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SENATE

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AMENDMENTS TO THE CRITICAL HABITAT REQUIREMENTS OF THE ENDANGERED SPECIES ACT OF 1973

JULY 28, 1999.—Ordered to be printed

Mr. CHAFEE, from the Committee on Environment and Public Works, submitted the following

REPORT

[to accompany S. 1100]

together with

ADDITIONAL VIEWS

[Including cost estimate of the Congressional Budget Office]

The Committee on Environment and Public Works, to which was referred the bill (S. 1100) to amend the Endangered Species Act of 1973 to provide that the designation of critical habitat for endangered and threatened species be required as part of the development of recovery plans for those species, having considered the same, reports favorably thereon with an amendment, and recommends that the bill, as amended, do pass.

GENERAL STATEMENT AND BACKGROUND

Critical Habitat Designations

Congress enacted the Endangered Species Act in 1973 (ESA) to establish a program to identify and protect species of fish, wildlife and plants that are endangered or threatened. Section 4(b) of the ESA establishes a process for the Secretary (the Fish and Wildlife Service or the National Marine Fisheries Service) to determine whether a species is endangered or threatened. Concurrently with this determination, the Secretary is also required, to the maximum

extent prudent and determinable, to designate critical habitat for the species. If the Secretary finds that critical habitat is indeterminable at the time of listing, the Secretary may delay the designation by one year.

The ESA defines critical habitat occupied by the species as the area containing biological and physical features essential to the conservation of the species and requiring special management considerations or protections. Critical habitat not occupied by the species may be designated upon a determination by the Secretary that it is essential for the conservation of the species. The Secretary is required to base the designation on the best scientific data available, 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 upon a determination that the benefits of exclusion outweigh the benefits of designating the specific area, unless failure to do so will result in the extinction of the species.

Once critical habitat is designated for a listed species, each Federal agency is required under section 7 to ensure that any action it funds, authorizes or carries out is not likely to jeopardize the continued existence of the species or result in the destruction or adverse modification of its critical habitat. Through regulations codified at 50 CFR 402.02, the Secretary has defined “likely to jeopardize the continued existence of” as “engag[ing] in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of survival and recovery of a listed species in the wild,” and has defined “destruction or adverse modification of critical habitat” as “a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species.”

The designation of critical habitat for endangered and threatened species has proven to be one of the most vexing, complicated and controversial provisions of the ESA. Of almost 1,200 species listed as endangered or threatened by the Fish and Wildlife Service, only 113—nine percent—have critical habitat designated. Indeed, of the 256 species listed since April 1996, the Service has designated critical habitat for only two. As a result, numerous lawsuits have been recently brought against the Service for failure to designate critical habitat. According to the Fish and Wildlife Service, currently 17 active lawsuits are pending, with 15 already decided—all but one against the Service (see e.g., *Conservation Council for Hawaii v. Babbitt*, 24 F. Supp. 2d 1074 (D. Hi. 1998))—and prospective challenges on critical habitat for another 123 species are on the horizon.

Problems with critical habitat have been chronic over the life of the ESA. In 1978, this committee noted in its report accompanying S. 2899 that “[i]n many cases the Fish and Wildlife Service has been unable to explain fully or predict what the impacts of a critical habitat designation are going to be on activities which occur within a designated critical habitat.” For this reason, Congress required an economic analysis and public participation as part of the designation process. However, in 1982, this committee observed, in its report accompanying S. 2309, that the 1978 amendment “burdened the listing process.” It went on to state: “The designation of

critical habitat has failed on two grounds. First, it is not being designated. Second, it has improperly delayed listings.” As a result, Congress enacted the strict timetables for listings and designations that exist in the law today. As the recent statistics demonstrate, neither of these amendments to the ESA have achieved their desired effect.

Indeed, during a hearing before the Subcommittee on Fisheries, Wildlife and Drinking Water on May 27, 1999, not one witness endorsed the current law with respect to the designation requirement. While each offered reasons why the current process was problematic, there was a fundamental disagreement on the basic concept of critical habitat. The Honorable Jamie Clark, Director of the Fish and Wildlife Service, stated that “[f]or almost all Federal actions, the adverse modification of critical habitat and jeopardy to the species are the same, resulting in critical habitat designation being no more than regulatory process that duplicates the protection already provided by the jeopardy standard.” At the same time, John F. Kostyack of the National Wildlife Federation argued that critical habitat augments protections afforded by the jeopardy standard with respect to unoccupied habitat, and further stated that critical habitat is “a vital tool for protecting, managing and restoring habitats of listed species.” Charles T. DuMars of the University of New Mexico School of Law also believed that critical habitat designations had significant consequences, and noted that “not only does the critical habitat designation place individual[s]. . . at risk for civil and criminal penalties if they alter critical habitat. . . it governs all future operations of all Federal agencies. . . .” As William R. Murray of American Forest and Paper Association observed, there is “overall disarray of the critical habitat concept and the lack of support from the expert agencies.” A recent report by the Congressional Research Service notes the importance of critical habitat and comments that the Service’s conclusions that designations provide little additional protection to listed species and consumes significant funding and staff time “seem to have resulted from how the FWS has interpreted certain aspects of the ESA.” See CRS, *The Role of Designation of Critical Habitat under the Endangered Species Act*, July 16, 1999.

The reasons for the problems with critical habitat designations become evident with an analysis of the statutory and regulatory structure outlined above. The root of the problems lies in the fact that the designation is required concurrently with the listing, although the information required for designations is different from the information required for listings. In determining whether a species is threatened or endangered, the Secretary must consider population numbers, distributions and trends, as well as immediate and future threats to the species; however, in designating habitat as critical, the Secretary must know the conservation needs of the species, as well as special management considerations for the species and its habitat. This difference is a question of degree: information for designation generally requires more knowledge of the species and its habitat and the natural and human impacts to them, which is unavailable, or not well known, to the Secretary during the listing process. Both the listings and designations are required to be based on the best available scientific and commercial

data. With respect to designations, however, even the best available data at the time of listing are often poor because the data are generally ascertained in developing the recovery plan for the species. Consequently, more scientifically sound decisions regarding designation can be made at the time of recovery planning than at the time of listing.

