthy national objective and the Act's goals are beyond censure. Our nation's diversity of fish, wildlife and plants are part of our cultural and historical heritage, and the Act's aspirations to nurture and preserve a biodiverse environment are laudable. To be certain, the ESA is not without its successes. Indeed, most recently the Bald Eagle was "downlisted" from the endangered to the threatened category, an action that many hail as the result of the Act's effectiveness. Unfortunately, the Eagle is one of a few rare exceptions, as the Act has largely failed to achieve its ultimate goal of species recovery. Even in the case of the Eagle, although it was downlisted under the ESA, much of the credit for its recovery must be attributed to the 1972 Bald Eagle Protection Act, which banned the use of DDT.

Unquestionably, the ESA can be a much more effective vehicle for species preservation than it has been to date. Even the environmental community has recognized the Act's shortcomings, and has gone on record in support of significant changes to the Act. Peter A.A. Berle, President of the National Audubon Society, has acknowledged publicly that "the Act is not working well enough to accomplish its purpose." One of the Act's drafters and a former Sierra Club president, Douglas Wheeler, was succinct in his criticism: "The Endangered Species Act just doesn't work." His sentiments reflect the exasperation felt in both the industry and the environmental community. Consequently, the statute's legislative scheme should be made more effective, more efficient and more equitable. Accordingly, ESA implantation must be improved in five key areas: the listing process, critical habitat designation, habitat conservation plans, recovery planning, and public involvement in the process.

S. 1180, the Endangered Species Recovery Act of 1997, addresses each of these areas in some fashion, and this testimony will place its focus there. Clearly, the bill does not reflect NAHB recommendations in all of these areas, and does not address each and every aspect of the Act that NAHB believes needs improvement. Accordingly, this testimony will also note those areas where NAHB believes the bill falls short and could be improved by some additional language that, in the opinion of NAHB, should not be so controversial as to stall the progress of this legislation. However, NAHB believes S. 1180 makes some very important strides toward making the ESA a law that is much more equitable and workable for landowners, but which maintains the underlying goal of species protection.

THE LISTING PROCESS

Controversial decisions have become far too commonplace in the listing process, and have served to taint it. Clearly, the Fish and Wildlife Service (FWS) should extend the Act's protections to only those species that genuinely confront endangerment. Currently, there is no congressional or regulatory directive to guide FWS in their listing decisions. Predictably, the agency routinely renders unreliable listing decisions with no basis in science or fact. The harmful results from FWS's current listing practices are twofold: either the agency reviews and accepts petitions to list species that contain too little or unreliable data to determine if the species is in danger of extinction, or, more importantly, FWS may fail to list a species that is truly endangered.

Under current law, a species secures the Act's formidable protections upon FWS's official conclusion that it is in danger of extinction. The criteria for determining that a species is threatened or endangered are broad, and include: destruction, modification, or curtailment of habitat or range; disease or predation; and inadequate existing regulatory mechanisms. Considering the broad statutory proscription of a "take," reliable listing decisions are imperative. Although Congress directed that economic considerations play no role during species listing, it is hard to ignore the exorbitant costs inherent to the listing process. The ministerial act of listing a species is estimated at $60,000 per species.

[The Endangered Species Program—U.S. Fish and Wildlife Service Audit Report, Report No. 90–98, September 1990 at 6]. Based on this figure, well over $81 million

has been spent merely to queue species and signal they deserve some protection. As high as these costs are, however, they pale in comparison to the costs that flow from the listing decision.

Considering the Act's significant land use prohibitions and the excessive costs associated with listing a species, it would be reasonable to expect FWS's listing process to be based upon rigorous science and accurate, reliable data that demonstrates a species is truly endangered. Unfortunately, it is not. The listing process should be open to the public at all stages. Today it is not. The listing process should include the identification of critical habitat. Today it routinely does not.

