Public Law 97-304
97th Congress

An Act

To authorize appropriations to carry out the provisions of the Endangered Species Act of 1973 for fiscal years 1983, 1984, and 1985, and for other purposes.

Oct. 13, 1982
[H.R. 6133]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Endangered Species Act Amendments of 1982".

Endangered Species Act Amendments of 1982.
16 USC 1531 note.

SEC. 2. LISTING PROCESS.

(a) Section 4 of the Endangered Species Act of 1973 (16 U.S.C. 1533) is amended as follows:

(1) Subsection (a) is amended—

(A) by redesignating subparagraphs (1) through (5) of paragraph (1) as subparagraphs (A) through (E), respectively;

(B) by amending that part of paragraph (1) which precedes subparagraph (A) (as so redesignated) by inserting "promulgated in accordance with subsection (b)" immediately after "shall by regulation";

(C) by striking out "sporting," in paragraph (1)(B) (as so redesignated) and inserting in lieu thereof "recreational,";

(D) by striking out the last two sentences in paragraph (1); and

(E) by adding at the end thereof the following new paragraph:

Regulations.

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

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

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

(2) Subsection (b) is amended to read as follows:

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

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

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

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

"(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

Petition, findings.

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

Review.

Publications in Federal Register.

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

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

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

"(iii) The petitioned action is warranted, but that—

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

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

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

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

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

"(D)(i) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of title 5, United States Code, to revise a critical habitat designation, the Secretary shall make a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted. The Secretary shall promptly publish such finding in the Federal Register. Petition, findings. Publications in Federal Register.

"(ii) Within 12 months after receiving a petition that is found under clause (i) to present substantial information indicating that the requested revision may be warranted, the Secretary shall determine how he intends to proceed with the requested revision, and shall promptly publish notice of such intention in the Federal Register.

"(4) Except as provided in paragraphs (5) and (6) of this subsection, the provisions of section 553 of title 5, United States Code (relating to rulemaking procedures), shall apply to any regulation promulgated to carry out the purposes of this Act.

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

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

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

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

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

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

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

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

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

"(i) if a determination as to whether a species is an endangered species or a threatened species, or a revision of critical habitat, is involved, either—

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

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

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

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

"(ii) subject to subparagraph (C), if a designation of critical habitat is involved, either—

"(I) a final regulation to implement such designation, or

"(II) notice that such one-year period is being extended under such subparagraph.

Additional information, extension period.

"(B)(i) If the Secretary finds with respect to a proposed regulation referred to in subparagraph (A)(i) that there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned, the Secretary may extend the one-year period specified in subparagraph (A) for not more than six months for purposes of soliciting additional data.

"(ii) If a proposed regulation referred to in subparagraph (A)(i) is not promulgated as a final regulation within such one-year period (or longer period if extension under clause (i) applies) because the Secretary finds that there is not sufficient evidence to justify the action proposed by the regulation, the Secretary shall immediately withdraw the regulation. The finding on which a withdrawal is based shall be subject to judicial review. The Secretary may not propose a regulation that has previously been withdrawn under this clause unless he determines that sufficient new information is available to warrant such proposal.

Judicial review.

Publication in Federal Register.

"(iii) If the one-year period specified in subparagraph (A) is extended under clause (i) with respect to a proposed regulation, then before the close of such extended period the Secretary shall publish in the Federal Register either a final regulation to implement the determination or revision concerned, a finding that the revision should not be made, or a notice of withdrawal of the regulation under clause (ii), together with the finding on which the withdrawal is based.

"(C) A final regulation designating critical habitat of an endangered species or a threatened species shall be published concurrently with the final regulation implementing the determination that such species is endangered or threatened, unless the Secretary deems that—

"(i) it is essential to the conservation of such species that the regulation implementing such determination be promptly published; or

"(ii) critical habitat of such species is not then determinable, in which case the Secretary, with respect to the proposed regulation to designate such habitat, may extend the one-year period specified in subparagraph (A) by not more than one additional year, but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.

"(7) Neither paragraph (4), (5), or (6) of this subsection nor section 553 of title 5, United States Code, shall apply to any regulation issued by the Secretary in regard to any emergency posing a significant risk to the well-being of any species of fish or wildlife or plants, but only if—

"(A) at the time of publication of the regulation in the Federal Register the Secretary publishes therein detailed reasons why such regulation is necessary; and

Publication in Federal Register.