The disjunction between listings and designations also arises because of the different requirements regarding an economic analysis for each action. Specifically, designation of critical habitat requires an analysis of the economic impact, and any other relevant impact, resulting from the designation, whereas the listing of a species as endangered or threatened must be based upon solely the best scientific and commercial data available. With the strict deadlines and limited information available during the listing process, the Secretary frequently has conducted a cursory analysis of the economic impacts of the designation, even after invoking the 1-year extension in designating habitat allowed by statute. As with information on the conservation needs of the species, information on the economic costs of management measures for the species is prepared as part of the recovery plan.

The problems are compounded by the similarity in standards applied to species and critical habitat. Because "jeopardy" is so closely related to "adverse modification," the Secretary has concluded that they mean virtually the same thing. As Director Clark mentioned in her testimony before the Subcommittee on Fisheries, Wildlife and Drinking Water, "the Service believes that the protection conveyed by designation of critical habitat is duplicative of the prohibition against jeopardy for most species." Consequently, the Service has decided, in many instances, that critical habitat is "not prudent" because it affords no additional protections to the species. For the 256 species listed by the Fish and Wildlife Service since April 1996, it has determined that critical habitat is "not prudent" 228 times. The authority to determine that critical habitat is "not prudent" was intended for a different circumstance, to be exercised only rarely. Also because of the Service's position, it often prepares no economic analysis of a designation, insisting that there are no economic impacts attributed exclusively to the designation. However, when Congress enacted the 1978 amendments relating to critical habitat, it envisioned that the designation may have certain impacts on the area so designated, and further observed that protection of the habitat of listed species was the key to protection of the species themselves.

Recovery Plans

Under section 4(f) of the ESA, the Secretary is required to develop and implement recovery plans for listed species, unless the Secretary finds that the plan will not promote the conservation of the species. The Secretary must incorporate in each plan the following: a description of the site-specific management actions to achieve the plan's goal; objective, measurable criteria that, when met, would result in the delisting of the species; and estimates of the time and cost for carrying out the measures needed to achieve the plan's goal. For the species, recovery plans serve as blueprints for long-term conservation strategies leading to recovery; for the

landowners, recovery plans provide an opportunity to develop sound scientific information, an indication of activities that affect recovery, and estimated costs of recovery actions, which gives some certainty with respect to future requirements.

However, there is no deadline for the Secretary to develop recovery plans, which undermines these purposes. In recent years, the Fish and Wildlife Service has undertaken great efforts to prepare plans for listed species, and has significantly reduced the backlog of listed species that do not have recovery plans. Nevertheless, at present, according to the Service, 269 species do not have final recovery plans—23 percent of the total number of listed species. Of these 269 species, 41 have been listed for longer than 3 years.

Once the Secretary does prepare a plan, it can be many years before that plan will be revised with new scientific and economic information. Of the 890 species with existing plans, 438 species have plans that were developed 5 years ago or longer, with 216 of these species covered by plans developed 10 years ago or longer without being revised at all.

It is against the backdrop of these statistics that the recovery planning provisions must be viewed. The purpose of the ESA is to conserve, recover and delist species, so that the often costly and contentious protections afforded by the Act are no longer necessary. The ESA's ultimate goal is thus to make itself obsolete. The linchpin of recovery is the recovery plan. The first step toward recovery, therefore, is to ensure that recovery plans are developed in a timely manner, with the best scientific information available.

OBJECTIVES AND SUMMARY OF THE LEGISLATION

The purpose of this bill is to amend the Endangered Species Act of 1973 to provide that the designation of critical habitat for endangered and threatened species be required as part of development of recovery plans for those species.

The bill moves the requirement to designate critical habitat from the time of listing to the time of recovery plan development. This will enable the Secretary to better assess both the conservation needs and the economic impacts relating to the designation. The bill also makes the designation a component of the recovery plan, which will alleviate some of the regulatory burdens and litigation pressures on the Secretary. In the event that the Secretary determines that designation is necessary to avoid the imminent extinction of the species, the bill requires the Secretary to designate critical habitat concurrently with listing. The bill also requires the Secretary to seek additional information at the time of listing to assist both the Secretary and the recovery team in developing the recovery plan and designating critical habitat. In sum, the bill seeks to make the designation of critical habitat a meaningful and workable part of the law.

With respect to recovery planning, the bill provides a deadline for development of recovery plans, no later than 30 months after listing. The bill also requires the Secretary to appoint a recovery team, unless the Secretary decides, after public notice and opportunity for comment, that one will not be appointed. The bill identifies the parameters for selecting the team. In sum, the bill seeks to jump-start the recovery process for listed species.

As a related matter, the bill addresses the substantial backlog in critical habitat designations and recovery plans, particularly by the Fish and Wildlife Service. It provides a framework for species listed prior to date of enactment based on four criteria: whether a final recovery plan has been prepared before the date of enactment; whether the Secretary decides to revise an existing plan within 10 years after enactment; whether critical habitat has been designated for the species; and whether the failure to designate has been subject to a court order.

SECTION-BY-SECTION ANALYSIS

Section 1. Recovery Plans

Summary

This section amends section 4(f) of the ESA. Section 1(1) of the bill amends section 4(f)(1) to provide that recovery plans are not required to be developed by the Secretary for species that are not indigenous to the United States or waters with respect to which the United States exercises sovereign rights or jurisdiction.

Section 1(2) of the bill amends section 4(f)(2) of the ESA, relating to the appointment of recovery team. Not later than 120 days after the date of publication of a final determination that a species is a threatened or endangered species under subsection 4(b) of the ESA, the Secretary shall appoint a recovery team to develop a recovery plan for the species. The Secretary may, after public notice and opportunity for comment, determine that a recovery team shall not be appointed, in which case the Secretary shall perform all the duties of the recovery team. New section 4(f)(2)(D) provides that each recovery team shall include the Secretary and at least one representative from each affected State that chooses to participate, and shall have balanced representation among constituencies with an interest in the species and its recovery, and with an interest in the economic or social impacts of recovery. This includes Federal agencies, tribal governments, local governments, academic institutions, private individuals (including landowners), conservation and other organizations, and commercial enterprises. When a recovery plan or critical habitat designation will have a significant impact on private land, the Secretary shall invite at least one landowner or one representative of an organization representing landowners to serve on the team. 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.