Currently, the agency bases its listing decision upon "best scientific or commercial data available," vague language prescribed by the Act but not defined anywhere by law or regulation. The ramifications of Congress' failure to provide definitive language explaining what constitutes acceptable data has become a recurring source for dispute. FWS has accordingly been left with inadequate data, in the absence of a congressional directive, on which to base its listing decisions. Predictably, recurring debate and prolonged litigation regarding the validity of certain listing decisions has arisen.

The vernal pool Fairy Shrimp exemplifies the faulty listing process. In 1991, Ms. Roxanne Bitmann, an "interested" citizen, sent a one-paragraph petition to the Fish and Wildlife Service requesting the Fairy Shrimp be listed as endangered. The petition claimed that the shrimp were being threatened by urban development, and agricultural land conversion. The petition did not contain any data documenting these threats to the Fairy Shrimp. The petition did not contain any scientific evidence that the Fairy Shrimp's population was diminishing, even marginally.

Nevertheless, Fish and Wildlife determined the petition contained "substantial scientific data" and shortly proposed to list the Fairy Shrimp. FWS's proposal to list the Fairy Shrimp was based on two unproven assumptions: that the species is solely reliant on vernal pools as habitat and that California vernal pools are in imminent danger of eradication. In fact, the actual evidence presented to FWS is insufficient to indicate that either Fairy Shrimp or vernal pools are endangered. During the public comment period on the proposed listing, an independent biologist, widely recognized in the scientific community, sampled over 3,000 vernal pools. The biologist found the shrimp to be hardy, adaptable and ubiquitous throughout California. In addition, California already has strict conservation measures protecting wetlands such as vernal pools. In contrast, Fish and Wildlife accepted a study of only 120 vernal pools to reach the conclusion that the shrimp is threatened and listed the species in September 1994. The impacts of the Fairy Shrimp's listing are not minor. Vernal pools cover roughly 1 million acres in California. The Sacramento municipal utility district was notified by Fish and Wildlife that they were required to preserve 117 acres of land because a pipeline would impact on 2 acres of vernal pools.

Congress must ensure that FWS extends the Act's protections only to those species, which are truly threatened or endangered, based upon all appropriate documentation and research. The listing process, therefore, should be reformed to require a stricter scientific basis for listing species. Ideally, NAHB believes that Congress should define "best available science" to include: the minimum viable population of the species, the minimum habitat necessary for the species survival, the species geographic distribution, population, and percentage decline, and the actual threats to the species. NAHB also believes that an ideal formal, systematic peer review process would require evaluation of the methodologies used in the collection of the data. This would assure that researchers follow appropriate methodologies for gathering and analyzing data.

While S. 1180 does not go as far as NAHB's recommendations, it does indeed define what constitutes "best scientific and commercial data available." The legislation requires that the Secretary, when evaluating scientific data, give greater weight to that which is "empirical, field-tested, or peer-reviewed." While NAHB believes that all data should be field-tested, verifiable, and peer-reviewed, this language is an important step toward ensuring that the data on which listing and delisting decisions are made is as accurate as possible. In an effort to hold the Secretary further accountable, the legislation also requires that he or she publish a summary of the data utilized for the listing decision, and that the Secretary publish in the Federal Register a description of additional scientific and commercial data that would assist in recovery plan preparation. The Secretary would then be required to issue a schedule for obtaining that data. Finally, by replacing "or" with "and" in the phrase "best scientific and commercial data available," the legislation expands the universe of data from which it will be necessary to draw. S. 1180 makes some important changes to the listing process that would at once restore much of the credibility that has been lost in the process, and eliminate at least some of the controversy surrounding many of the listing decisions.

Also, NAHB believes that Congress should require FWS to establish professional standards for the researchers who prepare the best available data. It is imperative that the scientists and biologists that compile the required data have no financial interest in the outcome of the research. Expert biologists stand to gain substantial financial rewards once their petition listing a species as endangered or threatened is accepted by FWS. Large research grants and lucrative consulting contracts with government agencies and developers are the foreseeable outcomes once a researcher's listing becomes official. S. 1180 appears to have done that. The legislation requires that the independent referees chosen for peer review "do not have, or represent any person with, a conflict of interest with respect to the determination that is the subject of the review." NAHB applauds this provision.