"(B) in the case such regulation applies to resident species of fish or wildlife, or plants, the Secretary gives actual notice of such regulation to the State agency in each State in which such species is believed to occur.

Regulations, effective date.

Such regulation shall, at the discretion of the Secretary, take effect immediately upon the publication of the regulation in the Federal Register. Any regulation promulgated under the authority of this paragraph shall cease to have force and effect at the close of the 240-day period following the date of publication unless, during such 240-day period, the rulemaking procedures which would apply to such regulation without regard to this paragraph are complied with. If at any time after issuing an emergency regulation the Secretary determines, on the basis of the best appropriate data available to him, that substantial evidence does not exist to warrant such regulation, he shall withdraw it.

Data summary.

"(8) The publication in the Federal Register of any proposed or final regulation which is necessary or appropriate to carry out the purposes of this Act shall include a summary by the Secretary of the data on which such regulation is based and shall show the relationship of such data to such regulation; and if such regulation designates or revises critical habitat, such summary shall, to the maximum extent practicable, also include a brief description and evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify such habitat, or may be affected by such designation.".

(3) Subsection (c) is amended—

(A) by amending paragraph (1) by striking out ", and from time to time he may by regulation revise," in the first sentence thereof, and by adding at the end thereof the following new sentence: "The Secretary shall from time to time revise each list published under the authority of this subsection to reflect recent determinations, designations, and revisions made in accordance with subsections (a) and (b).",

(B) by striking out paragraphs (2) and (3) thereof; and

(C) by redesignating paragraph (4) thereof as paragraph (2).

16 USC 1533.

(4) Such section 4 is further amended—

(A) by amending subsection (d) by striking out "section 6(a)" and inserting in lieu thereof "section 6(c)";

(B) by striking out subsection (f) thereof;

(C) by redesignating subsections (g) and (h) as subsections (f) and (g), respectively;

(D) by amending the second sentence of subsection (f) (as redesignated by subparagraph (C)) by striking out "recovery plans," and inserting in lieu thereof "recovery plans (1) shall, to the maximum extent practicable, give priority to those endangered species or threatened species most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other developmental projects or other forms of economic activity, and (2)";

(E) by amending subsection (g) (as redesignated by subparagraph (C))—

(i) by striking out "subsection (c)(2)" in paragraph (1) and inserting in lieu thereof "subsection (b)(3)",

(ii) by striking out "for listing" in paragraph (3) and inserting in lieu thereof "under subsection (a)(1) of this section", and

(iii) by striking out "subsection (g)" in paragraph (4) and inserting in lieu thereof "subsection (f)"; and

Comments. Written statement to agency.

(F) by inserting at the end thereof the following new subsection:

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

16 USC 1533 note. *Ante*, p. 1411.

(b)(1) Any petition filed under section 4(c)(2) of the Endangered Species Act of 1973 (as in effect on the day before the date of the enactment of this Act) and any regulation proposed under section 4(f) of such Act of 1973 (as in effect on such day) that is pending on such date of enactment shall be treated as having been filed or proposed on such date of enactment under section 4(b) of such Act of 1973 (as amended by subsection (a)); and the procedural requirements specified in such section 4(b) (as so amended) regarding such petition or proposed regulation shall be deemed to be complied with to the extent that like requirements under such section 4 (as in effect before the date of the enactment of this Act) were complied with before such date of enactment.

(2) Any regulation proposed after, or pending on, the date of the enactment of this Act to designate critical habitat for a species that was determined before such date of enactment to be endangered or threatened shall be subject to the procedures set forth in section 4 of such Act of 1973 (as amended by subsection (a)) for regulations proposing revisions to critical habitat instead of those for regulations proposing the designation of critical habitat.

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

Restrictions.

(4) Section 4(a)(3)(A) of such Act of 1973 (as added by subsection (a)) shall not apply with respect to any species which was listed as an endangered species or a threatened species before November 10, 1978.

SEC. 3. COOPERATION WITH THE STATES.

Section 6 of the Endangered Species Act of 1973 (16 U.S.C. 1535) is amended—

(1) by striking out "66⅔ per centum" in subsection (d)(2)(i) thereof and inserting in lieu thereof "75 percent"; and

(2) by striking out "75 per centum" in subsection (d)(2)(ii) thereof and inserting in lieu thereof "90 percent".