Section 1(3) of the bill amends section 4(f)(4) of the ESA, so that when a final recovery plan has been published, the Secretary shall respond to comments received during the comment period.

Section 1(4) of the bill mandates deadlines for developing recovery plans. Specifically, under new section 4(f)(6), for each species for which the Secretary is required to develop a recovery plan, the Secretary shall publish, not later than 18 months after the date of the publication under subsection (b) of the final regulation containing the listing determination, a draft recovery plan; and not later than 30 months after the date of publication under subsection (b) of the final regulation containing the listing determination, a final recovery plan.

Discussion

As noted earlier, recovery of species is the paramount objective of the ESA, and recovery plans serve as the blueprints for recovery. As a first step, then, recovery plans must be developed in a timely manner. The bill requires recovery teams to be appointed no later than 120 days after listing, draft recovery plans to be published no later than 18 months after listing, and final recovery plans to be published no later than 30 months after listing. These deadlines are consistent with the administrative policies of both the Fish and Wildlife Service and the National Marine Fisheries Service.

The next step in promoting recovery is to develop scientifically sound recovery plans that have the support of the various stakeholders interested in the species and recovery efforts. For this reason, the Secretary is generally required to appoint a recovery team, although the Secretary maintains the ability to not appoint a team after public notice and opportunity for comment.

The recovery team should be broad-based and well-balanced. At the same time, it should not be so large that it becomes cumbersome and unwieldy. At a minimum, each team must have a balanced representation among constituencies with an interest in the species and its recovery, and with an interest in the economic or social impacts of recovery. When a recovery plan or critical habitat designation will have a significant impact on private land, the Secretary shall invite at least one landowner or one representative of an organization representing landowners to serve on the team. All members must have knowledge of the species or expertise in the elements of the recovery plan or its implementation. The Secretary may appoint members from among Federal agencies, tribal governments, local governments, academic institutions, private individuals, conservation and other organizations, and commercial enterprises. In selecting members, the Secretary shall give preference to qualified local individuals of these entities.

Section 2. Critical Habitat Designations

Summary

Section 2(a) amends the ESA by adding a new section 4(f)(7) relating to critical habitat designations. New subparagraph (A) provides that the Secretary, to the extent prudent, shall designate habitat that is considered critical habitat of an endangered or threatened species that is indigenous to the United States or waters with respect to which the United States exercises sovereign rights or jurisdiction. Specifically, under new clause (i), the Secretary shall designate proposed critical habitat as part of the draft recovery plan, and final critical habitat as part of the final recovery plan, both after consultation and in cooperation with the recovery team. Under new clause (ii), if the Secretary does not prepare a plan, the Secretary must designate critical habitat by regulation not later than 3 years after making a determination that the species is endangered or threatened.

Under new clause (iii), the Secretary shall designate critical habitat for an endangered or threatened species concurrently with the listing if the Secretary determines that the designation of such habitat at the time of listing is essential to avoid the imminent ex-

tinction of the species. When designating at the time of listing, the Secretary must provide public notice and opportunity for comment prior to the designation, respond to such comments, and publish responses and the designation in the Federal Register. The designation shall be considered a final agency action for purposes of judicial review, although the recovery team and the Secretary shall review and revise, as appropriate, the designation during the development of the recovery plan for the species.

New subparagraph (B) states that the critical habitat designation shall be made on the basis of the best scientific and commercial data available and after taking into consideration the economic impact, impacts to military training and operations, and any other relevant impact, of specifying any particular area as critical habitat. These impacts must be described in the draft and final recovery plans (or regulations).

New subparagraph (C) states that the Secretary may exclude any area from critical habitat 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, based on the best scientific and commercial data available, that the failure to designate the area as critical habitat will result in the extinction of the species.

New subparagraph (D) provides that, at the time of a determination that a species is endangered or threatened, the Secretary undertake efforts to attain additional data for designations and recovery plans. Specifically, the Secretary shall publish a description of additional scientific and commercial data that would assist in the preparation of a recovery plan and designation of critical habitat, invite any person to submit data to the Secretary, and describe the steps that the recovery team and the Secretary will take to acquire additional data.

New subparagraph (E) states that, in accordance with section 11(g), any person may bring a civil action against the Secretary regarding the designation of critical habitat.

Section 2(b) of the bill addresses the backlog of recovery plans and designations for species listed prior to the date of enactment of the bill. Paragraph (1) relates to recovery plans. Paragraph (1)(A) requires the Secretary to develop a plan for any species listed, but without a final recovery plan, on the date of enactment. Plans for not less than half the species must be completed no later than 36 months after that date, and for the remaining species not later than 60 months after that date.

Paragraph (1)(B) provides that the Secretary shall publish, not later than 270 days after the date of enactment, a list of the species for which the Secretary will revise recovery plans developed prior to the date of enactment, and the schedule for revising the plans.

Paragraph (1)(C) requires that the Secretary of the Interior and the Secretary of Commerce each, after providing notice and opportunity for public comment, develop and implement a priority ranking system for the development and revision of recovery plans under the law, in the most efficient and effective manner practicable. In developing the priority ranking System, the Secretary shall be consistent with the criteria set forth in section 4(f)(1)(A)

of the ESA and shall take into account the scientifically based biological needs of the species.

Paragraph (1)(D) establishes a schedule for revising recovery plans identified on the list established under subparagraph (B), with $\frac{1}{3}$ of the species required to have recovery plans completed not later than 4 years after date of enactment, $\frac{2}{3}$ of the species required to have recovery plans completed not later than 7 years after date of enactment, and the remaining balance required to have recovery plans not later than 10 years after date of enactment.