Finally, in an effort to further tighten the listing process and prevent the sort of "back of the envelope" listing petitions referenced here, S. 1180 takes what NAHB believes to be some very important steps in requiring minimum documentation for undertaking the listing process. The requirements include: 1) documentation that the fish, wildlife, or plant is a species as defined by the ESA; 2) description of the available data on the historical and current range and distribution of the species; 3) appraisal of the available data on the status and trends of all extant populations; 4) appraisal of the available data on the threats to the species; and 5) identification of what data or information has been peer-reviewed. NAHB would encourage that the legislation take the additional step of establishing a public docket with all of the information received or generated internally and make it available to any interested person.

CRITICAL HABITAT

FWS routinely fails to designate critical habitat for listed species. Congress mandated that the critical habitat of a species should be identified at the time the listing decision is made "to the maximum extent prudent and determinable." Only those areas essential to the protection and recovery of the focal species are considered its critical habitat. Furthermore, Section 4 of the Act directs FWS to consider economic and other relevant impacts when it designates critical habitat, and the Secretary may exclude any area from a species' critical habitat if the detriments of inclusion outweigh the benefits. FWS's routine failure to designate critical habitat for endangered and threatened species compromises the Act's chances for success. Opponents of reform rely on the statutory language contained in Section 4 to defend their position that the Act sufficiently considers economic impacts. This argument is deficient. As of September 1991, FWS had not designated critical habitat for 84 percent of all listed species. [Endangered Species Act: Types and Number of Implementing Actions, Briefing Report to the Chairman, Committee on Science, Space, and Technology, House of Representatives at 29 (U.S. General Accounting Office, May 1992).] This poor track record suggests that the FWS has not met the statute's mandate in designating critical habitat or fulfilling the congressional mandate.

FWS's consistent failure to designate critical habitat unquestionably subverts one of the few areas in the Act where legislative intent is clear. The legislative history for the Act's 1978 amendments evidences Congress's intent that:

. . . in most situations the Secretary will, in fact, designate critical habitat at the time that a species is listed as either endangered or threatened. It is only in rare circumstances where the specification of critical habitat concurrently with the listing would not be beneficial to the species. [Act of Nov. 10, 1978, Pub. L. No. 95–632, ¶11(1), 92 Stat. 3751, 3764. H.R. Rep. No. 1625, 95th Cong. 2d. sess. (1978)] [emphasis added].

The agency's failure to designate critical habitat creates severe and unnecessary problems for private landowners. As a result of FWS' failure to designate critical habitat, FWS regulates development on all potential habitat. Moreover, since the Act does not require notification of property owners that they own potential habitat of a listed endangered species, many individuals are unaware of their responsibilities. Congress should require that FWS provide much greater notice to potentially affected landowners. NAHB includes a recommendation on how this can be improved later in this statement.

Without critical habitat designation, we face more unnecessary conflicts like the one between the Delhi Sands Flower-Loving Fly and the San Bernardino County Medical Center. The Medical Center was required to spend over $3.28 million to preserve land that might be occupied by 8 flies—a cost of over $410,000 per Fly.

FWS often asserts that there is insufficient scientific data to support the designation of critical habitat. If deficiencies in the data exist at the time of the species listing, Congress should require FWS to collect and consider all necessary data. Too often the task of collecting and analyzing biological data is expected from the land-

owner at great expense. Furthermore, it is imperative that the information upon which a critical habitat is designated be based upon the best scientific and commercial data available. Locking up thousands of acres of land based upon questionable determinations of critical habitat is simply unacceptable.

Congress, therefore, needs to make collection of sufficient and appropriate data for critical habitat designation a requirement, and a priority, of FWS.