SEC. 4. INTERAGENCY COOPERATION AND COMMITTEE EXEMPTIONS.

(a) Section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1536) is amended as follows:

(1) Subsection (a) is amended by redesignating paragraph (3) as paragraph (4), and by inserting immediately after paragraph (2) the following new paragraph:

"(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.".

(2) Subsection (b) is amended to read as follows:

"(b) OPINION OF SECRETARY.—(1)(A) Consultation under subsection (a)(2) with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

Consultation period.

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

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

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

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

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

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

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

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

"(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a), the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and can be taken by the Federal agency or applicant in implementing the agency action.

Review and notification.

"(B) Consultation under subsection (a)(3), and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsec-

tion (a)(2), and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

Written statement to agency.

"(4) If after consultation under subsection (a)(2), the Secretary concludes that—

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

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

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

"(i) specifies the impact of such incidental taking on the species,

"(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact, and

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

(3) Subsection (c) is amended by amending the penultimate sentence in paragraph (1) by inserting ", except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor" immediately after "agency" and before the parenthesis.

(4) Subsection (e)(10) is amended by striking out the first sentence thereof.

(5) Subsection (g) is amended as follows:

(A) The sideheading is amended to read as follows: "APPLICATION FOR EXEMPTION AND REPORT TO THE COMMITTEE.—".

(B) The second sentence of paragraph (1) is amended to read as follows: "An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be considered by the Committee for a final determination under subsection (h) after a report is made pursuant to paragraph (5).".

Submittal to Secretary.

(C) Paragraph (2) is amended—

(i) by striking out the first sentence of subparagraph (A) and inserting in lieu thereof the following: "An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f), not later than 90 days after the completion of the consultation process; except that, in the case of any agency action involving a permit or license applicant, such application shall be submitted not later than 90 days after the date on which the Federal agency concerned takes final agency action with respect to the issuance of the permit or license. For purposes of the

"Final agency action."

preceding sentence, the term 'final agency action' means (i) a disposition by an agency with respect to the issuance of a permit or license that is subject to administrative review, whether or not such disposition is subject to judicial review; or (ii) if administrative review is sought with respect to such disposition, the decision resulting after such review."; and

(ii) by amending subparagraph (B)—

Publication in Federal Register.

(I) by inserting "(i)" immediately after "promptly",

(II) by striking out "to the review board to be established under paragraph (3) and", and

(III) by inserting "; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed" immediately before the period.

(D) Paragraphs (3), (4), (9), and (11) are repealed.

(E) Paragraph (5) is redesignated as paragraph (3) and is further amended to read as follows:

Application, determination.

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

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

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

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

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

"(B) deny the application for exemption because the Federal agency concerned or the exemption applicant have not met the requirements set forth in subparagraph (A)(i), (ii), and (iii). The denial of an application under subparagraph (B) shall be considered final agency action for purposes of chapter 7 of title 5, United States Code.".

5 USC 701 *et seq.*

(F) Paragraph (6) is redesignated as paragraph (4) and is further amended to read as follows:

Hearings.

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

(G) Paragraph (7) is redesignated as paragraph (5) and is further amended—

Report to Committee.

(i) by striking out that part which precedes subparagraph (A) and inserting in lieu thereof "Within 140 days after making the determinations under paragraph (3) or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing—";

(ii) by striking out the period immediately after "by the Committee" in subparagraph (C) and inserting in lieu thereof "; and"; and

(iii) by adding at the end thereof the following:

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

(H) Paragraph (8) is redesignated as paragraph (6).

(I) Paragraph (10) is redesignated as paragraph (7) and is amended to read as follows:

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

(J) Paragraph (12) is redesignated as paragraph (8) and is further amended by striking out "of review boards" and inserting in lieu thereof "resulting from activities pursuant to this subsection".

(6) Subsection (h)(1) is amended—

(A) by striking out "90 days of receiving the report of the review board under subsection (g)(7)" in the matter preceding subparagraph (A) and inserting in lieu thereof "30 days after receiving the report of the Secretary pursuant to subsection (g)(5)";

(B) by striking out "review board" in subparagraph (A) and inserting in lieu thereof "Secretary, the record of the hearing held under subsection (g)(4)";

(C) by striking out "and" at the end of subparagraph (A)(ii);

(D) by inserting immediately after subparagraph (A)(iii) the following:

"(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d); and".