Paragraph (1)(E) states that no person may bring a civil action under title 5 of the U.S. Code (the Administrative Procedure Act) or the ESA, alleging failure to develop a recovery plan or to designate critical habitat for the following: any listed species before 270 days after date of enactment; any species for which a recovery plan is required to be developed under subparagraph (A) before sixty months after date of enactment; or any species on a list established under subparagraph (B) before the date on which the recovery plan and designation are required to be completed in accordance with the schedule established under subparagraph (D).

Paragraph (2) relates to critical habitat designations. Paragraph (2)(A) states that the Secretary shall review, and revise as necessary, any designation for a listed species when the Secretary develops or revises the final recovery plan for the species. Each area designated as critical habitat before date of enactment shall continue to be considered until the designation is revised in accordance with this subsection, at which point the regulation designating critical habitat shall be withdrawn.

Paragraph (2)(B)(i) states that if the Secretary has not designated critical habitat for a listed species, the Secretary shall designate critical habitat for the species as part of the development or revision of the recovery plan. Paragraph (2)(B)(ii) provides an exception from this requirement in one of two cases: one in which court has issued, prior to the date of enactment, an order relating to critical habitat designation; or one in which a court issues an order in an action for which a complaint was filed before July 1, 1999 regarding the designation of critical habitat. Such designations, however, are subject to revisions under subparagraph (A). Nothing in this clause affects the right of any party to appeal a court order relating to a designation.

Discussion

As mentioned earlier, Congress has repeatedly tried to address chronic problems regarding critical habitat designations, and yet those problems persist. By moving the designation from listing to recovery planning and making it non-regulatory, this bill offers a solution that should benefit both species and landowners. These changes to the designation process were generally supported by the witnesses at the May 27 hearing. The substantive requirements in designating critical habitat change only slightly, and the section 7 mandate with respect to destruction or adverse modification does not change at all.

The new provisions for critical habitat are moved to a new section 4(f)(7) of the ESA. Subparagraph (A) of this new section lays

out the general requirement, but in doing so, makes several clarifications and changes. First, the Secretary has exercised discretion in finding that, for species in foreign countries, designation is not prudent and recovery plans do not promote the species' conservation. Consistent with this practice, this bill requires recovery plans and designations only for those species that are indigenous to the United States or waters with respect to which the United States exercises sovereign rights or jurisdiction.

Second, this subparagraph eliminates the authority for the Secretary to find the critical habitat is indeterminable. This authority gave the Secretary some breathing room in the context of the strict deadlines associated with the listing petition process. Given the changes made by this bill, there is no need for this excuse to not designate critical habitat.

Third, the Secretary's authority to determine that designation is not prudent is retained, although it is with the express understanding that this authority is to be exercised only in rare situations. In finding that designation is not prudent in 228 out of 256 instances since April 1996, the Fish and Wildlife Service has made the designation of critical habitat the exception rather than the rule. This is inconsistent with the original purpose of a "not prudent" finding, well stated in the 1978 report by the former House Committee on Merchant Marine and Fisheries:

The phrase . . . is intended to give the Secretary the discretion to decide not to designate critical habitat concurrently with the listing where it would not be in the best interests of the species to do so. As an example, the designation of critical habitat for some endangered plants may only encourage individuals to collect these plants to the species [sic] ultimate detriment. The committee intends that in most situations the Secretary will, in fact designate critical habitat It is only in rare circumstances where the specification of critical habitat concurrently with the listing would not be beneficial to the species.

Subparagraph (A) also requires the Secretary to designate critical habitat for species concurrently with the determination that the species is endangered or threatened, if the Secretary determines that the designation at the time of listing is essential to avoid the imminent extinction of the species. This provision is expected to be rarely used, only in those instances in which the designation is the difference between survival and extinction.

As provided by subparagraphs (B) and (C), the basis for the designation and any exclusions is generally unchanged from existing law. There is one change in the factors that the Secretary must consider in designating critical habitat: the Secretary must take into consideration any impacts to military training and operations.

In deciding whether to exclude any lands from the designation under subparagraph (C), the Secretary should apply the principles of the Administration's "Ten Point Plan" on the ESA, published March 6, 1995. The Plan provides that the ESA must be administered in a manner that assures fair and considerate treatment for those whose use of property is affected by its programs. The Plan further emphasizes the importance of having each Federal agency

fully meet its responsibilities for conserving species in order to reduce impacts to private lands.

Addressing the backlog of critical habitat designations and recovery plans for species already listed has been one of the most challenging aspects of this bill. Section 2(b) of the bill establishes a framework to allow the Secretary an opportunity to catch up on overdue designations and recovery plans without incurring additional litigation exposure. This framework creates two broad categories.

The first category concerns species listed prior to the date of enactment and for which no final recovery plan has been developed. Under paragraph (1)(A) of section 2(b) of the bill, the Secretary shall complete recovery plans for no less than half the number of such species no later than 36 months after that date, and for the remaining species no later than 60 months after that date. The term “Secretary” has the same meaning as it does in section 3 of the ESA.

The second category concerns species listed prior to the date of enactment that do have final recovery plans. Many of these plans are outdated. The bill provides an opportunity for the Secretary to revise these plans, according to certain schedules and requirements, but in exchange, the Secretary is shielded from lawsuits while the revisions are being made. This structure is intended to encourage the Secretary to freely revise plans so that they are based on sound, accurate science. Specifically, paragraph (1)(B) requires the Secretary to publish, not later than 270 days after the date of enactment, a list of species for which the Secretary will revise recovery plans, as well as a schedule for revising the plans. Paragraph (1)(D) provides that, in establishing the schedule, the Secretary shall require that recovery plans for $\frac{1}{3}$ of the species on the list be completed not later than 4 years after date of enactment, $\frac{2}{3}$ of the species on the list be completed not later than 7 years after that date, and all species on the list be completed not later than 10 years after that date.