With one consideration, S. 1180 makes solid improvements in requiring that critical habitat be designated concurrently with the listing of a species. The legislation requires that within 9 months the team designated to develop the recovery plan provide the Secretary with a recommendation of any habitat that should be designated as critical. The Secretary must then propose the designation of critical habitat to the maximum extent prudent and determinable within 18 months of the listing. The final regulation is due within 30 months of the final listing. S. 1180 also requires that the critical habitat be based on the best scientific and commercial data available.

NAHB's chief concern in this provision is the continued use of the phrase "to the maximum extent prudent and determinable." This is the same as current law, and has been used by FWS to avoid listing critical habitat.

Additionally, NAHB believes that the Federal Government must weigh the socioeconomic consequences before critical habitat designations are made. These considerations are not part of the listing process. Congress should strengthen the mandate that critical habitat be designated at the time of listing and condition the Act's restrictions on these determinations. There should be no exceptions. Listings should not be permitted without critical habitat designation. This is an area where S. 1180 falls short. While the legislation requires that the Secretary "consider" the economic impacts of critical habitat designation and describes them in the proposed designation, there is no requirement that the designation be based in any way on this information. The legislation also requires that in the event the recovery measures proposed in a draft recovery plan would impose "significant costs" on a municipality, region, county, or industry, the recovery team shall prepare a description of the overall effects on the public and private sectors. Finally, the legislation would require that recovery measures "achieve an appropriate balance" between the effectiveness of achieving the recovery goal, the time period to achieve the goal, and the social and economic impacts of the measures. Unfortunately, the terms "consider," "significant costs," and "appropriate balance" are not defined. This leaves far too much up to interpretation.

HABITAT CONSERVATION PLANS

Congress needs to revise the Section 10(a) incidental take permit. The Section 10(a) permit is critical, as it is a landowner's sole remedy to the Act's land use prohibitions when no other Federal action is necessary. The Act's statutory language vaguely describes the necessary components of a Habitat Conservation Plan (HCP), and FWS regulations merely reiterate the Act's imprecise criteria. Meaningful and detailed HCP guidelines should be developed to advise participants on the essential elements of any plan, on what value the FWS ascribes to habitat enhancement or other conservation measures, and how to measure the success or failure of the plan.

Although the HCP concept originated in the Act's 1982 amendments, it has rarely been utilized. In the past 12 years, FWS has approved fewer than forty HCPs nationwide, a number that belies the claim that the HCP concept has been employed extensively. Ironically, even FWS recommends that private parties seeking HCP approval evaluate whether a proposed project contains a Federal nexus that would qualify it for Section 7. Unfortunately, many Federal agencies refuse to perform Section 7 consultations when granting permits because of the shortage of staff or the paperwork requirements. Thus many private landowners are left in an untenable position with few acceptable alternatives. Before HCPs are widely accepted as the Act's panacea, several reforms are essential.

In the past, FWS has been unwilling to offer definitive guidelines in crafting an acceptable HCP. Although the FWS has routinely attended all HCP planning sessions, the agency typically refuses to indicate whether it will find the plan acceptable or whether a particular component will prevent their approval of the HCP. Meaningful FWS involvement at all stages can introduce reliability, equality, and efficiency to the HCP process. Without FWS commitment, local officials and landowners alike face Federal regulations that impose stringent land use restrictions based on loosely defined criteria.

Congress should require FWS to furnish definitive guidelines, specific to the focal species, as to what constitutes an acceptable habitat conservation plan. HCP guidelines should be developed to advise participants on the essential elements of any

plan, on what value the FWS ascribes to habitat enhancement or other conservation measures, and how to measure the success or failure of the plan.