(7) Subsection (o) is amended to read as follows:

16 USC 1533, 1538.

"(o) Notwithstanding sections 4(d) and 9(a)(1)(B) and (C) or any regulation promulgated to implement either such section—

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

"(2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iii) shall not be considered to be a taking of the species concerned.".

(b) Paragraph (11) of section 3 of the Endangered Species Act of 1973 (16 U.S.C. 1532(11)) is repealed.

SEC. 5. CONVENTION IMPLEMENTATION.

Section 8A of the Endangered Species Act of 1973 (16 U.S.C. 1537a) is amended—

(1) by amending subsection (c) by inserting "(1)" immediately after "SCIENTIFIC AUTHORITY FUNCTIONS.—", and by adding at the end thereof the following new paragraph:

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

(2) by amending subsection (d) to read as follows:

Report to congressional committees.

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

(3) by amending subsection (e) to read as follows:

"(e) WILDLIFE PRESERVATION IN WESTERN HEMISPHERE.—(1) The Secretary of the Interior (hereinafter in this subsection referred to as the 'Secretary'), in cooperation with the Secretary of State, shall act on behalf of, and represent, the United States in all regards as required by the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (56 Stat. 1354, T.S. 982, hereinafter in this subsection referred to as the 'Western Convention'). In the discharge of these responsibilities, the Secretary and the Secretary of State shall consult with the Secretary of Agriculture, the Secretary of Commerce, and the heads of other agencies with respect to matters relating to or affecting their areas of responsibility.

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

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

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

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

"(3) No later than September 30, 1985, the Secretary and the Secretary of State shall submit a report to Congress describing those steps taken in accordance with the requirements of this subsection

Report to Congress.

and identifying the principal remaining actions yet necessary for comprehensive and effective implementation of the Western Convention.

"(4) The provisions of this subsection shall not be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate resident fish or wildlife under State law or regulations.".

Effective date. 16 USC 1537a note.

(b) The amendment made by paragraph (1) of subsection (a) shall take effect January 1, 1981.

SEC. 6. EXPERIMENTAL POPULATIONS AND OTHER EXCEPTIONS.

Section 10 of the Endangered Species Act of 1973 (16 U.S.C. 1539) is amended as follows:

(1) Subsection (a) is amended to read as follows:

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

16 USC 1538.

"(A) any act otherwise prohibited by section 9 for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j); or

Post, p. 1424.

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

Permit issuance. Conservation plan.

"(2)(A) No permit may be issued by the Secretary authorizing any taking referred to in paragraph (1)(B) unless the applicant therefor submits to the Secretary a conservation plan that specifies—

"(i) the impact which will likely result from such taking;

"(ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;

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

"(iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

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

"(i) the taking will be incidental;

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

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

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

"(v) the measures, if any, required under subparagraph (A)(iv) will be met;

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

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

(2) Subsection (d) is amended by striking out "subsections (a)" and inserting in lieu thereof "subsections (a)(1)(A)".

(3) Subsection (f) is amended—

(A) by amending paragraph (1)(B) by inserting "substantial" immediately before "etching" and before "carving", and by adding at the end thereof the following new sentence: "For purposes of this subsection, polishing or the adding of minor superficial markings does not constitute substantial etching, engraving, or carving."; and

(B) by adding at the end thereof the following new paragraph:

"(9)(A) The Secretary shall carry out a comprehensive review of the effectiveness of the regulations prescribed pursuant to paragraph (5) of this subsection— Review.

"(i) in insuring that pre-Act finished scrimshaw products, or the raw materials for such products, have been adequately accounted for and not disposed of contrary to the provisions of this Act; and

"(ii) in preventing the commingling of unlawfully imported or acquired marine mammal products with such exempted products either by persons to whom certificates of exemption have been issued under paragraph (4) of this subsection or by subsequent purchasers from such persons.

"(B) In conducting the review required under subparagraph (A), the Secretary shall consider, but not be limited to—

"(i) the adequacy of the reporting and records required of exemption holders;

"(ii) the extent to which such reports and records are subject to verification;

"(iii) methods for identifying individual pieces of scrimshaw products and raw materials and for preventing commingling of exempted materials from those not subject to such exemption; and

"(iv) the retention of unworked materials in controlled-access storage.