Paragraph (1)(E) provides a bar to lawsuits under the Administrative Procedure Act or the ESA alleging a failure to develop a recovery plan or to designate critical habitat for certain periods. Under clause (i), no challenge regarding failure to designate habitat or prepare or revise a recovery plan can be brought for any threatened or endangered species prior to 270 days after the date of enactment. This allows the Secretary an opportunity to prepare the lists, develop the priority ranking system, and put together the schedule for all species that either do not have plans or for which plans should be revised. Under clause (ii), no challenge can be brought for any species prior to 60 months after the date of enactment for which a recovery plan is required to be developed during that time. Under clause (iii), no challenge can be brought for any species prior to the date on which the plan and designation are required to be completed in accordance with the schedule. This bar to litigation applies only to these explicit categories. Nothing in this provision prohibits any person from commencing a civil action alleging the failure to revise a recovery plan or designate critical habitat for a species that is not included in the list published by the Secretary pursuant to paragraph 1(B).

The backlog for critical habitat designations is folded into the framework for developing or revising recovery plans. Under paragraph (2)(A) of section 2(b) of the bill, the Secretary shall review, and revise as necessary, any designation of critical habitat for a species listed, but for which no final recovery plan exists, prior to date of enactment. If the designation is revised, it must be done in accordance with the new requirements provided in the bill. Until then, any critical habitat previously designated remains valid.

Under paragraph 2(B), for any species that does not have critical habitat, the Secretary shall designate critical habitat, in accordance with the new requirements provided in the bill, as part of the development or revision of the recovery plan. An exception is provided for cases in which a court has issued, prior to date of enactment, an order relating to a designation, or in which a complaint relating to a designation was filed prior to July 1, 1999, and a court order is subsequently entered.

This framework thus provides that in all cases in which the Secretary develops or revises a recovery plan, the Secretary shall at least review existing designations, and make new designations if none exist. In cases in which the Secretary chooses not to revise a recovery plan, any obligation to designate critical habitat exists as it did under the law prior to the date of enactment. The Secretary remains susceptible to any legal challenge with respect to those designations under the existing law prior to date of enactment.

It should be noted that, when Congress established the duty to designate critical habitat, in the 1978 amendments to the ESA, designation was required only for those species listed after the date of enactment of those amendments. Designation of critical habitat for species listed prior to that date was discretionary on the part of the Secretary. Nothing in this bill seeks to change that premise. In requiring critical habitat for species listed prior to the date of enactment to be designated or revised under the new procedures, this bill applies only to those species for which the designation of critical habitat is already required.

Section 3. Authorization of Appropriations

Summary

Section 3 authorizes appropriations to carry out the bill, the amendments to the ESA made by the bill, and section 4(f) of the ESA. Annual appropriations to the Secretary of the Interior are authorized from fiscal year 2000 through 2004 as follows: \$42 million, \$46 million, \$50 million, \$55 million, and \$60 million. This section also authorizes appropriations to the Secretary of Commerce of \$30 million annually from fiscal year 2000 through 2004.

Discussion

The level of authorized appropriations for both the Secretary of the Interior and the Secretary of Commerce is derived from estimates as to the costs of the bill that they have provided. However, those estimates were received by the committee from the Administration shortly before the business meeting to consider the bill. Justification for the estimates was still being reviewed by the Office

of Management and Budget at the time of the business meeting. Consequently, there has been no opportunity to study these estimates, and they are included in the bill as placeholders. Based on the overall funding for ESA implementation, these estimates seem high, particularly in light of the facts that the Secretary has already budgeted for the development of recovery plans (although there is no mandatory deadline for completing these plans), and that the bill streamlines the requirements for designations by making them non-regulatory. The Congressional Budget Office, as noted below, estimates that less than \$20 million for both the FWS and NMFS will be spent in fiscal year 1999 for the development of recovery plans. The committee intends to review the authorization levels further, and if necessary, revise them.

At the same time, the Administration will certainly incur additional costs in complying with the new deadlines, and curing the backlog of uncompleted recovery plans and designations. Additional funding will be necessary to address these costs, which is the purpose for the new authorization of appropriations. This authorization is strictly for the procedural requirements contained in the bill and in developing plans under section 4(f); it is not intended to be used for implementation of recovery plans.

HEARINGS

The Subcommittee on Fisheries, Wildlife, and Drinking Water of the Senate Committee on the Environment and Public Works held a hearing on S. 1100 on May 27, 1999. Testimony was received from Senator Pete Dominici of New Mexico; Ms. Jamie Clark, Director of the United States Fish and Wildlife Service; Mr. William R. Murray, Natural Resources Counsel of American Forest and Paper Association; Mr. Charles T. DuMars, Professor of Law, University of New Mexico School of Law, Albuquerque, New Mexico; and Mr. John Kostyack, Counsel, National Wildlife Federation.

LEGISLATIVE HISTORY

On May 20, 1999, Senator Chafee introduced S. 1100, which was referred to the Committee on Environment and Public Works. On Tuesday, June 29, 1999, the committee held a business meeting to consider this bill. Senator Chafee offered an amendment in the nature of a substitute, which was adopted by voice vote, and Senator Hutchison offered an amendment, with a second-degree amendment by Senator Chafee, that was adopted by voice vote. S. 1100, as amended, was favorably reported out of the committee by voice vote.

REGULATORY IMPACT

In compliance with section 11(b) of rule XXVI of the Standing Rules of the Senate, the committee makes this evaluation of the regulatory impact of the reported bill.

The bill does not create any additional regulatory burdens, nor will it cause any adverse impact on the personal privacy of individuals. The current law states that "each Federal Agency. . . shall insure that any action authorized, funded or carried out by such Agency. . . is not likely to. . . result in the destruction or adverse

modification of [critical] habitat.” This provision may apply to private persons whose actions involve Federal authorization, funding or implementation, although this provision is not affected by the bill.

MANDATES ASSESSMENT

In compliance with the Unfunded Mandates Reform Act of 1995 (Public Law 104–4), the committee finds that this bill would impose no Federal intergovernmental unfunded mandates on State, local, or tribal governments. While the bill does not directly impose any private sector mandate, it prohibits certain civil lawsuits against the Secretary during periods specified by the bill.