Unfortunately, S. 1180 needs to go much further in this regard. NAHB advocates that the legislation do the following:

Provide the applicant with the opportunity to engage in a preapplication consultation procedure similar to informal consultation under Section 7; mandatory pre-application and application processing timeframes to incorporate a consultation and permit processing timeframe procedure like those procedures applied under Section 7;

Require FWS to approve or deny any complete Section 10 application that does not require an environmental impact study within 180 days of receiving such application, and should FWS not meet that deadline, require that the permit be deemed approved;

Require FWS to approve or deny any complete Section 10 permit that requires an environmental impact study within 1 year of receiving such application, and should FWS not meet that deadline, require that the permit be deemed approved;

Provide that should FWS deny an application, it must do so in writing within the review period and concurrently provide the applicant with those minimum necessary mitigation or compensation measures which, if incorporated into the applicant's permit application, would result in the approval of the permit application by FWS;

Require that a Section 10 application be deemed complete unless FWS has notified the applicant in writing within 20 days of receipt of the application that the application is incomplete and has clearly identified which aspects of the application are incomplete; notice to the applicant of the acceptability of the measures within the 180 day review period, FWS should be required to issue the local permit within 45 days of providing notice of acceptance of the mitigation measures;

Should FWS decide that the applicant's proposed mitigation and compensation measures are not sufficient to issue a Section 10 permit, the applicant should be immediately entitled to bring suit in the U.S. Court of Claims for a determination of damages suffered as a result of any regulatory taking.

Another area in which improvement is necessary is that of setting out the criteria for Section 10(a) permit issuance. Indeed, the current criteria are vague and subject to agency abuse, particularly in terms of what constitutes "indirect take." Permit applicants have little in the way of guidance on whether or not the action they are proposing would constitute a "take" under current law. While NAHB clearly is of the belief that the current definition of take is unfairly broad, that may be a fight for another day. However, at the very least, it should be incumbent upon the FWS to identify in any rule listing a species as endangered or threatened those activities that would constitute a take of that listed species.

Fortunately, the administration has set a precedent along these lines. Responding to public criticism that the FWS was being uncooperative in responding to landowner requests for information about the impact of their actions on listed species, the FWS and National Marine Fisheries Service (NMFS) introduced a new policy in 1994 in an attempt to stave off some of that criticism. They announced that in all future listings they will "identify, to the maximum extent known at the time a species is listed, specific activities that will not be considered likely to result in violation of Section 9." Notice of Interagency Cooperative Policy for Endangered Species Act Section 9 Prohibitions, 59 Fed. Reg. 34272 (July 1, 1994). This policy also identifies agency contact personnel for landowners seeking further guidance. The agencies have used these policies in a number of listings for which the prior practice of providing no "take/no take" guidance would have left regulated entities in the dark over what actions might trigger ESA liability. The listing of the Barton Springs Salamander is perhaps the best-known of these instances. NAHB believes that this administration policy should be codified in S. 1180.

In the same vein, another improvement to current law would be a requirement that FWS define the basic standards by which they judge permit applications. This would provide potential permit applicants with at least a framework within which they can prepare their permit applications. Additionally, FWS should be required to provide scientific documentation to substantiate any decision made to grant or deny a permit.

PUBLIC INVOLVEMENT

One of the great inadequacies of the current ESA is the lack of public involvement in the listing and critical habitat designation process, especially the members of the public most likely to be dramatically affected by these actions.

Clearly, it is the landowner that faces the most significant impact as a result of a listing, and it is the landowner that, therefore, should be immersed in the process

from beginning to end. Current law has no public notice requirement outside of a Federal register notice of proposed listing, and the requirement that a hearing be held in each affected state if requested within 45 days of final notice. Unfortunately, S. 1180 does not appreciably improve upon this scenario. It does require that a hearing be held on a draft recovery plan, which includes proposed critical habitat, if requested by any person.

NAHB strongly believes that this must be improved. NAHB recommends that a system be established whereby the FWS would maintain a mailing list of interested parties who would receive notification of any and all petitions to list, proposed listings and draft recovery plans. Currently, the Army Corps of Engineers maintains such a list for proposed actions under the Section 404 program. In this way, landowners, environmental organizations, and other interested parties would have sufficient opportunity to comment on these proposed agency actions.