The Secretary shall submit a report of such review to the Committee on Merchant Marine and Fisheries of the House of Representatives and the Committee on the Environment and Public Works of the Senate and make it available to the general public. Based on such review, the Secretary shall, on or before October 1, 1983, propose and adopt such revisions to such regulations as he deems necessary and appropriate to carry out this paragraph. Upon publication of such revised regulations, the Secretary may renew for a further period of not to exceed three years any certificate of exemption previously renewed under paragraph (8) of this subsection, subject to such new terms and conditions as are necessary and appropriate under the revised regulations; except that any certificate of exemption that would, but for this clause, expire on or after the date of enactment of this paragraph and before the date of the adoption of such regulations may be extended until such time after the date of adoption as may be necessary for purposes of applying such regulations to the certificate. Notwithstanding the foregoing, however, no person may, after January 31, 1984, sell or offer for sale in interstate or foreign commerce any pre-Act finished scrimshaw product unless

Report to congressional committees. Public availability.

Certificate of exemption, renewal.

such person has been issued a valid certificate of exemption by the Secretary under this subsection and unless such product or the raw material for such product was held by such person on the date of the enactment of this paragraph.".

(4)(A) Subsection (h)(1) is amended—

(i) by striking out "(other than scrimshaw)"; and

(ii) by amending subparagraph (A) to read as follows: "(A) is not less than 100 years of age; ".

Effective date. 16 USC 1539 note.

(B) The amendment made by subparagraph (A) shall take effect January 1, 1981.

(5) Subsection (i) is amended to read as follows:

"(i) NONCOMMERCIAL TRANSSHIPMENTS.—Any importation into the United States of fish or wildlife shall, if—

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

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

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

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

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

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

(6) At the end thereof insert the following new subsection:

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

Release of endangered species.

"(2)(A) The Secretary may authorize the release (and the related transportation) of any population (including eggs, propagules, or individuals) of an endangered species or a threatened species outside the current range of such species if the Secretary determines that such release will further the conservation of such species.

"(B) Before authorizing the release of any population under subparagraph (A), the Secretary shall by regulation identify the population and determine, on the basis of the best available information, whether or not such population is essential to the continued existence of an endangered species or a threatened species.

"(C) For the purposes of this Act, each member of an experimental population shall be treated as a threatened species; except that—

16 USC 1536.

"(i) solely for purposes of section 7 (other than subsection (a)(1) thereof), an experimental population determined under subparagraph (B) to be not essential to the continued existence of a species shall be treated, except when it occurs in an area within the National Wildlife Refuge System or the National

Park System, as a species proposed to be listed under section 4; and

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"(ii) critical habitat shall not be designated under this Act for any experimental population determined under subparagraph (B) to be not essential to the continued existence of a species.

"(3) The Secretary, with respect to populations of endangered species or threatened species that the Secretary authorized, before the date of the enactment of this subsection, for release in geographical areas separate from the other populations of such species, shall determine by regulation which of such populations are an experimental population for the purposes of this subsection and whether or not each is essential to the continued existence of an endangered species or a threatened species.".

SEC. 7. ENFORCEMENT.

Section 11 of the Endangered Species Act of 1973 (16 U.S.C. 1540) is amended as follows:

(1) Subsection (e) is amended by adding at the end thereof the following new paragraph:

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

(2) Subsection (g) is amended—

(A) by amending paragraph (1)—

(i) by striking out "any State." in subparagraph (B) and inserting in lieu thereof "any State; or",

(ii) by inserting immediately after subparagraph (B) the following new subparagraph:

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

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(iii) by amending the first sentence following subparagraph (C) (as added by clause (ii) of this subparagraph), by inserting "or to order the Secretary to perform such act or duty," immediately after "any such provision or regulation,"; and

(B) by amending paragraph (2) by adding the following new subparagraph immediately after subparagraph (B) thereof:

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

Written notification.

SEC. 8. AUTHORIZATION OF APPROPRIATIONS.