COST OF LEGISLATION

Section 403 of the Congressional Budget and Impoundment Control Act requires that a statement of the cost of the reported bill, prepared by the Congressional Budget Office, be included in the report. That statement follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 19, 1999.

Hon. JOHN H. CHAFEE, *Chairman,*
Committee on Environment and Public Works,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1100, a bill to amend the Endangered Species Act of 1973 to provide that the designation of critical habitat for endangered and threatened species be required as part of the development of recovery plans for those species.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Deborah Reis (for Federal costs), who can be reached at 226–2860, and Patrice Gordon (for the impact on the private sector), who can be reached at 226–2940.

Sincerely,

DAN L. CRIPPEN.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

S. 1100, A bill to amend the Endangered Species Act of 1973 to provide that the designation of critical habitat for endangered and threatened species be required as part of the development of recovery plans for those species, As ordered reported by the Senate Committee on Environment and Public Works on June 29, 1999

Summary

Assuming appropriation of the authorized amounts, CBO estimates that implementing S. 1100 would cost the Federal Government about \$380 million over the 2000–2004 period. Enacting this legislation would not affect direct spending or receipts; therefore, pay-as-you-go procedures would not apply. S. 1100 contains no intergovernmental mandates as defined in the Unfunded Mandates

Reform Act (UMRA) and would impose no costs on State, local, or tribal governments. S. 1100 would impose a mandate on the private sector, but CBO expects that the private sector would not likely incur any direct costs as a result.

S. 1100 would amend provisions of the Endangered Species Act (ESA) that govern the designation of critical habitat and the development of recovery plans for threatened or endangered species. The bill also would authorize funding for these activities for each of fiscal years 2000 through 2004. Specifically, the bill would authorize \$30 million annually for the National Marine Fisheries Service (NMFS) of the Department of Commerce and between \$42 million and \$60 million per year for the U.S. Fish and Wildlife Service (USFWS) of the Department of the Interior. The bill also would amend provisions of the ESA that govern these activities.

Estimated Cost to the Federal Government

The estimated budgetary impact of S. 1100 is shown in the following table. The costs of the bill fall within budget function 300 (natural resources and environment). For purposes of this estimate, CBO assumes that the entire amounts authorized will be appropriated for each fiscal year. Outlays are estimated on the basis of historical spending patterns for ongoing ESA programs.

by Fiscal Year, in Millions of Dollars

	2000	2001	2002	2003	2004
SPENDING SUBJECT TO APPROPRIATION					
Authorization Level	72	76	80	85	90
Estimated Outlays	40	82	83	85	89

The amounts authorized by the bill would be available solely to develop recovery plans and to designate critical habitat for threatened or endangered species. For fiscal year 1999, the NMFS and the USFWS received appropriations of about \$29 million and \$47 million respectively for species recovery and designation of critical habitat. Of these amounts, about \$2 million in total was allocated to habitat designation. CBO cannot determine the exact portion of the remaining amounts allocated to the development of recovery plans (rather than to implementation, which is not addressed by this legislation). We estimate, however, that less than \$20 million (in total for both agencies) will be made available during 1999 for that purpose, because over 70 percent of all listed species already have recovery plans.

Pay-As-You-Go Considerations: None.

Estimated Impact on State, Local, and Tribal Governments: S. 1100 contains no intergovernmental mandates as defined in UMRA and would impose no costs on State, local, or tribal governments.

Estimated Impact on the Private Sector

S. 1100 would impose a mandate on the private sector by prohibiting certain civil lawsuits against the Federal Government during the first 9 months after enactment and during periods specified by the bill to allow the government time to assess recovery plans and critical habitat designations for listed species. Under current law,

Federal agencies are supposed to designate a critical habitat at the same time that a species is listed as endangered or threatened. The bill would allow Federal agencies to designate critical habitat at a later stage of the process as part of the planning for the recovery of listed species.

According to sources in the government and the private sector, currently most suits filed under the Endangered Species Act are to force the government to designate a critical habitat. The bill would not impose any direct costs on the private sector by delaying such civil suits against the government.

Estimate Prepared By: Federal Costs: Deborah Reis (226–2860); Impact on the Private Sector: Patrice Gordon (226–2940).

Estimate Approved By: Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

ADDITIONAL VIEWS OF SENATOR THOMAS

Recently I introduced S. 1305, a bill that addresses recovery planning and a number of other Endangered Species Act issues. My legislation represents a different approach to critical habitat designation and recovery plans. I offer this statement to explain and clarify my views on the timing of critical habitat designation and recovery plan development. Under S. 1305, critical habitat designation would remain concurrent with listing, and recovery plans would be issued at the time of listing as well.

The information needed to support a listing determination, critical habitat designation or a recovery may not be exactly the same. However, in my view, if one has gathered information sufficient to support with confidence any one of the three actions, then one also must have obtained a great deal of information that is relevant to the other two.

More specifically, if the Secretary, at the time of listing, does not have enough information to provide substantial direction with regard to critical habitat and recovery, one should question whether the Secretary really knows enough about the species to support a listing determination. For example, suppose that the Secretary asserts that he understands species population numbers, distributions and trends sufficiently to list a species as endangered. Let's also assume that, as required by the ESA, he has considered threats to the species' habitat and other factors affecting the continuing existence of the species. I find it difficult to see how the Secretary could obtain this information without conducting a thorough analysis of the area inhabited by the species and without determining, with a high degree of confidence, what habitat is critical and what should be done to encourage recovery.

Among my primary concerns is the fact that the listing of a species can impose burdens on land owners and others. In my State, I strongly believe that the Fish and Wildlife Service needs to be as certain as possible of the need for listing before imposing these burdens on those in the local areas affected. If a listing is necessary, it is only fair that the Service inform the public as quickly as possible what lands are involved and how they will be affected. Critical habitat designations and recovery plans serve this function, so if they must be prepared, I believe they should be provided to the public at the earliest possible time.