RECOVERY PLANNING

The ESA will be effective only if it sets a course for species recovery. All of the effort associated with the Act's implementation is ultimately directed at a single goal—the recovery of endangered species to the point where their continued existence is no longer in doubt. Surprisingly, only a minority of listed species boasts recovery plans, and few of these plans have been implemented. The Act mandates the Secretary to develop and implement recovery plans for all listed species, unless, as the statute states, "a plan will not promote the conservation of the [particular] species." Yet nowhere has Congress explained how a recovery plan could ever fail to promote species conservation. Where the language of the statute itself is unclear, as it is here, it is impossible for divergent groups to agree on congressional intent, much less for FWS to successfully implement.

The recovery plan concept is crucial for several reasons. Unless the Act is successful in rescuing species from extinction, the ESA's reputation will be an ever-burgeoning catalog of rare species. Moreover, the recovery planning process directs FWS to give priority to those species "that are most likely to benefit from such plans, particularly those species ... in conflict with construction or other development activity." The Act's legislative direction seems clear: Federal resources should be aimed at recovering the maximum number of species that pose the minimum amount of conflict with development. Recovery plans are also required to include a description of site-specific management actions; objective, measurable standards on which to judge the appropriateness of delisting; and a timetable and cost estimates for attainment of the plan's goals. Recovery plans therefore empower Americans to effectively gauge desired results against the Act's costs.

Recovery plans also assume a great degree of urgency given that the Act boasts a recovery rate of about two species per decade. Of the 1,354 species listed since 1966, only 19 species have ever been removed from the list of species covered by the Act. Seven of these 19 were de-listed due to extinction. Eight were de-listed after subsequent information proved their initial listing was erroneous. Only four were de-listed because they had recovered and no longer warranted protection under the Act. Three of these recovered species were birds native to an island in the western Pacific (the other was a plant indigenous to Utah). Even the recovery of the three birds is questionable. FWS conceded that the birds' population counts may have been mistakenly low.

Another problem with the current recovery planning process is that FWS routinely adopts fiscally irresponsible recovery plans and then is not held accountable for implementing them. Consequently, FWS requires the private sector to bear the costs of recovery. For example, FWS requires Section 10(a) permits to achieve recovery for species. This requires property owners to implement excessively costly mitigation and preservation requirements, which exceed the impacts of the project.

NAHB believes Congress should fortify the recovery planning process envisioned in the Act by requiring the preparation and use of timely, comprehensive, effective and cost-efficient recovery plans. S. 1180 makes significant improvements in this direction by requiring that for each listed species, a recovery plan be drafted and finalized under a strict deadline. However, NAHB would also advocate that the requirement for peer review of the biological goals within a recovery plan be at least as stringent as that for listing and delisting decisions. Furthermore, there should be a requirement that the critical habitat designated as part of the recovery plan be peer reviewed in the same fashion. Finally, FWS should be required to adopt the "least-cost" alternative in recovery plans, and be prohibited from adopting a plan until all financial expenditures are identified.

NO SURPRISES/CANDIDATE CONSERVATION AGREEMENTS

NAHB applauds the sponsors of S. 1180 for taking the important step of codifying two important administration policies: "no surprises" and "candidate conservation agreements." Both of these policies provide much needed assurances that when a deal is struck between landowners and their local, state or Federal Government that provide for both species conservation and the ability of the landowner to use his or her property, the government cannot come back with new information that requires further mitigation. This is a critical component in getting the landowner to the table and providing him or her with a much-needed incentive to preserve species.