Section 15 of the Endangered Species Act of 1973 (16 U.S.C. 1542) is amended to read as follows:

"AUTHORIZATION OF APPROPRIATIONS

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

"(1) not to exceed $27,000,000 for each of fiscal years 1983, 1984, and 1985 to enable the Department of the Interior to carry

out such functions and responsibilities as it may have been given under this Act;

"(2) not to exceed $3,500,000 for each of fiscal years 1983, 1984, and 1985 to enable the Department of Commerce to carry out such functions and responsibilities as it may have been given under this Act; and

"(3) not to exceed $1,850,000 for each of fiscal years 1983, 1984, and 1985 to enable the Department of Agriculture to carry out its functions and responsibilities with respect to the enforcement of this Act and the Convention which pertain to the importation or exportation of plants.

16 USC 1535.

"(b) COOPERATION WITH STATES.—For the purposes of section 6, there are authorized to be appropriated not to exceed $6,000,000 for each of fiscal years 1983, 1984, and 1985.

"(c) EXEMPTIONS FROM ACT.—There are authorized to be appropriated to the Secretary to assist him and the Endangered Species Committee in carrying out their functions under section 7(e), (g), and (h) not to exceed $600,000 for each of fiscal years 1983, 1984, and 1985.

Ante, p. 1417.

"(d) CONVENTION IMPLEMENTATION.—There are authorized to be appropriated to the Department of the Interior for purposes of carrying out section 8A(e) not to exceed $150,000 for each of fiscal years 1983 and 1984, and not to exceed $300,000 for fiscal year 1985, and such sums shall remain available until expended.".

Ante, p. 1421.

16 USC 1535, 1536.

(b) Sections 6(i) and 7(q) of such Act of 1973 are repealed.

SEC. 9. MISCELLANEOUS AMENDMENTS.

16 USC 1531.

(a) Section 2(c) of the Endangered Species Act of 1973 (16 U.S.C. 1532(c)) is amended—

(1) by inserting "(1)" immediately before "It is"; and

(2) by adding the following new paragraph:

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

(b) Section 9 of the Endangered Species Act of 1973 (16 U.S.C. 1538) is amended—

(1) by amending subsection (a)(2) by redesignating subparagraphs (B), (C), and (D) as subparagraphs (C), (D), and (E), respectively, and by inserting the following new subparagraph immediately after subparagraph (A) thereof:

"(B) remove and reduce to possession any such species from areas under Federal jurisdiction;";

(2) by amending subsection (b)(1) to read as follows:

"(b)(1) SPECIES HELD IN CAPTIVITY OR CONTROLLED ENVIRONMENT.—The provisions of subsections (a)(1)(A) and (a)(1)(G) of this section shall not apply to any fish or wildlife which was held in captivity or in a controlled environment on (A) December 28, 1973, or (B) the date of the publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to subsection (c) of section 4 of this Act: *Provided*, That such holding and any subsequent holding or use of the fish or wildlife was not in the course of a commercial activity. With respect to any act prohibited by subsections (a)(1)(A) and (a)(1)(G) of this section which occurs after a period of 180 days from (i) December 28, 1973, or (ii) the date of publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published

Ante, p. 1411.

pursuant to subsection (c) of section 4 of this Act, there shall be a rebuttable presumption that the fish or wildlife involved in such act is not entitled to the exemption contained in this subsection."; and

(3) by amending subsection (b)(2)(A) by striking out "This section shall not apply to" and inserting in lieu thereof "The provisions of subsection (a)(1) shall not apply to".

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(c) Section 11(a)(1) and (b)(1) of such Act of 1973 are each amended by striking out "or (C)" immediately after "(a)(2)(A), (B)," and inserting in lieu thereof "(C), or (D)".

16 USC 1540.

Approved October 13, 1982.

LEGISLATIVE HISTORY—H.R. 6133 (S. 2309):

HOUSE REPORTS: No. 97-567 Pt. I (Comm. on Merchant Marine and Fisheries) and No. 97-835 (Comm. of Conference).

SENATE REPORT No. 97-418 accompanying S. 2309 (Comm. on Environment and Public Works).

CONGRESSIONAL RECORD, Vol. 128 (1982):

June 8, considered and passed House.

June 9, considered and passed Senate, amended, in lieu of S. 2309.

Sept. 20, Senate agreed to conference report.

Sept. 30, House agreed to conference report.

97-200 O—84—pt. 2——3 : QL3