S. 1100 reflects a judgment to delay critical habitat designation and recovery planning to allow among other things, more time to obtain information. S. 1305 would require all the information to be gathered before listing. I recognize that reasonable people can disagree on the precise timing of critical habitat designation and recovery planning. I do share the underlying desire of the committee to make the critical habitat and recovery planning processes more meaningful. In particular, I strongly support provisions in the legislation to provide greater balance on the recovery team, and I associate myself with the statement in the committee report that the Secretary must provide priority for local persons in the recovery planning process.

CHANGES IN EXISTING LAW

In compliance with section 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill as reported are shown as follows: Existing law proposed to be omitted is enclosed in [black brackets], new matter is printed in *italic*, existing law in which no change is proposed is shown in roman:

ENDANGERED SPECIES ACT OF 1973¹

[As Amended Through P.L. 104-333, Nov. 12, 1996]

AN ACT To provide for the conservation of endangered and threatened species of fish, wildlife, and plants, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the “Endangered Species Act of 1973”.

* * * * *

DEFINITIONS

SEC. 3. For the purposes of this Act—

(1) * * *

* * * * *

(5)(A) The term “critical habitat” for a threatened or endangered species means—

(i) the specific areas within the geographical area occupied by the species, [at the time it is listed in accordance with the provisions of section 4 of this Act,] on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species [at the time it is listed in accordance with the provisions of section 4 of this Act,] upon a determination by the Secretary that such areas are essential for the conservation of the species.

(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

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

* * * * *

¹As amended by P.L. 94-325, June 30, 1976; P.L. 94-359, July 12, 1976; P.L. 95-212, December 19, 1977; P.L. 95-632, November 10, 1978; P.L. 96-159, December 28, 1979; 97-304, October 13, 1982; P.L. 98-327, June 25, 1984; and P.L. 100-478, October 7, 1988; P.L. 100-653, November 14, 1988; and P.L. 100-707, November 23, 1988.

DETERMINATION OF ENDANGERED SPECIES AND THREATENED SPECIES

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

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

(2) With respect to any species over which program responsibilities have been vested in the Secretary of Commerce pursuant to Reorganization Plan Numbered 4 of 1970—

(A) in any case in which the Secretary of Commerce determines that such species should—

(i) be listed as an endangered species or a threatened species, or

(ii) be changed in status from a threatened species to an endangered species, he shall so inform the Secretary of the Interior, who shall list such species in accordance with this section;

(B) in any case in which the Secretary of Commerce determines that such species should—

(i) be removed from any list published pursuant to subsection (c) of this section, or

(ii) be changed in status from an endangered species to a threatened species, he shall recommend such action to the Secretary of the Interior, and the Secretary of the Interior, if he concurs in the recommendation, shall implement such action; and

(C) the Secretary of the Interior may not list or remove from any list any such species, and may not change the status of any such species which are listed, without a prior favorable determination made pursuant to this section by the Secretary of Commerce.

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

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

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

(b) BASIS FOR DETERMINATIONS.—(1)(A) The Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign na-

tion, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

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

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

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

[(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion 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.]

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

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

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

(ii) The petitioned action is warranted in which case the Secretary shall promptly publish in the Federal Register a gen-

eral notice and the complete text of a proposed regulation to implement such action in accordance with paragraph (5).

(iii) The petitioned action is warranted but that—

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

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

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

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

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

(iii) The Secretary shall implement a system to monitor effectively the status of all species with respect to which a finding is made under subparagraph (B)(iii) and shall make prompt use of the authority under paragraph 7¹ to prevent a significant risk to the well being of any such species.

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

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

(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—

¹ So in original. Probably should be paragraph “(7)”.

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

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

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

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

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

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

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

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

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

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

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

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

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

[(I) a final regulation to implement such designation,

or

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

(6) FINAL REGULATIONS.—

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

(i) a final regulation to implement the determination;

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

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

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

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

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

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

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

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

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

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

(B) in the case such regulation applies to resident species of fish or wildlife, or plants, the Secretary gives actual notice

of such regulation to the State agency in each State in which such species is believed to occur.

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

(c) LISTS.—(1) The Secretary of the Interior shall publish in the Federal Register a list of all species determined by him or the Secretary of Commerce to be endangered species and a list of all species determined by him or the Secretary of Commerce to be threatened species. Each list shall refer to the species contained therein by scientific and common name or names, if any, specify with respect to such species over what portion of its range it is endangered or threatened, and specify any *designated* critical habitat within such range. The Secretary shall from time to time revise each list published under the authority of this subsection to reflect recent [determinations, designations, and revisions] *determinations* made in accordance with subsections (a) and (b).

(2) The Secretary shall—

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

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

(i) be removed from such list;

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

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

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

(d) PROTECTIVE REGULATIONS.—Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish or wildlife, or section 9(a)(2) in the case of plants, with respect to endangered species; except that with respect to the taking of resident species of fish or wildlife, such, regulations shall apply in any State which has entered into a cooperative agreement pursuant to section 6(c) of this Act only to the extent that such regulations have also been adopted by such State.

(e) SIMILARITY OF APPEARANCE CASES.—The Secretary may, by regulation of commerce or taking, and to the extent he deems advisable, treat any species as an endangered species or threatened

species even though it is not listed pursuant to section 4 of this Act if he finds that—

(A) such species so closely resembles in appearance, at the point in question, a species which has been listed pursuant to such section that enforcement personnel would have substantial difficulty in attempting to differentiate between the listed and unlisted species;

(B) the effect of this substantial difficulty is an additional threat to an endangered or threatened species; and

(C) such treatment of an unlisted species will substantially facilitate the enforcement and further the policy of this Act.

(f)(1) RECOVERY PLANS.—The Secretary shall develop and implement plans (hereinafter in this subsection referred to as “recovery plans”) for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the [species.] *species, or that the species is not indigenous to the United States or waters with respect to which the United States exercises sovereign rights or jurisdiction.* The Secretary, in development and implementing recovery plans, shall, to the maximum extent practicable—

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

(B) incorporate in each plan—

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

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

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

[(2) The Secretary,]

(2) RECOVERY TEAMS.—

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

(B) APPOINTMENT OF A TEAM.—*Not later than 120 days after the date of publication under subsection (b) of a final determination that a species is an endangered species or a threatened species, the Secretary, in cooperation with any State affected by the determination, shall—*

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

(ii) after public notice and opportunity for comment, determine that a recovery team shall not be appointed.