OTHER IMPORTANT NAHB RECOMMENDATIONS

NAHB believes that S. 1180 can be substantially improved in other important ways by addressing the following issues:

Defining "Knowing" Violation

Currently, the ESA provides for criminal conviction of illegal taking or possession of listed species, even if the violator doesn't know the species is listed or that the conduct is illegal. Criminal penalties are severe and can be up to $50,000 and 1 year of imprisonment for a "knowing" violation of any provision of the Act, or any permit, or of Section 9 regulations. The ESA also authorizes civil penalties of $25,000 per "knowing" violation.

NAHB would propose two changes to this language. First, while clearly NAHB supports the concept that those who have the intent to take an endangered or threatened species should face penalty, current law does not limit prosecution to those who intend to commit this unlawful action. Indeed, "knowing" is defined nowhere in the ESA, and is left up to broad interpretation. As a result, an individual who had no knowledge that an endangered species might reside on his or her property, and who had no knowledge that his or her action might result in the take of such a species, can be held just as liable as the individual who fully intended to commit a take of a listed species. NAHB recommends that "knowing" be defined as a knowledge that one's action would result in the take of a listed species. This would mean that the alleged violator would have to have been aware that a species they might have taken was in fact on the endangered or threatened list.

Additionally, as is the case in other instances, NAHB recommends that the threshold for imposing criminal penalties on an individual found guilty of a violation under the ESA be higher than that for civil penalties. Indeed, the criminal penalties as spelled out in the Act are more severe, including jail time, and therefore should at the very least be held to the threshold that their actions "proximately and forseeably" would have resulted in the take of a listed species. S. 1180 is silent in this area.

Cost Sharing

Species preservation exacts a heavy financial burden on the local community. The Federal Government should share the cost. If species preservation is deemed a worthy national goal the Federal Government should share in the responsibility for the cost.

Recently, for example, FWS has asserted that the Federal Government should not share the financial burden of developing an HCP, since an HCP's purpose is to allow for the incidental taking of wildlife species, which are a "public commodity." FWS's reasoning suggests that landowners should continue to bear the sole financial burden of developing the conservation plans solely because the plan will enable landowners to realize some value from their land. Landowners already contribute significantly to species preservation by donating thousands of acres of essential habitat. Landowners are also the largest financial contributors to HCP development and implementation. It is important for Congress and FWS to recognize that private property owners are often instrumental in preserving crucial habitat for species, but they can not shoulder the financial burden alone.

Interestingly, FWS did not always adopt such a frugal opinion regarding species preservation. One of the earliest HCPs, the Coachella HCP, which consistently receives praise from a diverse group of admirers as model for compromise and cooperation between builders, developers, environmental organizations, government agencies, and private landowners, relied heavily upon government funding. Land acquisition costs for preserve lands totaled approximately $25 million. The majority of the funds ($15 million) were derived from the Federal Land and Water Conservation Fund and through land trades conducted by the Bureau of Land Management. Developer mitigation fees comprised only 25 percent of the HCP's cost. Unfortunately, since 1986 when the Coachella plan was approved and Congress used it as

a model for the 1986 ESA amendments, FWS has largely refused to use the funds appropriated by Congress to further species preservation in areas that need it most.

S. 1180 does not address this problem. NAHB advocates that the Land and Water Conservation Fund continue to provide funding for habitat acquisition for approved HCP's.

CONCLUSION

NAHB supports S. 1180, and recommends that the Senate move the legislation to the floor. While it does not accomplish everything that NAHB seeks in terms of reforms to the Endangered Species Act, it makes some extremely important strides in the direction of making the Act work better for all concerned.

STATEMENT OF THE NATIONAL ASSOCIATION OF REALTORS

INTRODUCTION

Thank you for the opportunity to submit the National Association of Realtors' comments for the record on S. 1180, the Endangered Species Recovery Act. The National Association of Realtors, comprised of nearly 720,000 members involved in all aspects of the real estate industry, has a keen interest in a balanced Endangered Species Act which accommodates both species protection and economic opportunity and vitality.

NAR believes that development should be encouraged as it is a stimulus to the economy, it increases the tax base, provides places to live and work, and offers opportunities that would not otherwise exist. However, we also realize the responsibility we have to educate and work with local, state, and Federal Government officials to develop responsible growth planning that is equitable and considers the divergent needs of transportation, housing, agriculture, commercial, industrial, and environmental concerns.

ENDANGERED SPECIES POLICY

The National Association of Realtors believes the way in which the Endangered Species Act (ESA) is implemented is of major importance. We support the addition of amendments to the Threatened and Endangered Species Act that recognize socioeconomic considerations and urge that compensation be required in cases where the value of private property has been unduly diminished by government action under the Act.

We believe that any legislation or regulation should include the following concepts:

Compensation to property owners whose land is adversely affected by implementation of any provision of the ESA.

Use of incentives to private property owners for species protection rather than relying solely on restrictions and penalties.

A listing as threatened or endangered must be based on verifiable, scientific evidence.

A strict limitation on how far down the chain of sub-species will be allowed in listings.

Provisions to protect private property rights and narrow the reach of the ESA on private lands, to include, but not limited to, notification of private property owner of potential listings which impact their property.

Increased local involvement in creating and implementing recovery plans.

Support for the concept of substantial equivalency for states that currently have adequate legislation.

No implementation of a National Biological Survey of private property without express written permission of the property owner.

Independent peer review committees should review both the scientific evidence and economic impacts of all listings.

Periodic review and expedited delisting of species when supported by verifiable scientific evidence.

S. 1180 PROVISIONS

Considering that nearly 90 percent of all listed species are found on private property, the concerns of private landowners are vitally important in this nation's efforts to protect our endangered plants and animals. The National Association of Realtors strongly supports S. 1180 for its focus on conserving and recovering endangered species by recognizing economic considerations, removing regulatory burdens, and en-

couraging landowners to conserve species and preserve biodiversity. We support the following elements of S. 1180:

A streamlined Habitat Conservation Plan (HCP) process which minimizes the cost to small landowners for activities having a negligible impact on a listed species.

Incentives to preserve species and habitat by ensuring landowners who develop HCPs or who voluntarily agree to conserve species that they will not be required to spend more money or set aside additional land, nor subject to additional liability.

Consideration of the economic impact of recovery measures by requiring an assessment of significant effects on employment, public revenues and the value of property.

A greater state role by soliciting state agency input in the listing process and allowing states to assume responsibility for development of recovery plans.

The creation of species recovery teams including local government, business and citizen representation.

Establishment of a process for independent scientific peer review for all listing and delisting decisions.

The delisting of species when recovery goals have been met.

PUBLIC NOTIFICATION

We urge the inclusion in S. 1180 of a process for notifying the public about proposed listing and habitat designation decisions. Citizens have a right to know about government actions which may impact their community or their property. A targeted notification system designed to apprise landowners of proposed listing and critical habitat designation decisions would improve the species protection process by broadening public notice and enhancing public participation.

FINANCIAL INCENTIVES AND COMPENSATION

We also urge the inclusion of financial incentives, such as the tax credit, deduction, estate and capital gains provisions provided in S. 1 181, which provide landowners with additional incentives to actively participate in the protection of endangered species.

The National Association of Realtors has worked for years to encourage a balanced approach to environmental protection that accommodates the important needs for conservation as well as economic opportunity and vitality. To balance the efforts of government to serve the public well-being with the economic and property rights secured by the Constitution, we believe that the cost of the benefits to the general public achieved by environmental regulation should be borne by the beneficiaries—the general public.

However, our primary interest is a reformed and improved Endangered Species Act which achieves recovery of endangered species through a cooperative effort between government and its citizens. Accordingly, we support S. 1180 despite the absence of a regulatory takings compensation provision.

CONCLUSION

The National Association of Realtors supports the reauthorization and reform of the Endangered Species Act represented by S. 1 180 as a significant forward step toward the recovery of endangered species through sound science, government and citizen participation, and cooperation with landowners.

Thank you for the opportunity to express our views.

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