(C) *NO RECOVERY TEAM APPOINTED.*—If a recovery team is not appointed by the Secretary, the Secretary shall perform all duties of the recovery team required under this subsection.

(D) *COMPOSITION OF RECOVERY TEAM.*—Each recovery team shall include the Secretary and at least 1 representative from each affected State that chooses to participate, and shall have balanced representation among constituencies with an interest in the species and its recovery and with an interest in the economic or social impacts of recovery, including Federal agencies, tribal governments, local governments, academic institutions, private individuals (including landowners), conservation and other organizations, and commercial enterprises. When a recovery plan or critical habitat designation will have a significant impact on private land, the Secretary shall invite at least one landowner or one representative of an organization representing landowners to serve on the recovery team. 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.

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

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

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

(6) *SCHEDULE.*—For each species determined to be an endangered species or a threatened species after the date of enactment of this paragraph for which the Secretary is required to develop a recovery plan under paragraph (1), the Secretary shall publish—

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

(B) not later than 30 months after the date of publication under subsection (b) of the final regulation containing the listing determination, a final recovery plan.

(7) *CRITICAL HABITAT DESIGNATIONS.*—

(A) *IN GENERAL.*—The Secretary, to the extent prudent, shall designate any habitat that is considered to be critical

habitat of an endangered species or a threatened species that is indigenous to the United States or waters with respect to which the United States exercises sovereign rights or jurisdiction.

(i) *DESIGNATION.—*

(I) *PROPOSAL.—As part of a draft recovery plan, the Secretary, after consultation and in cooperation with the recovery team, shall designate proposed critical habitat for the species.*

(II) *FINAL.—As part of a final recovery plan, the Secretary, after consultation and in cooperation with the recovery team, shall designate critical habitat for the species.*

(ii) *OTHER DESIGNATIONS.—If the Secretary determines that a recovery plan will not promote the conservation of an endangered species or a threatened species, the Secretary shall publish in the Federal Register, in accordance with paragraphs (4), (5), and (6) of subsection (b), a regulation designating critical habitat for the species not later than three years after making a determination that the species is an endangered species or a threatened species.*

(iii) *ADDITIONAL AUTHORITY.—The Secretary shall, after providing public notice and opportunity for comment, designate critical habitat for an endangered species or a threatened species concurrently with the final regulation implementing the determination that the species is an endangered species or a threatened species if the Secretary determines that designation of such habitat at the time of listing is essential to avoid the imminent extinction of the species. Such designation, in addition to responses to comments received by the Secretary, shall be published in the Federal Register and shall be considered to be a final agency action for the purposes of judicial review. The recovery team and the Secretary shall review and revise, as appropriate, the designation during the development of the recovery plan for the species.*

(B) *FACTORS TO BE CONSIDERED.—The designation of critical habitat shall be made on the basis of the best scientific and commercial data available and after taking into consideration the economic impact, impacts to military training and operations, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary shall describe in the draft and final recovery plans (or in the proposed and final regulations) the economic impacts and other relevant impacts considered under this paragraph in any designation of critical habitat.*

(C) *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, based on the best scientific and commercial data available, that the failure to des-*

ignate the area as critical habitat will result in the extinction of the species.

(D) ADDITIONAL INFORMATION.—At the time that the Secretary determines that a species is an endangered species or a threatened species, the Secretary shall—

(i) publish a description of additional scientific and commercial data that would assist in the preparation of a recovery plan and designation of critical habitat;

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

(iii) describe the steps that the recovery team and the Secretary will take to acquire additional data.

(E) CIVIL ACTIONS.—In accordance with section 11(g), any person may bring a civil action against the Secretary regarding the designation of critical habitat for a species.

(g) MONITORING.—(1) The Secretary shall implement a system in cooperation with the States to monitor effectively for not less than five years the status of all species which have recovered to the point at which the measures provided pursuant to this Act are no longer necessary and which, in accordance with the provisions of this section, have been removed from either of the lists published under subsection (c).

(2) The Secretary shall make prompt use of the authority under paragraph 7¹ of subsection (b) of this section to prevent a significant risk to the well being of any such recovered species.

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

(1) procedures for recording the receipt and the disposition of petitions submitted under subsection (b)(3) of this section;

(2) criteria for making the findings required under such subsection with respect to petitions;

(3) a ranking system to assist in the identification of species that should receive priority review under subsection (a)(1) of the section; and

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

(i) If, in the case of any regulation proposed by the Secretary under the authority of this section, a State agency to which notice thereof was given in accordance with subsection (b)(5)(A)(ii) files comments disagreeing with all or part of the proposed regulation, and the Secretary issues a final regulation which is in conflict with such comments, or if the Secretary fails to adopt a regulation pursuant to an action petitioned by a State agency under subsection (b)(3), the Secretary shall submit to the State agency a written jus-

¹ So in original. Probably should be paragraph “(7)”.

tification for his failure to adopt regulations consistent with the agency's comments or petition.

(16 U.S.C. 1533)

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EXCEPTIONS

SEC. 10. (a) PERMITS.—(1) The Secretary may permit, under such terms and conditions as he shall prescribe—

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(f)(1) As used in this subsection—

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(5) The Secretary shall prescribe such regulations as he deems necessary and appropriate to carry out the purposes of this subsection. Such regulations may set forth—

(A) terms and conditions which may be imposed on applicants for exemptions under this subsection (including, but not limited to, requirements that applicants register, inventories, keep complete sales records, permit duly authorized agents of the Secretary to inspect such inventories and records, and periodically file appropriate reports with the Secretary); and

(B) terms and conditions which may be imposed on any subsequent purchaser of any pre-Act endangered species part covered by an exemption granted under this subsection; to insure that any such part so exempted is adequately accounted for and not disposed of contrary to the provisions of this Act. [No regulation prescribed by the Secretary to carry out the purposes of this subsection shall be subject to section 4(f)(2)(A)(i) of this Act.]

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